FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ATRIUM, V.I., LLC **Plaintiff,** **v.** **ATRIUM STAFFING, LLC; ATRIUM PAYROLL SERVICES, LLC; ATRIUM MANAGED SERVICES, LLC; ATRIUM STAFFING OF NEW JERSEY, LLC; ATRIUM AVIATION, LLC; ATRIUM STAFFING OF CALIFORNIA, LLC; ATRIUM STAFFING SERVICES, LTD.; and REBECCA CENNI,** **Defendants.**	**CASE NO. ST-17-CV-194**

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MEMORANDUM OPINION

Pending before the Court is Plaintiff's Motion to Conduct Jurisdictional Discovery and Defendant's Motion to Dismiss based on V.I. R. Civ. P. 12(b)(2). The Motion to Conduct Jurisdictional Discovery will be denied, and the Motion to Dismiss will be granted.

Factual and Procedural History

On April 19, 2017, Atrium V.I., LLC filed a Complaint asserting breach of contract and demanding an accounting against a defendant then identified as Atrium, LLC.[1] The Complaint alleged Atrium breached duties owed under a Management Services Agreement[2] by failing to render payments of $340,000 per month for services performed by Atrium V.I. for Atrium[3] Attached to the Complaint was a copy of the Management Services Agreement [hereafter, MSA][4] and a collection of invoices purporting to demonstrate that monthly bills of $340,000 had been sent from Atrium V.I.—not to Atrium but—to a different entity identified as Atrium Staffing, LLC, from November 2016 to February 2017.[5] The MSA provides no description of the services to be performed by Atrium V.I. for Atrium in consideration for the monthly payment. The only execution of the undated document is what appears to the Court to be a stamped signature on behalf of Atrium, LLC, reflecting the name Adrian Cenni. The Court found no indication that anyone signed the document on behalf of Atrium V.I., the entity of which Adrian Cenni is the sole member, nor Atrium Staffing, LLC.

[1] Original Compl. ¶¶ 34-43, 44-51.
[2] *Id.* ¶¶ 11-32.
[3] *Id.*
[4] *Id.* Ex. 1.
[5] *Id.* Ex. 2.

On August 17, 2017, noting that Atrium V.I. failed to provide proof of service of the Summons and Complaint on Atrium, the Court ordered Atrium V.I. to provide proof of service by August 31, 2017.[6] On August 29, 2017, Plaintiff submitted a Return of Service to the Court indicating the Complaint and Summons had been served on Atrium, LLC, at 71 5th Avenue, New York, New York 10003.[7]

On October 2, 2017, Atrium V.I. filed a Verified First Amended Complaint, which launched: (1) breach of contract, quantum meruit, unjust enrichment, promissory estoppel, equitable estoppel, and demand for accounting claims against Atrium Staffing, LLC, Atrium Payroll Services, LLC, Atrium Managed Services, LLC, Atrium Staffing of New Jersey, LLC, Atrium Aviation, LLC, Atrium Staffing of California, LLC, and Atrium Staffing Services, Ltd., as well as (2) intentional interference with prospective business relations, intentional interference with existing contractual relations, and civil extortion counts against Rebecca Cenni.[8] All claims turn on the enforceability of the MSA, purportedly binding Atrium V.I. and Atrium Staffing, as well as allegations that Rebecca tortuously interfered with the MSA's current and future execution by threatening to have Atrium Staffing withhold monthly payments to Atrium V.I. if Adrian did not give Rebecca fifty percent of Atrium V.I.'s tax benefits and proceeds.[9]

Twenty-two days later, on October 26, 2017, Atrium V.I. filed a Motion for a Temporary Restraining Order to stop Rebecca from proceeding with an arbitration filed with the American Arbitration Association in New York, New York. The motion and its attached documents reveal that Rebeca is Adrian's estranged spouse with whom Adrian shared ownership of the collection

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[6] Order, August 17, 2017.
[7] Order, Oct. 30, 2017, at 5.
[8] Pl.'s V. First Am. Compl. ¶¶ 110-184.
[9] *Id.* ¶¶ 58-67; 70-77.

of stateside, related entities named in his Verified First Amended Complaint.[10] In response to the Original Complaint, Rebecca had filed on May 12, 2017, a Demand for Arbitration and Statement of a Claim with the American Arbitration Association. From the Demand, attached to the Motion for a Temporary Restraining Order, the Court learned: (1) the Operating Agreements of the stateside entities named as defendants in the Verified First Amended Complaint provided that any disputes between the members of the LLCs would be "submitted to and finally resolved by" binding arbitration with the American Arbitration Association; (2) under the same Operating Agreements, Rebecca's approval and consent was required for a contract to be enforceable against these entities; (3) per a document entitled "Written Consent of the Majority Member of the Atrium Companies," Rebecca's approval was required for the MSA to become enforceable and valid because she was Atrium Staffing's CEO and because Adrian was purporting to contract with an entity in which he had a material interest (i.e., Atrium V.I.); and (4) the Demand asked the arbitrator to find (a) that Adrian lacked authority to enter into the MSA on behalf of Atrium Staffing, (b) that the MSA and the monthly bills sent from Atrium V.I. to Atrium Staffing were "null and void," and (c) that Adrian "lacked authority to enter any agreement with any other entity in which he has a direct or indirect ownership interest."[11] The Court issued an Order on October 30, 2017, that denied the Motion for a Temporary Restraining Order and ordered Atrium V.I. to serve Rebecca and the stateside entities with copies of the Verified First Amended Complaint, the Motion requesting an *ex parte* Temporary Restraining Order, and the Court's decision.[12] On November 21, 2017, nearly one month after the Verified First Amended

[10] DiRuzzo Decl., Oct. 18, 2017, ¶ 3, at 1.
[11] Pl.'s Mot. TRO Ex. A, at 1-2.
[12] Order Denying Emergency Motion for Temporary Restraining Order, at 9.

Complaint was received by the Court, the Court received certifications from a New York process server that service of the Verified First Amended Complaint on Rebecca and on the stateside entities had been achieved.[13]

On November 21, 2017, Atrium V.I. also filed a Motion for Preliminary Injunction,[14] continuing its efforts to halt the New York arbitration proceedings initiated by Rebecca under the Operating Agreements governing the stateside entities. The Court issued an Opinion and Order on December 4, 2017,[15] that observed that the record lacked evidence of Rebecca or the stateside entities having received notice that Atrium V.I. had sought either an Emergency Temporary Restraining Order or a Preliminary Injunction.[16] Accordingly, given the lack of proof of service and that the motion requesting a preliminary injunction was "devoid of independently supported factual assertions [which would] permit the Court to conclude that immediate and irreparable harm [would] occur in the absence of notice,"[17] the Court ordered Atrium V.I. to provide proof of service on Rebecca and on the stateside entities.[18]

On January 16, 2018, Rebecca and the stateside entities filed Answers to the Verified First Amended Complaint. Each parties' Answers listed lack of personal jurisdiction as an affirmative defense.[19] On the heels of a February 14, 2018, Case Management Order mandating discovery scheduling, counsel for Rebecca filed a Motion to Stay[20] this lawsuit in tandem with a

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[13] Pl.'s Notice of Filing, Nov. 21, 2017.
[14] Pl.'s Mot. Prelim. Inj.
[15] Order, Dec. 4, 2017.
[16] *Id.*, at 2-3.
[17] *Id.*, at 3.
[18] *Id.*, at 4.
[19] Def. Rebecca Cenni's Answer to Pl.'s V. First Am. Compl. ¶ 142; Defs. Atrium Staffing, LLC, Atrium Payroll Services, LLC, Atrium Managed Services, LLC, Atrium Staffing of New Jersey, LLC, Atrium Aviation, LLC, Atrium Staffing of California, LLC, and Atrium Staffing Services Ltd.'s Answer to Pl.'s V. First Am. Compl. ¶ 167.
[20] Def. Rebecca Cenni's Mot. Stay this Case and Mem. of Law in Supp.

Motion to Dismiss for lack of personal jurisdiction.[21] On the same day, counsel for the stateside entities joined Rebecca's Motion to Stay,[22] and on April 5, 2018, the Court granted a stay.[23] After Atrium V.I. filed a Response in Opposition to Rebecca Cenni's Motion to Dismiss,[24] Rebecca filed a reply on April 6, 2018.[25]

Atrium V.I.'s Request for Jurisdictional Discovery is Denied

Atrium V.I. requests that it be allowed to conduct jurisdictional discovery to find further contacts connecting Rebecca to the Virgin Islands.

Standard of Review

"In any action, the plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court *in personum* jurisdiction. Where the plaintiff's claim is not clearly frivolous, the . . . court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden."[26] "[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."[27] "If a plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite contacts between [the parties] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained."[28] Once the plaintiff has met "this required

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[21] Def. Rebecca Cenni's Mot. Dismiss for Lack of Personal Jurisdiction.
[22] Defs. Atrium Staffing, LLC, Atrium Payroll Services, LLC, Atrium Managed Services, LLC, Atrium Staffing of New Jersey, LLC, Atrium Aviation, LLC, Atrium Staffing of California, LLC, Atrium Staffing Services Ltd.'s Joinder in Rebecca Cenni's Motion to Stay this Case.
[23] Order Staying Scheduling and Disc., April 5, 2018.
[24] Pl.'s Resp. in Opp'n to Rebecca Cenni's Motion to Dismiss.
[25] Def. Rebecca Cenni's Reply Mem. of Law in Further Supp. of Motion to Dismiss.
[26] *Compagnie des Bauxites de Guinee v. l'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983).
[27] *Rocke v. Pebble Beach Co.*, 541 F. App'x 208, 212 (3d Cir. 2013).
[28] *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003).

threshold, . . . courts within [the Third] Circuit have sustained the right to conduct discovery before" dismissing the action for lack of personal jurisdiction.[29]

The Third Circuit "has found jurisdictional discovery particularly appropriate where a defendant is a corporation."[30] "[T]he presumption in favor of discovery is reduced when the defendant is an individual."[31] Further, "jurisdictional discovery is not available merely because the plaintiff requests it. . . . A plaintiff may not . . . undertake a fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery."[32]

Here, Atrium V.I. fails to make factual allegations suggesting "with reasonable particularity" that Rebecca has necessary contacts with the Virgin Islands, and its submission does not establish that it is entitled to conduct jurisdictional discovery. While Atrium V.I. is a business entity and Rebecca is at the helm of a group of LLCs against whom Atrium V.I. asserts breach of contract and accounting claims, the jurisdictional discovery pertains to Rebecca—the individual. Atrium V.I. asserted in its Verified First Amended Complaint that Rebecca "is a resident of the state of New York."[33] Four months later in its responses to the present motions, Atrium V.I. presents only: (1) a quitclaim deed in which Rebecca gives up her property rights in Virgin Islands real property approximately nine months to one and one-half years before the alleged torts occur,[34] (2) Virgin Islands Water and Power Authority bills in Rebecca's and Adrian's names reflecting electricity usage at that property, and (3) a text message Atrium V.I.

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[29] *Id.*
[30] *Rocke,* 541 F. App'x at 212 (3d Cir. 2013).
[31] *Fatouros v. Lambrakis*, 627 F. App'x 84, 88 (3d Cir. 2015).
[32] *Malik v. Cabot Oil & Gas Corp.*, 710 F. App'x 561, 565 (3d Cir. 2017).
[33] Pl.'s V. First Am. Compl. ¶ 25.
[34] Atrium V.I.'s latest complaint gives neither a precise date nor an approximate window of time during which it alleges Rebecca made her tortious phone call to Adrian. *Id.* ¶¶ 70-79, 161-184. But Adrian submitted a declaration to the Court, which states that Rebecca made her call "in May 2016." Adrian Cenni Declaration ¶6.

asserts shows Rebecca claiming a "usage right" to vacation at the real property in which she relinquished all rights in the quitclaim deed. All three contacts raised hinge on real property interests Rebecca surrendered to Adrian before the purported MSA was executed and before the alleged torts occurred. With no more facts than these asserted, Atrium V.I. does not "suggest with 'reasonable particularity' [that] the possible existence of the requisite contacts between" [Rebecca] and the Virgin Islands would be found with additional discovery.

Compounding this dearth of allegations is the fact that Rebecca is Adrian's ex-wife. Atrium V.I.'s assertion that the jurisdictionally related information Atrium V.I. seeks is in the sole possession of Rebecca does not align with the facts and events leading to this litigation. As Rebecca's ex-husband and the owner of the subject Virgin Islands real property, Atrium V.I.'s sole member (i.e., Adrian) is in a unique position to know contacts Rebecca had or currently has with the Virgin Islands. In its Verified First Amended Complaint, Atrium V.I. details exactly how the group of LLCs that Adrian owns with his former wife, Rebecca, are interrelated, specifying that the various LLCs share costs, office space, and back-office functions.[35] Because of Adrian's unique position, Atrium V.I. was able to provide these details in its First Amended Complaint. Because of Adrian's unique position, Atrium V.I. should be able to provide additional information in its motion which would enable the Court to grant its Motion for Jurisdictional Discovery. Yet, Atrium V.I. does not identify any specific, additional information which could be gleaned from discovery, which directly pertains to Rebecca, and to which it has not been privy in the past. Because Atrium V.I.'s sole member is not "a total stranger"[36] to

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[35] Pl.'s First Am. Compl. ¶¶ 29-38.

[36] *Rocke*, 541 F. App'x at 213 ("A plaintiff who is a total stranger to a corporation should not be required, unless he has been undiligent, to try such an issue on affidavits without the benefit of full discovery.")

Rebecca nor the group of LLCs she heads and due to the lack of demonstrable need, "no imbalance in access to information exists here"[37] to justify jurisdictional discovery.[38] The motion is denied.

Rebecca Cenni Did Not Waive her Defense of Lack of Personal Jurisdiction

Relying on *In re Najawicz*,[39] Atrium V.I. asserts that Rebecca consented to the authority of Virgin Islands courts and waived her right to assert a defense based on a lack of personal jurisdiction when her counsel filed a Notice of Appearance and a Motion for Extension of Time. Citing *W. Indian Co. Ltd. v. New Image Found. Corp.*,[40] Rebecca contends that her counsel's November 15, 2017, Notice of Appearance and November 21, 2017, Motion for Extension of Time to Answer, Plead, or Otherwise Respond to the Plaintiff's First Amended Complaint did not amount to consent to the Court's jurisdiction nor to a waiver of her ability to assert a V.I. R. Civ. P. 12(b)(2) defense because the initial November filings did not show Rebecca "acquiesce[d] to the jurisdiction of the Court with an intent to defend against the civil action."[41] Further, Rebecca highlights that her counsel filed a January 16, 2018, Answer listing the lack of personal jurisdiction as a possible defense and a March 5, 2018, Motion to Dismiss for lack of personal jurisdiction.

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[37] *Id.*

[38] *See id.*, 541 Fed. App'x at 212-13 ("Discovery is necessary . . . since the business-related information [the plaintiffs] seek is in the sole possession of [the corporate defendant they are suing]. . . . Because such an imbalance in access to information exists, . . . the Rockes should have the opportunity to conduct jurisdictional discovery."

[39] 52 V.I. 311 (V.I. 2009)

[40] Case No. ST-15-CV-25, 2016 WL 4248875, at *3 (V.I. Super. Ct. July 22, 2016).

[41] Def. Rebecca Cenni's Reply Mem. of Law in Further Supp. of Motion to Dismiss, at 2 (citing *W. Indian Co., Ltd. v. New Image Found. Corp.*, Case No. ST-15-CV-25, 2016 WL 4248875, at *3 (V.I. Super. Ct. July 22, 2016)).

Atrium V.I.'s and Rebecca's arguments—and, more importantly, legal authorities—speak around but not directly to the two questions presented to the Court by these facts. First, do Virgin Islands courts adhere to the requirement of older civil procedure rules regimes that recognizes a distinction between special and general appearances when 5 V.I.C. § 115 specifies that only a "voluntary appearance" serves as the "equivalent to personal service of the summons upon" the defendant? Second, if the answer to this question is in the affirmative, how, then, does this distinction interact with the pleading of V.I. R. Civ. P. 12(b)(2)-(5) defenses (i.e. lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process) in accordance with the timing prescribed by Rule 12(h)? Because the Virgin Islands Rules of Civil Procedure fail to include the term "special appearance," because the Virgin Islands Code expressly states only a "voluntary appearance" amounts to the equivalent of service of process (which grants personal jurisdiction to a presiding court), and because of case law from federal courts and from state courts whose civil procedure rules regimes are based on the federal rules, which also do not recognize a distinction between general and special appearances as they relate to waiver of Rule 12(b)(2)-(5) defenses, the Court concludes that a defendant need not file a special appearance when asserting V.I. R. Civ. P. 12(b)(2)-(5) defenses before Virgin Islands tribunals. Concomitantly, a defendant does not waive the ability to assert Rule 12(b)(2)-(5) defenses, which must be asserted in accordance with Rule 12(h), upon counsel's filing a written appearance before filing a Rule 12(b) motion to dismiss or answer.[42] However, if a party,

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[42] This opinion does not address whether special appearances and general appearances are appropriately distinguished and used in situations outside of assertion of the defenses listed in V.I. R. Civ. P. 12(b)(2)-(5). The Court limits this opinion to the interplay between the assertion of Rule 12(b)(2)-(5) defenses and the filing of appearances before the filing of a motion to dismiss or an answer. *See Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 576 (2015) (cautioning that "uncritical application of the rules of another court to a proceeding in the Superior Court is wholly inconsistent with [the Virgin Islands Supreme Court's] admonition that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should

mindful of this older distinction, enters a "special appearance" or a "general appearance" before filing a motion to dismiss or answer asserting a Rule 12(b)(2)-(5) defense, no penalty will ensue because these labels trigger no legal repercussion under the present rules.

If the Court obtains jurisdiction over a defendant, then, first, "the defendant [must have been] given adequate notice of the suit."[43] Second, the defendant must have sufficient contacts with the Virgin Islands such that his liberty interests, protected by the Due Process clause, are not violated.[44] Adequate notice, and thus personal jurisdiction, is achieved via valid service of process in most instances. In the alternative, a defendant's *voluntary* appearance before the Virgin Islands Superior Court also serves to establish the Court's jurisdiction over the defendant and the action in lieu of a valid service of process. [45]

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represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other applicable procedure") (quotation marks, brackets, and citations omitted).

[43] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty[,] or property by adjudication be *preceded by notice and opportunity for hearing* appropriate to the nature of the case.") (emphasis added). *Accord Employees' Retirement System of Gov't of Virgin Islands v. Armstrong*, 23 V.I. 35, 37 (V.I. Terr. Ct. Aug. 27, 1987).

[44] *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945) ("But now that *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to judgment *in personum*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'. . . [The Due Process] Clause does not contemplate that a state may make binding a judgment *in personum* against an individual or corporate defendant with which the state has no contacts, ties, or relations."). *See also, World-Wide Volkswagon, Corp., v. Woodson*, 444 U.S. 286, 291-93 (1980) (reaffirming that the "concept of minimum contacts . . . performs two related, but distinguishable functions": (1) protecting defendants from having to litigate in distant forum states, "typically described in terms of 'reasonableness' or 'fairness' . . . such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice"'" and (2) ensuring state courts "do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system").

[45] *See Joseph v. Daily News Publishing Co., Inc*, 57 V.I. 566, 580, n.4 (V.I. 2012) (noting in dicta, in a case which reviewed a granting of summary judgment, that "service of process–unless waived by a general appearance–is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant" and then citing, for legal authority for that assertion, 5 V.I.C. § 115 and its language establishing that a "*voluntary* appearance of the defendant shall be equivalent to personal service of the summons upon him. . . ."). *Compare* N.C. Gen. Stat. § 1-75.6 ("*A court of this State having* jurisdiction of the subject matter and *grounds for personal jurisdiction* as provided in G.S. 1-75.4 *may exercise personal jurisdiction over a defendant by service of process* in accordance with the provisions of Rule 4(j) or Rule 4(j)(1) of the Rules of Civil Procedure.") *with* N.C. Gen. Stat. § 1-75.7 ("*A court of this State having jurisdiction of the subject matter may, without serving a summons* upon him, *exercise*

Before the adoption of the new Federal Rules of Civil Procedure, a defendant's entry of a general appearance before a court waived any and all objections to that court's exercise of personal jurisdiction.[46] Under those regimes, it was possible for a defendant to involuntarily or inadvertently waive jurisdictionally based objections because counsel failed to comply with a jurisdiction's procedures for filing a special appearance with objections to the court's exercise of jurisdiction.[47]

After the new Federal Rules of Civil Procedure were adopted, however, two sets of civil procedure rules regimes developed at the federal, state, and territorial levels through which a defendant may challenge a court's jurisdiction.[48] In the first set of jurisdictions, which use the Federal Rules of Civil Procedure or use civil procedure rules derived from the federal rules, objections to a court's exercise of personal jurisdiction must be made under Rule 12(b)(2) (or its equivalent) in motions to dismiss and may be made in conjunction with any other objections based on the claim's merits allowed by Rule 12(b).[49] If no Rule 12(b)(2) motion to dismiss is made objecting to the exercise of personal jurisdiction, then objections to the court's exercise of personal jurisdiction may be launched in the answer or responsive pleading along with any other objections allowed by Rule 12(b).[50] In these jurisdictions, a defendant waives his ability to assert a jurisdictionally based objection when he fails to make a motion to dismiss contesting the court's personal jurisdiction during motions practice or, in the event no pre-answer motions are

jurisdiction in an action *over a person*: (1) *Who makes a general appearance* in an action provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance.").

[46] Jeffery J. Kanne, Note, *The Special Appearance Rule in Iowa: Last Century's Innovation Becomes a Present Day Anomaly*, 70 IOWA L. REV. 501, 503-04 (1985).

[47] *Id.* at 501-02.

[48] *Id.* at 502-03, 511-12.

[49] *See* Fed. R. Civ. P. 12(b). *See also* V.I. R. Civ. P. 12(b).

[50] *See* Fed. R. Civ. P. 12(b). *See also* V.I. R. Civ. P. 12(b).

made, when the defendant fails to reserve the affirmative defense of lack of personal jurisdiction in his answer or first responsive pleading.[51] Because Rule 12(b)(2) expressly states that a defense based on a lack of personal jurisdiction must be made in a motion to dismiss or a responsive pleading, courts in these jurisdictions have come to recognize that (1) the "technical distinctions between general and special appearances have been abolished [by the rule's non-recognition of those latter terms] and . . . (2) no end is accomplished by retaining [them]."[52] When explaining why certain jurisdictions no longer recognize the distinction between special and general appearances, scholars point out that the "overall goal of [the new rules aims to] . . . decide[] [controversies] on their merits . . . without unreasonable delay . . . and inefficiency,"[53] and especially "the delay which results from the filing of pleading after pleading in the way of dilatory defenses . . . that do little more than lengthen the proceedings."[54] The "net effect of these changes has been to reduce the number of pretrial motions, thereby promoting more efficient litigation of preliminary matters . . . [and a reduction in] the number of claims dismissed on grounds unrelated to the merits."[55]

In the second set of jurisdictions, which typically do *not* derive their civil procedure rules from the Federal Rules of Civil Procedure but retain their own state-specific civil procedure rules and jurisprudence, objections to a court's exercise of personal jurisdiction must be made by filing a "special appearance"—an appearance registered with the court solely for challenging the court's exercise of personal jurisdiction over the defendant.[56] In these jurisdictions, a defendant

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[51] *See* Fed. R. Civ. P. 12(b). *See also* V.I. R. Civ. P. 12(b).
[52] 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1344 (3d ed. 2004).
[53] Kanne *supra* note 46, at 511.
[54] *Id.* at 512.
[55] *Id.*
[56] *Harkness v. Hyde*, 98 U.S. 476, 479 (1878) ("The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the

waives his ability to launch a jurisdictionally based objection if the defendant raises any challenge or objection that addresses issues other than the court's jurisdiction before entering a special appearance and filing a motion to contest personal jurisdiction.[57]

In the Virgin Islands, 5 V.I.C. § 115 provides: "From the time of the service of the summons or the allowance of a provisional remedy the court shall be deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A *voluntary* appearance of the defendant shall be equivalent to personal service of the summons upon him."[58] Research within Virgin Islands jurisprudence in search of a more precise definition and application of the term "voluntary appearance" and distinctions between "special" or "general" appearances, within the context of V.I. R. Civ. P. 12(b) defenses, has produced little fruit.[59] The closest Virgin Islands

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action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.").

[57] Kanne, *supra* note 46, at 512. *See also*, *supra* note 45.

[58] 5 V.I.C. § 115 (1921) (emphasis added).

[59] For example, the following cases only mention (1) the term "general appearance," often quoting either *In re Najawicz*, 52 V.I. 311 (V.I. 2009) or 5 V.I.C. § 115, and (2) how a "general appearance" can be used to confer personal jurisdiction to the Superior Court, with only one case even addressing "special appearance" and its definition. *E.g., In re: Petition for the Expungement of Criminal Record Callwood*, 66 V.I. 299, 301 n.1 (V.I. 2017) (holding that because the Government "fil[ed] an appellate brief with [the Supreme] Court without raising insufficient service as an alternate basis to affirm the underlying judgment, the Government . . . made a general appearance[,] and, thus, waived any challenge to service of process" at the appellate level; and citing the rule which states that "service of process—unless waived by a general appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant" as its supporting legal authority; *Ernest v. Morris*, 64 V.I. 627, 639-40 (V.I. 2016) (holding that the Superior Court's decision to deny a party's petition to vacate a default judgment on the basis that too much time had passed was error because "no amount of time can render a void judgment valid . . . because Due [P]rocess requires that the defendant be given adequate notice of the suit and be subjected to the personal jurisdiction of the court"); *Ross v. Hodge*, 58 V.I. 292, 311 n.22 (V.I. 2013) (expressing the Supreme Court's concern that while the Superior Court mentioned in its opinion that "service of process—unless waived by a general appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant," it never applied the rule nor analyzed whether a party waived the defenses of insufficient service of process or lack of personal jurisdiction under that rule when the party appeared at a status conference and, later, took part in a deposition even though the party had not been served with a counterclaim); *Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 580 n.4 (V.I. 2012) (mentioning in footnoted dicta the Supreme Court's concern about the Superior Court's failure to address a motion to dismiss due to a lack of service because of the following reasoning:

sources of law come to delineating these terms is in a discussion in *In re Najawicz*.[60] However, the *Najawicz* court (1) addressed an issue that bears no resemblance to the factual and legal issues *sub judice*, (2) defined special and general appearances in order to identify when a defendant in that case submitted to the jurisdiction of the Court during a temporary restraining order proceeding before trial commenced and, ultimately, in order to determine when the defendant's assets were frozen by the temporary restraining order, and (3) was forced to make its determination using definitions derived from jurisdictions which still invoke the distinction between general and special appearances because those jurisdictions use civil procedure rules not based on the current Federal Rules of Civil Procedure but that have developed through the evolution of their own state-specific jurisprudence.[61] No discussion was had on the topic of

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> service of process—unless waived by a *general* appearance—is a prerequisite to the Superior Court obtaining personal jurisdiction over a defendant. *See* 5 V.I.C. § 115 ("From the time of the service of the summons . . . the court shall be deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A *voluntary* appearance of the defendant shall be equivalent to personal service of the summons upon him"); *see also In re Najawicz*, 52 V.I. 311, 338 (V.I. 2009) (emphasis added);

In re Najawicz, 52 V.I. at 33-39 (providing the most clear, in-depth discussion and definitions of a "special appearance" versus a "general appearance" and applying those definitions to determine when a defendant's assets were frozen based on his attorney's appearance in a temporary restraining order proceeding addressing those assets).

Further, a search of cases mentioning the term "special appearance" revealed that local courts failed to define or discuss "special appearance," only mentioning the term to state that counsel had filed certain motions to dismiss along with such a document. *See e.g., Edwards v. Hess Oil Virgin Islands Corp.*, Case No. SX-15-CV-382, 2017 WL 2797903, at *2, *4 (V.I. Super. Ct. June 28, 2017); *In re Catalyst Third-Party Litigation*, Case No. SX-05-CV-799, 2015 V.I. LEXIS 140, at *1 (V.I. Super. Ct. Nov. 18, 2015); *Hills v. Whitecap Investment Corp.*, Case No. ST-12-CV-395, 2014 WL 7532186, at *1-*2 (V.I. Super. Ct. Dec. 19, 2014); *Callwood v. Superior Court of the Virgin Islands*, Case No. ST-09-CV-499, 2014 WL 7186900, at *1 (V.I. Super. Ct. Oct. 29, 2014); *Neon Construction Enterprises, Inc. v. International Bonding and Construction Services, Inc.*, Case No. ST-11-CV-13, 2012 WL 3111748, at *1, *3 (V.I. Super. Ct. July 25, 2012); *Caribbean Island Adventures, Inc. v. Marzano*, Case No. ST-07-CV-467, 2011 WL 3862085, at *1 (V.I. Super. Ct. Aug 25, 2011); *Bertrand v. Cordiner Enters., Inc.*, Case No. ST-08-CV-457, 2011 WL 3036128, at *1 n.1 (V.I. Super. Ct. June 24, 2011); *In re Kelvin Manbodh Asbestos Litigation Series*, Master Case No. 324/1997, 2006 WL 8251135, at *1, *2 (V.I. Super. Ct. Aug. 31, 2006); *Charles v. Woodley*, Case No. 178/2003, 2005 WL 3487864, at *1 (V.I. Super. Ct. Nov 21, 2005); *Virgin Islands Daily News v. Gov't of Virgin Islands*, Case No. 593/2002, 2002 WL 31956031, at *1, *3 (V.I. Terr. Ct. Dec. 19, 2002). The only case mentioning "special appearance" was *In re Najawicz*.

[60] 52 V.I. at 338-39.

[61] *Id.*

appearances, generally, the filing of general versus special appearances before motions practice commences, nor the intersection of appearances with Rule 12(b) defenses. As a result, the case provides little light for a path forward here.

The Virgin Islands Rules of Civil Procedure are near mirror images of the Federal Rules of Civil Procedure, and V.I. R. Civ. P. 12 is no exception.[62] Accordingly, the Court looks to the guidance provided by federal case law because it provides an internal logical consistency. In addition, other states, upon adopting civil procedure rules based on the federal rules, interpret their rules as having abolished the distinction between special and general appearances owing to their interaction with Rule 12 defenses.[63] Typically, "the Superior Court, when considering a

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[62] In fact, V.I. R. Civ. P. 12(b) is a mirror image of F.R. Civ. P. 12(b), with the exception of one phrase inserted into V.I. R. Civ. P. 12(b) which establishes that it is not necessary to assert a defendant's lack of subject matter jurisdiction before a responsive pleading. Compare V.I. R. Civ. P. 12(b) with F.R. Civ. P. 12(b).

[63] *See, e.g., Romero v. Star Markets, Ltd.*, 82 Haw. 405, 414–15 (Haw. Ct. App. 1996) ("Prior to the adoption of the federal rules, a party objecting to the court's jurisdiction was required to appear specially before the court to contest its jurisdiction. The 'failure to follow the correct procedure for doing so often resulted in a waiver of the defense [of lack of jurisdiction].' . . . [H]owever, '[t]here no longer is any necessity for appearing specially to challenge personal jurisdiction. . . .' The distinction between a special and a general appearance was abolished, and a party could raise 'a jurisdictional defense even though [a party's] voluntary appearance ha[d] already called into existence the potential power of the court to adjudicate the merits of [one's] controversy.' . . . We hold, then, that HRCP Rule 12 has eliminated the distinction between special and general appearances, and thus, a party need not make a 'special appearance' for the sole purpose of asserting lack of personal jurisdiction over the person under HRCP Rule 12(b)."); *Dunbar v. Vandermore*, 295 S.C. 493, 495 (S.C. Ct. App. 1988) ("Under the procedure which existed when *Security Management* was decided, an objection based on lack of jurisdiction over the person was typically raised by special appearance pursuant to [South Carolina codes]. . . . It is clear that this procedure no longer exists. Under Rule 12, an objection based on lack of jurisdiction over the person must be raised, either by responsive pleading or, at the option of the pleader, by motion. '[T]he special appearance has been eliminated.' Therefore, a general appearance is the only appearance a party can make under existing procedure. The procedure which existed when *Security Management* was decided cannot still be followed because it has been expressly abolished by the Rules.") (citations omitted); *Greenberg v. Greenberg*, 101 So. 2d 608, 609–10 (Fla. Dist. Ct. App. 1958) ("A reading of Rule 1.11, . . . and of Rule 12, Federal Rules of Civil Procedure, . . . reveals that our rule was taken from the latter. The plain intent of our rule is, as it was in the case of the Federal rule, to abolish the former distinction between general and special appearances. It is expressly provided that 'No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.' The filing of the motion to dismiss upon the grounds set forth did not require a special appearance as a protective measure.") (citations omitted); *Treadwell v. District Court, City and County of Denver*, 133 Colo. 520, 522-523 (Colo. 1956) ("This case seems to squarely present a convenient opportunity to dispose of the old abracadabra about 'general' and 'special' appearances. . . . Prior to the adoption of Rule 12(b) of our rules of civil procedure there seemed to be some confusion, and possibly a distinction between special and general appearance was made; however, in the above cited rule there is no provision for a 'special' appearance. . . . The rule is almost identical with the federal rule of procedure and the federal cases seem to hold that a party may appear generally and still raise objections to

question not foreclosed by prior precedent from [the Virgin Islands Supreme Court], must perform a three-part analysis as set forth in *Banks v. International Rental and Leasing Corporation*."[64] "[T]he Superior Court possesses, in the absence of binding precedent from [the Supreme] Court, concurrent authority with [the Supreme] Court to shape Virgin Islands common law."[65] However, the intersection of 5 V.I.C. § 115 and V.I. R. Civ. P. 12(b) is not a common law issue but a creature of statute and thus requires only statutory interpretation.[66]

"The first rule of statutory interpretation is that when the statutory language is plain and unambiguous, no further interpretation is required."[67] "In such situations, the [C]ourt does not look beyond the language of the statute in interpreting the statute's meaning." Instead, the

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jurisdiction of person. Such a motion, of course, must be filed in apt time, and the question cannot be raised after answers and other motions as to the merits have been filed. It cannot be contended that the written general appearance of counsel in the case is a defense; it cannot be considered as a pleading; and it neither adds to nor detracts from the motion. . . ."); *Abercrombie v. Davies*, 35 Del. Ch. 354, 356 (Del. Ch. 1955) ("Plaintiffs argue that the right to enter a limited or special appearance has been abolished by the Chancery Court Rules adopted on January 1, 1948. I believe the right to raise the matters formerly incorporated in a special appearance, including an attack upon the Court's jurisdiction over the person or property, has been preserved by appropriate provisions in the Rules. Generally speaking, it may now be done by motion or in some cases in the answer. I therefore conclude that by implication the terminology and procedure surrounding the special or limited appearance have been replaced by the Rule of Court.") (citations omitted); Ala. R. Civ. P. 12 committee's comments on 1973 adoption ("Alabama has had the traditional 'special appearance,' with the required words of limitation in the plea or motion, and the waiver of objections by taking any inconsistent position looking to the merits. This practice is abolished by the third sentence of Rule 12(b). Neither the filing of a general appearance, nor the taking of a position looking to the merits, prevents a party from attacking the jurisdiction of the court or the service of process. This is a departure from former Alabama practice. Nor need words denoting a special appearance ever be used.) (citations omitted); Ark. R. Civ. P. 12 reporter's notes to Rule 12 n.7 ("This section is identical to Section (b) of the Federal Rule with the exception of the addition of (b)(8) which is a defense previously allowed under [the older version of the Arkansas rules]. One important feature of this section is that it abolishes the distinction between general and special appearances; thus, it is not necessary to make a special appearance in order to challenge the jurisdiction of the person, process, or venue.") (citations omitted).

[64] *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 603 (V.I. 2014).

[65] *Connor*, 60 V.I. at 604. Common law is defined in Black's Law Dictionary as a "body of law derived from judicial decisions rather than from statutes or constitutions." BLACK'S LAW DICTIONARY 270 (7th ed. 1999).

[66] The Virgin Islands Superior Court, as a result of this mandate, has "original jurisdiction to adjudicate particular legal issues in the first instance . . . to be disturbed only in truly extraordinary situations." *Id.* at 604. While *Banks* applied and *Connor* crystallized the tripartite test, now referred to as the *Banks* analysis, the statutes underpinning both decisions, 1 V.I.C. § 4 and 4 V.I.C. § 21, have been interpreted to mean that the Court has the obligation to employ a *Banks* analysis to decide issues of common law. Here, the Court is interpreting the Virgin Islands Rules of Civil Procedure, which is not judge-made law. *Banks v. Int'l Rental and Leasing Corp.*, 55 V.I. 967, 973-79 (V.I. 2011). Accordingly, a *Banks* analysis is not appropriate for this particular issue.

[67] *Smith v. Henley*, 67 V.I. 965, 972 (V.I. 2017) (quotation marks and citations omitted).

"[C]ourt[] must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first cannon [of statutory interpretation] is also the last: judicial inquiry is complete."[68] Nonetheless, the Court must explain what guides its opinion on this issue.

Virgin Islands Rules of Civil Procedure 12(b) and 12(h) make certain precepts clear. First, a defendant may raise a defense based on the Court's lack of personal jurisdiction by filing a pre-trial motion or a responsive pleading.[69] If a motion is submitted, the submitting party must do so before filing a responsive pleading.[70] If the defense is not presented in the form of a Rule 12(b) motion to dismiss, it must be included in the first responsive pleading submitted to the Court.[71] If lack of personal jurisdiction, or any other Rule 12(b)(2)-(5) defense, is not asserted in a pre-answer motion to dismiss or an answer reserving the defense, then that defense is waived.[72]

Therefore, according to the express, "plain and unambiguous" wording of V.I. R. Civ. P. 12(b)(2) and Rule 12(h), "the principal method for attacking the court's jurisdiction over the person of a defendant, and the one used in the case at bar, is a Rule 12(b)(2) motion" or a reservation of the defense in an answer or responsive pleading.[73] The term "special appearance" does not appear in the Virgin Islands Rules of Civil Procedure 12(b) and 12(h) or in Title 5 section 115 of the Virgin Islands Code.[74] Because the Court "must presume that [the Virgin

[68] *Codrington v. People of the Virgin Islands*, 57 V.I. 176, 185 (V.I. 2012).
[69] *See* V.I. R. Civ. P. 12(b)(2).
[70] *See id.*
[71] *See id.*
[72] *See* V.I. R. Civ. P. 12(h).
[73] *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir. 1974) (overruled on other grounds by *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999)).
[74] Further, while the term "special appearance" does not appear in the Virgin Islands Rules of Civil Procedure, the word "appearance" does appear eighteen times in the rules. However, none of the references to "appearance" are made in the context of a Rule 12(b)(2)-(5) defense nor in the context of a Rule 12(b) waiver. Instead, "appearances" are discussed in the context of contact information to be provided in Rule 3-1 by attorneys when entering their information with the Court, in the context of serving any filing with the Court outlined in Rule 5 and what a filing

Islands] legislature says in a statute what it means and means in a statute what it says,"[75] the Court must conclude that "[s]pecial appearances to challenge jurisdiction over the person [or other Rule 12(b)(2)-(5) pre-trial defenses] are not necessary under the [Virgin Islands] Rules of Civil Procedure as currently written."[76] As the Third Circuit opined in *Orange Theatre Corporation v. Rayherstz Amusement Corporation*, after passage of the Federal Rules of Civil Procedure:

> Rule 12 permits a defendant to raise a jurisdictional defense even though his voluntary appearance has already called into existence the potential power of the court to adjudicate the merits of his controversy. The rule requires the court to decide without reference to the voluntary appearance the question of jurisdiction thus raised, and, if the question is decided in the defendant's favor, to refrain from further exercising over him the power which his appearance has given it.
>
> It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and specific appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in.[77]

must include, in the context of withdrawing an appearance in Rule 6-5, in the context of disclosure statements in Rule 7.1, in the context of actions initiated using fictitious names of defendants in Rule 8-1, in the context of joint final pre-trial orders and joint discovery and scheduling plans in Rule 16-1, in the context of notices to class action members in Rule 23 (c), in the context of depositions in Rule 30, in the context of subpoenas in Rule 45, in the context of execution of judgments in Rule 69, in the context of notices to defendants and appearances of defendants in condemnation proceedings in Rule 71.1, and in the context of records kept by the Court in Rule 79.

[75] *Codrington*, 57 V.I. at 185.

[76] *Speir v. Robert C. Herd & Co.*, 189 F.Supp. 436, 438 (D. Md. 1960).

[77] 139 F.2d 871, 874 (3rd Cir. 1944) (holding that the defendant's motion for an extension of time to respond and motion to quash service of process—interpreted by the court to be, in substance, a motion to dismiss based on a lack of personal jurisdiction—were not improper due to the defendant's failure to enter a special appearance when making the motions).

Here, Rebecca's counsel submitted a November 15, 2017, "Notice of Appearance" that did not specify whether it was of a special or general nature, and a Motion for an Extension of Time to Answer, Plead, or Otherwise Respond on November 21, 2017. In the latter, Rebecca's counsel made clear (1) the "hardships" imposed by Hurricanes Irma and Maria and thus her counsel's inability to conduct legal or factual research given her counsel's lack of electricity, landline phone access, internet, and intermittent cell phone coverage, (2) her belief that some issues could be resolved by the then-pending arbitration in New York, as well as (3) her need to conduct more research to know if or what documents would need to be filed on behalf of her client. Nothing in these filings evidences they were to jointly serve as a motion to dismiss on any of the bases listed in V.I. R. Civ. P. 12(b)(2)-(5) nor as an answer or responsive pleading. Under the plain and unambiguous language of V.I. R. Civ. P. 12(b), no waiver of the defense of lack of personal jurisdiction occurred when Rebecca's counsel filed these documents because no mention of *any* sort of appearance is mandated by Rule 12. While in certain jurisdictions that still adhere to the old distinction differentiating special from general appearances a reading of V.I. R. Civ. P. 12(b)(2) and 5 V.I.C. §115 would "intone that ancient abracadabra of the law," that is not the case here. Since the Court reads the rule and the statute using their plain meaning, and since neither source requires a special appearance be entered to preserve Rule 12(b)(2)-(5) defenses, Rebecca's ability to raise her Rule 12(b)(2) defense of lack of personal jurisdiction remains intact in the Virgin Islands.

The Court lacks Jurisdiction over Rebecca Cenni

Personal jurisdiction is the "court's power to bring a person into its adjudicative process" and to exercise authority "over a defendant's personal rights."[78] Since *Pennoyer v. Neff*[79] was handed down in 1877, United States Supreme Court decisions have reaffirmed that "the Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personum* jurisdiction over a nonresident defendant."[80] As a result, "any judgment purporting to bind the person of a defendant over whom the court [has] not acquired *in personum* jurisdiction [is]void,"[81] and local courts are "forbidden to enter a judgment attempting to bind a person over whom [they have] no jurisdiction."[82] Over time, "the rigid rule of *Pennoyer v. Neff* [has evolved into] the flexible standard of *International Shoe Co. v. Washington*,"[83] which establishes that due process is satisfied when "a nonresident . . . defendant . . . has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[84] Despite this flexibility, "it is a mistake to assume that this [evolution] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[85]

As a non-resident defendant, Rebecca may be subject to this Court's "jurisdiction based on common law grounds or by the application of statutory provisions governing personal jurisdiction."[86] Cases emanating from the United States Supreme Court and the courts of this

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[78] BLACK'S LAW DICTIONARY 857 (7th ed. 1999).
[79] 95 U.S. 714 (1877).
[80] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413 (1984).
[81] *Hanson v. Denkla*, 357 U.S. 235, 250 (1958) (italics added).
[82] *Id.*
[83] 326 U.S. 310 (1945).
[84] *Helicopteros*, 466 U.S. at 414 (citations and quotations marks omitted).
[85] *Hanson*, 357 U.S. at 251.
[86] *In re Kelvin Manbodh Asbestos Litigation Series*, 47 V.I. 267, 276 (V.I. Super. Ct. 2005).

jurisdiction have come to recognize personal jurisdiction in three forms: (1) traditional common law personal jurisdiction, (2) general personal jurisdiction, and (3) specific jurisdiction.[87]

When exercising personal jurisdiction based on the common law, the Court may exercise its authority "where the defendant consents, is deemed to have consented, or is physically present in a jurisdiction."[88] When exercising personal jurisdiction based on a statute, personal jurisdiction may be based on general or specific grounds. General personal jurisdiction empowers the Court to "hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State."[89] "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile, for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[90] Though the Court may exercise its authority "where there is an enduring relationship, commonly referred to as general personal jurisdiction, [owing to the fact that the] defendant's contacts with the forum are so continuous and systematic that the defendant can be held to be present for all purposes,"[91] "only a limited set of affiliations with a forum will render a defendant amenable to" a court's general jurisdiction.[92] Specifically, the Virgin Islands Code empowers the Court to "exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this territory as to any claim for relief."[93]

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[87] *Id.* at 276-77.
[88] *Id.* at 276.
[89] *Bristol-Myers Squibb, Co. v. Super. Ct. of California*, 137 S.Ct. 1773, 1780 (2017).
[90] *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011)).
[91] *In re Manbodh*, 47 V.I. at 276-77.
[92] *Bristol-Myers Squibb*, 137 S.Ct. at 1780 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)).
[93] 5 V.I.C. § 4902.

Alternatively, specific personal jurisdiction empowers the Court to exert its authority in lawsuits "aris[ing] out of or relat[ing] to the defendants' contacts with the forum" state.[94] This type of authority "is confined to adjudication of issues deriving from, or connected with, the very controversy [or substantial connection] that establishes jurisdiction."[95] The Court may also exercise its authority where the defendant has engaged in certain actions or established certain contacts such that "specific jurisdiction may be asserted through the long-arm statute under any of the eight grounds enumerated in the statute."[96]

Here, Atrium V.I. submits that Rebecca's contacts with the Virgin Islands enable the Court to exercise general jurisdiction and specific jurisdiction over Atrium V.I.'s claims against Rebecca. Specifically, Atrium V.I. argues that Rebecca has property and maintains an address on St. John, that Rebecca retains an account with the Virgin Islands Water and Power Authority, and that Rebecca claims "usage rights" in the same St. John real property. When these contacts are viewed in tandem with a tortious phone call Atrium V.I. alleges she made demanding that Adrian give her fifty percent of Atrium V.I.'s proceeds and tax benefits, Atrium V.I. argues that the Court has authority to exercise jurisdiction over her.

Standard of Review

When "a defendant challenges the court's jurisdiction [by asserting a V.I. R. Civ. P. 12(b)(2) motion], the burden then shifts to the plaintiff to show that jurisdiction over the defendant is proper."[97] Overall, "[t]he plaintiff bears the ultimate responsibility to prove by a preponderance of the evidence that the trial court may exercise personal jurisdiction over the out-

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[94] *Bristol-Myers Squibb*, 137 S.Ct. at 1780.
[95] *Id.* This authority derives from "an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.*
[96] *In re Manbodh*, 47 V.I. at 277.
[97] *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 473 (V.I. 2014).

of-state defendant."[98] Yet, when questioning the court's authority to exercise personal jurisdiction "at the motion to dismiss stage of the litigation, the burden on the plaintiff depends on the action a trial court takes in disposing of the motion."[99] During motions practice, the Court may hold an evidentiary hearing to assess the plaintiff's assertion of personal jurisdiction or decide the issue based on the moving papers.[100]

> If the trial court holds an evidentiary hearing on the issue of personal jurisdiction, then the plaintiff must come forward with evidence to prove the court's jurisdiction by a preponderance of the evidence. At a 12(b)(2) factual hearing, the trial court may accept evidence, weigh the facts, and determine disputed factual issues, including credibility determinations.
>
> However, if the trial court does not hold an evidentiary hearing to determine the motion to dismiss based on personal jurisdiction, the plaintiff is only required to establish a prima facie case for personal jurisdiction. Under this standard, it is [the] plaintiff's burden to demonstrate the existence of every fact required to satisfy both the forum's long-arm statute and the Due Process Clause of the Constitution. When the Superior Court makes that prima facie determination, it must accept as true all of plaintiff's allegations that are supported by affidavits or other competent evidence which would be admissible at trial and must resolve all factual disputes in the plaintiff's favor.[101]

Nonetheless, "[t]he Court will discount any statement by the parties that is clearly inconsistent or insupportable on the face of the documentary evidence submitted by the parties," while still granting greater weight to the Plaintiff's version when not insupportable.[102]

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[98] *Molloy v. Independence Blue Cross*, 56 V.I. 155, 172 (V.I. 2012).
[99] *Id.*
[100] *Id.*
[101] *Id.* at 172-73 (citations, quotation marks, and italics omitted).
[102] *Borschow Hosp. & Medical Supplies, Inc., v. Burdick-Siemens, Corp.*, 143 F.R.D. 472, 476, 482-85 (D. P.R. 1992) (finding personal jurisdiction existed under the Puerto Rico long-arm statute, specifically the prong requiring that the defendant "participate[] in tortious acts" which are not required to be performed in Puerto Rico but are required to have their effects felt in the forum, because the effects of the defendant's tortious interference with a contract (in the form of a re-assignation of a distributorship agreement to another company) were felt by the plaintiff

General Personal Jurisdiction

When assessing whether the Court has general jurisdiction over a defendant, the Virgin Islands Code points to whether the defendant has an enduring relationship with the Territory by asking if a defendant is "domiciled in, organized under the laws of, or maintaining his or its principal place of business in"[103] the Virgin Islands. The Virgin Islands Supreme Court has held that a "court may constitutionally find that it has general jurisdiction, or the right to hear all cases against a defendant regardless of where or how they arise, if it finds that [the] defendant has continuous and systematic contact with the forum" such that the defendant would be considered "at home" in the Territory—regardless of whether the "at home" designation stems from an individual continuously residing in the Territory or a business organizing or conducting its business operations under the laws of the Territory.[104]

Here, Atrium V.I. has failed to allege facts sufficient to permit the Court to conclude that Rebecca's contacts with the Virgin Islands are "continuous" or "systematic" or "substantial." First, Atrium V.I. claims that Rebecca represents that she has property and an address on St. John. As evidence, Atrium V.I. provides the Court with a copy of a quitclaim deed dated August 13, 2015.[105] Presumably, Atrium V.I. believes the deed operates to show Rebecca maintains a domicile in the Territory. Instead, the quitclaim deed shows that Rebecca transferred her property interests and rights in the St. John real property to Adrian almost three years ago.

Further, the additional contacts pointed to by Atrium V.I. do not show that Rebecca has any sort of continuous association with, use of, or presence in the Virgin Islands. The most

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in Puerto Rico and because the defendant engaged in other forum-based activities, such as sending letters and faxes to Puerto Rico addressing the contract re-assignation and visiting Puerto Rico to discuss the contract re-assignation).
[103] 5 V.I.C. § 4902.
[104] *Molloy*, 56 V.I. at 181-82.
[105] Pl.'s Resp. in Opp'n to Def.'s Motion to Dismiss Ex. 4.

continuously occurring contact to which Atrium V.I. points is a collection of Virgin Islands Water and Power Authority invoices—invoices which are listed in both Adrian and Rebecca's names.[106] However, Rebecca states under oath in a declaration that she had no knowledge that the invoices listed her name. Atrium V.I. offers no evidence indicating whether Adrian attempted to remove her name from the WAPA account after August 13, 2015, when Rebecca released her rights and interests in the real estate. Nor does Adrian provide evidence that Rebecca refused to have her name removed from the WAPA account, insisted on paying, or did pay the WAPA bills at issue. Nothing "systematic" nor "substantial" can be extrapolated from the bills bearing her name.

Finally, Atrium V.I. erroneously asserts that Rebecca still claims "usage rights" in the St. John property. Specifically, Atrium V.I., in its Response in Opposition to Rebecca's Motion to Dismiss, relies on a declaration provided by Sarah Bigelow.[107] In the declaration, Bigelow contends that Rebecca continues to claim "usage rights" in the property.[108] However, Bigelow's declaration is supported only by a single text message Rebecca exchanged with Bigelow in April 2016.[109] Closer inspection of the text message reveals that Rebecca actually stated:

> It was my house for years that I paid your salary and was told I had usage rights even when I signed it over. . . . Guess you weren't made aware of all details. . . . I think you guys should leave the house for the week and actually honor what was told to me. But since not and since you have gone back on your word causing this problem we both will not be staying there. . . ."[110]

[106] *Id.* Ex. 9.
[107] *Id.* Ex. 1.
[108] *Id.* Ex. 1 ¶ 2.
[109] *Id.*; *Id.* Ex. 2.
[110] *Id.* Ex. 2.

In her Reply to Atrium V.I.'s Opposition to her Motion to Dismiss, Rebecca explained that, when she quitclaimed her rights in the property in 2015, she understood Adrian promised to allow her to use the St. John property if she was ever on vacation in the Virgin Islands.[111] Then, when Rebecca attempted to take a vacation with her son and stay at the St. John property, Adrian did not extend to Rebecca the right to use the property as a lodging place.[112] While the standard of review requires the Court to interpret disputed facts in a light favoring the plaintiff, when read in its entirety, the text message not only supports Rebecca's version of events but is also "clearly inconsistent or insupportable"[113] with the argument of Atrium V.I. Under these facts, the Court is not able to exercise general jurisdiction over Rebecca.

<u>Specific Personal Jurisdiction</u>

"The Superior Court may exercise personal jurisdiction over an out-of-state defendant only where the plaintiff has satisfied the requirements of the long-arm statute and the exercise of personal jurisdiction satisfies the requirements of due process."[114] Title 5, section 4903 of the Virgin Islands Code specifies the bases upon which plaintiffs in the Virgin Islands may prove their prima facie cases for the Court's exercise of jurisdiction. In pertinent part, it provides:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
>
> . . . .
>
> (3) causing tortious injury by an act or omission in this territory;
> (4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory;

[111] Def. Rebecca Cenni's Reply in Further Supp. of Motion to Dismiss Ex. 1 ¶ 3.
[112] *Id.* Ex. 1 ¶¶ 4-6.
[113] *Borschow Hosp. & Medical Supplies, Inc.*, 143 F.R.D. at 476.
[114] *St. Croix, Ltd.*, 60 V.I. at 474.

. . . .

> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Because Section 4903 empowers the Court to exercise specific personal jurisdiction on a claim-specific basis, Atrium V.I.'s claims asserted against Rebecca will be analyzed to determine whether personal jurisdiction can be extended under section 4903's grounds.[115] The Court must discern whether the plaintiff presents prima facie evidence that (1) "the defendant's contacts meet one of the categories under section 4903(a) and then (2) whether the plaintiff's claim 'arises from' that contact," as required by section 4903(b).[116] Regarding the latter requirement, the Court must find that one of the defendant's contacts with the Virgin islands "is the 'but-for' cause of the action, and, if so, . . . then determine if the contact's substantive obligations and privileges are closely related to the cause of action."[117] After discovering whether specific personal jurisdiction exists under section 4903(a) and (b), the Court must decide if personal jurisdiction comports with the Fourteenth Amendment's Due Process Clause.[118] The Virgin Islands employs a tripartite test for this analysis: (1) whether the defendant "purposefully

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[115] *Bristol-Myers Squibb,* 137 S.Ct. at 1780. *See also, supra* note 95 and accompanying text.

[116] *Molloy*, 56 V.I. 174.

[117] *Id.* at 175. When adopting this but-for test as the means of determining whether section (b)'s "arising from" requirement is met, the *Molloy* court explained: ". . . the Third Circuit has addressed a similar requirement under the constitutional jurisdiction doctrine of specific jurisdiction that a claim must 'arise out of' the defendant's contacts with the forum. In discussing that similar 'arise out of' requirement of constitutional personal jurisdiction, the Third Circuit defined the term as requiring the claim to reasonably relate to the cause of action. The court went on to note that

> [w]ith each purposeful contact by an out-of-state resident, the forum state's laws will extend certain benefits and impose certain obligations . . . . The relatedness requirement's function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact closely tailored to that contact's accompanying substantive obligations. The causal connection can be somewhat looser than the tort concept of proximate causation but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable."

Molloy, 56 V.I. at 175.

[118] *Chabuz v. Putnam Lumber & Exp. Co.*, Case No. ST-13-CV-596, 2016 V.I. LEXIS 33, at *7, *11 (V.I. Super. Ct. April 12, 2016).

directed [its] activities at the forum;" (2) whether the litigation "arise[s] out of or relates to at least one of those activities;" and (3) "if the first two requirements have been met, . . . whether the exercise of jurisdiction otherwise comports with fair play and substantial justice."[119]

The Court lacks Jurisdiction over Rebecca Cenni on the intentional interference claims

Atrium V.I. argues that that the Court should exercise its jurisdiction over Rebecca based on 5 V.I.C. 4903(a)(4) for intentional interference with existing contractual relations and intentional interference with prospective business relations. Specifically, Atrium V.I. argues that Rebecca committed a tort in New York that interfered with its existing contract and its prospective business relationship with Atrium Staffing when Rebecca telephoned Adrian, sole member of Atrium V.I., in the Virgin Islands from New York in May 2016 "demanding [he] give her 50 % of any proceeds [and tax benefits flowing] from Atrium V.I."[120]

Virgin Islands courts have found that exercising specific jurisdiction was proper in instances where a non-resident defendant committed a tortious act outside of the Virgin Islands, causing injury in the Virgin Islands, because the plaintiff was able to show the defendant had "plus factor" contacts in the Virgin Islands that fulfilled the second prong of 5 V.I.C. 4903(a)(4).[121] In *In re Kelvin Manbodh Asbestos Litigation Series*, another judge on the Court found that a non-resident defendant's contacts fulfilled the plus factor requirements because they consisted of a "significant number of purchase orders . . . suggesting that "[the defendant's] sale of goods to HOVIC was not an isolated occurrence, but rather, a regular course of dealing over seven years . . . [a] course of dealing which [made] the possibility of defending suit in the Virgin

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[119] *Molloy*, 56 V.I. at 183.
[120] Adrian Cenni Declaration ¶ 6.
[121] The plus factor requirements are actually the latter-mentioned requirements in 5 V.I.C. 4903(a)(4): ". . . regularly [doing] or solicit[ing] business, or engag[ing] in any other persistent course of conduct, or deriv[ing] substantial revenue from goods used or consumed or services rendered in this territory. . . ."

Islands foreseeable."[122] Finding the purchase orders fulfilled the second prong of 4903(a)(4), the Court pointed to the purchase orders' contents, which dated from 1977 to 1984, and contained the following information: (1) "the party requesting the products;" (2) the "name [of] the vendors;" (3) descriptions of "the specifications of the requested products, including quantity ordered, per unit price, type, thickness, width, and length;" (4) "the respective date required, the estimated date of delivery, the estimated date of arrival on St. Croix and sometimes, the actual date of receipt;" and (5) a "memorializ[ation] [of] the method of shipment."[123]

In cases where Virgin Islands courts have opted not to exercise jurisdiction over a non-resident defendant who committed a tort outside the Virgin Islands alleged to have caused injury in the Virgin Islands, the courts have found that contacts purporting to establish the "plus factor" were lacking. For example, in *Evans v. General Gases*,[124] the court found that, even though a Puerto Rico-based defendant repaired certain gas cylinders at its Puerto Rico facilities that caused injury at a Virgin Islands workplace, jurisdiction could not be established over the defendant because the defendant had not done or solicited business in the U.S. Virgin Islands. When making this decision, the court took care to note that the non-resident defendant "never actively conducted any trade or business in the U.S. Virgin Islands, maintained any offices, salespersons, agents, or representatives in the U.S. Virgin Islands[,] or authorized anyone to

[122] *In re Manbodh*, 47 V.I. at 285.
[123] *Id.* at 282. In fact, the Court found that the purchase orders and the information contained therein "implicate[d] the 'doing business,' 'substantial revenue,' and 'persistent course of conduct' plus factors." *Id.* at 281. *See also, Molloy*, 56 V.I. at 181 (holding that 5 V.I.C. § 4903(a)(4)'s plus factor of deriving substantial revenue from the Virgin Islands was met by a defendant who "received between $50,000-$100,000 per year in licensing fees, plus a one % [sic] royalty on all gross proceeds"); and *Chabuz*, 2016 V.I. LEXIS 33 at **9-*10 (finding that 5 V.I.C. 4903(a)(4)'s plus factor of deriving substantial revenue from the Virgin Islands was met by a defendant who derived $432,884.72 in revenue from lumber sold by a Virgin Islands vendor and finding that the defendant's "assertion that it did not control the destination of its products and did not specifically intend for the products to be sold in the Virgin Islands [was] irrelevant to [the] long arm statute" because "the statute's terms are objective; there is no subjective knowledge requirement").
[124] 40 V.I. 3 (V.I. Terr. Ct. Nov. 30, 1998).

travel to the U.S. Virgin Islands to promote its business or advertise its products;" and the Virgin Islands-based plaintiff, in fact, appeared to reach out to the non-resident defendant by (1) delivering the cylinders to Puerto Rico for repair, (2) leaving the cylinders in Puerto Rico for repair, (3) picking up the cylinders in Puerto Rico after the repairs had been completed, and (4) returning the cylinders to the Virgin Islands workplace where the defectively repaired items caused tortious injury.[125] As a result, the Court held that none of the plus factors enumerated under 5 V.I.C. 4903(a)(4) had been evidenced by the non-resident defendant's contacts with the Virgin Islands.[126]

Atrium V.I. argues that the Court has specific jurisdiction over Rebecca because she placed a phone call to Adrian in May 2016, during which she interfered with Atrium V.I.'s existing and prospective business relations by threatening to cease payment under the MSA if Adrian did not give her fifty percent of Atrium V.I.'s proceeds and tax benefits. Though Rebecca asserts she did not make such a phone call, the standard of review obliges the Court to interpret these disputed facts in favor of Plaintiff, especially in light of the fact that no phone records have been produced by either party that could corroborate either party's version of events.

To properly assert specific jurisdiction over Rebecca, Atrium V.I. must prove a prima facie case illustrating that Rebecca committed a tortious act outside of the Virgin Islands that

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[125] *Evans*, 40 V.I. at 8-9.
[126] *Id.* at 8-10. *See also St. Croix, Ltd.*, 60 V.I. at 475 (holding that the Superior Court correctly refused to exercise jurisdiction over two non-resident defendants who manufactured defective plumbing systems causing the injuries and damages at issue because the plus factor required by 4903(a)(4) had not been met by evidence which (1) only showed that the defendants had no "involvement in the sale or distribution of the plumbing system" at issue and, in fact, attributed the plumbing system's arrival at a Virgin Islands resort to "an unnamed 'Florida-based contractor;'" (2) consisted of a marketing guide, showing the defendants, in fact, "'aimed' their efforts to market the [plumbing] systems 'at Florida and the Caribbean markets'" and not the Virgin Islands; and (3) rested on assertions that the defendants "engaged in a nationwide marketing campaign to create a market for [their] piping . . . [instead of] submit[ting] any evidence that either [defendants] engaged in business activities in the Territory").

caused it injury in the Virgin Islands. By asserting that Rebecca made the phone call specified above, Atrium V.I. shows that Rebecca committed a tortious act—by intentionally interfering with Atrium V.I.'s then-present and future contractual relations—during the course of this phone call and later by withholding payment under the MSA. Viewing these assertions in a light most favorable to the plaintiff, Atrium V.I. has fulfilled the first portion of 5 V.I.C. 4903(a)(4)'s requirements for establishing personal jurisdiction.

But, after making this showing, Atrium V.I. is required to also show that Rebecca (1) did or solicited business in the Virgin Islands, (2) engaged in a persistent course of conduct in the Virgin Islands, or (3) derived substantial revenue from the Virgin Islands. In attempting to prove that Rebecca engaged in a persistent course of conduct in the Virgin Islands, Atrium V.I. points to three pieces of evidence. First, Atrium V.I. asserts, through Adrian's declaration, that Rebecca "represents" her address as being in the Virgin Islands. In support of his declaration's assertion, Adrian points to a copy of the quitclaim deed through which Rebecca released her property interest in real estate on St. John. Upon inspection of the deed, the Court notes that Rebecca's address is listed as the St. John location. But, she clearly quitclaimed her interest in that property in August 2015, as illustrated by the deed. If the quitclaim deed evidences anything, it is that Rebecca's release of property rights limited her contact with the Virgin Islands instead of continuing to maintain a persistent presence or course of conduct in the Territory. Second, Atrium V.I. asserts that invoices issued by the Virgin Islands Water and Power Authority in both Adrian's and Rebecca's names reflect yet another way that Rebecca continues to maintain a persistent connection with the Virgin Islands. However, Atrium V.I. produces no evidence showing that Rebecca knew these invoices, for a property in which she no longer holds a legally enforceable property interest, were still issued in her name or that she paid the invoices. Finally, Adrian and Bigelow assert in declarations that Rebecca claims a "usage right" in the St. John property. In support of their assertions, both Adrian and Bigelow point to a text message sent in April 2016 from Rebecca to Bigelow in which Rebecca stated: "It was my house for years that I paid your salary and was told I had usage rights even when I signed it over." Problems abound with the assertion that a text message amounts to Rebecca claiming usage rights—much less, legally enforceable usage rights—in the St. John property Rebecca once owned. First, Rebecca quitclaimed her interests in the real property referred to in the text message in August 2015. The quitclaim deed does not reserve usage rights to Rebecca, and none were granted by Adrian to Rebecca. Further, Atrium V.I. also provided paperwork evidencing the recording of the August 2015 quitclaim deed, but fails to provide a later deed or other document purporting to grant usage rights to Rebecca.

At no point does Atrium V.I. show facts that establish that Rebecca has contacts in the Virgin Islands, nor a mode of conducting business or personal or business relationships within the Virgin Islands akin to those proven by the *Manbodh* purchase orders. While Rebecca has vacationed once with her son in the Virgin Islands since relinquishing her rights in the St. John property, a vacation does not give rise to an inference of a continuing relationship. No evidence of property ownership, business activity, advertising, sales, purchases, or community activities has been submitted. Nor is there evidence Rebecca derived income, maintained offices, or employed personnel in the Virgin Islands. Accordingly, Atrium V.I. has failed to present prima facie evidence that Rebecca has contacts with the Virgin Islands which fulfill the "plus factor" requirement embodied by the latter portion of 5 V.I.C. 4903(a)(4). In the absence of a prima facie showing of that required portion of the statute, the Court need not conduct the but-for causation analysis set out in 5 V.I.C. 4903(b) or the constitutional analyses ensuring that jurisdiction comports with the limits and defendant-based protections imposed by the Due Process Clause.

The Court lacks Jurisdiction over Rebecca Cenni on the civil extortion claim

Atrium V.I. argues that "when an extortionist threat [is] published to the listener and/or reader" in the Territory, the making of the threat qualifies as "an act that occurs *in* this territory."[127] It also posits that this argument has not been addressed by the Virgin Islands Supreme Court and, therefore, purports to conduct a *Banks* analysis attempting to persuade the Court that the telephone call through which Atrium V.I. alleges Rebecca committed civil extortion would qualify not only as a tort committed in the Virgin Islands but also as a ground upon which personal jurisdiction can be established under the Territory's long-arm statute. However, this argument fails to consider that a complete analysis of whether personal jurisdiction is properly exercised by Virgin Islands courts, as defined by the Virgin Islands Supreme Court in *Molloy v. Independence Blue Cross*,[128] ultimately culminates in an assessment of whether the defendant's contacts with the Territory legitimizes the Court's extension of its jurisdiction and whether the extension of jurisdiction comports with the protections afforded to out-of-state defendants' due process liberty rights. As a result, before expending judicial resources to complete and publish a full-blown *Banks* analysis assessing whether a single extortionist phone call made from New York to the Virgin Islands qualifies as a "tortious . . . act or omission in this territory," the Court will analyze whether establishing specific jurisdiction through a single phone call will comport with the Due Process Clause.

[127] Pl.'s Resp. in Opp'n to Rebecca Cenni's Motion to Dismiss, at 8 (emphasis added).
[128] 56 V.I. at 181.

Case law since *Pennoyer v. Neff*[129] and *International Shoe*'s[130] establishment of the minimum contacts rubric confirm that "[t]he Due Process clause [continues] to protect an individual's liberty interest in not being subject to the binding judgments of a forum [with] which he has established no meaningful contacts, ties, or relations."[131] The Due Process Clause demands that defendants be afforded "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."[132] "[T]his 'fair warning' requirement is satisfied [where] the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."[133] In contrast to actions that evidence purposeful direction,

> unilateral activit[ies] of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[134]

"For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct [or contacts with the forum] must create a substantial connection with the forum State."[135] When assessing whether a substantial connection—or sufficient minimum contacts—exist, the Court's inquiry "properly focuses on the relationship among the defendant, the forum, and the litigation."[136] The relationship must meet two requirements to establish specific

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[129] 95 U.S. 714 (1978).
[130] 326 U.S. 310 (1945).
[131] *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (citations and quotation marks omitted).
[132] *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977).
[133] *Burger King*, 471 U.S. at 472.
[134] *Hanson*, 357 U.S. at 253.
[135] *Walden v. Fiore*, 571 U.S. 277, 284 (2014).
[136] *Calder v. Jones*, 465 U.S. 783, 788 (1984).

jurisdiction. "First, the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State," because the Due Process Clause works to protect the liberty interest of the non-resident defendant and not plaintiff's convenience.[137] "[H]owever significant the plaintiff's contacts with the forum may be, those contacts cannot be decisive in determining whether the defendant's due process rights are violated."[138] Second, specific jurisdiction must be founded upon minimum contacts the defendant establishes "with the forum State itself, not . . . with persons who reside there."[139] If and when a plaintiff does form a link—or contact—between the defendant and the forum state, the plaintiff cannot serve as the only link. Instead, "the defendant's conduct . . . must form the necessary connection with the forum State that [serves as] the basis for its jurisdiction over him."[140] While "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff," that relationship, "standing alone, is an insufficient basis for jurisdiction."[141]

For example, in *Walden v. Fiore*,[142] the United States Supreme Court addressed an intentional torts claim, again reestablishing the above tenets—but in a factual scenario more similar to the one before the Court. In *Walden*, the Court stated that the "proper focus of the minimum contacts inquiry in intentional-tort cases is the relationship among the defendant, the forum, and the litigation."[143] The *Walden* Court also addressed its holding in *Calder v. Jones*[144] and, in doing so, made four important points. First, the thrust of *Calder* was that the "effects"

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[137] *Walden*, 571 U.S. at 284.
[138] *Id.* at 285.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 286.
[142] 571 U.S. 277 (2014).
[143] *Id.* at 291.
[144] 465 U.S. 783 (1984).

used to establish personal jurisdiction were (1) "the reputation-based effects of the alleged libel" claim and (2) these reputation-based effects worked to "connect[] the defendants to California, not just to the plaintiff who lived there.[145] Important to the *Walden* court was the fact that the "*strength* of that connection was largely a function of the *nature* of the libel tort."[146] Second, and more precisely, the "effects" appurtenant to the defendant's tort—there a libelous article—connected the defendants' conduct to California, and not just to a plaintiff who lived there.[147] Third, it was this connection—established by the effects of the libelous article—"*combined with* the various facts that gave the article a California focus [which] sufficed to authorize the California court's exercise of [personal] jurisdiction."[148] Finally, the *Walden* court drove home one additional point: "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State."[149]

An earlier decision, *Burger King v. Rudzewicz*,[150] drives home the same points as *Calder* and *Walden* in addressing facts that focused on contractual claims. In *Burger King*, the United States Supreme Court addressed the sufficiency of a defendant having one contact with a forum state in the context of personal jurisdiction:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer

[145] *Walden*, at 287.
[146] *Id.* (emphasis added).
[147] *Id.*
[148] *Id.* at 288 (emphasis added).
[149] *Id.* at 290.
[150] 471 U.S. 462 (1985).

> clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests.[151]

From this observation, the Court continued to instruct that courts should employ

> a 'highly realistic' approach that recognizes that a 'contract' is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences. . . . It is these factors—prior negotiations and contemplated future consequences, along with the focus of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.[152]

Atrium V.I. argues that the U.S. Supreme Court decision in *Calder v. Jones*[153] and its interpretation in Third Circuit case law, namely *IMO Industries, Inc. v. Kiekert AG*,[154] establishes that "unique relations among the defendant, the forum, the intentional tort, and the plaintiff may under certain circumstances render the defendant's contacts with the forum—which would otherwise not satisfy the requirements of due process—sufficient."[155] However, Atrium V.I.'s interpretation of these legal authorities fails to account for two important points that bear mentioning.

First, *Calder* appears to allow tort plaintiffs, in the defamation context, to bring out-of-state defendants into their home forum state courts based, loosely, on the knowledge that the defendant was going to cause the plaintiff a certain amount and a precise type of harm in the

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[151] *Id.* at 478 (emphasis original).
[152] *Id.* at 479. (holding that a defendant's susceptibility to personal jurisdiction in an out-of-state court hinged—not on the contract a defendant entered with an out-of-state plaintiff but—the contract's substantial connections with the other state (Florida); the defendant's deliberately reaching beyond his home state to Florida; the defendant's negotiating with the out-of-state corporation; the defendant's "enter[ing] into a carefully structured 20-year [sic] relationship that envisioned continuing and wide-reaching contacts with . . . Florida;" and the defendant's refusal to make contractually-obligated payments to a Florida corporation).
[153] 465 U.S. 783 (1984).
[154] 155 F.3d 254 (3rd Cir. 1998).
[155] *Id.* at 265.

forum state and on the defendant's targeting of the plaintiff in the forum state.[156] While *Calder* certainly highlighted that (1) the "libelous story concerned the California activities of a California resident;" (2) the article "impugned the professionalism of a [professional] . . . whose television career was centered in California;" (3) "California [was] the focal point both of the story and of the harm suffered;" and (4) the defendants' "intentional, and allegedly, tortious actions [were] expressly aimed at California,"[157] the *Calder* court also focused part of its decision on contact the defendants themselves established. Namely, the Court drew light to the fact that the article's author "frequently travel[ed] to California on business," "reli[ed] on phone calls to sources in California for the information contained in the article," and telephoned the plaintiff's "home and read to her husband a draft of the article so as to elicit his comments upon it."[158]

Second, the Third Circuit has adopted its version of the *Calder* effects test—in the form of a narrow, more traditionally interpreted version of various federal circuits' application of *Calder*. In *IMO Industries, Inc. v. Kiekert AG*, the Third Circuit reviewed *Calder*, surveyed other federal circuits' versions of the *Calder* effects test, and adopted its own version of the *Calder* effects test to apply to intentional torts lawsuits sounding in intentional interference and other business torts claims.[159] When conducting its analysis, the *IMO* Court surveyed *Far West*

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[156] *See Calder*, 465 U.S. at 788-90 ("Petitioner South wrote and Petitioner Calder edited an article that they knew would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that [reputation-based] injury would be felt by [Jones] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation.").
[157] *Id.* at 788-790.
[158] *Id.* at 786. The Court notes that, unlike the telephone call Adrian alleges Rebecca made to him, the telephone call, made by one defendant in *Calder* asking the plaintiff's husband for a response, did not convey the tortious activity itself but was simply one in a collection of contacts on which the extension of personal jurisdiction rested.
[159] 155 F.3d 254, 263-65 (3d. Cir. 1998) (establishing that the *Calder* effects test in the Third Circuit "requires the plaintiff to show the following: (1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be

Capital, Inc. v. Towne[160] from the Tenth Circuit, *Southmark Corp. v. Life Investors, Inc.*[161] from the Fifth Circuit, *ESAB Group Inc. v. Centricut, Inc.*[162] from the Fourth Circuit, *Cybersell, Inc. v. Cybersell, Inc.*[163] from the Ninth Circuit, and *Janmark Inc. v. Reidy*[164] from the Seventh Circuit, specifically noting that the Fourth, Fifth, Ninth, and Tenth Circuits applied a more conservative, or more narrow, interpretation of the *Calder* effects test, while the Seventh Circuit applied a broader interpretation.[165] When making its decision, the Third Circuit expressly stated that it "reject[ed] *Janmark* and agree[d] with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits that jurisdiction under *Calder* requires more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum." The *IMO* court further specified that:

> the *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity. Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement. The defendant must manifest behavior intentionally targeted at and focused on the forum for *Calder* to be satisfied. In the typical case, this will require some type of "entry" into the forum state by the defendant.[166]

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said to be the focal point of the tortious activity;" and explaining its rationale for choosing the more narrow version of the *Calder* effects test by stating: "We believe the Seventh Circuit interpreted *Calder* too broadly when it read that case to hold that the State in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor. . . . [S]uch a broad sweep fails to accommodate *Calder*'s emphasis on the fact that the forum must be the focal point of the harm and that the defendant must expressly aim the tortious activity at the forum. [It] relies solely on the geographical locus of the harm caused . . . [and] fails to pay necessary attention to the defendant's knowledge and intent in committing the tortious activity") (quotation marks and citations omitted).

[160] 46 F.3d 1071 (10th Cir. 1995).

[161] 851 F.2d 763 (5th Cir. 1988).

[162] 126 F.3d 617 (4th Cir. 1997).

[163] 130 F.3d 414 (9th Cir. 1997).

[164] 132 F.3d 1200 (7th Cir. 1997).

[165] *IMO*, 155 F.3d at 260-266.

[166] *Id.* at 265 (emphasis original) (quotation marks and citations omitted).

Here, Atrium V.I. posits, most pointedly, that Rebecca "published" an "extortionist threat" to Adrian while he was in the Territory by making a phone call to him during which she threatened to withhold monthly payments under the MSA to Atrium V.I. if Adrian, as sole member of Atrium V.I., did not give her fifty percent of Atrium V.I.'s proceeds and tax benefits.[167] Atrium V.I. attempts to persuade the Court to establish personal jurisdiction over Rebecca based largely on the undated phone call to Adrian by (1) purporting to conduct a *Banks* analysis on the sufficiency of a phone call into the Virgin Islands when establishing the Court's personal jurisdiction; (2) analogizing the extortionist phone call to the libelous article in *Calder v. Jones*;[168] and (3) positing that each element of the Third Circuit's *Calder* effects test is met.[169]

The Court foregoes conducting a *Banks* analysis because, since *Calder*, the United States Supreme Court has handed down *Walden v. Fiore*, in which the Court stated: "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum."[170] Though Atrium V.I. makes three torts claims and points to what it posits as additional forum contacts in the form of a quitclaim deed, a series of WAPA bills, and a claim of usage rights in St. John property, all center on one alleged injury: Atrium Staffing's not paying Atrium V.I. on a monthly basis.

In *Calder*, contacts, separate from and in addition to the libelous article's reputation-based effects, were highlighted in the decision's analysis as having been created by the defendant *with California* as opposed to with the plaintiff. In contrast, Atrium V.I. highlights only three contacts: (1) the quitclaim deed, which shows Rebecca transferred her ties in the Virgin Islands

[167] Pl.'s Resp. in Opp'n to Rebecca Cenni's Motion to Dismiss, at 8.
[168] 465 U.S. at 783.
[169] Pl.'s Resp. in Opp'n to Rebecca Cenni's Motion to Dismiss, at 8-11, 13-19.
[170] *Walden*, 571 U.S. at 290.

to Adrian; (2) the WAPA bills, of which Rebecca claims to have no knowledge, and (3) a text message purportedly claiming usage rights mentioned above. Importantly, all three fail to show Rebecca formed contacts *with the Virgin Islands*, such that she availed herself of Virgin Islands law, rather than with Adrian as her one-time husband.

First, Atrium V.I. posits that Rebecca's quitclaim establishes a contact. As explained above, the quitclaim deed shows that Rebecca transferred her rights in the St. John property to the sole member of Atrium V.I., Adrian. This transfer of property rights from Rebecca to Adrian fails to show Rebecca "purposefully directed . . . activities at residents" in the Virgin Islands because: (1) she purposefully re-directed her activities away from the Virgin Islands when transferring her interests to Adrian; and (2) no claim in the present suit relates to or resulted from the St. John property. Regarding the Virgin Islands Water and Power Authority invoices, Rebecca has stated in a declaration that she had no knowledge the invoices listed her by name. Moreover, even if she did have knowledge of the invoices bearing her name when still married to Adrian and holding interests in the St. John property, *Walden* points out that specific jurisdiction must be founded on minimum contacts the defendant establishes with the forum State itself, not with a person who resides there. Finally, the text message, which Atrium V.I. characterizes as an assertion of property usage rights in the St. John property by Rebecca, still fails to establish requisite contacts. Even if a text message conveyed the same legally protected interests in property as a deed or other official document, *Walden* nonetheless held that a "defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff . . . but . . . cannot serve as the only link" establishing jurisdiction. Assuming, arguendo, that the text message did constitute an oral agreement for Rebecca to use the St. John property, the usage right would still be a contact Rebecca had with Adrian as a result of their marriage and not with Atrium V.I. or the Virgin Islands. Nor would the contact be one that gave rise to the present claims of intentional interference with prospective business relations, intentional interference with present contractual relations, and civil extortion.

Further, the contacts to which Atrium V.I. points also fail under the analysis proposed in its own Response submitted to the Court. Specifically, Atrium V.I. cited *IMO* as standing for the proposition that "unique relations among the defendant, the forum, the intentional tort, and the plaintiff may, under certain circumstances, render the defendant's contacts with the forum—which would otherwise not satisfy the requirements of due process—sufficient." From there, Atrium V.I. posits that *IMO*'s tripartite test is fulfilled by the above contacts. However, Atrium V.I. overlooks that *IMO*, like *Calder*, requires that the defendant establish contacts with the forum state itself and in addition to those contacts from which the tortious injury is alleged to have resulted. The paucity of Rebecca's contacts with the Virgin Islands shows she has not availed herself of the laws and protections of this jurisdiction. As a result, the Due Process clause protects her liberty interest in not being subject to the binding judgments of this Court.

Conclusion

For the foregoing reasons, Atrium V.I., LLC's Motion to Conduct Jurisdictional Discovery is DENIED; Rebecca Cenni's right to assert the defense of lack of personal jurisdiction under V.I. R. Civ. P. 12 (b) (2) is NOT WAIVED; and Rebecca Cenni's Motion to Dismiss for Lack of Personal Jurisdiction is GRANTED.

An order consistent with this memorandum opinion shall follow.

Dated: August 9, 2018

ATTEST: Estrella George
Clerk of Court ___/___/___

by ______________
Lori Boynes-Tyson
Court Clerk Supervisor 8 / 13 2018

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS