FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ROHN & ASSOCIATES, LLC,	)	**CASE NO. SX-12-CV-482**
	)	
Plaintiff,	)	**JURY TRIAL DEMANDED**
	)	
v.	)	
	)	
MARSHALL A. BELL & ASSOCIATES, P.C.,	)	
	)	
Defendant.	)	
	)	

Cite as: 2019 VI Super 132

Appearances:

LEE J. ROHN, ESQ.
Lee J. Rohn & Associates, LLC
Christiansted, VI 00820
For Plaintiff

DOLACE MCLEAN, Ph.D., Esq.
VISIONS LAW FIRM
St. Thomas, VI 00801
For Defendant

MEMORANDUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a motion filed by Marshall A. Bell & Associates, P.C. ("Bell Firm" or "Defendant") to dismiss for improper venue or, in the alternative, to transfer venue from the St. Croix District ("St. Croix") to the St. Thomas/St. John District ("St. Thomas"). Rohn & Associates, LLC ("Rohn Firm" or "Plaintiff") opposes dismissal and transferring venue. Defendant filed a request after the venue motion was fully briefed for judicial notice of the *forum non conveniens* doctrine. Plaintiff opposes the request and requests sanctions for having to respond to the "erroneous and superfluous filing." (Pl.'s Resp. to Req. for Jud. Notice 2, filed July 2, 2014 (hereinafter "Jud. Notice Opp'n").)

¶2 For the reason explained further below, Defendant's request for judicial notice is rejected because courts "judicially notice . . . fact[s]," V.I. R. Evid. 201(b), not legal doctrines. Moreover, the doctrine of *forum non conveniens* only comes into play when another forum would be more convenient, not another district within the same forum. Nevertheless, venue in St. Croix was not proper because a cause of action for breach of contract claim accrues in "the place of intended performance rather than the place of repudiation." *Decker Coal Co. v. Commonw. Edison Co.*, 805 F.2d 834, 842 (9th Cir. 1986). Accordingly, the Court will grant Defendant's alternate request and direct the Clerk's Office to transfer venue to St. Thomas for all further proceedings. Dismissal is not appropriate when venue, not forum, is at issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶3 Marshall A. Bell, Esq. ("Bell"), principal of the Bell Firm, entered into co-counsel agreement in March of 2006 with Lee J. Rohn, Esq. ("Rohn") and her former law firm, Rohn & Cameron, LLC, "for the joint representations of two different personal injury plaintiffs, David Pettigrew and Luis Moquete-Mella, whereby Bell and Rohn divided the duties of representing these clients between them (with Bell primarily responsible for client relations and Rohn for trial practice)." *Bell v. Lee J. Rohn & Assocs., LLC*, No. ST-14-CV-585, 2015 V.I. LEXIS 89, *1 (V.I. Super. Ct. July 8, 2015).[1] *Luis Moquete-Mella v. CULUSVI, Inc., et al.*, ST-06-CV-170, was filed on March 22, 2006, and *David Pettigrew v. American Yacht Harbor, Inc., et al.*, ST-06-CV-266, was on May 19, 2006. Both cases were filed in St. Thomas by Rohn on behalf of Rohn & Cameron, LLC. "Bell . . . left the practice of law in the Virgin Islands in 2009 while these representations were still pending. Pettigrew's case settled fully by the end of 2011 . . . ." *Bell*, 2015 V.I. LEXIS 89 at *1. Moquete-Mella's case settled in 2016. *Cf. In re: Rohn*, 67 V.I. 764, 766 (2017) ("Ultimately, Moquete-Mella and the Cost-U-Less defendants entered into a stipulation of dismissal with prejudice, which the Superior Court approved on July 21, 2016."). "Bell and Rohn now dispute how much of the final settlement and judgment amounts are, or will be, owed to Bell." *Bell*, 2015 V.I. LEXIS 89 at *2.

¶4 The Rohn Firm commenced this declaratory judgment action in St. Croix against the Bell Firm to declare the parties' rights and obligations concerning the co-counsel agreement. The Bell Firm appeared and moved to dismiss for improper venue or, in the alternative, to transfer venue to St. Thomas, which the Rohn Firm opposed. After the motion was fully briefed, the Bell Firm filed an

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[1] Because the underlying facts are not in dispute, the Court borrows from a related Superior Court case.

answer and counterclaimed against the Rohn Firm for breach of contract and a declaratory judgment. Several days later, the Bell Firm filed a request, which the Rohn Firm opposed, for judicial notice of the doctrine of *forum non conveniens*, reaffirming that this case should be transferred to St. Thomas. In response, the Rohn Firm asked that the request be stricken as improper further briefing filed without leave, and that the Bell Firm's counsel be sanctioned.

¶5 Bell later filed his own case in St. Thomas against Rohn and the Rohn Firm "for breach of contract and wrongful enrichment for the now-settled Pettigrew representation and for anticipatory breach of contract for the [then-]still-pending Moquete-Mella representation." *Bell*, 2015 V.I. LEXIS 89 at *3. However, the Superior Court dismissed that case under the "'first-filed' rule." *See id.* at *4 ("[T]he Court considers it obvious and uncontroversial that two judges in the same judiciary should not preside over parallel litigations of the same dispute simultaneously. To do otherwise would be an inefficient waste of judicial resources (and the parties'). It also opens up the risk of potentially conflicting rulings and inconsistent adjudications of essentially the same factual and legal issues" (citations omitted)). Bell did not appeal the dismissal.

II. DISCUSSION

A. Request for Judicial Notice

¶6 Before turning to the merits of the venue motion, the Court must first address the Bell Firm's request for judicial notice, which came after the venue motion was fully briefed. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 128-29 (Super. Ct. 2016) ("Any 'application'— whether orally or in writing—'made to a court or judge for the purpose of obtaining a ruling or order directing some act to be done in favor of the applicant in a pending case' is a motion." (quoting 60 C.J.S. *Motions and Orders* § 1 (2012)) (brackets omitted)); *see also id.* at 120 (resolving ancillary motions first as they affect arguments and issues to be considered).

¶7 In its request, the Bell Firm asks the Court to "take judicial notice of the doctrine of *forum non conveniens*." (Def's Req. for Judicial Notice 1, filed June 12, 2014.) The Bell Firm asserts that this doctrine, "codified at 5 V.I.C. § 4905," *id.* at 2, gives courts discretion to dismiss or stay actions that "'should be heard in another forum.'" *Id.* (quoting 5 V.I.C. § 4905). And, according to the Bell Firm, court discretion under section 4905 should "be determined by reference to, *inter alia*, convenience to the parties and witnesses" as well as "any other factors which have a substantial bearing upon the selection of a convenient, reasonable and fair place of trial." *Id.* Finding further support for the venue motion, the Bell Firm believes the Court should "take judicial notice of the doctrine of inconvenient forums and [its] applicability to the transfer of venue requested in this case." *Id.* at 3. "When 4 V.I.C. § 78 is read in tandem with 5 V.I.C. § 4905, the Code, and the relevant case law analysis, clearly allows for a balancing test that takes into account the Defendant's interests in having this matter litigated in St. Thomas," Defendant contends. *Id.*

¶8 The Rohn Firm responded by requesting sanctions and to "strik[e] . . . Defendant's superfluous and unauthorized request . . . ." (Jud. Notice Opp'n 1.) The Rohn Firm views the Bell Firm's request as "yet another brief on the exact same issue," venue, but filed "more than a year after the briefing . . . closed . . . [and] without leave of Court." *Id.* The Rohn Firm further asserts that, because the parties dispute whether St. Thomas or St. Croix "is the more appropriate forum," "improper venue is not one for which a [c]ourt could take judicial notice." *Id.* Furthermore, because the judicial notice request briefs the same issue that was addressed in the venue motion, and filed without leave, the Rohn Firm believes the document should be stricken and sanctions awarded in "the amount of $200 representing 30 minutes of attorney time having to respond to Defendant's Request for Judicial Notice." *Id.* at 2. The Bell Firm did not reply to the Rohn Firm's opposition.

¶9 The Court agrees with the Rohn Firm that judicial notice is inappropriate here, but for not for the reasons the Rohn Firm articulated. First, "the Superior Court may take judicial notice of a fact if it represents general knowledge in the territory or it is capable of being readily determined by relying on sources whose accuracy cannot be questioned reasonably." *Slack v. Slack*, 69 V.I. 567, 573 (2018) (citing V.I. R. Evid. 201). But judicial notice is not necessary for a court to consider statutes, regulations, and case law or precedent. *See generally id.* at 574. Instead, "based on the judicial obligation to determine what law applies in the case being considered," "the court may simply consider" statutes, regulations, and case law or precedent. *Id.* In other words, "the Superior Court . . . need not take formal judicial notice of a statute, rule, regulation, or judicial opinion; such sources may simply be applied to the case at hand." *Id.* Thus, the Bell Firm's request for judicial notice of the *forum non conveniens* doctrine is misplaced. Second, and more importantly, the Bell Firm's request is also misplaced because it conflates *forum non conveniens* with venue. They are not interchangeable. In fact, in a sense, they are mutually exclusive.

¶10 *Forum non conveniens* is Latin for "inconvenient forum." *See Espinoza v. Evergreen Helicopters, Inc.*, 376 P.3d 960, 972 (Or. 2016) ("The doctrine of *forum non conveniens*—Latin for 'inconvenient forum'—provides that, in such cases, 'a court having jurisdiction may decline to exercise it on considerations of convenience, efficiency, and justice.'" (citations omitted)). "[T]he doctrine has deep roots in the common law." *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 675 (Tex. 2007); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981) ("The doctrine of *forum non conveniens* has a long history. It originated in Scotland, and became part of the common law of many States." (citations omitted)); *Clark v. Luvel Dairy Prods., Inc.*, 731 So. 2d 1098, 1100 (Miss. 1998) ("In the United States, the doctrine of *forum non conveniens* appeared in the 1800s in the jurisprudence of a few state courts although the phrase '*forum non conveniens*' was not used."). Federal courts nearly all state and territorial courts recognize the doctrine. *See Guil Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *see also Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008) ("[T]hirty-eight states have recognized the doctrine through case law."); *Chambers v. Merrell-Dow Pharm.*, 519 N.E.2d 370, 372 n.3 (Ohio 1988) (same).

¶11 Although historically a common law doctrine, many jurisdictions have codified *forum non conveniens* to some extent. *Cf. Kedy*, 946 A.2d at 1180 n.9 ("Our survey of sister jurisdictions reveals . . . . twenty-two states have enacted *forum non conveniens* statutes or promulgated rules of civil procedure."); *Chambers*, 519 N.E.2d at 372 n.2 ("[F]our states have adopted the doctrine by statute."); *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 376 (Ga, 2001) ("Most states have relied on their courts' inherent judicial power in adopting the doctrine, although a few states have enacted statutes with a *forum non conveniens* provision."); *see also In re: St. Croix Seamen's Asbestos Cases*, Civ. No. 606/92, *et seq.*, 1993 V.I. LEXIS 19, *11 (V.I. Terr. Ct. June 18, 1993) ("Locally, 5 V.I.C. § 4905 codifies the doctrine of *forum non conveniens*."). Broadly-speaking, the distinction between statutory and common law *forum non conveniens* is the result. Historically, at common law, dismissal was the only option. *See Chambers*, 519 N.E.2d at 374 ("Once a court has determined that the alternate forum is the more convenient, the common-law doctrine requires the court to dismiss the action." (citing *Gilbert*, 330 U.S. at 512); *accord Clark*, 731 So. 2d at 1101 ("The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in [28 U.S.C.] § 1404(a) for transfer." (quoting *Norwood*, 349 U.S. at 31); *First Fin. Tr. Co. v. Scott*, 929

P.2d 263, 265 (N.M. 1996) ("The common law doctrine of *forum non conveniens* allows only for the dismissal of a lawsuit, not the transfer of a lawsuit."). Under statutory *forum non conveniens*, courts may stay or dismiss. *See* 5 V.I.C. § 4905 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."); *see also* 16 V.I.C. § 133(c)-(d). And whether statutory *forum non conveniens* precludes common law *forum non conveniens* remains an open question in some jurisdictions. *Compare Espinoza*, 376 P.3d at 978 ("Although the venue statutes set out certain procedural parameters for addressing the appropriateness of a particular forum, plaintiffs have offered nothing to suggest that those statutes were intended to eliminate the common law doctrine of *forum non conveniens*, either expressly, or by necessary implication."), *with Clark*, 731 So. 2d at 1101 ("'When Congress adopted [28 U.S.C.] § 1404(a), it intended to do more than just codify the existing law on *forum non conveniens*.'" (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955)); *State ex rel. Am. Elec. Power Co. v. Nibert*, 784 S.E.2d 713, 729 (W. Va. 2016) (Loughry, J., dissenting) ("With the adoption of our *forum non conveniens* statute, and the doctrine's codification, the common law precedent was superceded."). *But cf. Gottwald v. Cano*, 568 S.W.3d 241, 249 (Tex. Ct, App. 2019) (applying both) ("The issue of whether an alternate forum is available and adequate is an issue considered in both statutory and common law *forum non conveniens* analysis . . . ."). Even without statutory authority, some courts modified their own common law *forum non conveniens* pursuant to their inherent authority to develop the common law. *Cf. Espinoza*, 376 P.3d at 979 ("Even if *forum non conveniens* were not a well-developed common law doctrine, courts would have authority to stay or dismiss an action for prudential reasons as an exercise of their inherent power to administer justice.").

¶12 But staying or dismissing a case under statutory or common law *forum non conveniens* is different than transferring venue because "venue and *forum non conveniens* are not the same." *Topic v. Topic*, 221 So. 3d 746, 751 (Fla. Dist. Ct. App. 2017); *accord Dayton Mall Motor Inn v. Honeywell, Inc.*, 347 N.W.2d 15, 17 (Mich. Ct. App. 1984) ("Although we agree with plaintiffs that analogies can be drawn between changes of venue and dismissals based on *forum non conveniens*, they are not the same thing."); *see also Great Am. Ins. Co. v. Kapitan Byankin*, No. C-96-0258 EFL (ARB), 1996 U.S. Dist. LEXIS 22394, *9 (N.D. Cal. Aug. 1, 1996) ("*Forum non conveniens* is distinguishable from improper venue."). *Forum non conveniens* permits a court to stay or dismiss an action because it should be litigated in a different jurisdiction, not another district within the *same* jurisdiction. *Cf. Clark*, 731 So. 2d at 1101 ("We have recognized the doctrine of *forum non conveniens* in cases involving out-of-state defendants requesting transfer to another state."). Venue, which is what the Bell Firm objects to, concerns the specific location within the jurisdiction where the action should be litigated. *Cf. Espinoza*, 376 P.3d at 977-78 ("Oregon's venue statutes do establish where certain actions may be litigated and allow a court to transfer an action to another venue *within the state for a variety of reasons* . . . but those statutes are silent as to whether . . . a court may dismiss or stay an action in favor of allowing it to be litigated in another forum *outside the state*." (emphasis added)).

¶13 Thus, *forum non conveniens* is not an issue here. The Bell Firm is not contending that the Virgin Islands is an inconvenient forum and the parties' disputes should be heard in another jurisdiction. Instead, the Bell Firm asserts that St. Croix is not the proper venue. Since jurisdiction is vested in the Superior Court of the Virgin Islands, *see* 4 V.I.C. § 76(a); *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 573 (2015), not in specific districts or divisions of the court, there is no dispute that the Virgin Islands is the proper forum for this dispute between two Virgin Islands law firms over attorney's fees under a co-counsel agreement. Hence, the Bell Firm's request for judicial notice must be denied.[2]

B. Motion to Transfer Venue

¶14 Turning to the venue motion, the Bell Firm first "asks this Court to dismiss this case from the St. Croix Division to be refilled in the St. Thomas/St. John Division as mandated by local statute." (Def.'s Mot. to Dismiss for Venue or in the Alt. Mot. to Transfer 1, filed Apr. 4, 2013 (hereinafter "Venue Mot.").) In fact, the Bell Firm contends that dismissal is mandated by statute. *See id.* at 2 ("The statute directs that the case be dismissed requiring the Plaintiff to refile the matter in St. Thomas. There is no prejudice to Plaintiff to bring the case in the proper venue, St. Thomas."). Before considering whether to transfer venue, the Court must first decide whether the Bell Firm is correct that this case must be dismissed. If the case must be dismissed, deciding whether to transfer venue would be moot. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 99 (Super. Ct. 2014).

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[2] The Rohn Firm's request for sanctions must also be denied because the Bell Firm did not act in bad faith. *Cf. In re: Rohn*, 67 V.I. 774 n.4 (Cabret, J., dissenting). Likewise, the Bell Firm did not violate briefing limits if a request is essentially a motion. *See Der Weer*, 64 V.I. at 128-29.

¶15 Historically, venue was governed by the common law. *See, e.g., Kane v. Schulmeyer*, 708 A.2d 1038, 1041-42 (Md. 1998) (discussing history of venue at common law). Today, venue is governed by statute. *Cf. O'Brien v. Mitchell*, 190 So. 2d 189, 190 (Fla. Dist. Ct. App. 1966) ("It is well settled that except as its power may be limited by express constitutional provisions fixing or regulating venue, a legislature may at its discretion fix the venue or place of trial of civil actions as long as it does not transgress fundamental guaranties of equal protection of laws and does not arbitrarily and unreasonably discriminate against particular persons."); *Dimmitt & Owens Fin., Inc. v. Deloitte & Touche (ISC), L.L.C.*, 752 N.W.2d 37, 40 (Mich. 2008) ("Venue is controlled by statute in Michigan."); *Shobe v. Latimer*, 792, 253 S.E.2d 54, 62 (W. Va. 1979) ("Venue is controlled by statute."); *see also* George Neff Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 Mich. L. Rev. 307, 311 (1951) ("Forty-two states have a provision for venue in the county where the cause of action or some part thereof arose or accrued.")). Like most jurisdictions, the Virgin Islands Legislature has also specified the proper venue for civil actions. *See* 4 V.I.C. § 78(a). But the statute does not authorize dismissal if venue is improper.

¶16 To be sure, dismissal is available under Virgin Islands Rule of Civil Procedure 12(b)(3) when the Virgin Islands is an inconvenient forum. *See* 5 V.I.C. § 4905 ("When the court finds that in the interest of substantial justice the action should be heard in *another forum*, the court may *stay or dismiss* the action in whole or in part on any conditions that may be just." (emphasis added)); *cf. Gayanich v. Gayanich*, 69 V.I. 583, 597 n.5 (2018) (discussing elements for dismissal under *forum non conveniens*). But Rule 12(b)(3) does not permit dismissal when a civil action is initiated in the wrong judicial division of the Territory because "the Virgin Islands Code 'authorize[s] . . . [the] transfer [of] any action or proceeding . . . to the other judicial division . . . if such a change in venue is in the interest of justice.'" *Melendez v. People*, 56 V.I. 244, 266 (2012) (quoting *In re: People*, 51 V.I. 374, 391 (2009) (*per curiam*)). *Cf.* V.I. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the Superior Court or the venue of actions in those courts."). And the interests of justice never support perfunctory dismissals of the type the Bell Firm advocates, (*see* Venue Mot. 2 (asserting section 78 requires dismissal and refiling in proper district), particularly because since statute of limitations could be implicated and additional costs would be incurred. *Cf.* V.I. R. Civ. P. 1 ("[R]ules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). Thus, the Bell Firm is mistaken in claiming that the Rohn Firm would not be prejudiced if a new action were initiated in St. Thomas.

¶17 In federal courts, when venue is improper, the action may be dismissed. *See* Fed. R. Civ. P. 12(b)(3); *see also Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W.D. of Tex.*, 571 U.S. 49, 55 (2013) ("Rule 12(b)(3) states that a party may move to dismiss a case for 'improper venue.' These provisions therefore authorize dismissal only when venue is 'wrong' or 'improper' in the forum in which it was brought."). *But cf. id.* at 58 ("When venue is challenged . . . the case must be dismissed *or transferred* under §1406(a)." (emphasis added)). But Virgin Islands law does not authorize dismissal if an action should have been initiated in another district within the Territory. Thus, the Bell Firm is simply incorrect in claiming that the Virgin Islands venue statute "directs that the case be dismissed . . . ." (Venue Mot. 2.) The word "dismiss" does not appear anywhere in the venue statute. Furthermore, Virgin Islands courts have consistently rejected dismissal, favoring transfer to the proper venue instead. *Cf. Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247 n.1 (2014); *Yusuf v. Estate of Hamed*, ST-17-CV-384, 2018 V.I. LEXIS 41 (V.I. Super. Ct. Apr. 5, 2018); *Christian v. Christian*, 21 V.I. 297 (Terr. Ct. 1985).[3] Consequently, this Court holds that, except as a sanction, dismissal is not available if an action should have been initiated in another venue within the Territory. "[V]enue is not immutable," *James v. O'Reilly*, 70 V.I. 990, 997 (2019), and in the Virgin Islands can be transferred to the appropriate district. Thus, the Bell Firm's request to dismiss for improper venue must be denied.

¶18 As an alternative to dismissal, the Bell Firm requests a transfer of venue to St. Thomas, asserting that "[t]his case should <u>**never**</u> have been filed on St. Croix . . . ." (Venue Mot. 2.) Resolving the Defendant's request is not straight-forward, however, because the Rohn Firm and the Bell Firm disagree over where the cause of action arose. The Rohn Firm correctly points out that "this matter is for declaratory judgment on a case sharing and fee agreement between Plaintiff and Defendant." (Pl.'s Opp'n 4, filed Apr. 25, 2013 (hereinafter "Venue Opp'n").) "All funds and settlement checks were received in St. Croix and disbursed from St. Croix." *Id.* Hence, venue is proper in St. Croix,

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[3] In fact, only one case considered dismissal as an option under section 78(b) of title 4 of the Virgin Islands Code, but the discussion was *dicta* as the court concluded that transfer was proper. *See generally Estick v. Reynolds*, SX-09-CV-339, 2010 V.I. LEXIS 125 (V.I. Super. Ct. Sep. 29, 2010).

Plaintiff contends, because "the cause of action arose in St. Croix." *Id.* The Bell Firm agrees that what "occurred in St. Croix were Rohn's failure to perform pursuant to the fee sharing agreement, her unilateral attempt to modify extra judicially the terms of the agreement, her concealment of the settlements of the mediations, and her failure to provide an accounting . . . ." (Def.'s Rebuttal of Pl.'s Opp'n 2, filed May 13, 2013 (hereinafter "Venue Reply").) But Defendant disagrees that St. Croix is "where the cause of action arose." *Id.*

¶19 To resolve the venue motion, the Court must first decide where venue lies in a declaratory judgment action. The Rohn Firm commenced this action for a declaratory judgment, not for breach of contact. Even though the Bell Firm counterclaimed for breach of contract, venue is determined according to where the plaintiff's cause of action arose, not the defendant's counterclaims. *Cf. United States ex rel. Kashulines v. Thermo Contracting Corp.*, 437 F. Supp. 195, 197 (D.N.J. 1976) ("But venue has never been a significant consideration for counterclaims. The federal venue statute, 28 U.S.C. § 1391, prescribes the places where a suit may be "brought," and that statute has been strictly construed to apply only to the initiation of suit rather than to counterclaims. "); *Ex parte M.A.G.*, 160 So. 3d 22, 25 (Ala. Civ. App. 2014) ("Venue is determined at the commencement of the action. . . . the . . . subsequently filed counterclaim does not alter that determination."); *Soloman v. Excel Mktg.*, 682 N.E.2d 724, 728 (Ohio Ct. App. 1996) ("[V]enue is determined by where the plaintiff's claim for relief arose, not where the defendant's counterclaim for relief arose."); *Schemitsch v. Valley Enters. Parks & Realty LLC*, 941 N.Y.S.2d 541, 541 (Sup. Ct. 2011) ("Although a counterclaim does not ordinarily affect venue, the assertion of a counterclaim subject to mandatory venue requirements will govern venue." (citations omitted)). *Cf. New Holland, Inc. v. Trunk*, 511 So. 2d 746, 747 (Fla. Dist. Ct. App. 1987) ("In a multi-count suit or one involving claims and counterclaims the court cannot change venue of only a portion of the entire lawsuit.").

¶20 The Virgin Islands Declaratory Judgments Act does not specify venue. But the Virgin Islands act is based on the Uniform Declaratory Judgments Act, *cf. Companion Assurance Co. v. All. Assurance Co., Ltd.*, 21 V.I. 34, 37 (D.V.I. 1984), and other jurisdictions that adopted the uniform act have concluded "that general venue rules apply since the Uniform Declaratory Judgments Act does not fix venue . . . ." *Hartford Accident & Indem. Co. v. Viken*, 483 P.2d 266, 268 (Mont. 1971); *accord Ex parte Bd. of Water & Sewer Comm'rs of Mobile*, 272 So. 3d 635, 639 (Ala. 2018) (same); *see also Father*

Flanagan's Boys' Home v. Graybill, 132 N.W.2d 304, 308 (Neb. 1964) ("The Uniform Declaratory Judgments Act is a procedural act. Venue in a declaratory judgment action is governed by the rules relating to venue of civil actions generally." (citations omitted)). Since the primary purpose of declaratory judgment actions is to "declare rights, status, and other legal relations," 5 V.I.C. § 1261, courts look to "the primary purpose," the "'essence,'" or the "'controlling issue' in suit[s] for declaratory judgment." *Bergin v. Tex. Beef Group*, 339 S.W.3d 312, 316 (Tex. Ct. App. 2011) (citations omitted); *accord Alliance Life Ins. Co. v. Ulysses Vol. Fireman's Relief Ass'n*, 529 P.2d 171, 174-75 (Kan. 1974). In other words, "[v]enue in a case brought under the Uniform Declaratory Judgments Act . . . [is] controlled by the 'nature and dominant purpose of the suit, as shown by the petition [or complaint].'" *Bergin*, 339 S.W.3d at 316 (citation omitted).

¶21 In this instance, even though the Rohn Firm seeks a declaratory judgment, the controlling issue is the agreement between the two law firms now that Bell "no longer ha[s] an active license to practice law in the Virgin Islands . . . ." (Compl. ¶ 18.) The Rohn Firm avers that "the unauthorized practice of law statues and . . . Rules of Ethical Conduct prohibit Plaintiff from paying legal fees to a non attorney." *Id.* ¶ 19. For this reason, Plaintiff

> seeks a declaratory judgment on whether Plaintiff can pay legal fees to a company not in good standing, whether a[] non attorney can receive a legal fee, whether an attorney who performs virtually no work on a case can receive a fee, [and] whether . . . Bell can collect fees for [the Bell Firm].

Id. ¶ 20. So, even though this is a declaratory judgment action, the essence of this action is really the contract between the Bell Firm and the Rohn Firm's predecessor,[4] Rohn & Cameron, LLC, and

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[4] Plaintiff attached a copy of the *Pettigrew* and *Moquete-Mella* fee sharing agreements to its complaint. Further, the *Pettigrew* agreement shows that the contracting parties were Rohn & Cameron, LLC and Marshall A. Bell & Associates, P.C. The Bell Firm, in its Answer, admitted the Rohn Firm's allegation that "Bell allowed his license to go inactive in or about 2010." (Compl. ¶ 4; *see* Ans. ¶ 4, filed Apr. 14, 2017 ("4. Admit.").) By separate order the Court will direct the parties to brief whether either party is the proper party here and, further, whether a professional services corporation is automatically dissolved within three years after its sole member is no longer licensed to practice that profession. *Cf.* 13 V.I.C. § 285 ("All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their business . . . ."). The Court takes judicial notice that the Supreme Court of the Virgin Islands granted Bell's petition for inactive status on April 14, 2009. If Bell's professional corporation also expired the same day by its own limitation, *cf.* 13 V.I.C. § 714, then this action, initiated on November 30, 2012, may have been commenced too late, more than three years after the April 14, 2012 expiration date established by law. *Cf. A.B. Med. Servs., PLLC v. Travelers Indem. Co.*, 895 N.Y.S.2d 759, 761 (Sup. Ct. 2009) ("Dissolution occurred on the effective date of the suspension of Dr. Braver's medical license since, at that point, there were no remaining members of the professional service limited liability company."

whether the contract can or should be honored or has already been breached.

¶22 This leads to a final question: where venue lies for a breach of contract claim. Historically, at common law, contract actions were considered transitory actions.

> [T]he general rule is that a cause of action which seeks recovery of damages based upon an alleged breach of contract is transitory in nature and "may therefore be adjudicated by any court which has jurisdiction *in personam* of the defendant, irrespective of where the contract was concluded, and irrespective of where it is to be performed." This is true even if neither party is a resident of the forum jurisdiction.

Tuky Air Transp. v. Edinburgh Ins. Co., 19 V.I. 328, 242 (D.V.I. 1982)." (citation omitted)); *accord Gagnon v. Wright*, 200 A.2d 196, 198 (D.C. 1964) ("An action for breach of contract is transitory in nature and maintainable in any jurisdiction where personal service can be obtained upon the defendant."); *Aquidneck Realty, Inc. v. G.P. Pier Retail, LLC*, No. NC-2007-0625, 2008 R.I. Super. LEXIS 22, at *1 (Super. Ct. Feb. 5, 2008) ("Rhode Island courts have long held that contract actions are transitory actions." (citing *Bowden v. Ide*, 138 A. 190, 191 (R.I. 1927)). By contrast, "[a]ctions for damages to real property, for nuisance, or for the obstruction of one's right of way were regarded as local and had to be brought where the cause of action arose; if brought elsewhere, they were subject to dismissal on demurrer." *Kane*, 708 A.2d at 1042.[5]

(citation omitted)). The Bell Firm, or perhaps just Bell, does not want the case dismissed, of course, because the Bell Firm counterclaimed for breach of contract. Thus, any statutes of limitations should not be at issue and, further, would have been waived. But the question raised is whether Rohn & Associates, LLC, either as successor or partial successor in interest to Rohn & Cameron, LLC, and Bell should be the correct parties here as plaintiff and defendant, respectively. *Cf.* V.I. R. Civ. P. 17(a); V.I. R. Civ. P. 15(c)(1)(C); *see also* V.I. R. Civ. P. 15-2 (court may amend defects in pleadings). The members of Rohn & Cameron, LLC may have a share in the potential liability to Bell or the Bell Firm. *Cf. Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A.*, 679 So. 2d 637, 640 (Ala. 1996) ("[P]ending contingent-fee cases are assets of the originating firm and . . . lawyers practicing together have a continuing fiduciary duty to each other and the firm."). Assuming that Virgin Islands law is similar, it would follow that, if "legal fees earned from clients of the partnership or professional association [must] be divided according to the interest of each partner in the partnership or the interest of each shareholder in the professional association," "in the absence of an agreement" providing otherwise, *id.*, then the fees to be paid to another law firm under a fee sharing agreement must also be divided accordingly. In other words, assuming for sake of this Opinion only that Rohn & Cameron, LLC dissolved, unless the Rohn Firm assumed all the benefits and burdens of the co-counsel contracts for *Pettigrew* and *Moquete-Mella*, Rohn & Cameron, LLC may share in the responsibility here since it was that corporate entity, and not the Rohn Firm, that entered into the co-counsel agreement with the Bell Firm. *Cf. Goodwin v. Fawkes*, 67 V.I. 104, 116 (Super. Ct. 2016) ("Before turning to the merits, the Court must first resolve . . . who the parties to this action are.").

[5] The Court of Appeals of Maryland explained further in *Kane*:

> Like many common law rules and doctrines, venue has an ancient lineage, one that originally was tied to the early, and long-since discarded, role of jurors as knowledgeable witnesses rather than as impartial determiners of fact based on evidence heard in court. In *Crook v. Pitcher*, 61 Md. 510, 513

¶23 Like other jurisdictions, the Virgin Islands Legislature modified our common law to authorize venue generally for civil actions as "the judicial division where the defendant resides . . . or where the defendant may be served with process," 4 V.I.C. § 78(a), but also "where the cause of action arose." *Id.*; *cf. Ebell v. Seapac Fisheries*, 692 P.2d 956, 957-58 (Alaska 1984) ("In 1966, 'claim arose' language was added to 28 U.S.C. § 1391(a) and (b), extending venue in the federal courts to 'the judicial district in which the claim arose.' Similar language is also present in the venue statutes of several of our sister states." (ellipsis omitted)). Courts have struggled with determining where a claim or cause of action accrued or arose. *E.g., Brooks Range Petroleum Corp. v. Shearer*, 425 P.3d 65, 75 (Alaska 2018) ("[F]ederal interpretations of this language were never uniform." (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 184-85 (1979)). "State courts with 'claim arose' language in their venue statutes . . . followed a variety of approaches, finding proper venue where the contract was made, where it was breached, or where the damages occurred." *Id.* at 76; *see also id.* at 75-76 (noting other tests included weight of the contacts, most significant ties, and place of intended performance).

¶24 Before the federal venue statue was amended in 1990, *cf. Shearer*, 425 P.3d at 75 n.51, several federal courts followed the United States Court of Appeals for the Ninth Circuit in *Decker Coal Company v. Commonwealth Edison Company*, which held, concerning contract claims, that "venue for a claim based on breach of contract [should] be the place of intended performance rather than the place of repudiation." 805 F.2d 834, 842 (9th Cir. 1986) ("We favor this rule because the place of performance is determined at the inception of the contract and therefore parties can anticipate where they may be sued. Furthermore, the place of performance is likely to have a close

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> (1884), we observed that, at early common law, the plaintiff was required to state with precision not just the county, but the particular district or "hundred" within which the action arose, so that "the sheriff might summon as jurors, persons from the immediate neighborhood, who were presumed to be acquainted with the nature of the transaction, which they were called upon to try, and who were liable to be attainted, if they rendered a wrong verdict." That requirement, tying venue to the immediate neighborhood where the cause of action arose, continued to be the rule in England into the Seventeenth Century. . . . As we noted in *Crook v. Pitcher*, however, the required local nexus became inconvenient, "especially in mixed transactions which might happen partly in one place, and partly in another," and, as a result, (1) venue became an action-based, rather than a juror-based concept, and (2) a distinction was recognized between actions that were "local" – those which could only have arisen in a particular place – and those which were "transitory" founded on events or transactions that might have taken place anywhere.

708 A.2d at 1041-42 (citations and footnote omitted).

nexus to the underlying events."). Considering that the Virgin Islands Legislature enacted section 78 in 1976 "through what was commonly called the Territorial Court Act," *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 160, 166 (Super. Ct. 2016), and further considering that section 78 specifies venue "in ***the*** judicial division . . . where the cause of action arose," 4 V.I.C. § 78(a) (emphasis added), paralleling the "claim arose" language of other jurisdictions' venue statutes and implying that a claim arises in only one division, this Court agrees with *Decker Coal Company* and holds that venue for contract claims is the place of intended performance.

¶25 Although this is a declaratory judgment action, the Virgin Islands declaratory judgment statute does not address venue, so the Court must look to the underlying nature of the dispute between the parties, which concerns a contract. Section 78 authorizes venue where the defendant resides or where he can be served, both of which support the Bell Firm's contention that venue was proper on St. Thomas. But the Rohn Firm contends that venue was proper on St. Croix. The only plausible basis for that claim is if "this cause of action arose on St. Croix . . . ." (Venue Opp'n 4.) But this Court cannot agree. Instead, the Court holds that a breach of contract cause of action accrues in the place where it was performed. *Cf. Shearer*, 425 P.3d at 76-76 ("We note that given the facts of *Decker Coal*, the rule the Ninth Circuit applied was really a 'place of actual performance' rule, not a 'place of intended performance' rule, despite how it was stated and later characterized.").

¶26 The Court acknowledges that the Supreme Court of Alaska recently rejected *Decker Coal* in *Shearer* in favor of "the American Law Institute (ALI) test, which allows venue in any district in which 'a substantial part of the events or omissions giving rise to the claim occurred . . . .'" 425 P.3d at 77 (footnote omitted). The Alaska Supreme Court reasoned that "[t]he ALI's 'test's 'major purpose' is 'to liberalize the weight of the contacts test by ensuring that venue would be proper in more than one district . . . .'" *Id.* (footnote omitted). Further,

> the ALI test is the basis for the current version of the federal venue statute, which in 1990 replaced the phrase "*the* judicial district in which the claim arose' with the more inclusive phrase "*a* judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

Id. (ellipsis and footnote omitted). But one distinction is key here: the Alaska Legislature had repealed its "claim arose" statute and transferred authority to the Alaska Supreme Court to specify venue through its rule-making authority. *See id.* at 72. Likewise, the Congress of the United States amended the federal venue statute in 1990 to clarify that venue may be proper in more than one district. *Cf. id.* at 75 n.51. The Virgin Islands Legislature has not amended section 78 and "'[c]ourts are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it.'" *People v. Noel*, 68 V.I. 196, 210 (Super. Ct. 2017) (brackets and citation omitted).

¶27 Alaska is the largest state in the nation, while the federal judiciary is the largest judicial system in the country. By contrast, the Virgin Islands is likely the smallest territory in the nation with a comparably small judicial system at present: one trial court and one appellate court. *Cf. Lettsome v. Cazaubon*, ST-11-SM-239, 2011 V.I. LEXIS 81, *1 (V.I. Super. Ct. May 19, 2011) ("The Superior Court of the Virgin Islands is divided into the Division of St. Thomas and St. John and the Division of St. Croix. While the islands of St. Thomas and St. John compose a single judicial division, the Superior Court maintains facilities in both islands."). Moreover, the Virgin Islands has only two judicial divisions at presently: St. Thomas and St. Croix. Venue must lie in one or the other. "Although the proper venue problem is exacerbated in large states that have many different local court districts, the two districts in the Virgin Islands are separated by forty miles of sea . . . ." *Olive v. de Jongh*, 57 V.I. 24, 37 (Super. Ct. 2012). And the only reliable means of transport between the two venues is by plane. *Cf. United States v. Rivera*, 61 V.I. 617, 638 n.15 (D.V.I. 2014) ("It should be noted that for most of the year, the only method of travel between St. Croix and St. Thomas is by air."). To liberalize venue for breach of contract causes of action, allowing venue to lie where the contract was signed or where it was breached would only increase the cost of litigation. If the Legislature believes that venue should be liberalized, it is within their power to do so.

¶28 Courts found "proper venue where the contract was made, where it was breached, or where the damages occurred." *Shearer*, 425 P.3d at 76. Here, the agreements were prepared and signed on St. Thomas by Bell and Pettigrew, and Bell and Moquete-Mella, then mailed to St. Croix where Rohn signed and returned them to St. Thomas. The Rohn Firm states that funds and settlement checks were received and disbursed from St. Croix, presumably implying that the breach, if any, occurred on St. Croix. But the agreements on which this action is based were not for receipt and payment of funds. The Bell Firm did not contract with the Rohn Firm to act as a surety. Instead, the Bell Firm entered into an agreement with the Rohn Firm to act as co-counsel on cases to be filed in and litigated in St. Thomas, where Pettigrew and Moquete-Mella lived and were injured. Even under the "weight of the contacts" or "substantial contacts" tests, venue would be proper in St. Thomas. This Court prefers clarity over confusion and concluding that venue for a breach of contract claim lies in the place of actual or intended performance provides that clarity.

¶29 Lastly, the Rohn Firm contends St. Croix was the proper forum because "[i]t would be costly for Plaintiff to litigate this matter in St. Thomas where all of Plaintiff's witnesses would have to fly to St. Thomas for trial." (Venue Opp'n 4.) Further, "[t]he witnesses . . . will consist of Rohn and Associates principals and employees who worked on the case and reside in St. Croix and Defendant's principles and employees who worked on the case." *Id.* But arguments concerning "the convenience of [the] parties and witnesses," 4 V.I.C. § 78(b), go to changing venue. The issue the Bell Firm raised is where should this action have been commenced. The answer to that question is St. Thomas: where the Defendant had its principal place of business, where the Defendant was served, and the place where the parties performed their contract. "Venue requirements 'are designed to ensure that litigation is lodged in a convenient forum and to protect the defendant against being sued in an arbitrary place.'" *Shearer*, 425 P.3d at 70 (brackets and footnoted citation omitted); *accord Leroy*, 443 U.S. at 183-84 ("In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.").

III. CONCLUSION

¶30 For the reasons stated above, the Defendant's request for judicial notice must be denied because *forum non conveniens* is not applicable here and judicial notice would not be necessary even if it were. The Defendant's motion to transfer venue to St. Thomas will be granted as St. Thomas is where this case should have been filed. Although this is a declaratory judgment action, courts look to the nature of the dispute between the parties to determine venue. Here, the dispute centers on a contract and that contract was intended to be performed on St. Thomas. Thus, venue over this contract action lies in St. Thomas. An appropriate order follows.

Date: October 2, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________
Court Clerk
Dated: 10/2/2019