PUBLIC JUSTICE
RIGHTING WRONGS

March 28, 2013

Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
601 Market St., 21400 United States Courthouse
Philadelphia, PA 19106

RE: Letter Brief of Appellees Eleanor Abraham, et al. in No. 13-1725, *Abraham, et al. v. St. Croix Renaissance Group, L.L.L.P.*

INTRODUCTION

The question in this appeal is whether this toxic tort suit, which was filed in Virgin Islands court on behalf of several hundred St. Croix residents who were injured by a local Superfund site owned by Appellant-Defendant St. Croix Renaissance Group (SCRG), is removable to federal court under the Class Action Fairness Act (CAFA). JA136. The district court held that, because the suit concerns a local "event or occurrence," the case does not constitute a removable "mass action" under CAFA. JA17. That ruling was correct as a matter of law.

Before addressing the merits, however, it is useful to understand why CAFA was enacted in the first place. CAFA's principal goal is to ensure that "*interstate* cases of *national* importance"—in particular, large, national class actions—are

National Headquarters
1825 K Street NW, Suite 200
Washington, DC 20006
ph: 202-797-8600
fax: 202-232-7203

West Coast Office
555 12th Street, Suite 1230
Oakland, CA 94607
ph: 510-622-8150
fax: 510-622-8155

www.publicjustice.net

decided in federal, not state, court. *See* 28 U.S.C. § 1711 note (emphasis added). To this end, CAFA relaxes the requirements for federal court diversity jurisdiction over class actions *except* where the action concerns a local controversy: where more than two-thirds of the plaintiffs are citizens of the state where the action was filed and the defendant is also a citizen of that state. 28 U.S.C. § 1332(d)(4)(B).

CAFA also provides that "mass actions" are removable to federal court if they meet the same criteria applicable to class actions. § 1332(d)(11)(A). Congress clarified, however, that a case is not a removable "mass action" under CAFA if "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." § 1332(d)(11)(B)(ii)(I).

The two "local controversy" provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I), serve to keep class and mass actions in state court if they concern local plaintiffs and local events. They reinforce that CAFA's primary concern was making sure that national, interstate class actions are decided in federal court.

Here, the district court was correct in recognizing that this is not such a case. Appellees all live or lived in St. Croix at the time they were injured; all of their injuries were incurred in St. Croix; and—most pertinent to this appeal—all of the Appellees' injuries resulted from a single "event or occurrence": the continuous, ongoing exposure of the populace to wind-blown residue from SCRG's industrial

property, a defunct alumina refinery. In light of these facts, the district court's holding that this lawsuit falls within the local controversy provision applicable to mass actions—§ 1332(d)(11)(B)(ii)(I)—is unassailable.

If this Court disagrees, however, removal would still be improper because this action *also* falls within the local controversy exception applicable to both class actions and mass actions, § 1332(d)(4). Appellees raised this alternative argument below, and sought discovery on whether SCRG is a citizen of the Virgin Islands, one of the requirements for meeting the § 1332(d)(4) exception. The district court, however, denied the requested discovery and found that SCRG is not a citizen of the Virgin Islands, but did not discuss whether § 1332(d)(4) applies. If this Court disagrees with the lower court's ruling as to the mass action local controversy provision (§ 1332(d)(11)(B)(ii)(I)), the district court's ruling as to SCRG's citizenship should be vacated, and this case should be remanded to district court for discovery on whether it qualifies for the § 1332(d)(4) exception.

ISSUES

1. Whether the district court was correct in remanding the case to Virgin Islands state court based on its holding that the "regular or continuous release of toxic or hazardous chemicals" is a local "event or occurrence" within the meaning of the local controversy provision of CAFA applicable to mass actions, 28 U.S.C. § 1332(d)(11)(B)(ii)(I)?

2. In the event the Court answers "no" to the first issue, whether the district court erred in not permitting Appellees to take discovery to determine whether this case also falls within the local controversy provision of

CAFA applicable to both mass actions and class actions, 28 U.S.C. § 1332(d)(4)?

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the district court's remand order under 28 U.S.C. § 1453(c) because the case is not a "class action" as defined by § 1332(d)(1). Typically, orders remanding actions to state court are not appealable at all, § 1447(d), but CAFA created an exception for remand orders applicable to class actions—not mass actions. § 1453(c)(1). Section 1453 limits the definition of "class actions" to the definition in § 1332(d)(1): representative actions filed under Rule 23 or a similar state procedure. *See* § 1453(a). There is no dispute here that this case does not meet the definition of "class action" in § 1332(d)(1) and § 1453 because it is not a representative action filed under a class action procedure—all the plaintiffs are named parties. JA21-48. This Court therefore lacks jurisdiction over this appeal.[1]

STANDARD OF REVIEW

The issue of whether Appellees' claims give rise to federal court jurisdiction under CAFA is a question of statutory interpretation and subject matter jurisdiction

[1] SCRG contends that this is a removable mass action. Mass actions, however, are deemed to be class actions removable under § 1332(d)(2)-(10), not under (d)(1), the section referenced in the appeal statute. § 1332(d)(11)(A). The appeal statute itself makes no mention of any of the sections governing mass actions or the provision linking mass actions to class actions. *See* § 1453. While it is true that § 1331(11)(A) mentions § 1453, that does not change the limited definition of "class action" in §§ 1453 and 1332(d)(1).

subject to *de novo* review. *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 151 (3d Cir. 2009). A district court's decision on whether to grant jurisdictional discovery is reviewed for abuse of discretion. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455 (3d Cir. 2003).

STATEMENT OF THE CASE

SCRG's defunct alumina refinery sits on the south shore of the island of St. Croix, close to thousands of homes. JA48-49. The byproduct of the alumina refining process is a bauxite residue called "red mud" or "red dust." JA49. At the alumina refinery site, which is now a Superfund site, red dust is stored outdoors in uncovered, unsecured piles as high as 120 feet and covering up to 190 acres. JA50. *See* SCRG Br. 2. These piles of industrial byproduct include hazardous materials such as arsenic, molybdenum, selenium, coal dust, and other particulates. JA50. The remaining unrefined bauxite, meanwhile, is stored in a damaged shed that does not prevent the bauxite from blowing off the property. *Id.* Red dust and bauxite can cause damage to the skin, eyes, and respiratory system, and it is a cancer hazard. JA49-50. The toxic dust also causes property damage. JA49. Finally, the refinery is also rife with loose (friable) asbestos fibers, which, like the red dust and bauxite, are not secured and are carried by the wind onto and into the homes of Appellees—as well as into the cisterns from which Appellees get their drinking water. JA51.

The unsecured red dust, bauxite, and friable asbestos existed at the refinery

when it was purchased by SCRG in 2002. JA51-52. SCRG has done nothing to seal, secure, clean up, or otherwise prevent the toxins from continuously blowing off the SCRG property onto Appellees' property. *Id.* [2]

In November 2011, Appellees sued SCRG in Virgin Islands court, bringing tort and nuisance claims for the continuous release of the toxic particles from SCRG's 2002 purchase through the present. JA53-59. Appellees seek damages for personal injury and property damage, an injunction preventing the further dispersal of the particles, and punitive damages. *Id.* SCRG did not answer the complaint. JA136. Instead, SCRG filed a notice of removal in federal district court, contending that there is federal court jurisdiction under CAFA's "mass action" provisions. *Id.* Appellees responded by filing a motion to remand to Virgin Islands court, arguing that there is no federal court jurisdiction under either of CAFA's local controversy provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I). JA67-69, 71-72.

SCRG countered that its ongoing failure to secure the red dust, bauxite, and asbestos does not constitute a single "event or occurrence" under § 1332(d)(11)(B)(ii)(I), and, thus, this case is a removable "mass action" under CAFA. JA94. SCRG also argued that the local controversy exception set forth in § 1332(d)(4) does not apply because it is not a citizen of the Virgin Islands. JA99.

[2] SCRG protests that it has entered into a consent decree with the government and the prior owner to clean up the refinery site. SCRG admits, however, that the consent decree was not approved until *after* the residents filed this suit. *See* SCRG Br. 2.

In support of the latter claim, SCRG filed an affidavit, unsupported by any documentation, stating that, as of May 2011, SCRG's principal place of business is in Massachusetts, and that it is, therefore, not a citizen of the Virgin Islands. JA114-15. Appellees countered with evidence from SCRG's website indicating that it is headquartered in St. Croix and requested the opportunity to conduct discovery on the question of SCRG's citizenship. JA121-22, 133-34.

Without explicitly ruling on Appellees' motion for discovery, the district court held that SCRG is a Massachusetts citizen. JA11. That finding was not relevant to the court's decision, however, because it did not address whether the case was excepted from CAFA jurisdiction under § 1332(d)(4), which only applies if the defendant is a local citizen. Instead, the district court remanded the case to state court under § 1332(d)(11)(B)(ii)(I), which does not require that the defendant be a local citizen, based on its conclusion that "an event" includes the "continuous release of toxic or hazardous chemicals . . . where there is no superseding occurrence or significant interruption that breaks the chain of causation." JA17.

SCRG sought discretionary review of the district court's decision to remand under § 1332(d)(11)(B)(ii)(I), and this Court granted review. JA3. SCRG does not dispute that this case meets § 1332(d)(11)(B)(ii)(I)'s requirements that the case involve local events and injuries—SCRG's sole argument is that its ongoing, continuous release of toxins is not "*an* event or occurrence" under

§ 1332(d)(11)(B)(ii)(I).

ARGUMENT

I. The District Court Correctly Remanded this Case to Virgin Islands State Court Under § 1332(d)(11)(B)(ii)(I).

A. The District Court Was Correct in Holding that SCRG's Continuous Release of Toxins Is an "Event or Occurrence" Under § 1332(d)(11)(B)(ii)(I).

The district court held 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." JA17 (emphasis in original). That conclusion comports with common sense, the use of "occurrence" in the claim preclusion and supplemental jurisdiction contexts, industry practice, and the structure and purpose of CAFA.

First, there is no sensible way to break down the ongoing, continuous release of toxins into multiple events or occurrences, and SCRG fails to explain how to do so. Over how short of a period of time does the release of toxins have to last to qualify under SCRG's theory? One day? One month? One year? For the duration of each breeze? Any attempt to say that SCRG's failure to properly store and secure red dust, for example, at 11:59 pm on December 31, 2003, is separate event from its failure to do so at 12:00 am on January 1, 2004, would be purely arbitrary line drawing. Thus, the district court's conclusion is the only sensible one: Unless

there is an intervening action that changes the causal chain, an ongoing release of toxins is a single event or occurrence.

Other courts facing similar facts have reached the same conclusion as the district court here. In *Allen v. Montsanto Co.*, the plaintiffs, like Appellees here, owned property near a facility that continuously released toxins over a period of 40 years because of the facility's failure to properly store industrial byproducts. No. 3:09cv471, 2010 WL 8752873, at *1 (N.D. Fla. Feb. 1, 2010). In rejecting removal, the district court held that the fact "[t]hat the event is alleged to have been ongoing through time does not thereby 'pluralize' the event or occurrence." *Id.* at *10. The court rejected the facility's argument that because the release of the toxins spanned a number of years, it was not "an event or occurrence," pointing out that any event could always theoretically be broken down into other events mere seconds long. *Id.* at *10 & *10 n.12. SCRG calls *Allen* "inapposite," but does not make any actual attempt to distinguish it from this case for good reason: It is indistinguishable. SCRG Br. 16-18. [3]

Similarly, in *Mobley v. Cerro Flow Products, Inc.*, the court found that the

[3] SCRG takes issue with *Allen*'s holding that because the local event or occurrence provision is part of the definition of "mass action" and not an exception, the burden to show federal jurisdiction remains on the party seeking removal and does not shift to the party opposing it. SCRG Br. 17-19; *see Allen*, 2010 WL 87528873, at *3. Appellees disagree with SCRG, but regardless of which party bears the burden, Appellees should prevail here because their complaint describes a claim that is "an event or occurrence" within the meaning of the statute.

plaintiffs' claims for damages from the defendants' improper disposal of toxic industrial waste over many years fell within § 1332(d)(11)(B)(ii)(I). No. 09-697-GPM, 2010 WL 55906, at *3 (S.D. Ill. Jan. 5, 2010). If anything, this is an even easier case than *Mobley* because, while *Mobley* involved three different sites and several affiliated defendants, *id.* at *1, this case involves only one facility and only one defendant.

The *sole* case that has held the opposite—that the ongoing release of toxins is not an event or occurrence under § 1332(d)(11)(B)(ii)(I)—did so without any reasoning whatsoever. *Aana v. Pioneer Hi-Bred Int'l, Inc.*, No. CV 12-00231 JMS-BMK, 2012 WL 3542503, at *2 (D. Haw. July 24, 2012). *Aana* does not address *Allen* and *Mobley* and does not explain how it is logically possible to break down a continuous release into multiple events. Thus, *Aana* stands in stark contrast to the carefully reasoned decisions here below and in *Allen*, and it is unpersuasive.

SCRG gains no further traction by pointing out that *Abednego v. Alcoa, Inc.* dealt with a local environmental tort based on the impact of a 1998 hurricane—indisputably "an event or occurrence" under § 1332(d)(11)(B)(ii)(I). No. 1:10-cv-09, 2011 WL 941569 (D.V.I. Mar. 17, 2011); *see* SCRG Br. 17. That conclusion, however, does not foreclose a finding that a similar environmental tort that takes place over a longer period of time is also "an event or occurrence." If anything, *Abednego*, which involved dispersal of red dust from the same site as the one at

issue here, highlights the arbitrariness of SCRG's proposed interpretation of the statute. In SCRG's view, similar local environmental torts—indeed, torts brought against the same facility based on the improper storage of the same toxic particles—would be divided between federal and state court based solely on whether the release of toxins happened over a few days or over a few years. That cannot be the law.

This is not to say that the pollution emanating from a single facility is always a single event. Changes in ownership, changes in manufacturing processes, or damage done by a catastrophic natural event are all the sorts of intervening happenings described by the district court that might break the causal chain and turn the release of pollutants into multiple events. In *Hamilton v. Burlington Northern Santa Fe Railway Co.*, for example, the court held that more than 100 years' worth of pollution from a plant owned by successive operators using different formulas for the pollutants does not constitute a single "event or occurrence" under CAFA. No. A-08-CA-132-SS, 2008 WL 8148619, at *1, *9, *12 (W.D. Tex. Aug. 8, 2008). Here, in contrast, Appellants are suing a single defendant-owner for its failure to secure toxic particles throughout the period that the single defendant solely owned the dormant refinery.

Hamilton is helpful for another reason. In concluding that the plaintiffs' claims did not involve a single "event or occurrence," the *Hamilton* court looked to

well-accepted standards for claim preclusion and supplemental jurisdiction. *Id.* at *11-*12 (citing Fed. R. Civ. P. 13(a)(1)(A) and 28 U.S.C. § 1367(a)). In both contexts, the concern is whether the "claims arising out of the same 'occurrence' are related in such a way that they should be litigated in a single proceeding." *Id.* at *11. There is claim preclusion if the claims involve "essential similarity of underlying events." *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983-84 (3d Cir. 1984). The standard for supplemental jurisdiction is whether the claims "derive from a common nucleus of operative facts" that one "would ordinarily be expected to try . . . in one judicial proceeding." *Lyon v. Whisman*, 45 F.3d 758, 760 (3d Cir. 1995). [4]

All of Appellees' claims easily fall within the definition of "occurrence" in the claim preclusion and supplemental jurisdiction contexts, and there is no reason to think Congress intended "occurrence" to have a different meaning in CAFA. Here, Appellees allege that SCRG failed to properly store and secure toxins at the refinery and that it continually failed to do so over a period of years. Those claims involve the same underlying facts and would ordinarily and most sensibly be decided in the same proceeding—there is no reason to divide the failure to secure

[4] Borrowing the definition of "occurrence" from other areas is appropriate because when interpreting a statute, there is a presumption that Congress legislated against already established principles, and that presumption has particular force in the CAFA context, where Congress reversed "certain established principles but not others." *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

the toxic particles by, for example, year, when the plaintiffs, defendant, and failure of the defendant to act are all the same.

SCRG's insistence that the "events" at issue in this case are only "marginally" or "remotely" related lacks credibility and defies common sense. *See* SCRG Br. 15, 16. Notably, SCRG does not even attempt to specify what events are so remote from each other as to break a single course of conduct into multiple occurrences. This omission, standing alone, speaks volumes.

SCRG's fallback is to attempt to distinguish its failure to properly store and secure the red dust and bauxite from its failure to properly secure the friable asbestos. *Id.* at 7. SCRG cannot escape the fact, however, that *all* of its storage failures are part and parcel of the same "event or occurrence" for one simple reason: When SCRG purchased the defunct refinery, it failed to do anything about the loose toxic particulates that were being blown into the surrounding neighborhoods. Asbestos fibers and red dust particles being released from the same inoperational facility over the same period of time due to the same inaction on the part of SCRG are hardly "remotely" related. The conclusion might be different if SCRG were engaging in two separate industrial processes, one that emitted red dust and one that emitted asbestos. But that is not the case here: SCRG has never operated the refinery, which was defunct at the time of its purchase. Appellees' claims are that, as the owner of the refinery, SCRG has not done anything to secure

the toxins subject to being blown off the property.[5]

The lower court's conclusion that ongoing pollution from a single facility over a number of years is an event or occurrence is consistent with how the insurance industry defines "occurrence" in its liability insurance contracts. In every such contract described in a case in this circuit located by counsel for Appellees, the insurance contract and/or the applicable contract law defines "occurrence" to include events that are continuous or ongoing. *See, e.g.*, *Sunoco, Inc. v. Ill. Nat'l Ins. Co.*, 226 Fed. Appx. 104, 107-08 (3d Cir. 2007) ("a single occurrence" is "one proximate, uninterrupted and continuing cause"); *Armotek Indus., Inc. v. Emp'rs Ins. of Wausau*, 952 F.2d 756, 758 (3d Cir. 1991) (occurrence defined as "an accident, including continuous or repeated exposure ") (Alito, J.); *AC&S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 971 (3d Cir. 1985) (same). *See also Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 333 (3d Cir. 2005) (damages arising out of "continuous and repeated exposure . . . shall be considered one and the same occurrence") (emphasis omitted); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 59 n.8 (3d Cir. 1982) (same). Thus, not only is this definition the most sensible, but it is already used by industry in the context of ongoing toxic exposure—there is no reason to think that Congress intended something different.

[5] If this court finds that the release of friable asbestos is a separate event or occurrence from the release of red dust and bauxite, Appellees ask this court, in the alternative, to remand to permit them to amend the complaint.

The district court's conclusion that the ongoing release of toxins is a single "event or occurrence" under § 1332(d)(11)(B)(ii)(I) is also consistent with the structure and purpose of CAFA. As explained above, Congress enacted CAFA to ensure that "interstate cases of national importance" are decided in federal court. § 1711 note. But Congress took pains to include not one, but *two* CAFA provisions, §§ 1332(d)(4) and (d)(11)(B)(ii)(I), designed to keep *intra*state controversies between local actors in local court. Cases like the one here, which involve local plaintiffs injured by a local facility, are not "interstate cases of national importance" whether the injuries are caused by an event that lasts one day or an event that lasts a decade.

CAFA's legislative history bears this out. The Senate Judiciary Committee Report for CAFA provides: "The purpose of this exception [for 'an event or occurrence'] was to allow cases involving environmental torts such as a chemical spill if both the event and the injuries were truly local, even though there are some out-of-state defendants." S. Rep. 109-14, at 47 (2005). There is no dispute that this an environmental tort in which the plaintiffs, the events, and the injuries are truly local.

Nonetheless, SCRG seizes on the example of a chemical spill used in the Report, and it contends that the Report actually supports its view because the example limits the kinds of event and occurrences that are covered by

§ 1332(d)(11)(B)(ii)(I) to those that take place over a short period of time. SCRG Br. 16. That would be helpful to SCRG if that were true, but that is not what the Report says. Instead, the Report explains that local environmental torts that cause local injuries belong in state court under the statute. That is exactly the case here, and the example provided is just that, an example.

SCRG fares no better by arguing that the Report's value is limited by the fact that it was drafted after CAFA was passed. *See* SCRG Br. 11-12. Committee reports remain the most authoritative source for establishing Congress's intent, and there is nothing in CAFA's pre-enactment history that contradicts the Report. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205-06 (11th Cir. 2007). Further, the claim that SCRG continually failed to prevent toxins from blowing off its property fits comfortably within the meaning of "an event or occurrence" even without considering the Report—the Report simply confirms that result is consistent with Congress's intent in enacting CAFA. [6]

SCRG's attack on the district court for citing the Senate Report is, therefore, misguided. *See* SCRG Br. 11-16. Not only was the court correct in its approach,

[6] SCRG argues that the "real" legislative history—one Senator's floor remarks—supports its reading of CAFA. SCRG Br. 14-15. Putting aside the authoritativeness of a single Senator's remarks, it is unclear how these remarks support SCRG's reading of § 1332(d)(11)(B)(ii)(I) to exclude occurrences that take place over several years. It appears that SCRG is quoting the remarks for the proposition that Congress intended to treat class actions and mass actions identically. Perhaps that is the point of the Senator's remarks, but that does not describe the statute that Congress enacted.

but its reliance on the Senate Report was only icing on the cake of its analysis. Contrary to SCRG's claims, the district court first analyzed the text of the statute and reviewed the applicable case law, including an extensive analysis of *Allen*, the most on-point case. JA12-16. Although the district court also quoted the Senate Report, it merely pointed to it as buttressing its analysis of the statute and the case law. JA16. There is nothing improper about this approach—and the district court's ultimate conclusion is correct, with or without the Senate Report.

B. The District Court Did Not Make Any Improper Findings of Fact.

Nor is the district court guilty, as SCRG claims, of "accept[ing] incorrect averments from the complaint as facts." SCRG Br. 19-20. Although the district court relied on the allegations in the complaint in determining whether Appellees' claims were a local event or occurrence under § 1332(d)(11)(B)(ii)(I), the court made clear throughout its opinion that it was describing Appellees' *allegations*, not finding facts. JA10, 13, 16, 17. And evaluating jurisdiction based on the allegations in the complaint is exactly what the statute requires. Section (d)(11)(B)(ii)(I) is couched in terms of the plaintiffs' *claims*, and the complaint reflects the plaintiffs' claims. Whether or not Appellees ultimately prove their claims is, of course, a merits question to be decided after discovery and trial—SCRG cannot evade the local occurrence or event provision with the bare assertion that the Appellees' claims are not true.

II. If Not Affirmed, this Case Should be Remanded to the District Court for Discovery to Enable Appellees to Meet Their Burden of Establishing a § 1332(d)(4) Local Controversy Exception.

Even if SCRG's ongoing failure to properly store and secure the toxic substances were not "an event or occurrence" under CAFA's definition of "mass action," removal to federal court would not be proper at this juncture. Instead, the case should be remanded to permit Appellees to take discovery with regard to SCRG's citizenship—a fact that is critical to a question the lower court did not decide: whether this case falls within the local controversy provision applicable to both class and mass actions, § 1332(d)(4).

Appellees sought discovery on this point in the district court. JA122. The district court did not grant the request, yet it concluded—Appellees believe erroneously—that SCRG is a citizen of Massachusetts instead of the Virgin Islands. JA11. This conclusion matters because, if SCRG is a citizen of the Virgin Islands, this case falls within § 1332(d)(4), which provides that federal courts lack jurisdiction over actions in which at least two-thirds of the plaintiffs are citizens of the state in which the action was originally filed and the primary defendant is also a citizen of that state, § 1332(d)(4)(B), or if any defendant is a citizen of that state and all the injuries were incurred in there, § 1332(d)(4)(A). There is no dispute here that more than two-thirds of the Appellees are citizens of the Virgin Islands. The parties disagree, however, as to whether SCRG's "principal place of business"

is in Massachusetts or the Virgin Islands. ("Principal place of business" is the relevant standard under CAFA for an unincorporated organization such as SCRG. *See* § 1332(d)(10)).[7]

In light of this disagreement, the district court erred in not granting Appellees' request for discovery regarding SCRG's principal place of business. That denial—and the acceptance of the truth of SCRG's affidavit—was an abuse of discretion because, under CAFA, the party objecting to federal jurisdiction has the burden of showing the local controversy exception applies. *See Kaufman*, 561 F.3d at 153. Where a party bears the burden of demonstrating another party's citizenship for the purposes of jurisdiction, as Appellees do here, courts are to permit that party to conduct jurisdictional discovery. *See Rubin v. Buckman*, 727 F.2d 71, 73 (3d Cir. 1984). *Cf. Toys "R" Us*, 318 F.3d at 456 ("Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction, courts are to assist the plaintiff by allowing jurisdictional discovery[.]") (citation omitted).

Permitting jurisdictional discovery on remand would not be a pointless exercise. In the district court, Appellees countered the affidavit submitted by SCRG with public information (from SCRG's website) indicating that SCRG's

[7] Below, the parties have variously referenced §§ 1332(d)(4)(A) and (d)(4)(B). Both are part of the local controversy exception, and both would be met if SCRG is a citizen of the Virgin Islands.

principal place of business is in the Virgin Islands, not in Massachusetts. JA133-34. (The website states that SCRG was created for the sole purpose of purchasing and developing a piece of real property in St. Croix and that its principal partner is a longtime Virgin Islands businessman. In addition, the contact information on the website consists of Virgin Islands telephone numbers and addresses. *Id.*) Although the residents can recite this public information without discovery, they cannot learn about the inner workings of the partnership—the workings of its nerve center—without discovery. And given the publicly available facts pointing to the Virgin Islands, Appellees' concern that the affidavit might not be complete or accurate is far from frivolous. Thus, if this Court reverses the decision below, it should remand to permit Appellees to take the jurisdictional discovery they sought below.

CONCLUSION

For these reasons, the district court should be affirmed. In the event of reversal, this case should be remanded to permit discovery on SCRG's citizenship.

Respectfully submitted,

Leslie A. Brueckner
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607

Lee J. Rohn
Lee J. Rohn and Associates, L.L.C.
1101 King Street
Christiansted, VI 00820

/s/ Leah M. Nicholls
Leah M. Nicholls
Public Justice, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600
LNicholls@publicjustice.net

Attorneys for Appellees Eleanor Abraham, et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 13-1725

Eleanor Abraham, et al.,
Appellees,

v.

St. Croix Renaissance Group, L.L.L.P.,
Appellant.

CERTIFICATE OF SERVICE

I certify that on March 28, 2013, the foregoing Appellees' letter brief was filed with the Court and was served electronically via CM/ECF on the following. I also certify that, March 28, 2013, the following were each sent two copies of the foregoing letter brief via commercial carrier.

Carl J. Hartmann III
Carl J. Hartmann, Attorney-at-Law
5000 Estate Coakley Bay, L-6
Christiansted, St. Croix, VI 00820
carl@carlhartmann.com

Joel H. Holt
Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix, VA 00820
holtvi@aol.com

Attorneys for Appellant

/s/ Leah M. Nicholls
Attorney for Appellees