In the
United States Court Of Appeals
For the
Third Circuit

Case No. 12-8114

St. Croix Renaissance Group, LLLP

Petitioners,

Eleanor Abraham, *et. al*.

Respondents.

Petition from the District Court of the Virgin Islands
Division of St. Croix, Civil No. 12-CV-0011
District Judge: Hon. Harvey J. Bartle III

RESPONDENT'S OPPOSITION TO PETITION FOR DE NOVO REVIEW OF A CAFA REMAND ORDER PURSUANT TO 28 U.S.C. § 1453(C)(1)

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INTRODUCTION

The Petition for *de novo* review should be denied as this court lacks jurisdiction to review the remand order. Remand orders are not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d). There is only one exception to this rule---remand orders concerning a "class action". 28 U.S.C. § 1453(c). "Class Action" is statutorily defined. 28 U.S.C. § 1453(a); 28 U.S.C. § 1332(d)(1). The term "class action" is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1). This case was **not** filed as a class action under rule 23 of Federal Rules of Civil Procedure or another similar state statute. *See* First Amended Complaint ¶ 1, **Exhibit 1**; *see also* 4 V.I.C. § 76. Therefore, the remand order is not reviewable on appeal or otherwise and this Court lacks jurisdiction. 28 U.S.C. § 1447(d); *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) ("From the plain language of § 1453(c), which extends appellate jurisdiction only to remand orders for 'class actions' as defined in CAFA, it follows that we lack jurisdiction to proceed further.")

If the Court determines that it has jurisdiction, there was no error made by the District Court. Because this matter was not filed as a class action, removal was appropriate only if this case met all of the prerequisites of a "mass action" as defined

by 28 U.S.C. §1332(d), the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. §1332(d)(11). Per the plain language of the statute, CAFA removal jurisdiction never attached to this purported "mass action" because the case does not satisfy the provisions of **both** 28 U.S.C. §1332 (d) (11) **(A) and (B)**. Just as they did in the District Court, Petitioners ask this Court to proceed as though removal jurisdiction was a given, when in fact, the burden is on Petitioners to prove that federal jurisdiction is proper.

In addition, the relevant facts are not in dispute and Respondents' First Amended Complaint amply supports the District Court's decision to remand the case back to the Superior Court.

RELEVANT FACTS

The St. Croix Alumina Refinery is located just south of several residential neighborhoods. Pl's First Am. Compl., ¶ 462. The refinery used red-colored ore called bauxite 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 and the red mud. Pl's First Am. Compl. ¶¶ 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 Petitioner in 2002, and claims against those defendants are the subject of other lawsuits.

In 2002, Petitioner obtained the refinery. Since doing so, Petitioner has continued to inadequately store and/or secure the toxins and permitted the emissions of the dangerous particulates onto Respondents' property and persons. Pl's First Am. Compl.¶¶ 472-474. By at least 2006, Petitioner had learned that the asbestos in the refinery was friable and dangerous. *Id.* at ¶ 476. Upon learning of the situation, Petitioner concealed the existence of asbestos, tired to improperly remove it and made false reports as to the dangers posed by the asbestos. Pl's First Am. Compl. ¶¶ 477-481.

Because Petitioner never properly secured the toxins, Respondents continued to be exposed to these substances even at this late date. *Id.* at ¶¶ 472, 483-484. Respondents were injured in substantially the same way, by the same substances, and at the same time—they were exposed to toxins blown from the refinery onto their properties and into their lungs during high winds on St. Croix. *Id.* Thus, these

emissions are all logically connected. Respondents' exposure to the toxins has caused them personal injuries and property damage. *Id.* at ¶ 483-484.

The District Court properly found that the continuous release of red dust, red mud and coal dust as well as friable asbestos over years fit the meaning of "an event or occurrence in the State in which the action was filed" and thus not a "mass action" subject to federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

ARGUMENT

I. This Court Lacks Jurisdiction to Review the Remand Order

"In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141-42 (3d Cir. 2001).

Section 1453(c) of Title 28 U.S.C. specifically suspends the usual ban on appeals of orders remanding a removed case to state court **only** where the order sought

to be reviewed grants or denies a motion to remand a **class action**. 28 U.S.C. §1453(c). "We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there."' *Dodd*, 545 U.S., at 357, *citing Conn. Nat. Bank*, 503 U.S. at 253-254.

"Class Action" is statutorily defined. 28 U.S.C.§ 1453(a); 28 U.S.C. § 1332(d)(1). The term "class action" is defined as "any civil action **filed** under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1). This case was **not filed** as a class action under rule 23 of Federal Rules of Civil Procedure or another similar state statute. *See* First Amended Complaint ¶ 1; *see also* **4 V.I.C. § 76**. Therefore, the remand order is not reviewable on appeal or otherwise and this Court lacks jurisdiction. *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) ("From the plain language of § 1453(c), which extends appellate jurisdiction only to remand orders for 'class actions' as defined in CAFA, it follows that we lack jurisdiction to proceed further.").

II. The Purposes of CAFA Are Not Served By Granting Federal Jurisdiction in this Local Matter

Section 2(b) of CAFA states that "[t]he purposes of this Act are to (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of **interstate cases of national importance** under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." *Morgan v. Gay*, 471 F.3d 469, 473 n.3 (3d Cir. 2006)(quoting 28 U.S.C. § 1711 note)(emphasis added). It is undisputed that this case is NOT and never was a class action, thus the first purpose for CAFA federal jurisdiction—"to assure fair and prompt recoveries for class members"--does not apply. In addition, this case does not deal with "innovation" and "consumer prices," thus, the third purpose for CAFA jurisdiction is similarly inapplicable.

Last, this case does not involve "interstate controversies of national importance" as the tortious conduct and resultant injuries all occurred in one place: St. Croix, thus, it is a local action and rightly belongs in the local court. *See Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 154-55 (3d Cir. 2009). The District Court correctly found that Respondents' allegations in their Amended Complaint do not constitute a "mass action" for federal subject matter jurisdiction under CAFA, and properly remanded the case. Memo Op. at p. 8. Petitioner fails to establish why this

purely home state controversy about toxic emissions from a local refinery injuring only Territorial or "local" property and persons should be decided by a federal court in order to serve the goal of CAFA to resolve "interstate controversies of national importance ...." *Id.* For this reason alone, Petitioner is not entitled to this Court's exercise of its discretion to hear its appeal, and the Petition for should be denied.

III. The District Court Correctly Determined that it Lacked Removal Jurisdiction Under the Plain Language of CAFA

Mass actions are governed by 28 U.S.C. §1332(d)(11). ***Removability jurisdiction*** over "**mass actions**" is created by a separate subsection, 28 U.S.C. §1332 (d)(11)(A). *See Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) ("On its face, § 1332(d)(2)-(10) vests the district courts with ***original*** jurisdiction over certain class actions ..., but subsection (d)(11)(A) refers to actions '***removable*** under paragraphs (2) through (10)"') (emphasis in original). "This 'mass action' provision, codified at 28 U.S.C. § 1332(d)(11), gives the federal courts jurisdiction over some actions that were not filed as class actions but are similar to class actions, ***but the section limits this jurisdiction to actions that meet specific criteria***." *N.J. Dental Ass'n v. Metro. Life Ins. Co.*, Civ. No. 10-2121, 2010 U.S. Dist. LEXIS 99586, *8 (D.N.J. September 21, 2010) (emphasis supplied). *See also Lowery v. Ala. Power Co*., 483 F.3d 1184, 1199 (11th Cir. 2007) (recognizing that "§ 1332(d)(11)(A) comes with

a proviso: a mass action is **only** deemed a class action 'if it otherwise meets the provisions of [§ 1332 (d)(2) through (10)].'"'); *Abrego*, 443 F.3d, at 680 n. 6 ("Section 1332(d) imposes a range of requirements for class action jurisdiction, *see* § 1332(d)(2)-(10), ... [and **a] "mass action" must satisfy each of these requirements and processes**") (emphasis supplied).

Establishing CAFA jurisdiction over an alleged "mass action" is a two-part process. *See* 28 U.S.C. § 1332(d)(11). First, it must be demonstrated that the case meets the CAFA definition of a "mass action" under Section 1332(d)(11)(B). Pursuant to the plain language of that section, "the term 'mass action' shall not include any civil action in which ... all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

'"In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end."' *Kaufman,* 561 F.3d, at 155, *citing Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141-42 (3d Cir. 2001). In the 1st Amended Complaint, Respondents expressly alleged

that each and every operative incident occurred in St. Croix and caused injury and damages to the Respondents' persons and property in St. Croix. *See* **Exhibit 1** at ¶¶ 471-484. The Complaint alleges incidents all occurring in St. Croix: the existence of the red-mud piles at the St. Croix alumina refinery site, the dispersal of the red-mud and other particulates from the St. Croix site onto the persons and throughout the homes and property of the Respondents who were living and working in the vicinity of the St. Croix site; and the continuing exposure to toxic contaminants from the site by those Respondents who remain in the vicinity of the site on St. Croix. *Id.*

The District Court held that this case was similar to *Allen v. Monsanto Co.*, Civ. No. 09-471, 2010 U.S. Dist. LEXIS 144703 (N.D. Fla. Feb. 1, 2010). The *Allen* Court remanded a multi-plaintiff suit raising claims of exposure to the continuous release of toxins into a river over a period of 40 years, on the grounds, *inter alia*, that the claims were excluded from CAFA's definition of a "mass action." *Allen*, 2010 U.S. Dist. LEXIS 144703 at *11; *see also Mobley v. Cerro Flow Prods.*, No. 09-697, 2010 U.S. Dist. LEXIS 524, *9, *10 (S.D. Ill. Jan. 5, 2010) (remanding multi-plaintiff case raising claims of exposure to toxic chemicals by specifically relying on the fact that "Plaintiffs in this case are suing in Illinois on claims that arose in Illinois" and the

wording of §1332(d)(11)(B)(ii)(I), to find that "CAFA jurisdiction in this case is expressly foreclosed by the language of the statute").

The operative complaint in *Mobley* alleged "Plaintiffs are persons who reside or have resided in St. Clair County, Illinois, and who seek damages for personal injuries and/or property damage due to allegedly improper disposal of toxic chemicals at three locations in and around Sauget, Illinois..." *Mobley*, at *3, *10. In this case, Plaintiffs who reside or have resided in St. Croix seek damages for personal injuries and/or property damage due to improper maintenance, storage and containment of, and/or failure to remove, toxic substances at a single location, the alumina refinery on St. Croix. Pl's First Am. Compl. at ¶¶ 471-484.

In *Mobley*, "[t]he operative complaint in the case asserts claims for personal injuries based on theories of negligence, strict liability, nuisance, and battery together with claims for property damage based on theories of negligence, nuisance, and trespass." In this case, the operative Complaint sets out causes of action based on, *inter alia*, negligence, strict liability, nuisance, and infliction of emotional distress, together with claims of property damage based on negligence. *Mobley*, 2010 U.S. Dist. LEXIS 524, at *4; First Am. Compl. ¶¶ 471-474 ¶¶ 471-484. Moreover, the claims at issue in this suit all arise from a single location, the old alumina refinery,

making the facts of this case even more "localized" than *Mobley*, where local claims from *multiple* sites excluded the case from the definition of "mass action." *Mobley*, 2010 U.S. Dist. LEXIS 524, at *9, *10 *citing* 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

Here, the claims of every Respondent arise from "an event or occurrence", i.e. exposure to toxic substances and dust, that occurred from the old alumina refinery in St. Croix, and every Respondent alleges that their exposure resulted in injuries and damages in St. Croix, thus the case is not a "mass action" as defined by the CAFA. As such, the District Court correctly determined that the plain language of 28 U.S.C. § 1332(d)(11)(B)(ii)(I), excludes this case from "mass actions" under CAFA and properly remanded this action back to the Superior Court of the Virgin Islands.

IV. The District Court Correctly Found That Petitioner's Continuous and Ongoing Release of Toxins Is an "Event or Occurrence"

The District Court properly relied upon the cases of *Abednego v ALCOA*, No. 10-19, 2011 U.S. Dist. LEXIS 27892 (D.V.I. Mar. 17, 2011) and *Allen v. Monsanto Co.*, Civ. No. 09-471, 2010 U.S. Dist. LEXIS 144703 (N.D. Fla. Feb. 1, 2010) to find that ongoing and continuous toxic emissions constitute "an event or occurrence" pursuant to §1332(d)(11)(B)(ii)(I). Memo Op. at pp. 5-6. In *Abednego*, the facts involve the same alumina refinery on St. Croix, emitting the same dust pollutants and

causing the same kind of damages at issue in this case. *Abednego*, 2011 U.S. Dist. LEXIS 27892.

In *Allen*, a manufacturing defendant was alleged to have released PCB toxins into the local river for over forty years. The Court summarized the "event or occurrence" as the "simple, singular matter of the release of PCB toxins into the local waterway." *Allen*, 2010 U.S. Dist. LEXIS 144703, *29. To combat the defendant's contentions that no single "event or occurrence" existed because the release of toxins occurred over a period of forty years, the Court looked at a number of sources to define "event or occurrence", including the dictionary (*Id.* at 30-31, fn 11), the Senate Committee Judiciary Report, which it acknowledged was just for common sense inquiry purposes because it existed, and not for total reliance (*Id.* at 25-26), and other "local" environmental cases that were properly excluded as mass actions. *Id*. at 26-27. The *Allen* Court found that the release of the PCB into the waterway over a passage of time was a "continuous event," *Id.* at *29, and that "under the thinking Defendants seem to espouse, the singular 'event' could blossom into a multitude of 'events' even if the time span of the complaint took place in a matter of seconds, and they would then be pressing the same argument they now make." *Id.* at 31, fn 12.

The "event" is not "pluralized" merely because it has been ongoing through time. *Id.* at 30. Nor does the statute require that an "event" be "an indivisible or irreducible unit." *Id.* The Court reasoned that "if that were the case, it would be difficult to see virtually any situation as a singular event, for there are always ways to divide the 'main event' up into smaller 'component events.'" *Id.* In sum, the *Allen* Court defined a situation such as the instant one as a single "event or occurrence" so long as the event is "relatively uniform and ongoing in nature and is not interrupted by some other interceding event of sufficient weight or importance, it remains a single event or occurrence within the meaning of the statute." *Allen*, 2010 U.S. Dist. LEXIS 144703, *30.

Likewise, in this case, Petitioner is responsible for the "relatively uniform and ongoing" emissions of toxins from the alumina refinery onto Respondents' property and persons, since its ownership in 2002 to the present, and there has not been any other interceding event of sufficient weight or importance, thus it remains a single event or occurrence within the statute. *Id.*

Petitioner failed to show why *Allen* is incorrect in this specific regard, as *Allen* specifically pointed out why §1332(d)(11)(B)(ii) is a "provision" and not an "exception." Second, the burden of proof argument has no bearing on *Allen*'s

determination that a single "event or occurrence" under the statute is one that is "relatively uniform and ongoing" without any important interceding events. Petitioner cited a long quote from the *Allen* case to attempt to show that *Allen* suggested there might be a different result if the burden of proof was not on the defendant. Pet., p. 17. However, *Allen* holds that , "[t]his argument would be unavailing, however, because all those potential examples are merely facets or outgrowths of the core problem, the simple cause and effect event that defendants are alleged to have created or allowed: allowed PCB's to be released into the waterways." *Allen***,** 2010 U.S. Dist. LEXIS 144703, 29-30. Thus, regardless of burden of proof, the *Allen*, Court ruled that an event or occurrence under §1332(d)(11)(B)(ii)(I) is still a single event even if it involves an ongoing release of toxins over a long period of time. *Id.*

Petitioner's argument that the District Court "adopted" the legislative history of the Senate Judiciary Committee Report as its linchpin for determining how to interpret an "event or occurrence" is incorrect as the Court only mentioned the Report as "relevant analysis". Memo. Op., p. 8. The District Court, relying on *Allen*, concluded, "[w]e think that an event, as used in CAFA, encompasses a continuing tort which results in a regular or continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no superseding occurrence or significant

interruption that breaks the chain of causation." Memo. Op., p. 8. Petitioner fails to distinguish *Allen* from the case at hand and fails to show how the facts and circumstances of this case do not fall under the logical interpretation of an "event or occurrence" propounded by *Allen*, and this District Court.

Moreover, it is Petitioner who stretches the facts in arguing that the Third Circuit in *Morgan*, disapproved of the Judiciary Report . Pet., pp. 12-13 (citing *Morgan v. Gay*, 471 F.3d 469, 472-473 (3d Cir. N.J. 2006)). First, the *Morgan* case never once discussed §1332(d)(11), or "events or occurrences" or local environmental cases, and instead examined whether CAFA shifted the burden of proof onto the party wishing to litigate in state court, and away from the proponent of federal jurisdiction, as has always been the law. *Id.* at 472-473.

Petitioner improperly omitted pertinent sections of *Morgan*'s analysis of the Report to imply it was about interpreting an "event or "occurrence" rather than the "burden-shifting" legislative history. Pet., pp. 12-13. *Morgan* refused reverse the long-standing notion that the proponent of federal jurisdiction bears the burden of proof that jurisdiction exists even under CAFA, *Id.* at 473, and concluded that "[t]he problem with relying solely on CAFA's legislative history is that the portion that

supports burden-shifting 'does not concern any text in the bill that eventually became law.'" *Id.* at 473.

First, this Court did not say that relying on legislative history was incorrect, only that it could be unreliable in some instances. Second, in the instant matter, the District Court's reliance on the Judiciary Report is relevant as the portion cited by the District Court specifically relates to text in the bill that actually became law: "if both the event and the injuries were truly local," the case remains in state court. This exception is part of the text of CAFA, §1332(d)(11)(B)(ii)(I), and thus, analysis of the Judiciary Report pertaining to that exception is relevant for inquiry purposes. *See Galstaldi v. Sunvest Cmtys. United States, LLC,* 256 F.R.D. 673, 676 (S.D. Fla. 2009)(in deciding whether to refer to CAFA's legislative history, the Court held, "though 'it is error to cloud the plain meaning of a statutory provision with contrary legislative history,' it is appropriate to refer to it here because 'the legislative history comports with the interpretation that has been adopted . . .'").

Consequently, Petitioner fails to present any arguments that the decision to remand this case was in error and this Petition to Appeal the Remand to the Superior Court should be denied.

V. The District Court's Decision to Remand is Supported by the Record

Petitioner wrongly claims that Respondents have the burden of proof to establish under §1332(d)(11)(B)(ii) that this case is not a mass action because it involves an event or occurrence in the State. Pet., pp. 18-19. First, while it is true that the party seeking to remand a case to state court has the burden of proof to establish "exceptions" to federal jurisdiction under CAFA, such as the "local" exception under §1332(d)(11)(A)(4), that burden of proof is not applicable here as Petitioner petition for review is not based on the "local" exception under section 1332 (d)(11)(A)(4). *See Allen, supra*, (finding that §1332(d)(11)(B)(ii) is a non-exclusionary provision rather than an "exception", and thus the burden of proof remained with the party seeking to remove to federal court at all times); *but see Gavron v. Weather Shield Mfg.*, No. 10-22088, 2010 U.S. Dist. LEXIS 108559 (S.D. Fla. Sept. 29, 2010)(plaintiffs have burden to prove that 2/3 of their class are citizens of Florida to satisfy "local exception" to CAFA).

Contrary to Petitioner's argument, the Amended Complaint sufficiently alleges that the pollutants dispersed "continuously." First Am. Compl. ¶¶ 471-474. Petitioner wrongly argues that the District Court was required to rely only on jurisdictional "facts" in an Affidavit or other sworn statement, and that Respondent did not meet a burden as to these "facts." Pet., pp. 18-19. As noted above, Respondent does not bear

the burden of proof to show that this case is not a "mass action" and the allegations in the Complaint are sufficient to show that an "event or occurrence" in the State resulted in injuries in the State so that this case was rightly remanded back to Superior Court.

VI. Alternatively, the "Local Controversy Exception" also applies and remand remains appropriate

Respondents contend that yet another exception applies, the Local Controversy Exception. Section §1332 (d)(11)(A). squarely places on the removing party the burden of establishing that mandatory exceptions do not apply. Petitioner have not shown that the provisions of 28 U.S.C.§1332 (d)(2)-(10) have been met or otherwise do not apply, as required by 28 U.S.C. §1332 (d)(11)(A).

This exception allows a district court to decline jurisdiction if greater than one-third and less than two-thirds of the plaintiffs are citizens of the state in which the claim was filed and the primary defendants are citizens of that state. *See* 28 U.S.C. § 1332(d)(3). It also mandates that a district court must decline jurisdiction if more than two-thirds of plaintiffs are citizens of the state in which the claim was filed and the primary defendants are citizens of that state. *See* 28 U.S.C. § 1332(d)(4). More than two-thirds of Respondents in this matter are citizens of the Virgin Islands. Petitioner conceded this point but nevertheless contended that the Local Controversy Exception

did not apply because of its allegation that at the time Respondents filed their complaint, Petitioner was ***conveniently*** no longer a citizen of the Virgin Islands.

The self serving affidavit of Petitioner's principal John Thomas that conveniently alleges that its "nerve center functions" were transferred to Boston, Massachusetts at the time Respondents' filed their complaint cannot aid Defendant in its heavy burden of persuasion that removal is proper in this case. There has been no discovery on this issue, no documentary evidence (outside that of the self-serving affidavit) of this alleged transfer of the "nerve center functions" and no depositions have been taken of the persons with knowledge necessary to establish that the "nerve center functions" were no longer in the Virgin Islands. The District Court improperly accepted Petitioner's assertion that its "never center" was in Massachusetts. *See* Mem. Op., p. 2. However, that affidavit was challenged by Respondents (*See* Reply to Opposition to Motion for Remand, **Exhibit D-38 to Petition**) and therefore Petitioner was required to submit competent proof. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194-1195 (U.S. 2010)("The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it.); **When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof.** *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189,

56 S. Ct. 780, 80 L. Ed. 1135 (1936). If the Court finds that it has jurisdiction and that the District Court erred in its remand order, which Respondents deny, Respondents respectfully request that the District Court be ordered to hold a hearing and provide Respondents the opportunity to conduct discovery on Petitioner ***convenient*** contention that its "nerve center functions" were not in the Virgin Islands at the time Respondents filed their complaint.

CONCLUSION

This Court lacks jurisdiction to review the remand order as this matter was not filed as "class action" under rule 23 of federal rules of civil procedure or another similar state statute. Remand orders are not reviewable on appeal or otherwise except for "class actions". Further, the District Court made no error. Petitioner failed to meet its burden that federal jurisdiction was proper. The Petition for *De Novo* Review respectfully must be denied.

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CERTIFICATE OF BAR MEMBERSHIP

Attorney for Respondents certifies that I am a member in good standing of the bar of this Court pursuant to Third Circuit LAR 28.3.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. Proc. 5 and 32(a)(7)(B). The Brief contains 20 pages, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a) (7) (B) (iii).

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ELECTRONIC FILING CERTIFICATION

This is to certify that the text of the electronic brief and the hard copies of the Brief of Appellant are identical. A virus check was performed using AVG Anti-virus Business Edition which performs real-time scanning.

DATED: December 21, 2012

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CERTIFICATE OF SERVICE

I, **HEREBY CERTIFY** that on this 21st of December, 2012, I caused two (2) true and correct copies of the foregoing **OPPOSITION OF RESPONDENTS** to be served upon the following:

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