SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

CAROLYN ESPERSEN,	)
	) **CIVIL NO. ST-14-CV-355**
Plaintiff,	)
v.	)
SUGAR BAY CLUB & RESORT CORP. d/b/a SUGAR BAY RESPORT AND SPA, AIMBRIDGE HOSPITALITY, L.P. and ATLANTIC HUMAN RESOURCES, L.P.,	)
Defendants.	)

MEMORANDUM OPINION

Before the Court are eight motions: (1) a motion to extend the deadline for filing a motion for summary judgment filed by Defendants Sugar Bay Club & Resort Corp. and Atlantic Human Resources, L.P.; (2) a motion to amend the Answers of Sugar Bay and Atlantic; (3) a joint motion for summary judgment filed by Sugar Bay and Atlantic with respect to all claims, joined by Aimbridge Hospitality, L.P., with respect to the wrongful discharge claim; (4) a motion to strike deposition testimony filed by Sugar Bay; (5) a motion for reconsideration filed by Aimbridge; (6) a motion for relief from the Court's July 18, 2018, dismissal of the defamation claim filed by Plaintiff; (7) a motion for leave to file a second motion for summary judgment out of time filed by Sugar Bay and Atlantic; and (8) a second motion for summary judgment with respect to the wrongful discharge claim filed by Sugar Bay and Atlantic, joined by Aimbridge on October 30, 2018.

Because Defendants' delay in amending their Answers is undue, Defendants' motion to amend their Answers must be denied. Because there exist genuine issues of material fact as to whether Sugar Bay and Atlantic lawfully terminated Espersen and whether Sugar Bay defamed her, the portion of the motion for summary judgment seeking dismissal of the wrongful discharge claims must be denied, and the portion of the motion seeking dismissal of the defamation claim asserted against Sugar Bay must be denied. Because there is an absence of a genuine issue of material fact as to whether Atlantic defamed Espersen, the portion of the motion for summary judgment seeking dismissal of the defamation claim asserted against Atlantic must be granted. Because there is no evidence that Atlantic defrauded or deceived Espersen, the portion of the motion for summary judgment seeking dismissal of the claim for breach of the covenant of good faith and fair dealing asserted against Atlantic must be granted. Because there is no rule empowering the Court to strike deposition testimony prior to trial, Defendants' motion to strike must be denied, and further, because the testimony that Defendants seek to strike is admissible, the Court must not exclude it as inadmissible evidence with respect to summary judgment. The Court will grant Defendant Aimbridge's motion for reconsideration for the limited purpose of explaining the Court's interpretation of 24 V.I.C. § 62, but, because the Court did not err in finding that Espersen qualifies as an "employee" and that there is a genuine issue of material fact regarding whether Aimbridge was a joint employer, the relief sought by Aimbridge must be denied. Because the facts do not entitle Espersen to relief under V.I. R. CIV. P. 60(b), the motion for relief from the Court's Order dismissing Espersen's defamation claim against Aimbridge must be denied. Finally, because a discretionary extension is not appropriate, Defendants' motion for leave to file a second joint motion for summary judgment out of time must be denied.

RELEVANT FACTUAL & PROCEDURAL HISTORY

Carolyn Espersen was a server at Sugar Bay Club & Resort from August 2010 until her employment was terminated on September 29, 2013.[1] On September 15, 2013, two managers witnessed a customer give Espersen cash which Espersen did not declare at the end of her shift.[2] Defendants argue that whether the cash was for a sale or a tip, her failure to declare it was a terminable offense,[3] while Espersen contends that the termination was pretextual on the grounds that the cash was for a tip, rather than a sale, and as a server she was not required to declare any cash tips.[4] Espersen originally filed a Complaint on July 17, 2014, and after two amendments, filed the Third Amended Complaint on July 27, 2017. This Court dismissed three of Espersen's nine claims in its July 18, 2018, Opinion and Order,[5] and now, six claims remain in this case: wrongful discharge claims asserted against each of the three Defendants, defamation claims asserted against Sugar Bay and Atlantic, and a claim for breach of the implied covenant of good faith and fair dealing asserted against Atlantic.

On July 13, 2018, Defendants filed a motion for an extension of time to file their motion for summary judgment. On July 30, 2018, Defendants Sugar Bay and Atlantic filed a joint motion for summary judgment with respect to all claims, joined by Aimbridge on August 1, 2018, with respect to the wrongful discharge claim.[6] Also on July 30, 2018, Aimbridge filed a motion for reconsideration of its second motion for summary judgment.[7] On August 31, 2018,

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[1] *See* Third Amended Complaint, ¶6, ¶ 59.
[2] *See* Joint Memorandum in Support of Motion for Summary Judgment, p. 4.
[3] *See id.*, pgs. 10-11.
[4] *See* Plaintiff's Opposition to the Joint Motion for Summary Judgment, p. 6.
[5] *See Espersen v. Sugar Bay Club & Resort Corp.*, 2018 V.I. LEXIS 68, at *29 (V.I. Super. Ct. July 18, 2018).
[6] On August 30, 2018, Plaintiff filed an Opposition to Defendants' Sugar Bay Club & Resort Corp., and Atlantic Human Resources, L.P.'s Joint Motion for Summary Judgment. On September 10, 2018, Defendants Sugar Bay and Atlantic filed a Reply to Opposition to Motion for Summary Judgment.
[7] On August 31, 2018, Espersen filed an Opposition to Aimbridge's Motion for Reconsideration. On September 10, 2018, Aimbridge filed a Reply in Support of its Motion for Reconsideration.

Espersen filed a motion under V.I. R. CIV. P. 60(b) for relief from the Court's Order dismissing Espersen's defamation claim against Aimbridge.[8] On September 10, 2018, Defendants Sugar Bay and Atlantic filed a motion to strike a portion of the deposition testimony of a witness.[9] On October 5, 2018, Defendants filed a motion to amend their Answers.[10] Finally, on October 17, 2018, Sugar Bay and Atlantic filed a motion for leave to file a second joint motion for summary judgment out of time and filed a second motion for summary judgment. Aimbridge joined the latter on October 30, 2018.

DISCUSSION

I. Because Defendants' delay in asserting affirmative defenses is undue, Defendants' motion to amend their Answers must be denied.

Defendants Sugar Bay and Atlantic move to amend their individual Answers to the Third Amended Complaint to add the following two affirmative defenses to the defamation claims:

- "Plaintiff's defamation claims are barred by a conditional privilege concerning communications between parties having a common interest in the subject matter"; and
- "The statement of facts concerning Plaintiff that she alleges are false are substantially true."[11]

In response, Espersen argues that Defendants waived any affirmative defenses to the defamation claims by failing to raise them in Defendants' Answers.[12]

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[8] On September 24, 2018, Aimbridge filed an Opposition to Plaintiff's Rule 60 Motion Directed to the Portion of the Order Granting Aimbridge's Motion for Summary Judgment on Plaintiff's Defamation Claim.

[9] On September 24, 2018, Plaintiff filed an Opposition to the Motion to Strike. On October 5, 2018, Defendants Sugar Bay and Atlantic filed a Joint Reply in Support of the Motion to Strike.

[10] On October 15, 2018, Plaintiff executed an Opposition to Defendants' (Sugar Bay and Atlantic) Motion to Amend Answer to Third Amended Complaint. On November 7, 2018, Defendants filed a Reply to Opposition to Motion to Amend Answer to Third Amended Complaint.

[11] *See* Defendants' Motion to Amend Answer to Third Amended Complaint, p. 3. Defendants' proposed amendment also seeks to eliminate an affirmative defense that Defendants state is an erroneous repetition of another affirmative defense.

[12] *See* Plaintiff's Opposition to Defendants' Joint Motion for Summary Judgment, pgs. 20-21.

V.I. R. CIV. P. 8(c) requires a defendant to plead any affirmative defenses in response to a complaint. "The purpose of requiring the defendant to plead available affirmative defenses in his answer is to avoid surprise and undue prejudice by providing the plaintiff with notice and an opportunity to demonstrate why the affirmative defense should not succeed."[13] "Although '[p]arties are generally required to assert affirmative defenses early in litigation, so they may be ruled on, prejudice may be avoided, and judicial resources may be conserved,'"[14] a "court may permit a defendant to raise an unpled defense by way of a post-answer motion so long as it is raised 'at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.'"[15] V.I. R. CIV. P. 15(a)(2) permits a party to amend its pleading, including to assert an affirmative defense, with the opposing party's written consent or the court's leave, which the court should freely give when justice requires. For example, when a particular defense becomes apparent after discovery takes place and could not have been known by the party prior to discovery, it would be reasonable for the Court to grant leave to amend a pleading.[16] But, leave is inappropriate when, among other things, there has been undue delay or the opposing party would be prejudiced if the amendment is allowed.[17] Accordingly, a court "must not let the

[13] *Courteau v. United States*, 287 F. App'x 159, 162 (3d Cir. 2008) (quoting *Chainey v. Street*, 523 F.3d 200, 210 n.5 (3d Cir. 2008)).
[14] *Id.* at 161 (quoting *Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002)).
[15] *Id.* at 161-162 (quoting *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991) (brackets in original)) (citation omitted).
[16] *See Martinez v. Baldwin Steel Co.-Chicago Div.*, 2000 U.S. Dist. LEXIS 11563, at *10-*11 (N.D. Ill. July 24, 2000) (citing *Venters v. City of Delphi*, 123 F.3d 956, 967 (7th Cir. 1997)). The Court determines that decisions interpreting the Federal Rules of Civil Procedure are persuasive authority where the Virgin Islands Rules of Civil Procedure and Federal Rules of Civil Procedure are substantively identical. Here, F. R. CIV. P. 15(a)(2) as applied in *Martinez* is substantively identical to V.I. R. CIV. P. 15(a)(2), and thus, the case is persuasive.
[17] *See Pedro v. Ranger Am. of the V.I., Inc.*, 63 V.I. 511, 522-23 (V.I. 2015) (Gomez, J., dissenting) ("A motion to amend may be denied for reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment") (internal quotation marks and citations omitted); *see also Williams v. Cost-U-Less, Inc.*, 2014 U.S. Dist. LEXIS 90849, at *17 (D.V.I. July 3, 2014) (providing that undue delay is, by itself, a sufficient ground to deny leave to amend).

merits of the affirmative defense sway its decision"[18] when a defendant attempts to invoke the affirmative defense at the eleventh hour, without excuse and without adequate notice to the plaintiff.[19]

This case is four years old. The original Complaint, filed July 17, 2014, asserted, in part, claims of wrongful discharge and defamation against Sugar Bay.[20] Sugar Bay should have recognized from the face of the original Complaint that the affirmative defenses of "truth" and "conditional privilege" were applicable to the defamation claim. Similarly, the Third Amended Complaint filed July 27, 2017, asserted wrongful discharge and defamation claims against Atlantic,[21] putting Atlantic on notice to assert affirmative defenses for those claims. "Once the availability of an affirmative defense is reasonably apparent, the defendant must alert the parties and the court of his intent to pursue that defense."[22] Defendants have offered no explanation for failing to assert these affirmative defenses within the times permitted for discovery or for filing dispositive motions prescribed by the Court's February 6, 2018, Scheduling Order. Defendants filed their motion to amend the Answers on October 5, 2018— more than two months after the deadline for dispositive motions on July 15, 2018, and more than four months after the deadline for discovery on May 30, 2018. Accordingly, Defendants' delay in asserting the defenses is undue. By contrast, had the affirmative defenses only become reasonably apparent through information obtained from an opposing party during the discovery process, and had Defendants

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[18] *Martinez* at *13.
[19] *See id.* (citing *Venters*, 123 F.3d at 969); *see also Martinez at *13* ("We . . . will not speculate as to how the case would have proceeded had the correct procedure been followed.") (quoting *Maul v. Constan*, 928 F.2d 784, 786 (7th Cir. 1991)).
[20] *See* Complaint, pgs.
[21] *See* Third Amended Complaint.
[22] *Martinez* at *11-*12 (quoting *Venters*, 123 F.3d at 967).

asserted the defenses within the confines of the Scheduling Order, the Court would not find Defendants' delay undue.

Because Defendants' undue delay in asserting the defense suffices for a denial of the motion to amend, the Court need not determine whether the amendment would unduly prejudice Espersen. Nonetheless, the Court observes that permitting Defendants to raise the conditional privilege at this procedural juncture could burden Esperson with additional expense or preparation to defend against it, and without the benefit of an opportunity to conduct relevant discovery, the amendment would prejudice Espersen.[23] In the Virgin Islands, a claim of defamation requires: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[24] "The term 'unprivileged' refers to the alleged defamer's inability to demonstrate that he was in some way 'privileged' to make the defamatory communication."[25] The types of privilege defenses available fall into two categories: "absolute privileges"[26] and "conditional privileges."[27] While an absolute privilege is generally limited to legislative, judicial, or quasi-judicial proceedings[28] and affords a complete defense to

[23] *See Davis v. Perez*, 2017 U.S. Dist. LEXIS 131077, at *9 (D.N.J. Aug. 16, 2017) ("To determine if a party is unduly prejudiced courts examine, inter alia, whether the amendment will result in significant additional discovery, cost, or preparation to defend against new facts or theories") (citations omitted); *see also Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend").
[24] *Kendall v. Daily News Publ'g Co.*, 55 V.I. 781 (2011) (quoting and adopting Restatement (Second) of Torts § 558); *see also Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 585-86 (V.I. 2012) ("This Court has adopted the basic elements for a claim of defamation set forth in the Second Restatement of Torts").
[25] *Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 586 (V.I. 2012).
[26] *Id.* (citing Restatement (Second) of Torts §§ 583-592A).
[27] *Id.* (citing Restatement (Second) of Torts §§ 593-598).
[28] *See generally* Restatement (Second) of Torts, § 585-592A (1979).

defamation, a conditional privilege with respect to the employer-employee relationship[29] provides immunity when the publisher and recipient each has an common interest in the subject matter[30] and the publisher does not abuse the privilege.[31] The conditional privilege may be abused and its protection lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter, by the publication of the defamatory matter for some improper purpose, by excessive publication, or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.[32] Whether there is an abuse of a conditional privilege is generally a fact question for the jury,[33] and thus, to defeat summary judgment, a claimant must produce evidence demonstrating a genuine issue of material fact as to the abuse of the conditional privilege.[34]

Notably, the Virgin Islands Supreme Court has adopted absolute privilege as an affirmative defense to defamation[35] but has not yet adopted conditional privilege and the loss of the privilege through abuse as the common law of the Virgin Islands, nor has the Superior Court

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[29] *See* Restatement (Second) of Torts, § 596 (1979).
[30] *Id.*
[31] *See* Restatement (Second) of Torts, § 593 and § 599 (1979).
[32] *See* Restatement (Second) of Torts, § 596 cmt. a (1979) (citing §§ 600-605A).
[33] *See* Restatement (Second) of Torts, § 619(2) (1979).
[34] *See generally* Restatement (Second) of Torts, § 613 Burden of Proof:
(1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,
  (a) the defamatory character of the communication,
  (b) its publication by the defendant,
  (c) its application to the plaintiff,
  (d) the recipient's understanding of its defamatory meaning,
  (e) the recipient's understanding of it as intended to be applied to the plaintiff,
  (f) special harm resulting to the plaintiff from its publication,
  (g) the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and
  (h) the abuse of a conditional privilege.
(2) In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication.
[35] *See Mills-Williams v. Mapp*, 67 V.I. 574, at n.11 (V.I. 2017) (adopting the affirmative defense of absolute privilege as the best rule for the Virgin Islands and concluding that the Governor of the Virgin Islands is entitled to absolute immunity from defamation for statements made in conjunction with his or her official duties).

conducted a *Banks* analysis on this topic. Assuming for argument that the Court were to direct the parties to submit supplemental briefs addressing the *Banks* factors regarding conditional privilege, then to conduct a *Banks* analysis concluding that the conditional privilege should be adopted into Virgin Islands' common law, and finally, to permit Defendants to raise the defense, Espersen would be deprived of the opportunity to explore the merits of the conditional privilege defense in discovery, including any facts necessary to defeat it. Further, this Court's determination of the portion of Defendants' summary judgment motion with respect to the defamation claims would be postponed and the case further delayed for all parties involved.

Accordingly, the Court deems Defendants' affirmative defenses waived and the motion will be denied. Ultimately, Defendants' failure to timely assert the affirmative defense of "truth" is inconsequential to Defendants, since Espersen must nonetheless prove the falsity of allegedly defamatory communications at trial.

II. Defendants' Motion to Strike and Plaintiff's Request to Exclude the Combs Affidavit in Opposition to Defendants' Motion to Strike

After filing their joint motion for summary judgment, Defendants filed a motion to strike a portion of the deposition testimony of Carrie Combs, arguing that Combs' testimony constitutes an ambiguous response to an improper question posed by opposing counsel and should not be considered in the Court's summary judgment analysis on the wrongful discharge claims asserted against Sugar Bay and Atlantic.[36] Because the Court's decision on the motion to strike will affect its summary judgment analysis, the Court evaluates Defendants' motion to strike prior to reaching the dispositive motion for summary judgment.

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[36] Defendants' Motion to Strike, pgs. 6-8.

A. Because there is no rule empowering the Court to strike evidence at the pre-trial stage, the Court must deny Defendants' motion to strike the evidence. Further, the evidence that Defendants seek to strike is admissible, and thus, the Court will not exclude it from consideration in deciding whether summary judgment is appropriate.

Defendants Sugar Bay and Atlantic move to strike the following emphasized portion of Combs' deposition:

> Q Would you agree with me that in this employee handbook, there is no discussion of the policies for cash handling?
>
> A I would agree with you that cash handling is not in the employee handbook.
>
> (Deposition Exhibit No. 17 was marked for identification.)
>
> Q Exhibit 17, do you recognize this as the Sugar Bay Standard Operating Procedures of March 2013 for the food and beverage services process?
>
> A Yes.
>
> Q Now, this provides that "Cash interactions would be handled through the cashier supervisor." And then it says "Each cash check to be handled by the manager, supervisor on-duty at the time." So who would that manager/supervisor be?
>
> MR. RAMES: Object to form.
>
> Q At the pool bar, who would that manager supervisor be?
>
> A Whichever restaurant manager/supervisor was scheduled for that day for the day shift.
>
> Q Okay. So any cash interactions had to be done by the manager or supervisor?
>
> A The manager/supervisor should receive the cash. The employee can take the cash, but they have to report it to the manager or supervisor.
>
> Q Well, it says "Each cash check must be handled by the manager or supervisor." So that means that the manager or supervisor has to do the cash check? Does that mean that?
>
> A It means that the manager or supervisor will take the cash at the cash drop at the end of the day. Sometimes if they needed change, they go to the manager or supervisor but the manager or supervisor should get the cash interactions.
>
> Q Well, this just says, "Each" – I don't want to be argumentative but it says "Each cash check." So does that mean each time there's cash check?
>
> MR. RAMES: Objection.

> Q I answered the question to the best of my ability.
> Q And this provides that under Gratuities, "Gratuities added on a room charge or credit card must be recorded on the tip distribution sheet with the date.["] Those are the only tips that have to be recorded, correct?
> MR. RAMES: Object to form.
> **Q If it's a cash tip, it doesn't have to be recorded.**
> **A It says that servers will keep cash tips. Servers are responsible for reporting of tips for Internal Revenue purposes.**
> **Q Right. So there's no reporting cash tips; isn't that correct?**
> **MR. RAMES: Object to form.**
> **A According to policies, correct. That is cash tips, not checks.**[37] [emphasis added]

Defendants make clear that they do not seek to change the deposition testimony under V.I. R. CIV. P. 30(e).[38] Rather, they argue that the testimony should be stricken as an improper question and answer exchange.[39]

V.I. R. CIV. P. 12(f) permits the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" but does not empower the Court to strike material outside of the pleadings such as deposition testimony. V.I. R. CIV. P. 56(c) provides that the Court may decide a summary judgment motion based upon the materials in the record, including any depositions, documents, and affidavits. V.I. R. CIV. P. 56(c)(2) states that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Accordingly, if the Court determines that evidence offered by a party is inadmissible, the Court may disregard it in deciding a motion for summary

[37] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Carrie Combs Deposition, pgs. 80-82.
[38] *See* Joint Reply in Support of Motion to Strike, pgs. 8-9.
[39] *Id.*; *see also* Motion to Strike, p. 5 ("Specifically, Defendants argue that "Carrie Combs was asked an improper question that assumes facts not in evidence, was argumentative, was vague and ambiguous, was confusing and leading").

judgment, since that material would not serve to establish a genuine issue of material fact. But, there exists no rule in the Virgin Islands permitting the Court to strike inadmissible evidence from the record at the pre-trial stage. Consequently, the Court must deny the motion to strike. The Court will, however, construe the motion to strike as one to disregard the deposition testimony of Combs as inadmissible for the purpose of deciding the motion for summary judgment.

To determine whether evidence is admissible, the Court must first consider the relevancy of the evidence.[40] Under V.I. R. EVID. 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Relevant evidence is admissible unless provided otherwise in the United States Constitution, a federal statute, the Virgin Islands Rules of Evidence, or other rules prescribed by the Supreme Court of the Virgin Islands, and irrelevant evidence is not admissible.[41] The Court may then exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[42]

Here, Defendants contend that counsel's question—"So there's no reporting cash tips; isn't that correct?" —must be stricken as leading, argumentative, and assuming facts not in evidence, and Combs' answer—"According to policies, correct.[43] That is cash tips, not checks."—must be stricken as an unclear answer.[44] To the extent that the question was leading,

[40] *See People of the V.I. v. Charlery*, 2014 V.I. LEXIS 97, at *7 (V.I. Super. Ct. Oct. 27, 2014).
[41] V.I. R. EVID. 402.
[42] V.I. R. EVID. 403.
[43] *See* Defendants' Motion to Strike, pg. 7.
[44] *Id.* at 6.

V.I. R. EVID. 611(c) provides, in part, that "leading questions should not be used on direct examination except . . . (2) when a party calls . . . an adverse party, or a witness identified with an adverse party." As a result, the question is permissible, since Combs is a witness identifying with Sugar Bay and Atlantic, parties adverse to Espersen. To the extent that the question is argumentative or assumes facts not in evidence, those are not factors under the V.I. R. Ev. 403 test. Further, Defendants fail to argue or present any facts indicating that the probative value of the testimony is substantially outweighed by a danger of misleading the jury. Accordingly, the substance of the contested portion of the Combs deposition is admissible and subject to inclusion in the Court's summary judgment analysis. Moreover, because Combs' answer goes to the weight of the evidence, and questions of weight are for a jury to determine,[45] the Court must not exclude it.[46]

B. The Court must deny Plaintiff's request to exclude Defendants' affidavit from the Court's consideration, because to the extent that the affidavit and former

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[45] *See Rymer v. Kmart Corp.*, 68 V.I. 571, 577 (V.I. 2018) ("assessment and resolution of the meaning and weight of the evidence belongs with a jury"); *see also id.* ("if a credibility determination is necessary as to the existence of a material fact, a grant of summary judgment would be improper") (citation omitted).

[46] The Court observes that even if the testimony could be excluded, a genuine issue of material fact would nonetheless exist because elsewhere in the deposition, Combs' testimony indicates that Sugar Bay did not require the reporting of cash tips to Sugar Bay at the end of each shift. Where Espersen's counsel asked Combs about Espersen's September 15, 2013, tip sheet, on which Espersen had recorded only one tip made via credit card in the amount of $9.00, the exchange was as follows:

"Q Exhibit 59, can you identify what that is?

A It states "Tip Sheet" dated 9-15-2013.

Q Okay.

A Joe's signature and someone writing "no cash," or maybe that's Carolyn's signature, but it says "manager's sign." So if it was attached –I believe it was attached to something else.

Q I think it was too but when I got it, they didn't – this was attached – produced at a different time than the original documents were, so I don't know what it was attached to.

Now, you were only supposed to record tips that you get – according to the policy, tips that you get pursuant to a charge, correct?

A That would be correct. [emphasis added]

Q So, this tip sheet would be her reporting the $9.00 tip that she got on the 57, and the $9.00, this would be her $9.00?

A That would be – it correlates to the service charge, so, yes. This was probably turned in with her paperwork for the day."

See Plaintiff's Opposition to Motion to Strike, Exhibit 3: Carrie Combs Deposition, pgs. 111-112).

> testimony conflict, the conflict goes to the credibility of the witness and the weight of the evidence.

In support of Defendants' argument that Espersen was lawfully terminated, Carrie Combs, who was an employee of Atlantic and whose title was the Human Resources Director of Sugar Bay,[47] submitted an affidavit on July 27, 2018, attesting that Sugar Bay required servers to report cash tips at the end of each shift.[48] Espersen's Opposition to Defendants' motion to strike Combs' testimony asserts that Combs' affidavit conflicts with portions of the June 23, 2016, testimony.[49] Combs' affidavit provides in pertinent part:

> During my investigation, I made no distinction as to whether the $20.00 that Espersen acknowledged having received was for drinks or was a tip. If the payment was for drinks, the failure to report the $20.00 was dishonest and was, therefore, a terminable offense. If the payment was a tip, the failure to report the tip was a violation of Sugar Bay Resort's Tipped Associates Policy and was a terminable offense . . . The Tipped Associate Acknowledgment Form states, among other things, that *"I understand that it is my responsibility to properly report on a daily basis all charge and cash tips which I receive. I also understand that failure to do so could result in a disciplinary action up to and including termination"*.[50]

By contrast, Combs' June 23, 2016, testimony, which the Court declined to strike, indicates that Sugar Bay did not require servers to report cash tips to Sugar Bay.

> Q If it's a cash tip, it doesn't have to be recorded.
> A It says that servers will keep cash tips. Servers are responsible for reporting of tips for Internal Revenue purposes.
> Q Right. So there's no reporting cash tips; isn't that correct?
> MR. RAMES: Object to form.

[47] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Carrie Combs Deposition, pgs. 27-28, 184 (Combs provides that by contract with Sugar Bay, Atlantic managed Sugar Bay's Human Resources Department, and Sugar Bay referred to Combs as Sugar Bay's Human Resources Director).
[48] *See* Defendants' Motion to Strike, Exhibit A: Affidavit of Carrie Combs.
[49] *See* Plaintiff's Opposition to Motion to Strike, pg. 23.
[50] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 4: Affidavit of Carrie Combs, pg. 2. The affidavit is signed by Combs in her capacity as a former employee of Atlantic and former Director of Human Resources for Sugar Bay.

> A According to policies, correct. That is cash tips, not checks.[51]

Notably, Espersen asserts that the Tipped Associates Policy was obsolete at the time of her discharge, having been replaced by the "Standard Operating Procedures" which only required servers to record on their daily tip sheets any tips made pursuant to a charge.[52] The Standard Operating Procedures provide in pertinent part:

- "Gratuities added on a room charge or credit card must be recorded on the tip distribution sheet with the date. Room Charge & Credit Card Charge gratuities will be added weekly to servers [sic] pay checks by the paymaster";[53]
- "A Tip Distribution Sheet will be completed each day. Supervisors/[]Managers are responsible for signing it at the end of each shift";[54] and
- "Servers will keep all cash tips. Servers are responsible for reporting their tips for Internal Revenue purposes."[55]

Espersen asks the Court to adopt the Sham Affidavit Doctrine as the best rule for the Virgin Islands under *Banks* and then to apply the doctrine to exclude Combs' affidavit as a sham.[56] Espersen argues that Defendants submitted Combs' affidavit in an attempt to replace Combs' prior contradictory deposition testimony, and thus, to support Defendants' summary judgment motion.[57] Espersen appears concerned that if the Court does not exclude the affidavit from the

[51] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Carrie Combs Deposition, pg. 82.
[52] *See* Plaintiff's Opposition to Motion to Strike, pg. 23.
[53] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 5.
[54] *Id.*
[55] *Id.*
[56] *See* Plaintiff's Opposition to Motion to Strike, pgs. 18-22.
[57] *Id.* at 23 and 26.

Court's summary judgment analysis, the Court could find an absence of a factual dispute, entitling Defendant to summary judgment on the wrongful discharge claim.

The Virgin Islands Supreme Court has not yet addressed whether the Sham Affidavit Doctrine operates in this jurisdiction, but the Court observes that a *Banks* analysis is not required to determine the doctrine's applicability. The Sham Affidavit Doctrine is a product of rule construction rather than common law, since it is based upon the rules of civil procedure and evidence.[58] The doctrine recognizes that the object of summary judgment is "to discover whether one side has no real support for its version of the facts," and thus, to avoid unnecessary trials.[59] The purpose of the doctrine is to prevent a party who has been deposed from later raising an issue of fact by submitting an affidavit contradicting the party's prior deposition testimony, precluding summary judgment.[60] The doctrine is triggered when a party submits a sham affidavit in opposition to a motion for summary judgment so as to create a genuine issue as to a material fact,[61] and some courts have extended the doctrine to affidavits provided in support

[58] Because the Virgin Islands Rules of Civil Procedure were promulgated by the Virgin Islands Supreme Court, a *Banks* analysis is not appropriate for their interpretation. In *Gov't of the V.I. v. Connor*, the Virgin Islands Supreme Court instructed the Superior Court to perform a three-part *Banks* analysis to determine the common law of the Virgin Islands when considering a question of common law not foreclosed by prior precedent from the Virgin Islands Supreme Court, ("instead of mechanistically following the Restatements, courts should consider three non-dispositive factors to determine Virgin Islands common law: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands") 60 V.I. 597, 600 (V.I. 2014) (internal quotation marks and citation omitted). Because the second factor of the *Banks* analysis requires a consideration of the position taken by a majority of courts from other jurisdictions, and the Virgin Islands Rules of Civil Procedure are designed for Virgin Islands courts specifically while other bodies of procedural rules are tailored to their respective jurisdictions, the application of the second factor of the *Banks* analysis could work against the proper construction of the Virgin Islands Rules of Civil Procedure.

[59] *Salguero v. Fed. Realty Inv. Tr.*, 2015 Conn. Super. LEXIS 761, at *6 (Ct. Super. Ct. Mar. 31, 2015) (quoting *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

[60] *See id.*

[61] *See Anderson v. Am. Fed'n of Teachers*, 67 V.I. 777, n.8 (V.I. 2017).

of summary judgment.[62] Other courts reject the doctrine altogether as "improperly shift[ing] credibility determinations from the trier of fact to the trial court on summary judgment."[63]

Without determining whether the Sham Affidavit Doctrine should operate in this jurisdiction to exclude an affidavit that creates an issue of fact for trial, the Court will decline to apply the Sham Affidavit Doctrine to exclude an affidavit that supports summary judgment. This Court opines that to disregard an affidavit that attempts to support summary judgment is to improperly weigh the evidence, since factual discrepancies may create an issue of credibility of the affiant or deponent, and credibility questions are not appropriate for resolution on a motion for summary judgment.[64] Accordingly, this Court determines that to the extent that Combs' affidavit and former testimony conflict, the conflict goes to the credibility of Combs, and thus, to the weight of Defendants' evidence. Espersen's request to exclude the affidavit from the Court's consideration must therefore be denied.

III. Because a discretionary extension is appropriate, Defendants' motion for an extension of time to file their motion for summary judgment must be granted and the motion deemed timely filed.

On July 13, 2018, Defendants filed a motion for an extension of time to file their motion for summary judgment. Defendants asked the Court for permission to file their motion by July 30, 2018, instead of by July 16, 2018, as provided by the Scheduling Order, and to excuse

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[62] *See Illaraza v. Anthony Crane Int'l*, 2011 U.S. Dist. LEXIS 110220, at *5-*6 (D.V.I. Sep. 23, 2011) ("While the sham affidavit doctrine states that a contradictory affidavit cannot be used to defeat summary judgment, the Court assumes for purposes of this motion that facts alleged in an affidavit that contradict the affiant's prior sworn statements likewise cannot be used to *support* summary judgment") (citing *Fair v. Prime Sec. Distributors, Inc.*, No. 96-1989, 1997 U.S. App. LEXIS 36753, *6-7, [WL], at *2 (6th Cir. Dec. 29, 1997)).

[63] *See Anderson*, at n.8 (quoting *Marcantonio v. Moen*, 406 Md. 395, 959 A.2d 764, 771 (2008) (citing *Pittman v. Atl. Realty Co.*, 359 Md. 513, 754 A.2d 1030, 1041 (2000))).

[64] *See Williams v. United Corp.*, 50 V.I. 191, 197 (V.I. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

counsel's delay due to a professional exigency.[65] The motion asserts that Espersen and Aimbridge consented to the motion to extend the deadline.[66] Defendants then filed the motion for summary judgment on July 30, 2018, and Espersen replied to the motion on the merits.[67] The parties have since filed several responses with the Court.[68]

V.I. R. CIV. P. 6(b)(1) governs whether a court may extend the date for the filing of a motion, providing:

> **(1) *In General*.** When an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act. The court may consider whether the request to extend time is made before or after the required date; the reason for the movant's delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party's failure to meet the originally prescribed deadline.

"Courts have equated 'good cause' with the concept of 'excusable neglect,' which requires a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules."[69] "The determination of excusable neglect is at bottom an equitable one, where the court should take into account all

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[65] *See* Consent Motion for Extension of Time for the Filing of Motion for Summary Judgment, pg. 1; *see also* accompanying proposed order.
[66] *See id.*
[67] On August 30, 2018, Plaintiff filed an Opposition to Defendants' Sugar Bay Club & Resort Corp., and Atlantic Human Resources, L.P.'s Joint Motion for Summary Judgment.
[68] On September 10, 2018, Defendants Sugar Bay and Atlantic filed a Reply to Opposition to Motion for Summary Judgment. With respect to the motion for summary judgment, on September 10, 2018, Defendants Sugar Bay and Atlantic filed a Motion to Strike a portion of the deposition testimony of a witness. On September 24, 2018, Plaintiff filed an Opposition to the Motion to Strike. On October 5, 2018, Defendants Sugar Bay and Atlantic filed a Joint Reply in Support of the Motion to Strike.
[69] *In re Adoption of the V.I. Rules of Civil Procedure*, 2017 V.I. Supreme LEXIS 22, at *39-40 (V.I. Apr. 3, 2017) (Reporter's Note to Rule 6, quoting *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 713 (V.I. 2010) (internal quotation omitted)).

relevant circumstances, but the general preference is to decide cases on their merits and accordingly, any doubts should be resolved in favor this preference."[70] In addition, V.I. R. CIV. P. 6-2 provides that the party requesting more time must also "include … [a] statement" indicating "that the moving party has conferred with opposing parties and [that] there is agreement or objection or that despite diligent effort, the moving party cannot ascertain opposing counsel's position".

Because counsel's delay in filing the motion for summary judgment was not exceedingly long, counsel conferred with the opposing parties who consented to permit counsel to file the motion, the potential impact of the delay on the judicial proceedings is minimal, and there is no indication that consideration of the motion on the merits presents any danger of prejudice to the parties, a discretionary extension is appropriate. Thus, Defendants' motion for extension of time extending the deadline to July 30, 2018, is granted, rendering the motion timely.

IV. Motion for summary judgment

Defendants' joint motion for summary judgment argues for dismissal of four of the six claims in this case: the wrongful discharge claim asserted against Sugar Bay, the defamation claims against Sugar Bay and Atlantic, and the claim for breach of the implied covenant of good faith and fair dealing asserted against Atlantic.[71] Aimbridge joins the motion with respect to the wrongful discharge claim. Notably, Defendants did not make an argument for dismissal with respect to Espersen's sixth claim—the wrongful discharge claim asserted against Atlantic.

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[70] *In re Red Dust Claims*, 2017 V.I. LEXIS 98, at *27-28 (V.I. Super. Ct. July 7, 2017) (internal quotation marks, citations, and brackets omitted).

[71] *See* Joint Memorandum in Support of Motion for Summary Judgment, pg. 1 (seeking dismissal of "all counts" asserted against Defendants Sugar Bay and Atlantic); *see also id.* pgs. 3-11 (seeking dismissal of the wrongful discharge claim but only as asserted against Sugar Bay).

Motions for summary judgment are governed by V.I. R. CIV. P. 56, which provides that the Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[72] "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]'"[73] and a fact is material only where it "might affect the outcome of the suit under the governing law[.]"[74] "[T]he party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact."[75] "If the moving party does so, the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in [its] favor."[76] But, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial."[77] "A party asserting that a fact cannot be or is genuinely disputed must . . . (B) support the assertion by (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (ii) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[78]

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[72] V.I. R. CIV. P. 56(a).
[73] *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[74] *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (quoting *Anderson*, 477 U.S. at 248).
[75] *United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016) (quoting *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (citations omitted).
[76] *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017) (citation and internal quotation marks omitted).
[77] *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (internal quotation marks omitted).
[78] V.I. R. CIV. P. 56(c)(1).

"The [C]ourt must credit all reasonable inferences from the evidence on record in favor of the nonmoving party in considering whether there are any disputed issues of material fact"[79] and "must take the non-moving party's conflicting allegations as true if supported by proper proofs."[80] Further, the Court "should not weigh the evidence, make credibility determinations, or draw 'legitimate inferences' from the facts when ruling upon summary judgment motions because these are the functions of the jury."[81] "The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits."[82] The Court must deny summary judgment where a factual dispute exists[83] and must grant summary judgment if the non-moving party cannot establish an essential element of its claim.[84]

A. Claims Nos. 1-3: Because genuine issues of material fact exist regarding the wrongful discharge claims asserted against Defendants, Defendants are not entitled to summary judgment.

24 V.I.C. § 76 "establishes a presumption that an employee is 'wrongfully discharged' if the discharge is for a reason other than one of the nine (9) enumerated in section 76(a) as grounds for discharge."[85] A plaintiff only bears the burden of pleading—and ultimately proving—that the plaintiff was discharged, and the permissible grounds for discharge set forth

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[79] *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citing *Burd v. Antilles Yachting Servs.*, 57 V.I. 354, 358 (V.I. 2012) and *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011)).
[80] *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and internal quotation marks omitted).
[81] *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).
[82] *Hawkins*, 66 V.I. at 117 (citing *Williams*, 50 V.I. at 195).
[83] *See id.* (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009)).
[84] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (explaining that summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").
[85] *Frorup-Alie v. V.I. Hous. Fin. Auth.*, 2004 U.S. Dist. LEXIS 9084, at *15 (D.V.I. Mar. 12, 2004) (quoting *Hess Oil V.I. Corp. v. Richardson*, 32 V.I. 336, 344, 894 F. Supp. 211, 216 (D.V.I. 1995)).

in sections 76(a)(1)-(9) and 76(c) are affirmative defenses that the defendant is required to plead and prove.[86] An employer is not entitled to summary judgment on a wrongful discharge claim asserted under § 76 when the discharged employee demonstrates the existence of a genuine issue of material fact regarding the lawfulness of the discharge.[87]

Sugar Bay seeks dismissal of the wrongful discharge claim on the basis that the discharge was lawful.[88] The parties agree that on September 15, 2013, Espersen did not submit or report to Sugar Bay her receipt of cash from a customer. Sugar Bay argues that its policy required Espersen to declare the receipt of all cash, whether for a sale or a tip.[89] Specifically, Sugar Bay contends that any failure to declare a cash tip was a willful and intentional act of disobedience of a rule or instruction under 24 V.I.C. § 76(4), which provides that an employer may terminate an employee for "wilfully and intentionally disobey[ing] reasonable and lawful rules, orders, and instructions of the employer", and further argues that any failure to submit cash and to declare it as a sale was dishonest under 24 V.I.C. § 76(8), which provides that an employer may terminate an employee for dishonesty.[90] Sugar Bay submits emails from Loss Prevention Manager Dusty Good and Executive Housekeeper Gina Castro as evidence that Espersen mishandled cash on September 15, 2013.[91] Good's email, sent to several personnel at Sugar Bay, including the human resources department, provides in pertinent part:

> Today at approximately 3:30pm Gina and myself were having lunch at Mangrove when we noticed a man and women [sic] with no wristbands, neither visitor band nor registered guest band. They were using the poolside chairs in front of the pool volley ball net

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[86] *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 543-544 (V.I. 2015) (agreeing with the District Court in *Gumbs-Heyliger v. CMW & Assocs. Corp.*, 2014 U.S. Dist. LEXIS 160451, *9-10 (D.V.I. Nov. 13, 2014)).
[87] *Frorup-Alie*, 2004 U.S. Dist. LEXIS 9084, at *16-17.
[88] *See* Joint Memorandum in Support of Motion for Summary Judgment, pgs. 9-11.
[89] *Id.* at 10-11.
[90] *Id.*; *see also* 24 V.I.C. § 76(4) and 24 V.I.C. § 76(8).
[91] *Id.* at 8.

> and using SBR towels. Gina recognized the man as someone that she had seen before on SBR property and that lives at Point Pleasant. As we continued to observe them, the female walked toward the pool bar and order [sic] drinks from Caroline [sic]. Caroline made the drinks and handed them to the female un-registered guest. The unregistered guest then handed Caroline some money and walked away with two drinks, Caroline accepted the money and put it directly into the tip jar on the pool bar counter. No change was given back and Caroline did not go near the register.
>
> Also, Dorette, the poolside LP officer was walking around the pool but was not engaging the guests and did not stop and talk to the non-registered guests. I will be following up with Dorette on my end and issuing documentation.
>
> Gina's witness statement to follow.[92]

Gina Castro's email sent to Sugar Bay's Loss Prevention Manager states:

> Loss Prevention Manager, Dusty, and I were walking to Mangrove and noticed two non-guests seating [sic] by the pool area. I recognized the gentleman since I had a casual conversation with him last night in which he mentioned that he and his wife live in Point Pleasant and both like to hang out in our facilities. Dusty and I proceed to seat [sic] at the table and to have lunch and observe if the security officer would approach the non-guests without wristbands. Security officer Dorette passed by the non-guests and did not notice them.
>
> Then we witnessed the non-guests female walked [sic] to the pool bar to order drinks. She ordered a pink frozen daiquiri from Caroline [sic] and paid her cash for the drinks. Caroline received the cash and placed it on a bucket type tip jar looking container she had on the bar.[93]

The emails by Good and Castro express their observations that Espersen received cash from individuals who were not wearing the wristbands that the resort issued to hotel guests or paying

[92] Joint Memorandum in Support of Motion for Summary Judgment, Exhibit G.
[93] *Id.*, Exhibit H.

visitors. The emails further implicate that the cash was for a sale since the emails were sent before the end of Espersen's shift, before she had filled out a tip sheet.[94] Echoing the allegations by Good and Castro that the cash was for a sale is Manager Joseph Talbert's[95] employee discipline form which reads:

> On Sunday September 15, 2013, Carolyn was observed by 2 managers of Sugar Bay resort & Spa Serving drinks to non-registered Guests receiving cash payment for the drinks. The cash received was never submitted to the hotel at the[]end of Carolyns Shift , [sic] Carolyn was asked by her manager Joseph Talbert at the end of her shift when submitting her paper work if there was any cash to be dropped Carolyn's reply was " no " a POS reading and an investigation/ audit was also conducted of Carolyn's transaction for the day and that proved that no cash transactions were tendered by Carolyn (See attached audit report also Managers statement of witnessing the incident.)[96]

Talbert's discipline form concludes that Espersen failed to both submit and declare the cash as for a sale. Importantly, elsewhere the record indicates that visitors who paid for all-inclusive day passes were entitled to free drinks.[97] Accordingly, because it is possible that such a visitor could not have worn the wristband issued by the front desk, and because the record indicates that neither Good nor Castro ever verified with the front desk whether the customers from whom Espersen

[94] Good's email was sent at 4:39 p.m. and Castro's email at 5:21 p.m. Espersen's Employee Tip Report was generated at 7:02 p.m. *See* Joint Memorandum in Support of Motion for Summary Judgment, Exhibits G, H, and K.
[95] The Court observes that on a few occasions throughout the record, the name Joseph Lambert appears to be substituted for the name Joseph Talbert. The Court refers to the individual as Joseph Talbert, finding nothing to indicate that the names represent separate individuals.
[96] *See* Joint Memorandum in Support of Motion for Summary Judgment, Exhibit M.
[97] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 21: Deposition of Dusty Good, pgs. 19-21 (Q: And am I correct that there was an all inclusive [sic] wrist band that people who weren't house guests could purchase? A: Yes. Q: What other kinds of wrist bands were there? A: They have all inclusive wrist bands that were already hotel guests. They had, I think, hotel guests that wasn't all inclusive, [sic] that they would have to pay for their food and drink but would still have the band. And then they had the visitor bands that you're a visitor and you'll still have to pay for. Q: Unless you weren't an all inclusive visitor? If you're an all inclusive visitor, there will be a different band. You'll get that at the lobby."); *see also* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Deposition of Carrie Combs, pgs. 55-57.

received cash were visitors who had paid for all-inclusive day passes,[98] it is apparent that Good and Castro assumed in their emails that the customers were not entitled to free drinks and that the cash was for a sale. Had they paid for day passes entitling them to free drinks and neglected to wear the wristbands, the cash handed to Espersen would have been for a tip.[99] Further, where the employee discipline form allotted space for the disciplined employee to comment, Espersen wrote: "The 2 guests from Point Pleasant had day wrist bands on. They gave me $20.00 tip. I would never steal and have never stole [sic] money",[100] creating a genuine issue of material fact as to whether the cash was for a tip or sale. Thus, Sugar Bay has failed to demonstrate an absence of an issue of material fact that the cash was for a sale and is not entitled to summary judgment on the basis of dishonesty under 24 V.I.C. § 76(8).

While nowhere do the emails, employee discipline form, or unemployment form indicate that Espersen was discharge due to a failure to report cash received for a tip, Sugar Bay argues that if the cash was for a tip, the discharge was still lawful because "the failure to report the tip was a violation of Sugar Bay Resort's Tipped Associates Policy and was a terminable offense[.]"[101] In response, Espersen contends that the cash she received was for a tip and resort policy required

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[98] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 21: Deposition of Dusty Good, pg. 42; *see also* Joint Memorandum in Support of Motion for Summary Judgment, Exhibit H; *see also* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Deposition of Carrie Combs pgs. 55-57 and 108-110; *see also* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 19: Deposition of Joseph Talbert, pgs. 53-64.

[99] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Deposition of Carrie Combs pg. 102.

[100] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 2: Associate Performance Action Form.

[101] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 4: Affidavit of Carrie Combs, pg. 2. Combs' affidavit provides in part: "During my investigation, I made no distinction as to whether the $20.00 that Espersen acknowledged having received was for drinks or was a tip. If the payment was for drinks, the failure to report the $20.00 was dishonest and was, therefore, a terminable offense. If the payment was a tip, the failure to report the tip was a violation of Sugar Bay Resort's Tipped Associates Policy and was a terminable offense. The Tipped Associate Acknowledgement Form states, among other things, that '*I understand that it is my responsibility to properly report on a daily basis all charge and cash tips which I receive. I also understand that failure to do so could result in disciplinary action up to and including termination[.]*'"

servers to declare on their tip sheets only tips made via credit cards, not by cash.[102] Thus, Espersen asserts she did not act in contravention of 24 V.I.C. § 76(4) or 24 V.I.C. § 76(8).[103] As evidence that the cash was for a tip, Espersen submits a letter dated September 20, 2013, from the customer that she served on September 15, 2013, stating in part:

> Dear Sugar Bay Management,
>
> I was surprised to hear from our bartender that she was being accused of some impropriety. My wife and I live next to Sugar Bay Resort at the Pointe Pleasant Resort. We decided to pay a visit to your establishment last Sunday, September 15, 2013. We were happy to pay $170.00 for the day to enjoy ourselves in your pool area and in your restaurants. We had a wonderful experience until I received a phone call this afternoon from your bartender.
>
> The bartender explained to me that she was being accused of taking cash from me and putting into her tip jar in exchange for free drinks. I have included a copy of my receipt for the payment you received for my visit as well as a copy of the arm bands that you issued me when I arrived. What is alarming to me is that without regard for this young lady's character you have suggested that she was lying or cheating your establishment. The money that she took from me was a tip and meant to go into her tip jar. She was a great hostess and made the experience perfect for us.[104]

Attached to the letter is a copy of a receipt for $170.00 that Sugar Bay issue to the visitor, indicating the visitors' departure date as September 15, 2013.[105] Notably, Dusty Good was shown the receipt during his deposition and recognized it as for an all-inclusive day visit.[106] In addition, Espersen contends that the Wyndham Tipped Associates Policy was replaced by the Standard Operation Procedures.[107] The Standard Operation Procedures provide that servers are required to declare on

[102] *See* Plaintiff's Opposition to Motion for Summary Judgment, pgs. 6-7.
[103] *See id.* at 5-13.
[104] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 6: John Huffman Letter.
[105] *See id.*; *see also id.*, Exhibit 7: John Huffman Receipt.
[106] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 21: Deposition of Dusty Good, pg. 44.
[107] *See* Plaintiff's Opposition to Motion for Summary Judgment, pgs. 6-7.

their daily tip sheets tips made via a charge and do not require servers to declare cash tips to Sugar Bay.[108] Espersen also presents Combs' June 23, 2016, deposition testimony, which indicates that no policy existed requiring cash tips to be recorded:

> Q Exhibit 59, can you identify what that is?
> A It states "Tip Sheet" dated 9-15-2013.
> Q Okay.
> A Joe's signature and someone writing "no cash," or maybe that's Carolyn's signature, but it says "manager's sign." So if it was attached –I believe it was attached to something else.
> Q I think it was too but when I got it, they didn't – this was attached – produced at a different time than the original documents were, so I don't know what it was attached to.
> **Now, you were only supposed to record tips that you get – according to the policy, tips that you get pursuant to a charge, correct?**
> **A That would be correct.** [emphasis added]
> Q So, this tip sheet would be her reporting the $9.00 tip that she got on the 57, and the $9.00, this would be her $9.00?[109]

Espersen's submission of evidence demonstrating that the cash she accepted from the customer was for a tip and that the resort's policy did not require servers to report cash tips creates genuine issues of material fact from which a jury could conclude that Espersen did not disobey any of Sugar Bay's rules under 24 V.I.C. § 76(8). Further, Sugar Bay fails to submit evidence that any violation of the purported cash-tip reporting policy was willful or intentional. Therefore, there is no absence of any issue of material fact demonstrating that the discharge was lawful under 24 V.I.C. § 76(8), and the motion for summary judgment on the wrongful discharge claim must be denied.[110]

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[108] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 5.
[109] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 4: Deposition of Carrie Combs, pg. 112.
[110] *See generally*, *In re Bressman*, 327 F.3d 229, 237-38 (3d Cir. 2003) (citing *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) ("When the *moving* party has the burden of proof … , that party must show *affirmatively* the absence of a genuine issue of material fact: it … must show that, on all the essential

Finally, though Defendants' motion for summary judgment asks to the Court to dismiss all counts against Sugar Bay and Atlantic,[111] the motion contains no argument or evidence to show that Atlantic is entitled to summary judgment on the wrongful discharge claim for the reason that it was not a joint employer of Espersen, and consequently, not subject to the wrongful discharge claim. Because a genuine issue of material facts exists regarding the lawfulness of the termination of Espersen, and because Atlantic has failed to meet its burden to produce evidence indicating an absence of any issue of material fact regarding whether it was a joint employer, the burden has not shifted to Espersen to present affirmative evidence from which a jury might reasonably find that Atlantic was a joint employer subject to a wrongful discharge claim, despite that Espersen, as the nonmoving party, has the ultimate burden of persuasion at trial to demonstrate that Atlantic was Espersen's joint employer. Atlantic has not carried its burden of production and is not entitled to summary judgment on the wrongful discharge claim. The motion must be denied.

B. Claims Nos. 4-5: Because genuine issues of material fact exist regarding the defamation claims asserted against Sugar Bay, Sugar Bay is not entitled to summary judgment. Because there is an absence of evidence indicating that Atlantic defamed Espersen, Atlantic is entitled to summary judgment on the defamation claim.

Defendants argue that they did not defame Espersen and any statements regarding Espersen were subject to a conditional privilege.[112] In response, Espersen alleges that Sugar Bay and Atlantic employees defamed her by placing documents in her personnel file stating that

elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.")) (emphasis in original).

[111] *See* Joint Memorandum In Support of Motion for Summary Judgment, p. 17 ("Sugar Bay and AHRA [Atlantic] pray this honorable court grant summary judgment to them and against Espersen on all counts in Espersen's Third Amended Complaint").

[112] *See* Joint Memorandum in Support of Motion for Summary Judgment, pgs. 11-14.

Espersen was observed, suspended, and terminated for failure to report and deposit cash received for drinks.[113]

To survive summary judgment on a claim for defamation, a plaintiff must allege facts in support of each of the following elements and demonstrate that there is a genuine issue as to any material fact for trial:

> (1) the existence of 'a false and defamatory statement concerning another;' (2) the existence of 'an unprivileged publication [of the false and defamatory statement] to a third party;' (3) 'fault amounting to at least negligence on the part of the publisher;' and (4) 'either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'[114]

"'Publication' means the communication is made either as an intentional or negligent act to someone other than the person defamed."[115] "Specifically, there are two methods of publication depending on whether the party is claiming defamation by libel or slander. Libel is [] 'the publication of defamatory matter by written or printed words.' In contrast, slander is 'the publication of defamatory matter by spoken words.'"[116] "Remarks that impute a criminal offense to a plaintiff are considered defamation *per se*, that is they are actionable regardless of whether the plaintiff can show special harm."[117]

Espersen submits the December 3, 2013, Notice of Nonmonetary Determination issued by the Virgin Islands Employment Security Agency, which provides that VIESA denied

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[113] *See* Plaintiff's Opposition to Motion for Summary Judgment, pg. 18.
[114] *Arvidson v. Buchar*, 2017 V.I. LEXIS 21, at *11-12 (V.I. Super. Ct. Feb. 2, 2017) (quoting *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 223 (V.I. Super. Ct. 2015)).
[115] *Id.* at *12 (citing *Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 586 (V.I. 2012).
[116] *Id.* (quoting *Joseph*, 57 V.I. at 586).
[117] *Illaraza v. Hovensa LLC*, 73 F. Supp. 3d 588, 604 (D.V.I. 2014) (citing Restatement (Second) of Torts § 571 (1977)).

Espersen unemployment benefits because, "[y]our employer reported that you were discharged for taking $20.00 and not reporting it as cash sales. It was further stated that this action was witnessed by two managers."[118] At a minimum, because the VIESA form was published by VIESA, which is not a defendant in this case, the form does not support a claim for defamation asserted against Sugar Bay or Atlantic. As to other relevant documents in the record, the Court observes that Good's September 15, 2013, email carries the implication[119] that the customer gave cash to Espersen as payment for a drink sale rather than for a tip, and thus, that Espersen stole the cash to which Sugar Bay was entitled. Good's email documents his observation that Espersen accepted cash from customers, each not wearing a wristband issued by the front desk to either a paying visitor or a hotel guest, that Espersen "accepted the money and put it directly into the tip jar on the pool bar counter", and that "[n]o change was given back and Caroline [sic] did not go near the register."[120] Castro's email asserts that the visitor "paid" Espersen cash "for the drink" and that Espersen placed the payment in her tip jar, implying theft.[121] Finally, the employee discipline form filled out by Talbert provides that Espersen failed to submit and declare a cash payment for a sale as follows:

> Carolyn was observed by 2 managers of Sugar Bay resort & Spa Serving drinks to non-registered Guests receiving cash payment for the drinks. The cash received was never submitted to the hotel at the end of Carolyns Shift[.][122]

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[118] *See* Plaintiff's Opposition to Motion for Summary Judgment, pg. 18; see also id., Exhibit 13: Virgin Islands Employment Security Agency, Notice of Nonmonetary Determination or Redetermination, pg. 1.
[119] The Court recognizes that defamation may be either implicit or explicit.
[120] Joint Memorandum in Support of Motion for Summary Judgment, Exhibit G.
[121] *Id.*, Exhibit H.
[122] *See* Joint Memorandum in Support of Motion for Summary Judgment, Exhibit M.

Because Espersen has submitted evidence indicating that the cash was for a tip rather than a sale, a reasonable jury could find that the contrary indications found in the emails and discipline form each constitute 'a false and defamatory statement concerning Espersen' since each implies that she stole the cash. Further, because Sugar Bay and Atlantic have waived the affirmative defense of conditional privilege, a reasonable jury could find that each of the statements in the emails and discipline form constitutes "'an unprivileged publication [of the false and defamatory statement] to a third party[.]'"[123] Additionally, because the record does not indicate that Good, Castro, or Talbert ever verified with the front desk prior to publishing their respective material whether the customers who gave Espersen cash had paid for day passes, entitling them to free drinks, a jury could find that each of their respective statements in the emails and discipline form were made with "fault amounting to at least negligence on the part of the publisher[.]"[124] Finally, because "[w]ritten defamation [i.e. libel] is actionable *per se*",[125] and the statements are written, the defamation is actionable.

As a result, there exist genuine issues of material fact as to whether the emails and the employee discipline form each defamed Espersen. Because the record indicates that Good, Castro, and Talbert were Sugar Bay employees,[126] the motion is denied as to Sugar Bay. Because the termination letter authored by Carrie Combs, an employee of Atlantic, contains no defamatory material,[127] and Espersen has not offered any other documents authored by or

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[123] *Arvidson*, 2017 V.I. LEXIS at *11 (quoting *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 223 (V.I. Super. Ct. 2015)).
[124] *Id.* at *11-12 (quoting *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 223 (V.I. Super. Ct. 2015)).
[125] *Joseph*, 57 V.I. at 587 (quoting Restatement (Second) of Torts § 568 cmt. b).
[126] *See* Plaintiff's Opposition to Motion to Strike, Exhibit 3: Carrie Combs Deposition, pg. 184.
[127] *See* Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 12: Termination Letter ("Caroline [sic], this letter is to confirm our conversation on September 29, 2013 regarding your employment status with Sugar Bay Resort and Spa. As discussed, the Resort completed an investigation and as a result of the investigation terminated your employment effective Sept. 29, 2013. You will receive all pay owed to you at the time of termination

statements made by Combs or anyone else employed by Atlantic in support of the defamation claim, there is an absence of evidence indicating that Atlantic defamed Espersen. Atlantic is entitled to summary judgment on the defamation claim, and the motion is granted as to Atlantic.

C. Claim 6: Because there is no evidence that Atlantic defrauded or deceived Espersen, Atlantic's motion for summary judgment on the claim for breach of the covenant of good faith and fair dealing must be granted.

Atlantic asserts that no express contract existed between Espersen and Atlantic, that Atlantic had no employment relationship with Espersen, and that the record is devoid of evidence that Atlantic engaged in any fraud or deceit.[128] The Virgin Islands Supreme Court recognized in *Chapman v. Cornwall*, 58 V.I. 431, 442 (V.I. 2013) that "'[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'" and that, because "[t]he duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations[,]" a "successful claim [for breach of the implied duty of good faith and fair dealing]… requires proof of acts amounting to fraud or deceit on the part of the employer."[129] "The duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations."[130] "Fraud means an

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including any available vacation time. Please contact the hotel with any questions you may have. Sincerely, Carrie Combs HR Representative").

[128] *See* Joint Memorandum in Support of Motion for Summary Judgment, pgs. 15-16.

[129] *Chapman v. Cornwall*, 58 V.I. 431, 441-442 (V.I. 2013). *See contra, Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *40 (V.I. Super. Ct. 2015) (performing a *Banks* analysis and determining the best rule for the Virgin Islands to be that 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). Further, this Court notes that Virgin Islands courts have determined that in order to state a claim for breach of the covenant of good faith and fair dealing based on fraud, "a complainant must demonstrate: (1) a knowing misrepresentation of a material fact, (2) intent by the defendant that the plaintiff would rely on the false statement, (3) actual reliance, and (4) detriment as a result of that reliance." *Galloway v. Islands Mech. Contractor, Inc.*, 2012 U.S. Dist. LEXIS 129014, at *57 (D.V.I. Sep. 11, 2012) (quoting *Mendez v. Coastal Sys. Dev't, Inc.*, 2008 WL 2149373, at *10 (D.V.I. May 20, 2008)).

[130] *Pennick v. V.I. Behavorial Serv.*, 2012 U.S. Dist. LEXIS 23402, at *8 (D.V.I. Feb. 22, 2012) (quoting *Sterling Nat'l Mortg. Co. v. Mortgage Corner*, 97 F.3d 39, 44 (3d Cir. 1996)).

intention to deceive, while deceit involves the act of intentionally giving a false impression."[131] Because, at a minimum, Espersen fails to present any evidence of fraud or deceit on the part of Atlantic, Espersen's claim fails, and the motion must be granted.

V. Defendant Aimbridge's motion for reconsideration will be granted for the limited purpose of clarifying the Court's application of 24 V.I.C. § 62, but the relief sought denied because the Court did not err in concluding that Espersen was an "employee" and that there is a genuine issue of material fact regarding whether Aimbridge was a joint employer.

Aimbridge asks the Court to reconsider whether Aimbridge is entitled to dismissal of the wrongful discharge claim.[132] Except as provided in V.I. R. CIV. P. 59 and 60 relating to final orders or judgments, a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless extended by the court for good cause shown.[133] A motion to reconsider must be based on:

> (1) intervening change in controlling law;
> (2) availability of new evidence;
> (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.[134]

"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."[135]

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[131] *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, No. ST-14-CV-222, 2015 V.I. LEXIS 13 (V.I. Super. Ct. Jan. 29, 2015) (internal quotation marks, citations, and brackets omitted).
[132] *See* Defendant Aimbridge Hospitality, L.P.'s Motion for Reconsideration of Its Second Motion for Summary Judgment Addressing Plaintiff's Wrongful Discharge Claim, pgs. 1-3.
[133] *See* V.I. R. CIV. P. 6-4(a).
[134] V.I. R. CIV. P. 6-4(b).
[135] *Id.*

In its July 18, 2018, Opinion, the Court determined that Aimbridge was not entitled to dismissal of the wrongful discharge claim because sufficient indicia of significant control existed to suggest that Aimbridge acted in the interest of Sugar Bay as a joint employer of Espersen. Invoking V.I. R. CIV. P. 6-4(4), Aimbridge now argues that the Court failed to evaluate whether Espersen was an employee of Aimbridge and that Espersen was never its employee because she did not work under Aimbridge's management for the requisite six-month period provided by 24 V.I.C. § 62.[136] The Court did not specifically address Aimbridge's argument that Espersen was not an employee of Aimbridge, but the Court will address that argument now to explain its application of the statute.

"The first rule of statutory interpretation is that when the statutory language is plain and unambiguous, no further interpretation is required."[137] In such situations, the "[C]ourt does not look beyond the language of the statute in interpreting the statute's meaning."[138] Instead, the "[C]ourt[] must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first cannon [of statutory interpretation] is also the last: judicial inquiry is complete."[139] 24 V.I.C. § 62 defines "employee" as "not includ[ing] any person who has been employed by an employer for less than six (6) calendar months or [who] is a 'public employee . . . .'" and an "employer" as "any person acting in the interest of an employer directly or indirectly that has employed five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in

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[136] *See* Defendant Aimbridge Hospitality, L.P.'s Motion for Reconsideration of Its Second Motion for Summary Judgment Addressing Plaintiff's Wrongful Discharge Claim, p. 2.
[137] *Gayanich v. Gayanich*, 2018 V.I. Supreme LEXIS 19, at *9 (V.I. July 18, 2018) (quoting *Smith v. Henley*, 67 V.I. 965, 972 (V.I. 2017) (internal quotation marks and citation omitted).
[138] *Codrington v. People of the V.I.*, 57 V.I. 176, 185 (V.I. 2012) (citations omitted).
[139] *Id.* (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).

the two (2) year period preceding a discharge[.]"[140] Accordingly, 24 V.I.C. § 62 allows for multiple employers,[141] so that an employer may be a person or a juridical person[142] acting in the interest of an employer directly or indirectly, provided that the employer in whose interest the company acts has employed five (5) or more employees for each working day in each of twenty (20) or more calendar weeks in the two (2) year period preceding a discharge.[143]

Significantly, the definition of employee is divorced from the definition of employer. That an employee does "not include any person who has been employed by an employer for less than six (6) calendar months"[144] indicates that the discharged individual must have only been employed by "an" or one employer for at least six months to be deemed an "employee". Thus, where there are multiple employers or the potential for multiple employers, a discharged individual must have been employed by one of those employers for at least six months to be deemed an "employee". An employer is defined separately as "any person acting in the interest of an employer directly or indirectly that has employed five (5) or more employees for each working day in each of twenty (20) or more calendar weeks in the two (2) year period preceding a discharge".[145] The statute is not ambiguous.

Prior to the Court's July 18, 2018, Opinion, the parties did not dispute that Sugar Bay satisfied the definition of employer, nor did they dispute that Espersen had been employed by Sugar Bay, "an employer" under 24 V.I.C. § 62's definition of employee, for at least six calendar

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[140] 24 V.I.C. § 62.
[141] *Accord Webster v. CBI Acquisitions, LLC*, 2012 V.I. LEXIS 9, at *6-7 (V.I. Super. Ct. Mar. 5, 2012).
[142] The Virgin Islands Wrongful Discharge Act does not define "person" and 1 V.I.C. § 41 provides, "[a]s used in this Code or in any Act of the Legislature, unless it is otherwise provided or the context requires a different construction, application, or meaning[,]" the word "person" "include[s] corporations, companies, associations, joint stock companies, firms, partnerships, and societies, as well as individuals."
[143] 24 V.I.C. § 62.
[144] 24 V.I.C. § 62.
[145] *Id.*

months. Thus, Espersen satisfied the definition of employee. The Court further determined that there was a genuine issue of material fact with respect to whether Aimbridge satisfied the definition of a joint employer under the test articulated in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation.*[146] It is of no matter that Espersen worked under Aimbridge for less than six months, since nowhere does the statute require an employee to have worked under additional employers for a minimum of six months each. As a result, the Court did not err in determining that Espersen was an employee and that there is a genuine issue of material fact as to whether Aimbridge was a joint employer. The relief sought must be denied.

VI. Because Plaintiff is not entitled to the requested relief under V.I. R. Civ. P. 60(b), Plaintiff's motion for relief will be denied.

Espersen asks the Court for relief under V.I. R. Civ. P. 60(b), which provides, in part, that the Court may relieve a party from a Final Judgment or Order for any of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that could not, with reasonable diligence, have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether in a form previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Espersen contends that the Court mistakenly dismissed the defamation claim asserted against Aimbridge in its July 18, 2018, Opinion and Order.

[146] 683 F.3d 462, 469-470 (3d Cir. 2012).

In its July 18, 2018, Opinion, the Court assumed for argument's sake that the defamation claims asserted against Aimbridge arose from the same transaction or occurrence pled in the original Complaint, thus meeting the requirement of V.I. R. Civ. P. 15(c)(1)(B), and determined that the defamation claims asserted against Aimbridge had to be dismissed because the Settlement Agreement demonstrated that Aimbridge and Sugar Bay ended their business contract on November 6, 2013, and because Espersen failed to produce any evidence showing that Aimbridge shared an identity of interest with Sugar Bay within 120 days of Espersen's filing of the original Complaint on July 17, 2014.[147] The Court concluded that, at a minimum, a jury could not find that Aimbridge had constructive notice of the lawsuit, and thus, Espersen failed to satisfy at least one of the requirements for relation back under 15(c), for which a factual showing on all requirements was necessary for a jury to find in her favor on any of the defamation claims asserted against Aimbridge in the July 15, 2016, Second Amended Complaint and retained in the Third Amended Complaint.[148]

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[147] See *Espersen v. Sugar Bay Club & Resort Corp.*, No. ST-14-CV-355, 2018 V.I. LEXIS 68, at *19-24 (V.I. Super. Ct. July 18, 2018).

[148] *See id.* at 24. V.I. R. Civ. P. 15(c) provides that an amended pleading relates back to the filing of the original complaint if the following requirements are met: "(1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it. time-barred and Plaintiffs do not satisfy the requirements for relation back." The "identity of interests" concept, a judicial gloss on F.R. Civ. P 15(c)(1), a mirror image of V.I. R. Civ. P 15(c)(1), provides that: "the institution of the action serves as constructive notice of the action to the parties added after the limitations period expired, when the original and added parties are so closely related in business of other activities that it is fair to presume the added parties learned of the institution of the actions shortly after it was commenced . . . The identity of interest principle is often applied where the original and added parties are a parent corporation and its wholly owned subsidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate." *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979). "The many other courts to have recognized the 'identity of interest' exception to Rule 15(c) have also necessarily held that Rule 15(c) allows for the addition of a party, rather than only for the correction of a party's name." *Lundy v. Adamar of N.J.*, 34 F.3d 1173, n.27 (3d Cir. 1994). Further, the identity of interests concept relates only to the requirement of Rule 15(c)(1) that the added party received notice of the institution of the action before the limitations period expired. *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 103 (1st Cir. 1979). Thus, even when an "identity of interest" is present, an amended pleading will not relate back unless the other two requirements of Rule 15(c) are met. *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 103 (1st Cir. 1979).

Espersen contends that the Court failed to afford her an opportunity to respond to Aimbridge's reply, which argued that Aimbridge lacked constructive notice of the defamation claim.[149] Espersen asserts that the Settlement Agreement that Aimbridge attached to its reply was new evidence to Espersen, entitling her to respond before the Court rendered its decision on the merits.[150] Regarding motion practice generally, V.I. R. CIV. P. 6-1(c) provides that "only a motion, a response in opposition, and a reply may be served on other parties and filed with the court; further response or reply may be made only by leave of court obtained before filing. Parties may be sanctioned for violation of this limitation." With respect to summary judgment motion practice in particular, V.I. R. CIV. P. 56(e) provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact". The rule is discretionary, since it does not require the Court to allow a party to address another party's particular assertion of fact. V.I. R. CIV. P. 56(e) empowers the Court to "(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." Together these procedural rules demonstrate that at summary judgment the non-moving party must seek leave of court to file a response when the non-moving party contests any evidence that the moving party has submitted in reply to the non-moving party's opposition. The Court does not necessarily have the ability to recognize when evidence accompanying a party's brief has not been seen by an opposing party. Further, the court has no burden to *sua sponte* notify a party that it must respond to evidence that may be new to that party. While courts in other jurisdictions have afforded plaintiffs an

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[149] *See* Plaintiff's Rule 60 Motion for Relief, pgs. 2-3.
[150] *Id.* at 7-8.

opportunity to respond a defendant's submission of "new" evidence in a reply, a review of those cases indicates that the plaintiffs had first requested from the court an opportunity to respond to the defendant's reply.[151]

Here, Aimbridge filed the Reply Memorandum in Further Support of its Motion for Summary Judgment Dismissing Plaintiff's Defamation Claim on May 4, 2018, and the Court issued the Opinion on July 18, 2018. In the time in between, Espersen did not ask for leave of court to file a sur-response. Accordingly, Espersen failed to request an opportunity to respond to Aimbridge's reply under Rule 6-1(c) and filed the Rule 60(b) motion more than three months after Aimbridge filed the reply and more than one month after the Court issued the Opinion.

In addition, Espersen argues that Aimbridge waived the defense of constructive notice by not asserting the defense in Aimbridge's initial summary judgment motion.[152] Espersen relies on *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, which states, "[l]ike an issue raised for the first time in an appellate reply brief, an issue raised for the first time in a reply brief supporting summary judgment is deemed waived because the opposing party typically does not have the opportunity to respond".[153] *Perez* is not persuasive here, since Aimbridge did not raise any issue for the first time in its Reply. Aimbridge's March 26, 2018, motion for summary judgment argued that the

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[151] *Accord Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011) (finding that the district court did not abuse its discretion by entering summary judgment based on evidence that defendants submitted for the first time in their reply to the motion for summary judgment, reasoning that plaintiffs waived any challenge to the admissibility of the evidence by failing to object to or otherwise challenge the introduction of the new evidence); *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996) (finding that the lower court erred by not considering plaintiffs' supplemental declaration filed to rebut defendants' reply which contained new evidence, and further, considering on appeal both the evidence submitted by defendants in their reply and the evidence submitted by plaintiffs in their supplemental declaration); *Key v. Shelby Cty.*, 551 F. App'x 262, 264-65 (6th Cir. 2014) (affirming the lower court's denial of a motion for leave to file sur-reply on the basis that the rules of civil procedure did not permit the filing of a sur-reply without leave of the court, and the party's sur-reply, filed after six months, came too late);

[152] *See* Plaintiff's Rule 60 Motion for Relief, pg. 3.

[153] 59 V.I. 522, n.4 (V.I. 2013).

statute of limitations had expired,[154] in response to which Espersen filed an opposition on April 26, 2018, contending that the untimely claim nonetheless related back to the original Complaint because the Sugar Bay-Aimbridge Management Agreement should have afforded Aimbridge constructive notice of the defamation claim.[155] Aimbridge filed a reply on May 4, 2018, countering that the Management Agreement did not provide constructive notice because the Settlement Agreement ended the Sugar Bay-Aimbridge management services contract on November 6, 2013.[156] Accordingly, Aimbridge's Reply merely responded to the relation back argument that Espersen raised in her Opposition and did not surprise Espersen with any new reason for the entry of summary judgment.

Finally, Espersen argues that the Settlement Agreement contains an indemnity clause which should have provided Aimbridge with constructive notice.[157] Espersen asserts that "a jury could find that Aimbridge had constructive or imputed notice of the lawsuit within the requisite 120 days" on the basis that "it would be logical to infer that Sugar Bay would notify Aimbridge about Plaintiff's claims that were potentially covered under the Indemnity clause even if the Management Agreement had ended because [the] Indemnity provision was still relevant."[158] Espersen does not offer, nor has the Court found, a legal basis for Espersen's argument that an indemnity clause provides constructive notice of the original Complaint under an identity-of-interest theory for the purpose of relation back. Accordingly, no basis exists for Espersen's requested relief under V.I. R. CIV. P. 60(b), and the motion must be denied.

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[154] *See Espersen*, 2018 V.I. LEXIS 68, at *17-*18 (V.I. Super. Ct. July 18, 2018).
[155] *See id.* at *22-*23.
[156] *See id.* at *23. In addition, the Mutual Release and Settlement Agreement was finalized on May 23, 2014.
[157] *See* Plaintiff's Rule 60 Motion for Relief, pg. 8
[158] *Id.*

VII. Because a discretionary extension is not appropriate, Defendants' motion for leave to file a second joint motion for summary judgment out of time will be denied.

On October 17, 2018, Sugar Bay and Atlantic filed a motion for leave to file a second joint motion for summary judgment out of time and filed a second motion for summary judgment. Defendants' motion for leave to file a second joint motion for summary judgment out of time argues that during preparation for the October 24, 2018, motions hearing, Defendants recognized that Espersen was not entitled to protection under the VIWDA on the basis that she was not in the class of persons deemed to be an employee under 24 V.I.C. § 62.[159] The motion does not provide any reasonable basis for noncompliance with the Court's scheduling order, and thus, does not show the good cause or excusable neglect required to empower the Court to extend the deadline for filing the second motion for summary judgment. However, even if the motion were to show good cause or excusable neglect, and even if the Court were to grant the extension and deem the second motion for summary judgment timely, the Court would deny the second motion for summary judgment on the merits. Although 24 V.I.C. § 62 states an "'employee' includes any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment", and the record shows that Espersen obtained substantial and even more lucrative employment prior to filing her original Complaint, Espersen nonetheless constituted an employee for the period from the date was terminated until she secured "other regular and substantially equivalent employment". Accordingly, if Espersen is successful on any of her wrongful discharge claims, Espersen's

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[159] *See* Motion for Leave to File Second Joint Motion for Summary Judgment, pgs. 1-4.

damages will be limited to the period during which she constituted an employee under 24 V.I.C. § 62.

CONCLUSION

For the foregoing reasons, the motion to amend the Answers of Sugar Bay and Atlantic must be denied; the portion of Defendants' motion for summary judgment seeking dismissal of the wrongful discharge claims asserted against Sugar Bay and Atlantic must be denied; the portion of Defendants' motion for summary judgment seeking dismissal of the defamation claim asserted against Sugar Bay must be denied; the portion of Defendants' motion for summary judgment seeking dismissal of the defamation claim asserted against Atlantic must be granted; the portion of Defendants' motion for summary judgment seeking dismissal of the claim for breach of the covenant of good faith and fair dealing asserted against Atlantic must be granted; Defendants' motion to strike must be denied; the relief sought by Defendant Aimbridge in its motion for reconsideration must be denied; Plaintiff's motion for relief from the Court's Order must be denied; and finally, Defendants' motion for leave to file a second joint motion for summary judgment out of time must be denied. An Order consistent will this Opinion shall follow.

Dated: November 21, 2018

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

ATTEST: Estrella George
Clerk of Court

By:
Lori Boynes-Tyson
Court Clerk Supervisor 11/21/2018