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

FIRSTBANK PUERTO RICO,	)	Case No. ST-12-CV-273
Plaintiff,	)	
vs.	)	ACTION FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, IMPAIRMENT OF SECURITY INTEREST, AND UNJUST ENRICHMENT
HARTHMAN LEASING III, LLLP,	)	
Defendant.	)	

Cite as: VI SUPER 8U

MEMORANDUM OPINION

¶1 Before the Court are Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment, Defendant's Motion to Strike Plaintiff's Expert Designation[1], Defendant's Motion to Strike Plaintiff's Expert Designation of Morazzani-Ferrer, Plaintiff's Motion to Schedule Jury Selection & Trial, and Plaintiff's Request for Ruling on Motion for Summary Judgment. For the reasons set forth below, the Court will grant Defendant's motions to strike, and schedule the matter for jury selection and trial. It will deny Plaintiff's request for ruling on its summary judgment motion.

BACKGROUND

¶2 In its November 20, 2015 Memorandum Opinion, the Court described in detail the factual background of this case. Because the pending motions raise only

[1] In its first Motion to Strike Plaintiff's Expert Designation, Defendant states that Plaintiff's Rule 26(a)(2) disclosure failed to disclose which McCloskey—Robert F. McCloskey or Mark M. McCloskey—Plaintiff sought to designate as an expert witness. Thus, Defendant seeks simply to strike the designation of "expert McCloskey."

procedural challenges and do not address any substantive question, the Court here will focus on the relevant procedural background. The Court incorporates the 2015 Memorandum by reference to the extent necessary.

¶3 Plaintiff FirstBank Puerto Rico commenced this action on May 17, 2012. On February 26, 2013, the parties filed with the Court a joint Report of Parties' Planning Meeting that included a proposed discovery plan (the "Discovery Plan"). The plan provided, *inter alia*, deadlines for the parties to identify expert witnesses (Aug. 15, 2013 for Plaintiff; Sept. 15, 2013 for Defendant), provide expert reports (Oct. 1, 2013 for Plaintiff; November 15, 2013 for Defendant), complete expert depositions (Feb. 1, 2014), and file potentially dispositive motions (Mar. 1, 2014). The plan also provided that the parties should "expect to be ready for trial by April 1, 2014." In keeping with the parties' Discovery Plan, Plaintiff filed its first Motion for Summary Judgment on September 20, 2013 (the "first Summary Judgment Motion").

¶4 In a December 18, 2013 Order the Court scheduled the matter for trial in June 2014. On April 4, 2014, the Court granted a motion by Plaintiff for additional time to complete mediation pending the Court's decision on the Summary Judgment Motion. The Court ordered the parties to mediate within 30 days and suspended all other deadline dates, but otherwise did not continue the trial date. However on May 27, 2014, due to a busy criminal trial schedule, the Court continued without date the June 2014 trial.

¶5 On November 20, 2015, the Court issued its Memorandum Opinion and Order on Plaintiff's Summary Judgment Motion (the "November 2015 Opinion"). In that

decision, the Court held that Defendant Harthman Leasing III, LLLP had breached its duty to FirstBank when it leased Parcel 17-E to East End without FirstBank's consent. In the Order, the Court granted in part FirstBank's motion for summary judgment and set the matter for a status conference to be held on December 15, 2015.

¶6 At the status conference, the parties informed the Court that they were ready for trial. The following day the Court reduced to writing the dates placed on the record during the status conference, which referred the matter to mediation, directed the parties to file witness lists by February 1, 2016, and set the matter for jury selection and trial on June 6, 2016.[2] That Order was silent on all other discovery matters.[3]

¶7 Also on December 16, 2015, Plaintiff filed a Motion to Clarify the Court's November 2015 Opinion. Plaintiff asked the Court to "clarify in writing that Parcel 17-E is not a part of the 'leased premises' under the Lease, and would not, therefore, be a part thereof if conveyed to a buyer by assignment or otherwise." On December 21, 2015, the Court responded to Plaintiff's motion. It found that although Plaintiff's motion was styled as a Motion to Clarify, it essentially requested declaratory judgment on the issue of whether Parcel 17-E became part of the lease. The Court clarified that because Plaintiff had not adequately briefed that issue in its Motion for

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[2] *See* Dec. 16, 2015 Order.

[3] Neither party asked the Court to set any other deadlines during the December 15, 2015 status conference.

Summary Judgment, the Court's earlier Opinion did not make a finding on it; it denied Plaintiff's motion on those grounds.

¶8 Harthman filed its Witness List on February 8, 2016, and FirstBank filed its Witness List on February 16.[4] FirstBank identified 14 fact witnesses and the three expert witnesses for which it seeks expert designation and submits reports: Pedro Morazzani, CPA; Mark McCloskey, MAI; Robert McCloskey, MAI.

¶9 On April 5, 2016, FirstBank served Harthman with an Expert Appraisal Report and supporting documentation, and on May 3, 2016 it designated another witness with an accompanying 133-page report. On April 27, 2016, Harthman filed its first Motion to Strike Plaintiff's Expert Designation, and on May 17, 2016, filed its second Motion to Strike Plaintiff's Expert Designation.

¶10 The Court held a pretrial conference on May 17, 2016 and informed the parties that the case was still on for jury selection on June 20, 2016. The Court noted the two pending motions to strike expert designations and informed the parties that it would notify them if the trial date had to be postponed. On June 6, the Court issued an Order again continuing the trial without date. That Order did not specify any other deadlines or otherwise discuss any discovery matters.

¶11 On October 19, 2016, FirstBank filed a Motion to Schedule Jury Selection & Trial and for Ruling on Outstanding Motions. Harthman filed a Response, joining in

[4] Both parties asked for a one-week extension of the February 1 deadline to file their witness lists, and FirstBank filed a second, unopposed motion asking an additional week to file its list. The Court signed off on the first request. Because FirstBank's second request was unopposed, the Court will deem FirstBank's list to have been timely filed.

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FirstBank's request for a trial date, but otherwise continuing to oppose FirstBank's expert designations and reports and asking for the Court to strike them.[5]

¶12 On May 22, 2017, FirstBank filed a Motion for Summary Judgment as to the Status of Parcel 17-E (the "second Summary Judgment Motion"). Harthman moved to strike that motion on June 20, 2017.

¶13 The Court turns now to the motions.

DISCUSSION

I. Harthman's Motion to Strike FirstBank's Summary Judgment Motion

¶14 Harthman argues that FirstBank's second Summary Judgment Motion must be denied as untimely. Harthman contends that, according to the parties' Rule 26(f) Discovery Plan, all dispositive motions were to be filed by March 1, 2014. Harthman points out that this matter was scheduled for jury selection on June 20, 2016, and that the parties had begun preparing for trial, including preparing and filing a Joint Final Pretrial Order, by the time FirstBank filed its second Summary Judgment Motion.[6]

¶15 Harthman asserts that Virgin Islands Superior Rule 10 governs whether the Court should allow FirstBank's motion for summary judgment, and that pursuant to Rule 10 a court should do so only if the failure to meet a deadline is the result of "excusable neglect." Harthman argues that FirstBank has not made a showing of

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[5] *See* Harthman's Resp. to FirstBank's Mot. to Schedule Jury Selection & Trial and for Ruling on Outstanding Motions.
[6] The Joint Pretrial Order was filed May 6, 2016.

excusable neglect, and thus its Motion must be stricken and denied with prejudice. Harthman argues that the length of delay in FirstBank's filing of the Motion is "egregious," and that FirstBank offers no reason or excuse for the delay.

¶16 Additionally, Harthman asserts that if forced to oppose FirstBank's Motion, it will cost Harthman more time and attorney's fees, and asserts that this is the true reason FirstBank has filed the Motion. Finally, Harthman asserts that these circumstances point to bad faith by FirstBank in its filing of the Motion.

¶17 For its part, FirstBank argues that Harthman's Motion to Strike should be denied because FirstBank's second Summary Judgment Motion "seeks to resolve a relevant and crucial issue in this case[.]"[7] FirstBank argues that there is no "good cause" requirement in order for the Court to consider its Motion, since "nowhere in [the November 2015 Opinion] does that Court suggest that FirstBank would have to first show good cause or that FirstBank was foreclosed in any way whatsoever from bringing such a motion."[8] FirstBank argues that, even if good cause were required under these circumstances, it has it because its Motion seeks to resolve a "fundamental issue in this case prior to plenary jury trial."[9] It argues that the status of Parcel 17-E is a "defining issue" in this case, and that, but for the unresolved question of Parcel 17-E's legal status, this litigation might be resolved.

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[7] Oppo. to Def.'s Mot. to Strike Pl.'s Mot. for Summ. J. 1.
[8] *Id.* at 2.
[9] *Id.*

¶18 Regarding the timing of the Motion, FirstBank argues that it did not file sooner because the parties were on track for a trial and attempted resolution of the 17-E issue through a summary judgment motion might have been an unnecessary attraction. FirstBank argues that the filing of its Motion is not prejudicial but is beneficial to both parties since it resolves a significant issue, and that resolution of the issue will move the case forward and reduce the number of issues that would need to be presented to a jury. FirstBank argues that Harthman's Motion to Strike is the improper vehicle to challenge its Motion, since its summary judgment motion is not a pleading, and thus the Court should deny the Motion to Strike as procedurally deficient. Finally, FirstBank argues that, if the Court finds the Motion for Summary Judgment to be time-barred, the Court should consider the Motion alternatively as a motion *in limine* that concerns a crucial evidentiary issue.

¶19 The Court begins by noting that FirstBank doesn't explicitly challenge the assertion that its second Summary Judgment Motion was untimely. The Court finds that it was, whether the Court relies on the parties' own proposed Discovery Plan or the Virgin Islands Rules of Civil Procedure. The parties Discovery Plan set a deadline for dispositive motions of March 1, 2014. FirstBank filed its second Summary Judgment Motion in May 2017, well past that deadline.[10]

[10] FirstBank filed its first Summary Judgment Motion on September 20, 2013, in accordance with the Discovery Plan. While the Court did not formally sign-off on the Discovery Plan, no rule or caselaw suggests that parties should not act in good faith to comply with joint discovery plans submitted to but not endorsed by the Court, especially where here it has not been rejected by the Court.

¶20 On the other hand, under V.I. Rule of Civil Procedure 56(b), "[u]nless a different time is set by the court, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."[11] Even assuming *arguendo* that Rule 56(b) controlled here, the parties indicated to the Court that they were ready for trial in the December 15, 2015 status conference. The parties were also told in the December 16, 2015 Order that the case was set for jury selection on June 6, 2016. That trial date was not postponed until June 6, 2016. FirstBank's summary judgment motion came nearly a year later. Thus, FirstBank's motion was untimely under both the parties' Discovery Plan and the V.I. Rules of Civil Procedure.

¶21 Although FirstBank failed to timely file its Summary Judgment Motion, V.I. Rule of Civil Procedure 6(b)(1) allows that:

> 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.[12]

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[11] When this action was commenced, Virgin Islands courts followed the Federal Rules of Civil Procedure. They have since adopted the Virgin Islands Rules of Civil Procedure. However, V.I. Rule 56(b) is identical to the Federal Rules counterpart, and thus the parties face no prejudice in the Court referring to the Virgin Islands rule.

[12] Harthman references Virgin Islands Superior Court Rule 10 as providing the rule on whether a Court should admit an untimely filing. However, the Superior Court Rules "govern the practice and procedure in the superior court except in cases where the Virgin Islands Rules of Civil Procedure, the Virgin Islands Rules of Evidence, or other rules promulgated by the Supreme Court of the Virgin Islands apply." Since the Rule 6(b)(1) of the Rules of Civil Procedure applies here, that rule governs.

(emphasis added). Before the adoption of the V.I. Rules of Civil Procedure and the factors laid out in 6(b)(1), the Virgin Islands Supreme Court had held that, "'[e]xcusable neglect" and 'good cause' are essentially synonyms, and the determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances surrounding the omission including the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Fuller v. Browne*, 59 V.I. 948, 954 (V.I. 2013) (citations and internal quotations omitted).[13]

¶22 Nearly 15 months lapsed between the Court's ruling in the November 2015 Opinion and the time FirstBank filed its second Summary Judgment Motion. If FirstBank wanted a second go at the issue of Parcel 17-E, it had a duty to pursue that soon after the entry of the November 2015 Opinion. or request an extension of time to file such a motion. It did not do so. While it did file a Motion for Clarification on December 16, 2015, the Court issued its decision on that motion on December 21, 2015. Even using that date as a reference point, FirstBank still had ample time before May 22, 2017 in which to file a second motion.

[13] Although at the time this action was commenced, the Virgin Islands used the Federal Rules of Civil Procedure, the factors outlined in Rule 6(b)(1) mirror those outlined by the Supreme Court in *Browne*, which predated the adoption of the V.I. Rules of Civil Procedure.

¶23 Second, the Court finds that FirstBank's proffered reason for delay is insufficient to warrant a late filing. FirstBank asserts that it did not file its second Summary Judgment Motion earlier because it anticipated trial in June 2016 and did not want the motion to act as an unnecessary distraction. But that would not explain the nearly one-year gap between the Court's postponing the trial in June 2016 and FirstBank's filing of its motion in May 2017. Also, FirstBank filed its second Summary Judgment Motion after it filed its Motion to Schedule Jury Selection & Trial, which suggests that FirstBank itself believed the time for dispositive motions had passed.

¶24 Additionally, FirstBank's arguments against striking the motion are unsupported by legal authority. FirstBank offers no legal support for its argument that it need not show good cause because the Court has nowhere stated "that FirstBank would have to first show good cause." The Court knows of no rule that a party needn't adhere to rules of procedure merely because a court doesn't explicitly say it has to, nor any rule that states a memorandum opinion should include a directive to a party that it will have to show good cause to file a second motion on the same or related issue.

¶25 Nor does FirstBank offer legal support for the argument that the Court should allow the motion for summary judgment because the question of whether Parcel 17-E became part of the lease is a fundamental issue in this case. It might be more expedient to have the Court resolve that issue prior to trial by jury, but that doesn't excuse procedural barriers that limit when it is appropriate for the Court to entertain

certain motions. Also, FirstBank *did* have opportunity to seek summary judgment resolution of the Parcel 17-E issue: it could have briefed that issue in its first Summary Judgment Motion, or, upon receiving the Court's November 2015 Opinion (wherein the Court declined to rule on the Parcel 17-E question), more timely asked the Court for leave to file a second motion, especially after entry of the December 21, 2015 Order of Clarification.

¶26 Finally, FirstBank does not offer legal support for its argument that the Court should consider the summary judgment motion alternatively as a motion *in limine*. A motion *in limine* is "pretrial request that certain inadmissible evidence not be referred to or offered at trial." Black's Law Dictionary (10th ed. 2014). It is used to preclude irrelevant, prejudicial, or objectionable evidence before it is presented to the jury—an evidentiary challenge. FirstBank is not attempting to preclude evidence in its Summary Judgment Motion; it is asking the Court to resolve a question of fact. *See Wade v. Diamond A Cattle Co.*, 44 Cal. App. 3d 453, 457 (1975) ("Modification is a change in the obligation by a modifying agreement . . . . The question whether the necessary elements are present is one of fact . . . ."); *Thoroughbred Assocs., L.L.C. v. Kan. City Royalty Co., L.L.C.*, 297 Kan. 1193, 1209 (2013) ("Whether any particular term of a written contract has been modified or waived by a subsequent agreement is a question of fact for the trial court."). A motion *in limine* is not the appropriate vehicle for obtaining that result.

¶27 At the same time, however, FirstBank complains that Harthman's Motion to Strike is not the appropriate vehicle to challenge its Summary Judgment Motion.

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Harthman doesn't specify by which rule it moves to strike FirstBank's Summary Judgment Motion. As FirstBank points out, V.I. Rule of Civil Procedure 12(f) provides that, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Following from that, a motion to strike normally relates to pleadings. FirstBank is correct that a motion for summary judgment is not a pleading as defined by the Rules of Civil Procedure. *See* V.I. R. Civ. P. 7(a). However, whereas the Court finds it inappropriate to decide issues of fact pursuant to a motion *in limine*, the Court does have inherent authority to manage its docket. *Davies v. Certain Underwriters at Lloyds of London*, 2017 V.I. LEXIS 138, *8 (Super. Ct.) (citations omitted). "This inherent authority includes the ability to strike untimely motions and oppositions." *Utah Republican Party v. Herbert*, 2015 U.S. Dist. LEXIS 144392, *9 (D. Utah) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 629-30 (1962)); *see also id.* at *8; *Cromartie v. Goolsby*, 2010-Ohio-2604, P18 (Ohio App. 2010) ("Whether to grant or deny a motion to extend a court-ordered deadline or a motion to strike an untimely filed motion is a decision committed to the trial court's sound discretion."). Thus, Harthman challenging FirstBank's Summary Judgment Motion under the incorrect rule does not preclude the Court from considering the Summary Judgment Motion and ruling on it. The Court is persuaded that, on balance, it is appropriate to strike FirstBank's Summary Judgment Motion.

¶28 Harthman's Motion to Strike will be granted, the Summary Judgment Motion will be stricken, and FirstBank's Request for Ruling on the Summary Judgment Motion will be denied.

II. Harthman's Motions to Strike FirstBank's Designations of Witnesses

¶29 Harthman also seeks to strike FirstBank's expert designations and reports for being untimely. Harthman again asserts that FirstBank failed to comply with the parties' 2013 proposed Discovery Plan.[14] Harthman alleges that until a few days before its motion, FirstBank had never designated any experts, identified any experts, or submitted any expert reports."[15] Harthman argues that, "First Bank [sic] has not requested the Court amend its scheduling order to reopen expert discovery[.]" It points to Federal Rule of Civil Procedure 16(b)(4), which provides that, "[a] schedule may be modified only for good cause," and argues that FirstBank has not provided good cause here. It argues that FirstBank "cannot enunciate any excuse – much less good cause – as to why it designated experts on the eve of trial."[16]

¶30 Furthermore, Harthman argues that FirstBank, "knowingly and willingly postured this case as one without any need for experts; and importantly, as a result, Harthman has not designated any experts either."[17] Harthman argues that, as a result, it is prejudiced by the delay, and that allowing the expert designations would increase the cost of litigation and delay the trial of this matter by another year.

¶31 FirstBank, on the other hand, argues that Harthman's motions to strike are procedurally improper and without merit. FirstBank argues that Harthman has failed to comply with the Local Rules of Civil Procedure of the District Court and thus

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[14] As set forth in ¶ 3 above, the Discovery Plan set deadlines of August 15, 2013 and October 1, 2013, for FirstBank to identify its expert witnesses and provide expert reports, respectively.
[15] Def.'s Mot. to Strike Pl.'s Expert Designation ¶ 2.
[16] *Id.* ¶ 9.
[17] *Id.* ¶ 10.

should be sanctioned by dismissal of its motions with prejudice. FirstBank argues that there is no discovery order in place that FirstBank could have failed to obey. It asserts that it is "patently false" that it did not identify its witnesses on time, and points out that it complied with the deadline the Court set in its December 16, 2015 Order for providing witness lists to the Court.[18] FirstBank argues that the December 16 Order, while setting a deadline for identifying expert witnesses, set no deadline for the production of expert reports, and thus, it violated no order. It then points to Federal Rule of Civil Procedure 26(a)(2)(D) which says that, in the absence of a deadline set by the Court, a party should submit export reports 90 days prior to trial; it argues that at the time of its expert reports, no trial date had been set and therefore its designations and reports were not untimely.

¶32 Additionally, FirstBank argues that it did not submit its reports sooner because the appraisals therein would change over time and become stale. It argues that once the Court issued the December 16, 2015 Order setting this matter for trial, it contacted its witnesses, but that the witnesses required additional time to prepare the reports and thus FirstBank submitted them when it could.

¶33 Finally, FirstBank submits that it has not acted in bad faith, and that there will be no prejudice to defendant if the Court denies the motions to strike. It alleges that Harthman never suggested that it intended to hire experts or take depositions of FirstBank's experts (suggesting that Harthman therefore does not want to); that

[18] To be clear, Harthman argues that FirstBank failed to timely designate expert witnesses. FirstBank emphasizes that it met the Court's deadline for identifying witnesses with the Court.

the expert reports are simply updates of previously submitted appraisals; that, if Harthman wanted to take depositions of FirstBank's experts, "they are widely available for such engagement."[19]

¶34 To start, the Court notes again that, like its second Summary Judgment Motion, FirstBank's designations of expert witnesses were late under both the parties' Discovery Plan and the V.I. Rules of Civil Procedure. The Plan specified that FirstBank was to identify all expert witnesses on or before August 15, 2013, and provide all expert reports on or before October 1, 2013. Also, the Court did not suspend the June 2014 trial date until May 27, 2014, at which point FirstBank had already failed to meet its deadlines for designating witnesses and providing expert reports.[20] Instead, FirstBank served Harthman with an expert report on April 5, 2016, designating two of its experts, and another on May 3, 2016 designating the third.

¶35 Furthermore, even if the parties were not required to comply in good faith with their joint Discovery Plan, FirstBank's designations failed to comply with Rule 26 of the V.I. Rules of Civil Procedure. Rule 26(a)(2)(D)(i) provides that, in the absence of a stipulation or court order, a party must disclose expert witness reports "at least 90

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[19] Oppo. to Mot. to Strike Pl.'s Expert Designation 6-7.

[20] FirstBank suggests that, because it complied with the deadline in the Court's December 16, 2015 Order for providing witness lists to the Court, that it did not miss any deadlines in providing witness designations to Harthman. However, FirstBank confuses the deadline set by the Court for providing witness lists to the Court (in preparation for trial) with the deadlines under the parties' own agreements and the Rules of Civil Procedure for providing witness designations and reports to opposing party.

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days before the date set for trial or for the case to be ready for trial[.]"[21] Contrary to FirstBank's assertion, at the time it served its expert reports on Harthman there *was* a trial date in place. The Court's December 16, 2015 order had set jury selection for June 6, 2016, with trial to commence during the three-week period beginning thereon. Pursuant to Rule 26(a)(2)(D)(i), FirstBank should have designated its witnesses and submitted its expert reports by March 6, 2016.[22] Thus, its designations and reports were untimely under both the parties' Discovery Plan and the deadline set by the Rules of Civil Procedure.

¶36 In deciding whether to allow the designations and reports despite their being late, the Court looks again to the factors outlined in V.I. Rule of Civil Procedure 6(b)(1).[23] It finds it is not appropriate to extend the time allowed for FirstBank to

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[21] FirstBank relies on Federal Rule of Civil Procedure 26. The Federal Rules were followed in the Virgin Islands before March 31, 2017, when the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure. However, the parties face no prejudice if the Court applies the V.I. Rule, as Federal Rule 26 and V.I. Rule 26 have an identical 90-day pre-trial deadline.

[22] FirstBank also failed to meet the 90-day deadline as it related to the June 2014 trial date: at the time the Court postponed that trial date, May 27, 2014, the deadline has already passed.

[23] Both parties discuss the *Poulis* factors, from *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), when arguing whether the Court should sanction FirstBank by striking its expert witness designations. This Court in *Perkins v. Caribbean Automart* wrote that:

> A request for discovery sanctions requires a consideration of the *Poulis* factors, which examine: (1) the extent of [the nonmoving] party's personal responsibility (in failing to abide by court imposed dead lines and other procedural requisites]; (2) prejudice to the [moving party]; (3) whether there has been a history of dilatoriness in the case; (4) whether the conduct of the [nonmoving] party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense.

2013 V.I. LEXIS 6, *2 (citing to *Poulis*). However, *Caribbean Automart* was written before the adoption of the V.I. Rules of Civil Procedure, when this Court still relied on the Federal Rules of Civil Procedure. The V.I. Rules, since adopted, include Rule 6(b)(1) with its own factors to consider when determining whether to extend the date for doing an act. Because Harthman seeks only to have FirstBank's designations stricken, and seeks no additional sanctions, the Court finds it more appropriate to analyze Harthman's motions to strike under the factors laid out in that rule. In any event, the *Poulis* factors and those laid out in Rule 6(b)(1) are not at odds with each other, and the Court's analysis would remain largely the same under *Poulis*.

designated expert witnesses and file expert reports. While FirstBank contends that it waited to file its reports so that they would not become stale, that does not explain its failure to timely file the reports in relation to the original trial date set for this matter: originally, the trial was set for June 2014; the parties were not told until May 27, 2014 that the June trial date was postponed, and FirstBank apparently did not serve Harthman with its witness reports by then.[24] Had it done so, it could have supplemented those reports as a later trial date approached. The Court is not persuaded or convinced that there is good cause to grant an extension based on the fact that FirstBank failed to meet the deadlines set in the Discovery Plan and twice failed to meet the deadline set by the Rules of Civil Procedure.

¶37 Additionally, granting an extension in this instance would further delay a trial date, potentially significantly. The trial has already twice been postponed. While these delays have not been the fault of the parties, they have also not relieved the parties of their responsibilities to meet deadlines pursuant to their own Discovery Plan and the Rules of Civil Procedure. What's more, both parties have indicated that they are prepared for trial, and both have indicated a desire to proceed to trial; the Court finds that weighs in favor of granting Harthman's motions to strike.

¶38 The Court is unpersuaded by FirstBank's argument that it should sanction Harthman under the Local Rules of Civil Procedure and dismiss the motions to strike,

[24] In other words, FirstBank's expert reports were not submitted at least 90 days before the first trial date, even though the parties did not know until after the deadline that the trial date would be postponed.

for not conferring with FirstBank before filing its motions to strike. FirstBank argues that Harthman failed to comply with Local Rule 37.1, which directs that, "[p]rior to filing any motion relating to discovery pursuant to Federal Rules of Civil Procedure 26-37 . . . counsel for the parties shall confer in a good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible." However, effective March 31, 2017, Virgin Islands courts adopted the V.I. Rules of Civil Procedure, "which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal and Local Rules of Civil Procedure." *Hansen v. Gov. Juan F. Luis Hosp. & Med. Ctr.*, 2018 V.I. LEXIS 87, *1 n.1. "'These rules, and subsequent amendments, govern proceedings in any action pending on the effective date of the rules or amendments, unless the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.'" *Id.* (quoting V.I. R. Civ. P. 1-1(c)) (semicolons omitted). The Court finds that applying the V.I. Rules here is feasible and does not "work an injustice" on the parties, and thus will rely on the V.I. Rules. Those Rules do not have a rule identical to Local Rule 37.1. Rule of Civil Procedure 26(c)(1) does entail an obligation of parties to meet and confer, but only as it relates to protective orders when a party seeks discovery from another. Harthman has violated no Virgin Islands Rule by filing its motions to strike without conferring.

¶39 Additionally, even if the Court were required to apply the Local Rules of the District Court—which again, it is not[25]—Local Rule 37.3 directs, "[t]he failure of any counsel to comply with or cooperate in, or the abuse by counsel of, the foregoing [meet and confer] procedures *may* result in the imposition of sanctions." (emphasis added). Rule 37.3 thus does not mandate sanctions in all instances where a party has not conferred before filing a motion related to discovery. The Court finds that Harthman's actions do not warrant sanctions. Harthman's motions are not an attempt by Harthman to procure discovery from FirstBank, but are instead a response to an untimely discovery disclosure by FirstBank. FirstBank itself failed to meet the parties' own Discovery Plan, and twice failed to meet the deadline under the Rules of Civil Procedure for filing expert reports. And while Harthman might not have conferred with FirstBank before filing its motions to strike, nor did FirstBank seek leave from the Court regarding its designations of expert witnesses beyond the 90-day deadline.

¶40 Finally, again relying on its inherent authority to manage its docket, the Court finds that allowing FirstBank's expert designations and the entry of its expert reports at this point carries a heavy risk of further delaying these proceedings, potentially up

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[25] Even before the adoption of V.I. Rules of Civil Procedure in March 2017, the V.I. Supreme Court emphasized that Virgin Islands courts were not to "reflexively and mechanistically" apply the Local Rules. *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 582; *id.* at 576 (cautioning, "[The] uncritical application of the rules of another court to a proceeding in the Superior Court is wholly inconsistent with our admonition that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other applicable procedure.") (citations and internal quotations omitted).

to another year. Since both parties have indicated they wish to proceed to trial, and because the Court is mindful of how long this matter has been waiting for trial, the Court will not allow that risk. *See Perkins v. Caribbean Automart*, 2013 V.I. LEXIS 6, *3 (Super. Ct.) ("Export reports submitted when the trial date is fast approaching have been excluded in several instances.") (citing to several cases).

¶41 The Court will grant Harthman's motions to strike and will strike the relevant expert designations and reports.

III. FirstBank's Motion to Schedule Jury Selection & Trial

¶42 Based on the foregoing, there remains no outstanding issue that prevents this matter from being scheduled for trial. The Court will grant FirstBank's Motion to Schedule Jury Selection & Trial.

CONCLUSION

¶43 FirstBank's Motion for Summary Judgment and its two expert designations with accompanying expert reports were untimely under both the parties' proposed Discovery Plan and the V.I. Rules of Civil Procedure. The Court does not find good cause to warrant an extension of time for either the filing of the Motion or the expert designations. Accordingly, the Court will grant each of Harthman's motions to strike. Accordingly, it will deny FirstBank's Request for Ruling on Motion for Summary Judgment.

¶44 Because no other outstanding motions remain, the Court will grant FirstBank's Motion to Schedule Jury Selection & Trial.

An order consistent with this Memorandum will immediately follow.

DATED: January 28, 2019

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
LORI BOYNES TYSON
Chief Deputy Clerk 1/28/2019