

## DIVISION OF ST. THOMAS AND ST. JOHN

**Defendants.**

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Pending before the Court are three motions: Defendant Gary A. Hicks' December 28, 2017, Motion to Dismiss for Failure to Prosecute, Hicks' January 30, 2018, Motion for Reconsideration, and Hicks' February 15, 2018, Motion to Compel Discovery from Plaintiffs. Hicks' motion to dismiss for failure to prosecute will be denied without prejudice, Hicks' motion for reconsideration will be denied as moot, and Hicks' motion to compel will be denied without prejudice.

These matters arise from a Verified Complaint, filed on March 21, 2016, and amended on March 3, 2017, asserting several causes of action against Defendants with respect to a motor vehicle collision that occurred on April 2, 2014.<sup>1</sup> After Plaintiffs failed to respond to

<sup>1</sup> Plaintiffs' March 3, 2017, First Amended Verified Complaint asserts causes of action for negligence *per se* (for violation of motor vehicle statutes), negligence, intentional infliction of emotional distress, and gross negligence against Hicks and negligent entrustment against Deft, Inc., as well as a loss of consortium claim on behalf of Anali Todman, regarding a motor vehicle collision in which a Thrifty Car Rental vehicle driven by Hicks collided with a vehicle driven by Ishmael Todman, Jr.

interrogatories and abide by certain court orders, on December 28, 2017, Hicks filed a motion to dismiss for failure to prosecute.<sup>2</sup> On January 25, 2018, the Court designed and entered a Final Revised Scheduling Order, because the parties failed, twice, to conduct a scheduling conference and to submit a proposed revised scheduling order.<sup>3</sup> The same day, Plaintiffs filed responses to Hicks' first set of interrogatories and a first production of documents in response to Hicks' request for production of documents.<sup>4</sup> On January 30, 2018, Hicks submitted a Motion for Reconsideration of the Court's Final Revised Scheduling Order, requesting that the Court vacate the Order and withhold entry of any scheduling order until the Court ruled on Hicks' December 28, 2017, Motion to Dismiss for Failure to Prosecute. On February 15, 2018, Hicks filed a Motion to Compel outstanding discovery.<sup>5</sup> Finally, on February 21, 2018, Plaintiffs filed a Motion to Modify the Revised Scheduling Order, which this Court granted on February 22, 2018.<sup>6</sup>

## DISCUSSION

4 V.I.C. § 76(a) confers original jurisdiction upon the Superior Court in civil actions.

### **I. Motion to dismiss for failure to prosecute**

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<sup>2</sup> On January 8, 2018, Plaintiffs filed an Opposition to Hicks' Motion to Dismiss, a Declaration of Plaintiffs' counsel, and an Informative Motion. Subsequently, Deft, Inc., joined the Motion to Dismiss on January 17, 2018, and Hicks filed a Reply Brief in Support of the Motion to Dismiss for Failure to Prosecute on January 18, 2018. Deft, Inc., filed a Reply to the Opposition to Motion to Dismiss on January 25, 2018, and a Motion Requesting a Ruling on Hicks' Motion to Dismiss for Failure to Prosecute on February 1, 2018.

<sup>3</sup> See the Court's December 18, 2017, Order requiring the parties to file a proposed Revised Scheduling Order by December 29, 2017; *see also* the Court's December 4, 2017, Order mandating that the parties file a proposed scheduling order by November 30, 2017. On December 28, 2017, Hicks filed a Response to the Court's December 18, 2017, Order, asserting that Plaintiffs failed to respond to Hicks' communications regarding the Revised Scheduling Order, and as a result, Hicks attached to his Response a Motion to Dismiss for Failure to Prosecute.

<sup>4</sup> See Plaintiffs' filings on January 25, 2018: Responses to Hicks' First Set of Interrogatories of Ishmael Todman, Jr., and Alani Todman; Ishmael Todman, Jr.'s First Production of Documents; Ishmael Todman, Jr.'s Response to Deft, Inc.'s First Set of Interrogatories; and Alani Todman's Response to Deft, Inc.'s First Set of Interrogatories.

<sup>5</sup> The motion to compel remains unopposed by Plaintiffs.

<sup>6</sup> Plaintiff's Motion to Modify Revised Scheduling Order to Conclude and File Final Mediation Report by March 22, 2018, requested the Court to change the date for the mediation to be concluded and the final mediation report to be filed, from March 15, 2018, to March 22, 2018.

### A. Legal standard

V.I. R. CIV. P. 41(b) permits a defendant to move for dismissal of an action or a claim against it if a plaintiff fails to prosecute or fails to comply with the rules of civil procedure or a court order.<sup>7</sup> A dismissal for failure to prosecute constitutes an extreme sanction,<sup>8</sup> and unless the dismissal order states otherwise, operates as an adjudication on the merits.<sup>9</sup> When evaluating a motion to dismiss for failure to prosecute, the Superior Court must weigh six factors, adopted by the Virgin Islands Supreme Court in *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010):

- (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 was willful or in bad faith;
- (5) the effectiveness of sanctions other than dismissal, with entails an analysis of alternative sanctions; and
- (6) the meritoriousness of the claim or defense.<sup>10</sup>

To warrant dismissal, the Superior Court must make express findings as to each factor and conclude that, together, the factors strongly weigh in favor of dismissal.<sup>11</sup> While it is not

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<sup>7</sup> V.I. R. CIV. P. 41(b) provides: "Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subpart (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits."

<sup>8</sup> See *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 290 (V.I. 2010) (quoting *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511 (V.I. 2010)).

<sup>9</sup> See V.I. R. CIV. P. 41(b).

<sup>10</sup> See *Watts*, 54 V.I. at 290; see also *Halliday*, 53 V.I. at 510 (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (emphasis omitted)).

<sup>11</sup> See *Halliday*, 53 V.I. at 511.

required that all six factors weigh in favor dismissal,<sup>12</sup> dismissal is “reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff.”<sup>13</sup>

**B. Because the *Halliday* factors do not strongly weigh in favor of dismissal for failure to prosecute, Hicks’ motion must be denied.**

**1. The extent of the party’s personal responsibility**

Hicks asks the Court to dismiss Plaintiff’s entire action, arguing that five of the six *Halliday* factors weigh in favor dismissal.<sup>14</sup> The first factor assesses whether evidence in the record demonstrates that a plaintiff is personally responsible for any delays or failures to comply with court orders or discovery requests.<sup>15</sup> The Court finds, and Hicks acknowledges, that there is no evidence in the record to show that Plaintiffs have been personally responsible for any delays or failures to respond in this case.<sup>16</sup> Accordingly, this factor does not weigh in favor of dismissal.

**2. The prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery**

The second factor ascertains whether the moving party has suffered any prejudice due the opposing party’s failure to move the case forward.<sup>17</sup> Prejudice exists when a party’s ability to prepare effectively a full and complete trial strategy is impeded.<sup>18</sup> Examples of prejudice

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<sup>12</sup> See *Watts*, 54 V.I. at 299 (citations omitted) (Swan, J. concurring).

<sup>13</sup> *Id.* (quoting *Poulis*, 747 F.2d at 866 (quoting *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339, 342 (3d Cir. 1982))).

<sup>14</sup> Hicks’ Motion to Dismiss, page 7.

<sup>15</sup> See *Watts*, 54 V.I. at 300 (Swan, J. concurring).

<sup>16</sup> Hicks’ motion to dismiss, page 5.

<sup>17</sup> See *Watts*, 54 V.I. at 300 (citations omitted) (Swan, J. concurring).

<sup>18</sup> *Id.* at 291 (“[P]rejudice does not [necessarily] mean irremediable harm, but the burden imposed by impeding a party’s ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial”) (citations and internal quotations omitted).

“include the irretrievable loss of evidence, an inevitable dimming of witnesses' memories, or excessive or irremedial [sic] burdens or costs imposed on an opposing party.”<sup>19</sup> Prejudice “also includes [the] deprivation of information through non-cooperation with discovery, and costs expended obtaining court orders to force compliance with discovery.”<sup>20</sup>

Hicks' motion to dismiss asserts that Plaintiffs' failure to answer written discovery has prevented Hicks from determining whether Ishmael Todman, Jr., could be liable for comparative fault.<sup>21</sup> When Hicks filed his motion to dismiss, Plaintiffs had not yet responded to Hicks' first set of interrogatories.<sup>22</sup> But, on January 25, 2018, Plaintiffs submitted a first set of interrogatory responses, including answers to Hicks' questions relevant to comparative fault, i.e., regarding potential drug or alcohol impairment and any cell phone usage.<sup>23</sup> Because there is no evidence in the record to suggest that Hicks incurred any costs, burdens, or losses due to Plaintiffs' failure to timely respond to Hicks' interrogatories, the Court lacks a factual basis to find any extent of prejudice.<sup>24</sup> Regarding the outstanding discovery sought by Hicks not discussed in his motion to dismiss, the Court evaluates Hicks' motion to compel, *infra*.

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<sup>19</sup> *Watts*, 54 V.I. at 300 (Swan, J. concurring) (citations omitted).

<sup>20</sup> *Adams v. Trs. of the N.J. Brewery Employees' Pension Tr. Fund*, 29 F.3d 863, 874 (3d Cir. 1994) (citation omitted).

<sup>21</sup> See Hicks' Motion to Dismiss, page 5.

<sup>22</sup> See Hicks filed the motion to dismiss on December 28, 2017, and Plaintiff's filed responses on January 25, 2018.

<sup>23</sup> See Plaintiff Ishmael Todman, Jr., Response to Gary Hicks' First Set of Interrogatories, pgs. 4 and 12, Interrogatories Nos. 6 and 24 (“INTERROGATORY NO. 6: Please state what you did for the twelve (12) hours preceding the occurrence, including but not limited to, whether you took prescription or non-prescription drugs, whether you drank any alcoholic beverages, or whether you smoked marijuana. RESPONSE: I was at home resting. I went to work at 6 a.m.] I was at work when my daughter called and said she forgot her physical education clothes at home. I went home to get [sic] the clothes and was returning to town to drop off her school clothes. I was not on any prescription drugs. I did not drink any alcoholic beverages. I did not smoke marijuana. . . . INTERROGATORY NO. 24: Please identify by name of provider and account number, all cell phones that you used in the month of April 2014. RESPONSE: AT&[T] [Plaintiff's phone number]”).

<sup>24</sup> See *Watts*, 54 V.I. at 301 (finding that there was no merit to the moving party's assertion that it was prejudiced by the opposing party's failure to timely comply with the moving party's demand for document production as there was no evidence in the trial record that the moving party incurred any costs, burdens, or losses from any efforts to obtain a court order to compel the opposing party to comply with its discovery request, nor were there any other compelling factors that constitute prejudice to the moving party) (Swan, J. concurring).

Additionally, Hicks' correctly asserts that nearly four years have passed since the motor vehicle collision, increasing the possibility of diminished recollection, but does not specify any prejudice he has suffered as a result.<sup>25</sup> The mere possibility of the dimming of memories is not sufficiently substantial to support a finding of prejudice. Accordingly, this factor does not weigh in favor of dismissal.

### **3. A history of dilatoriness**

Repeated, consistent delay by a party's counsel constitutes dilatoriness.<sup>26</sup> Examples include consistent non-responses to interrogatories, or consistent tardiness in complying with court orders.<sup>27</sup> One or two occurrences of delay or delinquency is not enough to demonstrate a history of dilatoriness.<sup>28</sup> Here, Plaintiffs have failed to timely comply with four court orders: the first requiring Plaintiffs to respond to Hicks' motion to quash by August 26, 2016; the second directing a response to Deft, Inc.'s motion to dismiss by September 6, 2016;<sup>29</sup> the third scheduling Plaintiffs to attend a status conference on November 15, 2017;<sup>30</sup> and the fourth mandating Plaintiffs to submit a proposed scheduling order by December 29, 2017.<sup>31</sup>

Notably, since Plaintiffs' first two failures to adhere to court deadlines, Plaintiffs have complied with other court deadlines.<sup>32</sup> Further, with respect to Plaintiffs' failures to attend the status conference on November 15, 2017, and to submit a proposed scheduling order by

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<sup>25</sup> See *id.* at 301 (not finding prejudice when the moving party failed to identify the exact nature of prejudice it claimed to have suffered) (Swan, J. concurring).

<sup>26</sup> See *id.* at 306 (citations omitted) (Swan, J. concurring).

<sup>27</sup> See *id.* (citation omitted) (Swan, J. concurring).

<sup>28</sup> See *id.* (citations omitted) (Swan, J. concurring).

<sup>29</sup> See September 20, 2016 Order memorializing Plaintiffs' failures to respond to motions.

<sup>30</sup> See December 4, 2017, Order referring to the November 15, 2017, previously missed by Plaintiffs.

<sup>31</sup> See December 4, 2017, Order.

<sup>32</sup> See, e.g., Plaintiffs' July 7, 2017, Motion in Reply to Deft, Inc.'s supplemented Motion for Relief from Order, Plaintiffs' June 2, 2017, Informative Motion regarding a proposed scheduling order, and Plaintiffs' October 7, 2016, Motions in Opposition to Defendants' Motions to Dismiss.

December 29, 2017, Plaintiffs filed a Declaration and an Informative Motion on January 8, 2018, citing communications problems due to the September 2017 hurricanes as the cause of Plaintiffs' counsel's delinquency and largely agreeing to Defendants' proposed scheduling order submitted on December 28, 2017.<sup>33</sup> Additionally, on January 8, 2018, Plaintiffs filed an Opposition to the Motion to Dismiss for Failure to Prosecute, on January 25, 2018, a production of documents and response to Defendants' first set of interrogatories,<sup>34</sup> and on February 21, 2018, a Motion to Modify the Final Revised Scheduling Order.

All things considered, Plaintiffs' delinquencies have been sporadic, and thus, lack the consistency required to demonstrate a history of dilatory conduct in support of dismissal as a sanction. Moreover, the Virgin Islands Supreme Court has suggested that a motion to dismiss for failure to prosecute is premature when most of the deadline dates in the trial court's scheduling order have not arrived as of the date of filing of a motion to dismiss for failure to prosecute.<sup>35</sup> Here, only the first of several deadlines in the Final Revised Scheduling Order has elapsed.<sup>36</sup> Thus, this factor does not weigh in favor dismissal.

#### **4. Whether the conduct of the party was willful or in bad faith**

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<sup>33</sup> See Plaintiffs Declaration and an Informative Motion.

<sup>34</sup> On May 1, 2017, Hicks' served upon Plaintiffs a (1) First Set of Interrogatories for Ishmael Todman, Jr.; (2) First Set of Interrogatories for Anali Todman; and (3) Request for Production of Documents directed to Ishmael Todman, Jr. Under V.I. R. CIV. P. 33(b)(2), regarding interrogatories, "[a] responding party must serve its answers and any objections within 30 days after being served with the interrogatories" although "[a] shorter or longer time may be agreed by the parties under Rule 29 or be ordered by the court." Under V.I. R. CIV. P. 34(b)(2), "[t]he party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court."

<sup>35</sup> See *Watts*, 54 V.I at 306 ("Appellee's Motion to Dismiss for Failure to Prosecute, because of Appellant's failure to comply with court ordered deadlines, was premature. Most of the deadline dates in the trial court's February 15, 2007 Scheduling Order had not arrived as of July 16, 2007, the date Appellees filed their Motion to Dismiss for Failure to Prosecute") (Swan, J. concurring).

<sup>36</sup> Only the discovery deadline of the Final Revised Scheduling Order has expired.

Where there is no affirmative evidence to support the conclusion that dilatory behavior has been willful or in bad faith, a court cannot presume the behavior to have been willful or in bad faith.<sup>37</sup> With respect to the failure to prosecute, courts have defined willfulness as “deliberate and contumacious”<sup>38</sup> and “intentional or self-serving” conduct.<sup>39</sup> Here, there is no evidence in the record to demonstrate that Plaintiffs’ counsel deliberately disregarded any court orders or Defendants’ requests. Conversely, Plaintiffs’ January 8, 2018, Declaration and Informative Motion assert that telecommunications problems caused by Hurricanes Irma and Maria of September 2017—specifically, a lack of internet and landline telephone service and poor cellular service<sup>40</sup>—prevented Plaintiff’s counsel from submitting a proposed scheduling order by the Court’s deadline on December 29, 2017. Thus, the Court must find that this factor does not weigh in favor of dismissal.

##### **5. The effectiveness of sanctions as an alternative means of dismissing the case**

Dismissal of a case for failure to prosecute is a sanction a court should impose as a last resort.<sup>41</sup> Because Plaintiffs are represented by counsel, as opposed to proceeding *pro se*, monetary sanctions are more appropriate in the event counsel fails to meet future deadlines.<sup>42</sup> In fact, the Court has already elected to impose daily monetary sanctions against counsel and the parties to begin in the absence of compliance with the Mediation Requirement of the Final

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<sup>37</sup> See *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 192 (V.I. 2012) (“[T]he trial court must point to specific evidence to justify its determination of willfulness or bad faith . . . The trial court cannot presume that the actions of the Molloy’s [non-moving party’s] counsel were willful in the face of no evidence to support that conclusion. Accordingly, because there is no evidence of willfulness on the record, we must presume the Molloy’s failure to respond to the prompting order was not willful and that this factor also does not favor dismissal”).

<sup>38</sup> *Watts*, 54 V.I. at 308 (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868-69 (3d Cir. 1984)) (Swan, J. concurring).

<sup>39</sup> *Watts*, 54 V.I. at 308 (citing *Briscoe v. Klaus*, 538 F.3d 252, 262 (3d Cir. 2008)) (Swan, J. concurring).

<sup>40</sup> See Declaration, page 2, and Informative Motion, pgs. 1-2.

<sup>41</sup> See *Watts*, 54 V.I. at 310 (citation omitted) (Swan, J. concurring).

<sup>42</sup> See *id.* at 310 (Swan, J. concurring).



Revised Scheduling Order as modified on February 22, 2018.<sup>43</sup> Accordingly, this factor does not weigh in favor dismissal.

#### **6. The meritoriousness of the claim or defense**

“A claim or defense is meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense.”<sup>44</sup> Here, considering the notice pleading requirements of V.I. R. CIV. P. 8(a)(2), effective March 31, 2017, the Court determines that the allegations in the Amended Complaint of the place, date, and circumstances of the motor vehicle collision that resulted in Ishmael Todman, Jr.’s injuries,<sup>45</sup> if supported by evidence at trial, may support recovery. As such, this factor does not weigh in favor dismissal.

#### **7. Balancing the six *Halliday* factors**

Because none of the *Halliday* factors weigh in favor of dismissal for failure to prosecute, dismissal is not warranted. Accordingly, Hicks’ motion to dismiss must be denied.

### **II. Motion for reconsideration**

#### **A. Legal standard**

“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.”<sup>46</sup> Under V.I. R. CIV. P. 6-4, generally, a party may file a motion asking the court to reconsider an order or decision within 14 days after the entry of the ruling, and the motion must be based on any one of four grounds:

- (1) intervening change in controlling law;
- (2) availability of new evidence;

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<sup>43</sup> See January 25, 2018, Final Revised Scheduling Order, and February 22, 2018, Order Granting Motion to Modify Revised Scheduling Order to Conclude and File Final Mediation Report by March 22, 2018.

<sup>44</sup> *Watts*, 54 V.I. at 309 (citations and internal quotations omitted) (Swan, J. concurring).

<sup>45</sup> See First Amended Verified Compl. pgs. 1-10.

<sup>46</sup> *In re Hartlage*, 54 V.I. 446, 452 (V.I. 2010) (citing *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)).

- (3) the need to correct clear error of law; or
- (4) failure of the court to address an issue specifically raised prior to the court's ruling.

“Where ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court.”<sup>47</sup> Additionally, the Reporter’s Note provides:

In *Martin v. Martin*, 58 V.I. 620, 629 (V.I. 2013), and *Beachside Assocs. v. Fishman*, 53 V.I. 700, 71 (V.I. 2010), the Supreme Court said that a party moving for reconsideration must: “demonstrate that there was (1) an intervening change in controlling law; (2) newly available evidence; or (3) a need to correct clear error of law or prevent manifest injustice.” As an example of the third factor, this Rule specifically lists failure of the court to address an issue specifically raised by a party prior to the court's ruling on pending matters.<sup>48</sup>

**B. Because the Court’s denial of Hicks’ motion to dismiss for failure to prosecute renders moot the issue of failure to prosecute, Hicks’ motion for reconsideration will be denied as moot.**

Hicks’ timely filed motion for reconsideration asks the Court to vacate the Final Revised Scheduling Order and withhold entry of any scheduling order until after the Court rules on Hicks’ motion to dismiss for failure to prosecute.<sup>49</sup> The motion moves for reconsideration based on the fourth ground, “failure of the court to address an issue specifically raised prior to the court's ruling”,<sup>50</sup> appearing to argue that the Court’s issuance of the Final Revised Scheduling Order prior to the Court’s evaluation of Hicks’ motion to dismiss for failure to prosecute constitutes a failure to address an issue (i.e., Hicks’ allegation of Plaintiffs’ failure to prosecute) specifically raised (i.e., in Hicks’ motion to dismiss) prior to the Court's ruling (i.e., the Final

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<sup>47</sup> V.I. R. CIV. P. 6-4(b).

<sup>48</sup> V.I. R. CIV. P. 6-4 Note Subpart (b).

<sup>49</sup> Motion for Reconsideration, page 3.

<sup>50</sup> V.I. R. CIV. P. 6-4(b)(4).

Revised Scheduling Order).<sup>51</sup> Hicks' motion does not seek to modify or amend the Final Revised Scheduling Order under V.I. R. CIV. P. 16(b)(4).

"A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion"<sup>52</sup> so that a "court's decision on [the] pending motion [would] be 'hypothetical or academic' or without any 'practical significance[.]'"<sup>53</sup> "In that instance, the motion should be dismissed or denied as moot because a decision [would] have no practical impact in the case however the court decides the motion."<sup>54</sup>

To the extent that Hicks' motion for reconsideration seeks to vacate the Final Revised Scheduling Order and withhold entry of any scheduling order until the Court decides Hicks' motion to dismiss for failure to prosecute, the Court's denial of Hicks' motion to dismiss renders Hicks' motion for reconsideration moot.

To the extent that Hicks' motion for reconsideration asserts that the Final Revised Scheduling Order sets dates that are impractical to achieve and will unfairly prejudice him, he may seek an extension for good cause, with respect to any deadline, under V.I. R. CIV. P. 16(b)(4). A motion for reconsideration does not provide the proper rubric under which to seek the modification of a scheduling order.<sup>55</sup>

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<sup>51</sup> See Motion for Reconsideration, page 3 ("There is no indication in the Final Revised Scheduling Order that the court considered Hicks' Motion to Dismiss for Failure to Prosecute and subsequent reply brief, the Response to Court Order, and the Response to Plaintiffs' Informative Motion").

<sup>52</sup> *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, at \*11 (V.I. Super. Ct. 2014) (citations omitted).

<sup>53</sup> *Id.* at \*12 (citing BLACK'S LAW DICTIONARY 1099 (9th ed. 2009)); see also *id.* at \*12-13 ("A motion is moot when a court is unable to fashion any form of meaningful relief" . . . "A motion is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (internal citations omitted).

<sup>54</sup> *Id.* at \*13.

<sup>55</sup> The Reporter's Note to V.I. R. CIV. P. 6-4 provides that the fourth ground, a "failure of the court to address an issue specifically raised prior to the court's ruling", is an example of the third ground, "the need to correct clear error of law." Here, Defendants have failed to identify a specific *error of law* that needs to be corrected regarding the Court's issuance of the scheduling order. V.I. R. CIV. P. 16(b)(4) provides, "[a] schedule may be modified only for good cause and with the judge's consent."

### **III. Motion to Compel**

#### **A. Legal standard**

V.I. R. CIV. P. 26(b)(1) governs the scope of discovery, providing that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[,]” regardless of whether the information would be admissible in evidence. V.I. R. CIV. P. 37 governs motions to compel the production of discoverable information. Specifically, V.I. R. CIV. P. 37(a)(3)(B) permits a party seeking discovery to “move for an order compelling an answer, designation, production, or inspection ... if ... a party fails to answer an interrogatory submitted under Rule 33 ... [or if] a party fails to produce documents ... as requested under Rule 34.”

Prior to filing a motion to compel, under V.I. R. CIV. P. 37-1(b), “[t]he party requesting resolution of a discovery dispute shall serve a letter on other counsel identifying each issue and/or discovery request in dispute, stating briefly the moving party's position with respect to each (and providing any legal authority), and specifying the terms of the discovery order to be sought.”<sup>56</sup> V.I. R. CIV. P. 37-1(c)(1) and V.I. R. CIV. P. 37-1(c)(3) further require the requesting party to arrange a conference with opposing counsel, which, generally, must be completed within 15 days of service of a letter requesting the conference. Regarding the conference, V.I. R. CIV. P. 37-1(c)(2) encourages counsel to meet in person, but if not practicable, permits the parties to confer by telephone or video conference, but not via mail or e-mail exchange.

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<sup>56</sup> V.I. R. CIV. P. 37-1(b).

Upon filing a motion to compel, under V.I. R. CIV. P. 37, the moving party must include “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”<sup>57</sup> Similarly, V.I. R. CIV. P. 37-1(a) provides that “[p]rior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties . . . shall confer in a good faith effort to eliminate the necessity for the motion — or to eliminate as many of the disputes as possible.” Good faith “mandates a genuine attempt to resolve the discovery dispute through non-judicial means[,]”<sup>58</sup> and “[c]onferment requires that the moving party ‘must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention.’”<sup>59</sup>

**B. Because the parties have not satisfied the meet and confer requirement of V.I. R. CIV. P. 37(a)(1), Hicks’ motion to compel must be denied.**

Hicks’ motion to compel seeks production of (1) answers to interrogatories nos. 1, 4, 9, and 12 directed to Ishmael Todman, Jr., and (2) answers to interrogatories nos. 6-12 directed to Anali Todman, on the basis that the existing answers to those interrogatories are incomplete or evasive, and (3) documents, including authorization forms to obtain medical, tax, employment, and other pertinent records.<sup>60</sup> Hicks attached to his motion to compel a certification asserting the following:

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<sup>57</sup> V.I. R. CIV. P. 37(a)(1).

<sup>58</sup> *Algonquin Heights v. United States*, 2008 U.S. Claims LEXIS 479, at \*8-9 (Fed. Cl. Feb. 29, 2008) (quoting *Shuffle Master v. Progressive Games*, 170 F.R.D. 166, 171 (D. Nev. 1996)).

<sup>59</sup> *Id.* at \*9 (quoting *Shuffle Master, Inc.*, 170 F.R.D. at 171).

<sup>60</sup> Motion to Compel Discovery from Plaintiffs, page 2.

- On May 1, 2017, Hicks served Plaintiffs with interrogatories and a request for production of documents, with attached authorizations.<sup>61</sup>
- Plaintiffs' interrogatory answers, received by Hicks on January 29, 2018, were evasive and incomplete.<sup>62</sup>
- On January 31, 2018, Hicks served a Specification Letter demanding that Plaintiffs provide complete answers to interrogatories and respond to Hicks' request for production of documents.<sup>63</sup>
- At a February 8, 2018, deposition where Plaintiffs' counsel was present, Hicks' counsel raised the issue of Plaintiffs' failure to respond to discovery.<sup>64</sup>
- At the February 8, 2018, deposition, after Hicks' counsel presented copies of the authorizations to Ishmael Todman, Jr., Plaintiffs' counsel instructed Ishmael Todman, Jr., not to sign the authorizations on the basis that the request to sign the authorizations was not proper at a deposition.<sup>65</sup>
- Plaintiffs have not otherwise responded to Hicks' efforts to resolve the discovery issues delineated in the Specification Letter or raised in person at the deposition.<sup>66</sup>

Notably, Hicks' motion to compel asserts that Ishmael Todman, Jr., was deposed on February 8, 2018, Anali Todman was not deposed due to time constraints, and the deposition transcript is not

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<sup>61</sup> Motion to Compel Discovery from Plaintiffs, Certification of Good Faith Effort to Resolve Discovery Dispute, ¶ 1.

<sup>62</sup> *Id.*, ¶ 2.

<sup>63</sup> *Id.*, ¶ 4. Because Hicks failed to attach the Specification Letter to the motion to compel, the Court cannot conclude whether the letter contained Hicks' position, substantiated by legal authority, with respect to each discovery request or whether the letter specified the terms of the discovery order to be sought by Hicks.

<sup>64</sup> *Id.*, ¶ 5.

<sup>65</sup> *Id.*, ¶ 7.

<sup>66</sup> *Id.*, ¶ 8.

yet available.<sup>67</sup> That Hicks' counsel raised the issue of Plaintiffs' failure to respond to discovery during a deposition of only Ishmael Todman, Jr., fails to demonstrate that the parties met for the purpose of resolving all of the discovery disputes with respect to both plaintiffs, and thus, that the parties conferred in a good faith effort to eliminate the necessity for a motion to compel. Moreover, nothing in Hicks' certification indicates that Hicks' counsel arranged for a conference specifically to resolve the discovery disputes. Accordingly, the Court finds that Hicks' certification fails to show that the meet and confer requirement was met. The motion must be denied without prejudice.

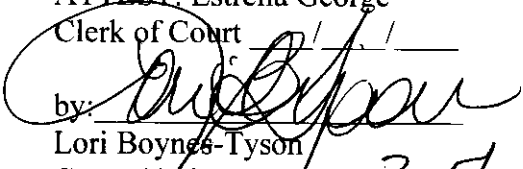
### CONCLUSION

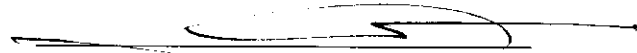
For the foregoing reasons, Hicks' motion to dismiss for failure to prosecute will be denied without prejudice, Hicks' motion for reconsideration will be denied as moot, and Hicks' motion to compel will be denied without prejudice. An Order consistent with this Opinion shall follow.

Dated: March 5, 2018

ATTEST: Estrella George  
Clerk of Court

by:

  
Lori Boynes-Tyson  
Court Clerk Supervisor

  
HON. MICHAEL C. DUNSTON  
JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS

<sup>67</sup> Motion to Compel Discovery from Plaintiffs, page 3.