FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

FREDERICK T. KUYKENDALL, III,	)	**CASE NO. SX-05-CV-097**
	)	
Plaintiff,	)	**COMPLEX LITIGATION DIVISION**
	)	
v.	)	
	)	
THOMAS H. HART, III; THOMAS ALKON; JAMES A. MEANEY; JAMES A. MEANEY, P.C. and THOMAS ALKON, P.C. d/b/a ALKON MEANEY; MRRM, P.A.; and RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC,	)	
	)	
Defendants.	)	
	)	

Cite as: 2019 VI Super 65

Appearances:

HENRY C. SMOCK, ESQ.
Smock & Moorehead
St. Thomas, VI 00804
For Plaintiffs

EDWARD L. BARRY, ESQ.
Law Offices of Edward L. Barry
Christiansted, VI 00820
For Thomas H. Hart, III

JOEL H. HOLT, ESQ.
Law Offices of Joel H. Holt
Christiansted, VI 00820
For Thomas Alkon, James A. Meaney, and James A. Meaney, P.C. & Thomas Alkon, P.C. d/b/a Alkon Meaney

MARK W. ECKARD, ESQ.
Law Offices of Mark W. Eckard, P.C.
Christiansted, VI 00820
For Richardson, Patrick, Westbrook & Brickman, LLC

THEODORE H. HUGE, ESQ.
Harris & Huge, LLC
Charleston, SC 29403
For MRRM, P.A.

MEMORADUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a motion filed by defendant Richardson, Patrick, Westbrook & Brickman, LLC to dismiss this case pursuant to the "common law doctrine of prior pending action" which "permits a court to dismiss a second cause of action that raises the same issues in a prior case currently pending before the court." (Defs.' Richardson, Patrick, Westbrook & Brickman, LLC's. Mot to Dismiss Compl. 1, filed Aug. 22, 2005 (quotation marks and citation omitted) ("Mot.).) Co-defendants Thomas Alkon, James A. Meaney, and James A. Meaney, P.C. and Thomas Alkon, P.C. doing business as Alkon Meaney joined in the motion to dismiss. The other defendants, MRRM, P.A. and Thomas H. Hart, III, did not respond. The plaintiff, Frederick T. Kuykendall, III, opposes the motion. Although the Virgin Islands has not yet recognized this common law doctrine, the Court concludes, for the reasons stated below, that adopting the prior action pending doctrine is the soundest rule for the Territory. Allowing the same parties to litigate the same issues in several cases is wasteful of scarce judicial resources and invites the potential for inconsistent outcomes. However, the Court must deny the motion to dismiss in this instance because the parties and the claims in this action are not the same as in the prior action.

I. BACKGROUND

¶2 Between August 1995 and October 2002, several hundred asbestos cases were filed in the District Court of the Virgin Islands and the Territorial Court of the Virgin Islands, now known as the Superior Court of the Virgin Islands. The Territorial Court cases were grouped under a master case, *In re: Kelvin Manbodh Asbestos Litigation Series* ("*Manbodh*"), to coordinate pre-trial litigation. By October of 2002, all the Territorial Court plaintiffs had agreed to settle with the primary defendants, Amerada Hess Corporation, Hess Oil Virgin Islands Corporation, and Litwin Corporation. *Accord In re: Kelvin Manbodh Asbestos Litig. Series*, No. SX-97-CV-324, *et seq.*, 2018 V.I. LEXIS 96, *6-7 (V.I. Super. Ct. Sep. 19, 2018) ("From October 22 through 24, 2002, Litwin, HOVIC, and HOVIC's parent corporation, Amerada Hess Corporation held a successful global mediation in Miami, Florida. Litwin, Hess, and HOVIC later entered into a confidential settlement agreement involving 211 Territorial Court plaintiffs and 147 District Court plaintiffs making asbestos claims." (parenthetical abbreviation, quotation marks, ellipsis, and citation omitted)). Settlement by the District Court plaintiffs was finalized on or around March of 2003. *Cf. The Litwin Corp. v. Universal Oil Prods. Co.*, 69 V.I. 380, 384 (Super. Ct. 2018) (Litwin "entered into a joint settlement agreement with Claimants and other parties and settled all claims by Claimants with payment of a settlement on or about March of 2003. This settlement has resulted in a final resolution of all claims Claimants could bring against the Defendants named herein." (quotation marks and citation omitted)). Allegedly $11,000,000 in attorney's fees were realized by plaintiffs' counsel. The fees earned in prosecuting the Virgin Islands asbestos cases is the focus of this case and two others.

¶3 The first case, *Thomas Alkon, et al. v. Frederick T. Kuykendall, III, et al.*, Civil No. 63/2004, was filed on February 19, 2004 in the Territorial Court of the Virgin Islands[1] (hereinafter "*Alkon v. Kuykendall*" or "First Action"). The second case, *Frederick T. Kuykendall, III, et al. v. MRRM, P.A., et al.*, Case No. 2004-CP-10-1525, was filed in the Court of Common Pleas for the Ninth Judicial Circuit in Charleston, South Carolina (hereinafter "*Kuykendall v. MRRM, P.A.*" or "Second Action"). The third case, *Frederick T. Kuykendall, III v. Thomas H. Hart, III, et al.*, Civil No. 97/2005, is this case, which

[1] To avoid confusion, the Court will refer to the Territorial Court of the Virgin Islands as the Superior Court of the Virgin Islands throughout the remainder of this Opinion except for direct quotes.

was filed in the Superior Court of the Virgin Islands on February 23, 2005 (hereinafter "*Kuykendall v. Hart*" or "Third Action").[2] These three cases form the basis of the motion to dismiss.

¶4 Frederick T. Kuykendall, III ("Kuykendall") is an attorney who lives in Alabama where he practices law. He approached Thomas H. Hart, III ("Hart") and Michael J. Brickman ("Brickman") in June 1995 about "potential asbestos litigation in the United States Virgin Islands, which would arise out of steelworker medical testing and monitoring being initiated by Kuykendall." (Amend. Compl. ¶ 8.[3]) With or without their respective firms' blessings, which really is the gravamen of these cases, Kuykendall, Brickman, and Hart allegedly "entered into a contractual relationship related to the division and sharing of attorneys' fees and expenses in connection with the potential asbestos litigation." *Id.* ¶ 9. The agreement was "memorialized" by Brickman "in a letter dated August 2, 1995." *Id.*; *see also Alkon v. Kuykendall*, 2019 VI Super 64, ¶ 3 ("*Alkon II*") (quoting 1995 letter from Brickman to Kuykendall, copying Hart) (hereinafter "the 1995 agreement").

¶5 Kuykendall represented the United Steelworkers of America, AFL-CIO-CLC in July 1995. Brickman was a partner at that time with the law firm of Ness, Motley, Loadholt, Richardson & Poole, P.A. based out of Charleston, South Carolina. And Hart was a partner with the law firm of Alkon, Rhea & Hart based out of St. Croix, U.S. Virgin Islands. Ness, Motley, Loadholt, Richardson & Poole, P.A. later became Ness Motley, P.A., then Motley Rice, LLC, and finally MRRM, P.A. ("MRRM"). In February 2002, Brickman, along with Terry E. Richardson, Jr., Charles W. Patrick, Jr., and Edward J. Westbrook, left Ness Motley to form Richardson, Patrick, Westbrook & Brickman, LLC ("RPWB").

[2] Since the allegations in the cases are largely the same, a broad summary follows before the specifics of each case are addressed. The background is taken from the pleadings filed in *Alkon v. Kuykendall* and in *Kuykendall v. Hart* as well as the complaint filed in *Kuykendall v. MRRM, PA,* which was attached to the motion to dismiss.

[3] Citations to the record are for documents filed in this case, *Kuykendall v. Hart*, unless stated otherwise.

Alkon, Rhea & Hart became Alkon, Meaney & Hart and then Alkon Meaney[4] once Thomas Alkon ("Alkon") and James A. Meaney ("Meaney") bought Hart out and Hart then "transferred and relinquished his partnership interest to Alkon Meaney in a Buy-Out Agreement dated June 27, 2001 (retaining only a very limited 'of counsel' status)." *Alkon II*, 2019 VI Super 64 at ¶ 2. Hart had filed most of the Virgin Islands asbestos cases and was lead counsel for the *Manbodh* plaintiffs until July 2001, when Alkon Meaney agreed to take over the prosecution of the Superior Court cases, and possibly the District Court cases as well; the record is unclear on that point. At some point Alkon took over the prosecution of the Manbodh cases. Meaney has since retired from the practice of law. (*See* Order, entered Dec. 18, 2017, *In re: Meaney* (V.I. S. Ct. BA No. 2017-0086) (granting petition to resign from the practice of law).)

¶6 Kuykendall continually "assert[ed] his interests in attorneys' fees generated from the VI Asbestos Cases." (Amend. Compl. ¶ 13.). And once he learned about the settlement, he retained Lee J. Rohn, Esq. ("Attorney Rohn"), who sent a letter, dated March 6, 2003, to Hart and Meaney, providing a copy of the Brickman-Kuykendall-Hart 1995 agreement, *see Alkon II*, 2019 VI Super 64 at ¶ 2, and explaining that Kuykendall "expected to be paid attorney's fees from the settlement proceeds based upon an alleged agreement between his former firm, Cooper, Mitch, Crawford, Kuykendall & Whatley ["Cooper Mitch"] and Alkon, Rhea & Hart." *Alkon v. Kuykendall*, 2019 VI Super 61, ¶ 3 (quotation marks, citation, and footnote omitted) ("*Alkon I*"). Alkon Meaney responded by asking Kuykendall "to set forth the basis of his claim." *Id.* (quotation marks and citation omitted). According to Alkon Meaney, Kuykendall "produced an alleged agreement made in 1995 with Tom

[4] So far as the record shows, Alkon Meaney was not a formal corporation or company but rather Alkon's and Meaney's respective professional corporations doing business as Alkon Meaney.

Hart" but "not with any firm with which Alkon or Meaney were ever partners." *Id.* (quotation marks, brackets, and citation omitted).

¶7 "Alkon & Meaney then reached out to Hart who provided correspondence between himself and Kuykendall discussing the sharing of fees between various law firms regarding cases to be filed in the Virgin Islands, including both asbestos and non-asbestos cases. But the correspondence did not reference any agreements between Alkon & Meaney and Kuykendall." *Id.* at ¶ 4 (quotation marks, brackets, and citations omitted). "Further, the correspondence confirmed that Hart had terminated all contracts he had with Kuykendall's firm well before Alkon & Meaney became counsel for Asbestos Litigation," which is why (according to them), "Kuykendall was never contacted or consulted about settlement negotiations, including the decision to ultimately recommend settlement to the clients." *Id*. quotation marks, brackets, ellipsis, and citations omitted).

A. *Alkon v. Kuykendall*

¶8 To preempt Kuykendall's claims to their attorney's fees, Alkon, Meaney, and their respective professional corporations, Thomas Alkon, P.C. ("Alkon PC") and James A. Meaney, Attorney at Law, P.C. ("Meaney PC") (collectively "the *Alkon* Plaintiffs") filed the First Action in 2004 as a declaratory judgment, naming Kuykendall and Hart as defendants. The *Alkon* Plaintiffs seek a declaration "that there is no contract between . . . [them] and Kuykendall or that . . . [they] do not owe any funds to him," (Compl. ¶ 19, filed Feb. 19, 2004, *Alkon v. Kuykendall*, SX-04-CV-063), that the contract, if any, was "terminated due to Kuykendall's failure to perform under the terms thereof before the [*Alkon*] Plaintiffs became counsel of record," *id.* ¶ 21, in the Virgin Islands asbestos litigation, that any agreement with Kuykendall is "unenforceable as it violated the applicable rules and canons of professional conduct which govern such fee-sharing agreements," *id.* ¶ 24, and finally, to declare that if "Kuykendall ever had any contract rights to a portion of any attorneys fees . . . Kuykendall is barred under the applicable equitable principles or alternatively is limited to an award based on the quantum merit of the services he performed." *Id.* ¶ 26.

¶9 Although Hart was named only "as a necessary and/or permissive party" to count two, *id.* ¶22, he counterclaimed against the *Alkon* Plaintiffs for indemnification because they had "agreed to assume the obligations with respect to, and to release and indemnify [him] from liability with respect to, the claim or potential claim of Kuykendall" "[u]nder the terms of the certain Buy-Out Agreement dated June 30, 2011, in which" Alkon Meaney acquired his "interest in the firm of Alkon Rhea & Hart." (Def. Hart's Ans. & Countercl. ¶ 2, filed Apr. 23, 2004, *Alkon*, SX-04-CV-063.) Hart also amended his answer to both allege that the Superior Court lacked jurisdiction because the Buy-Out Agreement had an arbitration clause and to assert a crossclaim against Kuykendall for declaratory relief, namely that Kuykendall had been "fully and fairly compensated by the Firm of Alkon, Rhea & Hart for the limited amount of services rendered, costs incurred and work accomplished in connection with the asbestos claims prior to the termination of the agreement." (Def. Hart's Amend. Ans., Countercl. & Crosscl. 6, filed May 12, 2004, *Alkon*, SX-04-CV-063.)

¶10 Kuykendall appeared and challenged the sufficiency of service of process and personal jurisdiction in a pre-answer motion to dismiss, which the Court denied on May 4, 2004. He then answered the complaint, "admit[ting] that he did not appear as counsel of record in the subject litigation." (Def. Kukendall's Answer ¶ 14, filed June 7, 2004.) But he also countered that he could show that he "fulfilled all aspects of his agreement." *Id.* ¶ 17. And relevant to the present motion, he alleged, as an affirmative defense, that the Superior Court

> should decline to exercise subject matter jurisdiction over this declaratory judgment action on the grounds that another action is pending in another jurisdiction between

> these parties and others seeking damages for breach of contract arising out of the same state of facts underlying this case.

Id. ¶ 18. Which action and what jurisdiction were not identified, however, and Kuykendall later amended his answer with leave of court to drop the prior pending action defense, and to assert nine claims or demands as counterclaims against the *Alkon* Plaintiffs, as crossclaims against Hart, and as third-party claims against Gordon Rhea ("Rhea"), Rhea's professional corporation, Gordon Rhea, P.C., ("Rhea PC"), MRRM, and RPWB.

¶11 RPWB responded to Kuykendall's third-party claims by filing a motion to strike, which this Court subsequently denied. *See generally Alkon II*, 2019 VI Super 64. Hart "moved to compel arbitration, contending that his portion of the dispute over the 1995 agreement should be decided by an arbitrator. The Court (Ross, J.) granted the motion to compel over the Plaintiffs' opposition and this Court recently entered judgment on the Alkon-Meaney-Hart claims." *Alkon II*, 2019 VI Super 64 at ¶6 n.1 (citation omitted). Count II as well as Hart's Counterclaim are no longer pending in the First Action. But Kuykendall's crossclaim against Hart remains. *See Alkon I*, 2019 VI Super 61 at ¶ 8 ("Kuykendall successfully obtained clarification of the November 8, 2005 Order, that his rights of recovery against any party shall not be affected in any way by the arbitration between Alkon, Meaney, and Hart with respect to their Buy-Out agreement. (quotation marks and citation omitted)).

B. ***Kuykendall v. MRRM, P.A.***

¶12 After the First Action had commenced, but before the Court had denied Kuykendall's pre-answer motion to dismiss, Kuykendall and the law firm of Kuykendall & Associates, LLC ("the *Kuykendall* Plaintiffs"), alleged to be a successor in part to Cooper Mitch, filed the Second Action in South Carolina against MRRM and RPWB, and Hart, Meaney, Alkon, Rhea, and their respective professional corporations, Meaney PC, Alkon PC, and Rhea, PC. The *Kuykendall* Plaintiffs voluntarily dismissed Rhea and Rhea PC without prejudice. *See Kuykendall v MRRM, P.A.*, No. 04-CP-10-1525, 2006 WL 4037598, *1 n.1 (S.C. Com. Pl. Jan. 04, 2006). Alkon, Meaney, and their professional corporations noticed, on May 5, 2004, their intent to move to dismiss for lack of personal jurisdiction and, alternatively, because the First Action was pending. *Cf.* S.C. R. Civ. P. 12(b)(8) (dismissal because "another action is pending between the same parties for the same claim."). Hart also noticed his intent, on June 2, 2004, to move to dismiss based on South Carolina Rule of Civil Procedure 12(b)(8), or in the alternative, to stay.

¶13 On November 9, 2005, the South Carolina court heard oral argument on the motions. In a written decision issued January 4, 2006, the court granted Alkon Meaney's motion to dismiss "find[ing] that defendants Alkon and Meaney do not have the requisite minimum contacts with South Carolina." *See Kuykendall*, 2005 WL 4037598 at *3. The court denied Hart's motion to dismiss, however, but granted his motion to stay, concluding that the First Action was "not the same," *id.* at *10, as the Second Action, even though "both suits arise from the same series of actionable wrongs, i e a dispute over a fee agreement and the subsequent disbursement of funds according to its terms." *Id.* The court reasoned that the First Action, *Alkon v. Kuykendall*, was "originally filed for declaratory relief," though "subsequent pleadings have changed the nature of the Virgin Islands suit such that the relief requested is similar to the present action." *Id.* But the court expressed concern that Kuykendall "may be denied certain advantages if forced to litigate via counterclaim in the Virgin Islands." *Id.* at *4. Largely for this reason, the South Carolina court concluded that "the actions are similar, [but] they are not the same for purposes of . . . Rule 12(b)(8)." *Id.* at *4; *see also id.* at *7-8 (South Carolina three-part test) ("'(1) the parties must be the same; (2) identity in the thing sued for; and (3) identity in the cause of action.'" (quoting *S.C. Publ. Serv. Comm'n v. City of Rock Hill*, 234 S.E.2d 228, 229 (S.C. 1977))). Hence, the court denied Hart's motion to dismiss, but did grant his request to stay the Second Action. *See id.* at *5 ("On the above grounds, the court finds within its discretion that a stay of proceedings is appropriate to allow the Territorial Court of the Virgin Islands time to decide the issues before it. If after disposition of the suit in St Croix the plaintiff is still without an adequate remedy, he will be allowed to continue with the present action."). Kuykendall appealed on February 7, 2006, but later withdrew the appeal. The case was remitted to the trial court on September 28, 2006. Presumably, the Second Action remains stayed as the First Action is still awaiting resolution.

C. *Kuykendall v. Hart.*

¶14 Kuykendall filed the Third Action in the Superior Court of the Virgin Islands on February 23, 2005, naming the same parties as defendants—Hart, Alkon, Meaney, Rhea, their professional corporations Meaney PC, Alkon PC, and Rhea PC, and MRRM and RPWB—though he later amended his complaint on June 16, 2005 to drop Rhea and Rhea PC. Kuykendall did not demand a jury trial. Meaney PC and Alkon PC answered the complaint, denied liability, demanded a trial by jury, and alleged as an affirmative defense that the Third Action "is barred as to Meaney and Alkon as this claim is a compulsory counterclaim that should have been asserted in the case filed by Meaney and Alkon against Kuykendall." (Defs. Meaney PC and Alkon PC's Ans. 4, filed June 23, 2005 (citing *Alkon v. Kuykendall*, SX-04-CV-63).) MRRM answered on August 31, 2005 and denied liability, and in an amended answer crossclaimed against Meaney and Meaney PC. Hart answered the complaint on November 3, 2005, denied liability, and like Alkon and Meaney, alleged that the Third Action "is duplicative of an earlier case filed in this court, *Alkon v. Kuykendall*, Civ. No. 63/2004, and should be abated under the 'prior action pending' doctrine." (Def. Hart's Ans., p. 7, filed Nov. 3, 2005 (citing Mot.).) After Alkon PC and Meaney PC had appeared, and before MRRM or Hart appeared, RPWB appeared and filed a motion in this case to dismiss based on the prior action pending doctrine. Alkon, Meaney, Alkon PC, and Meaney PC joined RPWB's motion. Kuykendall opposes dismissal.

II. DISCUSSION

¶15 "Abatement, also known as the prior action pending doctrine, holds that where the claims involve the same subject matter and parties as a previously filed action so that the same facts and issues are presented, resolution should occur through the prior action and the second action should be dismissed." (Mot. 7 (citing *Patrick V. Koepke Const., Inc. v. Woodsage Const. Co.*, 119 S.W.3d 551, 556 (Mo. Ct. App. 2003); *Nationwide Mut. Ins. Co. v. Douglas*, 557 S.E.2d 592, 593-94 (N.C. Ct. App. 2001); *Brandon v. Ark. W. Gas Co.*, 61 S.W.3d 193, 200 (Ark. Ct. App. 2001)).) In its motion, RPWB acknowledges that the Virgin Islands has not recognized the prior action pending doctrine yet. *See id.* at 6 ("[T]he Virgin Islands does not have a statute which requires certification by a party as to whether similar litigation is pending."). But RPWB points to persuasive authority from the United States Court of Appeals for the Third Circuit disapproving of "duplicative litigation." *Id*. (citing *Remington Rand Corp.-Del. v. Business Sys., Inc.*, 830 F.2d 1274, 1276 (3d Cir. 1987)) (other citation omitted). And RPWB avers that "[t]he majority of jurisdictions have adopted the prior pending action doctrine, either by statute or by case law." *Id.* So, the Virgin Islands should as well. *See id.* ("In the absence of local Virgin Islands law to the contrary, the common law of the majority of jurisdictions shall be deemed controlling in the courts of the Virgin Islands." (citing 1 V.I.C. § 4)). The *Alkon* Plaintiffs joined in RPWB's "motion to dismiss . . . based on the doctrine of abatement." (Def. Alkon, et al.'s Joinder in Mot. to Dismiss 1, filed Aug. 24, 2005.) Kuykendall did not object to their joinder or to RPWB raising the doctrine, or to the Virgin Islands recognizing it. Nevertheless, this Court must decide first whether to adopt this common law doctrine before considering whether the First Action abates the Third Action. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 140 (Super. Ct. 2016) ("[P]arties cannot stipulate to the law, not explicitly by agreeing on the applicable law, or implicitly by not questioning what law applies." (quotation marks and citations omitted)).

¶16 "'[W]hen confronted with an issue of Virgin Islands common law' not settled by binding precedent, courts must 'engage in a three-factor analysis' before applying a specific common law rule." *Id.* at 139-40 (quoting *Machado v. Yacht Haven U.S.V.I., L.L.C.*, 61 V.I. 373, 380 (2014)). "Colloquially, this three-part analysis has become known as 'a *Banks* analysis.'" *People v. Rivera*, 68 V.I. 552, 559 (Super. Ct. 2018) (footnote and citation omitted). The three factors to be considered in a *Banks* analysis are "which common law rule Virgin Islands courts have applied in the past," which "rule [has been] adopted by a majority of courts of other jurisdictions; and then finally . . . which common law rule is soundest for the Virgin Islands." *Machado*, 61 V.I. at 380 (quotation marks and citations omitted). Of the three factors (referred to as a *Banks* analysis), the third is considered the "most important[]." *Id.* (quotation marks and citations omitted). Each will be examined below.

¶17 Regarding the first factor, RPWB is correct that, at the time when RPWB filed its motion, Virgin Islands courts had not yet recognized the prior action pending doctrine. Since then, however, several courts in the Virgin Islands have recognized this common law doctrine, though referred to as the "first to file" rule. *See Bell v. Lee J. Rohn & Assocs., LLC*, No. ST-14-CV-585, 2015 V.I. LEXIS 89, *4 (V.I. Super. Ct. July 8, 2015) ("[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." (citing *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941)); *see also Cenni v. Estate Chocolate Hole Landowners Ass'n*, No. ST-15-CV-383, 2016 V.I. LEXIS 98, at *84-86 (V.I. Super. Ct. July 18, 2016) (agreeing with *Bell* but concluding that the "first to file" rule was inapplicable); *cf. Balbo Corp. v. Indep. Bank*, No. 2014-19, 2014 U.S. Dist. LEXIS 102445, at *5 (D.V.I. July 28, 2014) ("Where two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." (citation omitted)).[5] The *Bell* court acknowledged that "the Virgin Islands Supreme Court has not yet expressly adopted the first-filed rule," but felt "confident that it is . . . a non-jurisdictional, prudential doctrine of deference and forbearance that best promotes the ends of efficiency and comity." 2015 V.I. LEXIS 89 at *5-6. The court referred to the rule as one that "has an ancient pedigree in the United States, going back at least as far as Justice John Marshall's opinion in *Smith v. M'Iver*, 22 U.S. (9 Wheat.) 532, 535 (1824)." *Bell*, 2015 V.I. LEXIS 89 at *5.

¶18 Turning to the second factor, the majority of courts in other jurisdictions, federal, state, and territorial, have all adopted the prior action pending or first-to-file doctrine. *Bell*, 2015 V.I. LEXIS 89 at *5 (First-to-file "is the accepted judicial policy in many other jurisdictions . . . including the Third Circuit." (citations omitted)); *cf. Kuykendall*, 2006 WL 4037598 at *4 ("There is little South Carolina case law interpreting the elements of duplicative litigation, so it is instructive to look to other states

[5] Abstention, not abatement, is the rule in federal court when a prior action is pending in a state or territorial court. *Cf. Mamouzette v. Jerome*, Civ. No. 2013-0117, 2017 U.S. Dist. LEXIS 112003, *15 (D.V.I. July 19, 2017) ("The first filed rule . . . is one of deference between two suits filed in different federal courts, and is therefore, inapplicable to the case at bar. . . . The question, therefore, is whether this Court should abstain from adjudicating this matter in deference to the Superior Court action." (paragraph break omitted)).

that have enacted similar rules of civil procedure California, Idaho, Illinois, Missouri, New York, Oklahoma, and Wisconsin have rules that allow for abatement, or the suspension or defeat of a pending action for a reason unrelated to the merits of the claim." (quotation marks and citation omitted));[6] *accord Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) ("[I]t is clear that Mrs. Walton had no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." (citing *United States v. Haytian Republic*, 154 U.S. 118, 123-24 (1894)) (other citations omitted)); *Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465, 476 (Conn. 1998) ("The prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court."); *State ex rel. Dos Amigos, Inc. v. Lehman*, 131 So. 533, 535 (Fla. 1930); *Speicher v. Speicher*, 2013 Guam 11, ¶ 21 (citing *Simmons v. Super. Ct. of Los Angeles Cnty*, 214 P.2d 844, 848 (Cal. Dist. Ct. App. 1950)); *The Steamer Mee Foo*, 6 Haw. 294, 295 (1881) ("The law abhors multiplicity of actions, and therefore whenever it appears

[6] Some jurisdictions have codified the prior action pending doctrine. *E.g.*, Ga. Code Ann. § 9-2-5(a); *see also Combined Ins. Co. v. Certain Underwriters*, 826 N.E.2d 1089, 1094 (Ill. Ct. App. 2005) ("Pursuant to section 2-619(a)(3) of the Code, a defendant may seek dismissal of a complaint on the basis that 'there is another action pending between the same parties for the same cause.'" (quoting 735 Ill. Comp. Stat. Ann. § 5/2-619(a)(3)) (other citation omitted)); *see generally* 1 C.J.S. *Abatement and Revival* § 24 (2016) ("In some jurisdictions, the doctrine of abatement by reason of the pendency of another action is declared by statute, sometimes with modifications of the general rule."). By contrast, South Carolina Rule of Civil Procedure 12(b)(8) "has historic ties to a former statute." *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 531 (S.C. Ct. App. 2009) (footnote omitted). Case law construing statutory law must be excluded from a *Banks* analysis. *Cf. Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 472 n.102 (Super. Ct. 2017) ("The Superior Court should consider 'non-statutory law created by judicial precedent' and 'exclude case law relying on state statutes from a *Banks* analysis.'" (brackets omitted) (quoting *In re: L.O.F.*, 62 V.I. 665, 661 n.6 (2015)). But these courts have also recognized their statutory law is merely a codification of their common law. *Cf. Clark v. Weaver*, 284 S.E.2d 95, 97 (Ga. Ct. App. 1981) ("The legislative declaration . . . is totally consistent with prevailing jurisprudential philosophy that 'a party is not entitled to prosecute a suit for the same cause of action in different Courts, or in the same tribunal, at the same time.'" (brackets omitted) (quoting *Hartell v. Searcy*, 32 Ga. 190, 191 (1861)); *Skolnick v. Martin*, 203 N.E.2d 428, 430 (Ill. 1964) ("Historical background shows that, prior to the enactment of the Civil Practice Act, it was the general rule that where a party began two actions for the same cause within the same jurisdiction, the pendency of the first was ground for the abatement of the second, the reason being that one should not be vexed with a litigation in more than one action at the same time." (citations omitted)). Nonetheless, case law from Illinois, Georgia, Alabama, New York, and Michigan is excluded. South Carolina case law is considered, however, because South Carolina's statute was repealed, and similar a rule of procedure promulgated in its place. No court conducting a *Banks* analysis has concluded that case law construing rules of procedure must be excluded like case law construing statutes must be.

on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate."); *State ex rel. Meade v. Marshall Super. Ct. II*, 644 N.E.2d 87, 88-89 (Ind. 1994) ("When an action is pending before a court of competent jurisdiction, other courts must defer to that court's extant authority over the case. Courts observe this deference in the interests of fairness to litigants, comity between and among the courts of this state, and judicial efficiency." (citations omitted)); *Long v. McKinney*, 897 So. 2d 160, 172 (Miss. 2004); *see also* Idaho R. Civ. P. 12(b)(8); S.C. R. Civ. P. 12(b)(8); Or. R. Civ. P. 21A(3). Courts in other jurisdictions construe this common law rule as "prevent[ing] the defendant from being harassed by the pendency at the same time of two actions based on the same cause of action, at the instance of the same plaintiff, who has a complete remedy by one of them." *Lee v. Mitchell*, 953 P.2d 414, 418 (Or. 1998) (quotation marks, brackets, and citation omitted); *accord Commonwealth v. Churchill*, 5 Mass. (1 Tyng) 174, 176 (1809) ("It is very well known that a man cannot bring a second action for the same cause, for which he has a prior action pending."). But many courts require that the parties in the two cases are identical, having the same status in each, and further that the courts are identical, having the same jurisdiction. *See, e.g.*, *Horter v. Commercial Bank & Tr. Co.*, 126 So. 909, 912 (Fla. 1930) ("This court has followed the general rule that a plea of a prior action pending applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases in which there are cross-suits by a plaintiff in one suit who is defendant in the other; in other words, that, where the party defendant in the prior suit is plaintiff in the subsequent suit, the first suit cannot be pleaded in abatement of the second."); *Syver v. Hahn*, 94 N.W.2d 161, 164 (Wis. 1959) ("Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having *concurrent jurisdiction*, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court *of coordinate power* is at liberty to interfere with its action." (emphasis added) (quotation marks and citation omitted)). But the prior action pending doctrine is not without its limits.

¶19 The rule does extend to appeals. *See, e.g.*, *Eways v. Governor's Island*, 391 S.E.2d 182, 185 (N.C. 1990) ("[W]here the prior action has been adjudicated by the trial court but is pending appeal it will continue to abate a subsequent action between the parties on substantially identical subject matter and issues." (citations omitted)). But "the pendency of a prior suit in a Federal Court is not ground for the abatement of a like suit in a State Court even though both suits are brought in the same State by the same parties and for the same cause." *Lehman*, 131 So. at 535 (citations omitted); *accord Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 330 (3d Cir. 2007) ("Although the Appellants repeatedly resort to the rule . . . that parallel proceedings do not disturb the jurisdiction of either court, we made it clear long ago that this rule generally applies only when one court is a state court and the other is a federal court. As we explained, the 'parallel proceedings' rule 'clearly has no application to a situation in which two actions are pending in courts of equal dignity within the judicial system of a single sovereignty.'" (brackets omitted) (quoting *Crosley Corp.*, 122 F.2d at 929)). Likewise, a prior action pending in one state or territory is not grounds for abating a case in the other. *Cf. Pac. & Atl. Shippers, Inc. v. Schier*, 205 A.2d 31, 32 (N.H. 1964) ("A prior action pending in a foreign jurisdiction is ordinarily no ground for abatement, since a court of this jurisdiction cannot assure full protection of the plaintiff's rights elsewhere." (citations omitted)). But the second court may stay its case to allow the first court in the other jurisdiction to proceed. *Accord Kuykendall*, 2006 WL 4037598 at *5; *see also, e.g.*, *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263

A.2d 281, 283 (Del. 1970) ("[A] Delaware action will not be stayed as a matter of right by reason of a prior action pending in another jurisdiction involving the same parties and the same issues; that such stay may be warranted, however, by facts and circumstances sufficient to move the discretion of the Court.").

¶20 Regarding the third *Banks* factor, this Court holds that the soundest rule for the Virgin Islands is to adopt the prior action pending doctrine, a "common sense rule, which provides that as between two judges with jurisdiction, the judge 'which first has possession of the subject must decide it.'" *Bell*, 2015 V.I. LEXIS 89 at *5 (quoting *Smith*, 22 U.S. (9 Wheat.) at 535)). The two cases must be pending in the same court, the parties to each must be the same, and the issues and claims asserted (or that could be asserted) must be the same or substantially the same except for "marginal differences." *Id.* at *4 n.2; *accord Kuykendall*, 2006 WL 4037598 at *3; *see also Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 532 (S.C. Ct. App. 2009) ("[W]e interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate."). *But cf. Meagher v. Quale*, 77 N.W.2d 878, 882 (N.D. 1956) ("A 'plea of former action pending is not good where, though actions relate to same subject-matter, their nature is essentially different.'" (quoting *Reichart v. Pure Oil Co.*, 172 Minn. 8, 8 (1927)).

¶21 Returning to the motion to dismiss, RPWB filed its motion on August 23, 2005, at a point when Kuykendall's motion in the First Action to amend his answer and to assert crossclaims, counterclaims, and third-party claims had not yet been ruled on. (*See* Mot. 4 ("The Court has not yet ruled on Kuykendall's 'Motion to Amend Answer, Affirmative Defenses and Counterclaims' in the Original Action."). RPWB claims these events reveal "a strategy of forum shopping" by Kuykendall and "completely contradictory positions" "taken . . . to advance his own agenda." (Mot. 2; *see also id.*

at 2-3 ("For example, on March 24, 2004, Kuykendall moved to dismiss the Complaint in the Original Action, on the grounds that the Court lacked personal jurisdiction over him. Less than a year later, on February 23, 2005, Kuykendall invoked the jurisdiction of this same Court and filed the Second Action in the capacity of Plaintiff.").) But the Court cannot agree. And a brief timeline will show why.

February 19, 2004	**First Action** filed.
March 30, 2004	Kuykendall files pre-answer motion in **First Action** to dismiss for lack of personal jurisdiction
April 5, 2004	<u>Second Action</u> filed
May 4, 2004	Court denies Kuykendall's pre-answer motion in **First Action**
May 5, 2004	Alkon, Meaney, Alkon PC and Meaney PC notice motion in <u>Second Action</u> to dismiss for lack of personal jurisdiction or based on **First Action**
June 2, 2004	Hart notices motion in <u>Second Action</u> to dismiss or stay based on First Action
June 7, 2004	Kuykendall files answer in **First Action**
February 15, 2005	Kuykendall files motion in **First Action** for leave to amend answer to amend answer and assert counterclaims, crossclaims, and third-party claims
February 23, 2005	*Third Action* filed (complaint dated February 15, 2005)
June 16, 2005	Amended complaint filed in *Third Action* dropping Rhea and Rhea PC.
June 23, 2005	Meaney PC and Alkon PC file answer in *Third Action*
August 16, 2005	Court grants Kuykendall's motion in **First Action** to amend answer and assert counterclaims, crossclaims, and third-party claims
August 23, 2005	RPWB files motion in *Third Action* to dismiss based on First and Second Actions
August 31, 2005	MRRM files answer in *Third Action*
November 9, 2005	Court holds hearing in <u>Second Action</u> on motions to dismiss
November 10, 2005	MRRM amends answer in *Third Action* to assert crossclaims against Meaney and Meaney PC
November 22, 2005	Rhea and Rhea PC voluntarily dismissed from <u>Second Action</u>
December 5, 2005	RPWB files motion in **First Action** to strike third-party complaint
January 4, 2006	Court grants motion filed by Alkon, Meaney, Alkon PC, and Meaney in <u>Second Action</u> to dismiss for lack of personal jurisdiction, denies Hart motion to dismiss <u>Second Action</u> based on **First Action**, but grants Hart request to stay <u>Second Action</u> based on **First Action**

¶22 Much occurred between February 19, 2004, when the First Action was filed, and January 4, 2006, when the Second Action was stayed. But most importantly here, the First Action was filed as a declaratory judgment action. If it had remained a declaratory judgment action, and if the Virgin were to recognize the declaratory judgment exception to *res judicata*, *cf. Alkon II*, 2019 VI Super 64 at ¶ 23, a decision in the First Action might not have precluded any of the parties from filing a second action. *See* 5 V.I.C. § 1286 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."). *Cf. Kuykendall*, 2006 WL 4037598 at *5 ("'There has always been a close connection between abatement for another action pending and the claim preclusion doctrines.' To establish a plea of *res judicata*, or claim preclusion, the claiming party must establish that the identity of the parties is the same, that the subject matter is the same, and that the issue is the same in the present action as in the former suit." (punctuation added) (quoting *Lee*, 953 P.2d at 419, and citing *Renaissance Enterps., Inc. v. Ocean Resorts, Inc*, 496 S.E.2d 858 (S.C. 1998)).

¶23 Kuykendall opposed Hart's motion to amend his answer because *Alkon v. Kuykendall* was "a declaratory judgment action" and the Second Action was already pending in South Carolina. (Def. Kuykendall's Opp'n to Hart's Mot. to Amend Ans. 1-2, filed June 7, 2004, *Alkon v. Kuykendall*, SX-04-CV-063 (citing *Kuykendall v. MRRM, PA* complaint attached).) So, the Court cannot find fault with Kuykendall filing the Second Action. He had moved to dismiss *Alkon v. Kuykendall* for lack of personal jurisdiction over him. If he had prevailed, there would not have been another action pending as to him. But he did not prevail. The Court denied his motion and Kuykendall answered the *Alkon* Plaintiffs' complaint. But by then, he had already filed *Kuykendall v. MRRM PA*. Then Alkon, Meaney, Alkon PC, and Meaney PC, i.e., the *Alkon* Plaintiffs, moved to dismiss the Second Action for lack of personal jurisdiction or, in the alternative, to dismiss because the First Action was pending. Hart too moved to dismiss the Second Action based on the First Action.

¶24 At this point, Kuykendall was a party to the First Action and facing the prospect (which later materialized) that the Second Action could be dismissed as to Hart and the *Alkon* Plaintiffs, without whom he might not obtain complete relief. *Cf. Kuykendall*, 2006 WL 4037598 at *4 ("Despite changes in the nature of the action through subsequent pleadings, the plaintiff may be denied certain advantages if forced to litigate via counterclaim in the Virgin Islands, specifically the ability to choose a forum where he believes he would receive the most complete relief."). And Kuykendall had not asserted any claims in the First Action yet. His motion to amend his answer was not filed until February 15, 2005, and not granted until August 16, 2005. In the interim, Kuykendall filed the Third Action on February 23, 2005.

¶25 It does give the Court pause that Kuykendall filed the Third Action on the same day that he moved for leave to amend his answer to assert crossclaims, counterclaims, and third-party claims in the First Action.[7] But motions, even unopposed motions, are not granted because they are filed. *Cf. Ayala v. Lockheed Martin Corp.*, 67 V.I. 290, 303 (Super. Ct. 2017) ("[A] motion is not automatically granted simply because it is unopposed. . . . [C]ourts must still determine whether granting the motion is appropriate." (quotation marks and citations omitted)). Although the *Alkon* Plaintiffs only opposed Kuykendall's motion for technical reasons, *cf.* D.V.I. Local R. Civ. P. 15.1 (amendments to pleadings must delineate proposed changes), considering that Kuykendall was looking to "change the nature of the Virgin Islands suit," *Kuykendall*, 2006 WL 4037598 at *4, the Court could have denied Kuykendall's motion. If it had, Kuykendall would have been a party to the First Action, but precluded from asserting his own claims in it, and facing dismissal of the Second Action. Every party seeks "to advance his own agenda." (Mot. 2.) That's the nature of adversarial process. So, the Court cannot find fault with Kuykendall's action under these circumstances. (*Accord* Pl.'s Opp'n to Mot. to

---

[7] The complaint in the Third Action is dated February 15, 2005 and was stamped in by the Clerk's Office the same day, but not processed until February 23, 2005, the date the filing fee was paid.

Dismiss 5, filed Nov. 15, 2005 ("The present action was not filed for the purpose of vexation or harassment, but in order to secure Kuykendall's rights in case Kuykendall's Motion to Amend in 63/04 was ultimately denied or did not relate back.").)

¶26 Nevertheless, the question remains whether to grant RPWB's motion since Kuykendall is seeking the same relief from the same parties in two different actions, albeit via different pleadings. To make this determination, courts typically review the pleadings to determine whether the actions are similar. *Cf. Schoonmaker v. Lawrence Brunoli, Inc.*, 828 A.2d 64, 81 n.22 (Conn. 2003) ("A court applying the prior pending action doctrine 'must examine the pleadings to ascertain whether the actions are virtually alike and whether they are brought to adjudicate the same underlying rights.'" (ellipsis omitted) (quoting *Cumberland Farms, Inc.*, 719 A.2d at 476); *see also Cianci v. Chaput*, 64 V.I. 682, 690 n.2 (2016) (recognizing that courts may take judicial notice of the content of other courts' dockets).

¶27 First, both cases are pending in the Superior Court.[8] Thus, the first factor is met. Second, the issues and claims are similar. On this, RPWB is correct. "Kuykendall's claims against RPWB and the other defendants in the [Third] Action, brought by Kuykendall as a plaintiff, are duplicative of the claims asserted by Kuykendall in the Original Action in his posture as a counterclaimant, cross-claimant and third-party claimant." (Mot. 8.) In fact, in all three actions, Kuykendall asserted the same claims or demands for relief: Breach of Contract (Count I); Constructive Trust (Count II);

---

[8] Technically, RPWB did not move to dismiss this action based on the Second Action. But RPWB did alert the Court to the Second Action. (*See* Mot. 4 ("The Court should also be aware that in between the time that the Original Action was filed in this Court on February 19, 2004, and the date Kuykendall filed his Complaint in the Second Action on February 23, 2005 (both filed in the Superior Court of St. Croix), Kuykendall filed a similar action in a state court in Charleston, South Carolina on April 4, 2004 - against the exact same parties as those identified in the Original Action and the Second Action, and based on the same issues.").) So, to the extent that RPWB could be seen as relying on the Second Action as further support for dismissing this action, it is rejected. Dismissing the Third Action because of the Second Action would not be appropriate since the Second Action has been stayed. *See Kuykendall*, 2006 WL 4037598 at *5.

Unjust Enrichment (Count III); Breach of Fiduciary Duty (Count IV); Conversion (Count V); Civil Conspiracy (Count VI); Equitable Accounting (Count VII); and Injunctive Relief (Count VIII).[9] But the parties are not the same.

¶28 Rhea and Rhea PC are Third-Party Defendants in the First Action whereas Kuykendall dropped both from the Third Action when he amended his complaint. MRRM crossclaimed against Meaney and Meaney PC in the Third Action, but not in the First Action.[10] Hart's counterclaim in the First Action and the Alkon Plaintiffs' claim against Hart have been referred to arbitration and final judgment was entered. Yet, in the Third Action, Hart and the *Alkon* Plaintiffs remain as defendants and, on appropriate motion, could crossclaim against each other. So, the parties are not exactly the same.

¶29 But perhaps the most important distinction between the First and Third Actions is that the First Action began as a declaratory judgment action. If this Court were to dismiss this action based on the pendency of the First Action, and if the Supreme Court of the Virgin Islands were later to conclude that this Court erred in denying RPWB's motion to strike, *see generally Alkon II*, 2019 VI Super 64, then Kuykendall very likely might be left be without any recourse. The more prudent course in this instance is to consolidate the cases. As the Third Circuit explained years ago,

> [w]hen a court learns that two possibly duplicative actions are pending on its docket, consolidation may well be the most administratively efficient procedure. If the second complaint proves to contain some new matters, consolidation - unlike dismissal of the

[9] Kuykendall asserted a ninth count (for equitable account/injunctive relief) against MRRM in the third-party complaint filed in the First Action.

[10] Whether a third-party defendant can assert crossclaims or counterclaims against a first-party plaintiff (absent a claim by the first-party plaintiff against the third-party defendant) is open to debate. *Compare Morris, Wheeler & Co. v. Rust Eng'g Co.*, 4 F.R.D. 307, 308 (D. Del. 1945) ("A third-party defendant may not set up a counterclaim against the original plaintiff where such plaintiff has asserted no claim against such defendant."), *with Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 652 (5th Cir. 1999) ("Under rule 14(a), third party defendants can join additional parties to the lawsuit to resolve claims related to the claim made against them. It therefore seems strange to conclude that they cannot bring those claims against parties already involved in the suit.").

> second complaint without prejudice or staying the second action - will avoid two trials on closely related matters. If, on the other hand, the second complaint proves to contain nothing new, consolidation of the two actions will cause no harm *provided* that the district court carefully [e]nsures that the plaintiff does not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed. In particular, the court must insure that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to the amendment of complaints . . . and demand for trial by jury . . . .

Walton v, 563 F.2d at 71 (citations omitted). Rather than dismiss this action without prejudice, the Court will instead consolidate the First and Third Actions. *Cf.* V.I. R. Civ. P. 42(a)(2) ("If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions.").

III. CONCLUSION

¶30 For the reasons stated above, the Court holds that adopting the prior action pending doctrine is the soundest rule for the Virgin Islands. It is "obvious and uncontroversial that two judges in the same judiciary should not preside over parallel litigations of the same dispute simultaneously." *Bell*, 2015 V.I. LEXIS 89 at *4. It is also obvious and uncontroversial that the same person should not seek the same relief against the same parties in the same court in multiple cases. If the parties, claims, and court are the same, the second action should be dismissed without prejudice. Here, however, the claims and parties are largely the same, but not sufficiently identical to warrant dismissal. Instead, the Court will consolidate the two cases. An appropriate order follows.

Date: May 7, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________________
Court Clerk Supervisor
Dated: 5/7/19

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

FREDERICK T. KUYKENDALL, III,	)	**CASE NO. SX-05-CV-097**
	)	
Plaintiff,	)	**COMPLEX LITIGATION DIVISION**
	)	
v.	)	
	)	
THOMAS K. HART, III; et al.,	)	
	)	
Defendants.	)	
	)	

ERRATA ORDER

COMES NOW the Court, *sua sponte*, to correct the following omission and scrivener's error in the Memorandum Opinion dated and entered May 7, 2019.

On page 1, in the appearances section, strike the "s" in "For Plaintiffs" and insert the following text between the appearances for Henry C. Smock, Esq. and Edward L. Barry, Esq.:

STEVEN J. HARFENIST, ESQ.
Friedman Harfenist Kraut and Perlstein, LLP
Lake Success, NY 11042
For Plaintiff (admitted *pro hac vice*)

On page 2, change "**MEMORADUM**" to "**MEMORANDUM**".

DONE AND SO ORDERED.

Date: May 15, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ____________________
Court Clerk Supervisor
Dated: 5/15/2019