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

KATHERINE ELIZABETH LEACH and JAMIE LEACH	)	
	)	Case No. ST-16-CV-506
Plaintiffs,	)	
vs.	)	
	)	ACTION FOR DAMAGES
CRUISE SHIP EXCURSIONS, INC.,	)	
	)	
Defendant.	)	
	)	

Cite as 19 V.I. Super 110U

MEMORANDUM OPINION

¶1 This negligence action is before the Court on Defendant Cruise Ship Excursions, Inc.'s Motion for Summary Judgment, filed March 8, 2019. Plaintiffs sued after Katherine Leach fell on a catamaran and was injured while on a snorkeling excursion operated by Defendant in the waters off St. Thomas. Defendant asserts that Plaintiffs' negligence claim is barred by a release and waiver that Plaintiffs signed before the excursion. Plaintiffs argue the release is not enforceable. The Court finds the release and waiver was not conspicuous, sufficiently clear and unequivocal. As a result, it is unenforceable. Therefore, the Court will deny the motion for summary judgment.

FACTS

¶2 The following facts are taken from the summary judgment record and are either uncontroverted or viewed in the light most favorable to the Plaintiffs since they are the non-moving party.

¶3 In May 2016, Plaintiffs Katherine and Jamie Leach were passengers on a cruise ship operated by Royal Caribbean Cruise Lines.[1] On May 25, while their ship was moored in St. Thomas, the Leaches went on a day excursion operated by Defendant Cruise Ship Excursions ("CS") aboard the Champagne Cat, a 53-foot catamaran sailing vessel (the "boat"). The excursion was a snorkeling sail trip from St. Thomas to St. John and back.

¶4 As Plaintiffs and other passengers boarded the boat, the captain told the passengers about the schedule for the excursion, pointed out the location of life preservers and gave instructions on how to use the vessel's lavatory.

¶5 After passengers boarded the boat, and while the boat was departing, the crew passed around to passengers a clip board which contained a purported waiver and release (the "Release"). On one side of the clip board was a document with the heading, "Release of Liability, Assumption of Risk, Waiver of Claims & Indemnification Agreement". Beneath that heading was written "**Notice** – By signing this document you may be waiving certain legal rights, including the right to sue". Below that was the following language:

> In consideration of being allowed to use the facilities and vessels and participate in fishing, snorkeling, boating, and other activities (collectively the "Activities") provided by Cruise Ship Excursions, (collectively the "Host"), the Participant, and the Participant's parent(s) or legal guardian(s) if the Participant is a minor, do hereby agree, to the fullest extent permitted by law, as follows:

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[1] Plaintiffs Katherine and Jamie Leach are husband and wife. Jamie Leach has a claim for loss of consortium.

> I) **TO WAIVE ALL CLAIMS** that they have or may have against the Host arising out of the Participant's participation in the Activities or the use of any equipment provided by the Host ("Equipment"), including while receiving instruction and/or training;
>
> 2) **TO ASSUME ALL RISKS** of participating in the Activities and using the Equipment, even those caused by the **negligent** acts or conduct of the Host, its owners, affiliates, operators, employees, agents, and or officers. The Participant and his/her parent(s) or legal guardian(s) understand that there are inherent risks of participating in the Activities and using the Equipment, which may be both foreseen and unforeseen and include serious physical injury and death;
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> 3) **TO RELEASE** the Host, its owners, affiliates, operators, employees, agents, and officers from all liability for any loss, damage, injury, death, or expense that the Participant (or his/her next of kin) may suffer, arising out of his/her participation in the Activities and/or use of the Equipment, including while receiving instruction and/or training. The Participant and his/her parent(s) or legal guardian(s) specifically understand that they are releasing any and all claims that arise or may arise from any **negligent** acts or conduct of the Host, its owners, affiliates, operators, employees, agents, and/or officers, to the fullest extent permitted by law. However, nothing in this Agreement shall be construed as a release for conduct that is found to constitute gross negligence or intentional conduct; and
>
> 4) **TO INDEMNIFY** the Host, its owners, affiliates, operators, employees, agents, and/or officers, from all liability for any loss, damage, injury, death, or expense that the Participant (or his/her next of kin) may suffer, arising out of participation in the Activities and/or use of the Equipment, including while receiving instruction and/or training. (emphasis in original)

¶6 On the reverse side of the clip board was a page with several lines for passengers' names and signatures. At the top of that page was the following language, "I HAVE READ AND UNDERSTAND THIS AGREEMENT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I MAY BE WAIVING CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE." Beneath that language and

above the lines for passengers' signatures was written "**Parents of Guardians must also sign if the Participant is UNDER 18 (see last page).**" Plaintiffs assert that when the clip board was passed to them, this side of the clip board was facing up. Both Plaintiffs and two adult relatives with them signed and dated the form in the appropriate spaces provided.

¶7 The catamaran took Plaintiffs along with approximately 20 other passengers from St. Thomas to a beach on St. John where Plaintiffs snorkeled. Plaintiffs returned to the boat after snorkeling and the boat began sailing back toward St. Thomas. Katherine Leach's Resp. to Interrog. 8. As the boat made its return to St. Thomas, the boat encountered an "unusually large wave", *id.*, causing the bow of the boat to dip. The wave caused Katherine Leach, who was standing at the bow of the vessel with her back to the water, to be thrown forward onto the boat deck. *Id.* As a result, Leach suffered abrasions on her legs and feet and other injuries. Compl. ¶ 9.[2] She was examined by a doctor back on Plaintiffs' cruise ship who sent Leach to a hospital on St. Thomas for further attention. As a result of Leach's injuries, Plaintiffs had to cancel the rest of their trip and return home for medical care.

¶8 Plaintiffs filed this action, asserting that CS:

> [O]perated its excursion in a negligent manner to include but not be limited to allowing passengers not to be secured while the vessel was underway; not properly warning the customers, including the Plaintiff Katherine Leach, of dangers in not being secured while the vessel was under way; operating the vessel in rough seas with Plaintiff and other passengers at the bow, such that it hit a wave head on and caused the

[2] The nature of Leach's alleged injuries is not relevant for purposes of deciding this motion for summary judgment. Therefore, they are simply summarized here.

> vessel to become unstable; not warning of the approaching wave; and operating the vessel in an improper manner.

Compl. ¶ 6.

¶9 CS has moved for summary judgment, relying on the Release that Plaintiffs' signed and arguing that Plaintiffs' negligence claim against it is barred by the agreement. Plaintiffs challenge the enforceability of the Release. Katherine Leach asserts that she was told nothing about the clip board documents except that they should sign their names and date the form. Affirmation of Katherine Leach ¶ 6. She asserts that neither the captain nor the crew informed them that the form was a release and waiver. *Id.* ¶ 7. She asserts that she did not read the Release affixed to the back of the clip board, and that she only read the side of the board with the signature page. *Id.* Jamie Leach testified in his deposition that he did not recall seeing the side of the clip board with the waiver text. Jamie Leach Dep. 17, Aug. 28, 2018, Pls.' Statement of Facts Ex. 7. Most importantly, Plaintiffs assert that the Release was not sufficiently clear and unequivocal. Accordingly, Plaintiffs assert that the Release is not enforceable and the motion for summary judgment should be denied.

¶10 The Court now moves to consider the issue of whether the Release is enforceable.

LEGAL STANDARD

¶11 Summary judgment should only be granted if "'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (citing Fed. R. Civ. P. 56). A fact is material only where it "'might affect the outcome of the suit under the governing law,'" *id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)), and a factual dispute is deemed genuine if, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Liberty Lobby,* 477 U.S. at 248.

¶12 When reviewing the record under a summary judgment motion, a court, "must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party," and, "must take the non-moving party's conflicting allegations as true if supported by 'proper proofs.'" *Williams*, 50 V.I. at 194 (citing *Seales v. Devine*, 2008 V.I. Supreme LEXIS 23, *4). However, "[a] party opposing a motion for summary judgment, the non-movant, 'may not rest upon the mere allegations or denials of her or his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.'" *Liberty Lobby*, 477 U.S. at 248 (quoting Fed. R. Civ. P. 56(e)).

¶13 For the non-movant to proceed to trial, an issue of material fact needn't be clear enough, "to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual

dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 248-49 (citation and internal quotations omitted). Such evidence presented by the non-movant, "may be direct or circumstantial, but the mere possibility that something occurred in a particular way is not enough, as a matter of law," for a jury or judge to find it *probably* happened that way. *Williams*, 50 V.I. at 195 (citation and internal quotations omitted). In sum, "the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Robbins v. Port of Sale*, 2018 V.I. LEXIS 110, *6 (V.I. Super. 2018) (quoting *id.*).

CHOICE OF LAW

¶14 Both parties contend that this action rings in admiralty. Nevertheless, Plaintiffs assert that Virgin Islands law applies to this matter, while Defendant asserts "this is a case sounding in admiralty where federal admiralty law should apply to the case," but then also discusses Virgin Islands law. Since it is the Court's duty to know which law to apply—a disparity in law could change of the outcome of this matter—the Court will proceed to make certain which law it should apply.

I. This cause of action rings in admiralty.

¶15 Title 28, section 1333 of the United States Code provides that, "[t]he [United States] district courts shall have original jurisdiction, exclusive of the courts of the States, of any civil case of admiralty or maritime jurisdiction, *saving to suitors in all*

cases all other remedies to which they are otherwise entitled." (emphasis added). "[T]he 'saving to suitors' clause has been interpreted by the [U.S.] Supreme Court as a means of preserving the role of state courts in administering common law remedies, such as a jury trial, in admiralty cases." *See Nassau Cnty. Bridge Auth. v. Olsen*, 130 F. Supp. 3d 753, 759 (E.D.N.Y. 2015) (quoting *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444 (2001) ("Thus, the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims.") (citations omitted).

> Specifically, a district court's admiralty jurisdiction is exclusive "only as to those maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. . . . But the [savings to suitors clause] does leave state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation."

Crowley Am. Transp., Inc. v. Bryan, 143 F. Supp. 2d 530, 531 (D.V.I. 2001) (quoting *Madruga v. Superior Court*, 346 U.S. 556, 560 (1953)).

¶16 As this is not a proceeding in rem, the Court may maintain jurisdiction over Plaintiffs' action whether or not it is a maritime cause of action. However, if this is a maritime action the Court must determine whether to apply local law or federal admiralty law.

> [T]he 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics v. Tallentire, 477 U.S. 207, 222-23 (1986).

¶17 To determine if this is an admiralty cause of action, "the Court applies the traditional location and maritime connection tests set forth by the United States Supreme Court in [*Grubart*]." *See Anderson v. United States*, 245 F. Supp. 2d 1217, 1224 (M.D. Fla. 2002) (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)). First, "[a] court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on and was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534. Next, for the connection test, "[a] court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, [it] must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* (citations and internal quotations omitted).

¶18 The location test is clearly satisfied here, as Leach was injured while on a catamaran in the navigable waters between St. Thomas and St. John. *See Piche v. Stockdale Holdings, LLC*, 51 V.I. 657, 662 (D.V.I. 2009) (finding location test "clearly satisfied" where personal injury occurred during a boating tour on navigable water off the coast of St. Thomas); *Oran v. Fair Wind Sailing, Inc.*, 2009 U.S. Dist. LEXIS 110350, at *16 (D.V.I. 2009) (court found it "sufficient" to meet the location prong of the test where accident occurred aboard a catamaran sailing off the coast of St. Thomas); *Dadgostar v. St. Croix Fin. Ctr., Inc.*, 2011 U.S. Dist. LEXIS 106278, at *10

(D.V.I. 2011) (location test "easily satisfied" where plaintiff was injured while swimming in the navigable waters off of St. Croix).

¶19 The Court finds the connection test, while a closer call, is ultimately met by the facts of this case. Finding that necessary connection to maritime activity requires the Court to first assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Courts have often liberally construed 'potentially disruptive':

> The potential disruption test has been construed broadly by courts to encompass cases involving swimmers injured by boats, recreational vessels that have spun out of control, people injured by failed equipment who might be in need of rescue assistance, and defective vessels where the injury may cause disruption to the vessel's navigation or to other craft. Many of these cases make the point that rescue efforts and after-accident investigations can lead to disruption of maritime commerce.

Donnelly v. Slingshot Sports LLC, 605 F. Supp. 2d 613, 617 (D. Del. 2009) (citations omitted). When discussing a collusion between two pleasure boats on navigable waters, the U.S. Supreme Court wrote, "[t]he potential disruptive impact of a collision . . . coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). The Court there found that "a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts." *Id.* at 677.[3]

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[3] *See also, e.g., In re Christopher Columbus, LLC*, 872 F.3d 130, 136-37 (3rd Cir. 2017):

¶20 The incident in this case can appropriately be described as "an injury to a passenger on a vessel."[4] The Court initially hesitated to find that such an incident could potentially have a disruptive impact on maritime commerce; however, given the liberal construction courts—including the U.S. Supreme Court and Circuit Courts—

> Similar assessments in this case lead us to conclude that an altercation between passengers on a boat in the process of docking has the potential to disrupt maritime commerce. . . . [T]here are numerous scenarios that could result from a passenger altercation, each of which poses more than a fanciful risk to maritime commerce. First, this type of incident has the potential to distract the captain or crew during the docking procedure, which could have resulted in the vessel crashing into or in some way colliding with the pier, causing damage to the vessel or to the pier. Depending on the degree of damage to the pier, it could be rendered unusable. Second, a mishap during docking also has the potential to cause injuries to passengers or the crew, the latter of which could leave the vessel unable to dock at the pier. Such injuries could require a rescue of those on board, which might then lead to a Coast Guard investigation. Finally, if the crew was sufficiently sidetracked by the altercation and unable to execute the docking maneuver, the vessel could be forced back out on the waterway with a veritable riot among the passengers. That would certainly be distracting to the captain and crew, and also pose a risk to nearby vessels. Any of these outcomes were possible, and all have the potential to disrupt maritime commerce.;

Germain v. Ficarra (In re Germain), 824 F.3d 258, 273 (2d Cir. 2016) ("We similarly conclude that the crew of a vessel, commercial or recreational, on open navigable waters could become distracted when a passenger is injured from jumping overboard and that the distraction could risk collision with a commercial vessel.").

[4] "In deciding whether an incident ha[s] a potentially disruptive impact on maritime commerce, the Supreme Court has noted that the inquiry should focus "not on the particular facts of the incident . . . but on whether the 'general features' of the incident were 'likely to disrupt commercial activity.'" *Grubart*, 513 U.S. at 538 (quoting *Sisson v. Ruby*, 497 U.S. 358, 363 (1990)). The first inquiry in the connection test "turns, then, on a description of the incident at an *intermediate level of possible generality*." *Grubart*, 513 U.S. at 538 (emphasis added); *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 217 ("[T]he type of incident involved must not be defined at too high or too low a level of generality; instead the question is 'whether the incident could be seen within a class of incidents that posed more than a fanciful risk' to maritime commerce.") (quoting *Grubart*, 513 U.S. at 538-39).
Some examples of the ways in which courts have crafted different incidents are: *Grubart*, 513 U.S. at 539 ("The incident's general features' may be described as *damage by a vessel in navigable water to an underwater structure*.") (emphasis added); *In re Christopher Columbus, LLC*, 872 F.3d 130, 135 (3rd Cir. 2017) ("[T]he incident at issue here is best described as "an altercation between passengers on a boat in the process of docking."); *Hargus v. Ferocious & Impetuous, LLC*, 840 F.3d 133, 137 (3rd Cir. 2016) ("Here, the activity in question can be described as "throwing a small inert object from land at an individual onboard an anchored vessel."); *In re Germain*, 824 F.3d at 272 (defining incident as "injury to a passenger who jumped from a vessel on open navigable waters" and finding too specific the lower court's description of "an injury to a recreational passenger who jumped from a recreational vessel in a shallow recreational bay of navigable waters").

have given to the term "potentially disruptive", the Court ultimately finds it could have such an impact. *See, e.g., Piche,* 51 V.I. at 663 (where the Plaintiff was injured on a powerboat excursion off of St. Thomas and the District Court found the connection test was satisfied); *Oran*, 2009 U.S. Dist. LEXIS 110350, at *16 ("Injuries occurring aboard those vessels engaged in maritime commerce necessarily have the potential to disrupt such commerce, and thus meet the first prong of the connection condition.") (where the plaintiff had slipped and fallen on bench cushions aboard a catamaran).

¶21 Thus, the Court finds this incident quite clearly evidences a substantial relationship to traditional maritime activity. Therefore, the action does ring in admiralty. Nonetheless, that does not end the inquiry about which law applies.

II. The Court will apply Virgin Islands law.

¶22 Even if this cause of action rings in admiralty, that does not mean the Court must automatically apply federal maritime law to determine whether CS' Release is enforceable. *Grubart*, 513 U.S. at 545 ("[E]xercise of federal admiralty jurisdiction does not result in automatic displacement of state law. . . . [A] fundamental feature of admiralty law, [is] that federal admiralty courts sometimes do apply state law.").

> The "saving to suitors" clause leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* and means that a state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit so long as it does not attempt to give in rem remedies or make changes in the substantive maritime law. Stated another way, the "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of

> action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics v. Tallentire, 477 U.S. 207, 222-23 (1986) (citations and internal quotations omitted). The Third Circuit has held that because of the "strong interest in maintaining uniformity in [national] maritime law," *Sosebee v. Rath*, 893 F.2d 54, 56 (3d Cir. 1990), "state law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with maritime law." *Floyd v. Lykes Bros. S.S. Co.*, 844 F.2d 1044, 1047 (3d Cir. 1988). In other words, state or territorial law may be applied in an admiralty action to the extent it does not encroach upon national maritime law.

¶23 Before the Court is the question of whether a release is enforceable. The Court discerns no uniform maritime law on whether and when these types of agreements are enforceable. The Eleventh Circuit Court of Appeals has found that, "to determine whether a limitation of liability clause is enforceable in a maritime contract. . . . The clause must (1) clearly and unequivocally indicate the parties' intentions; (2) *not absolve the repairer of all liability* and still provide a deterrent to negligence; and (3) the 'businessmen' must have equal bargaining power so there is not overreaching." *Mount Sage, Ltd. v. Rolls-Royce Commer. Marine Inc.*, 635 Fed. Appx. 833, 836-37 (11th Cir. 2016) (emphasis added) (citations and internal quotations omitted). "In contrast . . . the First, Eighth, and Ninth Circuit[s] have . . . found that exculpatory clauses that release parties from all negligence liability may be enforceable under

certain circumstances outside the towing context." *Piché v. Stockdale Holdings, LLC*, 51 V.I. 657, 666 (D.V.I. 2009)) (citing *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 274 (1st Cir. 2006); *Sander v. Alexander Richardson Investments*, 334 F.3d 712, 717 (8th Cir. 2004); *Royal Ins. Co. of Am. v. S.W. Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999)); *Broadley*, 471 F.3d at 274 ("Two circuits [the Eighth and Ninth] would allow a release from all liability for negligence (at least in the dockage context) and one circuit [the Eleventh] arguably would not. Another circuit [the Fifth] has upheld exculpatory clauses that limited but did not entirely preclude liability for negligence[.]") (citations omitted). Since no uniform maritime rule is applicable, this Court finds applying Virgin Islands law would not interfere with uniformity in national maritime law—indeed, it appears there is no uniformity. Accordingly, the Court will apply Virgin Islands law.

ANALYSIS

I. The Release was not conspicuous, and its language was not clear, unambiguous, and unequivocal.

¶24 For an exculpatory clause which limits or absolves a party for its own ordinary negligence to be enforceable, the language of the clause must be clear, unambiguous, and unequivocal. *Davis v. American Youth Soccer Organization*, Super. Ct. Civ. No. ST-09-CV-70, 2016 V.I. LEXIS 54, at *6-7 (V.I. Super. Ct. May 18, 2016) (unpublished) (completing a *Banks* analysis on the enforcement of exculpatory

clauses). Plaintiffs argue that the Release here is unenforceable because it was not conspicuous, sufficiently clear, and unequivocal. The Court agrees.

¶25 Defendant's release form comprised two sides of a clip board. The release clauses were written on one side of a clip board. See¶5 above. On the reverse side of the clipboard was the following language, "I HAVE READ AND UNDERSTAND THIS AGREEMENT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I MAY BE WAIVING CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE." The passengers signed below that language.

¶26 Plaintiffs argue the substance of the Release appeared at the bottom side of the clip board and not in plain sight. Katherine Leach testified that she did not recall seeing the Release clause language on the opposite side of the form she and Jamie signed.[5] Katherine Leach Dep. 25:8-11, Aug. 28, 2018, Pls.' Statement of Facts Ex. 3. She testified that she did not recall reading the text at the top of the form she signed. *Id.* at 26:4-11. Jamie Leach testified that he did not remember seeing or reading the Release clause language on the opposite side of the form. Jamie Leach Dep. 17:9-15; 19:4-14. He testified that at the time he signed the form, he thought it was "kind of a participation form." *Id.* at 27:5-7.

¶27 It's not clear that Plaintiffs knew what they were signing. Also, atop the spaces in which passengers were to sign was written "Participant's Printed Name" and "Participant's Signature", which might suggest to some that the form was a sign-in

[5] They also recall not seeing the form they signed.

sheet. It is quite possible that a person signing the form might not have been alerted to the fact that waiver and release clauses appeared on the reverse side of the clip board. Therefore, the Court finds the Release was not conspicuous.

¶28 Additionally, the language above where Plaintiffs signed stated that, "I HAVE READ AND UNDERSTAND THIS AGREEMENT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I **MAY** BE WAIVING CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE." (bold emphasis added). Even if Plaintiffs had read the language atop the form they signed, this language did not unequivocally state that Plaintiffs would be waiving their right to sue—"may" expresses possibility and not certainty. Thus, the Court finds the Release language was not unequivocal.

¶29 Accordingly, the Release is unenforceable and summary judgment will be denied.

II. Plaintiffs did not allege a claim of gross negligence in their Complaint.

¶30 Plaintiffs complain that CS failed to address the elements of gross negligence in its summary judgment motion. Plaintiffs assert that, even if the Release validly precluded a claim for negligence, it could not exempt CS from liability for gross negligence. CS counters that Plaintiffs did not properly plead a claim for gross negligence in their Complaint. CS asserts that even under the liberal standards of Virgin Islands notice pleading, Plaintiffs' Complaint failed to successfully allege gross negligence.

¶31 Under Virgin Islands Rule of Civil Procedure 8(2):

> [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 -- because this is a notice pleading jurisdiction -- and the pleading shall be set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts and defenses for each claim identified in the pleading[.]

"Under notice pleading, there is a very low threshold to determine whether a complaint states a claim. All [a] party must provide is a 'short and plain statement showing that they are entitled to relief." *Bank of Nova Scotia v. Flavius*, Super. Ct. Civ. No. SX-16-CV-125, 2018 V.I. LEXIS 14, at *13-14 (V.I. Super. Ct. Feb. 2, 2018) (unpublished) (citations and internal quotations omitted). However, "[s]uch a statement must [] give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citation omitted). Though under notice pleading, a plaintiff faces a very low threshold in stating a claim for relief, the premise of pleading and purpose of the complaint is nonetheless to give a defendant notice of the claims against it.

¶32 In the Virgin Islands, a plaintiff pursuing a claim of gross negligence "must establish that: (1) the defendant owed plaintiff a legal duty of care; (2) the defendant breached that duty in such a way as to demonstrate a *wanton, reckless indifference to the risk of injury to plaintiff*; (3) and the defendant's breach constituted the proximate cause of (4) damages to plaintiff." *Brathwaite v. Xavier*, S. Ct. Civ. No. 2017-0037, 2019 V.I. 26, ¶31, 2019 V.I. Supreme LEXIS 37, *31, 2019 WL 3287069 (V.I. July 16, 2019) (emphasis added). *Brathwaite* explicitly held that gross negligence means wanton, reckless behavior demonstrating a conscious indifference to the health or

safety of persons or property; that gross negligence "must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *Id.* at ¶ 30 (quoting *Yusuf v. Ocean Props.*, Super. Ct. Civ. No. SX-15-CV-008, 2016 V.I. LEXIS 19, at *4 (V.I. Super. Ct. Mar. 7, 2016)).

¶33 Here, Plaintiffs' Complaint contains no short and plain statement of a claim of gross negligence. It does not make any conclusory allegations of gross negligence, recklessness, or wanton indifference to a risk of injury to Plaintiffs. The only paragraph in the Complaint speaking to CS' alleged negligence states:

> *Defendant operated its excursion in a* ***negligent*** *manner* to include but not be limited to allowing passengers not to be secured while the vessel was underway; not properly warning the customers, including the Plaintiff Katherine Leach, of dangers in not being secured while the vessel was under way; operating the vessel in rough seas with Plaintiff and other passengers at the bow, such that it hit a wave head on and caused the vessel to become unstable; not warning of the approaching wave; and operating the vessel in an improper manner.

Compl. ¶ 6 (emphasis and bold text added). That language contains no factual allegations that, if true, could reasonably be construed to show a state of mind indicating wanton or reckless indifference by CS to the safety needs of Plaintiffs. And as a matter of form, Plaintiffs' Complaint provides no separate designation of counts as directed by V.I. R. Civ. P. 8(2). The Complaint can only reasonably be construed as putting CS on notice of a negligence claim against it. While Plaintiffs assert that, "from the outset," they have "no obligation to produce anything on this claim, even if they have the ultimate burden of persuasion at trial," they did have an obligation to

at least put CS on notice of a claim for gross negligence if they intended to pursue that claim.[6] The Court finds Plaintiffs have not alleged a claim of gross negligence against CS. *See, e.g., Brathwaite v. H.D.V.I. Holding Co.*, Super. Ct. Civ. No. ST-16-CV-764, 2017 V.I. LEXIS 76, at *7 (V.I. Super. Ct. May 24, 2017) (unpublished) (dismissing claim for gross negligence where plaintiff asserted in complaint that "negligence was gross," but did not provide any more detail, and later conceded that he failed to allege the elements for gross negligence).

CONCLUSION

¶34 This action for negligence, which springs from Katherine Leach's fall on a boat in the waters off St. Thomas, meets the location and connection tests for determining whether an action rings in admiralty. However, because the Court finds no uniform rule in maritime law on whether and when exculpatory clauses are enforceable, the Court will apply Virgin Islands law.

¶35 The Release in this matter is unenforceable under Virgin Islands law. Accordingly, Plaintiffs' negligence claim against CS is not barred. Summary judgment on the negligence claim must be denied.

¶36 Plaintiffs did not plead a claim of gross negligence in their complaint.

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[6] Plaintiffs cite to a portion of a Virgin Islands Supreme Court opinion where the court discussed burdens of production under motions for summary judgment. *United Corp. v. Hamed*, 64 V.I. 297, 309-10 (2016). However, the issue here is not whether either party has a burden of production, but whether Plaintiffs' claim for gross negligence has been properly pled in the complaint sufficient to put CS on notice of same.

¶37 An Order consistent with this Memorandum Opinion follows.

DATED: August 12 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 8/12/2019