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

GREAT ST. JIM, LLC,	)	
	)	**CIVIL NO. ST-18-CV-293**
Plaintiff,	)	
	)	**ACTION FOR ENFORCEMENT**
v.	)	**OF COVENANT, INJUNCTIVE**
	)	**RELIEF, PRIVATE NUISANCE,**
CHRISTIAN KJAER *in personam*, &	)	**DIMINUTION OF VALUE,**
PARCEL 11, ESTATE NAZARETH,	)	**UNJUST ENRICHMENT &**
ST. THOMAS, U.S. VIRGIN ISLANDS *in rem*,	)	**ACCOUNTING**
	)	
Defendant.	)	
	)	

OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

COMES NOW, Plaintiff **GREAT ST. JIM, LLC**, by and through its undersigned counsel KELLERHALS FERGUSON KROBLIN PLLC, and hereby opposes Defendants Christian Kjaer and Parcel 11's Motion to Dismiss the First Amended Complaint and in support thereof states as follows:

I. Defendants' Motion to Dismiss Must be Denied

Plaintiff Great St. Jim, LLC ("GSJ") filed its First Amended Complaint to enforce its property rights in Parcel 11, Estate Nazareth, St. Thomas. Defendants Christian Kjaer ("Kjaer") and Parcel 11 filed a Motion to Dismiss the First Amended Complaint which seeks dismissal of GSJ's claims. The only task before this Court on Defendants' Motion to Dismiss is to determine whether GSJ's First Amended Complaint meets the easily satisfied liberal notice pleading standard laid out in Rule 8 of the Virgin Islands Rules of Civil Procedure. This liberal standard creates a relatively low threshold, merely requiring GSJ to adequately allege facts that put Defendants on notice of GSJ's claims. GSJ's First Amended Complaint well exceeds the low notice pleading threshold. Accordingly, Defendants' Motion to Dismiss must be denied.

GSJ acquired title to Great. St. James Island ("Great St. James") in 2016. Great St. James is located off the eastern end of St. Thomas. As set forth in the First Amended Complaint, Kjaer is the record owner of certain real property described as Parcel 11 Estate Nazareth, Red Hook Quarter, St. Thomas, Virgin Islands. First Amended Complaint ("FAC") at ¶¶ 2-3. Parcel 11, which is located on St. Thomas itself, is subject to a restrictive covenant that benefits the owner of Great St. James. The covenant provides that Parcel 11

> shall be used **exclusively** for a dock, wharf, or landing facilities for boats of owners or occupants of premises situation on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use.

FAC at ¶¶ 7-8 (emphasis added).

The restrictive covenant defines and narrowly limits the scope of exclusive use permitted for Parcel 11. In sum, it narrowly limits the use of Parcel 11 to the "exclusive" use of the owners, occupants, licensees and invitees of Great St. James for purposes of transportation to and from Great St. James. Kjaer is using Parcel 11 in the operation of a business, from which he derives income, no part of which is used "for a dock, wharf, or landing facilities for boats of owners or occupants of premises situation on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use." Therefore, as alleged in the First Amended Complaint, Kjaer's use clearly violates the exclusive uses prescribed by restrictive covenant. GSJ's First Amended Complaint asserts five causes of action based on the violation of the restrictive covenant properly alleged: (1) Enforcement of Restrictive Covenant Against Kjaer & Parcel 11 (Count One); (2) Private Nuisance Against Kjaer and Parcel 11 (Count Two); (3) Action for Declaratory Judgment Against Kjaer & Parcel 11 (Count Three); (4) Diminution of Value of Plaintiff's Property Against Kjaer & Parcel 11 (Count Four); and (5) Unjust Enrichment & Action for Accounting Against Kjaer (Count Five).

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Defendants' Motion to Dismiss the First Amended Complaint seeks to dispose of the First Amended Complaint by injecting disputed factual issues well outside the four corners of the Complaint, and is therefore more properly viewed as a motion for summary judgment filed before any of the necessary factual development through depositions and discovery. Moreover, in their improper attempt to refute the factual basis for the First Amended Complaint, Defendants ask this Court to apply an old, outdated "plausibility" standard of review, specifically made inapplicable by Rule 8 of the Virgin Islands Rules of Civil Procedure. As fully explained below, Defendants' Motion fails to identify any valid basis for dismissal pursuant to the Virgin Islands Rules of Civil Procedure and must therefore be denied.

II. First Amended Complaint More Than Meets Notice Pleading Standard

The First Amended Complaint fully and properly pleads causes of action for enforcement of restrictive covenant, private nuisance, declaratory judgment, diminution of value of Plaintiff's property, and unjust enrichment, and an action for an accounting. Its allegations well exceed the current Virgin Islands notice pleading standard, and are clearly more than adequate under the Virgin Islands Rules of Civil Procedure. Defendants' Motion to Dismiss is premised on the wrong pleading standard, and fails to identify a single legitimate pleading issue in the First Amended Complaint, and therefore must be flatly denied.

A. Applicable Standard of Review

Rule 8 of the Virgin Islands Rules of Civil Procedure governs motions to dismiss. Rule 8(a) provides that "a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief" and expressly recognizes that "this is a notice pleading jurisdiction."

Defendants' Motion erroneously suggests that the plausibility test articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) is the standard applicable to motions to dismiss in the Virgin Islands.

Rule 8 of the Virgin Islands Rules of Civil Procedure, which became effective on March 31, 2017, well before Plaintiff commenced this action on May 22, 2018, "expressly states that the Virgin Islands 'is a notice pleading jurisdiction,' and the Reporter's Note eliminates any doubt that this language is calculated to 'apply [ ] an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.'" *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (citing V.I. R. CIV. P. 8 Reporter's Note (emphasis added) (internal citations omitted)). The commentary following V.I. R. CIV. P. 8 explains that "[l]anguage has been included in Rule 8(a) to note that practice in the Virgin Islands continues to adhere to the traditional "notice" pleading ethos as many states and territories have chosen to do, applying an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief." Therefore, as the Supreme Court of the Virgin Islands has observed, "going forward, it is clear that the adoption of Rule 8 of the Virgin Islands Rules of Civil Procedure supersedes our prior precedents which imposed the *Twombly* plausibility standard by virtue of the now-amended Superior Court Rule 7, and restores the notice pleading regime that had previously been in effect." *Mills-Williams v. Mapp*, 67 V.I. at 585.

In *Brathwaite v. H.D.V.I. Holding Co.*, No. ST-16-CV-764, 2017 WL 2295123, at *2 (V.I. Super. May 24, 2017), the Superior Court, applying the notice pleading standard under V.I. R. CIV. P. 8, considered whether "a complaint adequately alleges facts that put an accused party on notice of claims brought against it." To the extent the "truth" of the facts alleged in the Complaint is

considered, the Complaint's allegations are assumed true. *See Finn v. Adams*, No. ST-16-CV-752, 2018 WL 3756421, at *4 (V.I. Super. Aug. 6, 2018) (applying notice pleading standard under V.I. R. CIV. P. 8(a) and assuming truth of facts alleged in complaint). Accordingly, pursuant to V.I. R. CIV. P. 8, when evaluating a motion to dismiss, the Superior Court assumes the truth of the facts alleged and evaluates only whether those facts (assumed to be true) are adequate to put an accused party on notice of the claims brought against it.

In evaluating a motion to dismiss, the Court considers only the pleadings themselves. Pursuant to V.I. R. Civ. P. 12(d):

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

See also Island Tile & Marble, LLC v. Bertrand, 57 V.I. 596, 612 (V.I. 2012) (citing V.I. R. CIV. P. 12(d)). "Matters outside the pleadings" include "unsworn representations of counsel as to factual matters—which are not themselves evidence . . . ." *Island Tile & Marble, LLC*, 57 V.I. at 613. "[U]nsworn representations of counsel as to factual matters—which are not themselves evidence, *see Henry v. Dennery,* 55 V.I. 986, 994 (V.I. 2011)—are sufficient to transform a Federal Rule 12(b)(6) motion to a Federal Rule 56 motion pursuant to Federal Rule 12(d)." *Id*. (citing *McAuley v. Fed. Ins. Co.,* 500 F.3d 784, 787 (8th Cir. 2007)). Accordingly, the unsworn declarations throughout Defendants' Motion to dismiss must be disregarded.

Converting Defendants' Motion to Dismiss into a motion for summary judgment would, as the Virgin Islands Superior Court has found under similar circumstances, be premature at this stage, given that discovery has not even started and the facts underlying the parties' claims have not been developed or fully investigated. For example, in *Ford v. Virgin Islands Dep't of Education*, the Superior Court found that, with respect to a portion of defendant's motion to

dismiss, converting defendant's motion into a motion for summary judgment was inappropriate at this early stage of the proceedings, as it would likely prejudice the parties since no discovery has been conducted and the parties have not been given a reasonable opportunity to respond." No. ST-15-CV-489, 2016 WL 3606304, at *11 (V.I. Super. June 27, 2016); *see also Fenster v. DeChabert*, No. SX-16-CV-343, 2016 WL 8943821, at *5 (V.I. Super. Aug. 8, 2016) (concluding that conversion of motion to dismiss to motion for summary judgment is "inappropriate" because the case was "in the early stages of litigation," "discovery has yet to be conducted," and the plaintiff "has not been given a reasonable opportunity respond to WLG and Walker's motions as if for summary judgment, as required under Rule 12(d)."); *GRS Dev. Co. v. Jarrett*, 45 V.I. 211, 225 (Terr. V.I. 2003) (finding "any consideration of summary judgment premature" "because [plaintiff]'s response contains facts that rebut [movant]'s arguments") *Pant v. Gov't of the Virgin Islands*, No. CV 903/1990, 1992 WL 12934021, at *3 (Terr. V.I. Nov. 9, 1992) (noting that "the U.S. Supreme Court has recently recognized that proper summary judgment procedure mandates the entry of summary judgment after adequate time for discovery has been made" and finding motion for summary judgment "premature" as further discovery was anticipated" (emphasis in original)).

At the very least, if the Court converts Defendants' Motion to Dismiss to a motion for summary judgment, pursuant to V.I. R. CIV. P. 12(d), GSJ must be permitted an opportunity to file an appropriate response. *See, e.g., Castillo v. St. Croix Basic Servs., Inc.*, 67 V.I. 26, 30 (V.I. Super. 2016) (citing identical language of FED. R. CIV. P. 12(d) and stating "If the court considers matters outside the pleadings, then a motion for judgment on the pleadings must be treated as one for summary judgment and the parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

B. First Amended Complaint Properly Asserts *In Rem* Action

Defendants' Motion argues that the First Amended Complaint fails to allege an *in rem* action against Parcel 11 because injunctive relief is sought and title to the property is not in question. Contrary to Defendants' Motion, the First Amended Complaint properly asserts an *in rem* action against Parcel 11.

In *Estate of Skepple v. Bank of Nova Scotia*, the Supreme Court of the Virgin Islands explained the scope of actions classified as *in rem*:

> The term "in rem" has multiple meanings, though all related, depending on the issue being discussed when the term is used. An "action in rem" is probably most commonly understood as an "action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." Black's L. Dict., at 32. Another common understanding of this term would also be an "action in which the named defendant is real o[r] personal property." *Id.* "In rem jurisdiction" is a "court's power to adjudicate rights to a given piece of property, including the power to seize and hold it." *Id.* at 869. Whereas to call a proceeding "in rem" is to describe the proceeding as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing. *Id.* at 809. Interestingly, the archaic term for this was "impersonal." *Id.* A "judgment in rem" then is a "judgment that determines the status or condition of property and that operates directly on the property itself. The phrase denotes a judgment that affects not only interests in a thing but also all persons' interests in the thing." *Id.* at 860. In *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-59 (1810), the Court explained the distinction at common law between service in a proceeding *in personam* versus *in rem*. If the judgment operated directly upon the person, a judgment *in personam*, service in hand directly upon the person when she was within the territorial jurisdiction of the state was essential to valid legal notice—valid service. *McDonald*, 243 U.S. at 91 ("There is no dispute that service by publication does not warrant a personal judgment against a nonresident." (citing *Pennoyer*, 95 U.S. at 714; *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 193-94 (1915))).

S. Ct. Civ. No. 2014-0050, 2018 WL 4024983, at *9 n.13 (V.I. Aug. 17, 2018).

Accordingly, pursuant to *Estate of Skepple*, an "action in which the named defendant is real o[r] personal property" and a proceeding "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing" are *in rem* actions. *Id.* Here,

GSJ named Parcel 11, which is real property, as a defendant in the action for, among other things, the purpose of obtaining a judgment declaring the rights of GSJ with respect to Parcel 11, which rights would apply not only to restrict use of the property by Kjaer, as the present owner of Parcel 11, but also use by all those who might hereafter acquire title to the same. Accordingly, the First Amended Complaint properly asserts an *in rem* action.

The citation in Defendants' Motion to *Bryan v. Fawkes*, 61 V.I. 416 (V.I. 2014) actually refutes the position for which it was cited in Defendants' Motion that an in rem action is only appropriate to where title to property is in question. Defendant's Opposition at 4. *Fawkes* specifically states: "an *in rem* action 'is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property," or "res," "upon which the court had adjudicated." BLACK'S LAW DICTIONARY 864 (9th ed. 2009)." 61 V.I. at 445. *Fawkes* concerned a challenge to the inclusion of a certain senatorial candidate on the ballot of a Virgin Islands election. Noting that in rem proceedings involve the rights in a thing against all persons at any time dealing with them, the court in *Fawkes* concluded that an election is a "res" and that the proceeding was properly determined to be an *in rem* proceeding. *Id*. at 437. In so finding, *Fawkes* notes that "numerous decisions from other courts expressly hold[ ] that an election contest is, in fact, an *in rem* proceeding, with the '*res*' being the election itself." Given the holding in *Fawkes*, the suggestion in Defendants' Motion that the instant action may not proceed against Parcel 11 in rem because the title to the property is not in question is clearly erroneous. This particularly so, where, as in this case, what is at issue and what is sought by Plaintiff is a declaratory judgment as to the applicability of the restrictive covenant, not only to Kjaer, but as to "all persons at any time" who might acquire title to Parcel 11.

C. Statute of Limitations Argument

No applicable statute of limitations bars any claims in the First Amended Complaint. The continued violation of the restrictive covenant, as amply and repeatedly alleged throughout the First Amended Complaint constitutes a recurring breach. "Consequently, the statute of limitations begins to run anew as each breach occurs." *Christmas v. Virgin Islands Water & Power Auth.*, 527 F. Supp. 843, 848 (D.V.I. 1981). The restrictive covenant has been violated on a continuous basis. Accordingly, each violation of the restrictive covenant re-starts the limitations period. Therefore, Great St. Jim's private nuisance claim was timely filed.

D. Great St. Jim is a Beneficiary of the Restrictive Covenant and It Therefore Has Standing to Enforce the Covenant

The First Amended Complaint adequately alleges facts to put Defendants on notice of Great St. Jim's breach of restrictive covenant claim.

First Amended Complaint Alleges Existence of Restrictive Covenant

In a deed dated June 30, 1965, William Houston Evans, James Alderman Evans, Jr., Executors of the Last Will and Testament of Charles Redfield Vose, conveyed title to property, including Parcel 11, to Irving L. Young, William Houston Evans, and James Alderman Evans, Jr. as Trustees under the Last Will and Testament of Charles Redfield Vose. The deed contains the following restrictive covenant:

> It is understood and agreed that this conveyance is made an accepted upon the following covenants, conditions, restrictions and reservations **which shall run with the land** and which are made for the benefit of the present and future owner or owners of any lot of lots comprising the premises known as Tract Nos. 1 and 2, Estate Nazareth (Benners) No. 1 Red Hook Quarter, St. Thomas, V.I., as delineated on P.W.D. File No. F 9-372-T59, viz:
>
> Said premises shall be **used exclusively for** a dock, wharf or landing facilities for boats of **owners or occupants of premises situated on Great St. James Island**, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use.

See FAC at ¶¶ 8-9 (emphasis added). In 1979, Parcel 11 and Great St. James were conveyed to Karen Kjaer. Following Karen Kjaer's death, Parcel 11 and Great St. James were distributed to the four heirs of her estate, one of whom was Christian Kjaer. In 2016, Christian Kjaer conveyed title to Great St. James to Plaintiff GSJ.

The First Amended Complaint seeks to enforce the restrictive covenant regarding the exclusive use of Parcel 11. To allege that a covenant affecting land exists, a plaintiff must allege the following:

> (1) the grantor and the grantee intended the covenant to run with the land
> (2) the covenant is one that "touches" or "concerns" the land with which it runs; and
> (3) there is privity of estate between the party claiming the benefit of the covenant and the right to enforce it, and the party who rests under its burden.

Estate Carlton Home & Prop. Owners Ass'n v. Daas, 16 V.I. 500, 504 (Terr. V.I. 1979) (citing *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank,* 15 N.E.2d 793 (N.Y., 1938); Clark on Covenants and Interests Running with Land, p. 74).

The First Amended Complaint alleges each of the required elements. At paragraph 9, the First Amended Complaint quotes the restrictive covenant, including the provision therein expressly stating that "the following covenants, conditions, restrictions and reservations . . . shall run with the land." The First Amended Complaint further notes that "[t]he Deed expressly provides that the grantor and grantee intended the covenant to run with the land." FAC at ¶ 15. Regarding the second element, the First Amended Complaint alleges that "[t]he covenant touches or concerns the land with which it runs because it benefits Plaintiff and imposes a burden on Parcel 11." FAC at ¶ 16. In satisfaction of the last element, the First Amended Complaint alleges that "[t]here is privity of estate between Plaintiff and Defendant Kjaer because there is a mutual or successive relationship to the same property rights between Plaintiff as successor in interest of the

original covenantees, and Defendant Kjaer, whose predecessors in interest were the original covenantors." FAC at ¶ 19. Accordingly, GSJ's First Amended Complaint properly alleges the existence of a covenant running with the land and a cause of action to enforce the same.

First Amended Complaint Alleges That Great St. Jim is a Beneficiary of the Restrictive Covenant

"Who may sue on or seek to enforce a restrictive covenant depends upon whether the covenant was made for the benefit of the one seeking to enforce it." *Freeland Tr. v. Roach*, 43 V.I. 3, 8 (Terr. V.I. 1995) (quoting *Freeland Trust v. Roach,* Memorandum Opinion, September 13, 1993). "Determination of this issue turns upon the intent of the parties who made the original agreement, i.e., whether they intended by agreement to benefit the land held by the person seeking to enforce the agreement." *Id.*

The First Amended Complaint alleges that "Parcel 11 is subject to a restrictive covenant which benefits the owner of Great St. James" and that "the clear and express language of the Deed clearly demonstrates that the covenant benefits Plaintiff as the owner and occupant of premises situated on Great St. James." FAC at ¶¶ 7, 17. The language of the restrictive covenant itself demonstrates that the covenant benefits the owner of Great St. James:

> Said premises shall be used **exclusively** for a dock, wharf or landing facilities for boats of **owners or occupants of premises situated on Great St. James Island**, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use.

Pursuant to Virgin Islands Rule of Civil Procedure 8 and the liberal notice pleading standard, the First Amended Complaint has adequately alleged facts placing Defendants on notice of its claim that Defendants breached the restrictive covenant and that the covenant was intended to benefit the owner of Great St. James. Plaintiff need plead nothing more. Defendants' efforts to dispute the allegations in the First Amended Complaint regarding the continued existence of the restrictive

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covenant or its intended beneficiaries are far outside the scope of what may properly be considered by this Court on a Motion to Dismiss. Accordingly, Defendants' Motion to Dismiss must be denied.

E. The First Amended Complaint Alleges the Existence of an Implied or Express Easement

The First Amended Complaint alleges facts to place Defendants on notice of Great St. Jim's claim that an express easement or implied easement by prior use may exist.

As an alternative to the enforcement of the restrictive covenant, the First Amended Complaint alleges that an express or implied easement exists. FAC at ¶ 10, 18. The facts supporting the existence of an express easement are the same as those supporting the restrictive covenant. The 1965 Deed provides that Parcel 11 "shall be used exclusively for a dock, wharf or landing facilities for boats of owners or occupants of premises situated on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use." FAC at ¶ 9.

Defendants' Motion to Dismiss inaccurately avers that the restrictive covenant or merger was extinguished by merger because Karen Kjaer' owned the Island of Great St. James and Parcel 11 at the same time. These are improper grounds for a Motion to Dismiss; they are at best allegations of an affirmative defense to Plaintiff's First Amended Complaint. At the motion to dismiss stage, the only question for this Court is whether the First Amended Complaint adequately alleges facts to put Defendants on notice of the claims asserted. The First Amended Complaint unquestionably meets that minimal threshold and no further analysis is permitted under Rule 8 of the Virgin Islands Rules of Civil Procedure.

If, however, the Court were to venture beyond the narrow limits of Rule 8 to evaluate Defendants' assertion that the merger doctrine extinguished the restrictive covenant, it is clear that the merger doctrine cannot be applied to defeat the restrictive covenant based on the allegations made by Defendants' counsel in the Motion to Dismiss.

"[T]he doctrine of merger is not favored either at law or in equity and will not be applied in the absence of an intent on the part of the person acquiring both estates to effect a merger and extinguish existing obligation, or unless application of the doctrine is required by the equities of a particular case." *Aviation Assocs., Inc. v. Virgin Islands Port Auth.*, 26 V.I. 24, 33 (Terr. V.I. 1990) (citing *Kelly v. Weir,* 243 F. Supp. 588, 598 (E.D. Ark.1965); *National Surety Corporation v. Inland Properties, Inc.,* 286 F. Supp. 173, 187 (E.D. Ark. 1968), *Harris v. Alaska Title Guaranty Company,* 510 P. 2d 501, 503-504 (Alaska 1973)). Pursuant to Restatement (Third) of Property (Servitudes) § 7.5 (2000), "[a] servitude is terminated when all the benefits and burdens come into a single ownership." Kjaer's counsel essentially argues that the restrictive covenant in this case was exclusively "made for the benefit of the present and future owner or owners of any lot of lots comprising the premises known as Tract Nos. 1 and 2, Estate Nazareth (Benners) No. 1 Red Hook Quarter, St. Thomas, V.I., as delineated on P.W.D. File No. F 9-372-T59 . . . ." Defendant's Motion at 7. However, as alleged in the First Amended Complaint, the restrictive covenant also provides that Parcel 11 is to be "exclusively" used "for a dock, wharf or landing facilities for boats of owners or occupants of premises situated on Great St. James Island, St. Thomas, V.I., or their licensees or invitees, and as the site of such shelter, garages, storage buildings, or like facilities as are incident to such use," FAC at ¶ 9, which exclusive use plainly benefits the owner of Great St. James. For the merger doctrine to apply, Tracts 1 and 2, **Great St. James Island**, and Parcel 11 would all have to have been owned by a single owner at one time. Defendants' Motion to Dismiss,

by contrast, only alleges that Karen Kjaer held title to Great St. James and Parcel 11. Defendant's Motion at 9 n.2, 9-10. Most importantly, there is nothing within the four corners of the First Amended Complaint to establish such unified ownership in a Karen Kjaer or any other single person. Arguments disputing the continued existence of the restrictive covenant as a result of merger, based on unsworn and untested assertions of fact by Defendant's counsel -- which, as stated above, cannot properly be considered to be evidence of anything and which are themselves insufficient to establish merger -- cannot and should be considered on a Motion to Dismiss.

The First Amended Complaint also alleges facts more than sufficient to notify Defendants of Plaintiff's claim that an implied easement by prior use exists. In *SBRMCOA, LLC v. Morehouse Real Estate Investments, LLC*, 62 V.I. 168, 190 (V.I. Super. 2015), the Superior Court noted that "it appears that the Virgin Islands Supreme Court has yet to consider the appropriate rule of law for implied easements." Accordingly, the Superior Court conducted a *Banks* analysis and concluded that the Restatement (Third) of Property (Servitudes) § 2.12 is the rule applicable to implied easements by prior use.

Section § 2.12 provides:

> Unless a contrary intent is expressed or implied, the circumstance that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.
>
> The following factors tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use:
>
> (1) the prior use was not merely temporary or casual; and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use; and (3) existence of the prior use was apparent or known to the parties.

Restatement (Third) of Property (Servitudes) § 2.12.

Defendant Kjaer owned both Great St. James and Parcel 11 at the time he conveyed Great St. James to Great St. Jim. The First Amended Complaint alleges that "Parcel 11 has been used as a staging ground for Great St. James Island in keeping with the restrictive covenant in the 1965 Deed and because a permanent access point on St. Thomas was and remains necessary to the owners and occupants of Great St. James." FAC at ¶ 18. Plaintiff had reasonable grounds to expect that the conveyance of Great St. James from Kjaer to Plaintiff would not terminate the right to continue the prior use of Parcel 11 as a launching point to Great St. James because a launching point on St. Thomas is reasonably necessary for the enjoyment of Great St. James, as alleged in the First Amended Complaint. FAC at ¶ 18. Because Plaintiff has alleged in the First Amended Complaint facts sufficient to place Defendants on notice of Plaintiff's claim of an implied easement by prior use, Defendants have no basis whatsoever to seek dismissal of the portion of the First Amended Complaint asserting the existence of an implied easement, and their motion must be denied.

F. Private Nuisance Claim

The First Amended Complaint also properly and adequately asserts a private nuisance claim against Defendants so as to readily defeat Defendants' Motion to Dismiss. Section 331 of Title 28 of the Virgin Islands Code "creates a private right of action against one who causes damages to another by private nuisance, but the statute does not define what constitutes a private nuisance." *Cifre v. Daas Enterprises, Inc.*, 62 V.I. 338, 359 (V.I. Super. 2015).

The Supreme Court of the Virgin Islands has not yet defined the precise elements of a private nuisance claim, but the Superior Court has published opinions analyzing the required elements. *See Alleyne v. Diageo USVI, Inc.*, 63 V.I. 384, 403-405 (V.I. Super. Sept. 17, 2015) (defining private nuisance as "a substantial, unreasonable, interference with another's interest in

the private use and enjoyment of their property."); *Cifre*, 62 V.I. at 362 (defining private nuisance "as a substantial and unreasonable nontrespassory interference with another's interest in the private use and enjoyment of land."). Defendants themselves concede on page 12 of their Motion to Dismiss that "The 'soundest rule for the Virgin Islands is to define a private nuisance as a substantial and unreasonable nontrespassory interference with another's interest in the private use and enjoyment of land.'"

The First Amended Complaint more than adequately alleges a private nuisance claim. It alleges that Kjaer's violation of the restrictive covenant to which Parcel 11 is subject is an intentional and unreasonable invasion of Great St. Jim's interest in Parcel 11. *See* FAC at ¶¶ 24-29. The restrictive covenant provides that Parcel 11 shall be "exclusively" used by the owners and occupants of Great St. James for the purposes of transportation to and from Great St. James. Kjaer's use of Parcel 11 to operate a business for purposes other than those contemplated by the restrictive covenant is by definition a substantial and unreasonable interference with the owner of Great St. Jim's exclusive right to use Parcel 11 for those purposes. Moreover, throughout the First Amended Complaint, Plaintiff makes clear that Defendants' violations have continued and are ongoing. Thus, as explained above, Defendants' argument that the statute of limitations somehow bars Plaintiff's private nuisance claim has no merit. Accordingly, Defendants' Motion to Dismiss as to Plaintiff's private nuisance claim must be denied as well.

G. No Diminution of Value of GSJ

The First Amended Complaint properly states a claim for diminution of the value of Great. St. James. "The measure of damages for breach of a restrictive covenant is the diminution in the value of the benefitted parcel by reason of the breach." *New York City Econ. Dev. Corp. v. T.C. Foods Imp. & Exp. Co.*, 46 A.D.3d 778, 847 N.Y.S.2d 669, 670 (2007) (citing *Flynn v. New York,*

Westchester & Boston Ry. Co., 218 N.Y. 140, 112 N.E. 913; *Binghamton Plaza v. Gilinsky,* 32 A.D.2d 994, 301 N.Y.S.2d 921)); *see also Cobb v. Gammon*, 389 P.3d 1058, 1074 (N.M. Ct. App. 2016) (describing "diminution of value" as "relevant as a measure of damages for injury to real property."). The First Amended Complaint puts Defendants on notice of Great St. Jim's diminution of value claim, and Plaintiff is not required to plead anything more than that which it has already plead in the First Amended Complaint. The unsworn and untested factual assertions of Defendant's counsel in support of Defendants' motion to dismiss Plaintiff's claim for diminution of value is not evidence of anything, is improperly offered and may not be considered on this Motion to Dismiss. To the extent the Court determines that diminution of value is a remedy and is not a separate cause of action, Great St. Jim's diminution of value claim is not subject to dismissal, but is properly alleged as part and parcel of its claim for Defendant's breach of the restrictive covenant.

H. Unjust Enrichment Claim

Count Five is properly alleged and adequately places Defendants on notice of Great St. Jim's claim against them for unjust enrichment.

An unjust enrichment claim consists of four elements: "(1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff." *Walters v. Walters*, 60 V.I. 768, 779-780 (V.I. 2014) (adopting elements of unjust enrichment pursuant to a *Banks* analysis).

The First Amended Complaint alleges that "Defendant Kjaer has wrongfully earned income through the operation of a business on Parcel 11, in violation of the clear and express terms

of said restrictive covenant" and that "[i]ncome is a thing of value which Defendant Kjaer is not entitled to receive by his use of Parcel 11." FAC at ¶¶ 40-41. The first element is therefore satisfied because the First Amended Complaint alleges that Kjaer was enriched by his receipt of income he would not otherwise have, but for the violation of the restrictive covenant. The First Amended Complaint further explains that Kjaer has earned income at Great St. Jim's expense because the income is generated in violation of the restrictive covenant, and the restrictive covenant limits the uses of Parcel 11 to serving the transportation needs of owners or occupants or premises situated on Great St. James Island. FAC at ¶ 42. These allegations satisfy the second and third elements of unjust enrichment. Moreover, Defendants' Motion to Dismiss does not deny knowledge of the income described in the First Amended Complaint.

The First Amended Complaint also sets forth facts supporting the fourth element of unjust enrichment, that the circumstances are such that in equity or good conscience Kjaer should return the money or property to Great St. Jim. The clear terms of the restrictive covenant limit the use of Parcel 11 to serving as a launching point and landing spot for the owners and occupants of Great St. James. The First Amended Complaint alleges that Kjaer, who is not an owner or occupant of Great St. James, is using Parcel 11 for purposes other than those set forth in restrictive covenant making it so that Plaintiff is unable to use Parcel 11 "as the site of such shelter, garages, storage buildings, or the like facilities as are incident to such use." FAC at ¶ 12. As set forth in the First Amended Complaint, the income Kjaer has earned through his use of Parcel 11 in violation of the restrictive covenant has reduced the value of Great St. James Island, which Great St. Jim owns. FAC at ¶ 42. Accordingly, equity dictates that the income Kjaer owned through his violation of the restrictive covenant should be awarded to Great St. Jim.

III. Conclusion

Defendants' Motion to Dismiss must be denied because it fails to set forth any valid basis for dismissal of any portion of the First Amended Complaint for failure to meet V.I. R. CIV. P. 8(a)'s liberal notice pleading standard. The First Amended Complaint more than adequately alleges that a restrictive covenant exists and that Kajer is violating the restrictive covenant by using it for purposes other than those set out in the restrictive covenant, i.e., for the transportation needs of the owners and occupants of Great St. James. The First Amended Complaint also properly asserts claims for private nuisance, diminution of value, and unjust enrichment. Accordingly, Defendants' Motion to Dismiss must be denied.

Respectfully,

Dated: November ____, 2018

CHRISTOPHER ALLEN KROBLIN, ESQ.
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RULE 6-1 CERTIFICATE

I HEREBY CERTIFY that this document complies with the page or word limitation set forth in V.I. R. CIV. P. 6-1(e).

_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of November, 2018, I caused a true and exact copy of the foregoing **Opposition to Motion to Dismiss** to be served via first class mail, postage prepaid, upon:

Gaylin Vogel, Esq.
Kevin F. D'Amour, P.C.
P.O. Box 10829
St. Thomas, V.I. 00801
[redacted]

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