

can be found in previous Opinions of the Court.² The Court briefly recounts the following relevant facts:

At the time Fenster entered into a contract with the deChaberts on March 25, 2016,³ to purchase the Property, Fenster was aware that the original lease agreement with WLG, a tenant, granted WLG a right of first refusal to purchase the Property subject to certain conditions, though Fenster challenges the enforceability of that provision.⁴ Before Fenster' closing could occur, Fenster learned that WLG intended to exercise its right of first refusal, and the deChaberts moved forward with selling the Property to WLG rather than Fenster.⁵ As a result, Fenster filed a Complaint against Walker, WLG, and the deChaberts on May 23, 2016, and on June 2, 2016, Fenster filed an Emergency Application for Temporary Restraining Order and Preliminary Injunction.

On July 13, 2016, the Court issued a Memorandum Opinion and Order temporarily enjoining the deChaberts from selling, and WLG and Walker from purchasing, the Property. By this time, however, the Property had already been conveyed by the deChaberts to WLG's assignee, Kye Walker, P.C., on July 8, 2016, a fact of which Defendants had not previously informed the Court. As a result, the Court amended the TRO to prohibit Walker, WLG, and its assignees, including Kye Walker, P.C., from alienating, placing any encumbrances, including, *inter alia*, liens, mortgages, or agreements, upon, and making any substantial alterations or improvements to, the Property until a preliminary injunction hearing could be held.⁶ The Court was then informed

² *Fenster v. Dechabert*, 65 V.I. 20 (Super. Ct. August 8, 2016); *Fenster v. Dechabert*, 2016 V.I. LEXIS 90 (Super. Ct. July 13, 2016).

³ First Am. Compl. ¶¶ 10-28.

⁴ First Am. Compl. ¶¶ 34-39.

⁵ First Am. Compl. ¶¶ 43-44.

⁶ July 20, 2016, Am. TRO and Order.

by the Walker Defendants that Kye Walker, P.C. had already conveyed the Property to Cospeedyca, LLC. An evidentiary hearing on Fenster's request for injunctive relief has been scheduled and continued with the consent of the parties on numerous occasions. Presently, the preliminary injunction hearing is scheduled for November 16, 2017.⁷

In her First Demand for Production of Documents to Defendant Cospeedyca, LLC, dated December 19, 2016, Fenster requested Cospeedyca produce the following:

[C]opies of all emails, text messages, notes, memos, correspondence, audio recordings, minutes of meetings, and other documents and communications exchanged between you or anyone acting on your behalf and any other individual or entity concerning the purchase, financing, closing and transfer of the property located at 16AA Church Street, Christiansted, V.I. 00802.⁸

On March 10, 2017, Plaintiff filed this Motion to Compel Cospeedyca, LLC to Produce Documents Requested in Response to Demand for Production of Documents on the grounds that Cospeedyca's response was insufficient because "[t]he documents produced did not include the emails between Cospeedyca and ... its counsel."⁹ Defendant Cospeedyca filed a response on April 21, 2017, to which Plaintiff replied on May 19, 2017.

STANDARD

On April 3, 2017, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure, which went into effect on March 31, 2017.¹⁰ The new procedural rules apply in "proceedings in any action pending on" March 31, 2017, unless doing so "would be infeasible or would work an injustice."¹¹ Under the new procedural rules, V.I. R. Civ. P. 26(b)(1) governs

⁷ The Walker Defendants have since moved to continue the preliminary injunction hearing scheduled for November 16, 2017, due to a scheduling conflict. *See* Walker Defs.' September 8, 2017, Mot. to Continue November 16, 2017 Hearing. This motion remains pending.

⁸ Pl.'s Mot. to Compel, Ex. 1.

⁹ Pl.'s Mot. to Compel, p. 1.

¹⁰ *See In re: Adoption of the VI Rules of Civil Procedure*, Promulgation No. 2017-001, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017).

¹¹ V.I. R. Civ. P. 1-1(c)(2)(B).

the scope of discovery and provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense[,]” regardless of whether the information would be “admissible in evidence.” Motions to compel the production of discoverable information are governed by V.I. R. Civ. P. 37. Specifically, V.I. R. Civ. P. 37(a)(B)(iv) provides that “[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection ... if ... a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.” Additionally, Rule 37 requires the moving party to bring the motion to compel “[o]n notice to other parties and all affected persons” and include “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”¹²

Additionally, where a motion to compel is granted or denied, the Court must, “after giving an opportunity to be heard,” award the prevailing party “its reasonable expenses incurred” in bringing or opposing the motion, “including attorney’s fees[,]” and if the motion is granted in part and denied in part, the Court “may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.”¹³ In these instances, payment is to be made by the unsuccessful party, its counsel, or both.¹⁴ However, the Court “must not order this payment[,]” where, *inter alia*, the motion or response was “substantially justified” or “other circumstances make an award of expenses unjust.”¹⁵

¹² V.I. R. Civ. P. 37(a)(1).

¹³ V.I. R. Civ. P. 37(a)(5)(A)-(C).

¹⁴ V.I. R. Civ. P. 37(a)(5)(A)-(C).

¹⁵ V.I. R. Civ. P. 37(a)(5)(A)(ii)-(iii), (B).

Notably, Plaintiff's motion was filed prior to the adoption of the Virgin Islands Rules of Civil Procedure,¹⁶ at which time the scope of discovery in the Virgin Islands and motions to compel the production of discoverable information were governed by Fed. R. Civ. P. 26(b)(1) and Fed. R. Civ. P. 37, respectively.¹⁷ V.I. R. Civ. P. 37 mirrors Fed. R. Civ. P. 37.¹⁸ However, "[u]nlike its federal counterpart, ... [V.I. R. Civ. P.] 26(b)(1) does not require the Court to consider the proportionate needs of a case when determining if material is discoverable."¹⁹ Notwithstanding this discrepancy, Plaintiff's motion and Defendant Cospeedyca's response hinge on whether the requested information is privileged, and discovery under Fed. R. Civ. P. 26(b)(1) and V.I. R. Civ. P. 26(b)(1) is limited to "nonprivileged matter."²⁰ As a result, an application of V.I. R. Civ. P. 26(b)(1) and V.I. R. Civ. P. 37 would be neither infeasible nor work an injustice in this case.²¹ Consequently, the Court will apply these new procedural rules in resolving Plaintiff's motion to compel.

ANALYSIS

Fenster moves to compel Cospeedyca to produce "emails between Cospeedyca and Gerry Groner[,] its counsel" in response to Fenster's December 19, 2016, request for production of

¹⁶ Plaintiff's motion to compel was filed on March 10, 2017, but the new procedural rules did not take effect until March 31, 2017. *supra* n. 10.

¹⁷ See *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 169 (V.I. 2012); See also *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2016 V.I. LEXIS 195, *3, 13 (V.I. Super. Ct. Nov. 30, 2016); *Abdallah v. Abdel-Rahman*, 2016 V.I. LEXIS 174, *3 (V.I. Super. Ct. September 23, 2016).

¹⁸ Compare V.I. R. Civ. P. 37 with FED. R. Civ. P. 37; See V.I. R. Civ. P. 37 Reporter's Note ("Rule 37, the central "sanction" provision of the modern American procedural rules is implemented in the Virgin Islands without material alteration"); *Wilson v. Hess Oil V.I. Corp.*, 2017 V.I. LEXIS 135, *8 (V.I. Super. Ct. Aug 23, 2017) ("The notes of the reporter concerning the intent of rules are controlling absent precedent to the contrary") (citing *Mills-Williams v. Mapp*, S. Ct. Civ. No. 2016-0054, ___ V.I. ___, ___, 2017 V.I. Supreme LEXIS 35, *11-12 (V.I. July 14, 2017) ("Reporter's Note eliminates any doubt")) (other citation omitted).

¹⁹ *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2017 V.I. LEXIS 86, *2 (V.I. Super. Ct. June 2, 2017). Instead, V.I. R. Civ. P. 26(b)(1) resembles the former version of Fed. R. Civ. P. 26(b)(1), applicable prior to the 2015 amendments to the federal rules. Compare V.I. R. Civ. P. 26(b)(1) with FED. R. Civ. P. 26(b)(1) (2010) and FED. R. Civ. P. 26(b)(1) (2015).

²⁰ Compare V.I. R. Civ. P. 26(b)(1) with FED. R. Civ. P. 26(b)(1).

²¹ See V.I. R. Civ. P. 1-1(c)(2)(B).

documents on the grounds that Cospeedyca has waived its attorney-client privilege by asserting that Cospeedyca's conduct with respect to the underlying transaction was a result of Cospeedyca's reliance on the advice of its counsel.²² Cospeedyca objects, arguing that Cospeedyca has not asserted its reliance on its counsel's advice as a defense in this action, and, therefore, has not waived its attorney-client privilege with Groner, and that Cospeedyca's response to Fenster's discovery request satisfies the applicable rules of civil procedure by raising the privilege through the production of a privilege log.²³

As a threshold matter, the Court must address the procedural sufficiency of Plaintiff's motion. As discussed, V.I. R. Civ. P. 37 requires motions to compel to include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."²⁴ V.I. R. Civ. P. 37-1 further describes the requirement that counsel "confer in a good faith effort to eliminate the necessity for the [discovery] motion — or to eliminate as many of the disputes as possible" and mandates "[t]he party requesting resolution of a discovery dispute ... serve a letter on other counsel identifying each issue and/or discovery request in dispute, briefly stating the moving party's position with respect to each (and providing any legal relevant authority), and specifying the terms of the discovery order to be sought."²⁵

Notably, neither Rule 37-1 nor Rule 37 specifically describe the form requirements of the moving party's certification regarding his or her counsel's attempt to meet and confer in good faith regarding the discovery dispute. However, V.I. R. Civ. P. 84 sets forth general form requirements

²² Pl.'s Mot. to Compel, pp. 1-5; *See id.* at Ex. A.

²³ Def. Cospeedyca's Opp'n to Pl.'s Mot. to Compel, pp. 1-6; *See id.* at Ex. A.

²⁴ V.I. R. Civ. P. 37(a)(1).

²⁵ V.I. R. Civ. P. 37-1(a)-(b); *See* V.I. R. Civ. P. 37-1(c).

of unsworn declarations, including, *inter alia*, certificates. Rule 84 provides, in pertinent part, that, when executed in the Virgin Islands, the certificate shall be:

in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

... “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”.²⁶

Note that prior to the adoption of the Virgin Islands Rules of Civil Procedure, the Superior Court considered the procedural sufficiency of certifications submitted in connection with motions to compel under the form requirements set forth in the United States District Court of the Virgin Islands’ local rules, namely Rules 37.1 and 37.2.²⁷

Here, Fenster avers that her attorney “sent a letter of insufficient production [to Cospeedyca’s counsel] ... on January 25, 2017[,]” a copy of which is attached as an exhibit with Fenster’s motion, and that subsequently “there was a meet and confer.”²⁸ Cospeedyca does not contest these allegations.²⁹ While the letter to defense counsel complies with the requirement of Rule 37-1(b) that the demanding party serve a specification letter on opposing counsel regarding the discovery dispute, Fenster’s blanket statement that “there was a meet and confer” provides no information regarding her attorney’s good faith attempt to resolve the discovery dispute without court action.

Courts in other jurisdictions applying procedural rules similar to those at issue here have been “unwilling to decipher letters between counsel to conclude that the [certification] requirement

²⁶ V.I. R. CIV. P. 84(a).

²⁷ See, e.g., *Abdallah*, 2016 V.I. LEXIS 174, *7 (applying LRCi 37.1 and 37.2 to a motion to compel the disclosure of discoverable information); *Davis v. Hovensa, L.L.C.*, 2011 V.I. LEXIS 88, *5-6 (V.I. Super. Ct. January 31, 2011); *Penn v. Whitecap Inv. Corp.*, 2012 V.I. LEXIS 63 (V.I. Super. Ct. December 12, 2012); *Demming v. V.I. Water & Power Auth. & Regatta Point Watergate Villas Condo. Assoc.*, 2013 V.I. LEXIS 3 (V.I. Super. Ct. January 20, 2013).

²⁸ Pl.’s Mot. to Compel, p. 1, Ex. 3.

²⁹ See Def. Cospeedyca’s Opp’n to Pl.’s Mot. to Compel.

has been met” on the grounds that the certification “prerequisite is not an empty formality” because “obliging attorneys to certify to the Court that they conferred in good faith results, in a large number of cases, in resolution of discovery disputes by counsel without intervention of the Court.”³⁰ This Court agrees, as the Superior Court has long recognized this purpose as underlying the procedural prerequisite that the moving party certify that he or she attempted to “meet and confer” in good faith regarding the discovery dispute before seeking judicial intervention.³¹

The Court recognizes that other jurisdictions sometimes require the certification to contain “facts to describe or identify the steps taken by the parties to resolve this discovery dispute[.]”³² but that this is not explicitly mandated by the relevant Virgin Islands Rules of Civil Procedure. Nevertheless, the Court need not address this discrepancy because, even assuming, *arguendo*, that Fenster’s statement that “there was a meet and confer” sufficiently demonstrates that Fenster’s counsel and defense counsel conferred in an effort to eliminate the necessity for Fenster’s motion to compel or to eliminate as many of the discovery disputes as possible, the statement does not certify that the attempt was made in good faith. And, considering the certification requirement under Fed. R. Civ. P. 37 is the same as that under V.I. R. Civ. P. 37, Fenster’s motion would also be procedurally deficient under the federal rules, which as discussed, applied at the time Fenster’s motion was filed.³³ Consequently, Fenster’s statement that “there was a meet and confer” is

³⁰ *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001); *See, e.g., Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 670 (D. Kan. 2005); *Sanchez v. Wash. Mut. Bank (In re Sanchez)*, 2008 Bankr. LEXIS 4239, at *2-4, 6-7 (U.S. Bankr. E.D. Cal. Sep. 8, 2008); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1059 (7th Cir. 2000); *See also In re Presto*, 358 B.R. 290, 293 (Bankr. S.D. Tex. 2006) (describing “[t]he policy reason for requiring the certification” that counsel conferred, or attempted to confer, with one another in good faith regarding the discovery dispute “before taking up court time”) (citation omitted).

³¹ *See Demming*, 2013 V.I. LEXIS 3, at *8-9.

³² *See Cory*, 225 F.R.D. at 670.

³³ Fenster’s certification is also deficient under the Local Rules of the United States District Court of the Virgin Islands, LRCi 37.1 and 37.2, which arguably applied at the time Fenster’s motion was filed. *See Abdallah*, 2016 V.I. LEXIS 174, *7. In her specification letter to opposing counsel, Fenster refers to LRCi 37.1. Pl.’s Mot. to Compel, Ex. 3.

insufficient to satisfy the procedural requirement that a certification be attached with her motion to compel regarding her compliance with the good faith negotiation requirement of Rules 37 and 37-1.³⁴

The procedural deficiency of Fenster's motion compel would ordinarily warrant the denial of the motion outright. However, in the interest of judicial economy, the Court will instead hold Fenster's motion in abeyance and direct Fenster to submit an amended motion to compel that complies with the Virgin Islands Rules of Civil Procedure. To ensure that Cospeedyca has an opportunity to be heard in response to Fenster's amended motion, Cospeedyca will be permitted to file an amended response should defense counsel deem it necessary, though Cospeedyca may also rely on to its original opposition to Fenster's initial motion.

With respect to the payment of expenses under V.I. R. Civ. P. 37(a)(5), the Court will defer its ruling until the merits of Fenster's motion to compel, and Cospeedyca's opposition thereto, are addressed, after which the Court will, as required under V.I. R. Civ. P. 37(a)(5)(A)-(C), give the parties an opportunity to be heard on the payment of expenses. Notwithstanding, should Fenster choose not to amend her motion to compel within the deadline imposed by the Court, Fenster's motion will be denied, and, after giving the parties an opportunity to be heard, the Court will consider whether Fenster must pay for the costs and attorney's fees incurred by Cospeedyca in opposing Fenster's motion, as set forth in V.I. R. Civ. P. 37(a)(5)(B).

CONCLUSION

In light of the foregoing, Plaintiff's March 10, 2017, Motion to Compel Cospeedyca, LLC to Produce Documents Requested in Response to Demand for Production of Documents will be

³⁴ See V.I. R. Civ. P. 37(a)(1); V.I. R. Civ. P. 37-1(a).

held in abeyance in order to give Plaintiff the opportunity to submit a procedurally sufficient motion, failing which Plaintiff's motion will be denied.

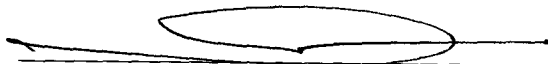
Dated: October 4, 2017.

ATTEST: Estrella H. George
Clerk of Court

by:

Lori Boynes-Tyson

Court Clerk Supervisor


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