DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Eleanor Abraham, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	**CIVIL NO. 12-cv-11**
	)	
St. Croix Renaissance Group, LLLP,	)	ACTION FOR DAMAGES
	)	
Defendant.	)	JURY TRIAL DEMANDED
	)	

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S
REPLY
TO PLAINTIFFS' OPPOSITION
TO DEFENDANT'S RULE 12(e) MOTION FOR A MORE DEFINITE STATEMENT

SCRG hereby replies to the plaintiffs' opposition to SCRG's Rule 12(e) motion for a more definite statement. Two preliminary 'procedural' comments are in order.

First, the plaintiffs' opposition memorandum is out of time, having missed the initial due date (August 29th) as well as the date a response was promised (September 10th) in the plaintiffs' first motion for an extension of time to respond to this motion. Thus, SCRG has moved to have its motion deem conceded (D.E. 25), which motion has not been opposed and remains pending. While the plaintiffs have filed a second motion for leave to file their opposition out of time (D.E. 26), that motion was opposed and has not been granted.

Second, the plaintiffs assert in footnote 3 of their *Opposition* to the motion to sever [D.E. 29] that they have filed a jurisdictional motion for remand that needs to be decided first. However, no such motion has been filed, as the plaintiffs only filed a

request to file such a motion out of time (D.E. 10)[1], as to which this Court entered a "Notice" stating that this was an unnecessary request, since jurisdiction can be raised at any time. (D.E. 13) (The proposed motion to remand was simply an exhibit to that motion for an extension.) With the foregoing comments in mind, SCRG will address the points raised in the plaintiffs' opposition memorandum. For the reasons advanced by SCRG, it is respectfully requested that the relief sought be granted.

I. Argument

The parties agree on the legal standards and most of the critical factors related to Defendant's motion for more definite statement:

1. They agree that the new pleading standard for the adequacy of complaints set out in the U.S. Supreme Court cases of *Twombly*[2] and *Iqbal*[3] applies here. Plaintiffs' *Opposition* at 6-7.

2. They agree that the *Twombly/Iqbal* standard did away with the prior practice of just reciting one of the elements of a cause of action and alleging that the particular element simply had 'been met.' *Opposition* at 8, citing *Twombly.*

3. They agree that a court must ask whether the complaint "contain[s] either *direct or inferential allegations respecting* ***all*** *the material elements*

[1] The docket entry states: "Motion for Extension of Time to File Plaintiffs' Third Motion to Remand for lack of Federal Subject Matter Jurisdiction by Plaintiff Eleanor Abraham, et al.. Motions referred to Magistrate Judge George W Cannon. (Attachments: # 1 Supplement, # 2 Exhibit, # 3 Text of Proposed Order) (Rohn, Lee) (Entered: 04/12/2012)"

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[3] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

necessary to sustain recovery under some viable legal theory." *Opposition* at 8. (Emphasis added.)

4. And they agree that the High Court further found that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief "*requires more than* labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Thus an element of the cause of action would have to be supplemented with a more definite statement if failed to include "enough factual matter (taken as true) to suggest that [the element is met]." *Opposition* at 8. (Emphasis added.)

With such agreement on the basics, how is it that the parties then disagree so completely on the adequacy of the Amended Complaint (D.E. 22) here? There are two reasons.

First, the parties part ways on the plaintiffs' pleading of the element of "actual" injuries/damages as well as their actual exposures. While it is clear that everyone agrees that the plaintiffs cannot simply plead a conclusory statement that the injury/damages element is met, Defendant cannot find a single factual allegation of what these injuries or damages might be for the plaintiffs generally or, just as important, for any particular plaintiff. The Complaint only states generally that somehow ALL OF THE PLAINTIFFS suffered SOME UNDEFINED injury or damage to ALL of their persons, property or possessions. That is *by definition* ***exactly*** what the parties agreed is insufficient under Twombly/Iqbal -- simply a bald, conclusory statement that the damage/injury element is somehow met.

As noted recently in *Thunander v. Uponor, Inc.*, 2012 WL 3430749, 16 (D.Minn. 2012) relying on Twombly, "[t]o the extent that plaintiffs allege personal injury, the allegations are vague and insufficiently supported. The Complaint does not specify the "other property" for which it alleges an injury. While plaintiffs argue that the damage is to the plaintiffs' water, the Complaint fails not only to identify this damage, but also fails to indicate whether the water [even actually] contains toxins."

The same is true of the exposure allegations. Where were each of the plaintiffs when they allegedly exposed to any offending substance and how long was their individual exposure?

Therefore, referring back to the *Twombly* language as to which everyone agrees, Defendant asks: "What are the direct or inferential allegations" regarding the damages to property or injuries to persons suffered by the individual plaintiffs?" Put another way, as set forth in *Twombly*: "[w]hat have plaintiffs supplied with respect to injuries/damages that go beyond 'labels and conclusions, and a formulaic recitation of the element (injury/damages) of this cause of action?'" If plaintiffs bald allegations that: "and thus they suffered damages" is not such a formulaic, conclusory statement that the element is "met" -- what would be?

The second disagreement involves the issue of whether some minimal injury/damages information has to be supplied with regard to each plaintiff -- or whether the complaint can simply be labeled a "mass tort" and then just state "they were **all** injured **somehow**." What makes this doubly confusing is that Plaintiffs admit that this is not a class action (nor, they argue elsewhere, is it a "mass action.") Instead they contend that calling it a "mass tort" (which they admit does not exist as a form of action

in the Federal Rules or have a definite definition) magically means that they need present **no facts at all** as to the element of the complaint where individual injury or damage must be set forth.[4]

Certainly, there may be some common elements in the more than 500 cases. Accepting, *arguendo*, the idea that ownership of the Site during certain periods and other such common matters of fact are actually the same (or will be stipulated to or proved in an early case) what does this have to do with the need to plead the damage/injury elements for each individual -- such as when they were in the exposure area(s) or what illness/symptom/injury or property damage they allegedly suffered? With no injury or damage stated, there is no actual live case or controversy.[5] Each plaintiff either allegedly suffered some injury or damage particular to him or her or they didn't -- all Defendant seeks is a simple statement that a given plaintiff suffered some illness/symptom/injury or property damage and very generally what it was.

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[4] Mass torts are defined, statutory creations in some state jurisdictions. The USVI has no such statute.

[5] Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). An Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the "case or controversy" requirement of Article III. A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Additionally, when a plaintiff seeks injunctive and declaratory relief, the plaintiff must also demonstrate that "he has suffered or is threatened with a *concrete and particularized legal harm*, coupled with a significant likelihood that he will again be wronged in a similar way." *Canatella v. State of California,* 304 F.3d 843, 852 (9th Cir.2002)

To avoid this simple truth, plaintiffs first try to muddy the waters with an irrelevant treatment of the plausibility test[6], and then go on to argue (at page 14 of the *Opposition)* that what Defendants seek is unrealistic ultra-precision as to what were the minute mechanisms of the injuries and what particular toxins caused a given Plaintiff's injuries:

> The Court explained that expert medical and scientific evidence would be required to prove the plaintiff's case, thus "his lack of personal knowledge regarding the **precise mechanism by which [his injury] occurred** should not be viewed as an admission that he cannot identify which specific products caused his injuries." *Id.* at 1195. The court rejected the defendants' argument that a complaint is unacceptably speculative if a plaintiff has not specifically identified which toxin contained in a particular product caused the alleged injury or has sued the manufacturers of multiple products, alleging all of them contained toxins that were substantial factors in causing his injury. *Jones*, 198 Cal. App. 4th at 1195. Similarly, in this case, the Court should reject Defendant SCRG's argument that Plaintiff's claims are speculative **merely because they are unable at this stage to identify exactly which toxins caused their injures** and when they did so, so long as Plaintiffs have alleged, as they did, what toxins they were exposed to over the course of time, from 2002 to the present and that they have suffered injuries therefrom. It is well accepted that Plaintiffs require and will continue to produce medical and engineering experts to assess those aspects of their claims. *Id.* [Emphasis added.]

Defendant seeks nothing of the kind. This argument is absurd, and intentionally misses the point. Defendant does not seek some exposition on the exact toxins or the exact pathways of injury or damage -- it seeks only the most bland and simply factual statement that <u>there **IS any** particular symptom, injury or damage; and generally, what sort it is</u>.

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[6] Plaintiffs address the "plausibility" test. It is not applicable here, because no facts or circumstances are alleged whatsoever. There is nothing which the court could determine the plausibility of. Plaintiffs state only that they, their real property or possession have been damaged -- but do not state any plaintiff owns property or that that anyone suffers from any symptom, much less any medical condition.

Thus, if there are injuries, Defendant seeks just the most simple statement that a particular plaintiff lived in a particular place from 2002 to the present and that they actually have some basis for suit in the form of a medical symptom/illness/condition, property damage or damage to realty. Have they had trouble breathing? Have they been diagnosed with asbestosis or ANYTHING? Have they had a rash? Is their bicycle corroded? Is the roof pitted? Was the lawn ruined? Have post-2002 materials from the Site been actually found in their cistern water? What is their individual effect that forms the basis for a suit?

Imagine 500 complaints related to a car running down the road out of control, where the allegation for each and every person who lived on the street where some were hit, some saw it and others were inside asleep, simply avers that everyone was "similarly injured in their person or property.". It would be thrown out of court.

As discussed below, to avoid having to plead ANY specificity with regard to plaintiffs' exposures/injuries/damages, they rely on totally inapplicable cases that deal with either CLASS ACTIONS or CASE MANAGEMENT of a group of existing cases -- admitting:

> Rather than looking at cases that simply involve multiple parties on one or both sides, as Defendant has done, it is more instructive to look at how courts have handled other mass tort cases. *Turner, et al., v. Murphy Oil USA, Inc.*, No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D. La. Dec. 29, 2005) involved **twenty-six consolidated lass actions**. The plaintiffs were residents and homeowners of St. Bernard Parish, Louisiana. According to the plaintiffs, an oil tank at Murphy Oil's Meraux, Louisiana oil refinery came loose from its bearings during (or shortly after) Hurricane Katrina and released thousands of barrels of oil into the surrounding neighborhoods, where plaintiffs lived. *Turner, et al., v. Murphy Oil USA, Inc.*, No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D. La. Dec. 29, 2005).

> Plaintiffs sought recovery for personal injuries, property damage, and mental anguish resulting from the spill. *Id.*
>
> Under Rule 42a, the court consolidated actions from numerous courts and ordered that the plaintiffs prepare a Master Complaint that would govern all actions. *Id.* at **4-5. **Although the Master Complaint is not a substantive pleading and is just a procedural device used to streamline motions and discovery**, the Louisiana district court referred to the normal standards regarding motions to dismiss. *Id.*
>
> Like the Defendant SCRG here, Murphy Oil challenged the that they suffered personal injuries, property damages, and mental anguish as not sufficiently establishing injuries-in-fact to meet the standing requirement. *Id.* at *10. The court rejected this argument because "the court must presume that general allegations embrace the specific facts that are necessary to support the Plaintiffs' claim." *Id.* at *10. It determined that the plaintiffs' general allegation that they resided near the oil refinery and suffered injuries as a result of the oil discharge was sufficient to put the defendant on notice of the claims against it. *Id.* **Although the *Turner* court used the *Conley v. Gibson* standard for evaluating the motions to dismiss, its rationale is still applicable.**

Thus, despite the fact that plaintiffs admit that a "Master Complaint is not a substantive pleading and is just a procedural device used to streamline motions and discovery" they ask this Court to embrace the standard set forth in a procedural consolidation for management purposes: arguing that the phrase "the court must presume that general allegations embrace the specific facts that are necessary to support the Plaintiffs' claim" means all that has to be alleged is that "all plaintiffs were somehow injured/damaged."[7] Plaintiffs argue that if they simply say "and thus all plaintiffs were damaged" that is sufficient because that general statement "must" include the more specific offers of proof.

[7] Moreover these were cases put together for management where each individual first filed a complaint which had to have been sufficient to have gotten to that point. That is why it was decided, as Plaintiff admits, under a totally different standard applicable to such cases.

This is directly and diametrically opposed to *Twombly/Iqbal* -- and the reason that plaintiffs offer, as discussed below, no decisions to support their contention that all they have to allege is "therefore we were injured and our personal and real property was damaged" -- for that is absolutely all that they plead. This is exactly what *Twombly* did away with.

II. Cases Cited by Plaintiffs to Show Only a Bald Conclusory Statement of injury/Damage Needs be Pleaded Are Inapposite

Plaintiffs rely on *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F.Supp.2d 506 (M.D.Pa. 2010) where property owners alleged a claim against natural gas producers under response cost provisions of Pennsylvania's *Hazardous Sites Cleanup Act* (HSCA).[8] Plaintiffs offer this to argue that the Court allowed a complaint where there were no allegations of any actual, specific illnesses/injuries/conditions.

First, *Fiorentino* involved a motion to dismiss -- not for a more definite statement. Thus, taking all allegations as true, the district judge had to determine whether the complaint should be dismissed -- not whether some elements were lacking in specificity which could be repaired by ordering a more definite statement. More important, directly contrary to plaintiff's assertions, the Court recited that:

[8] This was decided under a limited Pennsylvania statute. This the same as Defendant's citation to a federal case in Louisiana which Plaintiffs breathlessly contend was meant to deceive the Court.

> Defendants argue that Count Seven of the Second Amended Complaint must be dismissed because Plaintiffs have failed to allege the *narrow circumstances in which Pennsylvania recognizes a claim for a medical monitoring trust fund.* (Emphasis added.)

Fiorentino v. Cabot Oil & Gas Corp., 750 F.Supp.2d 506, 512 -513 (M.D.Pa. 2010)

> Plaintiffs aver that parties have **manifested neurological, gastro-intestinal, and dermatological symptoms** and **blood study results** consistent with toxic exposure. Although a much greater showing is required to actually prove this claim, including expert testimony, we find that, at this stage in the litigation, Plaintiffs have sufficiently alleged **plausible facts** necessary. . . .

Id. at 513. Defendants here are not asking for even this level of specificity -- just the facts that 'individual A' suffered ***any*** medical symptom, illness or condition; **any** damage to real property or damage to personal property, and what, generally, it was. No blood results or other tests are sought. No doctors' statements -- just that someone is either somehow actually affected or has had something actually damaged !

Oddly, the second case upon which plaintiffs rely is a California state case, *Jones v. ConocoPhillips Co.*, 198 Cal. App. 4th 1187, 1195 (Cal.App. 2d Dist. 2011). Not only is it a state case on an unrelated issue, but more importantly, it directly contradicts the proposition for which it is advanced. In referring to it, Plaintiffs state:

> In keeping with the rule that facts should be alleged in ordinary and concise language, the Court ruled that allegations of toxic exposure can be made in a conclusory fashion absent knowledge of the **precise cause of injury**. Allegations that each manufacturer concealed or failed to disclose the toxic properties of its product sufficiently stated a cause of action for fraudulent concealment. *Jones, supra*. Specifically, the Appellate Court held that "[o]nce the product had been identified, the plaintiff could allege that 'the toxins' in the product entered his body and were 'a substantial factor in bringing about, prolonging, or aggravating **[his] illness**." *Jones*, 198 Cal. App. 4th at 1194. The Court explained that expert medical and scientific evidence would be required to prove the plaintiff's case, thus "his lack of personal knowledge regarding the precise mechanism by which **[his injury] occurred** should not be viewed as an admission that he cannot identify which specific products caused his injuries." *Id.* at 1195. The court rejected the defendants' argument that a complaint is unacceptably speculative if a plaintiff has not specifically identified which toxin contained in a particular product **caused the alleged injury** or has sued the manufacturers of multiple products, alleging all of them contained toxins that were substantial factors **in causing his injury**. *Jones*, 198 Cal. App. 4th at 1195. [Emphasis added.]

However, it is 180 degrees from this case. In *Jones*, the plaintiff had a VERY specific health problem: he died. Moreover he did so with illnesses and symptoms consistent with the toxins involved. The family members had (and had pleaded) the explicit medical condition(s) and the ultimate injury -- being dead. The issue there was whether the plaintiff had to have pled, as a factual matter, the pathway of HOW the toxin caused the injury or illness. But like the blood tests and descriptions of specific symptoms suffered in *Fiorentino*, there *were* specific illnesses, conditions and a death consistent with the toxin pled. One need only look at the decision below in *Jones* (which of course the appellate court had) to see just how specific these illnesses and injuries were -- and had been pled.

Finally, plaintiffs cite several other cases in an effort to graft "no specificity" standards from case management and class settings into this case. As discussed above, *Turner, et al., v. Murphy Oil USA, Inc.*, No. 05-4206 Consol. Case Sec. "L"(2), 2005 U.S. Dist. LEXIS 45123, *2 (E.D.La. 2005), *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, *1 (D.Ariz. 2009) and *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, NO. 1:08-wp-65000, 2009 U.S. Dist. LEXIS 102468, *1, *40-41 (N.D.Ohio 2009) are completely inapplicable. *Turner* was a procedural consolidation for case management and *Consumer Protection* and *In re Whirlpool* were class actions -- where damage allegations on a class-wide basis can be sufficient because commonality and typicality are already determined. Similarly *In Re Digitek Products Liability Litigation*, MDL NO. 2:08-md-01968, 2009 U.S. Dist. LEXIS 113947, *1 (S.D.WV 2009) was a case where the Judicial Panel on

Multidistrict Litigation entered an order establishing a multidistrict litigation ("MDL") proceeding consolidating the federal *Digitek*-related actions for joint case management. Again, sufficient complaints already existed -- all that was being discussed was the sufficiency of the master complaint.

Thus, plaintiffs fail to present even one case where a large group of individuals, just because they file together and call it a mass tort, are somehow excused from having each state any actual illness/injury or property damage -- but instead have alleged only that "thus we were all damaged in our person or our real property or our personal property somehow." Did plaintiff B even own a house, did it sustain some sort of damage? Did plaintiff C have a car whose paint was pitted? What is the most basic statement of the claim?

III. Conclusion

Defendant does not understand why plaintiffs refuse to state where they were at times of exposure after 2002, and *generally* what illness/symptom/condition or damage to personal/real property they have suffered. This is not a discovery issue -- it is an issue of providing the most basic facts to meet an necessary element of a cause of action and demonstrate standing. Moreover, Defendant needs this information to be able to adequately do third-party pleading.

Dated: September 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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