CARL J. HARTMANN III
ATTORNEY-AT-LAW
5000 ESTATE COAKLEY BAY, L-6
CHRISTIANSTED, VI 00820
TELEPHONE: (340) 719-8941 EMAIL: CARL@CARLHARTMANN.COM FACSIMILE: (212) 202-3733

April 1, 2013

By ECF and Express Mail

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

Oral Argument Scheduled for April 16, 2013

Re: *Eleanor Abraham, et al. v. St. Croix Renaissance Group*, No. 13-1725
Letter Reply Brief of Appellant St. Croix Renaissance Group L.L.L.P.

Dear Ms. Waldron:

Appellant files its reply by letter as per the Court's Order of March 14, 2013.

I. Procedural Point 1: Reply to the Argument this Court Lacks Jurisdiction

Though 'mass actions' are not listed as a type of class action in 28 U.S.C. § 1332(d)(1), 28 U.S.C. § 1453 creates appellate jurisdiction as to a CAFA remand order when applied in conjunction with 28 U.S.C. § 1332(d)(11)(A).

II. Procedural Point 2: Reply to Plaintiffs' Request for Remand with Leave to Amend to Drop Their Asbestos Claims (to Defeat Removal)

Plaintiffs ask that if the Court determines their asbestos claims are not part of *an event*, they be granted remand—with leave to amend to drop those claims. Plaintiffs' letter brief ("Opposition") at 14, fn. 5. However, once removal occurs, a party cannot amend to avoid federal jurisdiction as it "is determined at the time of removal, and subsequent events, 'whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has

attached'." *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 375 (6th Cir. 2007) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938)); *see also Pate v. Huntington Nat. Bk*, 2013 WL 557195 (N.D. Ohio 2013) (for CAFA.)

III. Procedural Point 3: Reply as to the 28 U.S.C. § 1332(d)(4) Issue and the District Court's 'Principal Place of Business' Finding Under *Hertz*

Plaintiffs allege the Court improperly determined SCRG's principal place of business, and thus failed to correctly apply 28 U.S.C. §1332(d)(4). First, this is a cross-issue not before the Court and no appeal was allowed. Second, the record contained SCRG's unopposed, detailed affidavit. (Ex. F, JA2 pp. 114-115.) (Judge Bartle had just addressed the same issue under analogous facts, with the identical result. *Lewis v. Lycoming*, Civ. No. 11-6475, 2012 WL 2422451, at *5-6 (E.D.Pa. June 27, 2012)). Third, plaintiffs argue they did not have a full opportunity to oppose—but that is not correct. They tactically chose not to file affidavits or attach evidence thereto, instead arguing the need for a hearing—augmented with 9 pages of unsupported exhibits. (Ex. G, JA2 pp. 126-134.) Finally, there was no 'surprise' to excuse plaintiffs' failure to make a record where SCRG raised the issue and facts in earlier papers (Ex. H, JA2 p. 140) then cited *Lewis v. Lycoming*.

IV. Procedural Point 4: Reply as to the District Court's Findings of Fact

Both sides now agree (Opposition at 17) that the "district court relied on the allegations in the complaint in determining. . .Appellees' [jurisdictional, mass action exception] claims." Plaintiffs argue that the Court correctly used these as the source for fact findings because "[s]ection (d)(11)(B)(ii)(I) is couched in terms

of the plaintiffs' *claims*, and the complaint reflects the plaintiffs' claims." *Id.* This reverses the correct burden and is contrary to the Court's holding as to that burden.

V. Reply to the Facts in Plaintiffs' Brief

At page 1 of the Opposition, plaintiffs open with the charge (without citation) that injuries arose from a "Superfund site owned by [SCRG]. . . ." This is *not* a Superfund site nor is there any suggestion of this in the record. *See* EPA Superfund List, *www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm#VI.* The opposite is true. SCRG's opening brief states (with citations) that SCRG successfully litigated to obtain a full-remediation, court-approved, *non-EPA* CERCLA consent decree requiring Alcoa to fix Area A and its surrounds. That court found the decree (on which the EPA commented) will completely solve all future Area A red mud issues like those raised here. This is just one example of inaccurate 'facts' absent any reference to the record, ubiquitous in plaintiff's brief. Thus, SCRG will first reply broadly to the picture drawn of the Site in this manner.

Plaintiffs portray a desolate, wind-blown ghost town in which SCRG has done nothing to stop red dust and asbestos whistling around for 11 years. It is allegedly a place where the residue from Area A and structural asbestos combine in a (legally desirable for plaintiffs) *homogenous* swirl of particle-filled neglect. But as the record reflects, nothing could be further from the truth. From 2002 to 2010 this was a thriving brownfields site. (Ex. H at ¶5, JA2 p. 114.) Beginning in 2002, pursuant to the sales agreement, Alcoa was removing or encapsulating

asbestos built into the structures and by 2003 was remediating Area A under DPNR's control and supervision.[1] As that was under way, SCRG's office was moved from Boston to the USVI. (Ex. H at ¶¶4-5, JA2 p. 114.) Major tenants were sought for a deep-water-port light industrial area. More than 45 full-time employees worked in the rejuvenation effort—plus many contractors and sub-contractors. *Id.* The old refinery plant was cut apart and shipped away under DPNR permitting and oversight; and a re-purposed port attracted the largest commercial entity to St. Croix in years. As a tenant, Diageo/Captain Morgan built a green, ultra-modern distillery (within *50 feet* of Area A, between Area A and plaintiffs). It makes 20 million proof/gal/year and will yield $130 million in taxes. *See, www.diageo.com/en-sc/newsmedia/pages/resource.aspx?resourceid=655.*

Then, beginning in 2005, despite its being a *BFPP/Innocent Purchaser* and the government passing statutory brownfields protections, SCRG was forced to litigate with successive parties: first a contingency-based tort lawyer who got a *deal* with a USVI agency to do 'cost-recovery' cases against local industries. (SCRG was only caught up in that as a BFPP. It was quickly offered a *de minimus* settlement, but the past refinery operators fought that and the case was not dismissed for cause for three more years. *U.S.V.I D.P.N.R. v. SCRG,* Civ. No.

---

[1] In *St. Croix Renaissance Grp. v. Alcoa World Alumina and SCA*, Civ. No. 04–67, 2011 WL 2160910, at *2 (D.V.I. May 31, 2011) ("SCRG v. Alcoa") the Court noted that Alcoa (and its contractor) damaged the piles and dust suppression system in Area A during part of its 2003, post-sale remediation efforts.

1:07-114, 2011 WL 833227, at *4 (D.V.I. Mar. 4, 2011) ("no evidence of. . .any recoverable response costs.")) Allegations made there led to an action against Alcoa where, in refusing to overturn the punitive damages award, that court noted how "outrageous[ly]" Alcoa had defrauded SCRG. *SCRG v. Alcoa,* 2011 WL 2160910, at *2 (D.V.I. May 31, 2011). Next, there was a demolition firm that a court found failed to get permits and which invented the phantom "carried by the wind" (Opposition at 5) asbestos story.[2] While SCRG eventually won all of this litigation, it ate up time and resources. But the rehabilitation of the Site went on.

Then came successive waves of toxic tort plaintiffs—*thousands*—more than 3,000 on an island of only 60,000 people. There is not one single document even hinting at asbestosis. There is not a single documented medical claim of record. Yet, these plaintiffs were also represented by plaintiffs' local counsel in serial class and non-class cases, in association with off-island class action 'specialists.'

SCRG's partners, who had done ten brownfields projects across several jurisdictions without a single suit, were handcuffed—the lost time and 'friction costs' of such litigation forced a shutdown. (Ex. H at ¶¶6-15, JA2 p. 114-115.)

---

[2] Plaintiffs' local counsel, Attorney Rohn, knows that this was a discredited plaintiff's fabrication as she was also plaintiff's counsel in *Bennington Foods, L.L.C. v. SCRG,* Civ. No. 06-154, 2010 WL 1608483 (D.V.I. April 20, 2010) where all of this was litigated. There, after a jury trial, the court found that SCRG told plaintiffs, the demolition contractors, not to proceed without valid permits *several times*. But they did so—and then concocted the "free flying asbestos" allegations by mischaracterizing a DPNR report when they could not perform (which led, in part, to SCRG's defense verdict). *Id.* 2010 WL 1608483, at *2-3.

Moreover, although the USVI passed brownfields statutes when SCRG was obtaining the property, the Court is asked to take judicial notice that the promised protective regulations were never written. So SCRG now has just five USVI employees—and has returned to Boston while waiting for the endless USVI aggregate litigation machine to *slowly* grind. *Id.* at ¶15, JA2 p. 115. Remand to the overwhelmed St. Croix court would extend this for years. With this in mind, SCRG provides just a few more examples of plaintiffs' skewed Site portrayal:

a. "These piles of industrial byproduct include *hazardous* materials. . . ." Opposition at 5. Not true. This red mud and its constituents were found *not* to be hazardous materials by the Bevill Amendment, 40 C.F.R. § 261(b)(7). The materials in Area A are *well* below RCRA levels (at 40 C.F.R. § 262.22) which is why it was re-permitted for open storage.

b. "The remaining unrefined bauxite, meanwhile, is stored in a damaged shed that does not prevent the bauxite from blowing off the property." *Id.* at 5. Untrue, as Alcoa took its bauxite *ore* and most equipment when it left.

c. "Red dust. . .is a cancer hazard. JA49-50." *Id.* at 5. The USVI residue is not the higher pH material (above pH 12.5) normally referred to as red mud in studies. The post-1972 St. Croix plant was unique, utilizing a water wash.

d. "[T]he refinery is also rife with loose (friable) asbestos fibers, which, like the red dust and bauxite, are not secured." *Id.* at 5. Even in 2006 this was untrue—as discussed above, "vast amounts of loose, blowing asbestos" was an *allegation* by the losing party in *Bennington.*

e. "SCRG has done nothing to seal, secure, clean up, or otherwise prevent the toxins from continuously blowing. . . " *Id.* This assertion is unsupported and wildly untrue, as discussed in SCRG's opening brief and here.

Thus, one of the world's largest international food producing businesses just built a modern, multi-million dollar distillery *50 feet from Area A*—while the mythical (but for plaintiffs, legally necessary) 'merging' of the 30+ year residue 'event' with unrelated asbestos activities, is, like each breathlessly described 'fact,' just vapor.

VI. Reply as to the Definition of "an event"

Cases. Plaintiffs direct the Court to three cases: *Allen v. Monsanto Co.*, 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010), *Mobley v. Cerro Flow Prod.* [3] and *Hamilton v. Burlington N. Santa Fe Rwy. Co.*[4] The previously uncited *Allen* case was fully discussed in Appellant's opening brief, and plaintiffs raise no new arguments. The *Allen* court's concern about *Zeno's Paradox* that "any event could always theoretically be broken down into other events 'mere seconds long'" (Opposition at 9) lacks force in light of four decades of different types of acts in Area A by 9 parties and multiple of contractors—interrupted by a number of major hurricanes (both before and after SCRG's purchase). In fact, Attorney Rohn was counsel in a recent case where her clients sought a determination against several of the same 9 parties. That court give her clients *exactly* what they asked for—a holding that when Hurricane Georges hit this Site in 1998 and caused this same type of dispersion, it was a discrete, single event; *necessary* to avoid a CAFA mass action. *Abednego,* 2011 WL 941569, at *1. (This Court is asked for judicial notice that Jeanne (T.S. in 2004) and Omar (Cat. 3 in 2008) hit the USVI post-purchase.)

In *Mobley*, there is only a mention of 1332(d)(11)(B)(ii)(I) in one sentence; the reference is in passing, does not support plaintiffs and is dicta. (*Mobley* was decided on the same very strict textual reading of the '3 x 99 plaintiffs' issue in

---

[3] No. 09-697-GPM, 2010 WL 55906 (S.D. Ill. Jan. 5, 2010).

[4] No. A-08-CA-132-SS, 2008 WL 8148619 (W.D. Tex. Aug. 8, 2008).

Abrahamsen v. ConocoPhillips, Co., 2012 WL 5359530 (3d Cir. Nov. 1, 2012)).

The third case, *Hamilton,* is problematic for plaintiffs. As an aside, after the instant appeal was allowed, representation here passed to *Public Justice*—a group with an associated practice advocating for class actions to remain in state courts.[5] The class action industry's appreciation of, and desire to defend the Senate *non-Report's* view of "an event" is understandable as "cases involving environmental torts" now get diverted to state courts for no apparent reason. Perhaps that is why *Hamilton* is discussed at length despite the obvious downside for these plaintiffs.

The *Hamilton* court noted that it was the first court to consider the definition of an event under the newly enacted CAFA. Although it has never been followed or even cited on this point, that court did state that it did not feel comfortable "limit[ing] the 'local occurrence' exception to a single, discrete event." (That ended up being dicta, as it was actually decided on another basis.) However, that other basis creates a serious problem for plaintiffs in spotlighting *Hamilton.* That court's *actual holding* was: "the 100 year chain of actions allegedly taken by different Defendants at different times with different negligent or intentional motivations cannot constitute an 'occurrence. . . '. " *Id.* 2008 WL 8148619, at *12.

Because SCRG has no such agenda, as an alternative solution it invites the

---

[5] *See* Public Justice (formerly Trial Lawyers for Public Justice) mission statement as to Class Action Preservation, at *www.publicjustice.net/what-we-do/access-justice/class-action-preservation.* (Public Justice had not appeared in the two courts below. Local counsel has not entered her appearance here in 13-1725.)

Court to insert the phrase "during the 41 years from 1972 when Area A opened" for the "100 year[s]" in *Hamilton* and then adopt the identical language/reasoning.

As was the case in *Hamilton*, the complaint here alleges "a *series* of continuous *transactions*. . . ." *Id.* at ¶471 (This closely tracks *LaFalier's* "series of potentially related events" language, 2010 WL 1486900, at *4.[6]) Even leaving aside the asbestos for a moment, plaintiffs not only aver that red mud has blown on their properties during hurricanes, but also raise "flooding *and other physical disturbances*" (¶508) including "occasions when bulldozers ran over" Area A (¶467) which includes Alcoa's post-2002 work (¶475). They aver this was done not only by the many past operators, but also by Glencore Ltd., Glencore Int'l AG and Century "add[ing materials] and continu[ing] to stack and store them." (¶470)[7]

Plaintiffs Suggest Definitions from other Areas of Law. Certainly some insurance decisions and parts of the toxic tort industry define "an event" as plaintiffs request. But SCRG cited to *London Mkt. Insurers,* 146 Cal.App.4th 648, 661 (2007) for a court's take on the common meaning from Random House

---

[6] Plaintiffs argue that the court in *Aana v. Pioneer* stated no basis for its decision. However, it precisely follows the 9th Circuit (*Nevada v. Bank of America*) and *LaFalier* for the *well-settled* (at least outside of "cases involving environmental torts") proposition that "a series of potentially related events" is not "an event."

[7] What more could there be to establish *Hamilton's* "chain of actions. . .taken by different Defendants at different times with different negligent or intentional motivations?" The *vast* irony is that a court remitted $6 million in *SCRG v. Alcoa* (at *2-3) that SCRG could not collect from Alcoa for Alcoa's contractor's 2003 Area A bulldozing negligence, as Alcoa didn't *direct* him. But, bizarrely, *plaintiffs seek damages from SCRG here for that contractor's exact, **same** 2003 negligence.*

Webster's College Dictionary (from an asbestos dispersion case) that is much more plausible as to Congress' intent. Plaintiffs, apparently forgetting that the CAFA mass action provisions also apply to non-environmental cases, suggest, at 14,

> not only is this definition the most sensible, but it is already used by [the toxic tort] industry in the context of ongoing toxic exposure—there is no reason to think that Congress intended. . .different.

This is a regression to the idea that a special level of scrutiny should be applied when defining "an event" for "cases involving environmental torts." In other words, it is circular reasoning going back to the Senate Report. Moreover, there *is* a reason to "think that Congress intended" the opposite. Both chambers *fulminated* against class action lawyers and the state courts Congress felt so loved them. [8]

General Intent of CAFA and the **Senate Report**. Plaintiffs concede the Report is not *really* a committee report, though contend it should still be followed as "there is nothing in CAFA's pre-enactment history that contradicts the Report." *Id.* at 16. That is not accurate as plaintiff's case, *Hamilton,* makes clear at *10:

> [T]he legislative history of CAFA in general and its mass action provisions in particular documents *more debate than consensus.* . . . "negotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President." Barnhart v. Sigmon Coal Co ., 534 U.S. 438. . .(2002). The often confusing provisions of CAFA "reflect[ ] a *compromise amidst highly interested parties attempting to pull the provisions in different directions.*" (Emphasis added.)

The order must be reversed with remand instructions per the opening brief.

---

[8] *See generally*, Howard M. Erichson, CAFA's Impact on Class Action Lawyers, 156 U. Pa. L. Rev. 1593 (2008) (describing much of everything said or written by Congress as being inordinately strident, with unusually vocal antipathy.)

Respectfully Submitted,

Joel H. Holt, Esq. (On the Brief)
Counsel for Appellant SCRG

Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix, VI 00820

Carl J. Hartmann III, Esq. (Arguing)
Counsel for Appellant SCRG

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

CERTIFICATE OF SERVICE

I hereby certify that on this 1st[th] day of April 2013, a true and correct copy of the foregoing Letter Reply Brief of Appellant St. Croix Renaissance Group, L.L.L.P. was filed with the Clerk of the Court and served on opposing counsel using CM/ECF. An original and nine copies were also sent by Express USPS Mail to the Clerk of the Court—with a copy sent by email to Plaintiffs' counsel the same day, at the following addresses:

To the Clerk

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

To Counsel for the Appellees-Plaintiffs

Leah M. Nicholls, Esq.
Public Justice, P.C.
1825 K St., NW, Suite 200
Washington, DC 20006
Telephone: (202 797-8600
Facsimile: (202) 232-7203
Email: LNicholls@publicjustice.net

Carl J. Hartmann III