IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELEANOR ABRAHAM et al., Plaintiff(s), v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant(s).	CIVIL NO. 12-CV-0011 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

NOTICE OF FILING

COME NOW Plaintiffs, by and through undersigned counsel, and gives notice of filing Plaintiff's Memorandum in Opposition to Defendant's Motion for Severance Pursuant to Rule 21 and for More Definite Statement Pursuant to Rule 12, [Docket No. 1, Exhibit C].

RESPECTFULLY SUBMITTED
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DATED: March 15, 2012

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on March 15, 2012, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SEVERANCE PURSUANT TO RULE 21 AND FOR A MORE DEFINITE STATEMENT PURSUANT TO RULE 12

Plaintiffs, by and through their undersigned Counsel, respectfully submit this memorandum in Opposition to Defendant St. Croix Renaissance Group, LLLP's ("SCRG") Motion for Severance and for More Definite Statement.

INTRODUCTION

Defendant's Motion for a More Definite Statement discusses the pleading requirements of *Iqbal* and *Twombly* and asserts wrongly that Plaintiffs fail to plead their claims adequately under the Supreme Court's precedent. First, Defendant mistakenly believes that Plaintiffs are required, under *Iqbal* and *Twombly*, to expressly set out detailed allegations supporting each element of each claim against each defendant. The bar is simply not that high under *Iqbal*, *Twombly*, or recent Third Circuit opinions interpreting those decisions. Second, Defendant mischaracterizes this case as a multi-party action involving "claims that overlap in part but are not conceivably identical to one another." Def's

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Motion at p. 14. Instead, it is a mass tort case[1] involving the negligent conduct of SCRG from the time it took ownership of the alumina refinery in 2002, and in which all the Plaintiffs were injured in substantially the same way and at substantially the same time—they were exposed to toxic dusts blown from the refinery onto their persons and properties during and after SCRG took control of the property. Previous cases *Henry* and *Abednego* address the liability of the alumina refinery's previous owners and/or operators, thus Defendant SCRG's concern about "other's" potential liability and their possible joinder in this case is irrelevant as the claims herein all deal with liability against SCRG for intentional and negligent acts done from 2002 to the present when SCRG was the owner and/or operator of the refinery. Plaintiff has filed a Motion for Leave to Amend their Complaint to clarify the time period involved in this case as 2002 to present, and to clarify that the exposure was coming from the same place, the refinery, and to clarify that the emissions were multiple and continuous and affected Plaintiffs in the same manner because the same toxic materials in the dangerous dispersion of pollutants blew onto them and their property whenever strong winds blew or machinery disturbed the piles of red mud. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5]. Plaintiffs seek damages for their personal and property injuries and also seek to enjoin Defendants from subjecting Plaintiffs to future harm from similar exposures.

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1 A mass tort case should not be confused with a "mass action," defined by 28 U.S.C. §1332 (d) (11), under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1332 (d) and 28 USCS § 1453. Defendant is concurrently moving to remove this case from the Superior Court of the Virgin Islands, alleging that it is "mass action" subject to removal under CAFA. But a "mass action" is a creature of statute with an expressly defined meaning, whereas a "mass tort" is a term that encompasses much more than the limited statutory definition of a "mass action."

The distinction between, on the one hand, a multi-party case involving distinct occurrences and, on the other hand, a mass tort arising from one occurrence and/or related occurrences is an important one because, as the Third Circuit has explained, context plays a key role in the analysis of motions to dismiss under *Twombly*:

> [T]he *Twombly* decision focuses our attention on the "context" of the required short, plain statement. Context matters in notice pleading. Fair notice under *Rule 8(a)(2)* depends on the type of case -- some complaints will require at least some factual allegations to make out a "showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."
>
> *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citations omitted).

Viewed in the proper context, Plaintiffs' First Amended Complaint includes enough factual allegations "to raise a right to relief above the speculative level," which is all that the law of this jurisdiction requires, *see Phillips*, 515 F.3d at 234-35, and the motion for a more definite statement should be denied. Similarly, Defendant has not shown how severance is warranted given the fact that the exposure of each individual Plaintiff occurred out of the same series of transactions, and the issues to be tried are significantly the same requiring the same expert and corporate defendant witnesses. *See* Def's Exhibit B, Judge Maria Cabret's decision in *Alexander v HOVIC*, Civ. No. 323/1997; *see also German v. Federal Home Loan Mortgage Corp*., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)(cited by Defendant SCRG for factors to consider for severance to be granted). Clearly, the factors weigh in favor of non-severance.

Furthermore, Plaintiffs object to Defendant's motions as premature and respectfully request that this Court delay consideration of these motions until it decides the jurisdiction of this lawsuit. [2] In *Steel Co. v. Citizens for a Better Environment,* 118 S. Ct. 1003, 1012, (1998), the Supreme Court stated that "the requirement that jurisdiction be established as a threshold matter. . . is 'inflexible and without exception.'" *Id.*, quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884). Thus, the Court should determine its jurisdiction to hear this matter before deciding whether to sever any claims or order more definite statement. *See Moseley v. City of Pittsburg Public School District*, No. 07-1560, 2008 U.S. Dist. LEXIS 42189, at * 6 (W.D. Pa. May 27, 2008) (agreeing that a motion to remand must be decided before a motion to dismiss on the merits); *see also Blake v. Macy's Inc.*, No. 08-1040, 2008 U.S. Dist. LEXIS 45776, at *4-5 (E.D. Pa. June 12, 2008) (stating that any decision on the merits is futile if the court lacks jurisdiction to hear the case and resolving a motion for remand before addressing the motion to dismiss). Therefore, Plaintiffs respectfully request that this Court decide the removal issue before determining Defendant's motions for severance and for more definite statement.

RELEVANT FACTS

The St. Croix Alumina Refinery is located just south of several residential neighborhoods. Pl's First Am. Compl., ¶ 462, attached to Plaintiff's Motion for Leave to File First Amended Complaint, Docket No. [5]. The refinery used red-colored ore called bauxite

2 On February 2, 2012, Defendant filed a Notice of Removal to remove this action from the Superior Court of the Virgin Islands to the District Court. *See* Defs.' Notice of Removal. Plaintiffs will be filing an Opposition to that Notice on April 5, 2012 on the grounds that the District Court lacks subject matter jurisdiction over their claims.

as a raw material and produced a red substance generally called "red mud" as a byproduct in the alumina refining process. *Id.* For many years, previous owners and operators of the refinery failed to correctly store or contain the bauxite or the red mud. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5] ¶¶ 463, 471. Instead, the red mud, which contains numerous toxic substances and known irritants, were placed in large uncovered piles. *Id.* at ¶ 471. Additionally, the refinery contained unabated asbestos in various conditions that was never removed, in violation of the law. *Id.* at ¶¶ 476-480. The previous owners/operators retain some liability for environmental conditions existing at the time of the sale to Defendant SCRG in 2002, and claims against those defendants are the subject of other lawsuits *Henry* and *Abednego.*

In 2002, SCRG obtained the refinery. Since doing so, SCRG has continued to inadequately store and/or secure the bauxite, red mud, and asbestos and permitted the emissions of the dangerous particulates onto Plaintiffs' property and persons. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5], ¶¶ 472-474. By at least 2006, SCRG had learned that the asbestos in the refinery was friable and dangerous. *Id.* at ¶ 476. Although the asbestos had been unsecured for approximately ten years, Plaintiffs never knew about this dangerous condition. Upon learning of the situation itself, SCRG concealed and made false reports about the dangers posed by the asbestos. *Id* at, ¶¶ 477-481.

Because SCRG have never properly secured the bauxite, red mud, asbestos, and other particulates, Plaintiffs continued to be exposed to these substances even at this late

date. *Id.* at ¶¶ 472, 483-484. Plaintiffs' exposure to the bauxite, red mud, asbestos, and other particulates have caused them personal injuries, property damages, loss of earning capacity, mental anguish, pain and suffering, loss of enjoyment of life, and reasonable fears of contracting future illnesses. *Id.* at ¶ 483-484.

In this case, Plaintiffs seek compensatory damages, punitive damages, and injunctive relief to compensate them for their injuries and damages and protect Plaintiffs from continuing harm from the fugitive dusts being emitted from the refinery.

LEGAL ARGUMENT

I. DEFENDANT'S RULE 12 MOTION FOR MORE DEFINITE STATEMENT MUST BE DENIED BECAUSE PLAINTIFFS HAVE PROPERLY PLED THEIR CLAIMS UNDER THE APPLICABLE LAW

In urging a more definite statement of Plaintiffs' claims, Defendant has wrongly read the U.S. Supreme Court's holdings in *Twombly* and *Iqbal* to require each and every Plaintiff to expressly allege detailed facts regarding every element of their claims against each Defendant independently. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Defendant's perspective is contrary to the Third Circuit's recent pronouncement that,

> [w]hile *Rule 12(b)(6)* does not permit dismissal of a well-pleaded complaint simply because "it strikes a savvy judge that actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative level."
> The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: "stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable

> expectation that discovery will reveal evidence of" the necessary element.

Phillips, 515 F.3d at 234-35 (citations omitted).

A. Twombly's Plausibility Standard Does Not Require Detailed Factual Allegations.

The respondents in *Twombly* were local telephone and Internet users who filed suit against local exchange carriers for violation of § 1 of the Sherman Antitrust Act. The complaint alleged that the defendants conspired to restrain trade by engaging in parallel conduct in their respective service areas and by refraining from competing against one another in nearby markets despite attractive business opportunities. *See* 550 U.S. at 551-52. The district court dismissed the complaint, concluding that allegations of parallel conduct, taken alone, did not state a claim under § 1 of the Sherman Act. *See Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003). The Second Circuit Court of Appeals reversed.

On review, the Second Circuit held that the plaintiffs had established sufficient allegations to survive Bell Atlantic's motion to dismiss as the plaintiffs

> must plead facts that include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss…[and] to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.
>
> *Twombly v. Bell Atl. Corp.,* 425 F.3d 99, 114 (2d Cir. 2005).

The U.S. Supreme Court began its opinion by recognizing that Rule 8(a) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim

showing that the pleader is entitled to relief" giving the defendant "fair notice of what the...claim is and the grounds upon which it rests." *Twombly*, *supra*, 550 U.S. at 555 (*citing Conley v. Gibson*, 355 U.S. 41; 78 S. Ct. 99; 2 L. Ed. 2d 80 (1957)). A court must ask whether the complaint "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1106 (7th Cir. 1984)); *see also id.* at 555 (the plaintiff "does not need detailed factual allegation[s]."). The High Court further found that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Specifically, the Court concluded that a complaint alleging conspiracy under § 1 of the Sherman Antitrust Act will only survive a motion to dismiss if it includes "enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possesses enough heft to sho[w] that the pleader is entitled to relief." *Id.* at 557. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563 (citing *Sanjuan v American Bd. Of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) ("[At the pleading stage]

the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.")).

Subsequent to issuing its opinion in *Twombly*, the Supreme Court reiterated that Rule 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief. *Erickson v. Pardus*, 551 U.S. 89, 93; 127 S. Ct. 2197; 167 L. Ed. 2d 1081 (2007). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.*

B. *Iqbal* Reiterated that Neither *Twombly* nor the Federal Rules of Civil Procedure Require Detailed Factual Allegations.

Nearly two years from the date of its ruling in *Twombly,* the Supreme Court clarified its holding in its opinion in *Ashcroft v. Iqbal*, *supra*. In *Iqbal*, the petitioner, a Pakistani citizen, filed suit against several public officials after his release from prison alleging deprivation of various constitutional protections. The issue before the Supreme Court was whether Iqbal pleaded matters that, if taken as true, stated a claim that the respondents deprived him of his clearly established constitutional rights. The petitioner argued that the *Twombly* "plausibility requirement" applied only to antitrust actions. The Supreme Court found otherwise, holding that "[t]his argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure." *Iqbal*, 129 S.Ct. at 1949. Rule 8, the Court noted, "governs the pleading standard for 'all civil actions.'" *Id.*

The *Iqbal* Court reiterated its ruling in *Twombly*, stating that while "[d]etailed factual allegations are not required," Rule 8 does require "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (*citing Twombly*, 550 U.S. at

570). The Supreme Court further explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Here, the Court noted that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

The *Iqbal* Court held that two principles underlie its previous decision in *Twombly*: "First, the tenet a court must accept as true all allegations contained in a complaint is inapplicable to *legal conclusions*." *Id.* Second, "[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* Accordingly, the Court held that under *Twombly,* Iqbal's complaint had not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible" because (1) certain of the allegations contained in the complaint were conclusory and not entitled to be assumed true, and (2) the remaining factual allegations suggest a lawful and nondiscriminatory intent to detain illegal aliens who had potential connections to terrorist acts. *Id*. 129 S.Ct at 1952.

C. The Third Circuit Does Not Impose a "Probability Requirement" to Overcome Dismissal.

Even after *Iqbal*, in the Third Circuit, a court deciding a motion to dismiss must still "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Paschal v. Billy Beru, Inc.,* No. 09-2764*,* 2010 U.S. App. LEXIS 7239 (3d Cir. 2010), *citing Phillips*, 515 F.3d at 233; *see also Charleswell, et al. v.*

Chase Manhattan Bank, et al., No. 01-119, 2009 U.S. Dist. LEXIS 54519 *1, *18 (D.V.I. June 22, 2009); *see also Umland v. Planco Fin. Servs*., 542 F.3d 59, 64 (3d Cir. 2008).

Also left intact in the Third Circuit, after *Twombly* and *Iqbal*, is the notion that courts will read complaints to determine if "under any reasonable reading…the plaintiff may be entitled to relief." *Valentine v. Bank of America*, 2010 U.S. Dist LEXIS 8546 at *6 (D.N.J. 2010), *citing Pinker v. Roche Holdings, Ltd.* 292 F.3d 361, 374 n. 7 (3d Cir. 2002). Moreover, the Third Circuit has explained that the Supreme Court's new plausibility requirement "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 322 (3d Cir. 2008); *see also Bearden v. Honeywell Int'l, Inc.*, No. 3:09-01035, 2010 U.S. Dist. LEXIS 28331, *6-7 (M.D. Tenn. Mar. 24, 2010) ("The court must assume that all of the factual allegations are true, even if they are doubtful in fact. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).")

D. The Law Does Not Require Each Plaintiff to Allege Detailed Facts for Each Element of Each Claim Against Defendant; Instead, the Law Permits Common Allegations By Multiple Plaintiffs

The above-stated standards for proper pleadings in the Third Circuit apply whether there is one plaintiff or one thousand plaintiffs. Defendant repeatedly argues that Plaintiffs should be held to a more detailed pleading standard because of their number and that the Court should not permit Plaintiffs to make "joint," or "collective" allegations. Defendant inappropriately refers to Plaintiff's Complaint as a "shotgun pleading." Specifically, in the

Motion for a More Definite Statement, Defendant asks the Court to require each individual Plaintiff to allege separate counts and to identify his or her particular exposures and damages. But this position is contrary to the applicable law, stated above, governing motions to dismiss and the common practice in mass torts. Further, Defendant has also failed to provide any authorities on point supporting its position. All of the cases cited by Defendant refer to the ability of multiple defendants to ascertain which claims apply to each of them, however, those decisions are inapplicable to this scenario where SCRG is the only Defendant here. *See* Def's Motion at pp. 13-14.

(1) The Cases Defendant Cites Requiring Plaintiffs to Individually Plead Claims Against Defendant Are Not Applicable to Plaintiffs' Complaint

Defendant cites several cases in an attempt to support its request for, essentially, a separate complaint from each Plaintiff that sets out detailed allegations for every element of every claim. But these cases are distinguishable from this matter and do not support Defendant's request.

Defendant cites *Lam v. City & County of San Francisco*, No. C 08-4702 PJH, 2010 U.S. Dist. LEXIS 4899, *34 (N.D. Cal. Jan. 21, 2010), for the proposition that each Plaintiff should individually plead his or her claims against SCRG. In *Lam*, six plaintiffs brought 13 claims against nine defendants. Most of the claims involved workplace discrimination, but four of the claims arose from facts that had no connection whatsoever to the alleged discrimination upon which the other claims were based. *See id.* at *2. Because the plaintiffs only provided a "generic and collective charge of liability as to all defendants," without somehow informing each defendant of its role in the matter, the *Lam* court found

that the defendants were not given notice of the theories against them. Additionally, the court found that the incorporation of the four totally unrelated claims against some defendants was improper. In this action for personal injuries and property damages, every single cause of action arises from the same set of operative facts—the release of red dust, bauxite, and asbestos from the alumina refinery during the time that SCRG owned and/or operated the refinery, which is 2002 onwards. Plaintiffs also seek to enjoin Defendant from subjecting Plaintiffs to future harm from similar exposures. For this reason, all the counts apply to SCRG and there is no possible "confusion" as in *Lam*.

Defendants also cite *Walker v. Wentz* for the proposition that it is important for a plaintiff to use separate counts when there are various claims against multiple defendants. *Walker v. Wentz*, No. 1:06-CV-2411, 2008 U.S. Dist. LEXIS 11592, *17 (M.D. Pa. Feb. 15, 2008). Again, *Walker* does not apply to the instant matter as there is only one named Defendant here, SCRG and Walker address the issue of multiple defendants. In addition, the Court in *Walker* only granted the motion for a more definite statement under Rule 10(b), which "requires that 'each claim founded on a separate transaction or occurrence . . . must be stated in a separate count' if doing so would promote clarity," because Walker's claims were based upon several separate occurrences, including: (1) the seizure of automobiles, (2) a first arrest, (3) a second arrest; and (4) the alleged threat to fine Walker. *Id.* Additionally, each defendant had varying degrees of involvement in each incident. *Id.* The Court found that Walker's complaint did not describe each defendant's involvement such that each defendant understood the claims against him. *Id.*

In this case, Plaintiffs have alleged liability against only one Defendant, SCRG, about one main issue--the release of particulates from the red mud at the alumina refinery during heavy winds and several related incidents, including the failure to clean up the hazardous materials at the refinery and the subsequent failure to inform Plaintiffs of the dangers of the friable asbestos being blown into the Plaintiff's homes. However, unlike *Walker*, Plaintiffs here have clearly set out the claims and SCRG's role in each of these incidents. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5], at ¶¶ 471- 482.

For example, the First Amended Complaint explains that the red dust, bauxite, and asbestos problem originated under other entities' ownership of the alumina refinery, but that SCRG obtained the refinery and failed to correct the improper storage of the toxic particulates, which were blown by heavy winds into Plaintiffs' neighborhoods. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5], ¶¶ 471-482. The First Amended Complaint sets out how when SCRG took over the refinery in 2002, and failed to properly store the bauxite and red dust and it failed to contain the friable asbestos. *Id.* Thus, although there are a series of related occurrences giving rise to SCRG's liability, unlike in *Walker*, those occurrences are inextricably intertwined. Plaintiff's First Amended Complaint informs Defendant SRCG of its role specifically in the occurrences that gave rise to this suit.

Defendant also cite to *Folkman v. Roster Fin. LLC,* Civil No. 05-2099 (RBK), *et al*., 2005 U.S. Dist. LEXIS 18117, *4 (D.N.J. Aug. 16, 2005) to further its argument that

separate statements relating to each Defendant would be "helpful." Again, this instant case does not deal with multiple defendants, so the *Folkamn* case is totally irrelevant.

Defendant also cites to a case in which a pro se prisoner plaintiff was appealing the trial court's dismissal of his complaint alleging constitutional violations. *See Everly v. Allegheny County Exec. Dir.*, No. 11-1106, 2012 U.S. App. LEXIS 256 (3d Cir. Pa. Jan. 5, 2012). First, the opinion is marked as "Non-Precedential." *Id.* Second, the Third Circuit Court found that the pro se plaintiff's complaint was "exceptionally under-developed" with no facts as to who violated his constitutional rights, what conduct was at issue, when it occurred and what injuries he suffered. *Id.* at *1. Obviously the *Everly* case does not apply here where Plaintiffs have set forth a pleading replete with factual allegations as to SCRG's tortious conduct at issue, the Plaintiffs' exposure to the particulates, and their claims of physical and mental injuries. The Court should disregard this non-precedential case that bears no resemblance to the facts in this case.

In addition, none of the cases cited by Defendant involve mass torts; instead, Defendant's authorities all arose from separate and distinguishable occurrences involving varying circumstances as to each plaintiff and defendant. Contrary to Defendant's characterization of Plaintiffs' claims, this case involves the conduct of one company SCRG from the time it obtained the refinery in 2002. Here, all the Plaintiffs were injured in substantially the same way and at substantially the same time—they were exposed to toxic dusts blown from the refinery onto their properties and into their lungs during high winds on St. Croix. Consequently, Defendant has not cited any persuasive authorities urging the

Court to require each of the 400 plus Plaintiffs to file individual complaints.

2. Common Allegations are Typically Permitted in Mass Tort Actions.

Rather than looking at cases that simply involve multiple parties on one or both sides, as Defendant has done, it is more instructive to look at how courts have handled other mass tort cases.

Turner, et al., v. Murphy Oil USA, Inc., No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D. La. Dec. 29, 2005) involved twenty-six consolidated class actions. The plaintiffs were residents and homeowners of St. Bernard Parish, Louisiana. According to the plaintiffs, an oil tank at Murphy Oil's Meraux, Louisiana oil refinery came loose from its bearings during (or shortly after) Hurricane Katrina and released thousands of barrels of oil into the surrounding neighborhoods, where plaintiffs lived. *Turner, et al., v. Murphy Oil USA, Inc.*, No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D. La. Dec. 29, 2005). Plaintiffs sought recovery for personal injuries, property damage, and mental anguish resulting from the spill. *Id.*

Under Rule 42a, the court consolidated actions from numerous courts and ordered that the plaintiffs prepare a Master Complaint that would govern all actions. *Id.* at **4-5. Although the Master Complaint is not a substantive pleading and is just a procedural device used to streamline motions and discovery, the Louisiana district court referred to the normal standards regarding motions to dismiss. *Id.*

Like the Defendant SCRG here, Murphy Oil challenged the plaintiffs' general

allegations that they suffered personal injuries, property damages, and mental anguish as not sufficiently establishing injuries-in-fact to meet the standing requirement. *Id.* at *10. The court rejected this argument because "the court must presume that general allegations embrace the specific facts that are necessary to support the Plaintiffs' claim." *Id.* at *10. It determined that the plaintiffs' general allegation that they resided near the oil refinery and suffered injuries as a result of the oil discharge was sufficient to put the defendant on notice of the claims against it. *Id.* Although the *Turner* court used the *Conley v. Gibson* standard for evaluating the motions to dismiss, its rationale is still applicable.

Courts still employ the presumption regarding general allegations embracing specific facts under the new *Twombly* standard. In *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, *1 (D. Ariz. July 16, 2009), the court denied a motion to dismiss a class claim that the defendant sent unsolicited advertisement faxes in violation of the Telephone Consumer Protection Act. *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, *1 (D. Ariz. July 16, 2009). The court held that the plaintiff's bare allegations that the defendant sent unsolicited faxes were conclusory and not entitled to presumption of truth, but it credited the following allegations as factual: the defendant (1) knew the faxes were advertisements; (2) participated in preparing the faxes; (3) provided/obtained class members' fax numbers; (4) paid a contractor to transmit faxes, and/or (5) knew that class members had not authorized the fax. Assuming these to be true, plaintiff alleged a plausible violation of the Act. *Id*. at *4-5.

The court invoked the "general allegation" presumption in rejecting the defendants'

argument that the plaintiffs had to address the moving defendant specifically. *Id.* at **6-7.

Just like the Louisiana court in *Turner*, the Arizona court in *Neo-Tech News* held that "[o]n a motion to dismiss, we are required to assume that all general allegations embrace whatever specific facts might be necessary to support them." *Id*. at *7; *see also In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, NO. 1:08-wp-65000, *2009 U.S. Dist. LEXIS 102468*, *1, *40-41 (N.D. Ohio Nov. 3, 2009) (denying motion to dismiss putative class action for failure to allege violation of specific warranty provisions, but the court holds that plaintiff need not allege specific facts; it is sufficient that plaintiffs' allegations put defendant on notice of alleged breach of written warranty.) Thus, contrary to Defendant's argument that the complaint suffers from a "shotgun" approach in that it fails to include individual allegations about Plaintiffs' physical injuries, emotional injuries, and property damages, these cases demonstrate that simple allegations of damages are sufficient to survive dismissal.

Similarly, *In Re Digitek Products Liability Litigation*, MDL NO. 2:08-md-01968, 2009 U.S. Dist. LEXIS 113947, *1 (S.D. W. Va. Aug. 3, 2009), numerous groups of Plaintiffs filed civil actions in state and federal courts across the country against many groups of defendants that manufactured, marketed, tested, promoted, sold and/or distributed Digitek, a drug used to treat a number of heart conditions that was recalled and allegedly caused various injuries to plaintiffs. In 2008, the Judicial Panel on Multidistrict Litigation entered an order establishing a multidistrict litigation ("MDL") proceeding consolidating the federal Digitek-related actions for joint case management. *Id.* at 97. As in *Turner*, the MDL court

ordered the plaintiffs to prepare a Master Complaint, which it evaluated under the normal standards for a motion to dismiss.

As the court explained, "[t]he Mylan defendants are correct that the master complaint lacks detailed factual allegations respecting their specific knowledge of a manufacturing defect. It does allege though that all of the defendants knew generally of a manufacturing defect and that they failed to act." *Id.* Thus, once again, a post-*Iqbal* court dealing with a mass tort reiterated the rule that courts must assume that general allegations contain the specific facts that they subsume.

These cases support Plaintiffs' position in this case that the First Amended Complaint against Defendant need not set out detailed allegations as to each Plaintiff's claims. Unlike the authorities Defendant relies upon, these cases share a similar context with this case—they all involve mass torts in which the plaintiffs generally allege facts putting the defendant(s) on notice of the type of claims at issue and the bases for them. This practice is both common and practical for the administration of cases involving so many parties and so many claims. To require anything more would be to overwrite the law regarding dismissals in this jurisdiction.

Contrary to Defendant's claims, Plaintiffs have alleged sufficient facts and need not provide a more definite statement. These allegations include that:

- Plaintiffs were residents of neighborhoods located downwind from the refinery;

- Red mud, bauxite, asbestos, and the other particulates that blew into Plaintiffs' neighborhoods contained toxic and/or irritating contaminants;
- The red mud and bauxite were stacked in open mounds outdoors and the asbestos was left exposed;
- The dusty materials were blown by strong winds into the Plaintiffs' neighborhoods;
- Plaintiffs' real and personal property were coated with red dust and/or bauxite and Plaintiffs' ingested and/or inhaled the dusty particulates, causing them personal injuries; and
- SCRG concealed from Plaintiffs the dangers associated with the friable asbestos
- SCRG failed to take proper measures to control emissions
- Plaintiffs suffered and continue to suffer physical injuries, mental, psychological damages and medical expenses, amongst other damages

Accepting these and all other factual allegations as true and construing them in the light most favorable to the plaintiff, a reasonable reading of the complaint shows that the Plaintiffs may be entitled to relief under this pleading and a more definite statement is not warranted under Rule 12.

II. SEVERANCE WOULD NOT BE JUDICIALLY ECONOMICAL OR CONVENIENT, THUS THE MOTION FOR SEVERANCE MUST BE DENIED

"A district court has broad discretion in deciding whether to sever a party

pursuant to Federal Rule of Civil Procedure 21." *Cooper v. Fitzgerald,* 266 F.R.D. 86, 88 (E.D. Pa. 2010) (quoting *Boyer v. Johnson Matthey, Inc.,* No. 02-8382, 2004 U.S. Dist. LEXIS 9802, 2004 WL 835082, at *1 (E.D. Pa. Apr. 16, 2004)). Rule 21 states: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. The Court may also sever claims against a party. Fed. R. Civ. P. 21(a). Significantly, "Rule 21 is 'most commonly invoked to sever parties improperly joined under Rule 20.'" *Boyer*, 2004 U.S. Dist. LEXIS 9802, 2004 WL 835082, at *1 (citation omitted).

The Third Circuit holds that as a threshold matter, joinder is strongly encouraged. *Hagan v. Rogers*, 570 F.3d 146, 152 (3d Cir. 2009). However, joinder is only appropriate if both elements of Rule 20(a) are met. *Cooper,* 266 F.R.D. at 88 (citing *Lopez v. City of Irvington*, No. 05-5323, 2008 U.S. Dist. LEXIS 14941, 2008 WL 565776, at *2 (D.N.J. Feb. 28, 2008). Specifically, Rule 20(a) permits the joinder of plaintiffs in a single action if: "(1) the plaintiffs have a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there exists some question of law or fact common to the plaintiffs." *Cooper,* 266 F.R.D. at 88 (citing *Cumba v. Merck & Co., Inc.*, No. 08-2328, 2009 U.S. Dist. LEXIS 41132, 2009 WL 1351462, at *1 (D.N.J. May 12, 2009); *see also* Fed. R. Civ. P. 20(a).

The entire point of Rule 20(a) is to "promote trial convenience and expedite the final determination of disputes, thereby preventing multiple law suits." *Al Daraji v. Monica,* No. 07-1749, 2007 U.S. Dist. LEXIS 76205, 2007 WL 2994608, at *10 (E.D. Pa.

Oct. 12, 2007) (citation omitted). The rule is designed "'to promote judicial economy . . . [and] reduce inconvenience, delay, and added expense.'" *Id.* (citation omitted); *see also Cooper v. Fitzgerald,* 266 F.R.D. 86, 88 (E.D. Pa. 2010).

In the instant case, judicial economy, convenience and expenses would be greatly compromised if the Court severs the Plaintiffs' claims into over 400 lawsuits. Moreover, Plaintiffs are properly joined under Rule 20. Plaintiffs claims are all based on the same series of occurrences that red dust, mud, coal dust, and asbestos emanated from SCRG's alumina refinery during heavy winds and damaged the Plaintiffs and their property during the time period that SCRG owned and/or operated the refinery from 2002 to the present. Furthermore, all of the issues of law and fact concerning Defendant's negligence in failing to warn, failing to protect Plaintiffs against an abnormally dangerous condition, and issues of public and private nuisances and intentional or negligent infliction of emotional distress are shared by all of the Plaintiffs. Thus they satisfy Rule 20.

Defendant's claim that the Plaintiffs live over a "very large and varied physical are" is ludicrous, given that they all lived in St. Croix, in close proximity to the alumina refinery and the red dust dispersed miles across St. Croix. An expert witness will describe in detail the area of dispersion and show that all Plaintiffs were within the zone of danger of SCRG's tortious conduct. There is no rule requiring Plaintiffs to prove these facts in a Complaint. And while there are other cases filed in the District Court addressing the previous owners and operators' liability, this case centers solely around

SCRG's culpable actions with regard to the dangerous dispersion of particulates onto Plaintiffs' property and persons.

Defendant's reliance on Judge Cabret's Order in *Alexander et. al. v. HOVIC* supports joinder *not* severance. Judge Cabret ruled in favor of severance in that case only because the Plaintiffs made "no allegations that each individual's exposure occurred out of the same transaction, occurrence, or series of transactions or occurrences." *See* Def's Exhibit B at p. 4. In this case, Plaintiffs have made numerous allegations that their exposure to the red dust, coal dust, and asbestos occurred from strong winds blowing the toxic material from SCRG's alumina refinery onto their property and persons and that their exposure to the dangerous material were a result of a series of these dispersions. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5] ¶¶ 472-479. Thus, Judge Cabret's decision helps Plaintiffs' position not Defendant's.

III. CONCLUSION

Plaintiffs have filed a Motion for Leave to file their First Amended Compliant, which address the issues raised by Defendant that Plaintiffs' Complaint was allegedly not clear. Plaintiffs' Complaint does not allege a "variety" of exposures as Defendant claims, but substantially similar exposures from the same source and, in this case, over the same period of time, from 2002 onward when SCRG took control of the alumina refinery. There are over 400 Plaintiffs in this action and their common claims and issues of law and fact permits joinder in a single action under Rule 20. Joinder also

promotes judicial economy in this case as it would be costly and inconvenient to try over 400 of the cases as separate trials bringing down the same expert witnesses and corporate defendant witnesses repeatedly, and tying up the Court's docket for over a year or more. A joint trial would not, as Defendant suggests, take over a year as there would be no need to put the expert witnesses on the stand more than once in the Plaintiff's direct case, and that is true for the corporate defendant witnesses as well. Thus in the interest of judicial economy and convenience joinder is appropriate.

In addition, a more definite statement is unnecessary given the extensive factual pleadings in this case with descriptions of SCRG's wrong-doing. *See Exhibit 2,* to Plaintiff's Motion for Leave to File First Amended Complaint, previously filed as Docket No. [5], ¶¶ 472-482. Collective allegations about Plaintiffs' exposure, proximity to the alumina refinery and damages are also proper in a mass tort action such as this one. Rule 8 (a)'s requirement of a short plain statement has been amply satisfied and no further explanatory facts are necessary. Thus, Plaintiffs respectfully request that the Court deny the Defendant's Motion for Severance and for a More Definite Statement, and permit the Plaintiffs to litigate their case as joined parties.

RESPECTFULLY SUBMITTED
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DATED: March 15, 2012

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on March 15, 2012, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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