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 a Writer of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that the phrase "an event or occurrence" in the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B)(ii)(I), should be given its "ordinary meaning," thereby encompassing some circumstances that share "commonality and persist over a period of time," in the context of a complaint alleging that one owner has failed to take any action to prevent the spread of toxic particles from its inoperative industrial property.

2. Whether the Third Circuit incorrectly assigned the burden of establishing whether the complaint described "an event or occurrence" to SCRG when the Third Circuit did not discuss the issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

LEGISLATIVE HISTORY

INTRODUCTION

Petitioner St. Croix Renaissance Group, L.L.L.P. (SCRG) claims that this Court's review is warranted because the Third Circuit's decision below conflicts with a decision of the Ninth Circuit and because it announces a radical rule. SCRG is wrong on both counts.

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. *Compare id.* at 668, *with* Pet. App. 13. The Ninth Circuit then applied the ordinary meaning of § 1332(d)(11)(B)(ii)(I) to the facts before it—facts that were very different from those in this case. *See Bank of America*, 672 F.3d at 668 (holding that thousands of individual mortgage transactions were not "an event or occurrence"). All a comparison between the Third and Ninth Circuits' decisions shows is that some facts fall within the ordinary meaning of "an event or occurrence" and some very different facts do not.

Further, the premises of SCRG's questions presented are faulty. As to its first question presented, the Third Circuit did *not* hold that "forty years of alleged releases by different owners, of different materials by different mechanisms" is "an event or occurrence," Pet. i, for the simple reason that those are not the facts at issue in this case. And SCRG's second question presented is nonsense given that, as SCRG admits (Pet. 20), the Third Circuit did not even mention which party bears the burden on the "event or occurrence" issue.

For these and other reasons discussed below, SCRG's petition for certiorari should be denied.

STATEMENT OF THE CASE

1. The Class Action Fairness Act (CAFA) provides federal-court jurisdiction over some aggregate litigation even where there is not complete diversity between the parties. *See* 28 U.S.C. § 1332(d). Relevant here, CAFA provides for federal-court jurisdiction over "mass actions," which are certain civil actions involving 100 or more plaintiffs whose claims for money damages meet the ordinary $75,000 jurisdictional minimum. § 1332(d)(11)(B)(i); *see* § 1332(a). Because there is not complete diversity between the parties in this case, CAFA's mass action provision would be the sole basis for federal-court jurisdiction. First Am. Compl., Dist. Ct. Doc. 22, Aug. 7, 2012, ¶¶ 318-19, 442-43 (the group of plaintiffs includes citizens of Massachusetts and the Virgin Islands, the two possible domiciles of SCRG). *See* § 1332(a)(1).

This grant of jurisdiction comes with several important caveats. Of particular relevance here,

CAFA contains two provisions designed to keep truly local actions in state court: § 1332(d)(4), which requires federal courts to decline jurisdiction over actions in which at least two-thirds of plaintiffs and at least one defendant are citizens of the state in which the action was filed; and § 1332(d)(11)(B)(ii)(I), which provides that when "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," the action is not a "mass action" subject to federal court jurisdiction.

It is undisputed that all Respondents' claims pertain to a single site within the Virgin Islands, that all the alleged injuries took place in the Virgin Islands, and that this suit was filed in a Virgin Islands court. The only dispute is whether or not the Respondents' local claims arise from "an event or occurrence." The Third Circuit held that they did and thus remanded the case to state court under § 1332(d)(11)(B)(ii)(I). *See* Pet. App. 6-9, 18.[1]

2. The complaint alleges a number of state-law tort claims, including negligence and nuisance claims, against SCRG for its failure to abate the

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[1] Respondents contended in district court that § 1332(d)(4) applied to this case, but the district court declined to permit Respondents discovery on the question whether SCRG is a citizen of the Virgin Islands, accepting SCRG's statement that it was a citizen of Massachusetts. Pls.' Reply to Opp. to Remand, Dist. Ct. Doc. 38, Nov. 16, 2012, at 120-22; Pet. App. 27. Respondents raised the discovery issue in the Third Circuit, which did not reach it. *Id.* at 22 n.11, 137-39. If this Court reverses the Third Circuit, Respondents would likely continue to press the § 1332(d)(4) discovery question on remand.

dispersal of toxic particles from a defunct alumina refinery site on the island of St. Croix in the U.S. Virgin Islands. Br. in Opp. (BIO) App. 2-13. SCRG purchased the site in 2002—after the refinery had ceased operations—and the complaint seeks to impose liability only against SCRG and only for its inaction during the period it owned the site. Pet. App. 4-5, 20, 29-30; BIO App. 1-2, 4-13.

The refinery site sits on the south shore of the island, close to thousands of homes. *Id.* at 1. While the refinery operated, its process of refining bauxite into alumina produced an industrial byproduct called "red mud" or "red dust." *Id.* at 2-3. The red dust continues to be stored outdoors on the site in uncovered, unsecured piles as high as 120 feet and covering up to 190 acres, and unrefined bauxite continues to be stored in a heavily damaged shed. *Id.* at 3-4. Nothing prevents the dispersal of the particles away from the site and onto large swaths of the rest of the island. *Id.* The refinery is also rife with loose (friable) asbestos fibers, which, like the red dust and bauxite, are not secured and are regularly carried by wind onto and into the homes of Respondents—as well as into the cisterns from which Respondents get their drinking water. *Id.* at 3-6; Pet. App. 29-30.

Red dust contains hazardous materials such as arsenic, molybdenum, selenium, and coal dust. BIO App. at 3. Both red dust and bauxite can cause damage to the skin, eyes, and respiratory system; they are a cancer hazard; and they can cause significant property damage. *Id.* Similarly, asbestos causes severe respiratory disease.

The unsecured particles existed at the time SCRG purchased the property, and the complaint alleges that SCRG knew about the dangers, but did nothing to prevent the toxins from continuously blowing off the refinery site onto Respondents' property. *Id.* at 4-5.

3. Respondents filed their complaint in Virgin Islands court, and SCRG removed the case to federal district court as a "mass action" under CAFA. Pet. App. 2. The district court held that Respondents' claims alleged a local "event or occurrence" under § 1332(d)(11)(B)(ii)(I) and remanded the case to Virgin Islands court. *Id.* at 34. On discretionary review, the Third Circuit affirmed the remand to local court. *Id.* at 2.

The Third Circuit began by accurately describing the allegations in the complaint: That Respondents seek to hold SCRG liable for its post-purchase failure to abate the continuous dispersal of toxic particles from the inoperational site. *Id.* at 4-5.

In analyzing whether Respondents' claims fit into § 1332(d)(11)(B)(ii)(I), the Third Circuit recognized that Congress intended "event" and "occurrence" to be singular because of its use of "an." *Id.* at 13. The Third Circuit then proceeded to consider what a single "event or occurrence" is, and following this Court's precedents, held that "event" and "occurrence" must be given their "ordinary meaning." *Id.* at 14 (citing, among other authority, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.")). Because, in common parlance, "event" and "occurrence" are often used to refer to things that happen over time and not just at

a specific instant, the Third Circuit rejected SCRG's cramped 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. Although the Third Circuit declined to adopt a precise definition of "event" or "occurrence," *id.* at 18 n.7, it explained that those terms could encompass "circumstances that share some commonality and persist over a period of time," *id.* at 15. This reading is consistent with the structure of CAFA, and the court noted that the "local" requirements of § 1332(d)(11)(B)(ii)(I), the requirements that the event or occurrence must take place within the forum state and result in injuries in that or a contiguous state, will do most of the heavy lifting in terms of determining which cases are appropriately heard in federal court. *Id.* at 16-18 & 18 n.7.

Finally, the Third Circuit held that Respondents' complaint alleged "an event or occurrence" because it described a continuing set of circumstances—the release of toxic particles—over a fixed period of time—the time of SCRG's ownership. *Id.* at 20. The Third Circuit explained that because SCRG was not alleged to have taken any actions that increased the dispersal of any particular toxins, which existed throughout the site, the court could not identify any "separate and discrete incidents" causing the dispersal of particles. *Id.* at 21. As the Third Circuit put it, "[t]here is simply the ongoing emission from the site of the red mud and its hazardous substances." *Id.*

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split on the Interpretation of "an Event or Occurrence" in § 1332(d)(11)(B)(ii)(I).

SCRG begins its Petition by stating that there is "[a] clearly defined, explicit circuit conflict" on the meaning of "an event or occurrence" in § 1332(d)(11)(B)(ii)(I). Pet. 1. On the contrary, the Third Circuit was well aware of the Ninth Circuit's decision in *Bank of America* when it issued its opinion in this case, Pet. App. 104, 152 n.6, but made no claim to have created a conflict.

In fact, the decision below is consistent with *Bank of America*. *Bank of America* involved a parens patriae action brought by the state of Nevada against Bank of America for allegedly committing fraud in its mortgage modification and foreclosure transactions with consumers. 672 F.3d at 664. The Ninth Circuit's ultimate holding was that the parens patriae action was neither a class action nor a mass action under § 1332(d) and thus not removable to federal court under CAFA. *Id.* at 667, 672.

However, the district court had, without any urging from Nevada, determined below that the case met the "event or occurrence" provision, and the Ninth Circuit reversed in a one-paragraph discussion. *Id.* at 668. The Ninth Circuit explained that because § 1332(d)(11)(B)(ii)(I) only applied to a single "event or occurrence" and Nevada had alleged fraud in thousands of individual transactions, the provision was inapplicable. *Id.* Because this analysis was unnecessary to the court's ultimate conclusion—that the parens patriae action was not a mass action

to begin with—it is dicta and not the holding of the court.

Regardless, the Third Circuit's decision here is consistent with both the Ninth Circuit's description of what the statute requires and its application in *Bank of America*. As discussed above, the Third Circuit, like the Ninth Circuit, acknowledged that the "an" preceding "event or occurrence" renders the provision singular. Pet. App. 13, 22. The singularity of the provision is the only legal standard the Ninth Circuit articulated, and the Third Circuit agrees with that standard.

Because Respondents' claims here rest on a condition that persisted (and continues to persist) for a number of years, the Third Circuit went on to analyze whether that condition constituted a single "event or occurrence." The Ninth Circuit, however, had no occasion to consider that question because an ongoing condition was not alleged in that case. There is no reason to think that the Ninth Circuit, when faced with a complaint alleging ongoing circumstances, would disagree with the Third Circuit's conclusion here—and if it did, *then* this Court's review might be warranted. And the Third Circuit's holding here does not preclude it from concluding that where there are thousands of transactions at issue, as in *Bank of America*, multiple events or occurrences are involved. Indeed, in that scenario, it would be easy for the court to identify "separate and discrete incidents." *Id.* at 21. [2]

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[2] It is true that, in an unpublished opinion, at least one district court has reached a contrary conclusion to the Third Circuit in a similar factual scenario. *Aana v. Pioneer Hi-Bred Int'l,*

(*Footnote continued*)

Inc., No. CV 12-00231 JMS-BMK, 2012 WL 3542503 (D. Haw. July 24, 2012). That case, however, predated the Third Circuit's guidance, and most district courts to apply § 1332(d)(11)(B)(ii)(I) to ongoing circumstances have taken the same approach as the Third Circuit here. *Allen v. Montsanto Co.*, No. 3:09cv471/LAC/EMT, 2010 WL 8752873 (N.D. Fla. Feb. 1, 2010); *Mobley v. Cerro Flow Prods., Inc.*, No. 09-697-GPM, 2010 WL 55906 (S.D. Ill. Jan, 5, 2010); *Hamilton v. Burlington N. Santa Fe Ry. Co.*, No. A-08-CA-132-SS, 2008 WL 8148619 (W.D. Tex. Aug. 8, 2008). Regardless, conflict between a court of appeals and an unpublished district court opinion is not a basis for review in this Court. *See* Sup. Ct. R. 10.

The other district court cases cited by SCRG in which the court applied § 1332(d)(11)(B)(ii)(I)'s "an event or occurrence" language are easily distinguishable because either they deal with a single, discrete incident, *Armstead v. Multi-Chem Grp., LLC*, Civ. Action No. 6:11-2136, 2012 WL 1866862 (W.D. La. May 21, 2012) (fumes from a plant explosion and fire), or because, like *Bank of America*, they address allegations involving a number of individual transactions, *Adams v. Macon Cnty. Greyhound Park, Inc.*, 829 F. Supp. 2d 1127 (M.D. Ala. 2011) (hundreds of individual contracts and gambling transactions); *Dunn v. Endoscopy Ctr. of S. Nev.*, No. 2:11-cv-0560-RLH-PAL, 2011 WL 5509004 (D. Nev. Nov. 7, 2011) (thousands of individual injections and faulty vial design); *Lafalier v. Cinnabar Serv. Co.*, No. 10-CV-0005-CVE-TLW, 2010 WL 1486900 (N.D. Okla. Apr. 13, 2010) (among other allegations, alleged that insurer illegally denied payments in some individual insurance claims and illegally reduced payments in others) *aff'd sub nom. on other grounds Lafalier v. State Farm & Cas. Co.*, 391 F. App'x 732 (10th Cir. 2010); *Aburto v. Midland Credit Mgmt., Inc.*, No. 3:08-CV-1473-K, 2009 WL 2252518 (N.D. Tex. July 27, 2009) (numerous individual debt collection actions); *Galstaldi v. Sunvest Comties. USA, LLC*, 256 F.R.D. 673 (S.D. Fla. 2009) (numerous individual condo sales). If anything, these cases demonstrate that whether the "event or occurrence" provision applies is a very fact-dependent inquiry.

II. The Third Circuit's Decision Is Correct on the Merits.

A. SCRG Mischaracterizes the Decision Below by Mangling Respondents' Allegations.

The decision that SCRG describes in its petition sounds remarkable and perhaps worthy of reversal, but it bears no resemblance to the decision actually rendered by the Third Circuit.

To start, in its description of the Third Circuit's articulation of the standard, SCRG puts words in the court's mouth. As discussed above, the Third Circuit, consistent with this Court's precedent, held that the phrase "event or occurrence" in § 1332(d)(11)(B)(ii)(I) should be given its ordinary meaning, which includes something that happens over time. Pet. App. 14-15. The Third Circuit articulated that proposition by saying that § 1332(d)(11)(B)(ii)(I) applies to claims that arise out of "circumstances that share some commonality and persist over a period of time." *Id.* at 15. It declined to draw any more particular lines because it was not necessary to decide this case, which involves a "fixed period of time." *Id.* at 18 n.7, 20.

According to SCRG, however, the court held that the statutory provision could apply to circumstances that "persist over a [limitless] period of time." Pet. 8 (brackets in petition). Elsewhere in its petition, SCRG states that the court held that the circumstances could "persist over a[ny] period of time." *Id.* at 15 (brackets in petition); *see also id.* at 7 (describing the Third Circuit's standard using "regardless of the length" and "virtually boundless").

SCRG's alterations to the standard articulated by the Third Circuit are unfaithful to what that court held—it never stated that there were no limits, just that the clause could encompass something more than what happens in a specific instant. It left more precise line-drawing for another day. Pet. App. 18 n.7.

SCRG also misrepresents the allegations in Respondents' complaint, conflating them with claims in other cases. Throughout its petition, SCRG states that the Third Circuit held that a forty-year period involving nine different owners of the refinery, different manufacturing techniques, and two "intervening events" constituted a single event under § 1332(d)(11)(B)(ii)(I). Pet. i, 4-7 & 7 n.4, 18. But that is simply incorrect.

More modestly, the Third Circuit held that Respondents' allegations that SCRG caused injury by failing to do anything to prevent the dispersal of toxic particles from its inoperational refinery site during the period of its ownership, are claims that arise from a local "event or occurrence." Pet. App. 20. In other words, according to the Third Circuit, there is one owner, one site, and one alleged wrong—inaction—because that is what Respondents pled. And instead of there being multiple manufacturing techniques, there was no manufacturing going on at all. *Id.* at 21.

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. The only contrary authority SCRG cites is its own briefing below, and even that briefing admits that SCRG has been sued only for conduct occurring after its purchase. Pet. 4 n.2, 5.

SCRG also takes issue with the Third Circuit for describing an event that includes "two intervening" events, but that criticism is a byproduct of its incorrect description of the period at issue. Pet. 4, 7 n.4, 18. It is true that a district court found that a 1998 hurricane that damaged the refinery was a local event falling under § 1332(d)(11)(B)(ii)(I) and that there was extensive litigation between SCRG and the previous owner, but both of those "events" are outside the scope of the event alleged here—SCRG's post-purchase inaction. *See id.* at 7 n.4; *see also Abednego v. Alcoa, Inc.*, No. 10-009, 2011 WL 941569 (D.V.I. Mar. 17, 2011) (hurricane struck in 1998).

B. The Third Circuit Correctly Interpreted and Applied § 1332(d)(11)(B)(ii)(I), and Resort to Legislative History Was Unnecessary.

The Third Circuit's actual holding in his case is correct as a matter of law and as a matter of common sense.

To begin, in holding that "event" and "occurrence" are to be given their ordinary meanings, the Third Circuit's decision follows this Court's precedents. As this Court has consistently explained, when a statute

does not define a term, as CAFA does not define "event" or "occurrence," courts "give them their ordinary meaning." *Asgrow Seed*, 513 U.S. at 187. *See also Taniguchi v. Kan Pacific Saipan, Ltd.*, ___ U.S. ___, 132 S. Ct. 1997, 2002 (2012); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

That an "event" or "occurrence" often refers to something that happens over time, not just to something that happens at a particular instant aligns with common usage of those terms. Certainly, an instantaneous explosion is an event, but so are a four-hour party, a three-day convention, a month-long bicycle stage race, and a four-year civil war. *See* Pet. App. 15. In other words, that an "event is alleged to have been ongoing through time does not thereby 'pluralize' the event or occurrence." *Allen*, 2010 WL 8752873, at *10. To adopt SCRG's crabbed reading of the terms, then, would have been contrary to the ordinary meaning of "event" and "occurrence" and to how this Court interprets statutory terms.

Further, contrary to SCRG's argument, this straightforward, common-sense reading of CAFA is consistent with, not contrary to, the admonition in *Standard Fire Insurance Co. v. Knowles* that CAFA jurisdictional rules ought to be simple. ___ U.S. ___, 133 S. Ct. 1345, 1350 (2013); *see* Pet. 19. If Congress wanted "event" or "occurrence" to have anything other than their basic, ordinary meaning, it could have said so in the statute. Pet. App. 19 n.9.

The Third Circuit's application of this standard to the facts alleged by Respondents was also correct. Respondents allege that SCRG failed to take action to abate the continuous release of toxins from the inoperational refinery site. As the Third Circuit

recognized, there is no sensible way to break that failure down into discrete events or occurrences, and SCRG does not attempt to do so. *Id.* at 21. If the issue is that the event alleged here lasted too long to be an event, how short of a period of time does the release of toxins have to last to qualify? One month? One year? One day? 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 arbitrary.[3]

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. Asbestos fibers and red dust particles are being released from the same inoperational facility over the same period of time due to the same inaction on the part of SCRG. Pet. App. 21. The conclusion might be different if SCRG were engaging in two separate industrial processes, one that emitted red dust and one that emitted

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[3] The Third Circuit's articulation of the meaning of "event or occurrence" and its application to the allegations in the complaint are also consistent with the manner in which "occurrence" is used in liability insurance contracts, *see* Pet. App. 132-33, and with the standard for claim preclusion, *see id.* at 130-31, both of which are appropriate analogies for CAFA jurisdiction.

asbestos. But that is not the case here as SCRG has never operated the refinery. *See id.* at 21 n.10.

The Third Circuit'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. 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 § 1332(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.

Because Congress did not indicate that anything other than the ordinary meanings of "event" or "occurrence" were to be used and because the conclusion that this cases belong is state court is consistent with the structure of the statute, it was appropriate for the Third Circuit to decline to discuss the legislative history. *See* Pet. App. 18. This is particularly true with regard to the legislative history argument articulated by SCRG in its petition, an argument based on what Congress did *not* pass. Pet. 12-13. In any event, the legislative history—which explains that § 1332(d)(11)(B)(ii)(I) was intended to keep environmental torts in state court when the event and the injuries were truly local—helps Respondents, not SCRG. S.Rep. No. 109-14, at 47 (2005).

* * *

The Third Circuit's decision below is consistent with this Court's holdings and consistent with the language and structure of CAFA. SCRG presents no compelling arguments to contrary, relying instead on misrepresentations and exaggerations of the court's holding below.

III. Review of SCRG's Second Question Presented Is Unwarranted Because It Was Not Decided by the Court Below.

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.[4]

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[4] Which party bears the burden depends on upon whether § 1332(d)(11)(B)(ii)(I) is viewed as part of the definition of "mass action" or whether it is an exception to the removability of an action that is otherwise a "mass action." If it is the former, the party seeking removal bears the burden, and that is what Re-

(*Footnote continued*)

Second, the court below properly decided the question on the basis of the facts alleged in Respondents' complaint, acknowledging throughout its opinion that the factual bases for its decision were just that: allegations. Pet. App. 5, 11 n.5, 20-22. The Third Circuit did not purport it "find" any facts and there is no relevant evidentiary record on which it could do so. *See* Pet. 21. Indeed, SCRG did not submit *any* evidence to the district court relevant to the § 1332(d)(11)(B)(ii)(I) question, nor did it seek discovery. In other words, SCRG never created any dispute of fact that would have required the Third Circuit to look past the complaint.

Moreover, relying on the allegations in the complaint is exactly what the statute requires. Section 1332(d)(11)(B)(ii)(I) asks whether "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" (emphasis added). Resolving that question is precisely what the Third Circuit did here, and SCRG's burden-shifting argument unnecessarily complicates the statute's straightforward language.

CONCLUSION

The petition for writ of certiorari should be denied.

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spondents argued below, relying on *Allen*. Pet. App. 128 n.3. SCRG contends that it is an exception and that, therefore, the party opposing removal bears the burden. *Id.* at 112-15.

Respectfully submitted,

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IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

Abraham, Eleanor; [Names Of Additional Plaintiffs Omitted] Plaintiffs, v. St. Croix Renaissance Group LLLP, Defendant.	CIVIL NO. 12-CV-0011 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED (Filed Aug. 7, 2012)

FIRST AMENDED COMPLAINT

COME NOW, the Plaintiffs by and through their undersigned counsel, and file their First Amended Complaint and respectfully represent to the Court as follows:

1. This Court has jurisdiction pursuant to 4 V.I.C Section 76, *et seq*.

2. Abraham, Eleanor is a citizen of St. Croix, United States Virgin Islands.

[Paragraphs 3-459, Which List And Describe Additional Plaintiffs, Omitted.]

460. At all times relevant to this action, and within the time period of 2002 to the present, all Plaintiffs were residents of or guests staying in close proximity to the Defendant's alumina refinery on the south shore of St. Croix.

FACTUAL BACKGROUND

461. For about thirty years, an alumina refinery located near thousands of homes on the south shore of the island of St. Croix was owned and/or operated by a number of entities. The facility refined a red ore called bauxite into alumina, creating enormous mounds of the by-product, bauxite residue, red mud, or red dust.

462. St. Croix Renaissance Group LLLP ("SCRG") upon information is a Limited Liability Limited Partnership and is deemed to be a citizen of Delaware, Florida, Massachusetts, Puerto Rico and St. Croix, U.S. Virgin Islands. In or about 2002, Alcoa World Alumina, LLC ("ALCOA") and St. Croix Alumina, LLC ("SCA") entered into a Purchase and Sale Agreement ("PSA") for the refinery with Brownfields Energy Recovery Corporation ("BRC") and Energy Answers Corporation of Puerto Rico ("EAPR") and BRC and EAPR immediately transferred their interests in the refinery to St. Croix Renaissance Group ("SCRG").

463. SCRG has owned and/or operated the refinery from 2002 to the present.

464. Alumina is extracted from a naturally-occurring ore called bauxite. Bauxite is red in color. The Material Safety Data Sheets ("MSDS") for bauxite warn that it can cause irritation of the eyes, skin and upper respiratory tract.

465. The byproduct of the alumina refining process used at the St. Croix refinery is a red substance called bauxite residue, or "red mud" or "red

dust," which is indistinguishable in color and texture from bauxite. Red mud causes damages to real and personal property.

466. Red mud causes significant physical injuries. The MSDS for red mud states that it can cause "severe irritation and burns [of eyes], especially when wet," "can cause severe irritation [of skin], especially when wet," "can cause irritation of the upper respiratory tract," and that is a "cancer hazard." The MSDS also advises against skin and eye exposure to red mud.

467. From the beginning of the alumina refinery's operations, hazardous materials, including chlorine, fluoride, TDS, aluminum, arsenic, molybdenum, and selenium, as well as coal dust and other particulates were buried in the red mud, and the red mud was stored outdoors in open piles that at times were as high as approximately 120 feet and covered up to 190 acres of land. The piles of red mud erode into the environment if they are not secured by vegetation or retaining walls. For years, the uncovered piles often emitted fugitive dust when winds blew across the refinery and on the frequent occasions when bulldozers ran over them.

468. In addition, the refinery contained asbestos and other particulates and hazardous substances in various conditions that were never removed from the premises, in violation of law.

469. The bauxite was stored in a steel A-frame structure with plastic sheets hung down the sides, called the bauxite storage shed. In 1995, Hurricane Marilyn hit St. Croix and damaged

the roof of the bauxite storage shed, which allowed the dusty bauxite to be blown out of the shed.

470. Previous owners ALCOA and St. Croix Alumina added red dust, coal dust and other particulates to the materials left behind by Virgin Islands Alumina Company, Glencore, Ltd., Glencore International AG, and Century Aluminum Company, the former owners and/or operators of the refinery, and continued to stack and store them in huge uncovered piles.

471. When SCRG purchased the refinery it had knowledge of the potential for red mud releases. It was aware of the loose bauxite and piles of red mud and knew that those substances had the propensity for particulate dispersion when exposed to wind and that the refinery was in close proximity to thousands of residential dwellings. Indeed, all of the Plaintiffs lived or were staying or still live in close proximity to the dangerous dispersion of the red dust particulates. SCRG knew that every time there was a strong wind the toxic substances in the piles would be dispersed into the air, where they were inhaled by Plaintiffs, deposited onto Plaintiffs' persons and real and personal properties, and deposited into the cisterns that are the primary source of potable water for many Plaintiffs. This dispersion of toxic materials occurred continuously from the same source, the red mud piles at the alumina refinery, and SCRG, owner of the refinery from 2002, did nothing to abate it, and instead, allowed the series of continuous transactions to occur like an ongoing chemical spill.

Each Plaintiff's exposure occurred out of the same dispersions of toxic materials including the coal dust, which is buried in the red mud, and which was stored outdoors.

472. Despite that knowledge SCRG failed to take proper measures to control those emissions ever since it took control of the refinery from 2002 to the present.

473. In addition, SCRG took actions related to the red mud piles that increased the disbursement of the toxic substances into Plaintiffs' properties and further resulted in Plaintiffs' additional exposure to those toxic substances.

474. Red mud contains caustic soda, crystalline silica, iron oxide, titanium dioxide, and other toxic substances that make it a health risk to Plaintiffs and exposes Plaintiffs to toxic injuries.

475. SCRG discovered that ALCOA had not abated the asbestos in the property on or about 2006 when it was informed by DPNR.

476. SCRG attempted to conceal the fact it had friable asbestos in the plant and left it there for years.

477. SCRG knew that friable asbestos was being blown into Plaintiffs' homes and being inhaled by Plaintiffs but failed to disclose its knowledge or warn Plaintiffs.

478. During its operation and/or ownership of the alumina refinery, SCRG failed to remove the asbestos from the refinery for years and upon information asbestos remains in the property.

479. Upon information the asbestos has been friable and in an extremely dangerous condition for at least 10 years but Plaintiffs had no way of knowing or discovering that. In particular, Defendant concealed the existence of the friable asbestos from Plaintiffs until 2010, when DPNR produced documents, indicating the presence of asbestos in discovery in the *Bennington v. SCRG* matter indicating that unencapsulated asbestos fibers were permitted to hang and blow about freely.

480. Upon information SCRG hid the fact that it had friable asbestos not only from the Plaintiffs but also from Department of Natural Resources (DPNR) and Environmental Protection Agency (EPA) and in fact, made false reports concerning the same.

481. SCRG has done nothing to remove that asbestos to the present.

482. As a result of Defendant's conduct, Plaintiffs suffered and continue to suffer physical injuries, medical expenses, damage 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, and a reasonable fear of contracting illness in the future, all of which are expected to continue into the foreseeable future.

483. To this date, Defendant is continuing to expose Plaintiffs to red dust, bauxite, asbestos and other particulates and hazardous substances. Defendants' conduct is also continuing to

prevent Plaintiffs from freely enjoying their properties.

COUNT I: Abnormally Dangerous Condition

484. Plaintiffs repeat and re-allege each allegation of Paragraph 1-483 as if set forth herein verbatim.

485. The actions of the Defendant constitute maintaining an abnormally dangerous condition.

486. The St. Croix alumina refinery is located in a known hurricane zone at the head of the Kraus Lagoon Channel at Port Alucroix, which leads to the Caribbean Sea. The natural resources of the Virgin Islands are particularly sensitive and precious.

487. Thousands of residential dwellings are located in close proximity to the refinery and all of the Plaintiffs lived or stayed at or still live in close proximity to the refinery and certainly within range of the dispersion of the toxic materials from the refinery.

488. Defendant's use, storage, disposal and failure to remediate the bauxite, red dust and/or red mud, asbestos, coal dust, and other particulates and hazardous materials at the refinery is solely for Defendant's own business purposes.

489. Defendant knows and understands that there is a high risk that strong winds could blow bauxite, red mud, asbestos and other particulates and hazardous materials into Plaintiffs' neighborhoods.

490. Defendant's ongoing storage, disposal, and failure to remediate the bauxite, red mud, asbestos, and other particulates and hazardous materials presented and continues to present a high risk of great harm to Plaintiffs' health, chattel, and properties. Bauxite and red mud can irritate the skin, respiratory tract, and eyes and can permanently stain, clog, and otherwise damage property and objects. Friable asbestos is also a known carcinogen that can cause a variety of respiratory illnesses.

491. Defendant's ongoing use, storage, disposal and failure to remediate bauxite, red mud, asbestos and other particulates and hazardous materials at the alumina refinery caused and continue to cause serious harm to Plaintiffs' persons, chattel, and properties. As a result, the Plaintiffs suffered damages as alleged herein.

COUNT II: Public Nuisance

492. Plaintiffs repeat and re-allege each allegation of Paragraph 1-491 as if set forth herein verbatim.

493. The actions of Defendant constitute a public nuisance.

494. Specifically, the ongoing release of harmful dusts, including bauxite, red mud, coal dust, asbestos, and other particulates and hazardous materials, from the alumina refinery unreasonably threatens and interferes with the public rights to safety, health, peace, comfort, and the enjoyment of private land and public natural resources.

495. The actions of Defendant violated the statutes of the Virgin Islands (including, but not limited to, 12 V.I.R. & R. § 204-20(d) & (e), §§ 204-25(a)(2) & (3), § 20-425(c), and § 204-27(a)) and constitute nuisance *per se.*

496. Defendant knows or has reason to know that its conduct has a significant effect on the public rights.

497. Plaintiffs are entitled to damages as a result, thereof.

498. The Plaintiffs are further entitled to an injunction requiring Defendant to desist all activities that allow the release of pollutants, further requiring Defendant to remove the piles of "red dust", coal dust and other particulates and hazardous materials, to remove all such pollutants, "red dust", coal dust and other particulates and hazardous materials including asbestos from the island of St. Croix, and to refrain from allowing said substances from accumulating again on St. Croix.

COUNT III: Private Nuisance

499. Plaintiffs repeat and re-allege each allegation of Paragraph 1-498 as if set forth herein verbatim.

500. Defendant's actions constitute a private nuisance in violation of 28 V.I.C. § 331 and Virgin Islands common law against each Plaintiff as they all lived within close proximity to the refinery and were subjected to the dangerous ongoing emissions.

501. Defendant's recurring releases of massive quantities of bauxite, red mud, asbestos, and other particulates and hazardous substances have stained, clogged, and otherwise significantly damaged and/or destroyed Plaintiffs' homes and yards, and the damages and destruction continue to date.

502. Defendant's recurring releases of massive quantities of bauxite, red mud, asbestos, and other particulates and hazardous substances have exposed and continue to expose Plaintiffs' bodies to toxic and/or irritating dusts.

503. By so doing, Defendant has wrongfully and unreasonably interfered with Plaintiffs' private use and enjoyment of their homes and properties. As a result, Plaintiffs have been damaged, and continue to be damaged, as alleged, herein.

504. Pursuant to 28 V.I.C. § 331, in addition to damages, Plaintiffs are entitled to a warrant to abate the nuisance and/or an injunction to prevent the continuance of the nuisance.

COUNT IV: Intentional Infliction of Emotional Distress

505. Plaintiffs repeat and re-allege each allegation of Paragraph 1-504 as if set forth herein verbatim.

506. The actions of Defendant constitute the intentional infliction of emotional distress on Plaintiffs.

507. Defendant knows and understands that exposure to bauxite, red mud, asbestos, and other

particulates and hazardous substances presented and continues to present serious risks to the health and property of thousands of St. Croix residents. Defendant also understands that the emissions posed and continue to pose serious threats to the local environment and natural resources.

508. Defendant knows that wind, rain and/or flooding, and other physical disturbances could release bauxite, red mud, asbestos and other particulates and hazardous substances from the alumina refinery into Plaintiffs' neighborhoods.

509. Defendant understands that St. Croix is a hurricane-prone area and that local residents rely on cisterns as their primary source of potable water.

510. Since at least 2006, Defendant SCRG also knew that dangerous friable asbestos was present at the refinery and could, along with the red mud and related particulates and hazardous substances, be blown by winds into Plaintiffs' neighborhoods, and that it did in fact do so.

511. Despite this knowledge, Defendant has knowingly and intentionally failed to take precautions to prevent bauxite, red mud, asbestos and other particulates and hazardous substances from blowing into Plaintiffs' neighborhoods, where it did blow and was dispersed exposing each Plaintiff to the harmful emissions and toxic substances continuously.

512. After Defendant permitted Plaintiffs to be exposed to bauxite, red mud, asbestos and other

particulates and hazardous substances emissions from the alumina refinery, Defendant purposefully concealed and/or misrepresented the health risks associated with exposure to the emissions from Plaintiffs.

513. Years after learning that emissions from the alumina refinery presented high risk of serious injury to Plaintiffs and the natural resources of the Virgin Islands, Defendant continues to allow bauxite, red mud, asbestos and other particulates and hazardous substances to blow into Plaintiffs' neighborhoods and cause significant harm to Plaintiffs' minds, bodies, and property.

514. As a result of Defendant's callous disregard for the health, safety, well-being and property of Plaintiffs, Plaintiffs have suffered damages as alleged herein, including severe emotional distress and physical ailments resulting from such distress.

COUNT V: Negligent Infliction of Emotional Distress

515. Plaintiffs repeat and re-allege each allegation of Paragraph 1-514 as if set forth herein verbatim.

516. In the alternative to intentional infliction of emotional distress, the actions of Defendant constitute the negligent infliction of emotional distress.

517. As a result, Plaintiffs have been damaged as alleged, herein.

COUNT VI: Negligence as to Defendant

518. Plaintiffs repeat and re-allege each allegation of Paragraph 1-517 as if set forth herein verbatim.

519. The actions of Defendant constitute negligence.

520. SCRG has owned and/or operated the alumina refinery from 2002 to the present.

521. SCRG has failed and continues to fail to properly store and/or secure bauxite, red mud, related particulates, hazardous substances, and asbestos on the premises.

522. SCRG knew and/or should have known that its failure to secure these dangerous materials would allow them to blow freely into Plaintiffs' neighborhoods and harm Plaintiffs and their properties.

523. SCRG's failure to properly secure, store and/or maintain the bauxite, red mud, related particulates, hazardous substances, and asbestos at the alumina refinery has allowed and continues to allow these materials to blow into the nearby areas and harm Plaintiffs and their properties.

524. As a result Plaintiffs have been damaged as alleged, herein.

COUNT VII: Punitive Damages

525. Plaintiffs repeat and re-allege each allegation of Paragraph 1-524 as if set forth herein verbatim.

526. The actions of Defendant were and are so callous and done with such extreme indifference to the rights and interests of the Plaintiffs and the

citizens of St. Croix so as to entitle Plaintiffs to an award of punitive damages.

WHEREFORE, Plaintiffs pray for damages as they may appear, compensatory and punitive, an injunction requiring that Defendant cease and desist all activities that result in pollutants being discharged and, further requiring a cleanup of all pollutants and removal of the piles of "Red Dust", coal dust and particulates and hazardous substances, costs and fees and such other relief as this Court deems fair and just.

RESPECTFULLY SUBMITTED,

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Attorneys for Plaintiffs

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