UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 12-8114

St. Croix Renaissance Group, LLLP,

Petitioner,

v.

Eleanor Abraham, ***et al***.,

Respondents.

From the District Court of the Virgin Islands
(D.C. No. 12-cv-0011)
District Judge: Hon. Harvey J. Bartle III

PETITIONER'S MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO FILE A CROSS-ANSWER IN OPPOSITION REGARDING RESPONDENTS *DE FACTO* CROSS-PETITION FOR REVIEW OF A CAFA REMAND ORDER PURSUANT TO 28 U.S.C § 1453(c)(1)

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INTRODUCTION

On December 13, 2012, St. Croix Renaissance Group, L.L.L.P. ("SCRG") filed a petition seeking leave to appeal a CAFA remand order -- pursuant to 28 U.S.C. § 1453(c). Rule 5, Federal Rule of Appellate Procedure, allows respondents to then submit "an answer in opposition or a cross-petition."

> RULE 5. APPEAL BY PERMISSION
>
> * * * *
>
> (b) CONTENTS OF THE PETITION; ANSWER OR CROSS-PETITION; ORAL ARGUMENT.
>
> * * * *
>
> (2) A party may file **an answer in opposition** or a **cross-petition** within 10 days after the petition is served.

However, instead of filing either an answer in opposition or a cross-petition, on December 21, 2012, respondents filed an "Opposition" which contained not only answers in opposition, but also addressed matters beyond the petition.[1] What they filed was, in effect, a *de facto* cross-petition.

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[1] The portions of the opposition that *were* responsive to the petition were:

- III. The District Court Correctly Determined that it Lacked Removal Jurisdiction Under the Plain Language of CAFA
- IV. The District Court Correctly Found That Petitioner's Continuous and Ongoing Release of Toxins Is an "Event or Occurrence"
- V. The District Court's Decision to Remand is Supported by the Record

The portions of the opposition that are in the nature of a cross-petition are:

- I. This Court Lacks Jurisdiction to Review the Remand Order
- II. The Purposes of CAFA Are Not Served By Granting Federal Jurisdiction in this Local Matter
- VI. Alternatively, the "Local Controversy Exception" also applies and remand remains appropriate

Thus, petitioner seeks to have the Court either (1) strike the matters not responsive to the petition or (2) grant leave to have *this pleading* docketed as petitioner's cross-answer in opposition to the *de facto* cross-petition.

ARGUMENT

Respondents incorrectly contend that (1) this Court lacks jurisdiction to allow an appeal because "mass actions" are not "class actions" within the meaning of 28 U.S.C. 1453(c), and (2) because respondents label this a "purely home state controversy" such a classification should preclude this Court's *discretionary* consideration as to the appeal of a CAFA "mass action" remand. They argue that the "mass actions" provisions of CAFA have an additional, *hidden* requirement -- that even if there *are* multiple events, when cases are what respondents label 'purely home state controvers[ies]' they should not, through the invocation of this Court's discretion, ever be removed or appealed.

1. Respondents' Cross-Petition Argument is Incorrect: This Court Does *Not* Lack Jurisdiction to Review the Remand Order

Respondents argue at length that this Court lacks jurisdiction. Respondents' Opposition ("Opposition") at 1-2 and 4-5. Based on their reading of the language of 28 U.S.C. § 1332(d)(1) respondents contend that pursuant to the wording of 28 U.S.C. § 1453(c) "mass actions" are not "class actions" and thus there is no right to seek appeal:

> 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. (Emphasis in original.)

Id. at 1. However, despite the fact that "mass actions" are not listed as a type of "class action" in 28 U.S.C. § 1332(d)(1), section 1453 *specifically* applies to mass actions -- pursuant to 1332(d)(11)(A) which provides:

> **(A)** For purposes of this subsection ***and*** **section 1453**, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs. (Emphasis added.)

Therefore, the Court has the requisite jurisdiction to grant leave to file an appeal.

2. Respondents' Cross-Petition Argument is Incorrect: The Purposes of CAFA *are* Served By Granting Federal Jurisdiction -- as being a "Local Matter" was not the Sole Target of CAFA when it was Enacted

Because respondents label this a "purely home state controversy" based on the *subject matter* of the dispute, they contend such a classification should preclude this Court's discretionary consideration as to the appeal of a remand. They argue that the "mass actions" provisions of CAFA are subject to an additional, *hidden* requirement -- that even if there *are* multiple events, when cases are what respondents label 'purely home state controvers[ies]' mass actions should not, through the invocation of this Court's discretion, ever be removed or appealed.

To reach this conclusion, they quote the "findings and purposes"[2] section of 28 U.S.C. § 1711 for the proposition that despite the inclusion of the phrase "an event" in section (d)11(B)(ii)(I), the 'real purpose' of CAFA mass actions is to deal *solely* with cases that are 'not purely home state controversies' based on their subject matter -- however courts might interpret that phrasing.

> [T]his 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). . . .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

[2] What respondents cite to as the "note" to 28 U.S.C. § 1711 is the statutory "Findings and Purposes" section from the original enactment. Pub. L. No. 109-2, 119 Stat. 4, February 18, 2005.

> 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. (Emphasis added.)

Opposition at 6-7. However, this is another case of selectively reading only part of the statute and its history.

Certainly *one* of the reasons that this mass action exception was created was the desire to address *subject matter* of national interest in federal courts. But the clear language of this exception makes it obvious that this is not the only type of "controversy of national importance" about which Congress was concerned. Congress did not create a bar against removal of ALL local subject matter actions, only those extremely limited types of local actions *specifically defined by the exception's language limiting it to "an event.*"

Respondents concentrate on subject matter, and seek to give meaning ONLY to that part of section (d)(11)(B)(ii)(I) discussing local acts within a state.

> (d)(11)
>
> (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.
>
> (B)
>
> (i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs

> whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).
>
> (ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which -
>
> (I) 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**;. . . .(Emphasis added.)

But this ignores the first half of sub-paragraph (ii)(I), other of the "findings" from when the statute was enacted and the other half of the legislative history.

The other half of those statutory findings makes it clear that in enacting this provision, in addition to excepting *some* types of occurrences of local subject matter (as argued by respondents) some in Congress included other statutory language to demonstrate the intent to also reach a type of cases they felt were endemic -- out-of-state defendants being hauled before local courts in what were class actions in all but name. *They made it clear that they thought these were 'controversies of national importance' as well.* Thus, those other findings make it clear why this 'local' exception was limited down to precluding just "*an* event" from CAFA mass actions -- to protect such other important interests. Pub. L. No. 109-2, 119 Stat. 4 (February 18, 2005) provides:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) FINDINGS.—Congress finds the following:
>
> * * * *
>
> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, **and the concept of diversity jurisdiction as intended by the framers** of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> **(B) sometimes acting in ways that demonstrate bias against out-of-State defendants**;. . . . (Emphasis added.)

Neither consideration (A) nor (B) is described as being more important than the other. While keeping cases with subject matter of national interest in federal courts was clearly one concern -- equally important were both "the concept of diversity jurisdiction as intended by the framers of the United States Constitution"[3] and avoiding bias against non-local defendants in these "mass actions" which, like this case, are really just class actions avoiding removal to federal courts. To put this another way, a case becomes a "case of national importance" not only because

[3] This is why the diversity definition in 28 U.S.C. § 1332(d) altered normal diversity definitions.

> **(d)(10)** For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

of the *subject matter* -- but also, sometimes, because of the citizenship of the parties in relationship to the size of the case, the forums involved and the considerations of fairness and diversity which attend it.

This additional purpose of CAFA mass actions provisions resulted in the SEVERE restriction of this "exception" to instances where there was just "*an* event." Again, petitioner directs the Court's attention to the *explicit* floor debate: that the phrase "an event" should NOT be allowed to be expanded to encompass, as Judge Bartle's decision would allow, continuous mass torts that do not actually arise from *an* event.

> The mass action section was specifically included to prevent plaintiffs' lawyers from making this end run. . . .Under the mass action provision, defendants will be able to remove these mass actions to Federal court under the same circumstances in which they will be able to remove class actions. However, a Federal court would only exercise jurisdiction over those claims meeting the $75,000 minimum threshold. To be clear, in order for a Federal court to take jurisdiction over a mass action, under this bill there must be more than 100 plaintiffs, minimal diversity must exist, and the total amount in controversy must exceed $5 million. In other words, **the same safeguards that apply to removal of class actions would apply to mass actions**. Mass actions cannot be removed to Federal court if they fall into one of four categories: One, **if all the claims arise out of *an event or occurrence* that happened in the State where the action was filed and that resulted in injuries only in that State or contiguous States. . . .Some of my colleagues will oppose *this* mass actions provision and will want to gut it *by making an effort to confuse mass actions with mass torts*.** I realize we are kind of getting into a legalese discussion, **but words make a difference when you are considering a bill such as this.** I am very concerned that the real motive is to render this provision meaningless. . . .

151 Cong. Rec. S1082 (daily ed. Feb. 8, 2005) (emphasis added).

Thus, this exception for local actions was intentionally and explicitly defined down to exclude just case where there was '*an* event' as a counter-balance -- because half of the proponents wanted to protect one thing and the other half wanted to protect another. To give meaning to "local" but to avoid its limitation to "an event" is to do exactly what Senator Lott warned would happen -- "gut" the other side of the protection.

CONCLUSION

This Court has jurisdiction to consider the Petition. In addition, it should not exercise its discretion to avoid interpreting the phrase "an event" based on respondents' incorrect notion that the "mass actions" provision of CAFA have an additional, hidden requirement -- that only cases that involve purely local *subject matter* are of national importance, and can be removed or appealed.

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

Dated: December 27, 2012

/s/

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CERTIFICATE OF COMPLIANCE

I, Carl J. Hartmann, Esquire, hereby certify that:

1. This Brief complies with type and volume limitation of Fed.R.App.P. 32(a)(7)(B), because:

This Brief is less than 20 pages exclusive of prefatory materials, signatures and following materials as per Fed.R.App.P. 32(a)(7)(B)(III).

2. This Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32 (a)(6) because: This Petition has been prepared in a proportionately spaced typeface using MS Word, and the font size is "14 point Times New Roman."

3. The Petition is being filed by ECF and has been scanned using Norton Antivirus.

/s/
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Attorney for Petitioner

CERTIFICATE OF SERVICE

A true and accurate copy of this Motion was filed by ECF and email to Plaintiffs' counsel on the 27th of December, 2012, at the email address below:

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