FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

THOMAS ALKON; JAMES A. MEANEY; JAMES A. MEANEY, Attorney at Law, P.C.; and THOMAS ALKON, P.C. d/b/a ALKON MEANEY,	**CASE NO. SX-04-CV-063**
Plaintiffs,	**COMPLEX LITIGATION DIVISION**
v.	
FREDERICK T. KUYKENDALL, III and THOMAS H. HART, III,	
Defendants.	
FREDERICK T. KUYKENDALL, III,	
Third-Party Plaintiff,	
v.	
GORDON RHEA; GORDON RHEA, P.C.; MRRM, P.C. f/k/a MOTLEY RICE, INC.; and RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC,	
Third-Party Defendants.	

Cite as: 2019 VI Super 64

Appearances:

JOEL H. HOLT, ESQ.
Law Offices of Joel H. Holt
Christiansted, VI 00820
For Plaintiffs

HENRY C. SMOCK, ESQ.
Smock & Moorehead
St. Thomas, VI 00804
For Frederick T. Kuykendall, III

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

MARK W. ECKARD, ESQ.
Law Offices of Mark W. Eckard, P.C.
Christiansted, VI 00820
For Gordon Rhea, Gordon Rhea, P.C., and 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 to strike the third-party complaint filed by Richardson, Patrick, Westbrook & Brickman, LLC ("RPWB"), because the claims Frederick T. Kuykendall, III ("Kuykendall") asserted in his third-party complaint are not derivative of this declaratory judgment action commenced by Thomas Alkon ("Alkon"), James A. Meaney ("Meaney"), and their respective professional corporations doing business as Alkon Meaney ("Alkon & Meaney") (collectively "Plaintiffs"). Kuykendall opposes RPWB's motion, asserting that impleader is permissible in declaratory judgment actions. The other parties did not oppose or join RPWB's motion. For the reasons stated below, RPWB's motion will be denied.

I. BACKGROUND

¶2 The Court recently summarized much of the background of this case in *Alkon v. Kuykendall*, 2019 V.I. Super 61. Relevant to the present motion are the following points. In July 2001, Plaintiffs agreed to "serve as primary counsel to a group of asbestos plaintiffs in litigation before the Superior

Court consolidated under *In Re: Kelvin Manbodh Asbestos Litigation Series* which resulted in a settlement with multiple defendants in October of 2002." *Id.* at ¶2 (quotation marks, brackets, ellipsis, and citation omitted). The cases grouped under the *Manbodh* master case had been filed between 1997 and 2002 by attorneys Thomas H. Hart, III ("Hart") and Meaney on behalf of Alkon, Rhea & Hart and later Alkon, Meaney & Hart. *Cf. In re: Kelvin Manbodh Asbestos Litig. Series*, 47 V.I. 267, 272 (Super. Ct. 2005) ("To resolve pre-trial matters, the Superior Court, in May 1997, consolidated in a single docket, *In re Kelvin Manbodh Asbestos Litigation Series*, lawsuits filed on behalf of Plaintiff Kelvin Manbodh and 210 additional parties against HOVIC, Litwin Corporation . . . and some twenty-six other defendants."). Following the October 2002 settlement, Alkon & Meaney "disbursed funds to their clients as well as to various other co-counsel pursuant to fee arrangements . . . for services performed in the prosecution of the case." *Alkon*, 2019 VI Super 61 at ¶ 3 (quotation marks and citation omitted). Alkon and Meaney had already bought out Hart by then, who "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)." (Def. Hart's Mot. to Compel Arb. & for Stay 2, filed Oct. 17, 2005.)

¶3 Approximately six months after the October 2002 settlement, Lee J. Rohn, Esq. ("Attorney Rohn") sent a letter, dated March 6, 2003, to Hart and to Meaney on behalf of Kuykendall, an attorney living in and licensed to practice law in Alabama. The letter demanded that Hart and Meaney pay Kuykendall a third of the attorney's fees they had received from the *Manbodh* settlement. Accompanying the March 6, 2003 letter was another letter, dated August 2, 1995, sent by Michael J. Brickman, Esq., of the South Carolina law firm Ness, Motley, Loadholt, Richardson & Poole, to Kuykendall, which states as follows:

Dear Rick:

When I was in the Virgin Islands; I met with Tom Hart and was able to work out a fee arrangement in accordance with the terms you and I both agreed to: Tom has agreed to a one-third, one-third, one-third fee split on all asbestos and toxic tort cases that arise out of our screening and our contacts with the Steel Workers Union in the Virgin Islands. In addition, on all non-asbestos, non-toxic tort litigation, he has agreed to have the two (2) of us split fifteen (15%) percent of any fees generated from the Steel Workers Union cases that come to him as a result of our "advertising" his firm as the firm to which the workers should go when they have such injuries.

The only caveat is that the deal should go forward only if there are a sufficient number of cases that we obtain from the screening. I do not believe this will be a problem.

As further agreed, my firm will pay the costs of the screening and the costs of a paralegal should there be sufficient cases that arise out of the screenings from the plant. In addition, my firm will pay for any advertising and mailing costs in order to get the word out to the workers. Further, my firm will handle all work in the United States while Tom and his firm will handle all "on island" work. Your firm will handle the public relations work with the union and insure [sic] that the cases come to our firms. In addition, you will be responsible for all other work in your areas of expertise.

In addition, all three (3) firms will have the opportunity to participate in trial. We obviously will have Tom's firm at the trial and, in all likelihood, my firm as well. If you are interested in trying the case, then we would welcome the same. For all cases that do go to trial, we will adjust the fee split on any monies derived from said trial and/or settlement of the trial based upon participation at trial.

Please give me a call. Let's get going!

With best regards,

Sincerely,

Michael J. Brickman

(Letter (Aug. 2, 1995), attached as Ex. 1 to Letter (Mar. 6, 2003), attached in turn as exhibit A to Def. Hart's Mot. for Leave to Amend Ans. & Countercl. to Add Add'l Affirm. Defense and to Plead Crosscl. for Decl. Jgmt., filed May 12, 2004 (hereinafter "the 1995 agreement").)

¶4 After Attorney Rohn notified Hart and Meaney 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 and Alkon, Rhea & Hart," *Alkon*, 2019 VI Super 61 at ¶ 3 (quotation marks, citation, and footnote omitted), Alkon & Meaney responded by asking Kuykendall "to set forth the basis of his claim." *Id.* (quotation marks and citation omitted). Kuykendall allegedly "produced an alleged agreement made in 1995 with Tom Hart and not with any firm with which Alkon or Meaney were ever partners." *Id.* (quotation marks, brackets, and citation omitted).

¶5 "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. . . . Thus, 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).

¶6 To resolve the dispute over the 1995 agreement, Plaintiffs filed this declaratory judgment action on February 19, 2004, naming Hart and Kuykendall as defendants. Both Defendants appeared, answered the complaint, counterclaimed against the Plaintiffs, and crossclaimed against each other.[1] Kuykendall also asserted third-party claims against RPWB, Gordon Rhea, Gordon Rhea,

---

[1] 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. *See generally Alkon*, 2019 VI Super 61 at ¶ 38 ("'There is no just reason for delay," V.I. R. Civ. P. 54(b), in entering judgment on Count II and the Counterclaim." (brackets

P.C. and MRRM, P.A. Kuykendall's claims breach of contract, unjust enrichment, conversion, breach of fiduciary duty, and civil conspiracy. Kuykendall also seeks an equitable accounting, a constructive trust, and injunctive relief.

¶7 RPWB responded by filing a motion on December 5, 2005, to strike the third-party complaint, which Kuykendall opposed on January 26, 2006. RPWB did not file a reply in support and, as noted earlier, none of the other parties responded. Further proceedings occurred that do not bear on the instant motion except that the parties, in response to an April 26, 2010 order directing them to provide a list of all pending motions, listed the motion to strike as requiring a ruling.

II. DISCUSSION

¶8 Kuykendall was granted leave to "cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed. R. Civ. P. 14(a) (2004 ed.), *reprinted in* V.I. Ct. Rules Ann. 183 (2004 ed.). But the claims he asserted against the Third-Party Defendants do not arise out of the claims the Plaintiffs asserted against him. The question raised here is whether a defendant/third-party plaintiff may assert third-party claims that are independent of the claims in the first-party action. *Compare* V.I. R. Civ. P. 18(a) ("A party asserting a . . . third-party claim may join, as independent or alternative claims, *as many claims as it has* against an opposing party." (emphasis added)), *with* V.I. R. Civ. P. 14(a) ("A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of *the claim against it*." (emphasis added)). This is an issue of first impression in the Virgin Islands.

---

omitted)). The Plaintiffs and Hart responded to the April 17, 2019 opinion by filing a stipulation, but really a notice because it did not request relief, stating "that in consideration for foregoing the pursuit of the interlocutory appeal permitted . . . Hart and Alkon Meaney will agree to binding arbitration on all issues between them, but will postpone the arbitration of any such issues unless and until there is an adverse [f]inal [o]rder." (Stip. re Arb. 1, filed Apr. 26, 2019.)

¶9 Notwithstanding the amount of time that has elapsed since RPWB filed its motion to strike, the legal standard remains the same. "Any party may move to strike the third-party claim, to sever it, or to try it separately." V.I. R. Civ. P. 14(a)(4); *accord* Fed. R. Civ. P. 14(a) (2006 ed.) ("Any party may move to strike the third-party claim, or for its severance or separate trial."), *reprinted in* V.I. Ct. Rules Ann. 219 (2006 ed.). If a court grants a party leave to file a third-party claim, "the court retains its discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of plaintiff's claim." 6 Charles A. Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 1454 (3d ed. 2010) (quotation marks and footnote omitted); *accord Shockley v. Hoechst Celanese Corp.*, 132 F.R.D. 429, 432 (D.S.C. 1990) ("The Advisory Committee's Note to the 1963 amendment makes clear that the district court has discretion 'to sever the third party claim or accord it separate trial if confusion or prejudice would otherwise result.'").

¶10 Here, RPWB moves to strike Kuykendall's third-party complaint for one reason – because "[i]t is black letter law in the Virgin Islands that a third-party complaint is limited to contribution and contractual indemnity claims." (Third-Party Def. RPWB's Mot. to Strike Third-Party Compl. 5, filed Dec. 5, 2005 (hereinafter "Mot.") (citing *Dublin v. V.I. Tel. Corp.*, 17 V.I. 214 (Terr. Ct. 1978)).) According to RPWB, third-party claims that "seek affirmative or injunctive relief against a third-party defendant are not the proper subject of a third-party complaint." *Id.* (citing *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815 (D. Colo. 1968), *rev'd in part on other grounds*, 436 F.2d 1223 (10th Cir. 1970)). Kuykendall is not seeking contribution or indemnification. *See id.* at 5 ("It is undisputed that Kuykendall has not asserted a contractual indemnification claim against RPWB. . . . Kuykendall has not alleged any claims for contribution against RPWB."). "Instead, Kuykendall has asserted completely independent tort claims . . . which have nothing to do with Plaintiffs' claims against Kuykendall." *Id.* "Kuykendall's motion to assert third-party claims against RPWB should not have been granted," RPWB contends. *Id*. at 4. His third-party claims "are not proper," RPWB argues, even though they may "arise out of the same set of facts as plaintiff's complaint." *Id.* at 5-6 (citing *United States v. Berk & Berk*, 767 F. Supp. 593, 604 (D.N.J. 1991). For this reason, the Court should strike Kuykendall's third-party complaint.

¶11 Kuykendall counters that impleader "avoid[s] piecemeal or duplicative litigation." (Def./Third-Party Pl. Kuykendall's Opp'n to Mot. to Strike Third-Party Compl. 2, filed Jan. 26, 2006 (hereinafter "Opp'n").) And "[t]his has been widely recognized in virtually every case in which the rule is discussed," he contends. *Id.* (citing *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975); *Colton v. Swain*, 358 F. Supp. 859 (N.D. Ill. 1973), *aff'd* 527 F.2d 296 (7th Cir. 1975)). Furthermore, impleader should "be liberally construed." *Id.* at 3 (citing *United States v. Yellow Cab Co.*, 340 U.S. 543(1951); *Waylander-Peterson Co. v. Great N. Ry. Co.*, 201 F.2d 408 (8th Cir. 1953)). Applying "[t]his policy . . . to the present case," the Court should deny RPWB's motion, Kuykendall asserts, because "there is no intelligent reason to split these parties and have multiple trials over identical issues." *Id.* Although this is a declaratory judgment action, impleader was still proper, Kuykendall argues. While "one can argue that the plaintiff's declaratory judgment claim does not 'cost' the defendant anything that can be passed on to the third-party defendant," Kuykendall notes that "courts have . . . allowed impleader in such actions." *Id.* at 3-4 (citation omitted). In fact, "the strong policy desire for efficiency and consistency through inclusive joinder frees impleader from historical limitations inherent in classic indemnity theories." *Id.* at 4 (comma and citation omitted). And contrary to RPWB's contention, the Virgin Islands has not "somehow determined that it alone will forbid impleaders in declaratory judgment actions." *Id.* at 5. "No purpose is served," Kuykendall contends, "by creating a new ultra-strict standard in order to force the waste of judicial resources, and create potentially duplicative litigation and potentially inconsistent results." *Id.* at 5-6. For these reasons, the Court should deny RPWB's motion.

¶12 Kuykendall is correct in that "third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings." *Yellow Cab Co.*, 340 U.S. at 556. Impleader "guarantees consistent results, saves the time and cost involved in the needless repetition of evidence at a subsequent trial, and prevents the defendant in the original action from being handicapped by the time which may elapse between a judgment against him and a judgment in his favor." *Dublin*, 15 V.I. at 224 (quoting *Colton*, 527 F.2d at 299). For these reasons, many courts take a liberal approach to impleader. *See Colton*, 358 F. Supp. at 863 ("[T]he general policy that Rule 14 be liberally construed." (collecting cases)); *see also Certain Interested Underwriters at Lloyds v. Tupelo Pub. Sch. Dist.*, 898 F. Supp. 381, 384 (N.D. Miss. 1995) ("[I]t has been generally held that FRCP 14 should be liberally construed so as to promote judicial efficiency, especially with regard to declaratory judgments." (citing *Bernstein v. Crazy Eddie, Inc.*, 702 F. Supp. 962, 987 (E.D.N.Y. 1988), and *State Farm Mutual Auto. Ins. Co. v. Mid-Continent Casualty Co.*, 518 F.2d 292, 296 (10th Cir. 1975)); *accord Magnet Bank, F.S.B. v. Barnette*, 419 S.E.2d 696, 698 (W. Va. 1992) ("[I]t is clear that the remedial purpose of Rule 14 requires that it be interpreted liberally to promote its underlying purposes." (citation omitted)).

¶13 Yet, even though courts do "construe Rule 14(a) liberally in the interest of judicial economy, there are limits to the types of claims for which impleader is permissible." *Erkins v. Case Power & Equip. Co.*, 164 F.R.D. 31, 32 (D.N.J. 1995) (internal citation omitted)). And *deHaas*, which RPWB cites in support of its motion to strike, did hold that "the third-party complaint is a *narrow* device," 286 F. Supp. at 815 (emphasis added), that "cannot be used as a method of bringing into controversy *other matters* which happen to have *some* relationship to the original action." *Id.* (emphasis added) (citation omitted). *deHass* concluded that impleader can only be used "for seeking indemnification or contribution." *Id.* And many courts have agreed with *deHaas* since the rule governing third-party practice permits impleader "from a person 'who is or may be liable to the defendant for all or part of *the plaintiff's claim against him*.'" *Id.* (emphasis added) (quoting Fed. R. Civ. P. 14(a)); *cf. Horn v. Daniel*, 315 F.2d 471, 474 (10th Cir. 1962) ("Although the rule permitting third party practice has been liberally construed . . . [i]t does not permit the joinder of actions of persons who may have a claim against the defendant independently of the plaintiff's claim." (citations omitted)); *Wandrey v. McCarthy*, 804 F. Supp. 1384, 1387 (D. Kan. 1992) ("Rule 14 allows a defendant to bring a third-party complaint for indemnity or contribution at any time after commencement of the action." (quotation marks and citation omitted)); *Erkins*, 164 F.R.D. at 33 ("[T]he basis for third-party liability is generally either contribution or indemnity." (citing *Anderson v. Dreibelbis*, 104 F.R.D. 415, 416 (E.D. Pa. 1984)); *Assicurazioni Generali, S.p.A. v. Terranova*, No. 83-cv-1490 (JFK), 1984 U.S. Dist. LEXIS 22477, *10 (S.D.N.Y. Oct. 25, 1984) ("Absent a right to indemnification, contribution, or subrogation, Winick cannot proceed against Dr. Manning under Rule 14(a)."); *accord Premier Entm't Biloxi, LLC v. P.T.E. Sys. Int'l, LLC*, 225 So. 3d 1213, 1217 (Miss. App. 2017) ("Impleader is not available for the assertion of an independent action by the defendant against a third party, even if the claim arose out of the same transaction or occurrence as the main claim." (citation omitted)); *Zizzo v. Pender Cty. Bd. of Educ.*, 623 S.E.2d 328, 330 (N.C. Ct. App. 2006) ("A claim which is independent of the defendant's possible liability to the plaintiff cannot be the basis of impleader under Rule 14." (quotation marks and citations omitted)); *see also In re: Kelvin Manbodh Asbestos*

Litig. Series, 69 V.I. 394, 446 (Super. Ct. 2018) ("'[I]mpleader is limited to claims against third parties that are derivatively based on the original plaintiff's claim.'" (quoting *J&J Sports Prods., Inc. v. Tolentino*, No. 1:10-cv-02089-LJO-SKO, 2011 U.S. Dist. LEXIS 131029, *7 (E.D. Cal. Nov. 14, 2011)).

¶14 But other courts take a more holistic approach. Guided by the "general purpose" of impleader, which is "to adjudicate interrelated matters in one litigation, so as to obtain consistent and fair results for the parties and avoid duplication of effort for the courts," *Certain Interested Underwriters at Lloyds*, 898 F. Supp. at 384 (citation omitted), these courts have held that impleader "does not require an identity of claims, or even that the claims rest on the same theory. Otherwise the purposes of the Rule would be defeated." *Am. Fidelity & Cas. Co. v. Greyhound Corp.*, 232 F.2d 89, 92 (5th Cir. 1956) (footnotes omitted); *see also Assicurazioni Generali, S.p.A.*, 1984 U.S. Dist. LEXIS 22477 at *10 ("This Court is aware that Rule 14(a) has been liberally interpreted in the Second Circuit to avoid a multiplicity of lawsuits. To that end, several judges of this Court have permitted the assertion of nonderivative third-party claims simply because they involve related matters or arise out of the same transaction or core of facts as the plaintiff's claim." (collecting cases) (citations omitted)). These courts reason that whether the third-party claims are

> based upon a different legal theory from the underlying case is irrelevant; the question is whether the assertion of liability against the third-party defendant is derivative of the same transaction, occurrence or nucleus of operative fact as the underlying claim by the plaintiff. If the transactional relatedness is present, impleader is proper even if the third-party complaint will be tried to the court while the underlying action will be tried to a jury.

Magnet Bank, F.S.B., 419 S.E.2d at 698 (quoting 3 James Wm. Moore, et al., *Moore's Federal Practice* P 14.07(1), 14-45-46 (1991 ed.)); *accord Middlesex Mut. Assurance Co. v. Black*, 480 A.2d 614, 616 (Conn. Super. Ct. 1984) ("A third party complaint is equivalent in all respects to an original complaint. Accordingly, a third party complaint may join all claims against the third party defendant which arise out of the same transaction." (citation omitted)).

¶15 Still other courts take a middle-of-the-road approach. Reasoning that "once a defendant has asserted a claim suitable for impleader," these courts allow the defendant/third-party plaintiff to "join . . . all of his other claims against the third-party defendant." *State ex rel. Jacobs v. Mun. Court of Franklin Cty.*, 284 N.E.2d 584, 587 (Ohio 1972) (quotation marks, emphasis, and citation omitted); *see also Cohen v. McLaughlin*, 301 S.E.2d 37, 39 (Ga. 1983) ("[I]f a proper third-party claim of *secondary* liability is asserted, the third-party plaintiff may join additional *direct* damage claims against the third-party defendant." (emphasis added)); *accord Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62, 69 (3d Cir. 1971) "[O]nce a defendant has asserted a claim suitable for impleader under Rule 14(a), he may join with it any and all of his other claims against the third party defendant." (quotation marks and citation omitted)). So long as one of the defendant/third-party plaintiff's claims is derivative of the plaintiff's claims, then the defendant/third-party plaintiff can join any other claims he has against the third-party defendants according to these courts. And *Schwab* helps frames this distinction.

¶16 Otto T. Schwab was injured when the train he was riding on collided with a truck at a railroad crossing in Pennsylvania. 483 F.2d at 64. He worked for the Erie Lackawanna Railroad Company ("Erie"). *Id.* He sued his employer, Erie, under federal railroad laws. *Id.* (citing 45 U.S.C. § 51). He also sued the company responsible for maintaining the railroad crossing, S. J. Groves and Sons Company ("Groves"), for negligence. *Id.* at 64 n.1. Erie and Groves each asserted third-party claims against the truck driver's estate, the owner of the truck, and the company who leased the truck to the driver. *See id.* at 64. "In addition to its claim for contribution or indemnification under Rule 14, Erie's third-party Complaint included a separate claim for damages to its train in the amount of

$5,041." *Id.* "The third-party defendants moved to dismiss the claim for train damage, asserting a lack of diversity of citizenship, the absence of a federal question, and an insufficient amount in controversy. The district court granted the motion to dismiss and Erie appealed." *Id*. (footnote omitted).

¶17 On appeal, the United States Court of Appeals for the Third Circuit reversed. *Id.* at 72. The court first rejected Erie's contention that its third-party claim against the third-party defendants was akin to a "compulsory counterclaim." *See id.* at 64. Counterclaims are asserted against opposing parties and the third-party defendants had not asserted any claims against Erie. *See id.* The court also considered and rejected the possibility that Erie's claim could have been akin to a crossclaim. *See id.* at 65-66. Agreeing with *Murray v. Haverford Hospital Corporation*, 278 F. Supp. 5, 6-7 (E.D. Pa. 1971), the Third Circuit reasoned that crossclaims are asserted against co-parties, meaning parties who share the same status in the case. *See id.* at 65-66. Erie and the third-party defendants were opposing parties, not co-parties. *See id.* at 67 ("Because Erie, as third-party plaintiff, and the third-party defendants are opposing parties rather than co-parties, no claim between them may be characterized as a cross-claim.").

¶18 The court then returned to where it started, that Erie's claim for damage to its train was a third-party claim. But the court's research had disclosed only one case, *Noland Company v. Graver Tank & Manufacturing Company*, 301 F.2d 43 (4th Cir. 1962), "in which a court has squarely accepted the proposition that Rule 14 applies to claims other than those grounded on the theory that the third-party defendant is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against him." *Schwab*, 438 F.2d at 68 (quotation marks and brackets omitted). *Noland* involved

> an action by a general contractor against its subcontractor for the difference between the actual cost of a water tank and the subcontractor's original bid price on a tank that was not delivered. The subcontractor impleaded its supplier for the amount of its liability to the general contractor, and added a claim for the profit it had anticipated on the supplier's bid price on the tank.

Id. at 67. The *Noland* court found no fault with the possibility that a defendant/third-party plaintiff might recover more on its claims against a third-party defendant than the first-party plaintiff on its claims against the defendant/third-party plaintiff. *See Noland*, 301 F.2d at 49-50; *see also Schwab*, 438 F.2d at 68 ("'It is no obstacle that affirmative relief is sought against the proposed third-party defendants, above the amount claimed by the original plaintiff.'" (ellipsis and brackets omitted) (quoting *Crompton-Richmond Co., Factors v. United States*, 273 F. Supp. 219, 221 (S.D.N.Y.1967), parenthetically)). But the *Schwab* court believed that *Noland* had gone too far. *See* 438 F.2d at 68 ("Although we are sympathetic with much of the rationale in *Noland*, and find the result therein desirable, we too must reject the view that Rule 14 permits recovery of damages *in excess of, or different from*, that sought by the original plaintiff in his main claim." (emphasis added)). Yet, the *Schwab* court still determined that Erie should have been allowed to assert its train damage claim, not under Rule 14, which governs impleader, but under Rule 18, which governs joinder of claims.

¶19 Relying on history of the 1966 amendments to the Federal Rules of Civil Procedure, *Schwab* "conclude[d] that Rule 14 must be read in conjunction with Rule 18(a), as amended, and read together, these two rules give the third-party plaintiff a proper procedural route for asserting his affirmative claim for damages." *Id.* at 71.

> If a defendant asserts a claim against a third-party defendant for contribution or indemnity, the defendant should be able to join with this claim a claim for damages for injuries which he received in the same transaction or occurrence. Since the third-party defendant is properly in the action, the original defendant should be able to plead all claims that arise out of the same transaction or occurrence in order to prevent several suits between the same parties on the same facts

Id. at 70 (quoting George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 39-40 (1963)). Since Erie's claim for the damage to its train sounded in negligence, and involved the same incident, the collision that caused Schwab's injuries, the Third Circuit concluded that the district court erred in dismissing the claim and reversed. *See id*. at 71-72.

¶20 Clearly, the views on this question are divergent. *Cf. King Fisher Marine Serv., Inc. v. 21st Phx. Corp.*, 893 F.2d 1155, 1166 (10th Cir. 1990) ("[T]he case law of the circuits is mixed."). And much of the federal authority opining on it concerns ancillary jurisdiction and pendant jurisdiction and the limitations on federal courts. *Cf. id.* at 1166-72. Those concerns are not present here. *Cf. Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564 (2012) ("Virgin Islands courts are not Article III courts and thus not subject to the same constitutional constraints on jurisdiction."). Nonetheless, this Court does find *Schwab* persuasive insofar as it sought to harmonize Rules 14 and 18 of the Federal Rules of Civil Procedure. If *Schwab* had been filed in a state court without Article III limitations, forcing Erie to file a separate lawsuit to recoup five thousand dollars for the damage to its locomotive, rather than joining that claim through a third-party complaint, would encourage "'circuity and multiplicity of actions.'" *Schwab*, 438 F.2d at 67 (quoting *Noland Co.*, 301 F.2d at 50). That said, courts on all sides of this issue do recognize that third-party claims still have to have some connection to the plaintiff's case. *Cf. Magnet Bank, F.S.B.*, 419 S.E.2d at 699 ("[W]e find there was a sufficient factual nexus to warrant a Rule 14(a) procedure."); *Schwab*, 438 F.2d 71-72 ("Thus, the allowance of the separate claim will not have the effect of introducing an additional legal theory into the case. Moreover, plaintiff has already injected traditional negligence issues into the case by virtue of his claim against Erie's co-defendant on the basis of common law negligence. In this situation, it is difficult to perceive any prejudice to the plaintiff."); *Assicurazioni Generali, S.p.A.*, 1984 U.S. Dist.

LEXIS 22477 at *14 n.6 ("Impleader does not require an identity of claims, so long as all claims arise from the same transaction or core of facts." (citations omitted)).

¶21 Having reviewed the various approaches, this Court holds that, in addition to asserting an impleader claim, i.e., a claim by which a portion of the defendant/third-party plaintiff's own liability is passed on to a third-party defendant, the defendant, as a third-party plaintiff, may also "join, as independent or alternative claims, as many claims as it has against an opposing party." V.I. R. Civ. P. 18(a).[2] This conclusion flows from a plain reading of the rules. *Cf. In re: Asbestos, Catalyst & Silica Toxic Dust Exposure Litig.*, 68 V.I. 494, 501 (Super. Ct. 2018) ("When interpreting a rule, courts first look to the words of the rule and if the words are plain, the rule's plain meaning controls." (citing *Bryan v. Fawkes*, 61 V.I. 416, 457 (2014)). It also pays homage to past precedent. *Compare James v. Antilles Ins., Inc.*, 26 V.I. 3, 4 (Terr. Ct. 1990) ("Impleader should be granted where it will promote judicial economy and avoid duplication of closely related lawsuits." (citations omitted)), *aff'd in part and rev'd in part on other grounds*, 30 V.I. 230 (D.V.I. App. Div. 1994), *with Andrew v. Carvalho*, 14 V.I. 513, 516 (Terr. Ct. 1979) ("A claim against a third party defendant must belong to the original defendant and must be based upon the original plaintiff's claim against the original defendant in order to be afforded impleader status."). And it recognizes the persuasive authority of other courts who have considered this issue, which Virgin Islands courts have not yet addressed.

¶22 But Kuykendall's third-party complaint is still problematic because it does not fit with the Court's holding. Kuykendall did not assert any derivative claims against the Third-Party Defendants. That is, Kuykendall has not alleged that the Third-Party Defendants are or may be liable to him for

---

[2] RPWB contends that *Dublin* is controlling. It is not. *See Der Weer v. Hess Oil V.I. Corp.*, 60 V.I 91, 101 (Super. Ct. 2014) ("[D]ecisions of trial level courts are not binding on any other court, including that same trial court." (citations omitted)).

all or part of the Plaintiffs' claims against him. Instead, as RPWB correctly points out, "Kuykendall has asserted *completely independent tort claims* against RPWB based entirely on the alleged tortious actions taken by RPWB with respect to Kuykendall." (Mot. 5 (emphasis added).) Asserting completely independent tort claims against a third-party defendant is not improper. Rule 18 allows it. But only when Rule 14 is complied with and Rule 14 requires the assertion of a claim that the third-party defendant is or may be liable to the third-party plaintiff for all or part of the first-party plaintiff's claims against him. Kuykendall's third-party complaint does not comply with Rule 14.

¶23 But the problem here is that Kuykendall asserted the exact same claims as crossclaims and counterclaims. Yet, neither Hart nor the Plaintiffs moved to dismiss Kuykendall's crossclaims or counterclaims. And once Kuykendall asserted those crossclaims and counterclaims, he transformed this case into something other than a pure declaratory judgment action. Although the Virgin Islands has not yet addressed whether it would recognize the declaratory judgment exception to *res judicata*, other courts have. *E.g.*, *Stilwyn, Inc. v. Rokan Corp.*, 353 P.3d 1067, 1078 (Idaho 2015) ("Courts that have endorsed the declaratory judgment exception to claim preclusion have limited its application to cases in which 'the prior action involved *only* a request for declaratory relief.'" (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010)); *see also Tri-State Truck Ins. v. First Nat'l Bank of Wamego*, 564 F. App'x 345, 351 (10th Cir. 2014) ("The declaratory judgment exception applies 'when the prior action involved *only* a request for declaratory relief.' If any party seeks coercive relief—whether in a claim or counterclaim—then the declaratory judgment exception does not apply." (quoting *Duane Reade, Inc.*, 600 F.3d at 196)). Because more than declaratory relief has been asserted in this action, *res judicata* could bar all claims the parties could have asserted but not assert, so long as they arose "out of the transaction or occurrence that is the subject matter of" the Plaintiffs' complaint, Fed. R. Civ. P. 13(a), (g) (2005 ed.), assuming, of course, that the Virgin Islands were to adopt the declaratory judgment exception. *Accord Duane Reade, Inc.*, 600 F.3d at 197 ("When St. Paul raised its counterclaims, Duane Reade was compelled by Rule 13 to file its own claims arising out of the same transaction or occurrence or else be precluded from pursuing those claims in a subsequent lawsuit. The declaratory judgment exception does not provide a safe haven from Rule 13. In sum, the prior action did not involve only a request for declaratory relief and, as such, the declaratory judgment exception is unavailable." (citations omitted)). *But cf.* 5 V.I.C. § 1286 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."). To conclude, based on the holding above, that Kuykendall's third-party claims must be stricken because his third-party complaint lacks an impleader "hook," it might lead to an anomalous result. Furthermore, it would defeat the purpose of allowing impleader. *Accord Am. Fidelity & Cas. Co. v. Greyhound Corp.*, 232 F.2d 92.

¶24 "[A]n action for a declaratory judgment is regarded as an ordinary civil action . . . commenced by filing a complaint with the clerk." *Estate of George v. George*, 50 V.I. 268, 274 (2008) (*per curiam*) (quotation marks, emphasis, and citations omitted); *see also* V.I. R. Civ. P. 3 rptr's note. Court rules "govern the procedure for obtaining a declaratory judgment." V.I. R. Civ. P. 57. Impleader is permitted by the rules. *See* V.I. R. Civ. P. 14. Presumably, impleader is also permitted in declaratory judgment actions. But, because true declaratory judgment actions do not seek to assign liability to anyone, impleader is technically unavailable under a strict reading of the rule. This result is unwarranted. The Court further holds that impleader should be allowed if "it will promote judicial economy and avoid duplication of closely related lawsuits," *James*, 26 V.I. at 4, including in declaratory judgment actions, so all interested parties are joined and the entire dispute can be resolved.

¶25 The purpose of impleader "is to adjudicate interrelated matters in one litigation, so as to obtain consistent and fair results for the parties and avoid duplication of effort for the courts. Coupled with this intention is the rule that declaratory judgments should completely dispose of a controversy." *Certain Interested Underwriters at Lloyds*, 898 F. Supp. at 384 (rejecting argument that "the nature of a declaratory judgment action cannot render [a third-party defendant] secondarily liable." (citations omitted)). Courts have refused to strike damages claims of third-parties from first-party declaratory judgment actions. *See, e.g.*, *United of Omaha Life Ins. Co. v. Reed*, 649 F. Supp. 837, 841-42 (D. Kan. 1986); *see also Cambridge Mut. Fire Ins. Co. v. Michaud*, No. CV074032988, 2008 Conn. Super. LEXIS 2004, at *8-9 (Super. Ct. Aug. 8, 2008) ("This court has a longstanding tradition to avoid the multiplicity of actions and promote the interest of judicial economy. Since the third-party complaint entails similar and related issues and involves interests that may be affected by the outcome of the declaratory judgment action, the motion to strike is denied."). This Court agrees.

¶26 Virgin Islands law provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." 5 V.I.C. § 1261. And "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." *Id.* § 1286. The Court of Appeals of Maryland construed an identical statute to allow for additional lawsuits. *Cf. Bankers & Shippers Ins. Co. v. Electro Enters., Inc.*, 415 A.2d 278, 285 (Md. 1980) ("[T]he Act provides . . . that further relief based on a declaratory judgment or decree may be granted if necessary or proper. Thus, the statutory scheme expressly permits a party to bring one action requesting *only* a declaratory judgment and then to bring a separate action for further relief based on the rights determined by that judgment." (emphasis added) (quotation marks, brackets, and citation omitted)). If the Plaintiffs do not prevail on their declaratory judgment claims, Kuykendall could then seek further relief based on the declaratory judgment issued in this case. Forcing him to bring his claims in a second lawsuit is not warranted. *Accord* 5 V.I.C. § 1270 ("This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.").

¶27 The Court cannot agree with RPWB that Kuykendall's claims "have nothing to do with Plaintiffs' claims against Kuykendall." (Mot. 5.) If the Court were to agree with the Plaintiffs and declare that the 1995 agreement "unenforceable as it violated the applicable rules and canons of professional conduct," (Compl. ¶ 24), or declare "that the Plaintiffs do not owe any funds to" Kuykendall, *id.* ¶ 19, then Kuykendall's third-party complaint might have to be dismissed, at least in part, for failure to state a claim. But if the Court were to disagree with the Plaintiffs and decline to declare the 1995 agreement unenforceable, Kuykendall's claims could proceed. The parties are the same. The evidence will be the same. The entire dispute centers on whether there was an agreement to share attorney's fees for the asbestos cases filed in Virgin Islands courts between 1995 and 2002. Striking Kuykendall's third-party claims, while leaving his crossclaims and counterclaims intact, might yield inconsistent results.

III. CONCLUSION

¶28 For the reasons stated above, RPWB's motion to strike Kuykendall's third-party complaint must be denied. This Court holds that a third-party plaintiff may join as many claims as it has against a third-party defendant so long as at least one third-party claim is derivative of the plaintiff's claims. *See* V.I. R. Civ. P. 14(a); V.I. R. Civ. P. 18(a). In a true declaratory judgment action, however, none of the parties are found liable. *Cf. Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 302 (Cal. 2002) ("Unlike coercive relief (such as damages, specific performance, or an injunction) in which a party is ordered by the court to do or to refrain from doing something, a declaratory judgment merely declares the legal relationship between the parties."). Consequently, impleader does not fit neatly in a declaratory judgment action. But once coercive relief is sought, by counterclaim or crossclaim, third-party claims that might be affected by the outcome of the entire action should be allowed, even though no derivative third-party claim is asserted, because the same claims could be barred if the nonparties were not impleaded. Accordingly, RPWB's motion to strike will be denied. 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
Dated: 5/7/19

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

THOMAS ALKON, et al.,	)	**CASE NO. SX-04-CV-063**
Plaintiff,	)	**COMPLEX LITIGATION DIVISION**
v.	)	
FREDERICK T. KUYKENDALL, III, et al.,	)	
Defendants.	)	

ERRATA ORDER

COMES NOW the Court, *sua sponte*, to correct the following scrivener's error in the Memorandum Opinions dated and entered April 17, 2019 and May 7, 2019:

On page 2 of each opinion, 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