SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

RUDOLPH and ESLYN ALBERT; ALBERT P. and CYNTHIA VICTOR; ARNOLD and ELIZABETH ANTHONY; GEORGE C. and ESTHER JOSEPH,	)	**CASE NO. SX-04-CV-605**
	)	**COMPLEX LITIGATION DIVISION**
Plaintiffs,	)	*** * ***
v.	)	**GROUPED UNDER *IN RE: SANDBLASTER SILICOSIS CASES*, MASTER CASE NO. SX-19-MC-023**
HESS OIL VIRGIN ISLANDS CORPORATION; HOVENSA, LLC; AMERADA HESS CORPORATION; LITWIN CORPORATION, individually and as successor-in-interest to LITWIN PAN-AMERICAN CORPORATION; FLUOR ENGINEERS & CONSTRUCTORS, INC.; RIGGERS & ERECTORS INTERNATIONAL, INC.; RARITAN SUPPLY COMPANY, individually and as successor-in-interest to BRIDGE SUPPLY COMPANY; 3M a/k/a MINNESOTA MINING & MANUFACTURING COMPANY; CLEMCO INDUSTRIES, INC.; INGERSOLL RAND CORPORATION; and JOHN DOE DEFENDANTS,	)	
Defendants.	)	

Cite as: 2019 VI Super 45

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MEMORADUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a motion to dismiss with prejudice for failure to prosecute filed by Hess Oil Virgin Islands Corporation ("HOVIC"), HOVENSA, LLC ("HOVENSA"), and Amerada Hess Corporation ("Hess") (collectively "Hess Defendants") and a motion to strike the Plaintiffs' opposition for failure to comply with a local rule promulgated by the District Court of the Virgin Islands. For the reasons stated below, the motion to strike will be denied. To the extent the District Court's rule governed in the Superior Court of the Virgin Islands, the Court will excuse non-compliance because the Court can discern no disadvantage and because the District Court later eliminated the supporting document requirement, which the Plaintiffs' failed to follow. The Court will also deny the Hess Defendants' failure to prosecute motion because their motion to disqualify the Plaintiffs' counsel was still pending when they moved to dismiss for failure to prosecute. Imposing the extreme sanction of dismissal is unwarranted in that instance.

I. BACKGROUND

¶2 On October 28, 2004, Rudolph and Eslyn Albert, Albert and Cynthia Victor, Arnold and Elizabeth Anthony, and George and Esther Joseph[1] joined together to file a lawsuit against the Hess Defendants, Litwin Pan-American Corporation ("Litwin Pan-Am"), Riggers & Erectors International, Inc. ("R&E"), Raritan Supply Company ("Raritan"), 3M Company ("3M"), Clemco Industries, Inc.

[1] To avoid confusion, the Court uses "Plaintiffs" to refer to all eight persons collectively. Individual plaintiffs or couples will be referred to by last name, E.g., Mr. Albert or the Alberts. The Court also uses "husbands" or "wives" when necessary to refer to the male and female Plaintiffs, respectively.

("Clemco"), Ingersoll-Rand Company ("Ingersoll-Rand"), and several other unknown companies named John Doe Defendants. The husbands alleged that they were exposed to toxic dust while they worked at the St. Croix oil refinery, during the time it was owned and operated by HOVIC and later by HOVENSA. Messrs. Albert, Victor, and Joseph claim exposure to silica dust because they worked near sandblasters while Mr. Anthony claims exposure to silica dust and asbestos. The husbands brought negligence, strict product liability, and supplying a chattel dangerous for its intended use claims and, along with their wives, claims for intentional and negligent infliction of emotional distress. The husbands further assert premises liability claims against the Hess Defendants, while the wives also assert loss of consortium claims. The Plaintiffs seek damages, including punitive damages, and trial by jury.

¶3 R&E, 3M, Ingersoll-Rand, Raritan, and the Hess Defendants appeared and answered the complaint. HOVIC also crossclaimed against Raritan, 3M, and Clemco for indemnification, and breach of contract. Clemco appeared and responded by filing a pre-answer motion to dismiss for lack of personal jurisdiction. R&E, the Hess Defendants, and Raritan also moved immediately to sever the Plaintiffs' claims into separate lawsuits. Citing a 1997 decision of the Administrative Judge of the Territorial Court of the Virgin Islands issued in *Louis Alexander, et al. v. Hess Oil Virgin Islands Corporation*, *et al.*, civil number 343/1997, they argued that the Alberts, the Victors, the Anthonys, and the Josephs had violated standing court practice by joining their different claims together in the same case. Ingersoll-Rand joined in the Hess Defendants' and Raritan's motions and 3M joined in Raritan's motion.

¶4 While briefing on the severance motions and Clemco's motion to dismiss were underway, the Hess Defendants filed another motion – to disqualify the Plaintiffs' counsel, Lee J. Rohn, Esq.

("Attorney Rohn"), because she had worked for a predecessor to the Hess Defendants' current law firm and had defended Hess and HOVIC in prior asbestos cases. Plaintiffs opposed the severance, disqualification, and dismissal motions and then filed their own motion for leave to file an amended complaint to substitute The Litwin Corporation ("Litwin") in place of Litwin Pan-Am and to add Fluor Engineers & Constructors, Inc. as a defendant. The Hess Defendants opposed on technical grounds, i.e., because a redlined copy was not included showing the proposed changes. Although the Court had not yet granted the motion to amend, the Plaintiffs went ahead and served Litwin, who appeared on a limited basis to file a motion to quash summons.

¶5 With three motions to sever, two pre-answer motions, a motion to amend, and the disqualification motion fully briefed, the Hess Defendants filed another motion – for leave to supplement their disqualification motion, which the Court (Donohue, J.) granted over the Plaintiffs' objection. In an about-face, the Hess Defendants also filed a motion to consolidate two similar causes of action brought by the Anthonys, who are plaintiffs in this case and in *Ezekiel Farrell, et al. v. Hess Oil Virgin Islands Corporation, et al.*, case number SX-04-CV-607. Once the Anthonys failed to respond, the Hess Defendants then filed a motion to deem their motion to consolidate conceded, which the Anthonys also did not respond to.

¶6 Even though none of these motions had been ruled on, including the disqualification motion, the Hess Defendants proceed to file yet another motion – to dismiss for failure to prosecute. This motion the Plaintiffs did oppose. But the Hess Defendants then moved to strike their opposition because it failed to comply with what the Hess Defendants thought was a newly-promulgated rule of the District Court of the Virgin Islands. The Plaintiffs either overlooked the motion to strike or opted not to respond to it.

¶7 Amid all these motions, Theodore H. Huge, Esq. ("Attorney Huge") entered his appearance as co-counsel for the Plaintiffs, which prompted the Hess Defendants to file a second disqualification motion, arguing that Attorney Rohn's disqualification should be imputed to Attorney Huge and Motley Rice, LLC, the law firm he was associated with at that time. Plaintiffs opposed this disqualification motion as well. And before briefing on that motion had ended, the Hess Defendants filed another motion – to stay further proceedings until the disqualification motions were ruled on. Raritan joined in the motion to stay, which the Court granted, over the Plaintiffs' objection. Technically, the stay has not been lifted yet, but will be by separate order of even date.

¶8 Notwithstanding the cloud over counsel's authority to act, several defendants later stipulated with several Plaintiffs to dismiss their claims. The Alberts agreed to dismiss their claims against Raritan, Clemco, R&E, and 3M, and Litwin as well, notwithstanding that the motion to amend the complaint to add Litwin had not been granted yet. The Alberts and the Anthonys also agreed to dismiss their claims against the Hess Defendants, which rendered both disqualification motions, the motion to sever, the motion to consolidate, the failure to prosecute motion, the motion to deem conceded, and the motion to strike all moot as to them.[2]

¶9 By order dated August 30, 2018, entered October 26, 2018, the Presiding Judge of the Superior Court designated this case as complex and transferred it to the newly-established Complex

[2] Which Plaintiffs stipulated with the Hess Defendants to a dismissal is unclear because the document captioned this case as "Rudolph Albert and Eslyn Albert," not "Rudolph Albert, et al." But then in the body, the stipulation stated that the above entitled *action* was dismissed as between "the plaintiffs" and the Hess Defendants. If the "plaintiffs" meant the Alberts (based solely on the caption) that was unclear because the Court, in approving the stipulation, decreed that "the above named parties are DISMISSED" and listed all Plaintiffs in the caption. (Order 1, entered Nov. 15, 2006.) The Alberts, joined by the Anthonys, responded approximately two weeks after the order was entered and filed a corrected stipulation that explained that the Anthonys' claims and the Alberts' claims were dismissed but that "the claims of plaintiffs Albert P. Victor, Cynthia Victor, George C. Joseph and Esther Joseph [we]re unaffected by this stipulation and shall continue." (Corr. Stip. for Dismissal 2 filed Dec. 5, 2006.) By separate order the Court will vacate the November 15, 2006 order since the clear intent of the parties was that the claims of the Josephs and the Georges as to the Hess Defendants were not being dismissed.

Litigation Division. And by order dated and entered November 2, 2018, this Court scheduled a global hearing for January 24, 2019 to decide whether Attorney Rohn and Attorney Huge should be disqualified from representing the Plaintiffs in all the cases in which they had appeared. *Cf. McKenzie v. Hess Oil V.I. Corp.*, 2019 VI Super 31, ¶ 24 ("One of the reasons the Complex Litigation Division was established was to avoid inconsistent rulings in similarly-situated cases." (quotation marks, brackets, and citation omitted)).

¶10 Attorney Rohn was disqualified in several instances because she had defended Hess and HOVIC in asbestos-related cases in the past. *See generally In re: Sandblaster Silicosis Cases*, 2019 VI Super 44, ¶ 5 (collecting cases). Attorney Rohn and her law firm were also disqualified because of a conflict of an associate in her firm. *See id.* But Attorney Rohn's disqualification had not been imputed to Attorney Huge or J. Russell B. Pate, Esq. ("Attorney Pate"), another attorney who appeared in several individual cases. *See id.* (citing *See Farrell v. Hess Oil V.I. (HOVIC)*, 57 V.I. 50 (Super. Ct. 2012)).

¶11 Once this case was reassigned, the Court scheduled the global hearing to decide in all the cases whether Attorney Rohn would be disqualified and if so, whether her disqualification should be imputed to Attorney Huge or Attorney Pate. The common law vests courts with inherent authority to revisit interlocutory orders "*at any time* prior to entry of a final judgment." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (2012) (emphasis added) (citations omitted). Accordingly, because identical disqualification motions were pending in this case and several other cases, and because a different result reached by this Court on the same motion would have been inconsistent and caused further delay, the Court elected to address the issue globally for all the cases. But at the start of the January 24, 2019 hearing, Hess and HOVIC formally withdrew their disqualification motions based on representations by Attorneys Huge and Rohn that Attorney Rohn

would voluntarily withdraw from all the cases. None of the other parties objected. Since court approval is not required to withdraw a motion, *cf. Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 277 (Super. Ct. 2017), the disqualification motions were withdrawn on January 24, 2019.

¶12 Following the January 24, 2019 hearing, the Court grouped this case and several other cases under a master case, *In re: Sandblaster Silicosis Cases*, so that general orders could be issued pertaining to all the cases and that cases could be identified for pre-trial coordination that are sufficiently similar (hereinafter the *Sandblaster* cases). *See generally In re: Sandblaster Silicosis Cases*, 2019 VI Super 44, ¶ 1, n.1 (listing the individual cases grouped under the master case). The Court also granted several severance motions the defendants had filed in the individual cases and directed the affected plaintiffs, including the Plaintiffs in this case, to refile individual complaints, failing which their claims would be dismissed.

II. DISCUSSION

A. Motion to Strike

¶13 Before turning to the merits of the motion to dismiss, the Court must resolve the Hess Defendants' motion to strike the Plaintiffs' opposition. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 120 (Super. Ct. 2016) ("[G]ranting or denying these motions would affect the arguments and issues that can be considered."). The Hess Defendants move to strike the Plaintiffs' opposition because they failed to comply with Rule 7.1 of the Local Rules of Civil Procedure promulgated by the District Court of the Virgin Islands ("District Court"). The Plaintiffs did not respond.[3]

[3] This Court has rejected parties' attempts to embed motions in responses and replies. *See Der Weer*, 64 V.I. at 129 ("Written motions should be filed separately and not be embedded within other motion papers."). On that basis alone, the Court could deny the motion to strike.

¶14 The District Court of the Virgin Islands, on April 19, 2006, issued a promulgation order revising Rules 7.1, 12.1, and 56.1 of the Local Rules of Civil Procedure. *See generally In re: Amendment to the Local Rules of Civ. P.*, Misc. No. 2003-06, 2006 U.S. Dist. LEXIS 101812 (D.V.I. Apr. 19, 2006). The amendments took effect the next day, April 20, 2006, and superseded the prior rules. *See id.* at *1. Rule 7.1 concerned the filing of motions papers, including responses and replies. As amended, it provided, in pertinent part:

> If the respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within ten (10) days after service of the motion. The time period for a reply shall be ten (10) days after service of the opposition brief. The time period for any response and reply to a summary judgment motion filed under Civil Rule 56 shall be as provided in LRCi 56.1. The time period for any response and reply to a motion filed under Civil Rule 12 shall be as provided in LRCi 12.1. Briefs shall contain a concise statement of reasons in opposition to the motion and a citation of authorities upon which the respondent relies. For good cause appearing therefor, a respondent may be required to file his response and supporting documents, including brief, within such shorter period of time as the court may specify, or may be given additional time upon request made to the court. Nothing herein shall prohibit a district judge or magistrate judge from ruling without a response or reply when deemed appropriate.

D.V.I. Local R. Civ. P. 7.1(f) ("LRCi"), *reprinted in* V.I. Ct. Rules Ann. 470 (2007 ed.), *superseded by, inter alia, In re Amendments to the Local Rules of Civ. P., Local Rules of Crim. P., & Local Admiralty Rules*, Misc. No. 2003-06, *et seq.*, 2009 U.S. Dist. LEXIS 134082 (D.V.I. Nov. 30, 2009).

¶15 The Hess Defendants home in on section (f) and object to the Plaintiffs' opposition because the Plaintiffs did "not file[] a brief." (Hess Defs.' Reply Mem. of L. re: Pls.' Opp'n to Mot. to Dismiss with Prej. for Failure to Pros. 4, filed June 26, 2006 ("Reply Br.").) The Hess Defendants also object because the Plaintiffs failed to "supplement their Opposition with exhibits." *Id.* The Hess Defendants see the Plaintiffs' non-compliance with Rule 7.1(f) as "continued and deliberate delay" and "dilatory

and deliberate actions," which, they contend, necessitates that their "Opposition . . . be stricken" and "this matter" "dismiss[ed] . . . for failure to prosecute." *Id.* Plaintiffs failed to respond.

¶16 At the time when the Hess Defendants' filed their motion to dismiss, "the Superior Court routinely applied through Superior Court Rule 7 many of the rules the District Court of the Virgin Islands promulgated, including Rule[] 7.1." *Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 501 (Super. Ct. 2017) (citation omitted); *cf. In re: LeBlanc*, 49 V.I. 508, 515 n.8 (2008) (*per curiam*) (quoting trial court order applying LRCi 7.1); *see also Chavayez v. Buhler*, S. Ct. Civ. No. 2007-060, 2009 V.I. Supreme LEXIS 26, *18-19 n.6 (V.I. June 25, 2009) (Swan, J., concurring) (quoting LRCi 7.1). But the Supreme Court of the Virgin Islands later "criticized this uncritical application by the Superior Court of the Virgin Islands of rules promulgated by other courts." *Augustin*, 67 V.I. at 501-02 (citing *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (2015)). And this Court has held that "[a] motion to strike raises a question of propriety rather than of right." *Der Weer*, 64 V.I. at 127 (quotation marks and citations omitted).

¶17 Yet, even though the authority to strike court papers is inherent, *see id.* at 126 (recognizing that courts have authority to control their own files), nothing in Rule 7.1 authorized striking a non-conforming response as a remedy. And this Court sees no reason here to strike the Plaintiffs' opposition. The Hess Defendants are correct insofar as the Plaintiffs did not file one document titled "response" and another document titled "brief" or "memorandum of law." The Hess Defendants are also correct that the Plaintiffs represented that they would "supplement th[eir] opposition with exhibits substantiating the facts as described below," (Pls.' Opp'n to Defs.' Mot. to Dismiss with Prej. for Failure to Prosecute 2 n.1, filed June 22, 2006 ("Opp'n")), but then failed to do so. But the Hess Defendants overlook that the "facts" the Plaintiffs intended to substantiate either were reflected in

the record or already known to the Hess Defendants. *Cf.* id. at 2-3 ("On or about August 31, 2005, Attorney Huge of Motley Rice held a Rule 16 conference by conference call with all defense counsel except Attorney Bryant who had to miss the meeting at the last minute to attend a funeral. During the conference, the other defense counsel and Attorney Huge discussed case management order issues, including discovery plans and whether consolidation for discovery purposes was appropriate for the Motley Rice / Rohn & Cameron cases. Counsel exchanged proposed case management orders, and Attorney Bryant responded on September 14, 2005, with his comments and suggestions to the proposed case management orders.").[4] Beyond claiming an "[in]ability to meaningfully reply," (Reply Br. 4), the Hess Defendants fail to articulate how they were disadvantaged by the Plaintiffs' failure to adhere to Rule 7.1. This Court can discern no harm or disadvantage. Moreover, the District Court later rescinded the version of Rule 7.1 that the Hess Defendants relied upon. For that reason, this Court will not enforce it now.[5] Accordingly, the Hess Defendants' motion to strike the Plaintiffs' opposition will be denied.

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[4] Britain H. Bryant, Esq. was counsel of record for the Hess Defendants at the time.

[5] The Hess Defendants make much of the Plaintiffs failure to follow the April 20, 2006 amendments. (*Cf.* Hess Defs.' Reply to Pls.' Opp'n to Mot. to Dismiss for Failure to Prosecute and Mot. to Strike 2, filed June 26, 2006 ("Plaintiffs have also filed their Opposition which does not conform to the *new local rules* of civil procedure and Defendants request that their Opposition be stricken." (emphasis added)).) But the Local Rules of Civil Procedure, for years, required a "brief and such supporting documents as are then available" along with a response to a motion. *Compare* LRCi 7.1(f), *reprinted in* V.I. Ct. Rules Ann. 263 (1997 ed.), *with* V.I. Code Ann., tit. 5 App'x V R. 6 (1982 ed.) ("If the respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within five (5) days after service of the motion."). Consequently, the Plaintiffs' did not fail to follow a recently promulgated rule. Rather, the Plaintiffs failed to follow a longstanding rule. But the District Court of the Virgin Islands later rescinded the supporting document requirement specifically for responses. *Cf. In re Amendments to the Local Rules of Civ. P., Local Rules of Crim. P., & Local Admiralty Rules*, Misc. No. 2003-06, *et seq.*, 2009 U.S. Dist. LEXIS 134082 (D.V.I. Nov. 30, 2009 (general requirement under revised LRCi 7.1 for all motion papers). While the District Court's reasons for rescinding the supporting document requirement were not stated, this Court questions the wisdom of a rule that requires every motion, response, and reply to be accompanied by "affidavits and other pertinent documents" or "supporting documents as are then available." LRCi 7.1(d), (f), *reprinted in* V.I. Ct. Rules Ann. 470 (2007 ed.). The consequence of such a rule is that it would effectively convert nearly every motion concerning extra-record facts into a factual dispute the trial court must resolve to rule on the motion. Many motions do require a factual basis. *Cf. People v. Hatcher*, 68 V.I. 378, 381 (Super. Ct. 2018) (continuance motions) ("excusable neglect and good cause must be shown, not concluded." (citation omitted)); *see also* V.I. R. Civ. P. 6(b)(1) ("When an act is required or allowed to be done by or within a specified

B. Motion to Dismiss for Failure to Prosecute[6]

¶18 Turning to the failure to prosecute motion, the Hess Defendants admit that their disqualification motion was still pending when they moved to dismiss for failure to prosecute. (*See* Hess Defs.' Mem. of L. in Supp. of Mot. to Dism. with Prej. for Failure to Prosecute 2, filed June 1, 2006 (Hess Defendants "moved to disqualify Plaintiffs' counsel and "[s]aid motion . . . is still pending.") ("Mot. Br.").) They also implicitly acknowledge that their disqualification motion was filed approximately a month and a half after "Plaintiffs originally filed suit on October 29, 2004." *Id.*

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period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act."). But not every motion involving facts outside the record must be supported by an affidavit or documentation. *Cf.* 5 V.I.C. § 699 ("The statement of an attorney authorized by law and admitted to practice in the Courts of the Virgin Islands, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in an action in lieu of and with the same force and effect as an affidavit duly notarized."). The version of Local Rule of Civil Procedure 7.1 in effect in 2006 did not differentiate between pre-answer and post-answer motions, dispositive and non-dispositive motions, or ancillary motions or motions pertaining to case management. This Court sees no reason to follow the 2006 version of Rule 7.1(f), particularly because of the added cost and delay that attended the rule. *Cf. Castillo v. St. Croix Basic Servs., Inc.*, SX-09-CV-299, 2010 V.I. LEXIS 141 (V.I. Super. Ct. Feb. 9, 2010) (denying motion to strike based in part on inclusion of inadmissible hearsay per LRCI.1(f)).

[6] Although the Alberts and the Anthonys voluntarily dismissed their claims against the Hess Defendants, the motion to dismiss for failure to prosecute is still pending as to the Victors and the Joseph. Moreover, a similar failure to prosecute motion is also pending in another case *Alexander, et al. v. Hess Oil Virgin Islands Corporation, et al.* In that case, one of the defendants, Crane Co. ("Crane") remarked, in response to the severance order, "that the first order of business should be [for the Court] to rule on the pending Motion to Dismiss [for failure to prosecute]." (Def. Crane Co.'s Resp. to Ct. Order 2, filed Feb. 15, 2019, *Alexander, et al. v. Hess Oil V.I. Corp.*, et al., SX-04-CV-602.) The Court acknowledges Crane's concern. But Crane must also understand that courts, not parties, decide the order of business for their cases. Nonetheless, Crane does raise a valid point insofar as several courts in other jurisdictions have—after severing parties—dismissed pending motions with leave to refile once new cases are opened. *E.g.*, *Tureau v. 2H, Inc.*, Civ. Nos. 13-2969, 13-2977, 2014 U.S. Dist. LEXIS 139780, *4 (W.D. La. Sept. 30, 2014) ("Any party wishing to refile any motion tailored to the particulars of an individual action may do so after the Clerk of Court assigns new civil actions numbers to the newly-severed suits in keeping with our orders above."); *Slep-Tone Entm't Corp. v. Ellis Island Casino & Brewery*, No. 2:12-CV-00239-KJD-NJK, 2013 U.S. Dist. LEXIS 17967, *11 (D. Nev. Feb. 11, 2013) ("All motions pending against severed Defendants are terminated without prejudice and may be re-filed in the new case."). If Crane's concern is the possibility that the movants might have to refile their motions in the new cases once the severed plaintiffs file separately, the Court now puts that concern to rest. If "severance does not require the filing of an amended complaint," *Alexander v. HOVIC*, 324/1997, *et seq.*, 1998 V.I. LEXIS 36, *4 n.1 (V.I. Terr. Ct. Jan. 23, 1998) (citing *Gonzalez v. Fireman's Fund Ins. Co.*, 385 F. Supp. 140 (D.P.R. 1974)), because "the dropping of . . . misjoined parties [i]s a . . . remedy" and not a dismissal "with leave to file an amended complaint," *Gonzalez*, 385 F. Supp. at 144-45, then severance also should not require the parties to re-file or re-brief pending motions. Forcing the parties to re-file fully-briefed motions is not "just, speedy, [or] inexpensive." V.I. R. Civ. P. 1. Instead, the Court can deem the motions to be pending in the newly-opened cases or extend to the new cases whatever ruling is issued in the case the parties were dropped from. To avoid the concerns of the sort Crane raised in *Alexander*, the Court is proceeding post haste to resolve all pending motions before the deadline to refile passes.

But even though the motion was still pending, the Hess Defendants nonetheless conclude that the complaint should be dismissed because the Plaintiffs "have all failed in their entirety to comply with any of their obligations." *Id.* at 1. Neither initial nor pretrial disclosures have been provided and "[r]equiring Defendants to continue to defend this case would be manifestly unjust," they contend. *Id.* "[D]ue to Plaintiffs' unjustified and dilatory actions," "they have been deprived of the basic tools for preparing to defend a case," the Hess Defendants claim. *Id.*

¶19 The Plaintiffs counter that "Attorney Huge . . . held a Rule 16 conference by conference call with all defense counsel except [the Hess Defendants' counsel] . . . who had to miss the meeting at the last minute to attend a funeral." (Pls' Opp'n to Defs.' Mot. to Dismiss with Prej. for Failure to Pros. 2-3, filed June 22, 2006 ("Opp'n").) And attempts to hammer out a discovery plan continued but were delayed once the Superior Court judge assigned to other *Sandblaster* cases retired and the Hess Defendants "moved to dismiss [sic] both Plaintiffs' local counsel . . . and stateside counsel." *Id.* at 3. This is the source of the delay, according to the Plaintiffs. *See id.* at 4 ("[T]he delay in this case and the other . . . [*Sandblaster*] cases is due in large part to (1) the transitional period of the Superior Court as it contends with Judge Ross's docket; and (2) Defendants' pending motions to disqualify both Rohn & Cameron and Motley Rice.").

¶20 As noted, the Hess Defendants objected to the Plaintiffs' opposition and moved to strike it. But they also replied to the Plaintiffs' arguments, conceding that "[t]he parties did attempt to conduct a Rule 16 Conference on August 31, 2006; nearly one year after Plaintiffs filed this action." (Reply Br. 2.) But Plaintiffs' counsel still "let another year pass before scheduling another Rule 16 Conference for June 23, 2006," the Hess Defendants argue. *Id.* And then "on June 20, 2006 . . . Plaintiffs cancelled." *Id.* So, the Hess Defendants reject that they are the ones responsible for the

delay. Instead, "it is the Plaintiffs' counsel who is responsible for the delays in this case by contemptuously refusing to abide by the Court's Order to withdraw as counsel." *Id.* at 3. They also reject Judge Ross's retirement as a factor because he "retired in December 2005, more than one year after Plaintiffs filed this lawsuit, and no attempts were made by Plaintiffs to move this case forward." *Id.* ("Judge Ross' retirement ha[d] no effect on the ability of Plaintiffs' to conduct some discovery, including Rule 26 Disclosures.") So, Plaintiffs' counsel cannot "refuse to withdraw," they argue, and then "claim that Defendants are responsible for the delays." *Id.*

¶21 Unraveling the arguments on both sides here is made complicated because counsel conflate several cases.[7] Although the Hess Defendants did file a motion to consolidate the claims the Anthonys asserted in this case with similar claims they asserted in *Farrell*, that motion—along with three motions to sever, two pre-answer dismissal motions, the motion to amend, the first disqualification motion, and the motion to deem the consolidation motion conceded—were all still pending when the Hess Defendants moved to dismiss for failure to prosecute. In other words, this case (*Albert*) was not associated, consolidated, or in any way connected to any other case when the motions to disqualify and to dismiss were filed. As this Court recently observed, "notwithstanding the numerous references in later disqualification motions to the identical motions filed in earlier cases . . . the parties never asked the Presiding Judge of the Superior Court to reassign all the cases to the same judge. As a result, the disqualification motions were addressed on a case-by-case basis." *Sandblaster Silicosis Cases*, 2019 VI Super 44, ¶ 6. The disqualification motion was never addressed in this case. So, the Hess Defendants are simply incorrect in claiming that Attorney Rohn "refused to withdraw." Attorney Rohn was never disqualified in ***this*** case and another judge's decision to

[7] For example, Judge Ross' retirement is irrelevant here because this case was not assigned to him.

disqualify her in another case was not binding on this case. In fact, "decisions of trial level courts are not binding on any other court, *including that same trial court*." *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 101 (Super. Ct. 2014) (emphasis added) (citations omitted). Consequently, the judge assigned to this case when the disqualification motions were filed might have ruled differently since Attorney Rohn had tried to distinguish silica exposure from asbestos exposure. And ultimately the pendency of the disqualification motion is the reason why the Hess Defendants' failure to prosecute motion must be denied.

¶22 "[D]ismissal for failure to prosecute is an extreme sanction which the trial court should be careful to avoid except where it can justify the dismissal." *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 187 (V.I. 2012). To justify a prejudicial dismissal for failure to prosecute the trial court must consider and weigh several factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. at 185-86 (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)). These factors must "'strongly weigh in favor of dismissal as a sanction,'" *id.* (quoting *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511 (2010)), before the court can dismiss for failure to prosecute.

¶23 While all the factors must be considered, *see id.* at 187-88, dismissal may be still appropriate even though some do not lean toward dismissal. *Cf. id.* at 186 ("[A] trial court is not required to find that all the factors weigh in favor of dismissal to warrant dismissal of the claim."). In other words, the question is not whether all the factors warrant dismissal, but rather whether, on balance,

imposing the "sanction of last resort" is warranted. *Watts*, 54 V.I. at 298 (Swan, J., concurring) (citations omitted).

¶24 In this instance, the Court does not have to consider any of the factors at length because the Plaintiffs are correct that any delay is attributable to the Hess Defendants. Taking the second factor first, there can be no prejudice to the Hess Defendants here because a scheduling order never issued. And the Plaintiffs did attempt to meet and confer, but then canceled due to the pending disqualification motions. Consequently, the second factor does not support dismissal. It is the first and third factors, however, that weigh most against dismissal.

¶25 Two threshold question are raised here, both matters of first impression: when does the clock stop on the dilatoriness analysis and may an attorney whose authority in called into question continue to take action in a case. Regarding the first question, the Supreme Court of the Virgin Islands has recognized that the Superior Court is "required to evaluate the *history* of dilatoriness factor in light of the [plaintiff's] behavior over the life of the case." *Molloy*, 56 V.I. at 191 (emphasis added) (quotation marks and citation omitted). However, the Court has not expressly addressed whether events occurring after a failure to prosecute motion is filed should be considered. The Supreme Court of Guam did and concluded that they should not. *See generally Lujan v. McCreadie*, 2014 Guam 19. As the Guam Supreme Court reasoned in *Lujan*,

> [i]t would be illogical and unfair to consider the merits of the motion to dismiss as including the passage of time or the actions that took place after the motion was filed. To hold otherwise may, *a fortiori*, strengthen or weaken the merits of a motion and distract the trial court from properly considering the substantive virtues of the motion to dismiss based on the facts and circumstances at the time the motion was made.

Id. ¶ 11 (footnote omitted). A failure to prosecute motion should, therefore, "be decided based on the merits of the arguments *at the time of the filing of the motion*, because any activity afterwards is

irrelevant." *Id.* (emphasis added). This Court agrees. Consequently, the only time frame relevant here is the time between November 3, 2004, the date the Plaintiffs filed their complaint, and June 1, 2006, the date the Hess Defendants filed their failure to prosecute motion. And what mitigates against a finding of dilatoriness is the further fact that all the time after January 31, 2005 must be excluded as that was the date the Hess Defendants filed their motion to disqualify Attorney Rohn.

¶26 Courts have unanimously held that dismissing a case for failure to prosecute is not proper when motions are pending. *See, e.g.*, *United Pac. Islanders' Corp. v. Cyfred, Ltd.*, 2017 Guam 6, ¶ 28 ("[T]his court will surely consider delays attributable to the trial court . . . and we will be inclined to favor non-dismissal if we find the presence of such delay."); *Patton v. Kera Tech., Inc.*, 946 So. 2d 983, 987 (Fla. 2006) ("In a situation where there is a pending motion, the issue . . . is whether the pending motion provided good cause why there was no record activity during the one-year period."); *see also Flanigan v. City of Leavenworth*, 657 P.2d 555, 561 (Kan. 1983) ("The four-year delay in this case must be attributed to the trial court. . . . There is little the parties can do when the trial court fails to discharge its responsibilities. . . . For this reason the dismissal with prejudice against Flanigan and the KCCR was improper."); *In re: Succession of Moody*, 306 So. 2d 869, 873 (La. Ct. App. 1974) ("Where a case has been submitted to the court for decision . . . the delay is attributable to the court rather than the parties."); *cf. Lopez v. Cousins*, 435 F. App'x 113, 116 (3d Cir. 2011) ("Although there is no 'magic formula' that we apply to determine whether a District Court has abused its discretion in dismissing for failure to prosecute, two of the factors relied upon by the District Court in this case do not favor dismissal and, in fact, may be attributable to the court (history of dilatoriness and prejudice to the adversaries)." (quotation marks and citation omitted)); *accord Molloy*, 56 V.I. at 190-91 (reversing prejudicial dismissal in part because delay was attributable largely to the

Superior Court). This leads to the second question: the impact of the disqualification motions on the failure to prosecute motion.

¶27 Several courts have also held that "once a party moves to disqualify an adverse party's counsel based on counsel's former representation of the movant, all substantive proceedings must cease until the tribunal determines whether counsel is disqualified." *Living Cross Ambulance Serv. v. N.M. Pub. Regulation Comm'n*, 338 P.3d 1258, 1262 (N.M. 2014); *accord Grimes v. District of Columbia*, 794 F.3d 83, 90 (D.C. Cir. 2015) ("'[A] district court must rule on a motion for disqualification of counsel prior to ruling on a dispositive motion because the success of a disqualification motion has the potential to change the proceedings entirely.'" (quoting *Bowers v. Ophthalmology Grp.*, 733 F.3d 647, 654 (6th Cir. 2013)); *Sumpter v. Hungerford*, No. 12-717, 2013 U.S. Dist. LEXIS 71119, at *10-13 (E.D. La. May 20, 2013) ("While the Court recognizes that the motion to dismiss challenges the Court's jurisdiction over the subject matter in this case, NOR's motion to disqualify must still be resolved first in the interest of fairness and judicial economy, as plaintiffs' now-disqualified counsel will no longer be able to participate in this case and in the briefing related to the motion to dismiss."); *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 403 (S.D. Tex. 1969) ("In summary, this Court believes that this motion to disqualify raises issues which should be resolved before this case proceeds to judgment."); *Martino v. DeMartino*, No. FA054007219S, 2006 Conn. Super. LEXIS 1878, *5-6 (Conn. Super. Ct. June 14, 2006) ("[W]hen the defendant filed this motion to disqualify, action on all other motions was, of necessity, held in abeyance. A motion to disqualify must be resolved before the other pending motions may be decided." (citing *Martini v. Shelter Rock Realty*, No. 113425, 1996 Conn. Super. LEXIS 115, at *2 (Super. Ct. Jan. 19, 1996) (footnote omitted)); *In re: Woodruff*, 2014 MP 9, ¶ 24 ("Therefore, courts

must decide disqualification motions before dispositive motions. If the disqualification motion is granted, pending motions filed by the now-disqualified counsel are void. If, however, the voided motions likely are not infected by evidence garnered through confidential information, then later counsel may renew the motions."). *But see Jackson Nat'l Life Ins. Co. v. Greycliff Partners*, 22 B.R. 407, 412 (E.D. Wis. Bankr. 1998) ("I conclude that the disqualification motion does not require that I delay ruling on the other motions. To begin with, no party has requested that I do so. Second, even if I grant the disqualification motion, it will have no impact upon the disposition of the other motions."); *cf. Rales v. Rales*, 908 A.2d 64, 69 (D.C. 2006) ("[A] trial court is not bound by any specific rule requiring it to decide motions in a certain order. Nevertheless, in the present case, even assuming (without deciding) that it might have made more sense procedurally for the trial judge to rule on the disqualification motion before reaching the merits.").

¶28 In *Grimes*, the United States Court of Appeals for the District of Columbia Circuit reasoned that "a plausible claim of conflict must be resolved before allegedly conflicted counsel or the court takes further action in the case" "[b]ecause a conflict of interest could affect the fairness and impartiality of the proceeding, or the perception of fairness and impartiality." *Id.* ("Resolving asserted conflicts before deciding substantive motions assures that no conflict taints the proceeding, impairs the public's confidence, or infects any substantive motion prepared by or under the auspices of conflicted counsel." (footnoted omitted)). The Supreme Court of the Commonwealth of the Northern Mariana Islands similarly noted in *Woodruff* that "the court handling the case cannot know to what extent the disqualified counsel's conflict colored the pending motions; thus, it is safest to give replacement counsel a chance to make an independent judgment." 2014 MP 9, ¶ 23 (footnote omitted). And the United States Court of Appeals for the Sixth Circuit reasoned in *Bowers* that

disqualification motions must be resolved first because "if counsel has a conflict from previously representing the party seeking disqualification . . . there is a risk that confidential information could be used in preparing or defending the motion . . . in violation of . . . relevant state rules of professional conduct." 733 F.3d at 654 ("In other words, a potentially conflicted counsel's confidential information could infect the evidence presented to the district court.").

¶29 This Court agrees and holds that a motion to disqualify an attorney must be resolved before any other motion. Although concerns may not be as compelling when potentially conflicted counsel files a response in opposition to a motion, the better policy is to "rule first on the motion to disqualify counsel to avoid any chance of infecting the proceedings." *Id.* at 655 n.5. Here, several motions, including two pre-answer motions, were pending before the Hess Defendants filed their motion to disqualify Attorney Rohn. If "an action cannot be dismissed for failure to prosecute when a dispositive motion is pending," *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1065 (Fla. 2000), and if disqualification motions should be resolved before all others, it follows that the Plaintiffs, individually, cannot have any personal responsibility here. They were waiting on the Superior Court to decide whether their chosen representative could continue to act on their behalf.

¶30 The disqualification motion remained pending until January 24, 2019, when the Hess Defendants formally withdrew it in open court. Consequently, the Court finds the Hess Defendants' failure to prosecute motion was improper and boarded on an attempt to whipsaw the Plaintiffs, first moving to sever and then to consolidate, then moving to disqualify counsel from acting and later to dismiss because counsel failed to act. *Cf. Najawicz v. People*, 58 V.I. 315, 337 (2013) (disapproving of attorney's attempts at whipsawing the court "by assertions of error no matter which way it rules." (citation omitted)).

¶31 Finally, regarding remaining factors—willful or bad faith conduct, effectiveness of other sanctions besides dismissal, and the meritoriousness of the claim—each weigh against dismissal for failure to prosecute. Taking the facts alleged in the complaint to be true, the Plaintiffs' claims would have merit and if proven would entitle them to relief against the Hess Defendants. Additionally, as noted, Plaintiffs' counsel attempted to meet and confer but cancelled due to the disqualification motions, which does not show bad faith but rather good faith, attempting to avoid impropriety. Finally, there is no sanctionable conduct here because the delay is largely attributable to the Superior Court. "There is little the parties can do when the trial court fails to discharge its responsibilities." *Flanigan* 657 P.2d at 561 (citation omitted)). So, there is no need to consider any alternative sanctions. Thus, the failure to prosecute motion must be denied.

III. CONCLUSION

¶32 For the reasons stated above, the Court declines to apply former Local Rule of Civil Procedure 7.1 to strike Plaintiffs' opposition. The District Court of the Virgin Islands later repealed and replaced Rule 7.1 This Court finds no basis to follow it now and no harm from the Plaintiffs' failure to follow it when they filed their opposition. Regarding the failure to prosecute motion, the Court holds that a motion to disqualify an attorney must be resolved before any other motion. Since the disqualification motions were not resolved before the failure to prosecute motion was filed, it was premature and improper and must be denied. An appropriate order follows.

Date: March 27, 2019.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Court Clerk III
Dated: 3/28/2019