

FOR OFFICIAL PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PETRA SYSTEMS, INC.,	)	CASE NO. ST-18-CV-615
	)	
Plaintiff,	)	ACTION FOR BREACH OF
v.	)	CONTRACT and BAD FAITH
	)	BREACH OF INSURANCE
EVEREST NATIONAL INSURANCE	)	CONTRACT
COMPANY¹,	)	
	)	JURY TRIAL DEMANDED
Defendant.	)	

Cite as: 2019 VI Super 56

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MEMORANDUM OPINION

FRANCOIS, Judge

¶1 Before the Court is Defendant Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* and Incorporated Memorandum of Law ("Motion to Dismiss"), which

¹ By Order dated January 3, 2019, the Court dismissed Plaintiff's Complaint against Defendants Travelers Property Casualty Company of America, The Travelers Indemnity Company, The Travelers Indemnity Company of Connecticut, and The Phoenix Insurance Company.

was filed on January 24, 2019.² Plaintiff Petra Systems, Inc. filed its Opposition to Motion to Dismiss for *Forum Non Conveniens* [sic] on February 13, 2019, and Defendant's Reply Brief in Further Support of Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* was filed on March 1, 2019.³ On March 28, 2019, the Court held oral argument on Everest's Motion to Dismiss.

¶2 Having heard the parties' arguments and reviewed the parties' motions and exhibits, the Court finds that while an alternative forum exists for which Petra may bring suit, the private and public interest factors weigh against dismissal for forum non conveniens. Consequently, Everest failed to meet its burden to prove that the U.S. Virgin Islands is an improper forum. Therefore, the Court finds that dismissal is not appropriate under Virgin Islands Rules of Civil Procedure 12(b)(3) or V.I. CODE ANN. tit. 5, § 4905. Accordingly, the Court will deny the instant Motion to Dismiss.

I. BACKGROUND

¶3 Petra is a Delaware corporation with its principal place of business in Colorado.⁴ Petra states that it only has four (4) employees in New Jersey and over twenty (20) employees in the U.S. Virgin Islands. On or about November 18, 2016, Petra contracted with non-party Virgin Islands Water and Power Authority ("WAPA") for a Smart Streetlight System installation project (the "Project") to replace, design, and build a street lighting system for the U.S. Virgin Islands on St. Thomas, St. Croix, and St. John.⁵ WAPA is a public corporation and an autonomous governmental instrumentality of the Government of the U.S. Virgin Islands.⁶ WAPA was:

created for the purpose of developing and utilizing and aiding in the development and utilization of adequate water and electric power systems for the people of the [U.S.] Virgin Islands, and any other service or facilities incidental or appropriate thereto, including the providing of services for wholesale advanced communications capabilities and services and telecommunications systems, and making the benefits thereof available to the inhabitants of the [U.S.] Virgin Islands in the widest economic manner consistent with sound fiscal management, and by this means to promote the general welfare and increase commerce and prosperity[.]⁷

² Prior to the mentioned filing, Defendant filed Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* and Incorporated Memorandum of Law on January 23, 2019. However, Defendant represented to the Court that the Motion to Dismiss filed on January 24, 2019 in the St. Thomas-St. John District is the controlling filing. Accordingly, the Court will only address Defendant's Motion to Dismiss filed on January 24, 2019.

³ The Court will refer to Defendant Everest National Insurance Company as "Everest" and Plaintiff Petra Systems, Inc. as "Petra" throughout this Memorandum Opinion.

⁴ Compl. ¶ 1. Everest alleges in its Motion to Dismiss that Petra's principal place of business is in New Jersey. "However, the Court accepts as true the non-movant's factual allegations and construes factual disputes in favor of the non-moving party." *Jeffrey Epstein v. Fancelli Paneling, Inc.*, 55 V.I. 150, 156 n.2 (V.I. Super. May 16, 2011) (citing to *Bertrand v. Cordiner Enters., Inc.*, 53 V.I. 280, 289 (V.I. Super. Ct. June 2, 2010)).

⁵ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 2.

⁶ 30 V.I.C. § 103.

⁷ 30 V.I.C. § 105.

¶4 WAPA is the U.S. Virgin Islands' sole utility company which provides critical power and lighting infrastructure to the Territory.⁸ The Project involved one-hundred (100) percent of the street lights in St. Thomas, St. Croix, and St. John.⁹ Specifically, the Project encompassed: "(1) the replacement of existing street lights with 15,722 LED street lights, (2) the engineering, procurement, and installation of 15,722 street light LEDs with smart light controllers, and (3) the engineering, procurement, and installation of approximately 10,000 distributed pole-mounted solar unites [sic] capable of communicating through the TUNet network with the Intelliview Management System."¹⁰

¶5 Petra purchased Commercial Inland Marine Policy No. IM8CM00070161 (the "Policy") from Everest to insure the installation of the Project from December 1, 2016 to May 1, 2018.¹¹ During oral argument, Petra stated that on Everest's website, Everest promoted that it was the 2016 Caribbean Insurer of the Year, which led it to specifically use Everest to insure the Project in the U.S. Virgin Islands. On or about September 6, 2017 and September 19, 2017, Category-5 hurricanes Irma and Maria (collectively referred to herein as "hurricanes"), respectively, hit the U.S. Virgin Islands.¹² As a result, the hurricanes damaged Petra's materials, products, and properties located at two manufacturing facilities: 114 Subbase Road, St. Thomas, and Fleming Transport Building – Henry E. Rohlsen Airport, St. Croix.¹³

¶6 On October 24, 2017, Petra reported to Everest that its properties have been damaged by the hurricanes.¹⁴ Petra's New York and Washington D.C. based experts, BDO Seidman ("BDO"), travelled to the U.S. Virgin Islands and investigated the extent of the damage in October and November of 2017.¹⁵ On December 11, 2017, Petra submitted a claim for Ten Million Dollars Three Hundred Twenty-Eight Thousand Nine Hundred Sixty Four Dollars (\$10,328,964.00).¹⁶ On July 2018, Petra provided an updated report to Everest reflecting a loss of Ten Million Seven Hundred Forty-Five Five Hundred Thirty-Eight Dollars (\$10,745,538.00).¹⁷ Petra asserts that it suffered and will continue to suffer catastrophic loss as a result of the damage to its insured properties in the U.S. Virgin Islands caused by the hurricanes.¹⁸

⁸ Compl. ¶ 11; Amicus Curiae Br; 2.

⁹ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 2.

¹⁰ *Id.*

¹¹ Compl. ¶ 18.

¹² *Id.* at ¶ 19.

¹³ Compl. ¶ 20; Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 3; Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 3.

¹⁴ Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 4.

¹⁵ *Id.*; Compl. ¶ 23.

¹⁶ Compl. ¶ 27.

¹⁷ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 3.

¹⁸ Compl. ¶ 27.

¶7 According to Petra, Everest delayed payment under the Policy by six months.¹⁹ Petra claims that it received a payment of less than half of what it was owed by March 2, 2018.²⁰ Petra asserts that Everest has withheld funds it is rightfully owed under the Policy.²¹ Petra filed its Complaint in this matter on September 26, 2018 in the Superior Court of the Virgin Islands – Division of St. Thomas and St. John.²² On December 17, 2018, the parties participated in mediation, which was unsuccessful.²³ Petra’s Complaint consists of two Counts: Breach of Contract and Bad Faith Breach of Insurance Contract.²⁴

¶8 Everest moves to dismiss this matter pursuant to V.I. R. Civ. P. 12(b)(3).²⁵ In support of its Motion to Dismiss, Everest argues that this suit is brought by a New Jersey-based company against another New Jersey-based company, “involving an insurance policy that was negotiated and delivered in New Jersey, and a claim that was made, handled, and paid in New Jersey.”²⁶ Everest further argues that other than being the location of the damaged property that gave rise to Petra’s insurance claim, the U.S. Virgin Islands is not the proper venue for this suit.²⁷ Rather, Everest asserts that the better and proper venue for this action is New Jersey because the critical witnesses, in addition to relevant documents, are located either in or in proximity to New Jersey.²⁸ Everest also states that Petra was paid under the Policy less than two months after it was notified.²⁹

¶9 Everest’s entire forum non conveniens argument is based upon the following syllogism: Everest has already paid Petra 100% percent of the money that Petra is entitled to receive under the Policy; the only dispute remaining is one of interpretation of a contract negotiated in New Jersey; and therefore, this dispute over contract interpretation has no connection to the U.S. Virgin Islands.

II. LEGAL STANDARD

¶10 V.I. R. Civ. P. 12(b)(3) provides that a party may file a motion to dismiss for improper venue. Pursuant to § 4905, “[w]hen 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

¹⁹ Oppos’n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 2.

²⁰ *Id.* at 3.

²¹ *Id.*

²² Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 3-4.

²³ *Id.*

²⁴ Compl. ¶¶ 47-58.

²⁵ Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2. Notably, the record establishes that Everest filed a separate action in New Jersey against Petra seeking declaratory judgment to resolve disputes between the parties with respect to the availability and extent of coverage under the Policy for Petra’s claims. Petra moved to dismiss the action in New Jersey, which was granted in part on April 12, 2019.

²⁹ Reply Br. in Further Support of Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens*; 3.

part on any conditions that may be just.”³⁰ The codification of the forum non conveniens doctrine permits the Court,³¹

in the exercise of its sound discretion, [to] dismiss a case when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to the defendant . . . out of all proportion to plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.³²

¶11 Everest, as the moving party, has the burden to establish that the Superior Court of the Virgin Islands, Division of St. Thomas and St. John, is an improper venue.³³ Specifically, Everest must show that: (1) an adequate alternative forum exists and (2) that the relevant private and public interest factors weigh heavily in favor of dismissal.³⁴

III. ANALYSIS

A. While the Court finds that New Jersey is an adequate alternative forum, less deference will not be given to Petra's choice of forum because it is not engaging in forum-shopping.

¶12 The Court's first inquiry is to determine whether there is an adequate alternative forum.³⁵ “It is well settled that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.”³⁶ “The requirement of an adequate alternative forum is generally satisfied when the defendant is amenable to process in another jurisdiction.”³⁷

¶13 Here, Everest argues that New Jersey is an adequate alternative forum.³⁸ Everest argues that it, as a Delaware corporation with its principal place of business in New Jersey, is amenable to process in New Jersey.³⁹ Everest argues that because the Policy was negotiated, handled, and delivered to Petra in New Jersey, and all critical witnesses and relevant documents are located in New Jersey, the proper forum is New Jersey.⁴⁰ Furthermore, Everest argues that Petra's

³⁰ 5 V.I.C. § 4905. *Epstein*, 55 V.I. at 167.

³¹ *Epstein*, 55 V.I. at 167 (referencing the local Virgin Islands statute, 5 V.I.C. § 4905, as the forum non conveniens doctrine).

³² *Id.* (quoting *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 42 (3d Cir. 1988)).

³³ *Id.* at 166.

³⁴ *Id.* at 167.

³⁵ *Id.*

³⁶ *Buccaneer Hotel Corp. v. Reliance Intern. Sales Corp.*, 17 V.I. 249, 260 (V.I. Super. Ct. 1981) (citing to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

³⁷ *Trotter v. 7R Holdings, LLC*, 68 V.I. 715, 720-211 (D.V.I. 2016).

³⁸ *Epstein*, 55 V.I. at 167; Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 4-5.

³⁹ *Epstein*, 55 V.I. at 167 (defendant is amenable to process in the forum it argued is proper). Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 4. Everest's Notice of Filing Tr. of Mar. 19, 2019 Hr'g on Mot. to Dismiss for the New Jersey Matter; 14.

⁴⁰ Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 2-5.

headquarters and its principal place of business are also in New Jersey.⁴¹ Based upon these factors, the Court finds that New Jersey is an adequate alternative forum.⁴²

1. Deference is given to Petra's choice of forum.

¶14 Because New Jersey is an alternative adequate forum for this litigation, Everest argues that Petra's choice of forum should not be accorded the deference ordinarily given because Petra is engaging in forum-shopping to gain a tactical advantage.⁴³ On the other hand, Petra asserts that Everest is the party engaging in forum-shopping because it filed the instant Motion to Dismiss after filing suit against Petra in New Jersey three months after Petra filed its suit in the U.S. Virgin Islands.⁴⁴

¶15 "Ordinarily, great deference is accorded [to] a plaintiff's choice of forum, but the amount of deference due is less when the plaintiff is foreign."⁴⁵ Everest cites to three (3) federal cases to support its position: *Piper Aircraft Co. v. Reyno*,⁴⁶ *Iragorri v. United Technologies Corp.*,⁴⁷ and *Carey v. Bayerische Hypo-Und Vereinsbank AG*.⁴⁸ Everest argues that great deference is not appropriate in this matter because Petra is a foreign plaintiff and its causes of actions do not have significant ties to the U.S. Virgin Islands.⁴⁹

¶16 Everest's reliance on the rules from the cases it cites are misplaced. Firstly, in *Piper Aircraft Co.*, the Supreme Court of the United States ("SCOTUS") explained that deference is given to a plaintiff's choice of forum because it is presumed to be convenient.⁵⁰ However, SCOTUS explained that when a foreign plaintiff, as opposed to a domestic plaintiff, chooses a U.S. forum, it is much less reasonable to presume that the choice was made for convenience.⁵¹ SCOTUS agreed with the lower court's distinction between resident or [U.S.] citizen plaintiffs and foreign plaintiffs stating that "[w]hen the plaintiff is foreign, . . . [the] assumption [favoring the plaintiff's choice of forum] is much less reasonable."⁵²

⁴¹ *Id.* at 4.

⁴² *Epstein*, 55 V.I. at 167.

⁴³ Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 18-21.

⁴⁴ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 18-20.

⁴⁵ *Trotter*, 68 V.I. at 723 (quoting *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir. 1989)).

⁴⁶ 454 U.S. 235, 255-56 (1981).

⁴⁷ 274 F.3d 65, 71 (2d Cir. 2001).

⁴⁸ 370 F.3d 234, 236 (2d Cir. 2004). "Such deference is not appropriate where (1) the lawsuit involves a foreign plaintiff residing outside the forum; (2) the plaintiff engaged in "forum shopping" to gain a tactical advantage; or (3) the plaintiff's causes of action do not have significant ties to the forum." Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 18.

⁴⁹ Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 19.

⁵⁰ *Piper Aircraft Co.*, 454 U.S. at 242 ("The court recognized that a plaintiff's choice ordinarily deserves substantial deference. It noted, however, that Reyno "is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States.")

⁵¹ *Id.* at 255 ("The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. . . . When the plaintiff is foreign, however, the assumption is much less reasonable.")

⁵² *Id.* at 255-56.

¶17 *Piper Aircraft Co.* is not analogous to the matter at hand. Here, Petra is a U.S. corporation – regardless of whether its principal place of business is in Colorado or New Jersey – that contracted with Everest for insurance covering property based in a U.S. territory.⁵³ A plaintiff, based upon rationale self-interest, will not file suit to inconvenience himself.

¶18 Secondly, in *Iragorri*, the Second Circuit held that the lower court should have accorded great deference to plaintiffs’ choice of forum, where the plaintiffs were U.S. residents, despite the plaintiffs temporarily residing in a foreign judicial district.⁵⁴ The Second Circuit expressed the validity of a U.S. resident’s choice of a U.S. forum.⁵⁵ *Iragorri* is not comparable to this matter.

¶19 Lastly, Everest cites to *Carey*.⁵⁶ In that case, the Second Circuit compared the degrees of difficulties between a U.S. citizen, residing in Germany, and a large business when litigating in a foreign country.⁵⁷ The Second Circuit held that “an individual’s choice of . . . home forum may receive greater deference than the similar choice made by a large organization which can easily handle the difficulties of engaging in litigation abroad.”⁵⁸ In spite of this reasoning, the Second Circuit also agreed with the lower court’s decision to require the plaintiff, an individual, to bring suit in Germany stating that in addition to the plaintiff residing in Germany, “she voluntarily entered into a contract to purchase and finance an apartment unit in Germany, representing a long-term investment in German real property.”⁵⁹ “Such transactions in Germany reasonably give rise to the expectation on all sides that any litigation arising from them will be conducted in Germany.” *Carey* is not instructive to the instant case.

¶20 For the abovementioned reasons, Everest does not proffer persuasive authority for the proposition that Petra’s choice to bring suit where the claim arose is entitled to less deference.⁶⁰ The cases relied upon by Everest only demonstrate that while courts give greater deference to U.S. citizens or residents, in comparison to foreign plaintiffs, who bring suits in U.S. forums, courts will often give weight to not only the residence of the parties but also consider the significance of the forum’s ties to the litigation.⁶¹ Indeed, none of the cases cited by Everest demonstrate that the

⁵³ *Cf. id.* at 261 (“The American interest in [a commercial aircraft crash in Scottish highlands] is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.”). Compl. ¶ 1; Oppos’n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 2; Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 3.

⁵⁴ *Iragorri*, 274 F.3d at 75 (the cause of action arose in Colombia).

⁵⁵ *Id.* at 71-72.

⁵⁶ “‘Diminished weight’ to plaintiff’s forum choice where the ‘cause of action does not have significant ties to the’ forum.” Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 19 (quoting *Carey*, 370 F.3d at 238-39).

⁵⁷ *Carey*, 370 F.3d at 238.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Cf. Piper Aircraft Co.*, 454 U.S. at 255-56; *Iragorri*, 274 F.3d at 75; *Carey*, 370 F.3d at 238. *Beberman v. U.S. Department of State*, Civ. No. 2014-0020, 2016 WL 3014665, at *9 (D.V.I. May 24, 2016).

⁶¹ *Id.*; *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608-09 (3d Cir. 1991) (quoting *Piper Aircraft Co.*, 454 U.S. at 255- 56) (distinguishing that a foreign plaintiff’s choice may deserve less deference because it may be less reasonable to assume that a venue which is not the plaintiff’s home forum is convenient).

U.S. forum, where the claim of action arose, chosen by a U.S. plaintiff warrants less deference.⁶² Everest has failed to connect the rulings upon which it relies its proposition that Petra's choice of forum is not due deference. Consequently, the Court does not allocate Petra's choice of forum less deference.

2. Everest failed to demonstrate that Petra is engaged in forum-shopping.

¶21 In addition, Everest argues that it is self-evident that Petra is engaging in blatant forum shopping, and that Petra only filed in the U.S. Virgin Islands because it is a hospitable forum.⁶³ While no binding U.S. Virgin Islands case defines forum-shopping, some persuasive cases discuss the practice of forum-shopping.⁶⁴ In *Beberman*,⁶⁵ the district court noted that forum-shopping is when parties purposely file "an action in a district with improper venue simply to take advantage of the forum's longer statute of limitations." In *Government of Virgin Islands ex rel. Simanca v. Proctor*,⁶⁶ a child support modification case, this Court explained that avoidance of a jurisdiction's laws can be considered forum-shopping.⁶⁷

¶22 Furthermore, the Court in *Prentice v. Seaborne Aviation, Inc.*⁶⁸ noted that where businesses choose to incorporate, operate, or headquarter are also examples of forum-shopping.⁶⁹ *Black's*

⁶² *Id.*

⁶³ Reply Br. in Further Support of Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens*; 9-10. Everest fails to support its argument that Petra's preemptive filing of the lawsuit evidences forum-shopping. Therefore, the need not address this argument. *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments . . . before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument . . ."); V.I. R. Civ. P. 6-1(a)(2) ("All motions must state with particularity the grounds for seeking the order, including a concise statement of reasons and citation of authorities[.]"),

⁶⁴ In discussing forum-shopping as it relates to the degree a plaintiff's choice of forum is to be given, the Second Circuit, in *Iragorri*, stated that the greater the plaintiff's or lawsuit's *bone fide* connection to the plaintiff's choice of forum, the more difficult it will be to gain dismissal for [forum non conveniens]. The Second Circuit further explained that "factors that argue against [forum non conveniens] dismissal includes the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense. On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a [forum non conveniens] motion by showing that convenience would be better served by litigating in another country's courts." *Iragorri*, 274 F.3d at 72.

⁶⁵ 2016 WL 3014665 at 9.

⁶⁶ 39 V.I. 28, 36 (V.I. Super. Ct. 1998).

⁶⁷ *Id.* ("Accepting [that Respondent fled the Territory to avoid the laws of the Virgin Islands] as [the] truth, the Court would still be powerless against this proposed mode of 'forum shopping.'").

⁶⁸ 65 V.I. 96, 109 n.7 (V.I. Super. Ct. 2016).

⁶⁹ *Id.* ("Congress has determined that any state law specifically compromising the enforceability of arbitration clauses imposes, by definition, an impermissible burden on interstate commerce by incentivizing forum shopping—including not only selection of forums for litigation, but also selection of forums to incorporate, headquarter, and operate

*Law Dictionary*⁷⁰ defines, in relevant part, forum-shopping as: “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum-shopping, for example, by filing suit in a jurisdiction with a reputation for high jury awards[.]”

¶23 Here, the Court finds that Everest’s argument that Petra is forum-shopping, and thus, shall not be given the deference often accorded, is meritless, and not supported by its own legal authority, or the record for that matter. The Court notes that the Policy does not provide a forum selection clause. Notwithstanding Everest’s position that New Jersey is liberal in interpretation of insurance contracts, Everest does not identify how Petra would gain any improper tactical advantage by litigating this case in the U.S. Virgin Islands.⁷¹ Everest fails to provide evidence that Petra is avoiding New Jersey laws,⁷² that the U.S. Virgin Islands has a reputation for awarding high awards to plaintiff’s like Petra,⁷³ or that Petra is taking advantage of a longer statute of limitation by filing suit in the U.S. Virgin Islands.⁷⁴

¶24 Rather, Everest only states during the March 28, 2019 oral argument that the U.S. Virgin Islands is “a plaintiff’s paradise.” Everest provides the Court with conclusory assertions of forum-shopping without enough evidence from the record or legal support.⁷⁵ In fact, in *Iragorri* – the case relied upon by Everest – the Second Circuit noted that “[c]ourts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of [forum non conveniens] not because of genuine concern with convenience but because of similar forum-shopping reasons.”⁷⁶ Accordingly, the Court finds that Everest fails to demonstrate that Petra, by choosing to litigate in the U.S. Virgin Islands, is engaging in forum-shopping.

¶25 While Petra’s choice of forum is given great deference despite unsupported allegations of forum-shopping,⁷⁷ the Court still finds that New Jersey is an adequate alternative forum.⁷⁸ Having determined that an adequate alternative forum exists, the Court must next balance the relevant public and private interest factors.

businesses—between those jurisdictions upholding the enforceability of arbitration agreements and those that do not.”).

⁷⁰ 10th ed. 2014.

⁷¹ Everest’s Notice of Filing Tr. of Mar. 19, 2019 Hr’g on Mot. to Dismiss for the New Jersey Matter; 38. *See also* Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 18-21; Reply Br. in Further Support of Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens*; 8-12.

⁷² *Proctor*, 39 V.I. at 36.

⁷³ *Forum-Shopping*, *Black’s Law Dictionary* (10th ed. 2014).

⁷⁴ *Beberman*, 2016 WL 3014665 at 9.

⁷⁵ *See* Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 18-21.

⁷⁶ *Iragorri*, 274 F.3d at 75.

⁷⁷ *Trotter*, 68 V.I. at 724.

⁷⁸ *Epstein*, 55 V.I. at 167.

B. The Court finds that the private interest factors weigh in favor of the U.S. Virgin Islands as the proper forum.

The Court's second inquiry involves the consideration of the following private interest factors that affect the convenience of the litigants:

(1) the relative ease of access to sources of proof; (2) [the] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) [the] possibility of view[ing] . . . [the] premises, if view[ing] would be appropriate to the action; (4) and all other practical problems that make trial of a case easy, expeditious and inexpensive.⁷⁹

¶26 As to the first private interest factor, Everest argues that the “essential sources of proof” are in New Jersey.⁸⁰ It states that “all documents related to the Policy, and all handling related to Everest’s claim, and Petra’s tending of the claim are also located in New Jersey.”⁸¹ It further argues that “New Jersey is the location of Everest’s employees involved in handling Petra’s insurance claim as well as the location of Petra’s employees involved in making the claim.”⁸² On the other hand, Petra argues that all evidence relative to the Project and the insured property that was damaged by the hurricanes are in the U.S. Virgin Islands including the evidence of Petra’s post-hurricanes attempts on the ground to continue the Project.⁸³

¶27 The Court agrees that this private interest factor weighs towards a finding that this is a proper forum.⁸⁴ As Petra correctly notes, U.S. Virgin Islands courts have recognized that “in the age of modern technology, the location of documents matters a great deal less in the forum analysis.”⁸⁵ Moreover, the “location of the primary evidence [which led to Petra’s] claim of breach – the insured Project – is here[.]”⁸⁶ Thus, Everest’s argument, that the relevant documents being in New Jersey favors dismissal, fails.⁸⁷

¶28 The second private interest factor concerns the availability of compulsory process of attendance of unwilling witnesses, and the cost of obtaining attendance of willing, witnesses.⁸⁸ Everest argues that that this Court cannot compel the attendance of non-parties BDO and Meaden & Moore (“M&M”), who do not have offices in the U.S. Virgin Islands, but rather, BDO maintains an office in New Jersey while M&M maintains an office in the nearby state of New York.⁸⁹

⁷⁹ *Id.* at 167-68; *Trotter*, 68 V.I. at 724-25.

⁸⁰ *Epstein*, 55 V.I. at 167. Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 8-9.

⁸¹ Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 8-9.

⁸² *Id.* at 9.

⁸³ Oppos’n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 7.

⁸⁴ *Epstein*, 55 V.I. at 168.

⁸⁵ *Id.*

⁸⁶ *Id.* (“[T]his is Plaintiffs’ home forum and the location of the primary evidence of Plaintiffs’ claim of breach—the cabinetry—is located here.”).

⁸⁷ *Id.*

⁸⁸ *Id.* at 167; *Trotter*, 68 V.I. at 724; 726-27.

⁸⁹ Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 10.

Everest uses New Jersey Rules of Court 1:9-1⁹⁰ and 4:11-5⁹¹ to support its proposition that New Jersey, and not the U.S. Virgin Islands, “has the power to compel BDO and M&M to participate in this litigation.”⁹² In addition, Everest argues that RT Specialty, Petra’s insurance broker, is located in Pennsylvania with an office in New Jersey.⁹³

¶29 Here, the Court finds that Everest fails to establish that this factor strongly favors New Jersey being a proper forum. Everest premises much of its argument on the fact that the non-party witnesses have an office in New Jersey, or the continental U.S., and not the U.S. Virgin Islands.⁹⁴ However, the relevant BDO and M&M employees are not even based in New Jersey but rather, respectively, are based in New York City and Washington D.C., and New York City and Florida.⁹⁵ Contrary to Everest’s position, § 4824 of the Virgin Islands Uniform Interstate Depositions and Discovery Act allows the U.S. Virgin Islands’ to subpoena witnesses not based in the U.S. Virgin Islands to attend and give testimony at a deposition.⁹⁶ The parties will produce their own fact and expert witnesses that support their respective positions. Therefore, the Court is not persuaded that any difficulty in getting unwilling witnesses to testify in the U.S. Virgin Islands is a sufficient reason to dismiss this case.

¶30 Everest fails to consider the fact that the property it insured is located in the U.S. Virgin Islands as well as the additional expense non-party potential witnesses, such as WAPA, would incur.⁹⁷ WAPA, a potential non-party witness, states that “having to appear as a witness in New Jersey would be overly burdensome and unnecessary as the U.S. Virgin Islands is the proper and most convenient forum.”⁹⁸ In *Epstein*, this Court found that this private interest factor favored the U.S. Virgin Islands, where the cause of action arose, as the proper forum in spite of the defendant’s argument that it would “incur great delay and expense as a result of having to localize subpoenas to obtain depositions and documentation from . . . other witnesses in New York.”⁹⁹ Similarly, here, this factor also weighs in favor of maintaining the U.S. Virgin Islands as the proper forum.¹⁰⁰

¶31 The third private interest factor concerns the possibility of viewing the premises.¹⁰¹ Everest argues that viewing of the premises is not applicable in this matter because Petra has completed

⁹⁰ N.J. Ct. R. 1:9-1 (provides in part, “[subpoena] shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.”).

⁹¹ N.J. Ct. R. 4:11-5 (provides in part, “[a] deposition for use in an action in this state, whether pending, not yet commenced, or pending appeal, may be taken outside this state” in accordance with several other local rules.”).

⁹² Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 11.

⁹³ *Id.* at 10.

⁹⁴ *Id.* at 10-11.

⁹⁵ *Id.* at 4-5.

⁹⁶ 5 V.I.C. §§ 4923-25.

⁹⁷ Compl. ¶ 20; Amicus Curiae Br.; 3.

⁹⁸ “WAPA as an independent instrumentality of the Government of the Virgin Islands has no connections to New Jersey, and to travel to New Jersey to testify about damages sustained to the U.S. Virgin Islands property would be unnecessarily burdensome.” Amicus Curiae Br.; 3; Aff. ¶ 13.

⁹⁹ *Epstein*, 55 V.I. at 167-68.

¹⁰⁰ *Id.*

¹⁰¹ *Trotter*, 68 V.I. at 725; 727.

the Project.¹⁰² Petra, however, argues that the current state of the Project will be an issue at trial and may necessitate viewing parts of the Project.¹⁰³ Petra's argument that it has not received all of the money it is entitled under the Policy, which resulted in its failure to complete the Project, may require the possibility of viewing the current state of the premises.¹⁰⁴ Accordingly, this private factor interest also weighs against dismissal.

¶32 The last private interest factor concerns other practical concerns like delay and expense that would make trial easy.¹⁰⁵ Everest avers that it is difficult and impractical to try this matter in the U.S. Virgin Islands since both parties are represented by counsel in the continental U.S and the travel of both party and non-party witnesses will be expensive.¹⁰⁶ Furthermore, Everest asserts that dismissal of this suit would avoid unnecessary costs and needless wasting of the U.S. Virgin Islands' limited judicial resources.¹⁰⁷ On the other hand, Petra argues that Everest has already retained attorneys licensed in the U.S. Virgin Islands, and that its critical witnesses WAPA and third-party subcontractors are also located in the U.S. Virgin Islands.¹⁰⁸

¶33 In *Trotter*, the district court found that St. Thomas was not a proper forum because carrying out litigation in the British Virgin Islands, where several of the potential witnesses are located, would help reduce the costs for production of witnesses.¹⁰⁹ Here, however, aside from Everest's employees who are based in New Jersey, none of the other potential fact witnesses, such as BDO, M&M, or WAPA are located in New Jersey.¹¹⁰ Ultimately, each party will incur expense even if this Court was to find that forum is proper in New Jersey.¹¹¹ Litigation is expensive regardless of the forum. Moreover, contrary to representations made before the Superior Court of New Jersey, this Court does permit telephonic appearances for status conferences.¹¹² Indeed, claimed inconvenience is self-inflicted when a party does not retain local counsel. Nonetheless, while some inconvenience may arise if the proceedings are carried out in the U.S. Virgin Islands, for the purpose of dismissal for forum non conveniens, this factor is neutral at best.¹¹³ Accordingly, the Court finds that the private interest factors weigh towards the U.S. Virgin Islands as the proper forum.

¹⁰² Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 12-13.

¹⁰³ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 11.

¹⁰⁴ *Trotter*, 68 V.I. at 725; 727.

¹⁰⁵ *Id.* at 727-28.

¹⁰⁶ Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 12.

¹⁰⁷ *Id.*

¹⁰⁸ Oppos'n to Mot. to Dismiss for *Forum Non Conveniens* [sic]; 11-12.

¹⁰⁹ *Trotter*, 68 V.I. at 727.

¹¹⁰ *Id.* (dismissing case brought in St. Thomas to the British Virgin Islands where none of the parties and witnesses were located in St. Thomas); Everest Nat'l Ins. Co.'s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 10-11; *Amicus Curiae Br.*; 3.

¹¹¹ *Trotter*, 68 V.I. at 727-28.

¹¹² Everest's Notice of Filing Tr. of Mar. 19, 2019 Hr'g on Mot. to Dismiss for the New Jersey Matter; 40.

¹¹³ *Cf. Trotter*, 68 V.I. at 728 ("Whereas there will be some inconvenience if these proceedings are carried out in the [British Virgin Islands], the inconvenience would be far greater if [St. Thomas] retains this proceeding.").

C. Weighing the public interest factors, the Court finds that the U.S. Virgin Islands is the proper forum for this action.

¶34 Everest also argues that the public interest factors weigh in favor of dismissal.¹¹⁴ In determining whether the public interest factors favor dismissal, the Court considers: “the administrative difficulties resulting from court congestion; the burden of jury duty on people of a community which has no relation to the litigation; the local interest in having controversies decided at home; and the avoidance of unnecessary problems in the application of foreign law.”¹¹⁵ Initially, Everest avers that the U.S. Virgin Islands Superior Court manages a very crowded docket.¹¹⁶ However, while it is evident that the Court is often faced with new litigation, “its calendar is not so congested that it cannot handle another case.”¹¹⁷

¶35 Next, Everest argues that the second and third factors favor dismissal because the “[U.S.] Virgin Islands has no relationship to the actual dispute between the parties” and the litigation would only burden the people of the U.S. Virgin Islands.¹¹⁸ The Court disagrees. Contrary to Everest’s arguments, the people of the community do have a relation to the litigation, as the cause of action arose in the U.S. Virgin Islands.¹¹⁹ The people of the U.S. Virgin Islands have an interest in ensuring that infrastructure projects, which are to provide lighting to their streets, are completed in a timely manner.¹²⁰ In fact, WAPA states that “it has an interest in the solvency and completion of the project” and that delay in payment by Everest “threatens the completion of a project extremely important to the people of the U.S. Virgin Islands.”¹²¹ Surely, when Everest insured Petra’s Project it knew of the location.

¶36 Lastly, Everest argues that New Jersey law would govern the litigation while Petra argues that U.S. Virgin Islands law would govern.¹²² The Court notes that the Policy does not provide a

¹¹⁴ See Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 13-18.

¹¹⁵ *Epstein*, 55 V.I. at 168.

¹¹⁶ Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 15-16. Everest also attempts to use *In re Refinery Hydrocarbon Release Litigation*, Case No. SX-15-CV-100, 2017 WL 2928794, at *4 (V.I. Super. 2017), a bankruptcy case, in favor of dismissal. However, the Court discussed the rule cited by Everest to determine “whether [bankruptcy] cases must remain pending, but stayed, on the Court’s docket or whether the Court can implement another procedure.” The Court actually directed counsel for plaintiffs “to show cause in writing why the Court should not dismiss each case without prejudice . . . once the bankruptcy case is closed or dismissed; discharge is granted or denied; or the bankruptcy court terminates the automatic stay or grants relief from it[.]” The Court stated that “[t]he question raised . . . is whether the cases must remain pending, but stayed, on the Court’s docket or whether the Court can implement another procedure. Considering that “[t]he need of a court to advance a crowded docket . . . is certainly sufficient to justify the dismissal of a case,” the Superior Court acts entirely consistently with the overall purpose of the bankruptcy stay by dismissing without prejudice any case in which the only defendant in that case is subject to a bankruptcy stay.”

¹¹⁷ *Epstein*, 55 V.I. at 168.

¹¹⁸ Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 16.

¹¹⁹ *Epstein*, 55 V.I. at 168-69.

¹²⁰ *Id.* at 169.

¹²¹ “WAPA hereby reiterates that any further delay . . . jeopardizes critical infrastructure of the U.S. Virgin Islands.” Amicus Curiae Br.; 2-3; Aff. ¶ 16.

¹²² Everest Nat’l Ins. Co.’s Mot. to Dismiss for *Forum Non Conveniens* and Inc. Mem. of Law; 5, 14-15.

choice of law clause. However, the Court finds that there would not be any burden or difficulty in the application of another jurisdiction's laws.¹²³ As was the case in *Epstein*, at this stage, the Court is unwilling to decide whether the contract should be governed by New Jersey or U.S. Virgin Islands law.¹²⁴ If the Court ultimately decides that New Jersey law should apply, it would not be unnecessarily difficult given that most legal research is now computerized and this Court routinely considers the law of other states as the common law of the U.S. Virgin Islands continues to evolve.¹²⁵ Accordingly, the Court finds that the public interest factors weigh towards the U.S. Virgin Islands as the proper forum.¹²⁶

IV. CONCLUSION

¶37 Petra, who contracted with Everest, to insure a project it had with WAPA, to design and install one hundred (100) percent of the street lights in St. Thomas, St. Croix, and St. John, later to be interrupted by two Category-5 hurricanes, brought its claim in the proper forum. As a result, Petra's choice of forum is entitled considerable deference. While the Policy was handled, negotiated, and delivered in New Jersey, the cause of action arose due to damaged property in the U.S. Virgin Islands, which impacts the people of the U.S. Virgin Islands. In balancing the private and public interest factors, the Court finds that the U.S. Virgin Islands is the proper forum to hear this dispute. Consequently, Everest failed to meet its burden of establishing that the U.S. Virgin Islands is not a proper forum that would support dismissal under § 4905 or Rule 12(b)(3). Therefore, the Motion to Dismiss will be denied.

An appropriate order follows.

DATED: 4/16/2019

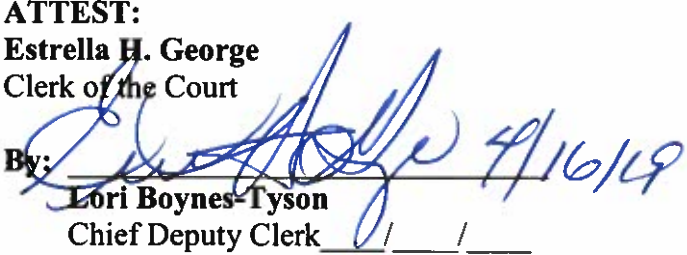


DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

ATTEST:

Estrella H. George
Clerk of the Court

By:  4/16/19

Lori Boynes-Tyson
Chief Deputy Clerk

¹²³ *Epstein*, 55 V.I. at 169.

¹²⁴ *Id.*

¹²⁵ *Id.*; *Malloy v. Reyes*, 61 V.I. 163, 176 (V.I. 2014) (quoting from *Banks v. International Rental and Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011) ("[T]his Court and—to the extent not bound by precedent, the Superior Court—may determine the common law.")).

¹²⁶ *Id.*

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PETRA SYSTEMS, INC.,

Plaintiff,

v.

EVEREST NATIONAL INSURANCE
COMPANY¹,

Defendant.

) CASE NO. ST-18-CV-615
)
) ACTION FOR BREACH OF
) CONTRACT and BAD FAITH
) BREACH OF INSURANCE
) CONTRACT
)
) JURY TRIAL DEMANDED

ORDER

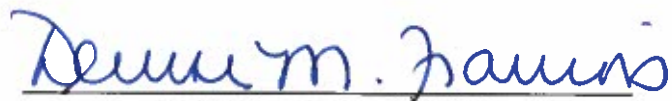
AND NOW, for the reasons stated in the accompanying Memorandum Opinion dated April 16, 2019, it is hereby

ORDERED that Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* and Incorporated Memorandum of Law, filed on January 23, 2019, is **DENIED as moot** because it was superseded by Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* and Incorporated Memorandum of Law filed on January 24, 2019; and it is further

ORDERED that Everest National Insurance Company's Motion to Dismiss for *Forum Non Conveniens* and Incorporated Memorandum of Law, filed on January 24, 2019, is **DENIED**; and it is further

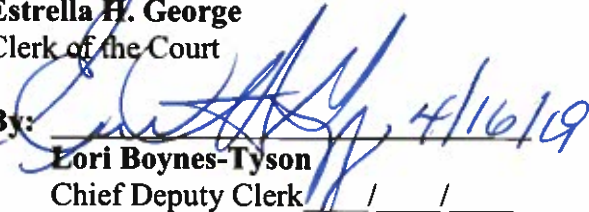
ORDERED that a copy of this Order shall be directed to Attorney Gaylin Vogel of Kevin F. D'Amour, P.C., and Attorney Jennifer P. Brooks and Attorney Chivonne A. S. Thomas of Hamilton, Miller & Birthisel, VI PC.

DATED: 4/16/2019


DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: 

Lori Boynes-Tyson

Chief Deputy Clerk / /

¹ By Order dated January 3, 2019, the Court dismissed Plaintiff's Complaint against Defendants Travelers Property Casualty Company of America, The Travelers Indemnity Company, The Travelers Indemnity Company of Connecticut, and The Phoenix Insurance Company.