IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

HISHAM HAMED, derivatively, on behalf of **SIXTEEN PLUS CORPORATION**,	
Plaintiff,	Case No.: 2016-SX-CV-650
vs.	DERIVATIVE SHAREHOLDER SUIT, ACTION FOR DAMAGES, CICO RELIEF, EQUITABLE RELIEF AND INJUCTION
FATHI YUSUF, ISAM YOUSUF and **JAMIL YOUSEF**,	
Defendants,	**JURY TRIAL DEMANDED**
and	
SIXTEEN PLUS CORPORATION,	
a nominal defendant.	

DEFENDANT, FATHI YUSUF'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, hereby replies in support of his motion to dismiss Plaintiff, Hisham Hamed's First Amended Complaint ("Complaint") against him, in its entirety, given that it fails to state a single claim upon which relief can be granted—both because all claims are barred by the statute of limitations and are also insufficiently pled—and fails to join an indispensable party, Manal Yousef. In support, Mr. Yusuf states as follows.

I. INTRODUCTION

In Plaintiff's Opposition to Mr. Yusuf's Motion to Dismiss, Plaintiff withdraws three of the claims set forth in the First Amended Complaint: 1) violation of 14 V.I.C. § 605(c) of the Criminally Influenced and Corrupt Organizations Act ("CICO"); 2) conversion; 3) and civil conspiracy. Accordingly, Mr. Yusuf has no need to, and does not, address those three claims in the instant reply. With respect to the remaining counts, Plaintiff's Complaint has several intractable problems that no amount of obfuscation on the part of Plaintiff can conceal. One, all

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remaining counts—the two alleged CICO claims (one a conspiracy to violate 14 V.I.C. § 605(a)[1] and the other for violation 14 V.I.C. § 605(b)), breach of fiduciary duty, usurpation of corporate opportunity and the "tort of outrage"—are all barred outright by the statute of limitations. The limitations bar is disclosed on the face of the Complaint, which reveals that Plaintiff knew in 2005 that Sixteen Plus's interests in the Property were impacted by the "sham mortgage" when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold. Two, Plaintiff has failed to plead actual facts—as opposed to conclusory allegations—sufficient to support his claims. Significantly, in his Opposition, rather than quoting the (albeit insufficient) allegations in the Complaint to demonstrate the "facts" pled, Plaintiff merely cites to the paragraphs purportedly containing "facts" that support his case. A review of those paragraphs shows that they merely contain conclusory statements which are insufficient to survive the Motion to Dismiss.

II. MEMORANDUM OF LAW

A. Plaintiff's 14 V.I.C. § 605(a) CICO Claim and 14 V.I.C. § 605(b) CICO Claim are Both Properly Dismissed

Plaintiff is attempting to allege a conspiracy to violate 14 V.I.C. § 605(a) and/or a violation of 14 V.I.C. § 605 (b). *See* Opposition, p. 8.

14 V.I.C. § 605(a) states:

> It is unlawful for any person . . . associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.

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[1] It is also a violation of CICO to conspire to commit any of the three CICO violation set forth in 14 V.I.C. § 605(a), (b) or (c). *See* 14 V.I.C. § 605(d).

14 V.I.C. § 605(b) states:

> It is unlawful for any person, though a pattern of criminal activity, to acquire or maintain, directly or indirectly, any interest in, or control of any enterprise or real property.[2]

Plaintiff's 14 V.I.C. § 605(a) conspiracy claim and 14 V.I.C. § 605(b) claim each represent separate violations of CICO with only a partial overlap in pleading requirements. Accordingly, each argument below concerning the proper dismissal of Plaintiff's CICO claims will specify to which CICO claim, or both, the individual argument applies.

In brief, with respect to 14 V.I.C. § 605(a), Plaintiff has failed to properly plead a CICO conspiracy given that his own allegations in the Complaint show that the alleged conspiracy; 1) was complete in 1997 when the alleged "sham mortgage" was obtained and; 2) **Plaintiff indisputably knew that Sixteen Plus's interests in the Property were impacted by the "sham mortgage" in 2005 when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold.** Thus, even if Plaintiff's CICO conspiracy claim was properly pled—which it is not—Plaintiff's claim is barred by the five (5) year statute of limitations. An independent ground for dismissal is that Plaintiff has failed to meet the burden to plead facts which, if true, demonstrate the necessary "criminal enterprise"—which enterprise must have an existence separate and apart from the "pattern of criminal activity"—and further fails to allege facts which, if true, would establish the "pattern of criminal activity" needed to properly plead a CICO conspiracy. For all these reasons, Plaintiff's 14 V.I.C. § 605(a) CICO conspiracy claim fails and is properly dismissed on each of these bases.

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[2] With respect to 14 V.I.C. § 605(b), Plaintiff alleges that: All Defendants are "person[s]" who through a pattern of criminal activity set forth in paragraphs 55 though 79 have "acquire[d]. . . directly or indirectly an "interest in" the Land which is "real property" within the meaning of the statute. *See* Complaint, ¶ 83(a). (The "Land" is the Diamond Keturah property at issue (hereinafter, "Land" or "Property")).

Separately, Plaintiff's 14 V.I.C. § 605(b) claim is deficient and properly dismissed on several grounds. First, Plaintiff's claim is barred by the five (5) year statute of limitation for a CICO claim. Second, Plaintiff has failed to plead facts that, if taken as true, would support the allegation that Defendants engaged in the necessary "pattern of criminal activity." Third, Defendants have not acquired any interest in the Land by virtue of the 2010 power of attorney, which power of attorney is unrecorded and has never been used. The Property is titled in the name of Sixteen Plus, just as it has been since it was acquired in the late 1990s.

1. *The CICO Statute of Limitations Began to Run in 2005 When Sixteen Plus Discovered that Mr. Yusuf Would Not Sell the Property Unless the Mortgage Was Paid and Bars Both CICO Claims - 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)*

A CICO claim "may be commenced within five years after the conduct made unlawful under section 605." 14 V.I.C. § 607(h). The Virgin Islands CICO statute is modeled after the federal RICO statute. *Gumbs v. People of the Virgin Islands,* 59 V.I. 784, n.2 (2013); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F.Supp. 961, 970 (D.V.I. 1994). **The limitations period for RICO claims begins to run once a plaintiff discovers his injury.** *See Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000). Because "CICO is cast in the mold of the federal RICO statute," the discovery rule applies to RICO claims in determining when plaintiffs' CICO claims accrued. *Pemberton*, 877 F.Supp. 961 at 970. Plaintiff agrees that a five (5) year statute of limitations is applicable and that the statute begins to run at the date of discovery of the alleged wrongdoing. Opposition p. 7 – Statute of Limitations: All Counts.

However, contrary to all logic, common sense, and the allegations in his own Complaint, Plaintiff states that the wrongful conduct began sometime in 2010[3] (Opposition p. 7) and claims

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[3] Later in the Opposition, subsequent to Plaintiff's argument regarding the applicability of the statute of limitations to all counts, Plaintiff claims that the 2010 power of attorney gave Mr.

that a letter sent from a St. Martin lawyer in 2012 was "the first suggestion of any wrongdoing" with respect to the "sham mortgage." *Id.* In fact, the Complaint plainly alleges that in the mid-2000s Mr. Yusuf refused to sell the Property unless the "sham mortgage" was paid. **To wit, Plaintiff specifically alleges that Sixteen Plus "lost [] [in 2005] . . . the benefit of such sales at the highest and best amount because of Fathi Yusuf's insistence the sham mortgage be paid upon the sale of the property."** Complaint, ¶ 43 (emphasis supplied); s*ee also id.* at p. 8, Section b ("The Value of the Sixteen Plus Property Dramatically Increases—2005). Thus, based on the facts unambiguously set forth in the Complaint, at the very latest, Plaintiff discovered the alleged injury to Sixteen Plus *vis-à-vis* the "sham mortgage," in the mid-2000s, over twelve (12) years ago. Therefore, both of Plaintiff's CICO claims are barred by the five (5) year statute of limitations and those claims are properly dismissal, in their entirety on that basis alone. *See Burton v. FirstBank of Puerto Rico,* 49 V.I. 16 (Super. Ct. 2007) (granting defendant's motion to dismiss, explaining that the date of plaintiff's "discovery" of the potential harm was clear on the face of her complaint and was outside the applicable statute of limitations). The statute of limitations bar, by itself, is a sufficient basis for dismissal of both the CICO claims. There are also a number of alternative bases for dismissal of both Plaintiff's 14 V.I.C. § 605(a) and 14 V.I.C. § 605 (b) claims given Plaintiff has failed to satisfy the individual pleading requirements which alternative bases are addressed below.

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Yusuf a "controlling interest" in the Property. Opposition at p. 8-9. However, the allegations in the Complaint discussed above—that in 2005 Mr. Yusuf refused to sell the Property unless the mortgage was paid—make it patently clear that if Mr. Yusuf is alleged to have what Plaintiff seeks to characterize as a "controlling interest" in the Property, such interest was created by the mortgage in 1997, and first learned about by Plaintiff in 2005, far before the power of attorney was executed in 2010.

1. *Plaintiff Fails to Properly Plead the Elements of a CICO Conspiracy - 14 V.I.C. § 605(a)*

In the Opposition, Plaintiff does not—nor can he—argue that law citied in the Motion to Dismiss setting forth the CICO pleading requirements is inapplicable or incorrect. Instead, Plaintiff merely recites that his Complaint contains sufficient factual allegations. Moreover, as noted above, Plaintiff does not quote any "facts" from the Complaint that support his claim his 14 V.I.C. § 605(a) conspiracy claim is properly pled; he merely cites to the Complaint. However, when one actually looks at the allegations in the cited paragraphs, it is clear that they are mere conclusory allegations not the requisite facts. The law requires the supporting factual allegations "be sufficient to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy." *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir.1989) (citation and quotation marks omitted). Moreover, "mere inferences from the complaint are inadequate to establish the necessary factual basis." *Id.* Plaintiff must allege facts to show that each Defendant objectively manifested an agreement to participate, directly or indirectly, in the affairs of a RICO enterprise through the commission of two or more predicate acts. *Smith v. Jones, Gregg, Creehan & Gerace, LLP*, 2008 WL 5129916, at *7 (W.D.Pa. Dec. 5, 2008). Bare allegations of conspiracy described in general terms may be dismissed. *Id.* Rather than properly pleading the necessary facts, Plaintiff merely makes insufficient boilerplate allegations that a CICO conspiracy existed. Accordingly, even if Plaintiff's 14 V.I.C. § 605(a) claim was not time barred, it would be properly dismissed on this basis as well.

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2. *Plaintiff Also Fails to Properly Plead the Existence of a Criminal Enterprise - 14 V.I.C. § 605(a)*

The CICO conspiracy to embezzle money from Sixteen Plus is deficient on yet another basis: its failure to allege the requisite criminal "enterprise" with which Defendants are associated. As discussed above, Plaintiff does not quote any "facts" from the Complaint that support his claim that his 14 V.I.C. § 605(a) conspiracy claim is properly pled; he merely cites to the Complaint. Of course, when one actually looks at the allegations in the cited paragraphs, it is clear that they are mere conclusory allegations, bereft of any necessary facts.

Notably, Sixteen Plus is not a "criminal enterprise" as contemplated in the statute but rather, as pled by Plaintiff, the alleged victim of the "criminal enterprise." Moreover, the "enterprise" is not the "pattern of racketeering activity" it is an entity separate and apart from the pattern of activity in which it engages. "The existence of an enterprise at all times remains a separate element which must be proved . . ." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Unlike a well-pled CICO conspiracy claim, the Complaint fails to provide any facts establishing the existence of an ongoing criminal enterprise between Mr. Yusuf, Isam Yousuf and Jamil Yousef. Even under the most liberal reading of the Complaint, Plaintiff has not alleged an enterprise "separate and apart from the activity in which it engages" and where its "various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. At best, Plaintiff has alleged "mere sporadic or temporary criminal alliance[s]" which is not sufficient to allege a CICO enterprise. *United States v. Henley*, 766 F.3d 893, 906 (8th Cir. 2014) (quoting *United States v. Leisure*, 844 F.2d 1347, 1363-64 (8th Cir. 1988)). The CICO statute is not intended to penalize sporadic or temporary criminal alliances which do not demonstrate "a sustained and continuous effort" to accomplish the enterprise's objectives, *Henley,* 766 F.3d at 906, or a sustained time period during which "the structure and personnel of the [enterprise] was

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continuous and consistent…". *Leisure*, 844 F.2d at 1364. Plaintiff has not pled facts which show that the requisite "criminal enterprise" existed sufficient to withstand the application of *Twombly* and *Iqbal*. *See Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 356 (8th Cir. 2011) ("While the complaint is awash in phrases such as 'ongoing scheme,' 'pattern of racketeering,' and 'participation in a fraudulent scheme,' without more, such phrases are insufficient to form the basis of a RICO claim."). Therefore, as Plaintiff has wholly failed to plead the necessary CICO "criminal enterprise" this failure is yet another independent and alternative ground for dismissal of Plaintiff's 14 V.I.C. § 605(a) claim.

3. *Plaintiff Has Failed to Plead any Facts that Would Support the Boilerplate Allegation that Isam Yousuf and Jamil Yousef Engaged in any Criminal Activity - 14 V.I.C. § 605(a)*

Of course, the law also requires at least two parties' participation in a pattern of criminal activity to have a conspiracy. The essential elements of a CICO conspiracy being: (1) **two or more persons** agreed to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of criminal activity; (2) the defendant was a party to or a member of the agreement; and (3) the defendant joined the agreement, knowing of its objective to conduct or participate in the conduct of the affairs of an enterprise through a pattern of criminal activity, and **intending to join with at least one other co-conspirator** to achieve that objective. *United States v. Massimino*, 641 Fed.Appx. 153, 160 (3d Cir. 2016) (emphasis supplied) (unpublished) (citing *Salinas v. United States*, 522 U.S. 52 (1997)). Plaintiff has not alleged, other than by boilerplate recitations like "Defendants committed mail fraud," that Isam Yousuf and Jamil Yousef engaged in any criminal activity at all with respect to obtaining the allegedly "sham" Promissory Note and First Priority Mortgage (or power of attorney). Thus, since Plaintiff fails to specifically allege any criminal activity on the part of Mr. Yusuf's alleged

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co-conspirators, Plaintiff has not properly alleged a 14 V.I.C. § 605(a) claim which is yet another alternative and independent ground its dismissal.

4. *The Complaint Fails to Properly Plead a "Pattern of Criminal Activity" - 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)*

Also crucial to properly pleading CICO claim under both 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b) is properly pleading the "pattern" element—*i.e.,* that each defendant participated in the affairs of the enterprise "through a pattern of criminal activity." 14 V.I.C. § 605(a). A pattern is defined as "two or more occasions of conduct" that: "(A) constitute criminal activity; (B) are related to the affairs of the enterprise; and (C) are not isolated." 14 V.I.C. § 604(j). The U.S. Supreme Court has observed that the statutory requirement that a pattern include "at least two acts of racketeering activity," means that "while two acts are necessary, they may not be sufficient." *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 237 (1989). A pattern is not formed by "sporadic activity," and a person cannot be subjected to RICO penalties simply for committing two "isolated criminal offenses." *Id.* at 239. Rather, a pattern requires acts that are (1) related; and (2) amount to or pose a threat of continued criminal activity. *Id.* at 239. In addition to the length of time during which the predicate acts occurred, courts have factored into their analyses the complexity of the scheme, careful to ensure that the RICO statute is not used to penalize acts that are sporadic, isolated or, as here, in furtherance of "**only a single scheme with a discrete goal.**" *Jackson v. BellSouth,* 372 F.3d 1250, 1267 (11th Cir. 2004) (emphasis supplied); *see also W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633–37 (D.C. Cir. 2001) (affirming dismissal of an eight-year-long scheme of racketeering activity because the plaintiff alleged only "a single scheme, a single injury, and few victims"); *Ritter v. Klisivitch,* 2008 U.S. Dist. LEXIS 58818 (E.D.N.Y. July 30, 2008) (stating "where plaintiff alleges nothing

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more than a "single scheme of narrow scope . . . including one victim and a limited number of participants closed-ended continuity does not exist.").

Once again, Plaintiff does not quote any "facts" from the Complaint to support his claim that he has properly pled a "pattern of criminal activity;" he merely cites to the Complaint. Yet, when one actually looks at the allegations in the paragraphs to which Plaintiff cites, it is clear that they are mere conclusory allegations, not the requisite facts. Plaintiff has merely made insufficient boilerplate recitations that Defendants allegedly "committed multiple criminal acts including conversion, attempted conversion, perjury, attempted perjury, wire and mail fraud, and others" in furtherance of the conspiracy. *See e.g.*, Complaint, ¶ 59. However, conspicuously absent are factual allegations of any kind regarding what was allegedly converted and by whom?[4] What was the content of the allegedly perjurous statements and why were they objectively not true? What constituted the alleged wire fraud, which, of course, needs to be pled with specificity? What about the alleged mail fraud, which also needs to be pled with specificity? Plaintiff cannot merely state that inchoate "crimes" were committed, without factual allegations to support those legal conclusions, and meet the applicable pleading standards set forth in *Twombly* and *Iqbal*. The pleading requirements rightfully call for far more than the conclusions and boilerplate in Plaintiff's complaint to properly plead the "pattern of criminal activity" required when pleading a CICO cause of action.

Perhaps, in a very generous reading of Plaintiff's allegations, Plaintiff alleged that Mr. Yusuf made false statements to the Hameds in order to get Sixteen Plus to execute the "sham mortgage." In an equally generous reading, Plaintiff makes the additional allegation that 2010 Mr. Yusuf obtained a power of attorney for Manal Yousef—however, these **are not crimes** and,

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[4] Since Plaintiff has dropped his conversion claim, it is unclear if he intends to rely on alleged "conversion" as part of the necessary pattern of criminal activity.

thus, cannot be part of the requisite "pattern of criminal activity." Even if they were, this is exactly the type of "isolated activity" occurring over ten (10) years apart that does not constitute the "pattern of criminal activity" necessary to properly support a CICO claim. *See H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989) (holding that a pattern is not formed by "sporadic activity," and a person cannot be subjected to RICO penalties simply for committing two "isolated criminal offenses."). Thus another independent and alternative ground for dismissal of Plaintiff's CICO claims—both under 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)—is Plaintiff's failure to properly plead the necessary pattern of criminal activity on the part of any of the three defendants.

5. *The 2010 Power of Attorney Did Not Give Defendants an Interest in the Property - 14 V.I.C. § 605(b)*

In the Opposition, Plaintiff, without citing to any law whatever, claims that the unrecorded 2010 power of attorney gave Mr. Yusuf a "controlling interest" in the Property. Opposition at p. 8-9. Notably, this jurisdiction is a "lien theory jurisdiction" with respect to mortgages. *See B.A. Properties, Inc. v. Gov't of V.I.*, 299 F.3d 207, 219 (3d Cir. 2002) (citing *Royal Bank of Canada v. Clarke*, 373 F.Supp. 599, 601 (D.Vi.1974)). This means a mortgage does not provide the mortgagee with an ownership interest in, or control of, the mortgaged property; rather the mortgagee merely has a lien on the property. *See Armstrong v. Armstrong*, 266 F.Supp.2d 385, 394 (D.V.I., 2003). Beyond that, however, the allegations in the Complaint make it patently clear that if Mr. Yusuf is alleged to have what Plaintiff seeks to characterize as a "controlling interest" in the Property, such interest was created far before the power of attorney was executed in 2010 since, according to Plaintiff, in 2005 Mr. Yusuf refused to sell the Property unless the mortgage was paid. Accordingly, Plaintiff's 14 V.I.C. § 605(b) is not only properly dismissed on statute of limitations grounds and because Plaintiff has failed to plead the requisite

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pattern of criminal activity, it is also properly and alternatively dismissed because the power of attorney did not provide the Defendants with control of, or an interest in, the Property.

A. Plaintiff Has Failed to State a Claim for Breach of Fiduciary Duty

The parties agree that to establish a claim for breach of fiduciary duty: (1) there must be a fiduciary relationship; (2) the fiduciary must have breached the duty imposed by such relationship; (3) the plaintiff must have been harmed; and (4) the fiduciary's breach must be a proximate cause of the plaintiff's harm. *Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (Super. Ct. 2012).

The gravamen of Plaintiff's claim of breach of fiduciary duty is that Mr. Yusuf negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation's principal asset, the Land, for the benefit of Sixteen Plus but obtained a power of attorney with respect to the mortgage. Complaint, ¶¶ 96(b) and (c). As discussed in the Motion to Dismiss, Plaintiff fails both to allege a breach of duty, or a specific harm. Plainly, the mere fact that Manal Yousef executed a power of attorney in favor of Mr. Yusuf is not a breach of fiduciary duty. However, in the Opposition, the Plaintiff claims that "Yusuf has a POA that he is using contrary to interests of Sixteen Plus." Opposition p. 11. But, in keeping with Plaintiff's *modus operendi*, Plaintiff fails to plead any facts to support this conclusory allegation. Rather, Plaintiff cites to a paragraph in the Complaint which claims—without a single supporting fact—that Mr. Yusuf is using the power of attorney to defend the case brought by Sixteen Plus to void the mortgage it gave to Manal Yousuf. This is precisely the kind of conclusory allegation, entirely unmoored from any factual predicate, that the controlling law requires the Court to ignore. Accordingly, Plaintiff's claim for breach of fiduciary duty fails.

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Plaintiff's breach of fiduciary duty claim also fails because, like the CICO claims, it is barred by the applicable statute of limitations. In the section of the Opposition addressing all Mr. Yusuf's statute of limitations arguments (Opposition. p. 7-8), Plaintiff claims that "the first suggestion of any wrongdoing took place in late 2012 when the letter from the lawyer in St. Martin was received." Opposition p. 7. Thus, even if the discovery rule applied, according to Plaintiff, the breach of fiduciary duty was discovered in 2012.[5] Breach of fiduciary duty has a two year statute of limitations. *See* 5 V.I.C. § 31(5) ("[A]ny injury to . . . rights of another not arising from contract not herein especially enumerated" has a two (2) year statute of limitations.); *see also Guardian Ins. Co.*, 63 V.I. 3 at 18 (stating that a claimed breach of fiduciary duty by an insurer to its insured "sounded in tort" and had a "two-year statute of limitations."). Accordingly, Plaintiff's claim for breach of fiduciary duty is also barred by the statute of limitations and properly dismissed on that independent ground as well.

B. Plaintiff Has Failed to State a Claim for Usurpation of Corporate Opportunity

Prohibition of a corporate fiduciary's usurpation of a corporate opportunity precludes a corporate fiduciary from acquiring for himself a business opportunity that his corporation is financially able to undertake, and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest. *Borden v. Sinskey*, 530 F.2d 478, 489-90 (3d Cir. 1976) (citing *Equity Corp. v. Milton*, 221 A.2d 494, 497 (Del. Supr. 1966)).

Plaintiff claims that the acts alleged "in paragraph 96 constitutes usurping of a corporate opportunity by Fathi Yusuf, an officer of the corporation acting in that capacity in dealing with

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[5] Moreover, as discussed above, Plaintiff has alleged that in 2005 Mr. Yusuf insisted that the mortgage be paid if the Property was sold. Thus, Plaintiff knew of the alleged "breach of fiduciary duty" as early as 2005.

Manal Yusuf[]" (Complaint, ¶100) and the boilerplate recitation that the "corporation has been injured thereby." *Id.* at ¶101. Paragraph 96 alleges that Mr. Yusuf "negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation's principal asset, the Land, for the benefit of Sixteen Plus" and "later obtained a power of attorney from Manal Yousef giving himself control of and all rights in those assets[.]" Complaint, ¶¶ 96(b) and (c), respectively.

In the Opposition, Plaintiff states, once again, that the power of attorney was the requisite business opportunity. Opposition, p. 16. Predictably, Plaintiff has failed to allege a single fact establishing: 1) that Manal Yousef would have provided Sixteen Plus with a power of attorney identical to the one she provided her trusted uncle, Mr. Yusuf, with respect to her mortgage; or 2) that Sixteen Plus had the financial wherewithal to obtain a power of attorney by which it could release a multi-million dollar mortgage. Accordingly, Plaintiff's claim for usurpation of corporate opportunity is properly dismissed as the alleged "business opportunity" was not available to—or affordable by—Sixteen Plus.

Plaintiff's claim for usurpation of a corporate opportunity is also barred by the statute of limitations. Once again, a two year statute of limitations applies. *See* 5 V.I.C. § 31(5). In the section of the Opposition addressing all Mr. Yusuf's statute of limitations arguments (Opposition. p. 7-8), Plaintiff claims that "the first suggestion of any wrongdoing took place in late 2012 when the letter from the lawyer in St. Martin was received." Opposition p. 7. Thus, even if the discovery rule applied, according to Plaintiff, Plaintiff discovered that its "corporate

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opportunity" was "usurped" in 2012.[6] Thus, Plaintiff's claim for usurpation of corporate opportunity is independently dismissed on this basis as well.

C. Plaintiff Has Failed to Plead a Viable Claim for the "Tort of Outrage"

Plaintiff now claims that, despite identifying Count Six as the "Tort of Outrage" (Complaint p. 23), and making no mention of a "*prima facie* tort," or anything resembling one, that Count Six is really a claim for "*prima facie* tort." Opposition p. 15-16. Unfortunately for Plaintiff, a claim for *prima facie* tort is also properly dismissed. A *prima facie* tort is a general tort. *Edwards v. Marriott Hotel Management Co. (Virgin Islands), Inc.*, Case No. St-14-CV-222, 2015 WL 476216, at * 6 (Super. Ct. Jan. 29, 2015) (citing *Moore v. A.H. Riise Gift Shops*, 659 F. Supp. 1417, 1426 (D.V.I. 1987)). *Prima facie* tort claims typically provide relief only where the defendant's conduct does not come within the requirements of one of the well-established and named intentional torts. As the Superior Court explained in *Edwards*:

> In the Virgin Islands, claims that are "insufficiently 'distinct' from plaintiffs' other, more established tort claims" are dismissed. While Plaintiff is correct that alternative claims are permissible under FED. R. CIV. P. 8(d)(2), Plaintiff fails to argue what "new" tort he intends to pursue and fails to plead any facts to support a claim for another tort in addition to and distinct from the claims already alleged.

Edwards, 2015 WL 476216, at * 6; *see also Sorber v. Glacial Energy VI, LLC*, Case No. ST-10-CV-588, 2001 WL 3854244, at * 3 (Super. Ct. June 7, 2011) (dismissing Plaintiff's *prima facie* tort claim for failure to state a claim upon which relief can be granted, explaining, "[i]n alleging a cause of action for prima facie tort, Sorber must show that the action does not fit within the category of any other tort."); *Garnett v. Legislature of the V.I.*, Civil Case No. 2013-21, 2014 WL 902502, at *7 (D.V.I. March 7, 2014) (dismissing Plaintiff's claim for *prima facie* tort stating "no claim for prima facie tort lies if the action complained of fits within another category

[6] Moreover, as discussed above Plaintiff has alleged that in 2005 Mr. Yusuf insisted that the mortgage be paid if the Property was sold. Thus, Plaintiff knew of the alleged "usurpation" as early as 2005.

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of tort . . . "[a]s the allegations in this case fit within defined tort categories, Garnett's claim of prima facie tort must be dismissed."); *Bank of Nova Scotia v. Boynes*, Case No. ST-16-CV-29, 2016 WL 6268827, at *4 (Super. Ct. Oct. 18, 2016) (dismissing Plaintiff's claim for *prima facie* tort stating "[h]ere it is evident that Boynes relies on the same set of factual allegations to support his prima facie tort claims as he does to support his fraud, IIED, and NIED counterclaims."). Plaintiff's claim for "*prima facie* tort" does not add any additional factual allegations, rather merely incorporates the preceding paragraphs of the Complaint and recites that the actions of Defendants were "intentional, wanton, extreme and outrageous ... culpable and not justifiable under the circumstances." Complaint ¶¶ 108-9. Accordingly, as Defendants' alleged actions fit into existing and defined torts—evidenced by the fact Plaintiff has brought two other tort claims: breach of fiduciary duty and usurpation of corporate opportunity—and has not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations, Plaintiff's claim for *prima facie* tort is properly dismissed as well.

D. Plaintiff Has Failed to Join Manal Yousef Who is a Required Party

Predictably, Plaintiff has failed to cite any law that contravenes Mr. Yusuf's position that Manal Yousef is a necessary party to this action (also called a "required" party under Federal Rule of Civil Procedure 19). Rather, Plaintiff claims *illogically* that Manal Yousef is not a required party because Mr. Yusuf has a power of attorney with respect to the mortgage. Opposition p. 19-20. First, the existence of a power of attorney does not affect the fact that Manal Yousef is a required party given that she holds a four and a half million dollar ($4,500,000.00) First Priority Mortgage on the Property the validity of which is the crux of this action. Plaintiff alleges that the mortgage is invalid and that alleged invalidity is central to Plaintiff's claims against Defendants. Therefore, the Court would necessarily have to adjudicate the validity of the

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mortgage in the instant case if this case is permitted to go forward. As discussed in Defendant's initial brief, this adjudication is currently happening in another case before the Honorable Harold Willocks styled *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65. Accordingly, it is clear Manal Yousef has an interest relating to the subject of the action—her First Priority Mortgage on the Property which Plaintiff seeks to have invalidated—and, plainly, disposing of the action in her absence will, as a practical matter, impair or impede her ability to protect the interest. Therefore, even if the case is otherwise not subject to dismissal and allowed to proceed, Manal Yousef is required party and should be joined. *See Hoheb v. Muriel*, 753 F.2d 24, 26-7 (3d Cir. 1985) (holding mortgagees were necessary parties as their security interest in the property could be affected by the litigation); *see also Dickson v. Murphy*, 202 Fed. Appx. 578 (3d Cir. 2006) (unpublished) (holding that co-obligees on agreements at issue were both necessary, and indispensable, parties to the action).[7] Moreover, Plaintiff's suggestion that even if Manal Yousef is a necessary party, and she cannot be joined, the case is not properly dismissed because: 1) Mr. Yusuf is obligated to use the power of attorney to defend her interest in the mortgage; 2) in a case where he, personally, is already a defendant, is wholly without logic or legal support.

III. CONCLUSION

All Plaintiff's remaining claims—the two alleged CICO violations, breach of fiduciary duty, usurpation of corporate opportunity and the tort of outrage/*prima facie* tort—are all barred by the statute of limitations and properly dismissed on that basis. Additionally, each

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[7] If joinder of a required party cannot be accomplished, this case is properly dismissed pursuant to Rule 19(b). When a court determines a person is a required party under Rule 19(a) and that joinder is not feasible, the court must then determine whether the non-joined party must be joined under Rule 19(b). *See HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1190 (3d Cir.1996). There are several factors to consider under Rule 19(b), including whether in whether "in equity and good conscience" the court should proceed without the non-joined party. Fed. R. Civ. P. 19(b). Accordingly, Mr. Yusuf respectfully reserves his right to submit further briefing addressing the 19(b) factors should the Court find Manal Yousef to be a required party and determines she cannot be joined.

and every remaining claim is also properly dismissed as insufficiently pled. Moreover, Plaintiff's Complaint is also properly dismissed, in its entirety, due to the failure to join Manal Yousef, the holder of the First Priority Mortgage at issue herein, who is both a necessary and indispensable party to this action.

Further, as noted in the Motion to Dismiss, even upon dismissal of this case in its entirety, the Hameds and Sixteen Plus will have their day in court with respect to the validly the mortgage on the Property as the issues regarding the validity of the mortgage are currently pending before, and properly left for resolution by Judge Willocks in *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: February 6, 2017 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2017, I served the foregoing *DEFENDANT, FATHI YUSUF'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT* via e-mail addressed to:

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