**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. CROIX**

| | |
|---|---|
| **LARRY WILLIAMS and LnL PUBLISHING, INC**<br><br>**Plaintiffs,**<br>**v.**<br><br>**GENESISFINANCIAL TECHNOLOGIES, INC. GLEN LARSON and PETE KILMAN**<br><br>**Defendants.** | **Case No.:2012-cv-105**<br><br>**BREACH OF CONTRACT**<br>**INTENTIONAL MISREPRESENTATION (FRAUD)**<br>**TRESPASS TO PERSONAL PROPERTY**<br>**TORTUOUS DESTRUCTION OF PROPERTY**<br>**VIOLATION OF 18 USC 1030**<br>**CIVIL CONSPIRACY TO VIOLATE 18 USC §1030, TO DESTROY PERSONAL PROPERTY AND TO COMMIT TRESPASS TO PERSONAL PROPERTY**<br>**CONVERSION OF INTELLECTUAL PROPERTY**<br>**RESTRAINING ORDER REQUEST**<br><br>**ACTION FOR DAMAGES**<br>**JURY TRIAL DEMANDED** |

**PLAINTIFF'S OPPOSITION**
**TO DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE,**
**OR IN THE ALTERNATIVE, FOR CHANGE OF VENUE**

On October 30, 2012, the Plaintiffs, both citizens of the U.S. Virgin Islands, filed a complaint against Defendants in this Court. (DE 1) **The defendants do not dispute that this Court has personal jurisdiction over them**, but they have moved to dismiss the complaint pursuant to Rule 12(b)(3) for lack of venue or, alternatively to transfer this case to Colorado pursuant to 8 U.S.C. §1404(a). (DE 9)

At the outset, it should be noted that this case involves three separate but related matters between these parties. First, there is no dispute that the parties had a contract to split the profits from the defendants marketing of the plaintiffs' intellectual property known as "LW Sentiment" which is a computer generated indicator of investor sentiment ("bullish or bearish") depending on factors created by Williams. This contract dispute does not require any contract interpretation, as it is simply (1) a claim for the accounting of and payment of the amounts due under the parties' agreement (**which the defendants have acknowledged is at least $500,000)** and, alternatively (2) a claim for

damages against the defendants based upon misrepresentations of the number of subscribers who used the product in order to conceal the breach of the agreement between the parties.

Second, when the parties reached an impasse in trying to resolve their differences, the defendants caused a computer "malware" to erase information in the plaintiffs' computers, resulting in damages to the plaintiffs who depended upon this information to operate their businesses and personal finances, which the defendants knew would happen. This violates a federal civil statute.

Third, the defendants are now using the plaintiffs' intellectual property, the "LW Sentiment", as if it were their own property, which the defendants began to do in September, 2012, after they improperly terminated the agreement between the parties.

Fourth, defendants have come to St. Croix to conduct business related to these financial products here along with plaintiffs -- running seminars and selling their software and data services, as early as 2004, and as recently as 2012. Payments to the plaintiffs have been made here and negotiations to alter the contract between the parties have taken place in part here. In short, the defendants certainly cannot be surprised that they are being hailed into court here, where they have actively done business directly related to this case for years.

With these general comments in mind, the plaintiffs will now address the defendants' motion, which is about as "bare bones" as a venue motion can be.

**I. Burden of Proof**

Regarding the defendants' Rule 12(b)(3) motion, the "[D]efendant[s] ... bear the burden of showing improper venue." *Myers v. Am. Dental Ass'n,* 695 F.2d 716, 724–25

(3d Cir.1982)). Regarding the motion to transfer, the defendants again bear the burden of proof, with the added caveat that the plaintiff's choice of venue should not be lightly disturbed. *Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 879 (3d Cir.1995).

## II. The Venue Motion Venue

### A. Applicable Law

On Dec. 7, 2011, President Obama signed the *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, H.R. 394, P.L. 112-63, which became effective on January 6, 2012. New section 28 U.S.C. § 1390 defined "venue" as being merely "the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general," as opposed to anything involving subject matter jurisdiction. New subsection 1391(b) established a single approach to venue rules whether the action is brought in federal court based on diversity or federal question jurisdiction. Under § 1391 venue is based on (1) residence of the defendants, (2) any of the places where substantial events regarding the action took place, and (3) "fallback" venue, which is used if there is no other district in which the action may be brought. Clause (b)(2) continues the use of the 1990 revised language's "substantial events" concept that venue is proper in ***any of the districts*** where some of the substantial events took place, stating as follows:

> **(b) Venue in General.—** A civil action may be brought in—
>
> **(2)** a judicial district in which **a** substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

Defendants' "venue" argument appears to be based on a misunderstanding of the phrase "a substantial part of the events or omissions giving rise to the claim occurred."

They try to read it as the place where "THE" substantial part of the events or omissions giving rise to the claim occurred, as the place with the "most" events somehow becomes the "ONLY" proper venue. This suggestion is incorrect -- and an attempt to return to the pre-1990 formulation of venue being only in the district "in which the claim arose." It is clear that the post-1990 statute was specifically intended to allow a plaintiff the selection of any of the different, possible districts in which such events occurred.

As noted in the USCA revision notes to §1391 by *David D. Siegel*, *Commentary on 1988 and 1990 Revisions of Section 1391*:

> Clause (2), modeled on the decades-old recommendation of the American Law Institute (see § 1303 in its 1969 Study of the Division of Jurisdiction Between State and Federal Courts), is designed to fill the gap left by the repeal of the "in which the claim arose" language. Its first part offers as proper venue the district in which a "substantial part of the events or omissions giving rise to the claim" took place. . . .
>
> The "claim arose" clause was usually held to demand that one place, and one place only, be pinpointed as the place where the claim "arose", and this was hard if not impossible to do in many cases. . . .The new language accepts venue in a district in which "a substantial part" of the activities (out of which the claim arose) took place, and there may be several districts that qualify as a situs of such "substantial" activities.
>
> **The fact that substantial activities took place in district B does not disqualify district A as proper venue as long as "substantial" activities took place in A, too. Indeed, *district A should not be disqualified even if it is shown that the activities in B were more substantial, or even the most substantial*.** Any other approach would restore the pinpointing problem that created the difficulties under the now discarded "claim arose" standard. If the selected district's contacts are "substantial", it should make no difference that another's are more so, or the most so. (Emphasis added)

The Third Circuit acknowledged this precise view in addressing this revision in *Cottman Transmission Sys, Inc. v. Martino*, 36 F.3d 291, 295 (3d Cir. 1994), noting that after the 1991 amendments (1) more than one venue may be proper and (2) that the Court is not

even required to "select the 'best' forum," as any venue that has substantial contacts with dispute is proper. *Id.* at 294.

This issue was also addressed by this Court in *Metropolitan Life Ins. Co. v. Dysart,* 2008 WL 5101686 (D.V.I.2008) , which noted in part, citing *Cottman*:

> To qualify as "substantial" under Section 1391(a)(2), the acts or omissions in question must be more than tangentially related. See *Cottman Transmission Systems, Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir.1994) ("Events or omissions that might only have some tangential connection with the dispute in litigation are not enough.") "Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Id. Indeed, "[t]he test for determining venue is not the defendant's 'contacts' with a particular district, but rather the location of those 'events or omissions giving rise to the claim' ...." Id. *Id.* at *4.

In short, the venue issue does not turn on which is the best (or even better) venue, but whether the acts of the defendants are substantial enough to be tangentially related this claims asserted in this lawsuit to the chosen venue, the Virgin Islands. It is now appropriate to apply this law to the facts giving rise to this complaint.

**B. The Applicable "Venue" Facts**

As noted, there are three related events giving rise to this litigation. Each will be discussed separately, but the relevant "acts" related to each warrant a finding that venue is proper in this Court, particularly when considered together.

**(1) The Business Relationship-Breach of Contract & Misrepresentation**

Regarding Counts I and I of the complaint alleges in relevant part as follows:

> 10.GENESIS is engaged in the business of financial software development, financial software sales, and software technical support services. When GENESIS was first starting in this business approximately 15 years ago, Plaintiff Williams and GENESIS developed a business relationship. GENESIS and Williams agreed that Williams would help promote and develop GENESIS software business as that would help his worldwide students.
> . . . .

12.Plaintiff Williams agreed to give GENESIS' software recognition in his books and writings. In return GENESIS promised to give for no charge access to their software and programming assistance to Williams on indicators and ideas he was developing. . . . . In return Williams allowed them to market at his seminars and lecture, never charging or taking a percentage of sales.

13.In response, Glen Larson proposed to Williams that he develop a "sentiment indicator" which Larry Williams agreed to do with the assistance of one of Defendants programmers.

14. Larry Williams' "Sentiment" became known as "LW Sentiment."

15.Larson told Williams that in appreciation for all he had done to help Larson, he would like to help Williams. Defendants business had grown from 2 people to over 20 employees due to Williams' recommendations that were provided free of charge to Genesis business. As a result of Williams endorsement, input of what was needed in the software and assistance, the business grew from a few thousand dollars a year to having 10,000 users.

16.The indicators have become known as "Larry Williams Futures and Stock Sentiment"; "Larry Williams Futures Sentiment" and "Larry Williams Stock Sentiment" which were initially offered by and through Larson. Users were charged $25 per month for stocks, $25 per month for futures or $35 a month for both.

17.Larson and GENESIS then offered to give all the revenue from LW Sentiment to Williams. Williams responded that it would be better if the revenue was split 50/50. GENESIS/LARSON agreed to that split.

18. In or about late 2010, Williams became aware that he was not receiving the 50% of revenue from the LW Sentiment as agreed and promised. LARSON agreed that GENESIS was in arrears. In an accounting in June of 2012, GENESIS acknowledged that revenues were at least $998,655.00, of which Williams was entitled to $499,327.50, even though he had only been paid $141,050.00 to date. This left a balance of more than $358,000.00, based on the numbers provided by LARSON/GENESIS.

19. In August 8, 2012, Defendant KILMAN wrote and acknowledged that $3,148.73 was due and owing for August of 2012 and that this was the split amount. KILMAN further stated in an email that he was "not sure if Glen already caught up on the past bills." In short, Genesis was now attempting to offset the amount due, with the fabrication of what they had done for Williams, even though it is known in the industry that Williams literally made Genesis the company that it had become, as in fact no offsets were due.

20. In August and September of 2012, GENESIS/LARSON refused to bring the past amounts due current. These amounts were based on the accounting LARSON provided. This included a misstated number of subscribers to Williams' Sentiments.

21. In late September of 2012, GENESIS/LARSON began denying due amounts. Williams informed GENESIS/LARSON that unless payment was brought current he was withdrawing from the agreement, that GENESIS could no longer use Williams' name to promote GENESIS' software and products and that GENESIS was to cease offering LW Sentiment to customers.

22. GENESIS/LARSON then informed Williams to cease the use of the GENESIS name in any future publications and to cease further use of GENESIS software. The date for ceasing use and publication was September 30, 2012.

These operative facts make it clear that this case is far more involved than the parties simply entering into a contract years ago for the defendant to market the plaintiffs' intellectual property, as suggested in the affidavit of Glen Larson attached to his opposition memorandum. Indeed, in an attempt to distance this case from the Virgin Islands, that affidavit contains numerous inaccuracies, suggesting that even the plaintiff has few contacts here, that the transaction has even fewer contacts and that in fact nothing is owed as the parties reached an agreement on the funds owed by GENESIS.

However, the facts are not one-sided, as Larson suggests. To the contrary, the plaintiff has conducted business related to this transaction on St. Croix since 2003, where he has lived on and off since 2003, so that there are extensive contacts regarding the events giving rise to this litigation with this forum, as noted in the attached declaration of Larry Williams (**Exhibit A**), which states in part:

2. I moved to St. Croix in 2003 and opened an office. The defendants are familiar with this fact, as they came to St. Croix in 2004 to help present a seminar related to the business agreement that is the subject of this litigation.

3. I left St. Croix in 2006, but I continued to maintain an office here, so that I have been doing some business on St. Croix since 2003 through the current date. The defendants are also familiar with this fact, as they have sent 1099's and payments to my offices on St. Croix pursuant to the agreement that is the subject of this litigation, initially to CTI Publishing ("CTI") and now to LnL Publishing, LLC ("LnL"), to whom I instructed the defendants to make the payments due me. See Exhibits 1 and 2 attached.

4. I returned to St. Croix in 2009, which the defendants are also familiar with, as Larson came to our wedding here in 2009.

5. In 2010 my wife and I purchased a house here and have resided here since that time. The defendants are also familiar with this fact, as they came to St. Croix in 2012 to again present a seminar related to the business agreement that is the subject of this litigation.

6. As alleged in the complaint, I entered into an agreement with the defendants, whom I collectively refer to as GENISIS, approximately 13 years ago, when I lived in California, to help promote and develop GENESIS software, as that would help my teaching/publishing business, as well as their software business. I gave GENESIS' software recognition in my books, videos, webinars, live presentations and writings that have been extensive and have continued to be published over the last 13 years.

7. I also allowed them to market their products at my seminars and lecture, including a "sentiment indicator" which we jointly developed known as the "LW Sentiment." As a result of my endorsement and input of what was needed in its software, the defendants' business grew from a few thousand dollars a year to having somewhere in the area of 10,000 users, including users who specifically wanted use of the "LW Sentiment."

8. It was agreed that I (or my designated company) would receive 50% of the revenue from the sale and use of the "LW Sentiment." As noted, I assigned these payments to a company I owned, CTI Publishing ("CTI"), but I subsequently assigned these rights to LnL.

9. As part of the on-going agreement to promote the defendants' business and the "LW Sentiment", I would exclusively promote the defendants' business (either directly or through the companies I use) in all of my books, videos, webinars, live presentations, and writings, which I have done primarily from my business on St. Croix from 2003 to 2006 and again from 2010 until this dispute arose in September of 2012.

10. As noted, the defendants have also come to St. Croix on several occasions to help with the promotion of GENESIS and the "LW Sentiment," working with me

here, as well as participating in two related seminars on St. Croix, one in 2004 and another one in 2012, to try to get the participants to subscribe to the "LW Sentiment" as well as buy their software and data services that they were promoting.

11. In short, much of the work done by me to promote GENESIS has been done here on St. Croix. Likewise, some of the work done by the defendants to promote the "LW Sentiment" has been done here as well.

12. In fact, contrary to the defendants' assertions, the defendants have made payments to CTI and LnL during the 2004-2012 time period to my St. Croix address, examples of which include my 1099 sent by GENESIS for the year 2008 to CTI and a payment sent in 2012 to LnL, which are attached as Exhibits 1 and 2.

13. When I confronted the defendants about the underpayment of funds due me, Glen Larson admitted in July of 2012 that I was owed at least $449,327.50. See Exhibit 3 attached to my declaration.

14. Larson then tried to renegotiate the method of paying me the amount due by suggesting that he would give me another software product that I could sell to my students, which he claimed would make up the amount owed under the agreement that is the subject of this lawsuit. See Exhibit 3.

15. This attempt to renegotiate the method of repaying me the amount due me under our agreement took place in 2012 while I was in the Virgin Islands, where I work and live.

16. I did not accept this offer. Indeed, I believe the amount due under the agreement is much higher than $500,000 as I believe the defendants have hidden the true number of subscribers of the LW Sentiment from me.

17. In response to my rejection of their offer to revise the agreement, the defendants stated they were terminating the agreement effective September 30, 2012, which is a breach of our agreement as they still are selling the "LW Sentiment", under the name "TN Consensus".

18. Thus, all events relative to the attempted renegotiation of the contract and the subsequent breach occurred while I was living and working on St. Croix.

As can be seen from this declaration, the 13-year business relationship that gave rise to

Counts I and II of this lawsuit has involved numerous, repeated contacts with this forum,

contrary to the defendant's assertions.[1] These relevant contacts include (1) many of the activities the plaintiffs were required to perform under the agreement (the promotion of the defendants' business) were done by the plaintiff while he was located here, (2) some of the activities the defendants were required to perform under the agreement (the promotion of the plaintiff's "LW Sentiment") were done here (3) payments have been made to the plaintiffs here over the years, (4) attempts to renegotiate the contract (which Larson acknowledges did occur in his affidavit attached to the defendants' motion) occurred while the plaintiffs were here in 2012 and (5) the termination/breach of the agreement in 2012 took place while the plaintiffs were here, after the defendants admitted that $500,000 owed the plaintiffs had not been paid.

As such, contrary to the defendants' representations, there are certainly sufficient contacts with this forum to find that venue is appropriate for Counts I and II. Indeed, the defendants could hardly be surprised by being "haled" into court here regarding this dispute, nor is it "unfair" to require them to litigate this dispute in this forum.

**(2) The Computer "Malware Attack"**

Regarding Counts III, IV, V and VI, the complaint alleges in part as follows:

19. On September 21, 2012, as Williams began his daily download for Genesis, a Trojan horse, virus and/or coded malware program or other destructive mechanisms, entered Williams' computer and erased all the data inputted previously into the GENESIS software on Mr. Williams' computer.

20. The destructive program was traced back to GENESIS. A few days later, Williams, broker, Alberto Alvarez received a call from Defendant KILMAN wherein KILMAN apologized, but stated that KILMAN had been instructed by

[1] In fact, it is clear that Larson's affidavit contains several misleading statements as well as several glaring omissions.

> LARSON to send the same evasive malware, virus and/or Trojan Horse into Alberto's computer to erase any trade signals of Mr. Williams in Alberto's system.
> . . . .
> 57. The destructive program erased Williams personal data including all commodity timing data and systems and formulas Williams had input into the software program over the last 15 years in which the personal property resided.
>
> 58. Defendants caused the same destructive program to wipe-out the trade position information and signals in Williams name at Williams' broker.

The declaration submitted by Williams (**Exhibit A** at paragraphs 19 to 21) reaffirms these allegations, including a description of the damage to his computer located on St. Croix caused by the defendants conduct.

As noted in Counts III and IV, the plaintiffs seek damages caused to the computer located here based on the common law theories of trespass and tortious damage to personal property, which clearly occurred in this forum. Indeed, the extensive work required to restore this information as best as possible was all performed on St. Croix. See **Exhibit A** at paragraphs 19 to 21.

Counts V and VI the seek damages based on this computer tampering based on a federal statute, 18 U.S.C. §1830. Congress enacted 18 U.S.C. § 1030 to address both criminal and civil effects of actions involving damage to computers through the internet. It provides in part as follows:

> § 1030 FRAUD AND RELATED ACTIVITY IN CONNECTION WITH COMPUTERS
> **(a)** Whoever—
>
> *** * * ***
>
> **(5)(A)** knowingly causes the transmission of a program, information, code, or command, and **as a result of such conduct, intentionally causes damage without authorization, to a protected computer**;
>
> *** * * ***
>
> **(g)** Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. . . .

Thus, §1030 was directed to *the specific act alleged in the complaint*.

In violations of criminal statutes dealing with "effects" of actions, venue is said to lie where the effects of the defendant's conduct are *felt* -- particularly when Congress has defined the essential conduct elements in terms of those effects. See generally *United States v. Bowens*, 224 F.3d 302, 314, 2000 WL 1173993 (4th Cir. 2000). Civil cases under the CFAA have followed that same logic. In *eBay Inc. v. Digital Point Solutions, Inc.*, 608 F. Supp. 2d 1156 (N.D. Cal. 2009) the court found that venue for CFAA and RICO actions brought by an operator of auction website against advertising affiliates was proper in district where the affiliates (as opposed to the server) were located and where the harm resulted.

This is the "most significant" event under the 18 U.S.C. § 1030 claim -- the injury and where it took place. Thus, under either the common law counts or the statutory counts, venue is proper here in the USVI.

**(3) The Theft of the Plaintiff's Intellectual Property**

Regarding Counts VII and VIII, the complaint alleges in part as follows:

74. The data in the LW Sentiment is the intellectual and/or personal property of Williams and LnL. Defendant LARSON agreed that the Williams data/property would not be offered by GENESIS after September 30, 2012.

75. In the week immediately following September 21st, GENESIS has continued to offer Williams' data to the public. As Eric P. stated, "the LW Sentiment has been changed to TN Consensus. All the data for the indicator is the same. It's the same indicator, just has a different name."

76. The data GENESIS and LARSON are offering are Plaintiffs' intellectual/personal property, as simply changing the name does not constitute the ceasing of sales of the data.

77. As such, the Defendants have no right to this data and have converted for their own use, sale and profit. Intentionally Defendants have intentionally converting the Plaintiffs' intellectual/personal property.

78. This property is the culmination of nearly 50 years of research in the commodity prices and forecasting. Defendants' intentional conversion of said property has caused Plaintiffs compensatory damages in an amount to be proven at the time of trial of this matter.

. . . .

81. Plaintiffs will be irreparably harmed if Defendants are not restrained from offering for sale the data which constitutes Plaintiffs' personal/intellectual property.

In these counts, it is clear that the worldwide sale of the plaintiff's intellectual property is properly raised in this Court, which the where the plaintiffs have resided for years, developing, updating and promoting this intellectual property, as confirmed in William's declaration. See **Exhibit A** (at paragraphs 22-23).

To hold otherwise would deprive the citizens of this territory of the right to protect their property when it is improperly taken by someone else, particularly when the "someone else" has continued to gain access to this intellectual property while actively doing business here with the plaintiff. In short, when a resident of the Virgin Islands has his or her intellectual property improperly taken by another party, there are sufficient contacts with this jurisdiction to find venue in this Court, particularly when the other party does not assert any objection to this Court asserting personal jurisdiction over it.

**(4) Conclusion**

Thus, under any of the three related claims, venue is appropriate in this forum. Moreover, once these three related claims are considered together, it is even clearer why venue is appropriate here based on the applicable law and relevant facts.

### III. The U.S. Virgin Islands is Convenient under §1404

Defendants correctly note that a 28 U.S.C §1404 motion is addressed to the sound discretion of the Court, citing *Long v. E.I. DuPont de Nemours & Co.,* 886 F.2d 628, 632 (3d Cir. 1989). In considering such motions, the Third Circuit has warned that "the plaintiff's choice of venue should not be lightly disturbed." *Jumara at* 55 F.3d 873, 879 (3rd Cir. 1995). As previously noted, the party moving for a change of venue bears the burden of demonstrating why the forum should be changed. *Metropolitan Life Ins. Co. v. Dysart,* 2008 WL 5101686 (D.V.I.2008) ("The burden is on the moving party to establish that a balancing of proper interests weigh in favor of the transfer, and unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail" *quoting Shutte v. Armco Steel Corp.,* 431 F.2d 22, 25 (3d Cir.1970)).

The leading Third Circuit case on the U.S. Supreme Court's *Gulf Oil* factors for determining *forum non conveniens* is *Windt v. Qwest Communications Intern., Inc.*, 529 F.3d 183, 189 (3d Cir. 2008).[2] It provides in part as follows:

> The Supreme Court has articulated precepts applicable in *forum non conveniens* cases. Although **"a plaintiff's choice of forum should rarely be disturbed**," *Piper Aircraft Co.,* 454 U.S. at 241, 102 S.Ct. 252, a federal court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). When an alternative forum has jurisdiction to hear the case, and **when trial in the plaintiff's chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience,**" or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. *Koster*

[2] This Court also discussed all of these same factors in *Metropolitan Life Ins. Co. v. Dysart,* 2008 WL 5101686 (D.V.I.2008).

> *v.(Am.) Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947).
>
> To guide the trial court's exercise of discretion and its determination of oppressiveness and vexation, the Supreme Court has prescribed a balancing of private interest factors affecting the convenience of the litigants and public interest factors affecting the convenience of the forum. See *Gulf Oil,* 330 U.S. at 508-509, 67 S.Ct. 839. Factors pertaining to the private interests of the litigants include:
>
> > the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
>
> *Id.* at 508, 67 S.Ct. 839. Public interest factors bearing on the inquiry include administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in "having the trial of a diversity case in a forum that is at home with the state law that must govern the case"; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509, 67 S.Ct. 839.

Thus, the Court needs to consider those factors in addressing this §1404 motion.

**(1) Factors pertaining to the private interests of the litigants**

> As the Third Circuit noted in *Windt,* this question involves:
>
> > the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;. . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.

In their motion, the defendants summarily argue this point without providing any specific facts to support their conclusions. For example, as this Court noted in *Borghi v. Purple Group, Inc.,* 2009 WL 1404752 (D.V.I. 2009):

> As this Court has previously explained, "[t]he convenience to witnesses weighs heavily in making a decision regarding a motion to transfer venue." *Kendricks v. Hertz Corp*., 2008 WL 3914135 at *5 (D.V.I.2008) (quotation omitted).. . . The party asserting witness inconvenience has the burden to proffer, by affidavit or

> otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience.

However, the defendants did not submit a detailed affidavit, averring only as follows:

> 7. Most of the persons who would have knowledge of facts relevant to this case are located in Colorado. The computer server accessed by Mr. Williams in September 2012 is located in Colorado Springs, Colorado. Many or perhaps all of the witnesses who would be called by Defendants to testify at trial live in Colorado.

Thus, there is nothing for the Court to consider (or the plaintiffs to respond to) regarding this important factor, although the plaintiff and his wife, who has knowledge of the relevant facts, reside here, as do the experts they will probably use. See **Exhibit A** (at paragraph 24-25).

Similarly, while the defendant contends its records are in Colorado, the plaintiffs' relevant records are located in this forum. **See Exhibit A** (at paragraph 26) Indeed, the information related to the damage to the plaintiff's computer is here, not in Colorado. **See Exhibit** A (at paragraphs 19 to 21). Again, as this Court explained in *Borghi v. Purple Group, Inc.,* 2009 WL 1404752 (D.V.I. 2009):

> The defendants also contend that the location of books and records favors transfer because "any Z & E records relating to the marketing and sale of T-shirts are located in St. Croix." (Mot. to Transfer 6, Dec. 17, 2008.) However, Borghi suggests that his books and records relating to this lawsuit are located on St. Thomas, where he resides. Additionally, there is nothing in the record to suggest that Z & E's books and records could not be copied and transferred to St. Thomas for the trial of this matter. Thus, the Court is unpersuaded that the location of books and records related to this case favors transfer.

As is the case in many such two-jurisdiction cases, one party's witnesses and records are one place and the other party's are in the other place, but there is no indication that

these records cannot be copied and transferred as needed. Indeed, the defendants are in the business of generating such data electronically through the use of computers.

In any event, the defendants' arguments in their motion regarding these "private factors" are based on conclusions, not factual support for necessary factors. In short, the defendants have not supplied any specific information as to any practical problem in trying this case here, such as the need for a site inspection or to secure testimony that cannot be secured otherwise. Indeed, this is a commercial transaction between sophisticated parties who reside in two different places. One side will be equally inconvenienced either way it goes, but the defendants have not carried the burden of proof showing these "private factors" warrant transferring this case from the plaintiffs' chosen forum, which is not to be lightly disturbed.

**(2) Public interest factors bearing on the inquiry**

As the Third Circuit stated in *Windt,* these "public factors" include:

> Public interest factors bearing on the inquiry include administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in "having the trial of a diversity case in a forum that is at home with the state law that must govern the case"; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Again, the defendants argue that these "public factors" favor transfer by making conclusory statements with no supporting facts. For example, they assert that "given the large case load of the District of the Virgin Islands, this factor favors the District of Colorado" but they cite no authority for this proposition. By way of another example, they assert that "Colorado law" will govern the contract claims, but they provide no authority to support this assertion either, leaving this Court to guess at what they mean.

Indeed, while it is not the plaintiffs' burden to establish which law applies, as the defendants bear the burden of proof on this motion, Counts I and II really involve nothing more than an accounting, for which no controlling law is needed, while Counts III and IV involve tortious conduct that occurred here in the Virgin Islands, so the law of the Virgin Islands will govern these torts. Put simply, defendants loaded a computer gun, aimed it at a USVI citizen in the USVI and shot his computer and his business here. It cost the citizen in income and damages, making it a "localized controversy," not one that occurred in Colorado, which the defendant concedes. Counts V and VI are based on federal law, so a transfer to Colorado is not needed to address this law. Finally, Counts VII and VIII involve the theft (and the remedy to address this theft) of intellectual property located here, so the law of the Islands would also govern this claim.

In short, the defendants have failed to demonstrate why there is a conflict of law requiring a transfer. It is obviously the fashion these days to say things in moving papers, and then actually argue them in Reply -- when the opposing party cannot respond.[3] The Court should decide this motion on what is in the motion -- NOTHING.

**Finally, the "unfairness of burdening citizens in an unrelated forum with jury duty" weighs against the defendants. Here, Virgin Islands plaintiffs are seeking damages for their business and property losses occasioned by defendants who have transacted business and committed torts in this**

[3] Courts generally disregard matters raised for the first time in a reply memorandum. *Embroidery Worker's Pension Fund v. Ryan, Beck &Co.*, 869 F. Supp. 278, 281 n.1 (D.N.J. 1994); *see also, McLendon v. Continental Can Co.,* 908 F.2d 1171, 1183 (3rd Cir. 1990). Thus, the defendants should not be permitted to add new matters in their reply to this opposition memorandum.

**jurisdiction!** As stated throughout -- this is not an case that is unrelated forum to plaintiffs; indeed, Virgin Island jurors should want to serve in a case involving such issues, particularly one in which a computer virus damaged a computer here, which is certainly one of local interest.

**(3) Conclusion**

This is as vanilla a two-jurisdiction business case as possible and one side or the other will be slightly more inconvenienced by the location of the litigation. However, plaintiffs filed here -- where the damage was actually done. Thus, under the applicable law relevant to a §1404 transfer motion, absent a convincing showing by the defendants as to why this case should be transferred to another District Court—their burden—the plaintiffs' choice of this forum should not be disturbed.

**IV. Summary**

This case does not involve an allegation of a tactical choice of venue. Larry Williams is a long time resident of St, Croix, having had business contacts here for years. Plaintiff LNL Publishing is a USVI limited liability company where its principal place of business and nerve center are located

In fact, the defendants have also come to St. Croix to conduct business here along with plaintiffs, running related seminars and selling their software and data services, as early as 2004, and as recently as 2012. Payments to the plaintiffs have been made here and negotiations to alter the contract between the parties have taken place here as well. In short, **the defendants certainly cannot be surprised that they are being "haled" into court here, where they have done business for years.**

Thus, for the reasons set forth herein, it is respectfully submitted that the defendants' venue motion should be denied in all respects, as this Court is a proper venue to hear this case and the defendants have not presented sufficient reasons for disturbing the plaintiffs' choice of the forum by transferring this case to Colorado.

**Dated:** January 23, 2013

/s/*Joel H. Holt, Esq.*
**Joel H. Holt, Esq.**
*Counsel for Plaintiff*
Law Offices of Joel H. Holt
2132 Company Street,
Christiansted, VI 00820

/s/*Carl J. Hartmann, III, Esq.*
**Carl J. Hartmann III, Esq.**
*Co-Counsel for Plaintiff*
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820

**CERTIFICATE OF SERVICE**

I HEREBY certify that on this 23rd Day of January, 2013, I electronically filed the foregoing with the Clerk of the Court using the DC/ECF system, which will send a notification of such filing (NEF) to the following:

Lisa Michelle Komives
BoltNagi PC
5600 Royal Dane Mall, Suite 21
St. Thomas, V.I. 00802-6410

/s/*Joel H. Holt, Esq.*

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. CROIX**

| | |
|---|---|
| **LARRY WILLIAMS and LnL PUBLISHING, INC**<br><br>**Plaintiffs,**<br>**v.**<br><br>**GENESISFINANCIAL TECHNOLOGIES, INC. GLEN LARSON and PETE KILMAN**<br><br>**Defendants.** | **Case No.:2012-cv-105**<br><br>**BREACH OF CONTRACT**<br>**INTENTIONAL MISREPRESENTATION (FRAUD)**<br>**TRESPASS TO PERSONAL PROPERTY**<br>**TORTUOUS DESTRUCTION OF PROPERTY**<br>**VIOLATION OF 18 USC 1030**<br>**CIVIL CONSPIRACY TO VIOLATE 18 USC §1030, TO DESTROY PERSONAL PROPERTY AND TO COMMIT TRESPASS TO PERSONAL PROPERTY**<br>**CONVERSION OF INTELLECTUAL PROPERTY**<br>**RESTRAINING ORDER REQUEST**<br><br>**ACTION FOR DAMAGES**<br>**JURY TRIAL DEMANDED** |

## DECLARATION OF LARRY WILLIAMS

I, Larry Williams, declare, pursuant to 28 U.S.C. Section 1746, that I have personal, direct knowledge about the following facts:

1. I am an adult resident of St. Croix and am in the business of providing financial services to others located throughout the world related to their investments in the various stock and futures markets, as well as generating financial publications/materials and developing indicators and trading tools (software) related to the financial services provided by me. I also teach seminars on how to invest in the stock and futures markets.

2. I moved to St. Croix in 2003 and opened an office. The defendants are familiar with this fact, as they came to St. Croix in 2004 to help present a seminar related to the business agreement that is the subject of this litigation.

3. I left St. Croix in 2006, but I continued to maintain an office here, so that I have been doing some business on St. Croix since 2003 through the current date. The defendants are also familiar with this fact, as they have sent 1099's and payments to my offices on St. Croix pursuant to the agreement that is the subject of this litigation, initially to CTI Publishing ("CTI") and now to LnL Publishing, LLC ("LnL"), to whom I instructed the defendants to make the payments due me. See Exhibits 1 and 2 attached.

4. I returned to St. Croix in 2009, which the defendants are also familiar with, as Larson came to our wedding here in 2009.

5. In 2010 my wife and I purchased a house here and have resided here since that time. The defendants are also familiar with this fact, as they came to St. Croix in 2012 to again present a seminar related to the business agreement that is the subject of this litigation.

6. As alleged in the complaint, I entered into an agreement with the defendants, whom I collectively refer to as GENISIS, approximately 13 years ago, when I lived in California, to help promote and develop GENESIS software, as that would help my teaching/publishing business, as well as their software business. I gave GENESIS' software recognition in my books, videos, webinars, live presentations and writings that have been extensive and have continued to be published over the last 13 years.

7. I also allowed them to market their products at my seminars and lecture, including a "sentiment indicator" which we jointly developed known as the "LW Sentiment." As a result of my endorsement and input of what was needed in its software, the defendants' business grew from a few thousand dollars a year to having somewhere in the area of 10,000 users, including users who specifically wanted use of the "LW Sentiment."

8. It was agreed that I (or my designated company) would receive 50% of the revenue from the sale and use of the "LW Sentiment." As noted, I assigned these payments to a company I owned, CTI Publishing ("CTI"), but I subsequently assigned these rights to LnL.

9. As part of the on-going agreement to promote the defendants' business and the "LW Sentiment", I would exclusively promote the defendants' business (either directly or through the companies I use) in all of my books, videos, webinars, live presentations, and writings, which I have done primarily from my business on St. Croix from 2003 to 2006 and again from 2010 until this dispute arose in September of 2012.

10. As noted, the defendants have also come to St. Croix on several occasions to help with the promotion of GENESIS and the "LW Sentiment," working with me here, as well as participating in two related seminars on St. Croix, one in 2004 and another one in 2012, to try to get the participants to subscribe to the "LW Sentiment" as well as buy their software and data services that they were promoting.

11. In short, much of the work done by me to promote GENESIS has been done here on St. Croix. Likewise, some of the work done by the defendants to promote the "LW Sentiment" has been done here as well.

12. In fact, contrary to the defendants' assertions, the defendants have made payments to CTI and LnL during the 2004-2012 time period to my St.

Croix address, examples of which include my 1099 sent by GENESIS for the year 2008 to CTI and a payment sent in 2012 to LnL, which are attached as Exhibits 1 and 2.

13. When I confronted the defendants about the underpayment of funds due me, Glen Larson admitted in July of 2012 that I was owed at least $449,327.50. See Exhibit 3 attached to my declaration.

14. Larson then tried to renegotiate the method of paying me the amount due by suggesting that he would give me another software product that I could sell to my students, which he claimed would make up the amount owed under the agreement that is the subject of this lawsuit. See Exhibit 3.

15. This attempt to renegotiate the method of repaying me the amount due me under our agreement took place in 2012 while I was in the Virgin Islands, where I work and live.

16. I did not accept this offer. Indeed, I believe the amount due under the agreement is much higher than $500,000 as I believe the defendants have hidden the true number of subscribers of the LW Sentiment from me.

17. In response to my rejection of their offer to revise the agreement, the defendants stated they were terminating the agreement effective September 30, 2012, which is a breach of our agreement as they still are selling the "LW Sentiment", under the name "TN Consensus".

18. Thus, all events relative to the attempted renegotiation of the contract and the subsequent breach occurred while I was living and working on St. Croix.

19. On September 21, 2012, as I began my daily download from Genesis while working in my office on St. Croix, a coded malware program (or other destructive computer mechanism) entered the computer and erased all the data inputted previously into the GENESIS software on the computer, preventing me from being able to access all of my intellectual property, resulting in significant damages, all of which occurred here on St. Croix.

20. The destructive program was traced back to GENESIS. A few days later, I learned that Larson had instructed Kilman to make sure the information in the computer was completely inaccessible.

21. This damage to this computer occurred here on St. Croix, causing me to have to recreate my entire historical files generated over the past 15 years as best as I could. This work is all being done on St. Croix.

22. Following September 21st, GENESIS continued to sell the intellectual property developed by me to the public. This intellectual property is the culmination of nearly 50 years of research in the commodity prices and forecasting.

23. The Defendants have no right to this data or my intellectual property, or that of LnL, which they have converted for their own use, sale and profit, which has damaged my reputation.

24. The key witnesses in this case as I understand the issues now will be myself and my wife, Louise Stapleton, who has worked in my business for years as a financial consultant and computer specialist. Indeed, she tracked all payments made by the defendants and was the person who spent the most time trying to reconstruct my information after the malware attack on my computer.

25. Other than the two of us, the witnesses may include some of the multiple subscribers of the "LW Sentiment" located in various jurisdictions (to demonstrate the under-reporting by the defendants), as well experts retained to calculate the damages after discovery has taken place. These experts will probably be an accountant and a computer specialist, who both reside on St. Croix, who will explain the damages, including the damage done to the computer (and the cost incurred to restore the data) caused by the defendants when they improperly eliminated the information in my computer.

26. All of my records, as well as those of CTI and LnL, relative to this case are located here as well.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 23, 2013

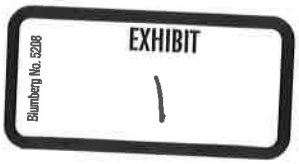
Larry Williams

**GENESIS FINANCIAL TECHNOLOGIES, INC.** 12188

LnL Publishing, LLC 9/7/2012

| Date | Type | Reference | Original Amt. | Balance Due | Discount | Payment |
|---|---|---|---|---|---|---|
| 9/5/2012 | Bill | August 2012 | 3,119.37 | 3,119.37 | | 3,119.37 |
| | | | | | Check Amount | 3,119.37 |

Wells Fargo Bank-262 3,119.37



☐ VOID ☐ CORRECTED

| PAYER'S name, street address, city, state, ZIP code, and telephone no. | 1 Rents | OMB No. 1545-0115 | Miscellaneous Income |
|---|---|---|---|
| Genesis Financial Technologies, Inc.<br>4775 Centennial Blvd<br>Suite 150<br>Colorado Springs, CO 80919 | $ | 2008 | |
| | 2 Royalties<br>125000.00<br>$ | Form 1099-MISC | |
| | 3 Other income<br>$ | 4 Federal income tax withheld<br>$ | Copy 1<br>For State Tax Department |
| PAYER'S federal identification number<br>75-3015904 | RECIPIENT'S identification number<br>33-0199857 | 5 Fishing boat proceeds<br>$ | 6 Medical and health care payments<br>$ |
| RECIPIENT'S name<br>CTI Publishing | | 7 Nonemployee compensation<br>$ | 8 Substitute payments in lieu of dividends or interest<br>$ |
| Street address (including apt. no.)<br>5027 Ancor Way #1 Christiansted, | | 9 Payer made direct sales of $5,000 or more of consumer products to a buyer (recipient) for resale ▶ ☐ | 10 Crop insurance proceeds<br>$ |
| City, state, and ZIP code<br>St. Croix VI 00820 | | 11 | 12 |
| Account number (see instructions) | | 13 Excess golden parachute payments<br>$ | 14 Gross proceeds paid to an attorney<br>$ |
| 15a Section 409A deferrals<br>$ | 15b Section 409A income<br>$ | 16 State tax withheld<br>$<br>$ | 17 State/Payer's state no. | 18 State income<br>$<br>$ |

Form 1099-MISC Department of the Treasury Internal Revenue Service

EXHIBIT 2

Blumberg No. 5208

**larry williams**

**From:** Glen Larson [glarson@tradenavigator.com]
**Sent:** Friday, July 20, 2012 9:32 PM
**To:** larry
**Subject:** Accounting
**Attachments:** lwsent.xls

Larry,
I've enclosed the spread sheet for the accounting you requested. It is comprised of futures only, stocks only and stock and futures combined. The total income generated from the fees was $998,655 split 1Ž2. $499,327.50 is due to you.

I'm a little confused with your anger and the amount of money you say are due to you. A cash payment of $141,050 has been made. I understood we had agreed upon Genesis creating a software package as well as a seasonal tool given exclusively to you. This would allow us to work off funds owed to you. You were able to distribute the software, the generated income you received from this more than makes up for the rest of what was owed you. This was the entire reason we created the software package, white labeled for your students use. As discussed, you would keep the funds from the sales or increased seminar attendance.

Since there seems to be a disconnect between receiving product in exchange for amount due, I need to make sure I understand what you would like to do. If you do not want to include any of the software value against the amount due, let me know you would prefer cash and we'll release the software into public sale. We will use the funds generated from the software sale to pay you completely in cash.

I will always appreciate the support and friendship you have given me while growing Genesis and will always treasure those times and look to the future to continue our symbiotic relationship. I, in turn, have always tried to protect your back and have tried to provide anything Genesis could do to help your business grow. That's why any time you have had a programming request, a support request, or development request, you've been placed at the top of our priority list.

In 2003, Genesis and Better Trades colaborated a deal that brought us over 18,000 software purchases and subscribers. Approximately, 300 new accounts were being added each month. This is when Genesis was able to

explode. These are the customers I had suggested that we go after with a stock product to get you more clients for your educational products. A similar approach I had discussed with Louise in creating a combo package for your students to generate income for you. CTI could sell a product that generates cash directly for you guys that your customers are asking for. Genesis, as any company does, is always scrambling to find new ideas and ways to generate income for us and our parnters. I presently am successfully working key projects that will bring new customers to us both.

I hope and really want us to continue to grow and help others become successful together, but need some input as to what direction you would like the working relationship to go. I value you as a mentor and friend and would like to reach an understanding together.

Glen