IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CLAUDE GERARD, Plaintiff,	)	SX-09-CV-076
v.	)	
AMY CLAIRE DEMPSEY, BIOIMPACT, INC., JOHN DOE 1 and JOHN 2 Defendants.	)	ACTION FOR DAMAGES (JURY)

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants Amy Claire Dempsey and BioImpact, Inc.'s Motion and Memorandum in Support of Judgment on the Pleadings or in the Alternative for Summary Judgment (Motion for Judgment), filed November 15, 2012; Plaintiff Claude Gerard's Opposition, filed February 19, 2013; and Defendants' Reply, filed March 27, 2013. For the reasons that follow, the Court will grant Defendants' Motion for Judgment in part and deny it in part, by Order entered herewith.[1]

BACKGROUND

This matter stems from Plaintiff's former employment with the Government of the Virgin Islands as the Assistant Director of the Coastal Zone Management (CZM) in the Department of Planning and Natural Resources (DPNR) on St. Croix. Complaint, filed April 28, 2009 ¶ 7.[2] Plaintiff alleges that in November 2008, Defendant Amy Dempsey volunteered to be a member of the DPNR Task Force for the Division of CZM to make "recommendations to Governor John de Jongh and members of his administration regarding CZM personnel and persons who should be hired or fired." *Id.* ¶ 10. Plaintiff alleges that Defendants "used their position on the Task Force to forcefully recommend that Plaintiff (and the staff of CZM on St. Croix) be terminated" and to falsely malign, injure, and defame Plaintiff for their financial gains. *Id.* ¶¶ 11, 12. Plaintiff alleges that "Defendants were aware that Plaintiff and the Government of the Virgin Islands had a contractual relationship wherein Plaintiff was required to perform

[1] Also pending is Defendants' Motion to Dismiss for Failure to Prosecute, filed August 16, 2010, and Plaintiff's Opposition, filed September 13, 2010. Defendants reassert in their Motion for Judgment the argument that dismissal for lack of prosecution is appropriate. Plaintiff does not address the failure to prosecute argument in his Opposition; but rather argues that he should be allowed to amend his Complaint. Given the strong preference in the Virgin Islands for deciding cases on their merits, the Motion to Dismiss for Failure to Prosecute will be denied without prejudice. *See Fuller v. Browne*, 59 V.I. 948, 955 (2013).

[2] Plaintiff's initial Complaint was dated and filed February 6, 2009. Prior to any responsive pleading of Defendants, Plaintiff filed a second Complaint, also dated February 6, 2009, on April 24, 2009. Defendants reference the second Complaint, filed April 24, 2009 along with the Summons dated February 6, 2009, in Exhibit 1 to their Motion for Judgment. The second Complaint is accepted as Plaintiff's Complaint of record.

the duties of Assistant Director of CZM – for compensation." *Id.* ¶ 13. Plaintiff alleges that Governor de Jongh relied on the Task Force's written and verbal recommendation (the Report) in making decisions about who to terminate, which resulted in Plaintiff's termination several days after Governor de Jongh assumed office. *Id.* ¶¶ 17, 18. Plaintiff alleges that "Defendants conspired to make false and malicious accusations against Plaintiff to destroy his professional reputation and have him terminated from his position as Assistant Director of CZM so that they could control CZM and avoid the strict regulations that the law requires and which Plaintiff enforced while he was employed as an Assistant Director of CZM." *Id.* ¶ 19. Plaintiff alleges that he was "damaged financially and professionally" as a result of Defendants' interference with "Plaintiff's contractual relationship between Plaintiff and the Government of the Virgin Islands." *Id.* ¶¶ 20-23. Finally, Plaintiff alleges that

> Defendants conspired to name replacements (their friends and associates) for Plaintiff and the entire staff which Defendant[s] recommended to be terminated. For example, Defendant Amy Dempsey, who resides on the North Shore of St. Croix within Tier 1 wanted to build a driveway made of poured cement. The driveway, because it is within Tier 1 of the Coastal Zone, required a CZM permit. Defendant Dempsey did not want to pay for the permit or prepare the required reports. Immediately after obtaining the removal of Plaintiff from his position as Assistant Director of CZM, Defendant Dempsey constructed an illegal driveway at her residence located at Plot No. 2 and 3 of Estate Clairmont, St Croix without the necessary CZM permits.

Id. ¶ 25.

Plaintiff alleges the following counts:

Count I: Intentional Infliction of Emotional Distress (IIED) *Id.* ¶¶ 27-29;

Count II: Negligent Infliction of Emotional Distress (NIED) *Id.* ¶¶ 30-32;

Count III: Negligent Interference with Contract *Id.* ¶¶ 33-35.

Plaintiff requests "judgment against Defendants jointly and severally to compensate him for his damages with costs and attorney's fees, and substantial punitive damages in an amount to deter future similar acts by Defendants, and any other further relief that the Court deems just and proper." *Id.* at 5.

Defendants' Motion urges that entry of judgment in their favor is proper because: 1) Plaintiff's claims are barred by the two-year tort statute of limitations; 2) as a matter of law, the Complaint fails to plead sufficient facts from which a plausible claim for intentional or negligent infliction of emotional distress may be inferred; 3) and as a matter of law no cause of action exists for negligent interference with contractual relations where only economic loss is alleged. Defendants also re-assert that the Complaint should be dismissed for failure to prosecute.

Plaintiff responds that he first learned of the contents of the report of Defendants giving rise to his claims on April 3, 2009 and that by application of the "discovery rule," his Complaint is not time-barred.

He argues that "the cluster of factual allegations" within his Complaint, accepted as true, sufficiently states a plausible claim against Defendants. Opposition, at 2. Plaintiff further asserts that, in lieu of dismissal, the Court should permit Plaintiff to file and serve a more definite statement pursuant to Super. Ct. R. 31 and Fed. R. Civ. P. 12(e) or, alternatively, that he should be permitted to amend his Complaint pursuant to Fed. R. Civ. P. 15(a)(2). Opposition, at 3-5.

LEGAL STANDARD

Judgment on the Pleadings

The Supreme Court of the Virgin Islands provides the following standard of review for motions for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c):

> A motion for judgment on the pleadings should not be granted unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law. As with a Rule 12(b)(6) motion, this Court views the facts alleged in the pleadings and the inferences to be drawn from those facts in the light most favorable to the plaintiff. Like the trial court, we are foreclosed from considering evidence from any source outside of the pleadings and the exhibits attached to the pleadings in determining whether it was proper to grant a motion for judgment on the pleadings.

Benjamin v. AIG Ins. Co. of P.R., 56 V.I. 558, 566 (V.I. 2012) (internal citations and quotations omitted).

The Supreme Court of the Virgin Islands has articulated a three-prong analysis in reviewing motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6):

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Joseph v. Bureau of Corrections, 54 V.I. 645, 649-650 (V.I. 2011) (internal quotations and citations omitted); *see also Pollara v. Chateau St. Croix*, LLC, 58 V.I. 455, 471-472 (V.I. 2013).

"Pursuant to Federal Rule of Procedure 12(d), if, on a motion under Rule 12(b)(6) matters outside the pleadings are presented to and not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012) (emphasis in original) (internal citations and quotations omitted). "[A] party need not actually attach admissible evidence to present the court with matters outside the pleadings, for unsworn representations of counsel as to factual matters — which are not themselves evidence, — are sufficient to transform a Federal Rule 12(b)(6) motion to a Federal Rule 56 motion pursuant to Federal Rule 12(d)." *Id.* at 613 (internal citations and quotations omitted). Since "the court must satisfy itself that the evidence in the summary judgment record supports this relief," the Court must grant the parties a reasonable opportunity to present material that is pertinent to the motion if the Court decides to convert the motion for judgment on the pleadings to a motion for summary judgment. *Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 583 (V.I. 2015); *United Corporation v. Hamed*, 2016 V.I. Supreme LEXIS 1, *13 (V.I. 2016) (noting that although the Superior Court "does have the discretion to consider evidence outside of the pleadings in ruling on a motion for judgment on the pleadings — and necessarily convert it to a motion for summary judgment,— it committed error by doing so in this case without first notifying the parties and providing United an opportunity to respond"). "Because summary judgment is a drastic remedy, it should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Walters v. Walters*, 60 V.I. 768, 775 (V.I. 2014).

If a court considers matters outside the pleadings when ruling on a Rule 12(b)(6) motion to dismiss, it must convert the motion into one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). However, while there is some disagreement among different jurisdictions over precisely what qualifies as being "outside the pleadings," the great weight of authority holds that generally courts are free to consider the allegations contained in the complaint, exhibits attached to the complaint and matters of public record when ruling on Rule 12(b)(6) motions. *See* 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299 (2d ed. 1990); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988). Additionally, courts may consider "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Pryor v. NCAA,* 288 F.3d 548, 560 (3d Cir. 2002) (internal citations omitted). The reasoning underlying this approach is particularly sound where the exhibit being considered is the very document forming the basis of Plaintiffs' Complaint. Thus, "when ruling on a motion to dismiss, courts may consider undisputed documents relied upon by the claimant." *Gov't Guar. Fund of Fin. v. Hyatt Corp.*, 955 F. Supp. 441, 449 (D.V.I. 1997).

Here, the Court declines to convert Defendants' Motion to one for summary judgment. Since no documents were attached to the Complaint, the only exhibit the Court will consider in deciding the motion for judgment on the pleadings is the Report that is itself the subject of the Complaint, which therefore forms an integral part of Plaintiff's claim. Other exhibits accompanying the moving papers will not be considered.

Leave to Amend the Complaint

Superior Court Rule 8 governs amendments to pleadings in the Superior Court. *See* Super. Ct. R. 8. When Rule 8 does not address a question regarding amendments, the Court looks to doctrines developed under Fed. R. Civ. P. 15. *Abdallah v. Abdel-Rahman*, 2015 V.I. LEXIS 102, *1 (V.I. Super. Ct. 2015). "A party must be afforded notice and an opportunity to amend or otherwise respond before the trial court may *sua sponte* dismiss a complaint." *Cacciamani & Rover Corp. v. Banco Popular de Puerto Rico,* 61 V.I. 247, n.5 (V.I. 2014).

The factors courts consider when evaluating a motion to amend include: delay in bringing the motion, prejudice to the opposing party, and futility of the amendment. *Id.* The Superior Court is not required to allow an amendment when an amendment would be futile. *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 478 n.4. (V.I. 2014). Amendment is considered futile when the proposed amendment would otherwise not survive a motion to dismiss. *Clarke v. Pan Am Invs., Inc.*, 2016 V.I. LEXIS 86, *6 (V.I. Super. Ct. July 5, 2016); *Wood v. Gov't of the V.I.*, 2016 V.I. LEXIS 85, *11 (V.I. Super. Ct. June 29, 2016).

DISCUSSION

Statute of Limitations

Tort actions in the Virgin Islands are subject to a two year statute of limitations. 5 V.I.C. § 31(5)(A). The statute of limitations commences to run when a plaintiff knows all of the essential facts that could purportedly give rise to a cause of action. *See Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 797 (V.I. 2015); *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010) (the two-year period within which plaintiff was required to bring his claim did not commence until he discovered or should have discovered the alleged fraud).

Defendants argue that since the Complaint is "explicitly grounded on the Report," that the statute of limitations began running when the Report was issued. Motion, at 9. The Report was issued on December 16, 2006 and the Complaint was filed on February 9, 2009. *Id.* Plaintiff counters that "Plaintiff did not discover or see the report and learn of its exact contents until April 3, 2009 after a federal judge ordered that it be produced." Opposition, at 2 (citing Gerard Affidavit ¶ 8). Defendants aver that "[n]otwithstanding that his Complaint is replete with references to the Report; Gerard filed his Complaint two months *before* he claims that he received the report." Reply, at 3 (emphasis in original). Therefore, Defendants contend that Plaintiff knew of the contents of the Report, with names redacted, prior to the filing of his Complaint. Reply, at 4-5.

The Court finds that it cannot be established as a matter of law that the statute of limitations had expired prior to the filing of Plaintiff's Complaint. Rather, there are genuine issues of material fact with regard to when information concerning the contents of Defendants" Report became available to Plaintiff and when the statute of limitations began to run. As such, it would be inappropriate to dismiss the claim at the pleadings stage based upon the expiration of the statute of limitations. *See United Corporation v. Hamed*, 2016 V.I. Supreme LEXIS 1 (reversing and remanding upon a finding that there was a genuine issue of material fact regarding when the statute of limitations began to run).

Judgment on the Pleadings

Intentional Infliction of Emotional Distress

This Court has previously adopted the standard set forth in Restatement (Second) of Torts § 46 as the soundest rule for the Virgin Islands relative to claims alleging IIED. *See FirstBank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *9-12 (V.I. Super. Ct. 2015); *Mina v. Hotel on the Cay Time-Sharing Ass'n*, 62 V.I. 220, 235 (V.I. Super. Ct. 2015).

> Under Section 46, the tort of intentional infliction of emotional distress is committed when "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. ... the actor's conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."

Id. (quoting *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *24 (V.I. Super. Ct. Jan. 29, 2015); Restatement (Second) of Torts § 46, cmt. d)).

"The tort of intentional infliction of emotional distress is meant to impose liability for only extreme and outrageous conduct." *Donastorg v. Daily News Publ. Co.*, 63 V.I. 196, 299 (V.I. Super. Ct. 2015). A "serious or severe emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case." *Id.* Factual scenarios in which Virgin Islands courts have determined that a plaintiff failed to state a claim for intentional infliction of emotional distress include: 1) termination of an employee; 2) failure to warn firefighters that they are operating in a building containing asbestos; 3) and a financial institution's alleged breach of its contractual duty of confidentiality and good faith during bankruptcy proceedings and negotiations, concerning a mortgage account with that institution does. *Id.* (citations omitted).

Here, Plaintiff simply states, "The acts of Defendants as stated above were intentional, outrageous, and done for the purpose of getting Plaintiff fired from his position … and resulted in Plaintiff's termination and the infliction of severe emotional distress and physical injuries." Complaint ¶ 28. Plaintiff's Complaint merely contains labels and conclusions, and baldly asserts that Defendants' actions resulted in unlawful harm without the factual enhancements needed in order to support the general allegation that Plaintiff has suffered severe emotional distress.

Plaintiff's allegations relative to his termination from employment are as a matter of law insufficient to permit a plausible inference that Defendant's behavior was such as to be "utterly intolerable in a civilized society." Further, accepting as true Plaintiff's allegation that Defendants' actions caused his termination from employment, without specific factual allegations of Plaintiff's serious emotional injury, that allegation cannot, as a matter of law, form the basis of a viable claim for IIED. *See Stevens v. Louise*, 2016 V.I. LEXIS 80, *8 (V.I. Super. Ct. June 13, 2016) (continual harassment at work in the form of unfounded complaints to plaintiff's superiors at her employment is not enough to amount to extreme and outrageous without some supporting facts); *Pickering v. Arcos Dorados P.R., Inc.*, 2015 V.I. LEXIS 133, *13-14 (V.I. Super. Ct. Nov. 9, 2015) (noting that recovery for intentional infliction of emotional distress in the employment context has been denied where claim was based upon: evidence of an unpleasant work place experience and termination; defamatory remarks made by management that Plaintiff was a disgruntled former employee who had committed bad acts and had been terminated; termination in retaliation for cooperating with federal officials; discriminatory actions favoring white stateside employees over a black West Indian plaintiff; and an employer's refusal to allow plaintiff to return to work after plaintiff became ill, humiliating plaintiff).

Consequently, the Court finds that Defendants' actions that purportedly resulted in Plaintiff's termination from employment, as alleged in his Complaint, do not rise to the level of extreme or outrageous action that can form the basis of a claim for IIED in the Virgin Islands. Further, Plaintiff's Complaint must also fail on this count as a matter of law by virtue of his failure to present specific factual allegations of serious emotional injury. The allegations of Plaintiff relative to his termination from employment are insufficient as a matter of law to permit a plausible inference that the elements of the tort of intentional infliction of emotional distress have been established. Furthermore, an amendment to the Complaint would be futile, as the Court finds that Defendants' presentation of their Report that purportedly resulted in Plaintiff's termination from employment does not represent the type of sufficiently outrageous conduct that might provide a basis of a viable IIED claim. Therefore, Defendants' Motion will be granted as to Count I, which will be dismissed.

Negligent Infliction of Emotional Distress

The Supreme Court of the Virgin Islands has yet to uphold a claim for negligent infliction of emotional distress. However, the Superior Court has recognized and defined the elements necessary to establish a claim of NIED, as follows:

> to prevail on a claim of negligent infliction of emotional distress under a theory that the plaintiff was the direct victim of a defendant's negligent conduct, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious or severe emotional injury, which duty either arose by contract or was imposed as an independent legal obligation; (2) that the defendant breached its contractual or legal obligation, i.e. its duty; and (3) that, as a direct and proximate result of defendant's breach, the plaintiff suffered a serious or severe emotional injury.

Donastorg, 63 V.I. at 314-315.

The District Court of the Virgin Islands has consistently held that allegations of physical harm are necessary to sufficiently allege emotional distress in the context of NIED. *Mingolla v. Minnesota Mining & Mfg. Co.*, 893 F. Supp. 499 (D.V.I. 1995). Here, the Court need not determine whether the requirement of physical harm is a necessary prerequisite to a claim for NIED. Suffice it to say that, like his claim for IIED discussed above, devoid of further factual enhancement, Plaintiff's naked factual assertions that he suffered emotional distress are not entitled to an assumption of truthfulness. *Joseph v. Bureau of Corrections,* 54 V.I. 650. Plaintiff states that "the acts of Defendants as stated above, if not intentional, were negligently done for the purpose of inflicting severe emotional distress on Plaintiff ... Plaintiff has suffered infliction of emotional distress, economic damages as well as damages to his reputation." Complaint ¶¶ 31, 32. These statements are insufficient to state a claim for NIED as a matter of law.

As with the claim for IIED, considering the facts presented, any proposed amended complaint to attempt to allege NIED would be futile. Plaintiff's allegations present a straight-forward claim that he suffered termination of his employment which, without more, cannot sufficiently allege physical harm or emotional distress to rise to the level necessary to sustain a claim for NIED. Therefore, Defendants' Motion will be granted as to Count II, which will be dismissed.

Negligent Interference with Contractual Relations

Although intentional interference with existing contractual relations is recognized as a cognizable claim in the Virgin Islands, no court in the Virgin Islands has recognized a claim for negligent interference with contractual relations. Similarly, in multiple other jurisdictions, there exists no recognized cause of action for negligent interference with contractual relations. *See e.g. PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058, 1059 (La. 1984) (recovery of economic losses for negligent interference with contractual relations is almost uniformly denied in other jurisdictions); *Bishop v. Porter*, 2003 U.S. Dist. LEXIS 7625, *34 (S.D.N.Y. 2003) (claims for negligent interference with contractual relations or negligent interference with economic advantage fail because neither cause of action exists); *Davis v. Nadrich*, 174 Cal. App. 4th 1, 9 (Cal. App. 2d Dist. 2009) (in California there is no cause of action for negligent interference with contractual relations); *Trepanier v. Getting Organized*, 155 Vt. 259, 268 (Vt. 1990) (most courts agree that the basis of liability for tortious interference is intent); *Valley Forge Convention & Visitors Bureau v. Visitor's Servs., Inc.*, 28 F. Supp. 2d 947, 952 (E.D. Pa. 1998) (there is no general cause of action in Pennsylvania for negligent interference with contractual relations). In keeping with this consistent persuasive jurisprudence of other jurisdictions, the Court finds that there is no cognizable claim for negligent interference with contractual relations in the Virgin Islands.

Nonetheless, the Supreme Court "has repeatedly held that the substance of a motion, and not its caption, shall determine under which rule that motion is construed." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-612 (V.I. 2012) (internal citations and quotations omitted). In keeping with this general preference to elevate substance over form, it follows that even though Plaintiff titled Count III of his Complaint as "Negligent Interference with Contract," it is appropriate to construe the claim as one alleging the tort of intentional interference with existing contractual relations, recognized by courts in every jurisdiction in the United States. *See Donastorg,* 63 V.I. at 282. The Superior Court in *Donastorg* conducted a thorough *Banks* analysis to conclude that the soundest rule for the Virgin Islands is to recognize a claim in tort for such conduct. To successfully plead such a claim, a plaintiff must prove: 1) the existence of a contract between plaintiff and a third party; 2) that the defendant knew of that contract; 3) that the defendant interfered with the contract using improper means or with an improper motive; and 4) that Plaintiff was damaged as a result. *Donastorg,* 63 V.I. at 288. The Court adopts this standard as setting forth a viable claim for intentional interference with existing contractual relations.

By the facts set out in his Complaint, Plaintiff has sufficiently pled a claim for intentional interference with existing contractual relations. He alleges: 1) the existence of a contract between himself and the Government of the Virgin Islands (Complaint ¶ 13); 2) that "Defendants each had actual knowledge that Plaintiff had a business relationship with the Governor of the Virgin Islands," who alone "can hire or fire employees of the Government of the Virgin Islands" (*Id.* ¶¶ 15-16); 3) that "It was the intent of Defendants to interfere with Plaintiffs' relationship with the Government of the Virgin Islands" and "Defendants' Task Force Report was designed to induce the Governor of the Virgin Islands to terminate Plaintiff." (*Id.* ¶¶ 20, 23-24); and 4) that Plaintiff was damaged financially and professionally as a result of Defendants' intentional interference" (*Id.* ¶ 22).

Plaintiff's Complaint sets forth detailed factual allegations concerning Defendants' improper motive, asserting that Defendants conspired to recommend Plaintiff and the entire CZM staff be terminated in order that their friends and associates could be named as replacements. Plaintiff further alleges that Defendant Amy Dempsey sought the removal of Plaintiff from his position as Assistant Director of CZM in order that she could construct a poured cement driveway at her residence at Plot Nos. 2 and 3 Estate Clairmont, St Croix, within Tier 1 of the Coastal Zone, without the need and expense of obtaining a required CZM permit; and that immediately after Plaintiff was terminated, Defendant Dempsey constructed an illegal driveway without the necessary CZM permits. *Id.* ¶ 25.

Despite Plaintiff's mischaracterization of his claim as an action for negligent interference with existing contractual relations, the Court finds that Plaintiff has plead sufficient facts to allege a plausible claim of intentional interference with existing contractual relations, and therefore Defendants' Motion to Dismiss will be denied as to Count III.

Leave to Amend the Complaint

Plaintiff proposes to file and serve a more definite statement pursuant to Super Ct. R. 31 and Fed. R. Civ. P. 12(e). Opposition, at 3. Alternatively, Plaintiff proposes to amend his Complaint pursuant to Fed. R. Civ. P. 15(a)(2). *Id.* Specifically, Plaintiff proposes to add detail about how and when he learned about the Report, but does not explain how that would enable him to set forth a plausible claim for relief for IIED, NIED, or negligent interference with contractual relations.

The Court has construed Plaintiff's Complaint to sufficiently allege a claim for intentional interference with existing contractual relations. As set forth above, the Court also finds that any amendment of Plaintiff's Complaint would be futile as to his IIED and NIED claims. The Court has also found the existence of genuine issues of material fact with regard to when information concerning the contents of Defendants' Report became available to Plaintiff, such that it is premature to rule on Defendants' present Motion that the statute of limitations had run prior to the filing of Plaintiff's Complaint. Therefore, it is not necessary to allow Plaintiff to amend his Complaint as its allegations are sufficient at this stage to sustain a claim for intentional interference with existing contractual relations that is not barred according to the Complaint's allegations by the statute of limitations.[3]

[3] A Complaint must "present sufficient factual matter which, when accepted as true, would state a claim to relief that is plausible on its face. … Although under Rule 8 of the Federal Rules of Civil Procedure, Plaintiff need not make detailed factual allegations, he was required to present 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Fleming v. Cruz*, 62 V.I. at 714 (citing *Iqbal*, 556 U.S. at 678).

More than three years have passed since Defendants' Motion was filed and Plaintiff has not filed a proposed amended complaint. Defendants argue that the "fictitious party rule" set forth by Super. Ct. R. 26 prevents Plaintiff from amending his Complaint at this late date to replace John Doe 1 and John Doe 2 with known individuals to be named as defendants.[4] Motion, at 21.

Plaintiff cites *Bank of Nova Scotia v. Dore*, to explain:

> the purpose of these fictitious party rules is to provide a mechanism for a plaintiff to file a suit within the applicable statutory limitations period when, after the exercise of due diligence, the true name of a defendant remains unascertained. The fictitious party practice seeks to "… balance the defendant's interest in repose with the plaintiff's interest in a just determination of his or her claim. [But], [t]he need to submit claims promptly to judicial management must be tempered by the policy favoring the resolution of claims on their merits." Therefore, once a plaintiff initiates the fictitious party procedure, it bears the burden of moving diligently during the litigation to identify the misnamed defendant.

57 V.I. 105, 114-115 (V.I. Super. Ct. 2012).

Here, Plaintiff has taken no steps to amend the identities of John Doe 1 and John Doe 2, more than seven years after the receiving a copy of the unredacted Report, which should have revealed such parties. Reply, at 5-6. Plaintiff has also provided no reasons by which the statute of limitations against persons to be substituted as named Defendants in place of John Doe 1 and John Doe 2 should be equitably tolled. Therefore, the Court will require that Plaintiff show cause why his Complaint should not be dismissed with prejudice against John Doe 1 and John Doe 2.

An Order consistent with this Memorandum Opinion is entered herewith.

Dated: August 22, 2016.

DOUGLAS A. BRADY, JUDGE

ATTEST: ESTRELLA GEORGE
Acting Clerk of the Court

By: ____________________
Court Clerk Supervisor 8/23/16

CERTIFIED A TRUE COPY
DATE: Aug 23, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: ____________________
COURT CLERK II

[4] Super Ct. R. 26 provides:

> If the defendant's true name is unknown to the plaintiff, process may issue against the defendant, designating him by a fictitious name and giving an appropriate description of defendant sufficient to identify him. Thereafter, and prior to entry of judgment, on motion and notice to the defendant the proceedings shall be amended to set forth the true name of the defendant. No such amendment shall be ordered unless an affidavit shall be filed showing how the true name of the defendant was obtained, and no final judgment shall be entered until such order has been made. The proceedings may be amended without mention or notice to the defendant, and without the filing of an affidavit in those cases in which the defendant has acknowledged his true name in a written appearance or an answer or orally in open court.
>
> Actions may be instituted, and judgments may be entered against defendants designated by the first initial letter or letters, or by a contraction of a given or first name or names.