IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

MARY DAVIES AS ASSIGNEE OF RESORT MANAGEMENT SERVICES INC., d/b/a MAGEN'S POINT RESORT INC., MAGEN'S INC., and ANY OTHER NAMED OR REFERRED TO BY THAT ENTITY,	) CASE NO. ST-2015-CV-0000637
	) ACTION FOR DAMAGES
Plaintiff,	
vs.	) JURY TRIAL DEMANDED
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,	
Defendant.	

MEMORANDUM OPINION AND ORDER

Before the Court are the following:

1) Defendant's Motion for Summary Judgment—Additional Insured (filed on February 21, 2017),

2) Exhibits to Defendant's "Motion for Summary Judgment – Additional Insured" (filed on February 21, 2017),

3) Plaintiff's Motion to Strike Underwriters' Motion for Summary Judgment-Additional Insured, or Alternatively, to Extend Time to Conduct Discovery [. . .] (filed on March 20, 2017),

4) Defendant's Response to Plaintiff's Response to [Motion for] Summary Judgment – Additional Insured [. . .] (filed on April 4, 3017), and

5) Plaintiff's Reply in Support of Her Motion to Strike Underwriters' "Motion for Summary Judgment-Additional Insured [. . .]" (filed on April 20, 2017).

Defendant Certain Underwriters at Lloyds of London argues that the pertinent insurance policy does not cover the underlying injuries in this matter and thereby moves the Court to grant summary judgment in its favor. In her Motion to Strike, Plaintiff Mary Davies simultaneously 1) moves the Court to strike Defendant's Motion for Summary Judgment—Additional Insured as improperly filed, 2) argues that the Court should deny Defendant's Motion, and 3) requests that the Court reserve ruling on Defendant's Motion to allow Plaintiff to conduct additional discovery needed to defend against the Motion. Upon review of the parties' pleadings, the Court will deny

Plaintiff's Motion to Strike and grant Defendant's Motion for Summary Judgment—Additional Insured (herein referred to as "Second Motion for Summary Judgment" or "Second Motion"). The Court first will address Plaintiff's request to strike Defendant's Second Motion. Then the Court will consider whether it should reserve ruling in order to allow Plaintiff to conduct further discovery. Finally, the Court will consider Defendant's request for summary judgment.

I. BACKGROUND

This matter derives from Plaintiff Mary Davies's action in *Mary C. Davies v. Resort Management Services, Inc. d/b/a Magen's Point Resort*, ST-2008-CV-293. Resort Management Services, Inc., d/b/a Magen's Point Resort Inc., the defendant in ST-2008-CV-293, assigned its claims against present defendant, Certain Underwriters at Lloyds of London, to Plaintiff. Plaintiff alleges Defendant was Resort Management Services's liability insurance carrier. As the assignee of Resort Management Services's rights, the validity of Plaintiff's claims in this matter hinges on whether Resort Management Services would have a valid claim against Defendant. Accordingly, the Court will provide a history of the underlying matter.

In ST-2008-CV-293, Plaintiff brought a premises liability negligence claim against "Magens Point, Inc. d/b/a Magens Point Hotel."[1] Plaintiff alleged that she suffered injuries while visiting Indigo Restaurant and Bar (herein referred to as "Indigo") on November 22, 2007,[2] which at the pertinent time was located at Magens Point Resort. Magens Point Resort is a hotel resort and, at the time, Indigo's landlord. Plaintiff alleged she fell in Magens Point Resort's parking lot due to the parking lots' unsafe condition.[3] In an August 29, 2012 Order, the Court approved a Stipulation for Plaintiff to Amend the Complaint and changed the named defendant in ST-2008-CV-293 to "Resort Management Services, Inc. d/b/a Magens Point Resort."

The lease between Magens Point Resort and Indigo defines the leased premises as "the dining room, kitchen, storage rooms located at the rear of the kitchen and pool-side bar/grill, all of which are outlined in the sketch annexed hereto as Exhibit 'A',[sic] but not including the general pool area."[4] The lease does not indicate that the parking lot at Magens Point Resort is part of the leased premises. Exhibit A, while difficult to decipher, also does not appear to depict a parking lot.

On September 9, 2015, the Court entered a Consent Judgment in favor of "Plaintiff Mary C. Davies and against Defendant Resort Management Services, Inc. d/b/a Magens Point Resort, Inc." As part of their settlement agreement, Resort Management Services, Inc. d/b/a Magens Point

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[1] *Mary C. Davies v. Magens Point, Inc. d/b/a Magens Point Hotel*, ST-2008-CV-293, Compl. ¶ 3 (filed on June 16, 2008).
[2] Indigo Restaurant and Bar is the brand name of KRG Holdings, LLC.
[3] *Mary C. Davies v. Magens Point, Inc. d/b/a Magens Point Hotel*, ST-2008-CV-293, Compl. ¶¶ 6, 10.
[4] Def.'s Response to Pl.'s Response to Summ. J. 8, Ex. 1 ¶ 2. The evidentiary foundation of the lease is provided by Michael C. Shelby's Affidavit, which is also part of Exhibit 1 of Defendant's reply to Plaintiff's response to the Second Motion. Shelby is the president and CEO of Magens Point Resort.

Resort, Inc. assigned its purported rights under a liability insurance policy to Plaintiff.[5] Indigo purchased a liability insurance policy from Defendant that was effective at the time of Plaintiff's accident.[6] The insurance policy covered "Magens Point Resort, Inc., Magens Point Road, St Thomas, VI 00802" as an "Additional Insured."[7] The policy number is CPG2684. Theodore Tunick & Company (herein "Tunick") underwrote the policy. The Assignment provided Plaintiff with "any and all rights that Defendant [Resort Management Services] may have against the Carrier[8] and/or the Insurance Agent . . . arising out of or in any way related to the Litigation.[9] The Assignment includes, but is not limited to, all of [Resort Management Services]'s extra-contractual or bad faith claims and any claims against the agents or employees of the Carrier.. . . arising from any failure of the Carrier to properly fulfill its good faith obligations to protect [Resort Management Services] from liability . . ., including the failure to provide [Resort Management Services] with appropriate insurance coverage as an also named insured . . .."[10]

In this matter (ST-2015-CV-637), as an assignee of rights, Plaintiff alleges that the insurance policy covered Resort Management Services as the Additional Insured and that Defendant wrongly denied coverage of Resort Management Services's liability insurance claim resulting from ST-2008-CV-293.[11] The parties are in dispute over whether Plaintiff's assignor of rights is in fact the "Additional Insured" mentioned in the insurance policy. In its first Motion for Summary Judgment,[12] Defendant argues that Plaintiff's assignor of rights was not covered by the insurance policy (herein referred to as "First Motion for Summary Judgment" or "First Motion").

However, in the Second Motion for Summary Judgment, Defendant argues that, irrespective of what entity is the "Additional Insured," Plaintiff's underlying claims in ST-2008-CV-293 were not covered by the insurance policy. Defendant instructs the Court to consider the insurance policy's section titled "ADDITIONAL INSURED – OWNERS, LESEES OR CONTRACTORS (FORM A)."[13] Form A is an endorsement and outlines the policy's coverage of any additional insured listed in Endorsement "B," which is found on the subsequent page. Specifically, Defendant points out the following text:

[5] Mot. for Summ. J., Ex. F (filed on Aug. 4, 2016) (depicting Assignment and Agreement Not to Execute).
[6] Mot. for Summ. J., Ex. A. The insurance policy's effective period ran from May 26, 2007 to May 26, 2008. Exhibits to Defendant's "Motion for Summary Judgment – Additional Insured," Form CG 2009 1093 (marked as page 3 in the copy provided to the Court) (filed on Feb. 21, 2017).
[7] *Id.* The Additional Insured Schedule is located on Form CG 20091093.
[8] The Assignment defines "Carrier" as "Certain Underwriters at Lloyd's Commercial General Liability Agreement No. NA 2007TT23 and/or or[sic] any other insurance company obligated to defendant and/or indemnify Defendant [Resort Management Services, Inc.]" Assignment and Agreement Not to Execute ¶ 2.07 (attached to Def.'s Opp. to Pl.'s Motion to Amend Her Compl. for a Second Time, which was filed on Nov. 15, 2016).
[9] The Assignment defines "Litigation" as "Civil No. 293/2008, pending in the Superior Court of the Virgin Islands, Division of St. Thomas. *Id.* at ¶ 2.03.
[10] *Id.* at ¶ 5.01.
[11] Compl. ¶ 10 (filed on Dec. 10, 2015).
[12] Filed on August 4, 2016.
[13] Exhibits to Defendant's "Motion for Summary Judgment – Additional Insured," Form CG 2009 1093 (marked as page 31 in the copy provided to the Court).

> WHO IS AN INSURED . . . is amended to include as an insured the person or organization (called "additional insured") shown in the Schedule but only with respect to liability arising out of:
>
> A. Your ongoing operations performed for the additional insured(s) at the location designated above; or
>
> B. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.

Defendant asserts that the above provision would preclude Resort Management Services, from filing a valid claim under the insurance policy, even if it was covered as the "Additional Insured." While Plaintiff was injured in the parking lot after leaving Indigo, the complaint in ST-2008-CV-293 does not allege she suffered injuries due to Indigo's negligent operation of its business or Magens Point Resort's negligent supervision of Indigo as a landlord.

For the purposes of simplicity and conciseness, the Court will refer to the defendant in ST-2008-CV-293 as "Magens Point Resort." The Court has not adjudicated the parties' dispute over what entity in fact is the Additional Insured.

II. PLAINTIFF'S MOTION TO STRIKE

Plaintiff moves the Court to strike the Second Motion for Summary Judgment and argues it was inappropriate for Defendant to file multiple motions for summary judgment. Plaintiff points out that the evidence offered in the Second Motion was available to Defendant when it filed the First Motion for Summary Judgment and, therefore, Defendant should have made its arguments in a single pleading. Plaintiff asserts that Defendant's piecemeal presentation of facts and arguments should cause the Court to strike the Second Motion for Summary Judgment.

A. Standard of Review

Courts have inherent authority to strike improper pleadings from their records.[14] Generally, "[b]ecause of the drastic nature of the remedy ... motions to strike are viewed with disfavor and will generally be denied unless the [claims or defenses] have no possible relation to the controversy and may cause prejudice to one of the parties."[15]

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[14] *Der Weer v. Hess Oil V.I. Corp.*, 2016 V.I. LEXIS 21 (V.I. Super. Ct. Mar. 15, 2016).

[15] *Benjamin v. Esso Standard Oil Co.*, No. 1:08-CV-101, 2009 U.S. Dist. LEXIS 48677, at *2 (D.V.I. June 4, 2009) (internal quotations omitted); *see also Hobson v. Gov't of the Virgin Islands*, 20 V.I. 413, 418 (V.I. Super. Ct. 1984) (stating that motions to strike are highly disfavored and infrequently granted).

B. Analysis

1. The Court Will Not Strike the Second Motion for Summary Judgment.

Plaintiff fails to convince the Court that it should strike the Second Motion for Summary Judgment. The Court has inherent authority to manage its docket[16] and, in the interest of judicial economy, it discourages parties from prolonging the resolution of cases by presenting evidence and arguments in stages. However, while Defendant should have made all of its arguments in the First Motion for Summary Judgment, the Court does not find that Defendant's disjointed presentation of its defense is so burdensome upon the Court and Plaintiff as to merit striking the Second Motion. Plaintiff does not describe how she would be unfairly prejudiced by the Court failing to strike the Second Motion.

To support her Motion to Strike, Plaintiff cites to non-binding opinions by courts from other jurisdictions. While these courts hold that a party does not have an absolute right to file multiple, piecemeal motions for summary judgment, the courts also affirmed that striking such pleadings is within a court's discretion.[17]

In addition, Plaintiff argues that Virgin Islands Rule of Civil Procedure 56 permits a party to file only a single motion for summary judgment. In her Reply, she quotes the following pertinent part of Rule 56:

> **(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment . . ..
>
> **(b) Time to File <u>a</u> Motion.** Unless a different time is set by the court, <u>a</u> party may file a motion for summary judgment at any time until 30 days after the close of all discovery. (emphasis added).

Plaintiff appears to interpret the article "a" as signifying that a party is permitted to file only a single pleading pursuant to Rule 56.

This argument is meritless for several reasons. First, the opinions cited by Plaintiff suggest a court can consider multiple motions for summary judgment filed a party, even though this practice is discouraged.[18] Second, the English language requires the placement of the article "a/an" before an indefinite and nonproper noun. An indefinite article is "used in English to refer to a

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[16] *Prentice v. Seaborne Aviation, Inc.*, 65 V.I. 96, 113 (V.I. Super. Ct. 2016); *Melchior. Univ. of the V.I.*, 2016 V.I. LEXIS 56, at *10 (V.I. Super. Ct. Apr. 27, 2016); *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 126 (V.I. Super. Ct. 2016).

[17] *See, e.g., Wootten v. Virginia*, No. 6:14-CV-00013, 2016 U.S. Dist. LEXIS 122714, at *2 (W.D. Va. Sep. 12, 2016) ("The Court will accordingly exercise its discretion to decline to hear successive summary judgment motions").

[18] *See, e.g., Essex Ins. Co. v. Foley*, 827 F. Supp. 2d 1326, 1329 n.2 (S.D. Ala. 2011) ("the Court will consider Essex's Renewed Motion for Summary Judgment, at least insofar as it relies on newly obtained evidence gleaned from discovery").

person or thing that is not identified or specified."[19] Therefore, while the indefinite article "a/an" can signify one-and-only-one, it may in the alternative mean "any" or simply that a noun is not already known to a reader or listener. The Court determines that reading the indefinite article "a" as meaning "any," instead of "only one," is the more logical interpretation in the context of Rule 56. Lastly, Rule 1 instructs that the Court construe the Virgin Islands Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action and proceeding." "The summary judgment procedure resolves unsustainable claims and defenses in advance of trial, thereby narrowing the number of outstanding legal issues and serving the interests of judicial economy and efficiency."[20] Considering Rule 1's instruction of securing speedy determination of actions and courts' general disfavor of striking pleadings, the Court errs on the side of allowing parties to file multiple motions for summary judgment. Therefore, the Court will deny Plaintiff's Motion to Strike in the instate matter.

2. Court Will Strike from Defendant's Pleadings Statements that Repeat Arguments Made in the First Motion.

While the Second Motion presents a new reason for granting summary judgment, Defendant's pleadings also repeat its arguments presented in the First Motion. Defendant discusses at length its claim that Resort Management Services, the entity that signed the Consent Judgment in ST-2008-CV-293, is not the same entity listed as the "Additional Insured" in the insurance policy. Defendant already presented this defense in the First Motion. Virgin Islands Rule of Civil Procedure 12(f) provides that the Court, on its own, "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Finding that the Second Motion contains redundant legal and factual arguments, the Court will strike from the Second Motion text asserting Plaintiff's assignor of rights is not the same company named as the Additional Insured in the insurance policy. For the purposes of this Memorandum Opinion and Order, the Court will not determine which company is in fact the intended Additional Insured under the pertinent insurance policy.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review for Summary Judgment

Summary judgment is appropriate where the "pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[21] The moving party bears the

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[19] *indefinite article,* MERRIAM-WEBSTER DICTIONARY https://www.merriam-webster.com/dictionary/indefinite%2 0article (last visited Aug. 9, 2017).
[20] *Guardian Gen. Insurance Ltd. v. Caribbean Food Servs., Inc.*, No. ST-15-CV-253, 2016 V.I. LEXIS 215, at *5 n.4 (V.I. Super. Ct. Oct. 24, 2016).
[21] V.I. R. CIV. P. 56(C)(2). The summary judgment procedure resolves unsustainable claims and defenses in advance of trial, thereby narrowing the number of outstanding legal issues and serving the interests of judicial economy and efficiency. *See* Super. Ct. R. 1. Therefore, the Court will apply these legal principles to the Motions.

burden of demonstrating there is no genuine issue of material fact.[22] A fact is material only if its existence or non-existence will affect the outcome of a lawsuit under applicable law, and a dispute over a material fact is genuine only if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party.[23] Thereafter, the non-moving party must show specific facts to establish a genuine issue for trial.[24] The "[c]ourt must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and . . . must take the non-moving party's conflicting allegations as true if 'supported by proper proofs.'"[25] "Th[e] [c]ourt may not itself weigh the evidence and determine the truth; rather, we decide only whether there is a genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party."[26] Then, if there is no genuine issue of material fact, the Court must determine whether the movant is entitled to judgment as a matter of law.[27]

B. Standard of Review for Interpreting an Insurance Policy

The interpretation, construction, and legal effect of an insurance policy is a matter of law that should be determined by a court.[28] Courts "should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them."[29] A court first should look to the express terms of the contract to determine the parties' intent.[30] Also, when construing an insurance contract, a court should consider the entirety of its terms and conditions.[31] Lastly, if possible, a court should avoid interpreting a contract in a manner that nullifies a provision.[32]

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[22] *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008); *United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016). Even though the Supreme Court of Virgin Islands in *Williams v. United Corp.* set out a framework for adjudicating motions for summary judgment pursuant to the now-abrogated Federal Rule of Civil Procedure 56(a), the Court finds *Williams's* analysis convincing and suitable for considering motions for summary judgment pursuant to V.I. CIV. R. 56(a). The Court notes that the two rules have identical text. Therefore, the Court will continue to use the standard of review set forth in precedent set by the V.I. Supreme Court.

[23] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986). The Court notes the U.S. Supreme Court's interpretation of federal procedural rules is not binding precedent for the Superior Court. However, the Court considers the U.S. Supreme Court's interpretation of Federal Rule of Civil Procedure 56 sound and adopts its analysis.

[24] *Id.* (citing Fed. R. Civ. P. 56(e)).

[25] *Id.* (citations omitted).

[26] *Id.* at 195 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255).

[27] V.I. R. CIV. P. 56(c).

[28] *James v. Guardian Ins. Co.*, No. SX-10-CV-435, 2015 V.I. LEXIS 85, at *10 (V.I. Super. Ct. July 14, 2015) (quoting *Certain Underwriters at Lloyds v. Robert Ellis Brown, Inc.*, 2013 U.S. Dist. LEXIS 3809, at *9 (D.V.I. Jan. 10, 2013)).

[29] *Id.* at *11.

[30] *Freund v. Liburd*, No. ST-11-CV-730, 2016 V.I. LEXIS 87, at *13 (V.I. Super. Ct. July 7, 2016).

[31] *See* 22 V.I.C. § 846.

[32] *Weary v. Long Reef Condo. Ass'n*, 57 V.I. 163, 175 (V.I. 2012) (Hodge, C.J., dissenting in part) ("Any such reading which renders contract provisions pointless, superfluous, or ineffective violates basic notions of contract interpretation, and leads to an absurd result which should not be entertained").

C. Analysis

1. Summary Judgment is Appropriate at the Current Stage of This Matter's Proceedings.

The parties' disputes centers on the interpretation of the insurance policy and "the interpretation, construction and legal effect of an insurance policy is a question to be determined by the Court as a matter of law."[33] In addition, the Virgin Islands Code provides that a court may issue declaratory judgments relating to the interpretation of contracts and statutes.[34] The insurance policy has been filed as an attachment to multiple pleadings filed by both parties. Therefore, the Court determines there is no genuine dispute that the copy of insurance policy provided in Defendant's Exhibits to Defendant's "Motion for Summary Judgment – Additional Insured" accurately depicts the terms of the insurance policy.

Plaintiff avers that Form A was included in the insurance policy inadvertently and requests that the Court allow her to conduct further discovery "in order to establish that the incorrect type of 'additional insured endorsement' was attached to the policy . . . ."[35] Plaintiff asserts that Form A is intended to apply to relationships between property owners, general contractors and subcontractors, instead of between landlords and tenants.[36] She argues Form A's language regarding "work" and the additional insured's "general supervision" of the insured's operations applies to a contractor's management of subcontractors or a contractor who agrees to add a property owner to an insurance policy. Claiming Form A is incompatible with a reasonable reading of the insurance policy, Plaintiff asserts that "if the Additional Insured Endorsement relied upon by [Defendant] Underwriters applies to Magens Point Resort, the policy will never cover Magens Point Resort, because KRG [Indigo] was simply leasing space from Magens Point Resort. KRG was not performing operations for Magens Point Resort and Magens Point Resort was not supervising operations being performed by KRG on behalf of Magens Point Resort."[37]

Virgin Islands Rule of Civil Procedure 56(d) governs requests for reservation of ruling on a motion for summary judgment in order to allow a party an opportunity to conduct further discovery. In general, to convince a court that it should reserve ruling on a motion for summary judgment, a party must 1) explain what particular information is sought; 2) how, if uncovered, it would preclude summary judgment; and 3) why it has not previously been obtained.[38] The Court recognizes the burden on the non-moving party in opposing a summary judgment motion is not a

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[33] *Guardian Gen. Insurance Ltd.*, 2016 V.I. LEXIS 215, *7 (V.I. Super. Ct. Oct. 24, 2016) (citing *James v. Guardian Ins. Co.*, 2015 V.I. LEXIS 85, at *10 (V.I. Super. Ct. July 14, 2015)).
[34] 5 V.I.C. § 1262 ("Any person interested under a ... written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, [or] contract ... may have determined any question of construction or validity arising under the ... statute ... [or] contract ... obtain a declaration of rights, status or other legal relations thereunder").
[35] *Id.* at 8-9.
[36] Pl.'s Mot. to Strike [. . .] 5-6.
[37] *Id.* at 6.
[38] *Rivera-Mercado v. Gen. Motors Corp.*, 51 V.I. 307, 313 (V.I. 2009) (citing *Dowling v. City of Phil.*, 855 F.2d 136, 140 (3d Cir. 1988)).

heavy one; she is simply required to show specific facts, as opposed to general allegations, that present a genuine issue of fact worthy of trial.[39]

The primary purpose of contract interpretation is to ascertain and give effect to the parties' objective intent.[40] The Court appreciates that Plaintiff is not a signatory to the insurance policy. Instead, Plaintiff stands in as an assignee of rights for one of the signatories. Therefore, she is tasked with arguing about someone else's intent when executing a contract. It follows that any parole evidence revealing the signatories' mutual intent, such as correspondence discussing the agreement's terms, would not be in her possession without discovery. However, "[w]here the language of a contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of its terms."[41]

The Court determines that Form A, as read within the context of the whole insurance policy, is clear and does not require a reader to go beyond the plain meaning of its terms. As Defendant points out, insurance forms, such as Form A, typically are standard industry forms that must be approved by the Office of Banking and Insurance,[42] as opposed to contract language written for a specific contractual relationship. "An insurance policy form is designed to be used by many different insurers and has exactly the same provisions, regardless of the insurer issuing the policy. Most standard insurance policy forms are developed by insurance advisory organizations . . .."[43] According to the copyright statement at the bottom of the page, Form A appears to be provided by Insurance Services Office, Inc.[44] Because Form A is a standard form, the Court accepts that it likely was written to cover various persons and entities. In addition, insurance policies often contain boilerplate provisions that might be irrelevant to an insured. For example, the insurance policy contains a "Radioactive Contamination Exclusion Clause." But there is no nuclear power plant on St. Thomas and the Court doubts that Indigo had equipment that could cause loss or damage arising from nuclear radiation. Therefore, the Court does not require its language to apply precisely to Indigo and Magens Point Resort. In addition, the presence of inapplicable language does not necessarily mean a form was added by mistake.

Furthermore, it does not appear that Form A's inclusion in the insurance policy is out of place. Form A's title is "Additional Insured – Owners, *Lessees*, or Contractors." (emphasis added, style changed). While Plaintiff states the title "refers to owners and contractors," her discussion leaves out lessees. The inclusion of "Owners" and "Lessees" alludes that Form A is meant to apply to landlords and tenants. Moreover, Defendant proffers landlords are frequently sued when a premise liability action is brought against a tenant because landlords customarily maintain general supervision over the condition of leased premises.[45] In other words, Form A provides that Magens

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[39] *Hanley v. Jones*, 21 V.I. 190, 193-194 (V.I. Super. Ct. 1984) (citing 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2727 (Civil 2d ed. 1983)).
[40] *Phillip v. Marsh-Monsanto*, No. 2015-0040, 2017 V.I. Supreme LEXIS 30, at *15 (V.I. May 30, 2017).
[41] *Id.* at *16.
[42] 22 V.I.C. § 812.
[43] International Risk Management Institute, Inc. (IRMI), standard form or standard policy (last visited Aug. 4, 2017), *available at* https://www.irmi.com/online/insurance-glossary/terms/s/standard-form-or-standard-policy.aspx.
[44] Insurance Services Offices, Inc. provides various services for insurance companies, which includes writing standard forms.
[45] Def.'s Response to Pl.'s Response to Summ. J. 8.

Point Resort is covered if a person sustains an injury on Indigo's property and Magens Point Resort is at least concurrently responsible for maintaining such property. The lease between Magens Point Resort and Indigo provides that the landlord is responsible for some maintenance and repair of the leased premises.[46] Therefore, under plain meaning reading, the insurance policy provides Magens Point Resort with liability coverage for plausible lawsuits. Consequently, Plaintiff fails to convince the Court that a plain meaning reading of the insurance policy does not rationally reveal the signatories' intent and, a result, the Court should reach beyond its plain meaning.

In addition, at the top of the page, Form A instructs in capital letters "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." The instruction further persuades the Court that Indigo did not agree to Form A's inclusion in the insurance policy by mistake.

Plaintiff points out that the Court reserved ruling when addressing Defendant's First Motion for Summary Judgment and implores the Court to issue a similar ruling for the Second Motion. However, in the February 24, 2017 Memorandum Opinion and Order, the Court found that a genuine issue existed as to whether Schedule "B" contained a scrivener's error. When defending against the First Motion, Plaintiff pointed out that "no explanation [was] provided by Defendant as to why Indigo would add Magens Point Resort, Inc., a company that Defendant claims does exist, as an Additional Insured."[47] Consequently, considering that a court should avoid interpreting a contract in a manner that nullifies a provision, the Court determined Plaintiff provided an adequate reason for going beyond the plain meaning of Schedule "B." However, Defendant has provided a plausible reason as to why the Indigo would execute an insurance contract with Form A. Therefore, unlike with the First Motion for Summary Judgment, Plaintiff has failed to convince the Court it should reserve ruling on the Second Motion.

2. The Court Determines the Insurance Policy Did Not Cover Plaintiff's Lawsuit in ST-2008-CV-293.

In her proposed Second Amended Complaint,[48] Plaintiff alleges that Defendant wrongly denied insurance coverage to and refused to defend and indemnify Magens Point Resort. However, a review of the insurance policy reveals that Plaintiff's claims against Magens Point Resort in ST-2008-CV-293 were not covered. As Defendant points out, the complaint in the underlying action[49] did not allege any wrongdoing by Indigo and it did not allege Plaintiff's injuries resulted from Magens Point Resort's negligent supervision of Indigo's operations. The complaint alleged Plaintiff fell while on Magens Point Resort's parking lot[50] and the lease the does provide that the parking lot was part of Indigo's leased premises. In addition, Plaintiff did not allege that the

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[46] *Id.* at Ex. 1, Lease ¶¶ 12, 13, 15.
[47] *Davies v. Certain Underwriters at Lloyds of London*, Case No. ST-2015-CV-0000637, 2017 V.I. LEXIS 34, at *15 (V.I. Super. Ct. Feb. 24, 2017).
[48] Attached to Pl.'s Revised Mot. to Amend Compl. (filed on Nov. 30, 2016).
[49] Compl. (filed on June 16, 2008).
[50] *Id.* at ¶¶ 6, 10.

parking lot was part of Indigo's leased premises irrespective of the terms of the lease.[51] In fact, Indigo is not mentioned in the complaint in ST-2008-CV-293.

Plaintiff's right of action in the present matter is based on Magens Point Resort's assignment of its rights against its insurance carrier. Specifically, Magens Point Resort transferred its right to bring an action against Defendant due to an alleged failure to protect and indemnify Magens Point Resort in accordance with the insurance policy.[52] The Court determines that the insurance Policy did not cover Plaintiff's action against Magens Point Resort. Therefore, the insurance policy did not obligate Defendant to defend or indemnify Magens Point Resort. Consequently, the Court determines Defendant is entitled to favorable judgment as a matter of law.

3. Plaintiff's Proposed Second Amended Complaint Does Not Alter the Court's Summary Judgment Analysis.

The Court notes that Plaintiff's Revised Motion to Amend Complaint[53] is pending. The Supreme Court of the Virgin Islands has expressed that, before ruling on a motion for summary judgment, a trial court should consider whether a proposed amended complaint would alter its summary judgment analysis.[54] Plaintiff's proposed Second Amended Complaint joins Tunick as a defendant and adds other possible d/b/a names for Magens Point Resort.[55] In addition, in Paragraph 12, the proposed Second Amended Complaint includes an additional claim that Defendant failed to provide proper notice of denial of coverage, properly investigate the claim, and provide Magens Point Resort with required information about its claim, and "otherwise failed to properly handle the claim."[56] Paragraphs 5, 6, and 17 allege Tunick improperly wrote the insurance policy and caused Defendant to deny coverage for Magens Point Resort's claim.

Except for Paragraph 12, the proposed Second Amended Complaint does not remove or add claims against Defendant. Therefore, except for Paragraph 12, the Court's summary judgment analysis of claims against Defendant is unaffected by Plaintiff's proposed Second Amended Complaint.

Before dismissing this matter entirely, the Court must determine if allowing Plaintiff leave to file her proposed Second Amended Complaint would be futile in light of its conclusion that the insurance policy did not cover the underlying claims. A dismissal with prejudice is appropriate where granting leave to amend would be futile.[57] The Court will first address the Second Amended

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[51] *See id.*
[52] Pl.'s Mot. to Strike Def.'s [First] Mot. for Summ. J., Ex. 5, Assignment and Agreement Not to Execute ¶ 5.01 (filed on Oct. 5, 2016).
[53] Filed on November 30, 2016,
[54] *See Pedro v. Ranger Am. of the V.I., Inc.*, 63 V.I. 511, 527 (V.I. 2015) ("if the proposed amended complaint advances a new claim while abandoning an original claim and the proposed complaint is valid, but not yet ruled on, a summary judgment order on the then-operative original complaint might rely entirely on different circumstances than are outlined in the proposed complaint").
[55] Revised Mot. to Amend Compl., Ex. 1, Second Amended Compl. (filed on Nov. 30, 2016).
[56] *Id.* at ¶ 12.
[57] *Mills-Williams v. Mapp*, No. 2016-0054, 2017 V.I. Supreme LEXIS 35, at *13 (V.I. July 14, 2017).

Complaint's additional claims against Certain Underwriters at Lloyds of London. Then, the Court will consider the soundness of Plaintiff's allegations against Tunick.

a. Paragraph 12 Does Not Allege a Claim that Survives Summary Judgment Review.

The insurance policy does not provide an explicit duty requiring Defendant to provide proper notice of denial of coverage, investigate claims properly, or provide Magens Point Resort with information about an insurance claim. Therefore, the Court determines that Paragraph 12 alleges breach of the implied duty of good faith and fair dealing. The Court does not construe and Plaintiff's pleadings do not provide any other recognized cause of action.[58] "[A] party breaches the implied covenant of good faith and fair dealing by taking actions that deprive another party of the benefits for which it had bargained."[59] Plaintiff cannot sustain a claim for breach of the implied duty when the subject policy does not obligate Defendant to defend or indemnify Magens Point Resort for Plaintiff's November 22, 2007 fall in the parking lot. The Court found that Defendant did not breach its contractual duty under the insurance policy by denying coverage for the claims arising out of the underlying case. Therefore, Magens Point Resort was not deprived of a benefit owed to it under the insurance policy.[60] Consequently, granting Plaintiff leave to file an amended complaint with Paragraph 12 would not alter the Court's analysis of Defendant's Second Motion.

b. Paragraphs 5, 6, and 17 Fail to Plead a Valid Claim against Tunick.

The proposed Second Amended Complaint adds Tunick as a defendant and alleges it improperly underwrote the insurance policy, in part, by providing the wrong name on the additional insured endorsement. These claims appear to allege a cause of action apart from Defendant's purported breach of contract.

When determining whether an amendment to a complaint would be futile, courts can consider whether it would survive a motion to dismiss.[61] In *Mills-Williams v. Mapp*, the V.I. Supreme Court held that the adoption of Virgin Islands Rule of Civil Procedure 8 supersedes prior precedents which imposed the *Twombly* plausibility standard and restores the notice pleading regime that had been in effect previously.[62] The United States Supreme Court in *Conley v. Gibson*

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[58] The Court notes that Virgin Islands courts have recognized the tort of bad faith of insurance companies. *See Justin v. Guardian Ins. Co.*, 670 F. Supp. 614 (D.V.I. 1086); *Guardian Ins. Co. v. Khalil*, 63 V.I. 3 (V.I. Super. Ct. 2012). However, no Virgin Islands court has adopted the tort of bad faith under the common law analysis provided by *Banks v. Int'l Rental and Leasing Corp.* 55 V.I. 967 (V.I. 2011). Nevertheless, Plaintiff's assertion of a tort of bad faith would be barred by the pertinent statute of limitations. 5 V.I.C. § 31(5).
[59] *Merchs. Commercial Bank v. Oceanside Vill., Inc.*, 64 V.I. 3, 35 (V.I. Super. Ct. 2015).
[60] Similarly, Plaintiff cannot allege a valid claim for the tort of bad faith because the tort relies on an insured demonstrating that an insurer breached an insurance contract. *See Justin*, 670 F. Supp. at 617.
[61] *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2017 V.I. LEXIS 73, at *7-8 (V.I. Super. Ct. May 19, 2017); *Dorsett v. Blomquist*, 2017 V.I. LEXIS 23, *2 (V.I. Super. Ct. Feb. 6, 2017).
[62] 2017 V.I. Supreme LEXIS 35, at *12 (V.I. July 14, 2017).

explained that, under a notice pleading standard, a complaint merely has to provide "the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests."[63]

Reading the proposed Second Amended Complaint in a light most favorable to Plaintiff, the Court determines that the pleading does not adequately notify Tunick what claims are being brought against it. The Court cannot determine and Plaintiff does not express under what legal theory are her claims against Tunick brought. Plaintiff's pleadings addressing her Motion to Amend Complaint also do not reveal the legal theory under which Plaintiff asserts her claims.[64] Therefore, the Court would not grant Plaintiff's Revised Motion to Amend Complaint and, thus, the proposed Second Amended Complaint does not affect the Court's summary judgment analysis.

More so, even if Plaintiff adequately pleaded a valid claim against Tunick, the addition of Paragraphs 5, 6, and 17 still would not alter the Court's summary judgment analysis. The Court will grant Defendant summary judgment because the underlying claims in ST-2008-CV-293 were not covered according to Form A. Plaintiff's claims in Paragraphs 5, 6, and 17 center on Tunick's alleged designation of the wrong entity as the Additional Insured in Schedule "B." However, the Court determines that the insurance policy did not cover Plaintiff's underlying injuries, irrespective of the parties' dispute over what entity is covered as the Additional Insured. Therefore, Plaintiff's assignor of rights suffered no damages resulting from Tunick's alleged typographical error.

IV. CONCLUSION

The Court determines Defendant has met its burden of demonstrating that this matter no longer involves a genuine dispute of facts and that it is entitled to favorable summary judgment as a matter of law. A review of the commercial general liability insurance policy with policy number CPG2684 reveals that Plaintiff's claim against Magens Point Resort in ST-2008-CV-293 was not covered. Therefore, Magens Point Resort did not have a valid claim for breach of contract against Defendant. As Magens Point Resort's assignee of rights, Plaintiff also cannot sustain a claim against Defendant. Consequently, the Court will grant Defendant's Second Motion for Summary Judgment.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion to Strike Underwriters' Motion for Summary Judgment-Additional Insured, or Alternatively, to Extend Time to Conduct Discovery [. . .] (filed on March 20, 2017) is **DENIED**; and it is further

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[63] 355 U.S. 41, 47-48 (1957), overruled by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Brathwaite v. H.D.V.I. Holding Co.*, Super. Ct. Civ. No. 764/2016, 2017 V.I. LEXIS 76, *3 (V.I. Super. Ct. May 24, 2017) (acknowledging that Virgin Islands Civil Procedure Rule 8(a)(2) eliminates the plausibility standard and instead will permit a complaint so long as it "adequately alleges facts that put an accused party on notice of claims brought against it") (cited by *Mills-Williams*, 2017 V.I. Supreme LEXIS 35, at *12).

[64] *See* Pl.'s Mot. to Amend Compl. (filed Nov. 2, 2016); Pl.'s Reply in Support of her Mot. to Amend Comp. (filed on Nov. 30, 2016); Pl.'s Revised Mot. to Amend Compl. (filed on Nov. 30, 2016); Pl.'s Reply in Support of her Revised Mot. to Amend Compl. (filed on Dec. 21, 2016).

ORDERED that Defendant's Motion for Summary Judgment – Additional Insured is **GRANTED**; and it is further

ORDERED that summary judgment is entered in favor of Defendant and against Plaintiff, and Plaintiff's First Amended Complaint is **DISMISSED with prejudice**; and it is further

ORDERED that all outstanding motions are **DENIED as moot**; and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to Lee J. Rohn and Associates, LLC (Kevin J. Kuhn) and Garry Garten, Esquire.

Dated: August 25, 2017

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: Lennne Scatliffe
for **Lori Boynes-Tyson**
Chief Deputy Clerk 8/25/2017