No. 13-116

In The Supreme Court of the United States

ST. CROIX RENAISSANCE GROUP, L.L.L.P.,

Petitioner,

v.

ELEANOR ABRAHAM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY

I. The Third and Ninth Circuits applied directly opposite analyses

Respondents freely admit that, at the very least, all single-site environmental cases involving environmental claims pertaining to closed or inactive facilities will be diverted to state courts if the Third Circuit's definition of "an event" in CAFA mass actions is favored over the Ninth Circuit's rule that "an event" is singular:

> SCRG attempts to distinguish its failure to secure the red dust from its failure to properly secure the friable asbestos. Pet. 5-6. 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**. (Emphasis added.)

Opposition at 13. So there it is! After St. Croix Renaissance Group (SCRG) purchased the site it allegedly failed to do anything – thus *all* events that occur there, any fires, explosions or releases from a facility are, *ipso facto,* automatically part of a *single* event. Under this new definition of "an event" in CAFA mass actions the "event" is the negligence of the owner or chain of owners, *not* the things that actually happen. Industrial residue released in a 2002 hurricane is

part and parcel of structural asbestos from building demolition discovered in 2006 – because they came from more than a decade of alleged *neglect* at the same place. Neglect becomes the jurisdictional event.[1] The phrase "an event" means nothing about the actual instances of fires, explosions or releases.

As a result, from this point on, if there is a hurricane in 2004 that releases an industrial byproduct, it is part of the same event as a building demolition in 2006 that exposes a totally unrelated structural asbestos. ***Never*** *has this been the case before*. Every credible case on this issue (*compare* cases in the Petition at 9, fn. 5 *with* those at 11, fn. 6) has determined that drifting pesticides (*Aana*), tornados (*Lafalier*) or explosions (*Armstead*) are the "events" – discrete "single" events as that term is used by the Ninth Circuit.

The Third Circuit's *new* mass action theory does what CAFA's opponents could not do when the proposed environmental amendment was attempted – CAFA is neutralized as to single-site environmental claims for all closed or inoperative facilities. The plaintiffs' class action bar rejoices.

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[1] Moreover, because, as discussed below, the complaint totally controls – without regard to burden – such negligence merely needs to be set forth by plaintiff. The Court must accept this overarching neglect as totally controlling of the jurisdictional issue.

To reach such a total and complete obliteration of CAFA in this context, Respondents necessarily argue that the Third Circuit's decision is not in direct conflict with the Ninth Circuit's holding in *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012). Yet they concede that the Ninth Circuit reversed a district court on the definition of "an event" as "singular" – though they attempt to minimize this by arguing that the Ninth Circuit reversed in a *one paragraph discussion.*[2] (It was a long decision, but the holding on this point only required *two* paragraphs because it was startlingly clear.) The district court held that "an event" did not mean "a *single* event" but the Ninth Circuit explicitly reversed on that exact point, holding:

> The district court reasoned that it lacked mass action jurisdiction because "the claims all allegedly arise from activity in Nevada

[2] Respondents put forth the view, at 1, that:

> The Third Circuit's decision stands for the unremarkable proposition that Congress intended the words "event" and "occurrence" to have their "ordinary meaning[s]." Pet. App. 16. Because those words are often used to refer to something that happens over time, not just to something that happens at a specific moment, the Third Circuit rejected SCRG's cramped, unnatural reading of the terms. *Id.* at 14, 16. The Third Circuit then applied the terms' ordinary meaning to the unusual facts alleged in Respondents' complaint.
>
> This straightforward approach creates no conflict with the Ninth Circuit, which, in *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012), interpreted the "an event or occurrence" language in the same manner as the Third Circuit: as singular.

> and all injuries allegedly resulted in Nevada." This was a misapplication of the "event or occurrence" exclusion.
>
> The "event or occurrence" exclusion **applies only where all claims arise from a *single* event or occurrence**. "[C]ourts have consistently construed the 'event or occurrence' language to apply **only in cases involving a single event or occurrence, such as an environmental accident, that gives rise to the claims of all plaintiffs**." *Lafalier v. Cinnabar Serv. Co., Inc.,* 2010 WL 1486900, at *4 (N.D.Okla. Apr. 13, 2010). (Emphasis added, italics on the word "single" in the original.)

Nevada v. Bank of America Corp., 672 F.3d 661, 668. The Ninth Circuit explicitly rejected the lower court's logic – not in dicta, but in the central holding. It ***emphasized*** the word "single" in rejecting the district court's view.

> Respondents also concede:
>
> the Third Circuit rejected SCRG's . . . reading of those terms – that "an" before "event or occurrence" means that § 1332(d)(11)(B)(ii)(I) only applies when plaintiffs allege injuries resulting from a **discrete happening** and not when plaintiffs allege **a longer, continuous tort**. *Id.* at 14-19, 102.

Respondents' Brief in Opposition at 6. Thus, the new rule is clear: One applies the Restatement of Torts concept of a continuing or continuous tort to

determine if there is an event. From this point on, under CAFA:

> An Event = **"a longer, continuous tort"**.

Respondents and the Third Circuit would divert "continuous torts" of any length to state court. All events, no matter how disparate – no matter how unconnected – become one event, and are diverted to state court. This is not what the statute says – and not what the Ninth Circuit decided.

II. The time period set forth by Respondents and the Third Circuit is vast – an event here covers a decade but could be unlimited

Respondents further argue that this event is only the length of SCRG's ownership – which alone would be more than ten years. The complaint, as Respondents admit, alleges "events" that take place over 40 years. Their claims here rest on ***a condition*** that persisted (and continues to persist) **for at least a decade**. The Third Circuit went on to analyze whether that condition constituted a single "event or occurrence." Consider this statement by Respondents:

> It is true that the complaint describes the history of the refinery site and how the piles of toxic particles came to be, but it is clear from the complaint – and the Third Circuit's opinion – that Respondents do not seek to hold SCRG responsible for any actions of its predecessors or the production of the red

> dust and asbestos. *Id.* at 4-5, 20-21; BIO App. 3-4. Rather, the singular "event or occurrence" at issue is SCRG's failure to abate the dispersal of the particles during its ownership of the closed refinery.

What this case boils down to is captured in a frank statement that jurisdiction is based on ownership, no matter how long, and that the true number of entirely unrelated "events" is irrelevant.

> SCRG attempts to distinguish its failure to secure the red dust from its failure to properly secure the friable asbestos. Pet. 5-6. 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.

Opposition at 14.

III. Processes not events would now control CAFA mass actions

Respondents argue:

> 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 as SCRG has never operated the refinery. *See id.* at 21 n. 10.

Id. at 14-15. The facts are not true. The facts are not in the record. Asbestos was discovered during demolition, years later. If there is a hurricane in 2004 that releases an industrial byproduct, how can that be the same event as a building demolition in 2006 that exposes a totally unrelated structural asbestos?

Again, the legislative history, the Ninth Circuit and very credible cases on this issue have determined that a tornado, a fire or an explosion is "an event." Could an event last a week? Perhaps. Could it last a month? Perhaps. Could it last more than a decade and involve unrelated materials? No.

IV. Review of SCRG's second question presented is warranted because it was raised and tacitly decided by the court below

Respondents argue that the Third Circuit's application of the wrong burden is acceptable because the court did not formally state why it applied the wrong burden.

> With respect to the second question presented, SCRG claims that the Third Circuit incorrectly placed on it the burden of establishing that the Respondents' claims do not fall under § 1332(d)(11)(B)(ii)(I), and, relatedly, that the Third Circuit improperly decided the § 1332(d)(11)(B)(ii)(I) question on the basis of facts alleged in Respondents' complaint. SCRG is wrong on both counts, and neither argument justifies certiorari review.

> First, as SCRG admits (Pet. 20), the Third Circuit never addressed the question of which party bears the burden of establishing remand under § 1332(d)(11)(B)(ii)(I). It would be inappropriate for this Court to review an issue that was never grappled with by the court below – and, for that matter, has not yet been discussed by *any* appellate court.

Opposition at 16. The Court applied the wrong burden. The issue was raised with the Court in detail. Respondents' opposition argues the same facts not of record that the court *applied* under this incorrect burden (such as the "fact" that SCRG never operated the facility.) Respondents argue:

> Second, the court below properly decided the question on the basis of the facts alleged in Respondents' complaint.

Exactly. And this is the incorrect standard where the plaintiffs had the burden on a jurisdictional issue.

CONCLUSION

It is respectfully concluded that the Writ of Certiorari should issue for the stated reasons.

Respectfully submitted,

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