IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELEANOR ABRAHAM ET AL., Plaintiff(s), v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant(s).	CIVIL NO. 12-CV -0011 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

REPLY TO OPPOSITION TO MOTION TO REMAND

COME NOW Plaintiffs by and through undersigned counsel and files this Reply to Defendant St. Croix Renaissance Group, LLLP's Opposition to Plaintiffs' Motion for Remand (Doc. No. 37).

I. DEFENDANT CANNOT SUCCEED IN ITS ATTEMPT TO SHIFT THE BURDEN TO PLAINTIFF

CAFA provides for subject matter jurisdiction over certain class actions where the amount in controversy exceeds $5 million and where only minimal diversity of citizenship exists, that is where only one plaintiff and one defendant are diverse. *See* 28 U.S.C. § 1332(d)(2). CAFA also grants subject matter jurisdiction over a "mass action" if minimal diversity exists and certain other requirements are met. *See* 28 U.S.C. § 1332(d)(11). No federal questions are alleged in the First Amended Complaint, and thus there is no subject matter jurisdiction under 28 U.S.C. § 1331. Similarly, this court lacks jurisdiction under 28 U.S.C. § 1332(a) because complete diversity of citizenship is absent. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

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Defendant SCRG has spent a considerable amount of time in its opposition claiming that the burden somehow lies with Plaintiff in proving that all elements of a CAFA exception are met. Opposition, p. 4. The burden in a removal case **always remains with the party asserting federal jurisdiction**, which in this matter is Defendant. This court has previously reminded Defendant SCRG of this in its Memorandum Opinion dated March 17, 2011 in the very similar matter, *Abenego, et al. v. Alcoa, Inc*, et al, Civil No. 10-009. In that matter, Defendant SCRG made very similar burden shifting arguments which the court disregarded reminding Defendant SCRG that "The parties asserting federal jurisdiction in a removal case, in this case the defendants, bear the burden of showing that the case is properly before the court. *See Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Samuel-Bassett v. Kia Motors America*, *Inc.*, 357 F.3d 392, 396 (3d Cir. 2004). Moreover, courts should strictly construe the requirements of removal jurisdiction and remand all cases in which jurisdiction is doubtful. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100,109 (1941)." *See* Memorandum Opinion, p. 4, **Exhibit 1.** Therefore, despite Defendant's contentions to the contrary, the overall burden is Defendant's not Plaintiffs' to show that this matter is properly before the court. Here, jurisdiction is clearly doubtful and remand is appropriate.

II. THE HOME STATE EXCEPTION

Plaintiff has clearly established that the Home State Exception applies in this matter and this court need not look further than its *Abednego* opinion in order to resolve this current dispute. In *Abednego*, the Court was presented with the very same question as to whether the CAFA Home State exception applied as asserted by Plaintiffs.

CAFA excludes from the definition of mass action any case in which "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." 28 U.S.C. § 1332(d)(11)(B)(ii)(I). A state for the purposes of this statute includes a federal territory such as the Virgin Islands. *See* 28 U.S.C. § 1332(e). This Home State exclusion applies and subject matter jurisdiction is therefore absent.

In the *Abednego* matter Defendant SRCG, as it does now, contended that Plaintiffs' pleading alleged a series of ongoing hazardous releases, occurring over twenty years and therefore was not a single event or occurrence. *See* Opinion, p. 4, **Exhibit 1**. The Court disagreed and ordered remand. The similarities between the *Abednego* Third Amended Complaint and the First Amended Complaint in this matter justify a similar result.

Defendant also relies on substantially the same case law that it did in the *Abednego* matter which was not only distinguished by Plaintiff but also the Court. In the *Abednego* opinion the Court correctly held that the decision of the United States District Court for the Southern District of Florida in *Galstaldi v. Sunvest Communities USA*, LLC. 256 F.R.D. 673 (2009) was clearly distinguishable in that there the court found that the fraudulent sale of condominium units "to hundreds of individuals around the country over a period of one and one half years" did not qualify as "an event or occurrence." *Id.* at 677.

The *Abednego* Court also opined that in the *Aburto v. Midland Credit Mgmt.*, Inc., 2009U.S. Dist. LEXIS 67467, *14 (N.D. Tex. July 27, 2009) matter cited by Defendant SCRG, 154 plaintiffs sought damages under various state statutes for unfair debt collection practices. Those plaintiffs had each been defendants in "separate lawsuits [which] were

filed in different Texas state courts against [them] individually by different lawyers with different law firms on behalf of [defendant collection agency] Midland." 2009 U.S. Dist. LEXIS at *15. The *Abednego* Court found neither of those cases to be relevant.

What the *Abednego* Court did find persuasive was the case cited by Plaintiffs in that matter and in this matter *sub judice*, *Mobley v. Cerro Flow Products*, in which the District Court for the Southern District of Illinois found that plaintiffs' complaint for personal injuries and property damages from improper disposal of toxic chemicals from three sites over many decades was excepted from CAFA's definition of a "mass action" based on § 1332(d)(11)(B)(ii)(I). 2010 U.S. Dist. LEXIS 524, *8-*11 (S.D. Ill. Jan. 5, 2010); *see also Clayton v. Cerro Flow Prods, Inc.*, 2010 U.S. Dist. LEXIS 226 (S.D. Ill. Jan. 4, 2010). *See* Plaintiffs' Motion to Remand, p. 7. As explained in Plaintiffs' moving motion, this matter is strikingly similar to that of the *Mobley* matter and thus should be excepted from CAFA's definition of a "mass action".

The similarities between the *Abednego* matter and this case dictates a similar outcome as the Home State Exception clearly applies and remand is warranted.

III. THE LOCAL CONTROVERSY EXCEPTION

Plaintiffs' contend that yet another exception applies, the Local Controversy Exception. This jurisdictional requirement is separate from the "home state" exception also established by CAFA. This exception allows a district court to decline jurisdiction if greater than one-third and less than two-thirds of the plaintiffs are citizens of the state in which the claim was filed and the primary defendants are citizens of that state. *See* 28 U.S.C. § 1332(d)(3). It also mandates that a district court must decline jurisdiction if more

than two-thirds of plaintiffs are citizens of the state in which the claim was filed and the primary defendants are citizens of that state. *See* 28 U.S.C. § 1332(d)(4). More than two-thirds of Plaintiffs in this matter are citizens of the Virgin Islands. *See* Plaintiffs' Motion to Remand, p.11. Defendant SCRG concedes this point but rests its contention that the Local Controversy Exception does not apply because of its allegation that at the time Plaintiffs' filed their complaint, it was ***conveniently*** no longer a citizen of the Virgin Islands.

Defendant's self serving affidavit of its principal John Thomas that conveniently alleges that its "nerve center functions" were transferred to Boston, Massachusetts at the time Plaintiffs' filed their complaint cannot aid Defendant in its heavy burden of persuasion that removal is proper in this case. There has been no discovery on this issue, no documentary evidence (outside that of the self-serving affidavit) of this alleged transfer of the "nerve center functions" and no depositions have been taken of the persons with knowledge necessary to establish that the "nerve center functions" was no longer in the Virgin Islands.

It is without dispute that the principle place Defendant conducts business is in the Virgin Islands. In fact, Defendant was recently interviewed as to its plan to manufacture and produce sufficient electricity to power St. Croix. Defendant SCRG's own website has its address and contact information as St. Croix and the phone numbers are local St. Croix landlines. *See* Contact Us Webpage downloaded on November 15, 2012, **Exhibit 2**. Further, SCRG was formed solely to acquire and develop the St. Croix Renaissance Park. *See* About Us Webpage downloaded on November 15, 2012, **Exhibit 3.** Defendant SCRB clearly has not proven that it was not a citizen of the Virgin Islands and therefore jurisdiction

is doubtful and based on the courts mandate to strictly construe the requirements of removal jurisdiction, remand is warranted. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100,109 (1941)."

If the Court does not agree that this matter fits squarely in the Home State Exception or the Local Controversy Exception based on Defendant's self-serving affidavit, Plaintiffs respectfully request the opportunity to conduct discovery on Defendant SCRG's ***convenient*** contention that its "nerve center functions" were not in the Virgin Islands at the time Plaintiffs' filed their complaint. Thereafter, the parties can more fully brief the issue of whether Defendant was a citizen of the Virgin Islands at the time of the filing of the complaint. Without this opportunity it is impossible for Plaintiffs' to refute Defendant's contentions.

RESPECTFULLY SUBMITTED
LEE J. ROHN AND ASSOCIATES, LLC
Attorneys for Plaintiff(s)

DATED: November 16, 2012

BY: /s/ *Lee J. Rohn*

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on November 16, 2012, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LAURIE L.A. ABEDNEGO, et al.	:	CIVIL ACTION
v.	:	
ALCOA, INC., et al.	:	NO. 10-009

MEMORANDUM

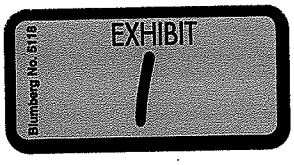
Bartle, C.J. March 17, 2011

Some 2,000 individual plaintiffs originally filed their complaint in the Superior Court of the United States Virgin Islands. Defendants[1] subsequently removed the action to this court on the ground that subject matter jurisdiction exists under the "mass action" provisions of the Class Action Fairness Act of 2005 ("CAFA"). See 28 U.S.C. § 1332(d).[2] Plaintiffs have now moved to remand.

The Third Amended Complaint contains claims arising from the release of various hazardous substances from an alumina

1. The defendants in this action are Alcoa, Inc., St. Croix Alumina, LLC, Glencore Ltd. (a/k/a Clarendon Ltd.), and Century Alumina Company.

2. Plaintiffs filed their initial motion to remand on March 30, 2010. The court had significant concerns regarding the accuracy of the list of plaintiffs and whether counsel actually represented all of the plaintiffs. As a result, amended complaints were subsequently filed. The initial motion to remand was denied without prejudice. On December 21, 2010, plaintiffs filed their Third Amended Complaint, which is the operative pleading in this action. On February 8, 2011, the court ordered the parties to file briefs on the issue of whether the court has subject matter jurisdiction. In response, plaintiffs renewed their motion to remand.



refinery on St. Croix as a result of Hurricane Georges in 1998. Plaintiffs allege that, as a result of exposure to a variety of particulates and toxic substances, they have "suffered physical injuries, medical expenses, damages to their properties and possessions, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life, a propensity for additional medical illness, a reasonable fear of contracting illness in the future." They request both compensatory and punitive damages, as well as an injunction requiring clean-up of these substances.

CAFA provides for subject matter jurisdiction over certain class actions where the amount in controversy exceeds $5 million and where only minimal diversity of citizenship exists, that is where only one plaintiff and one defendant are diverse. See 28 U.S.C. § 1332(d)(2). CAFA also grants subject matter jurisdiction over a "mass action" if minimal diversity exists and certain other requirements are met. See 28 U.S.C. § 1332(d)(11).

No federal questions are alleged in the Third Amended Complaint, and thus there is no subject matter jurisdiction under 28 U.S.C. § 1331. Similarly, this court lacks jurisdiction under 28 U.S.C. § 1332(a) because complete diversity of citizenship is absent. See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005); see also Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996).

Defendants maintain, as noted above, that this is a mass action subject to removal. A "mass action" is defined as:

> any civil action (except a civil action within the scope of section 1711(2) [28 U.S.C. § 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).

28 U.S.C. § 1332(d)(11)(B)(i). This lawsuit meets many of the criteria of a mass action. It contains claims by more than 100 persons whose claims involve common questions of law and fact and whose claims in the aggregate exceed $5 million exclusive of interest and costs. See 28 U.S.C. § 1332(2). In addition, the minimal diversity requirement is satisfied. While several of the plaintiffs as well as the defendant Alcoa, Inc. are citizens of New York, most plaintiffs are citizens of the Virgin Islands.

CAFA excludes from the definition of mass action any case in which "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." 28 U.S.C. § 1332(d)(11)(B)(ii)(I).[3] A state for the purposes of this

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3. This jurisdictional requirement is separate from the "local controversy" exception also established by CAFA. This exception allows a district court to decline jurisdiction if greater than one-third and less than two-thirds of the plaintiffs are citizens of the state in which the claim was filed and the primary defendants are citizens of that state. See 28 U.S.C. § 1332(d)(3). It also mandates that a district court must decline jurisdiction if more than two-thirds of plaintiffs are citizens of the state in which the claim was filed and the

(continued...)

statute includes a federal territory such as the Virgin Islands. See 28 U.S.C. § 1332(e). Plaintiffs argue that the exclusion applies and that subject matter jurisdiction is therefore absent.

The parties asserting federal jurisdiction in a removal case, in this case the defendants, bear the burden of showing that the case is properly before the court. See Morgan v. Gay, 471 F.3d 469, 473 (3d Cir. 2006); Samuel-Bassett v. Kia Motors America, Inc., 357 F.3d 392, 396 (3d Cir. 2004). Moreover, courts should strictly construe the requirements of removal jurisdiction and remand all cases in which jurisdiction is doubtful. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109 (1941).

Defendants maintain that the Third Amended Complaint does not fall within the exclusion under § 1332(d)(11)(B)(ii)(I). Instead, defendants assert that plaintiffs' pleading alleges a series of ongoing hazardous releases and negligent actions, occurring over twenty years. Defendants point to the language of the exclusion which uses the words "event or occurrence," in the singular.

Defendants first rely on the decision of the United States District Court for the Southern District of Florida in Galstaldi v. Sunvest Communities USA, LLC. 256 F.R.D. 673 (2009). In Galstaldi, the court found that the fraudulent sale

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3.(...continued)
primary defendants are citizens of that state. See 28 U.S.C. § 1332(d)(4).

of condominium units "to hundreds of individuals around the country over a period of one and one half years" did not qualify as "an event or occurrence." Id. at 677. Defendants also cite as support for their contention Cooper v. R.J. Reynolds Tobacco Corp., 586 F. Supp. 2d 1312, 1316 (M.D. Fla. 2008), Lafalier v. Cinnabar Serv. Co., 2010 U.S. Dist. LEXIS 36215, *14-17 (N.D. Ok. Apr. 13, 2010), and Aburto v. Midland Credit Mgmt., Inc., 2009 U.S. Dist. LEXIS 67467, *14 (N.D. Tex. July 27, 2009).

In Cooper, 700,000 citizens of Florida, who were former members of a decertified state class action, sued for various illnesses they alleged resulted from their addiction to cigarettes. The court found that "the injuries alleged by plaintiffs are not single events or occurrences occurring solely in Florida or states contiguous to Florida" without going into any further factual detail about the nature of the injuries sustained. 586 F. Supp. 2d at 1316.

In Lafalier, 207 plaintiffs alleged fraud by insurance companies in the buyout of their homes in the wake of damage from a tornado. Although the court decided that all of the events giving rise to the case occurred in Oklahoma, it held that various insurance companies made hundreds of individual decisions, denials of coverage, and reductions in payments over a span of time constituting a "series of potentially related events." 2010 U.S. Dist. LEXIS at *17.

Finally, 154 plaintiffs in Aburto sought damages under various state statutes for unfair debt collection practices.

These plaintiffs had each been defendants in "separate lawsuits [which] were filed in different Texas state courts against [them] individually by different lawyers with different law firms on behalf of [defendant collection agency] Midland." 2009 U.S. Dist. LEXIS at *15.

Plaintiffs, on the other hand, point to Mobley v. Cerro Flow Products, in which the District Court for the Southern District of Illinois found that plaintiffs' complaint for personal injuries and property damages from improper disposal of toxic chemicals from three sites over many decades was excepted from CAFA's definition of a "mass action" based on § 1332(d)(11)(B)(ii)(I). 2010 U.S. Dist. LEXIS 524, *8-*11 (S.D. Ill. Jan. 5, 2010); see also Clayton v. Cerro Flow Prods, Inc., 2010 U.S. Dist. LEXIS 226 (S.D. Ill. Jan. 4, 2010).

In our view, the plain meaning of CAFA's mass action exception encompasses this action. The Third Amended Complaint alleges the occurrence of a release of bauxite, red mud, and asbestos from an alumina refinery in St. Croix as a result of Hurricane Georges on September 21, 1998. Plaintiffs maintain that defendants' negligence from improperly containing these hazardous substances caused them personal injuries and property damage. The release penetrated into the neighborhoods surrounding the refinery on that same island. All injuries alleged in the Third Amended Complaint resulted from personal and property exposure to hazardous substances released on St. Croix as a result of that one hurricane. Despite the fact that a

number of the plaintiffs subsequently moved away from the Virgin Islands, their property damages and personal injuries were incurred when on St. Croix.

The Senate Judiciary Committee Report on CAFA discusses the provision which excludes from the definition of a mass action those cases in which "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". We find it persuasive. The report states:

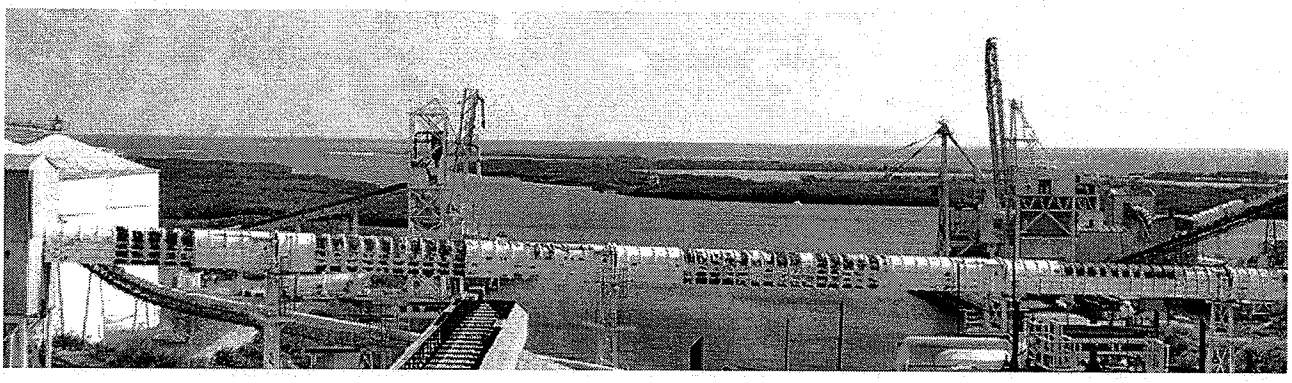
> The purpose of this exception was to allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local, even though there are some out-of-state defendants. By contrast, this exception would not apply to a product liability or insurance case. The sale of a product to different people does not qualify as an event.

S. Rep. 109-14, at 47 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, at 44. This exception from the contours of a mass action in CAFA was specifically designed to apply to circumstances such as are pleaded in the plaintiffs' Third Amended Complaint. Alleged here is a chemical release or spill precipitated by a hurricane that struck St. Croix. The injuries happened to persons and property near the alumina refinery from which the chemicals were released. This is not a products liability or an insurance case. Moreover, the claims here are quite different from the circumstances set forth in the cases cited by the defendants.

The plaintiffs' Third Amended Complaint does not qualify as a mass action under CAFA because all the claims arise from a single event or occurrence, that is, a hurricane, in the Virgin Islands, where the action was originally filed, and the allegedly resulting injuries occurred in the Virgin Islands. See 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Thus, we do not need to reach the question whether the requisite amount in controversy has been met for each plaintiff. See 28 U.S.C. § 1332(a) and (d)(11)(B)(i).

This action will be remanded to the Superior Court of the United States Virgin Islands.

St. Croix Renaissance



About Us

St. Croix Renaissance Group LLLP is a partnership of Brownfields Recovery Corporation, which is a division of Mugar Enterprises, and Myron Allick, a successful businessman who is based in the U.S. Virgin Islands. The partners formed SCRG in 2001 to acquire and develop St. Croix Renaissance Park. Members of the SCRG management team have worked together successfully from more than 20 years on numerous real estate development projects and other business ventures.

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St. Croix Renaissance

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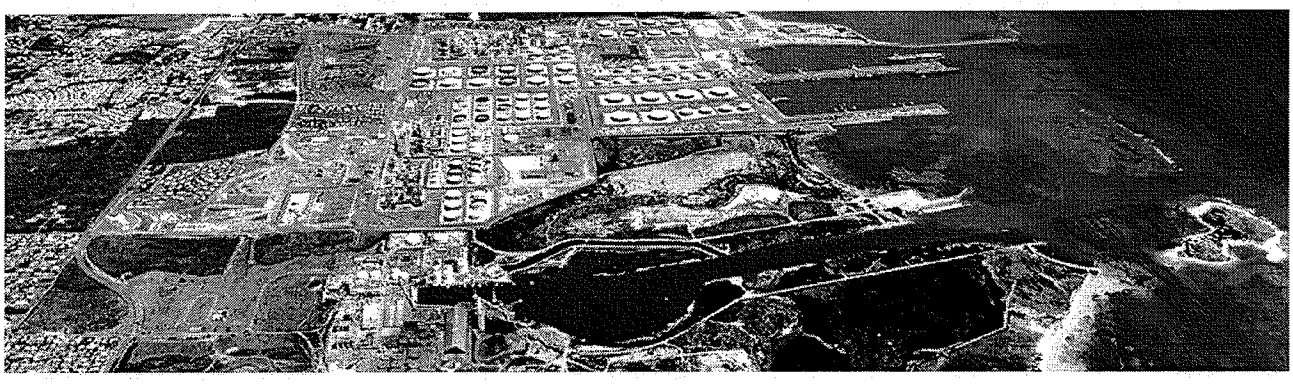

Contact Us

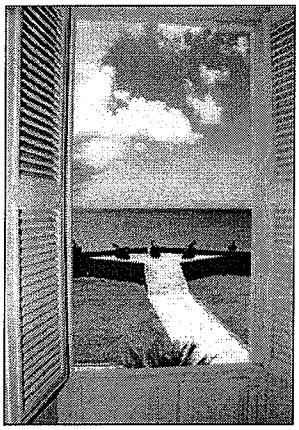

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EXHIBIT 3 Plaintiff's Exhibit No. 5115