FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: ASBESTOS, CATALYST, AND SILICA TOXIC DUST EXPOSURE LITIGATION.	) **MASTER CASE NO. SX-15-CV-096**
This Opinion Pertains to All Cases Grouped Under the Master Case.	)

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MEMORANDUM OPINION

MOLLOY, Robert A., Judge.

BEFORE THE COURT is a motion filed by non-party George H. Logan, Esq. ("Attorney Logan") for a protective order and an order quashing the Plaintiffs' deposition notice. The Plaintiffs oppose Logan's motion. The defendants, Hess Oil Virgin Islands Corporation ("HOVIC") and Hess Corporation ("Hess"), have not filed a response. For the reasons stated below, Attorney Logan's motion will be denied in part and granted in part.

I. BACKGROUND

Over 120 persons sued Hess and HOVIC in 2013 and 2014 for damages, alleging they were exposed to asbestos. The individual lawsuits have been grouped together under this case to manage discovery and pre-trial litigation. During discovery Hess and HOVIC produced an affirmation prepared by Leslie A. Kelley, Esq. ("Attorney Kelley") on August 9, 2017. Attorney Kelley worked for

* Admitted *pro hac vice.*

Nichols Newman Logan & Grey, P.C.[1] from August 2003 until he passed away on October 27, 2017. Before then he "was employed by the Virgin Islands Industrial Maintenance Corp[oration] ("IMC"), first as Director of Human Resources then as General Counsel / Legal Counsel" between "1991 and 1999." (Leslie A. Kelley Affirmation ¶ 2 (Aug. 9, 2017) (hereinafter "Affirmation"), Ex. A to Pls.' Mot. *in Limine* to Strike Kelley Affirmation, filed Dec. 29, 2017 (hereinafter "Pls.' Mot.").) It was in his former capacity as employee of and attorney for IMC that Attorney Kelley prepared the August 9, 2017 affirmation, which is the focus of this motion as well as two other motions.

In his affirmation, Attorney Kelley explained that he had personal knowledge of the contracts between IMC and HOVIC "and the services IMC provided at the HOVIC refinery." *Id.* From that knowledge he represented that "IMC employees were not involved in the removal or abatement of asbestos containing insulation at HOVIC" and were not "authorized to remove or abate any asbestos." *Id.* ¶¶ 3-4. Instead, "if an IMC worker encountered, or even suspected they had encountered asbestos, they stopped the work immediately and communicated it to their IMC supervisor who thereafter informed HOVIC." *Id.* ¶ 3. The Defendants retained an expert, John L. Henshaw, MPH, CIH, who relied on Attorney Kelley's affirmation to conclude "that IMC employees never worked with asbestos because Attorney Kelley says so, *ipse dixit.*" (Pls.' Mot. 2.)

> After being served with the Affirmation by Hess and HOVIC, Plaintiffs endeavored to set the deposition of Attorney Kelley by mutual agreement. But those efforts were fruitless, as Attorney Kelley did not respond to emails or phone calls.
>
> Plaintiffs then requested that Hess and HOVIC make Attorney Kelley available for deposition, but that effort was also fruitless. Despite Attorney Kelley working with the Defendants to craft an affidavit—an affidavit that any attorney would understand would be controversial, and most likely would result in a deposition—Defendants disclaimed the ability to make Attorney Kelley available for deposition.

[1] Nichols, Newman, Logan, Grey & Lockwood, P.C. presently.

> Instead, Defendants directed plaintiffs to Attorney Kelley's law partner, George H. Logan, Esq. According to Defendants, Attorney Logan represented Attorney Kelley. After speaking with Attorney Logan, it became clear that he was not Attorney Kelley's legal counsel—just a friend and colleague—and was not authorized to accept legal process on his behalf. Attorney Logan would not disclose Attorney Kelley's location other than to say that he was "in Virginia."
>
> The greater concern, however, was that Attorney Logan informed Plaintiffs that Attorney Kelley was dying of cancer. Attorney Logan also noted that Attorney Kelley, due to his medication, was not mentally competent as Kelley only had limited periods of lucidity.
>
> Plaintiffs' research revealed that Attorney Kelley maintained a residence in Henrico, Virginia. Plaintiffs prepared a subpoena *duces tecum*, as well as a subpoena for deposition, both under the authority of this Court; domesticated the subpoenas with the appropriate district court under the Virginia Uniform Interstate Depositions and Discovery Act; and after the first two attempts at personal service failed, made lawful substitute service by posting the subpoenas to the front door of his house.
>
> The deadline to make production in response to the subpoena *duces tecum* came and went; no documents were produced or made available. And Attorney Kelley failed to appear for his deposition on October 24, 2017. He passed away three days later on October 27, 2017.
>
> In order to determine what exactly occurred, Plaintiffs served deposition subpoenas on Attorney Logan, the Nichols Newman law firm, and Carl Beckstedt, Esq., counsel for Hess. Faced with the possibility of his deposition, counsel for Hess revealed at the November 2017 status conference that the Kelley Affirmation was based on "confidential" depositions and arbitration transcripts. These documents had never been disclosed or produced. Hess finally produced the transcript of the Leslie Kelley deposition on December 18, 2017. Three days later, *ex post facto*, Hess served Rule 26 disclosures, naming Leslie Kelley, Esq., this time as a witness via portions of the arbitration transcript.

Id. at 2-4 (footnotes omitted).

Attorney Logan became involved after Attorney Kelley had passed away. The Plaintiffs subpoenaed him to give sworn deposition testimony on December 5, 2017. Attorney Logan objects because the deposition may concern Attorney Kelley's employment with IMC "allegedly during a time when IMC had business dealings with HOVIC." (George H. Logan's Mot. for Protective Order &

Order Quashing Dep. Notice 2, filed Jan. 10, 2018 (hereinafter "Logan Mot.").) Plaintiffs' counsel had "agreed-to a continuance of the subpoena date in order to attempt-to negotiate the exchange of information in the least onerous way possible." *Id.* But Attorney Logan learned from another attorney, Charles E. Lockwood, Esq., that Plaintiffs' counsel had rescheduled his deposition for January 12, 2018. *See id.* Attorney Logan reached out to Plaintiffs' counsel "by email and telephone in order to try to reach an amicable solution, and . . . avoid the need for a deposition. The parties were not successful . . . ." *Id.* at 3. This motion followed. Attorney Logan has not been deposed yet.

II. DISCUSSION

Virgin Islands Rule of Civil Procedure 26 provides that "any person from whom discovery is sought may move for a protective order." V.I. R. Civ. P. 26(c)(1). A motion for a protective order "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." *Id.* Courts may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* If the court finds good cause it may, among other options, "forbid[] the disclosure or discovery," "specify[] terms, including time and place or the allocation of expenses, for the disclosure or discovery;" "prescrib[e] a discovery method other than the one selected by the party seeking discovery;" "forbid[] inquiry into certain matters, or limit[] the scope of disclosure or discovery to certain matters;" and "designat[e] the persons who may be present while the discovery is conducted." V.I. R. Civ. P. 26(c)(1)(A)-(E). If the court does not find good cause, or if the "motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery." V.I. R. Civ. P. 26(c)(2).

A. Rule 26(c) Certification Requirement

Before considering the merits, the Court must first determine whether Attorney Logan's motion is deficient because he did not submit a certification. *Cf.* V.I. R. Civ. P. 26(c)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."). Attorney Logan contends, that "'[w]hen a motion for protective order is related to an oral deposition, the parties are not required to confer or file a written certification prior to seeking court intervention.'" (Logan Mot. 4 (quoting *Abdallah v. Abdel-Rahman*, ST-13-CV-227, 2016 WL 4379514, *1 (V.I. Super. Ct. Aug. 15, 2016)).) But *Abdallah* is no longer good law on this point. Three reasons explain why.

First, *Abdallah* based its decision in part on another case, *Barton v. Virgin Islands Port Authority*. *See Abdallah*, 2016 WL 4379514 at *1 n.3 (footnoting *Barton v. V.I. Port Auth.*, ST-10-CV-725, 2015 V.I. LEXIS 59, *3-5 (V.I. Super. Ct. June 3, 2015)). *Barton* too held that "[w]hen a motion for protective order is related to an oral deposition, the parties are not required to confer or file a written certification prior to seeking court intervention." *Barton*, 2015 V.I. LEXIS 59 at *4. Both *Barton* and *Abdallah* relied on Local Rule of Civil Procedure 37.1, a rule promulgated by the District Court of the Virgin Islands which applied at that time in the Superior Court through Superior Court Rule 7. *See Abdallah*, 2016 WL 4379514 at *1 n. 4 ("While FED. R. CIV. P. 26(c)(1) requires the motion include 'a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action,' LRCi 37.1 excludes motions related to depositions from the requirement for counsel to meet and confer."); *Barton*, 2015 V.I. LEXIS 59 at *4 n.9 (citing D.V.I. Local R. Civ. P. 37.1; D.V.I. Local R. Civ. P 37.2). However, another more specific rule, Superior Court Rule 39, had governed discovery in the

Superior Court and made Federal Rule of Civil Procedure 26(c) applicable. *See Malloy v. Reyes*, 61 V.I. 163, 184 n.18 (V.I. 2014) ("Federal Rules of Civil Procedure 26 through 37 govern discovery in the Superior Court pursuant to Superior Court Rule 39." (citation omitted)). Because Superior Court Rule 39 was more specific, Federal Rule 26 and its certification requirement may have applied through Superior Court Rule 39 to the exclusion of Local Rule 37.1 through Superior Court Rule 7. *Cf. Rohn v. People*, 57 V.I. 637, 647 (V.I. 2012) ("the more specific statute takes precedence over the more general."); *see In re: Application of Shores*, 59 V.I. 994, 1001 n.5 (V.I. 2013) ("the canons of statutory construction . . . apply to the interpretation and application of court rules." (citations omitted)). Thus, how *Abdallah* reached its conclusion—by applying Local Rule 37.1 through Superior Court Rule 7 (a general rule) and not Federal Rule 26(c) through Superior Court 39 (a specific rule)—undermines its precedential value somewhat.

Second, and more importantly, *Abdallah* failed to appreciate that Local Rule 37.1 only does away with the certification requirement for motions "relating to depositions under Federal Rule of Civil Procedure 30." D.V.I. Local R. Civ. P. 37.1 ("Prior to filing any motion relating to discovery pursuant to Federal Rules of Civil Procedure 26-37, *other than a motion relating to depositions under Federal Rule of Civil Procedure 30*, counsel for the parties shall confer in a good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible." (emphasis added)). A motion for a protective order may relate to a deposition, but it is not brought under Rule 30. It is brought under Rule 26(c). Rule 26(c) motions are not the same as Rule 30 motions. *Cf. Clinton v. Cal. Dep't of Corr.*, Civ. No. 05-1600, 2009 WL 210459, *3 (E.D. Cal. Jan. 20, 2009) ("Motions brought under Rules 30(b)(4) and 26(c)(1) are ordinarily subject to different standards. A Rule 30(b)(4) motion focuses on the prejudice that a telephonic deposition would impose, whereas a Rule 26(c) motion focuses on the prejudice plaintiff-deponent would suffer if compelled to appear in person."); *see also, e.g., Duran v. M.R.R. Land Equity, Inc.*, 112 F.R.D. 648, 648 (M.D. Fla. 1986) ("Because the Plaintiffs are seeking to restrict the means by which their depositions are to be taken, as opposed to seeking leave of court to themselves take Fed. R. Civ. P. 30(b)(7) depositions, their motion is in reality a Fed. R. Civ. P. 26(c) motion for protective order."). Because *Abdallah* may have misread Local Rule 37.1, that too undermines its precedential value.

Finally, and most importantly, *Abdallah* is no longer good law because the authorities it relied on—Federal Rules of Civil Procedure 26(c) and 30, Local Rule of Civil Procedure 37.1, and Superior Court Rule 39—no longer apply in the Superior Court of the Virgin Islands now that the Supreme Court of the Virgin Islands has promulgated the Virgin Islands Rules of Civil Procedure. *See generally In re: Adoption of the V.I. R. Civ. P.*, S. Ct. Prom. No. 2017-001, V.I. Supreme LEXIS 22, *2 (V.I. Apr. 1, 2017) (inconsistent rules repealed); *see also In re: Amendments to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-019, 2017 V.I. LEXIS 60, *1 (V.I. Super. Ct. Apr. 6, 2017) (Superior Court Rule 39 expressly repealed), *approved by* S. Ct. Prom No. 2017-006, 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017). That said,

> [i]t benefits no one, least of all the Judiciary, to discard years of precedent . . . which considered the same or similar rules as those we recently promulgated, and instead start from scratch and go searching high and low for what we already have. Where a new rule retains or incorporates a prior rule, whether a federal rule, a District Court local rule, or a Superior Court rule, and where local case law has addressed a prior rule . . . absent precedent to the contrary or a compelling reason to depart from such prior case law . . . courts should look to this body of law first to harmonize our case law.

Wilson v. Hess Oil V.I. Corp., SX-13-CV-480, ___ V.I. ___, ____, 2017 V.I. LEXIS 135, *16-17 (V.I. Super. Aug. 23, 2017) (internal citation omitted). So, *Abdallah* could still have persuasive value, particularly in light of Virgin Islands Rule of Civil Procedure 37-1, which provides that

> [p]rior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties and any self-represented parties shall confer in a good faith effort to eliminate the necessity for the motion -- or to eliminate as many of the disputes as possible.

V.I. R. Civ. P. 37-1(a). Virgin Islands Rule of Civil Procedure 37-1(a) is nearly identical to Local Rule of Civil Procedure 37.1. Clearly Rule 37-1(a) was borrowed from Rule 37.1. *Cf. People of the V.I. v. Ventura*, SX-12-CR-076, 2014 V.I. LXIS 53, *53-54 (V.I. Super. Ct. July 25, 2014) (similarities between rules supports finding borrowing), *aff'd in part and remanded on other grounds by Ventura v. People*, 64 V.I. 589 (V.I. 2016).

The question then is whether, pursuant to *Wilson*, this Court should construe Rule 37-1(a) in the same way that *Abdallah* and *Barton* construed Rule 37.1. The answer to that question is no. The plain language of the rules refers only to Rule 30 motions. *Cf. Corraspe v. People*, 53 V.I. 470, 481 (V.I. 2010) (plain language canon applies to interpretation of motions); *accord Carty v. Mason*, ST-06-CV-433, 2012 V.I. LEXIS 12, *6-7 (V.I. Super. Ct. Apr. 23, 2012) (denying Rule 26(c) motion for failure to comply with Rule 37.1). The reason why is because Rule 30 requires leave of court only when "the parties have *not stipulated* to the deposition." Fed. R. Civ. P. 30(a)(2)(A) (emphasis added); *accord* V.I. R. Civ. P. 30(a)(2)(A) (same). If the parties can agree, they wouldn't seek leave of court. Hence, Local Rule of Civil Procedure 37.1 and Virgin Islands Rule of Civil Procedure 37-1(a) dispense with the certification requirement for Rule 30 motions because the filing a Rule 30 motion signals to the court that the parties cannot agree – either to taking more than ten depositions, for example, or to a subsequent deposition of someone previously deposed, or to conduct a deposition by telephone or other remote means. *Cf.* Fed. R. Civ. P. 30(a)(2)(A)(i)-(ii) & (b)(4); V.I. R. Civ. P. 30(a)(2)(A)(i)-(ii) & (b)(4). Accordingly, because the plain language of Local Rule of Civil Procedure 37.1 and Virgin

Islands Rule of Civil Procedure 37-1(a) conflict with *Abdallah*, the Court declines to apply the *Wilson* rule in this case to Virgin Islands Rule of Civil Procedure 37-1(a).

Pursuant to Virgin Islands Rule of Civil Procedure 26(c)(1), Attorney Logan was required to include a certification with his motion for a protective order. He did not. Failure to certify informal efforts to resolve a discovery motion could be grounds for denying that motion. *Cf. Carty*, 2012 V.I. LEXIS 12 at *6-7*; see also Go Fast Charters, LLC v. Texaco Caribbean, Inc.*, ST-10-CV-672, 2015 V.I. LEXIS 93, *12 (V.I. Super. Ct. July 31, 2015) ("This Court has consistently denied discovery motions when the movant failed to observe the requirements of LRCi 37.1 and 37.2." (collecting cases in footnote)).

In this instance, however, the failure to include a certification is not fatal because Attorney Logan substantially complied with the requirement. Even though he did not "include a certification" as such, V.I. R. Civ. P. 26(c)(1), he did explain his efforts "to resolve the dispute without court action." *Id.* He said that he

> attempted to contact [Plaintiffs' counsel] Attorney Nelson by email and telephone in order to try to reach an amicable solution, and (from [his] perspective) to avoid the need for a deposition. The parties were not successful in talking by telephone, nor has [Attorney Logan] received a response to his email to [A]ttorney Nelson. [Attorney Logan] has called Nelson twice and [A]ttorney Nelson has returned the first voice message . . . but not the return call from [Attorney Logan].

(Logan Mot. 3.) Plaintiffs do not dispute Attorney Logan's representations. They have not raised an objection to his failure to include a certification. The Court finds substantial (if not actual) compliance here.

B. Merits

Turning to the merits, Attorney Logan offers several reasons in support issuing a protective order. First, the subpoena was not served properly, he contends, because the Plaintiffs sent it to his secretary while he was off-island "following Hurricane Maria" with "no immediate plans to return." *Id.* at 4. Second, the subpoena "concern[s] the knowledge, acts and other information about the late Leslie A. Kelley, Esq. Moreover, Attorney Kelley himself was only sought-out by the Plaintiffs because he had knowledge of IMC. A corporate entity, like IMC, may be deposed in its own right," Attorney Logan argues. *Id.* at 5. Third, any knowledge he acquired independently "will no doubt fall within the attorney client and work product privilege." *Id.* Fourth, whether he and Attorney Kelley corresponded regarding Attorney Kelley's health "has no bearing on the Plaintiffs' claims." *Id.* Fifth, the Plaintiffs can gather information from other sources, such as IMC itself. Sixth, the subpoena is defective because the Plaintiffs did not include a check with the $45 witness appearance fee as required by section 660 of title 5 of the Virgin Islands Code. Finally, the "Plaintiffs' subpoena may call for privileged information," Attorney Logan contends. *Id.* at 6.

The Plaintiffs reject each objection Attorney Logan put forth in his motion. To his first objection the Plaintiffs state that, "[i]f he cannot make it back to St. Croix, Plaintiffs are more than willing to take his deposition by telephone." (Pls.' Opp'n 5.) To his objections based on privilege, the Plaintiffs respond that they were "not sufficiently expressed" and "any objection . . . on this basis is appropriately reserved until the actual deposition." *Id.* at 7. "Plaintiffs have not noticed specific deposition topics for his deposition, nor have Plaintiffs asked him to produce any documents. Attorney Logan has not expressed his privilege objection with the requisite particularity, and his motion should be denied on this basis." *Id.* To his objection based on the service of the subpoena, the Plaintiffs respond that they served the subpoena on Attorney Logan's secretary, Barbara Brin.

> Rule 45 of the Virgin Islands Rules of Civil Procedure requires that proper service of "a subpoena requires delivering a copy to the named person." In the context of an individual, Rule 45 does not require actual hand delivery; rather, it only requires that the method of service be reasonably calculated to ensure actual receipt.

> Service upon Attorney Logan by way of Ms. Brin at his Christiansted office was the best way to ensure Attorney Logan actual received the subpoena. Attorney Logan's St. Croix residence is not listed in the phone book, so service at his home was not possible. Further, by Attorney Logan's own admission, he has been off-island since the hurricanes, with no immediate plans to return. His absence made personal service impossible. And finally, as evident from his communications and his motion to quash, he timely and actually received the subpoena.
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> . . . Rule 45 does require personal service. In determining the propriety of service under Rule 45, federal courts, applying the federal analog, routinely look to Rule 4 regarding service of summons for guidance. There are no published Virgin Islands cases regarding the propriety of serving an office secretary under local Rule 4, but courts throughout the United States, employing the analog federal Rule 4, have consistently found such service to be perfectly acceptable.

Id. at 8-9 (footnotes omitted) (citing *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685 (9th Cit. 1988); *Union Asbestos & Rubber Co. v. Evans Products Co.*, 328 F.2d 949 (7th Cit. 1964); *D'Amario v. Russo*, 750 F. Supp. 560 (D.R.I. 1990); *Kuhlik v. Atlantic Corp., Inc.*, 112 F.R.D. 146 (S.D.N.Y. 1986); *Hall v. Gulf S. Utilities, Inc.*, 96 F. Supp. 351 (S.D. Miss. 1951); and *In re: Reese*, 14 B.R. 113 (Bankr. W.D.N.Y. 1981)). "Plaintiffs reasonably relied upon Ms. Brin's representation that she could accept service, and while Attorney Logan may not have been actually present when service was effectuated, it is clear that Attorney Logan received his subpoena in short order." (Pls.' Opp'n 9-10.) Additionally, "[f]ailure to tender a witness fee is no longer a valid basis to quash an otherwise validly served subpoena in the Territory," Plaintiffs argue. *Id.* at 10. Plaintiffs flag a distinction between Federal Rule of Civil Procedure 45(b)(1) and Virgin Islands Rule of Civil Procedure 45(b)(1) and argue that the provision that "statutory witness fees must accompany the service of a subpoena" "was deliberately excised from the Virgin Islands Rules of Civil Procedure." *Id.* "[T]he better practice under the new rule is to merely require the fee be tendered . . . upon the witness's actual appearance at the deposition. And this approach reflects *common sense.* Plaintiffs should not be required to pay a witness—like Attorney Logan—-[who] refuses to show for his deposition." *Id.* Lastly, Plaintiffs reject Attorney Logan's concerns regarding the probative value of his deposition because:

> there are real questions as to Attorney Kelley's mental competence in August 2017 when he executed his Affirmation. At that time Attorney Kelley was nearing the end of a long battle with brain cancer, and only a week after he executed the Affirmation, he departed stateside for end-of-life palliative treatment. During the time between when Attorney Kelley left St. Croix and his passing, Attorney Logan represented to Plaintiffs that Attorney Kelley was not mentally competent. He will likely have relevant testimony on this limited issue of Attorney Logan's competency.

Id. at 6 (footnote omitted).

After considering the arguments presented, the Court cannot agree with Attorney Logan on any ground except one. First, the authorities Plaintiffs cite to the Court on this point are persuasive, but they are not on point because in each case service was effected on secretary or receptionist, but on behalf of a corporation, not an individual. *Cf. D'Amario*, 750 F. Supp. at 564 ("By defendant's own admission, plaintiff's process server left the summons and complaint at the New York office of Capitol Records with an employee, believed to be a secretary. Service on the secretary is clearly in compliance with Rhode Island Rule 4(d)(3)." (internal citation and quotation marks omitted)); *Direct Mail Specialists*, 840 F.2d at 688 ("Generally, the determination of whether a given individual is a managing or general agent depends on a factual analysis of that person's authority within the organization." (quotation marks and citations omitted)); *see also, e.g., Kuhlik*, 112 F.R.D. at 147 ("The issue presented by this motion whether plaintiffs served the complaint upon a corporate employee authorized to accept such service."). The subpoena was delivered to Attorney Logan's secretary on his personal behalf, not on his behalf as a partner in the Nichols Newman law firm. But Attorney Logan clearly received actual notice of the subpoena because he filed this motion. Since he did not file a reply to the Plaintiffs' opposition to rebut their assertion, the Court accepts that service upon his secretary was not improper here.

Second, Attorney Logan would be entitled to "receive $4 for each day's attendance," "if he resides in the same district in which the deposition is noticed" plus transportation expenses or "an additional allowance of $8" if he is required to attend "in a judicial division in which he does not reside." 5 V.I.C. § 660. The most he could receive is a witness fee of $12, not $45,[2] though "his necessary and reasonable expenses of travel in going from and returning to his place of residence," *id.*, might be much higher if required to appear in person on St. Croix after having left island. But not receiving the witness fee in advance —whether $4 or $12—is not a basis for refusing to be deposed. Plaintiffs are correct that neither the Virgin Islands Code nor Rules of Civil Procedure mandates that a check for the witness deposition fee accompany a subpoena. The Court agrees that witness fees need not be tendered with the subpoena, particularly since "the time necessarily occupied in going to and returning from the" deposition and the "necessary and reasonable expenses of travel in going from and returning to his place of residence," 5 V.I.C. § 660, might not be known at the time when the subpoena is served. Rather, the witness fee should be tendered "upon compliance," meaning "at the deposition." (Pls.' Opp'n 10.)

The Court also rejects Attorney Logan's concerns that privileged or confidential information may be the subject of the deposition. As Plaintiffs explained they "do not wish or intend to depose

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[2] Where Attorney Logan obtained the amount of $45 from is unclear. Section 1821 of title 28 of the United States Code sets the fee for witnesses at $40. *See* 28 U.S.C. § 1821(b) ("A witness shall be paid an attendance fee of $ 40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance."). But section 1821 does not apply to cases in the Superior Court of the Virgin Islands. *See Terrell v. Coral World*, 55 V.I. 580, 590-92 (V.I. 2011). Unfortunately, the Legislature of the Virgin Islands has not amended section 660 of title 5 of the Virgin Islands Code since May of 1957 and courts cannot increase the fee by rule. *See id.* at 590-91 & n.13.

Attorney Logan about IMC or its safety protocols. Rather, the deposition is necessary to inquire into Attorney Kelley's competency in August 2017." (Pls.' Opp'n 6.) Attorney Logan's claim that the Plaintiffs' deposition notice "calls for . . . privileged information" is rejected. (Logan Mot. 1.) However, to placate Attorney Logan's concerns, the Court will order that his "deposition be sealed and opened only on court order." V.I. R. Civ. P. 26(c)(1)(F).

Attorney Logan's other concern, that his deposition might "call[] for irrelevant . . . information" is also rejected (Logan Mot. 1.) Frankly, as an attorney, he should know that "relevance is not generally an appropriate basis on which to issue a blanket refusal to be deposed." *United States v. Cathcart*, No. C-07-4762, 2009 U.S. Dist. LEXIS 20078, *21 (N.D. Cal. Feb. 25, 2009). Moreover, "[t]he scope of relevancy in deposition proceedings is broader than the scope of relevancy at trial." *Fields v. Stauffer Publ'ns, Inc.*, 578 P.2d 1138, 1142 (Kan. Ct. App. 1978) (citation omitted). "In fact, '[i]t is arguable whether objections based on relevancy should even be made during the deposition." *Quantachrome Corp. v. Micromeritics Ins. Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999) (citing Fed. R. Civ. P. 32(d)(2)(A)); *accord Nemirofsky v. Seok Ki Kim*, 523 F. Supp. 2d 998, 1000 (N.D. Cal. 2007) ("[A]n objection based on relevance is not an adequate reason to preclude or terminate a deposition."). "[I]f counsel feels that he must make a relevancy objection, the objection should briefly be made for the record, and the deposition should continue with the testimony being taken subject to the objection." *Quantachrome Corp.*, 189 F.R.D. at 700 (citing Fed. R. Civ. P. 30(c)). "Then, if necessary, the Court will determine any relevancy issues." *Id.*

The remaining objection Attorney Logan raised that does have merit was raised implicitly, not explicitly. And that is he has left St. Croix "and has no immediate plans to return." (Logan Mot. 4.) Pursuant to Virgin Islands Rule of Civil Procedure 45, "[a] subpoena may command a person to attend a . . . deposition only . . . within 100 miles of where the person resides, is employed, or regularly transacts business in person." V.I. R. Civ. P. 45(c)(1)(A). Attorney Logan is employed and regularly transacts business on St. Croix, but he may no longer reside here. Assuming this is the case, the Court will issue an order to permit that the "deposition be taken by telephone or other remote means," V.I. R. Civ. P. 30(b)(4), should Attorney Logan's return to the Territory be further delayed.

III. CONCLUSION

For the reasons stated above, Attorney Logan's motion for a protective order and to quash the Plaintiffs' notice of deposition will be denied in part and granted in part. An appropriate order follows.

Date: February 21, 2018.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: Court Clerk Supervisor
Dated: 2/21/18