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

Waleed Hamed and KAC357, Inc.	)	
	)	**CIVIL NO. SX-16-CV-429**
Plaintiff,	)	**ACTION FOR DAMAGES**
vs.	)	
	)	
Bank of Nova Scotia, d/b/a Scotiabank, Fathi Yusuf, Maher Yusuf, Yusuf Yusuf and United Corporation	)	**JURY TRIAL DEMANDED**
	)	
Defendants,	)	

DEFENDANTS, FATHI YUSUF, MAHER YUSEF, YUSUF YUSUF AND UNITED CORP.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants, Fathi Yusuf ("Mr. Yusuf"), Maher Yusuf ("Mike Yusuf"), Yusuf Yusuf (collectively "Yusuf Defendants") and United Corporation ("United"), through undersigned counsel, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby move the Court to dismiss Plaintiffs, Waleed Hamed ("Wally Hamed") and KAC357, Inc.'s First Amended Complaint ("Complaint"), in its entirety, given that it fails to state a single claim against any of the Defendants upon which relief can be granted and, in support, state as follows.

I. INTRODUCTION

This case arises from Plaintiff, Wally Hamed's unilateral removal of $460,000.00 ("Monies") from the bank account of Plessen Enterprises ("Plessen")—a business jointly owned by the Hamed and Yusuf families—which monies were not used for the benefit of Plessen but were instead deposited into Wally Hamed's personal bank account. As a result of the Yusufs reporting to the Virgin Islands Police Department ("VIPD") that Wally Hamed had taken the Monies without their knowledge and deposited them in his personal account, Plaintiffs allege: 1) malicious prosecution; 2) defamation; 3) "trade disparagement;" 4) the "prima facie tort of outrage;" 5) violations of the Criminally Influenced and Corrupt Organizations Act ("CICO"); and 6) a CICO conspiracy. Plaintiffs' claims all fail.

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Plaintiffs' claim for malicious prosecution is properly dismissed on the grounds that: 1) Defendants did not procure a criminal proceeding against Wally Hamed; 2) Defendants had probable cause to report him the VIPD; and 3) the criminal proceedings did not terminate in a way which proved his innocence of the charges. Plaintiffs' claims for defamation should be dismissed because Plaintiffs: 1) claim certain absolutely privileged communications with the VIPD as the basis for the same; 2) claim certain true statements as the basis for the same; 3) have not plead them with the requisite specificity. Plaintiffs' claim for trade disparagement fails because a common law action for trade disparagement is not—and should not be—recognized in the Virgin Islands. Plaintiffs' claim for *prima facie* tort is properly dismissed as duplicative of Plaintiffs' other tort claims. Plaintiffs' claims for direct violations of CICO and CICO conspiracy claims are both properly dismissed on the grounds that Plaintiffs failed to: 1) allege what predicate criminal acts were allegedly perpetrated by each defendant; and 2) allege a pattern of criminal activity. Plaintiffs' CICO conspiracy claims should also be dismissed for failure to allege the requisite CICO conspiracy. Finally, as to United, Plaintiffs have failed to plead a single fact which, if true, could support a finding that any of the Yusuf Defendants were acting within the scope of their employment with United when they undertook the actions alleged in the Complaint. In sum, when the Court strips away all of Plaintiffs' intentionally vague, false, and self-serving allegations, there not sufficient facts to state a single claim for relief against Defendants which is plausible on its face.

II. BACKGROUND FACTS

As the Court is likely aware, the Yusuf and Hamed families are engaged in protracted and acrimonious litigation related to the families' long-term joint business interests. The ongoing litigation encompasses multiple civil cases pending in the courts of the Virgin Islands, including

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the main case between the parties, which is styled *Hamed v. Yusuf, et al.*, Case No. SX-12-CV-370 ("Main Case").

In the course of Plaintiffs' strained attempt to plead causes of action where none exist, Plaintiffs have misrepresented and omitted certain facts related to the claims at issue herein. First, as practical matter, from its inception, the Hameds and Yusufs have always each owned 50% of Plessen. As with the other businesses owned by both families, Plessen was jointly managed and controlled.[1] With regard to Plessen's banking functions and check writing authority, Article V of its By-Laws required that checks be signed by either the President or Vice President (positions held by the Hameds) and then countersigned by the Secretary or Treasurer (positions always held by Fathi Yusuf); *i.e.*, the Bylaws required one Hamed and one Yusuf signature on checks. Further, in practice, beginning in mid-to-late 2011, all checks on the Plessen account were signed by one Hamed and one Yusuf.

Hence, it came as a shock to the Yusufs when they received a call from the Bank of Nova Scotia shortly after March 27, 2013, advising that the Plessen account, which had nearly a $500,000.00 balance was overdrawn and that immediate funds were needed to cover pending business obligations. Upon rushing to the bank with $20,000.00 to cover the potential overdraft, the Yusufs discovered that a check for $460,000.00 was made payable to Waleed Hamed, that it was signed by Mufeed and Wally Hamed without a Yusuf signature and deposited into a personal account jointly held by Mufeed and Wally Hamed. Funds in the Plessen account were

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[1] The Yusufs, including Mike Yusuf, were under the impression that Mike Yusuf was a director of United as a result of documents provided to the V.I. Government Department of Licensing and Consumer Affairs by Wally Hamed, and because Mike Yusuf was originally was provided signature authority on the Plessen account at Scotia Bank and is reflected in the August 17, 2009 bank records. He was also listed on the Intake Gathering Form for Scotia as a "director." Furthermore, Mohammed Hamed in response to interrogatories in the *Hamed v. Yusuf et al.*, SX-12-370 case, swore that "I [Mohammed] am one of the four directors of Plessen. To the best of my recollection, I have always been a director. The other three directors and shareholders of the complaint, including Fathi Yusuf and his sons were all aware of this fact, as is the Office of the Lieutenant Governor, Division of Corporations." *See* Interrogatory Responses in the Main Case.

only ever used for business purposes. The Yusufs never provided the Hameds with the authority to unilaterally remove funds from the Plessen account for the Hameds' personal use.

In April 2013, Yusuf Yusuf filed a derivative action against the Hameds for this improper removal of funds.[2] After the suit was filed, the Hameds paid a portion of the funds into the registry of the Court but otherwise used the remaining funds for a period of two years for other personal and independent business ventures. After suit had been filed, in May 2013, Mike Yusuf, Fathi Yusuf and attorney Nizar DeWood met with Sargent Mark Carneiro of the VIPD to provide information as to the improper and unauthorized removal of the $460,000.00. The information they provided is set forth by Sargent Corneiro in his Affidavit as well as the police report. Following this meeting, Sargent Corneiro conducted his own, independent investigation soliciting documents directly from the Bank of Nova Scotia as well as Banco Popular. Documents recovered from Bank of Nova Scotia included an "Intake Gathering Form" which required signatures from "one Hamed and one Yusuf" on all checks and was signed by Wally Hamed and Mike Yusuf identified on the form as "directors." Subsequently, Sargent Corneiro submitted the results of his investigation to the Virgin Islands Attorney General's office, who then determined there was a sufficient basis to proceed with the indictment. Mike Yusuf was arrested. The fact of his arrest and the basis therefore were published in the local paper.

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[2] Hence, claims relating to the improper removal of the $460,000.00 by Wally and Mufeed Hamed are already the subject of an earlier filed pending litigation to wit: *Yusuf Yusuf et al v. Mohammed Hamed et al*, SX-13-CV-120. The law of the Virgin Islands adheres to the "first to file" rule that "[t]he party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter." *Cenni v. Estate Chocolate Hole Landowners Association, Inc.*, 2016 WL 3981434, at *27 (V.I. Super., 2016), *citing Crosley Corp. v. Hazelline Corp.*, 122 F.2d 925, 930 (3d Cir. Del. 1941) and *Bell v. Lee J. Rohn & Assocs., LLC*, 2015 WL 4148315, at *2 (V.I. Super. Ct. July 8, 2015).

III. MEMORANDUM OF LAW

A. Motion to Dismiss Standard

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must demonstrate that the plaintiff's claims are more than just "conceivable," but are in fact "plausible on [their] face.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In applying this plausibility standard, the Court should disregard all conclusory statements, even when "couched as a factual allegation." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Rather, the question is whether the facts pled demonstrate that the claims cross the threshold from "conceivable" to "plausible," and therefore adequately state a claim for relief. As the Supreme Court of the Virgin Islands has explained:

> Thus, under *Robles, Twombly,* and *Iqbal,* courts must undertake a three step analysis to determine whether a complaint states a plausible claim for relief. . . . First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Brady v. Cintron, 55 V.I. 802, 823 (V.I. 2011) (citing *Joseph v. Bureau of Corrections*, Civ. Case No. 2009–0055, 2011 WL 1304605, at *2 (V.I. March 7, 2011). Notably, failure of any one of the elements necessary to a cause of action is sufficient to dismiss the entire count.

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B. Plaintiffs Fail to State a Claim for Malicious Prosecution

The elements of malicious prosecution are: 1) the initiating of or procuring of a criminal proceeding against the plaintiff by the defendant; 2) the absence of probable cause for the

proceeding; 3) malicious intent on the part of the defendant; and 4) termination of the proceeding in favor of the plaintiff. *Palisoc v. Poblete*, 60 V.I. 607, 615-16 (V.I. 2014). The Supreme Court of the Virgin Islands has also adopted the Restatement (Second) of Torts § 653 for its commentary analysis in applying these elements. *Id.*

1. Defendants Did Not "Procure" Criminal Proceedings

First, the Yusuf Defendants did not "procure" a criminal proceeding within the meaning of the applicable law as they simply gave information and made an accusation. Under the circumstances at issue, where the choice to prosecute was left to the unfettered discretion of both the VIPD and the Virgin Islands Attorney General ("Attorney General") the Yusufs did not procure the criminal proceeding.[3] To wit, Comment d, Section 653 of the Restatement of Torts, adopted by the VISC in *Palisoc*, explains that:

* * *

> The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

See Section 653 of the Restatement of Torts at Comment d.[4] In the instant case, the Yusuf Defendants reported to the VIPD that Wally Hamed had removed the Monies from the Plessen business account without their knowledge and put them in his private account. Subsequently, the VIPD did a thorough and independent investigation of the allegations, including procuring bank records from both the Bank of Nova Scotia and Banco Popular, and made the independent decision to refer them to the Attorney General for prosecution. *See* Affidavit of VIPD Sargent

[3] Importantly, no criminal proceeding was ever brought against Plaintiff, KAC357, Inc., so it has no claim for malicious prosecution.

[4] *See also* Comment f, Section 653 of the Restatement of Torts:
A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not.

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Mark Corneiro ("Corneiro Affidavit") attached as **Exhibit 1** detailing his independent investigation and factual conclusions. Accordingly, as it was left to the VIPD's—and presumably the Attorney General's—complete discretion as to whether charges would be brought against Wally Hamed, the Yusuf Defendants did not "procure" them as a matter of law and the claim for malicious prosecution is properly dismissed on this basis.

2. Defendants Had Probable Cause to Report Wally Hamed to the VIPD

Second, Wally Hamed has also failed to plead facts which would show there was no probable cause for the Yusuf Defendants to report to the VIPD his unauthorized removal of $460,000.00 from Plessen's bank account which money he deposited in his personal account. Even if Wally Hamed had the ability to remove Plessen's funds without the knowledge or permission of the Yusufs, he clearly did not have the legal authority to place those funds in his personal account, or put them to use solely for the benefit of the Hamed family. Moreover, in the Complaint he admits there was—at the very least—probable cause for the Yusuf Defendants to report his unauthorized taking of $460,000.00 given that he disgorged the Yusufs' half of the Monies after being confronted about their removal. To wit, "[o]n April 19, 2013, [a few days after Yusuf Yusuf had brought a civil action against him for wrongful withdrawal of the Monies] Waleed Hamed deposited the **Yusuf half of the funds** with the Court." Complaint, ¶ 61. Sargent Corneiro also addressed this fact in his affidavit as well noting that, "Waleed Hamed with the assistance of Mufeed Hamed took the funds from Plessen Enterprise without authorization and when they were confronted about the matter and after the Yusufs sued them, they deposited $230,000.00 on April 19, 2013 with the Clerk of the Superior Court[.]" Plainly, if the unilateral taking of the Monies and depositing them in his personal account did not amount to "probable cause" to report the taking, there was no need for him to return the "Yusuf half of

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the funds" by depositing it in the registry of the Court. Thus, the claim for malicious prosecution is properly dismissed on this basis as well. *See Illaraza v. HOVENSA LLC*, 73 F.Supp.3d 588, 612 (D.V.I. 2014) (holding that even if defendant had initiated proceedings against plaintiffs, that dismissal was proper where there is no evidence that defendant did so without probable cause "the sine qua non of malicious prosecution.").

3. The VIPD's Prosecution of Wally Hamed Did Not Terminate with a Finding of His Innocence of the Crimes Charged

Finally, a claim for malicious prosecution cannot be sustained in the absence of a termination of the prosecution which was favorable to the plaintiff. *See Palisoc*, 60 V.I. at 615-16. The purpose of the favorable termination requirement is to avoid "the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Kossler v. Crisanti*, 564 F.3d 181, 187 (3d Cir. 2009) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (alteration in original) (internal quotation marks omitted)). To meet that requirement, "a prior criminal case must have been disposed of in a way that indicates the innocence of the accused." *Weaver v. Beveridge*, 577 Fed. App. 103, 105 (3d Cir. 2014) (citing *Kossler v. Crisanti*, 564 F.3d 181, 187 (3d Cir. 2009) (*en banc*). The plaintiff's innocence may be shown if his criminal proceeding was terminated by a discharge by a magistrate at a preliminary hearing, the refusal of a grand jury to indict, the formal abandonment of the proceedings by the public prosecutor, the quashing of an indictment or information, an acquittal, or a final order in favor of the accused by a trial or appellate court. *Id.* A grant of *nolle prosequi* can be sufficient to satisfy the favorable termination requirement, but "not all cases where the prosecutor abandons criminal charges are considered to have terminated favorably." *Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002) (internal quotation

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marks omitted). Thus, a *nolle prosequi* indicates termination of the charges in favor of the accused "only when their final disposition is such as to indicate the innocence of the accused." *Id.* (internal quotation marks omitted).

In the instant case, Wally Hamed has failed to plead facts which show that the Attorney General requested the dismissal of the criminal charges against him because he was innocent. Rather, he alleged that the motion to dismiss stated "the people will be unable to sustain its burden of proving the charges against the Defendants beyond a reasonable doubt." Complaint, ¶ 138. (As a point of fact, the Attorney General dismissed the case without prejudice.) The statement that the People do not believe that they will be able to prove guilt beyond a reasonable doubt is a far cry from the necessary final disposition which indicates the innocence of the accused. *See Woodyard v. County of Essex*, 514 Fed.Appx. 177, 184 n.2 (3d Cir. 2013) (stating "[h]ere, the prosecution sought to dismiss the charges against Woodyard because it believed it could not meet its burden of proof after two witness identifications of Woodyard were suppressed by the trial court. . . . Therefore, it appears that the decision to dismiss did not reflect Woodyard's innocence, but rather was a result of the suppression of evidence."); *see also Weaver*, 577 Fed. App. at 105-6 ("ADA Moore chose not to retry Weaver because he felt it was unlikely that Weaver would serve additional time and Moore did not want to make Nispel go through another trial. There is no evidence suggesting that the decision not to retry Weaver was taken because Weaver was believed to be innocent. This case is similar to *Donahue*, where the decision not to retry was based on the unlikelihood of additional jail time and preservation of prosecutorial resources without any indication that Donahue was thought to be innocent. Weaver may not rely on his conclusory allegation . . . that the grant of *nolle prosequi* was because of his innocence."). Accordingly, Wally Hamed's malicious prosecution claim is properly dismissed on this third independent ground as well. Failure of any one of the elements is sufficient for the

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claim to be dismissed.

C. Plaintiffs Fail to State a Claim for Defamation

The elements of a defamation claim—as set forth in the Second Restatement of Torts and adopted by the Virgin Islands Supreme Court—are: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting to at least negligence on the part of the publisher; and 4) either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See Joseph v. Daily News Publishing Co.*, 57 V.I. 566, 586 (V.I. 2012). The term "unprivileged" refers to the alleged defamer's inability to demonstrate that he was in some way "privileged" to make the defamatory communication. *Id.* The types of privilege defenses available fall into two categories, absolute privileges and conditional privileges. *Id.* (citing the Restatement (Second) of Torts at §§ 583-592A and §§ 593-598, respectively).

Plaintiffs contend that two sets of statements give rise to their defamation claims: 1) statements made by the Yusuf Defendants to the VIPD; and 2) statements to off-island commercial entities regarding the fact that Wally Hamed was arrested. Neither is sufficient to state a claim. The first set of statements is deemed to be "privileged" as they were made to law enforcement and, therefore, are not actionable. The second set is true – Wally Hamed was arrested.

As to the first set, Wally Hamed contends that the allegedly false statements made by the Yusuf Defendants to the VIPD when making their report were that: 1) Mike Yusuf was a director of Plessen; and 2) Wally Hamed lacked the authority to withdraw funds on the Plessen account with his signature (Complaint at ¶ 142). These statements cannot form the basis of a claim for defamation, even if false, because they are alleged to have been published to the police (Complaint at ¶ 143), which is a privileged publication. *See Sprauve v. CBI Acquisitions, LLC*,

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Civ. Case No. 09-165, 2010 WL 3463308, at *12 (D.V.I. Sept. 2, 2010) ("There is a dearth of Virgin Islands cases addressing the absolute privilege for statements to law enforcement concerning violations of criminal law, and thus the Court relies heavily on the pertinent sections of the Restatement to resolve this issue. On the basis provided in the Second Restatement of Torts, the Court finds that Defendant's report to the Coast Guard that Plaintiff was operating a boat while intoxicated is protected by an absolute privilege."); *see also Illaraza v. HOVENSA LLC*, 73 F.Supp.3d 588, 604 (D.V.I. 2014) ("The Virgin Islands recognizes an absolute privilege for statements made to law enforcement personnel for the purposes of reporting a crime or initiating a criminal investigation."). Accordingly, any statements made to the police cannot form the basis of a defamation claim.

With respect to the second set of statements that the Yusuf Defendants "used the arrest in notifications to several off-island commercial entities" (Complaint ¶ 117) or otherwise notified third parties of Wally Hamed's arrest (Complaint ¶ 123), those statements cannot form the basis of a defamation claim as they were objectively true, not false. There is no dispute that Wally Hamed was arrested. Stating to others the true fact that Walled Hamed was arrested is not actionable. Therefore, the statements relating to the fact of Waleed Hamed's arrest cannot create a basis for a defamation claim.

Moreover, a complaint of defamation "must, on its face, specifically identify what allegedly defamatory statements were made by whom and to whom." *Manns v. The Leather Shop*, 960 F. Supp. 925, 928-9 (D.V.I. 1997) (citing *Ersek v. Township of Springfield,* 822 F.Supp. 218, 223 (E.D.Pa.1993) aff'd mem., 102 F.3d 79 (3rd Cir.1996)); *see also VECC, Inc. v. Bank of Nova Scotia*, 296 F.Supp.2d 617, 621-22 (D.V.I. 2003). Plaintiffs' defamation claim also fails on this independent ground given that Plaintiffs have failed to specify which of the defendants made the allegedly defamatory statements, or to specify to whom the statements were

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made, merely alleging that "the Yusufs" made statements to "off-island commercial entities." *See e.g.*, Complaint, ¶117. Accordingly, Plaintiffs' defamation claim is also properly dismissed—in its entirety—on this basis.

D. Plaintiffs Fail to State a Claim for Trade Disparagement

Virgin Islands common law does not contain a cause of action for "trade disparagement."[5] In a line of cases beginning with *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Supreme Court of the Virgin Islands held that, in the absence of Virgin Islands Supreme Court precedent on a common law rule, courts in the Virgin Islands must conduct what has become known as a "*Banks* analysis." *See Gumbs-Heyliger v. CMW & Assocs. Corp.*, 2014 U.S. Dist. LEXIS 160451, * 20 (D.V.I. Nov. 13, 2014) (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014) and *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014)). Accordingly, this Court must conduct a *Banks* analysis as to whether a common law action for "trade disparagement" should be recognized in the Virgin Islands. *See Carlos Warehouse v. Thomas*, 64 V.I. 173, 183-4 (Super. Ct. 2016) ("[T]he Magistrate Court should have first determined whether a claim for debt—and likewise whether payment as a defense to a debt claim—should be recognized under the common law of the Virgin Islands and then what specific rules should apply.") (citing *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (2014) (Brady, J.)).

In a *Banks* analysis, a court balances "three non-dispositive factors:" (1) whether any [local or federal] courts [in the Virgin Islands] have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which

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[5] There is a cause of action for trade disparagement under the Virgin Islands Deceptive Trade Practices Act ("DTPA") 12A V.I.C. § 101, *et seq.* However, Plaintiffs do not give any indication that they are bringing their "trade disparagement" claim under DTPA.

approach represents the soundest rule for the Virgin Islands. *Id.* (citing *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 680-81 (V.I. 2012)).

With respect to common law "trade disparagement," there do not appear to be any Virgin Islands cases, federal or local, recognizing, or addressing, such a claim. It also appears from a review of other American jurisdictions, that a handful of jurisdictions have common law causes of action for trade disparagement. *See e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 924 (3d Cir.) (applying Pennsylvania law); *see also Ramada Inns, Inc. v. Dow Jones & Co.,* 543 A.2d 313, 328–29 (Del.Super.Ct. 1987); *Am. Wheel & Eng'g Co., Inc. v. Dana Molded Prods., Inc.*, 476 N.E.2d 1291, 1295–96 (Ill.App.Ct. 1985). Many states, however, do not recognize claims for common law "trade disparagement."

As noted above, a statutory claim for "trade disparagement," which Plaintiffs do not appear to be making, is also available in jurisdictions that have adopted the Uniform Deceptive Trade Practices Act, including the Virgin Islands. *See* 12A V.I.C. § 101, *et seq.* Further, a claim for "trade disparagement" is also available under federal law pursuant to the Lanham Act, 15 U.S.C. § 1125(a). Given the substantial similarities between the common law cause of action for trade disparagement and a claim for defamation, and the availability of a trade disparagement cause of action under the Virgin Islands Deceptive Trade Practices Act as well as the Lanham Act, the soundest rule for the Virgin Islands is to not recognize a common law "trade disparagement" claim. Accordingly, Plaintiffs' claim for trade disparagement is properly dismissed.

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E. Plaintiffs Fail to State a Claim for the "Prima Facie Tort of Outrage"

Plaintiff's 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 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 ¶¶ 168-69. Accordingly, as Defendants' alleged actions fit into existing and defined torts—evidenced by the fact Plaintiffs have brought three other tort claims: malicious prosecution, defamation and trade

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disparagement—and have not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations, Plaintiffs' claim for *prima facie* tort is properly dismissed as well.

F. Plaintiffs Fail to State a Claim for "Direct Acts" Under CICO or a Claim for a CICO Conspiracy

Using rank boilerplate recitations, Plaintiffs attempt to allege violations of 14 V.I.C. § 605(a), (b) and (d) (*see* Complaint, ¶172-192) which statutes provide, respectively:

> 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.

14 V.I.C. § 605(a).

> 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.

14 V.I.C. § 605(b).

> It is unlawful for any person to conspire or attempt to violate, either directly or through another or others, the provisions of section 605 subsections (a), (b), and (c).

14 V.I.C. § 605(d).

1. Plaintiffs Fail to Allege What Allegedly Predicate Criminal Acts Were Done by Each Defendant

All Plaintiffs' CICO claims against each defendant have a deep and fatal flaw: Plaintiffs fail to allege what each of the defendants did that was an alleged violation of CICO or part of a CICO conspiracy, *i.e.*, which of the defendants committed the alleged predicate crimes. Rather, Plaintiffs make the boilerplate allegation that "the creation, transmission and placement into the bank records and provision of the forged documents" was the "pattern of criminal activity by which Defendants worked together to 'acquire or maintain, directly or indirectly, any interest in or control of Plessen.'" Complaint at ¶175. However, there are no allegations as to which alleged criminal act was perpetrated by which defendant, merely recitations that "Defendants"

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forged documents and provided them to police. *See* Complaint at ¶181. The sole act—which is notably not a predicate criminal act—attributed to a specific defendant is the allegation that Mike Yusuf "represented to the police that he was a director of Plessen and made a criminal complaint in that capacity." Complaint at ¶177. However, it is plain that Mike Yusuf could have brought the criminal complaint as a shareholder of Plessen, which he was, or as a private citizen.

These boilerplate recitations—and specifically the failure to plead facts specific to each defendant in support of the claimed CICO violations—wholly fail to meet the pleading standards set forth in *Twombly* and *Iqbal*. *See e.g., 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.").

2. Plaintiffs Fail to Properly Plead the Elements of a CICO Conspiracy

With respect to Plaintiffs' purported CICO conspiracy claim, Plaintiffs wholly fail to allege facts which, if taken as true, could support a CICO conspiracy. "CICO is cast in the mold of the federal RICO statute," thus, Virgin Islands courts should apply RICO analysis to CICO claims. *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp. 2d 545, 562 (D.V.I. 2004). The corollary subsection of the federal RICO statute, 18 U.S.C. § 1962(c), is virtually identical (with the exception of an effect on interstate commerce requirement), and a substantial body of federal case law has evolved to bring rationality and clarity to a statute that has proved difficult to interpret on its face.

The essential elements of both a RICO and CICO conspiracy are: (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 racketeering activity or collection of an unlawful debt (pattern of

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criminal activity under CICO); (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 racketeering activity or collection of unlawful debt, 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) (unpublished) (citing *Salinas v. United States*, 522 U.S. 52 (1997)). Thus, to properly plead a § 1962(d) conspiracy a plaintiff is required to "set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) (abrogated on other grounds by *Beck v. Prupis*, 529 U.S. 494 (2000)).

The supporting factual allegations "must 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.*

As noted above, with the failure to allege what any individual defendant did—instead, generically lumping all defendants together—Plaintiffs have failed to meet their burden to plead facts which show that each Defendant: 1) objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise; 2) through the commission of two or more predicate acts. Rather than properly pleading the necessary facts with respect to each

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defendant, Plaintiff merely makes insufficient boilerplate allegations that a CICO conspiracy existed. To wit, "the Yusufs did conspire among themselves and with United to violate either directly or through another or others, the provisions of section 605 subsections (a) and (b). *See* Complaint at ¶181. Plaintiffs' CICO conspiracy claims are properly dismissed on this basis.

3. Plaintiffs Fail to Properly Plead a "Pattern of Criminal Activity"

Plaintiffs' "direct act" claims under 14 V.I.C. Sections 605(a) and (b), as well as Plaintiffs' CICO conspiracy claim, are also properly dismissed given Plaintiffs' failure to plead facts which if true can establish the statute's "pattern" element—*i.e.,* that each defendant participated in the affairs of the enterprise "through a pattern of criminal activity." *See* 14 V.I.C. § 605(a) and (b). Notably, to be held liable under CICO each defendant must engage in a "pattern or criminal activity." *See id.* 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).

A pattern is not formed by "sporadic activity," and a person cannot be subjected to RICO penalties simply for committing two "isolated criminal offenses." *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989). Rather, a pattern requires acts that are (1) related; and (2) amount to or pose a threat of continued criminal activity. *Id.* 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). The Second Circuit, in *Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178 (2d Cir. 2008), noted that "although we have not viewed two years as a bright-line requirement, it will be rare that conduct

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persisting for a shorter period of time establishes [] continuity, particularly where...the activities alleged involved only a handful of participants and do not involve a complex, multi-faceted conspiracy." *Id.* at 184. In *Efron v. Embassy Suites (P. R.), Inc.*, 223 F.3d 12 (1st Cir. 2000), the First Circuit found no closed-ended continuity in an alleged scheme occurring over a 21-month period: "Taken together, the acts as alleged comprise a single effort, over a finite period of time, to wrest control of a particular partnership from a limited number of its partners. This cannot be a RICO violation." *Id.* at 21.

In the instant matter, Plaintiffs have wholly failed to allege a pattern of criminal activity by any of the Defendants—let alone each of them, as necessary—given Plaintiffs' failure to allege which defendant allegedly engaged in which allegedly criminal activity. But, even if all the alleged crimes were attributable to each defendant, which is it clear that they are not, this is exactly the type of "isolated activity" which does not constitute the "pattern of criminal activity" necessary to properly support a CICO claim against any one defendant. *See H.J. Inc.*, 492 U.S. at 239 (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."). Accordingly, all of Plaintiffs' CICO claims should also be dismissed for failing to properly plead the necessary pattern of criminal activity by any of the Yusuf Defendants.

G. Plaintiffs Fail to Properly State Any Claim Against United Corporation

Under agency principles, an employer may be held vicariously liable for its employees' negligent conduct occurring during the scope of employment. *Defoe v. Phillip*, 56 V.I. 109, 130 (V.I 2012) (citing *Williams v. Rene*, 72 F.3d 1096, 1099 (3d Cir. 1995). Employee conduct is "within the scope of employment if it is the kind he is employed to perform and it occurs substantially within the authorized time and space limits." *See Williams*, 72 F.3d at 1100 (citing

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Restatement (Second) of Agency § 228(1)(a)-(b)); *see also Nicholas v. Damian-Rojas*, 62 V.I. 123, 129-30 (Super. Ct. 2015) (Brady J.) (applying the Restatement (Second) of Agency after doing a Banks analysis)). Conversely, an employee's conduct falls outside the scope of his employment if it is different than the kind that is authorized, far beyond the authorized time or space limits, or too little actuated by as purpose to serve the master. *Illaraza v. HOVENSA LLC*, 73 F.Supp.3d 588, 607 (D.V.I. 2014).

In the instant case, Plaintiff has not even made the boilerplate allegation that the Yusuf Defendants were acting within the scope of their employment with United when they undertook the acts alleged in the Complaint. Nor have Plaintiffs pled a single fact which, if true, could support a finding that any of the Yusuf Defendants were acting within the scope of their employment with United when they undertook the actions alleged in the Complaint. The District Court's analysis in *Illaraza v. HOVENSA LLC*, 73 F.Supp.3d 588, 604 (D.V.I. 2014) is both applicable and instructive. To wit:

> Plaintiffs argue that HOVENSA is vicariously liable for defamation because the HOVENSA employees who made allegedly defamatory statements did so within the scope of their employment . . . We are unpersuaded. There is no evidence in the record that the statements we may properly consider here . . . were made by employees acting in the scope of their employment. Plaintiffs have produced no evidence that the HOVENSA employees who made unprivileged and allegedly untrue statements about them were engaging in conduct "of the kind [they were] employed to perform" or that such conduct was "actuated, at least in part, by a purpose to serve [HOVENSA]." As a result, any HOVENSA employees who made the allegedly defamatory statements before us did not do so within the scope of their employment.

Id. Rather, the actions and statements which Plaintiffs contend give rise to their causes of action relate to the Yusuf Defendants' roles *vis-à-vis* Plessen, the entity from whom the funds were removed. Accordingly, all causes of action brought against United Corporation are also properly dismissed on this basis.

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WHEREFORE, on the basis of the foregoing, Defendants, Fathi Yusuf, Maher Yusuf, Yusuf Yusuf and United Corporation respectfully request that this Court: 1) dismiss Plaintiffs' First Amended Complaint in its entirety; 2) award the Defendants the attorneys' fees and costs incurred in connection with defending this case; and 3) award Defendants such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: March 9, 2017 By:

Charlotte K. Perrell (V.I. Bar No. 1281)
Lisa Michelle Kömives (V.I. Bar No. 1171)
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Attorneys for Defendants, Fathi Yusuf, Maher Yusuf, Yusuf Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2017, I served the foregoing *DEFENDANTS, FATHI YUSUF, MAHER YUSEF, YUSUF YUSUF AND UNITED CORP.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT* via e-mail addressed to:

Joel H. Holt, Esq.
Law Office of Joel H. Holt
2132 Company Street
Christiansted, USVI 00820
Email: holtvi@aol.com

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AFFIDAVIT

TERRITORY OF THE VIRGIN ISLANDS)
) SS: CHRISTIANSTED
DIVISION OF ST. CROIX)

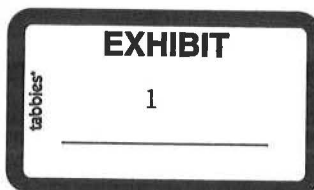
I, Mark A. Corneiro, being duly sworn and on oath depose and say;

1. That I am a Police Sergeant employed by the Virgin Islands Police Department (VIPD) and assigned to the Economic Crime Unit formerly known as the Insular Investigation Bureau.

2. That on May 17, 2013, Mr. Maher Yusuf, Director of Plessen Enterprises, Inc. filed a report with the Virgin Islands Police Department of "Embezzlement by Fiduciaries" and reported that the Yusuf and Hamed family, each has a fifty percent (50%) interest in Plessen Enterprise, Inc. That any check written from Plessen Enterprises, Inc. has to have a signature from both families. That Waleed Hamed is the Vice-President and that he cashed a check payable to himself in the amount of $460,000.00, which was signed by himself and Muffeed Hamed. This was done without the authorization of the Yusuf family.

3. That based on interviews and documents received, the undersigned learned the following:

a. That on May 17, 2013, Mr. Maher Yusuf of 306A Judith's Fancy, Christiansted, St. Croix, United States Virgin Islands was interviewed and stated that his brother, Yusuf Yusuf paid the property tax for Plessen Enterprise, Inc. with his credit card. That his brother was going to reimburse the charges with funds from Plessen Enterprise, Inc. That his brother used a check from the company and the bank called his father, Fathi Yusuf to notify him that there were insufficient funds in the account. The bank representative



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needed money to cover the check, so that it would not be returned. Mr. Maher Yusuf stated that they had to deposit money into the account so that the check could clear. He also indicated that when they looked at a copy of the back and front of the check they noticed that the check was signed by Waleed Hamad and Mufeed Hamed. Mr. Maher Yusuf further stated that the check was deposited in Waleed Hamad's personal account.

b. That Mr. Maher Yusuf indicated that the Board of Plessen Enterprise, Inc. comprise of the following:

Mr. Maher Yusuf	-	Director:
Mohamad Hamed	-	President;
Waleed Hamed	-	Vice-President; and
Fathi Yusuf	-	Secretary and Treasurer.

c. Mr. Maher Yusuf stated that two signatures are required, one from the Yusuf family and one from the Hamad family. That the signature card has been updated and other members were added and he could not recall who were authorized to sign.

d. Mr. Maher Yusuf added that both families have 50 percent shares in Plessen Enterprise, Inc. and the funds in that account were specifically for the purpose of covering expenses for the company. That no member in the Hamed family notified him or any other member of the Yusuf family that they were going to remove $460,000.00 from the account.

e. Mr. Maher Yusuf concluded by stating that Waleed Hamed did not have any authorization to withdraw the $460,000.00 and that he could positively identify Waleed Hamed.

f. That Attorney Nizar Dewood, representing the Yusuf family, provided the following documents:

1. Department of Consumer Affairs print-out with a list of corporate officers.
2. By-Laws of Plessen Enterprises, Inc.
3. Articles of Incorporation of Plessen Enterprises, Inc.
4. Civil Complaint, Case #SX-13-CV-120, Civil Action for Damages and Injunctive Relief (Yusuf Yusuf, derivatively on behalf of Plessen enterprises, Inc., Plaintiff vs. Waleed Hamed, Waheed Hamed, Mufeed Hamed, Hisham Hamed, and Five-H Holdings, Inc., Defendants, -and- Plessen Enterprises, Inc., Nominal Defendant.)
5. Docketing letter and notice of judge assignment.
6. Copy of Signature card for Plessen Enterprises, Inc. as of August 17, 2009.
7. Letter dated April 25, 2013 addressed to Joel H. Holt, Esq.
8. Notice of Depositing Funds in escrow with the clerk of court, dated April 19, 2013.
9. A copy of Banco Popular de Puerto Rico (BPPR) check No. 103119000007469, dated April 18, 2013, payable to Clerk of the Superior Court.
10. Government of the Virgin Islands Receipt No. 049070

g. That the Articles of Incorporation of Plessen Enterprises, Inc. clearly states that said corporation is established to take care of the business of the corporation.

h. An inquiry was done at Bank of Nova Scotia for documents belonging to Plessen Enterprise, Inc. Account No. 05800045012. Bank documents show that the account is a business account, there are six authorized signatories on the account three with the last name Hamed (Waleed Hamed, Mufeed Hamed

and Hisham Hamed) and three with the last name Yusuf (Maher Yusuf, Yusuf Yusuf and Fathi Yusuf). The signature card specifically requires two signatures, one from Hamed and one from Yusuf. Bank documents also show that check No. 0376 was made payable to "Waleed Hamed" in the amount of $460,000.00, dated March 27, 2013, signed by Waleed Hamed and Mufeed Hamed, and endorsed by Waleed Hamed for deposit only to account number 058-45609811.

i. An inquiry was also done at Bank of Nova Scotia for documents belonging to Mufeed or Wally Hamed, Account No. 058-45609811. Bank documents show that the account is a checking account and the two authorized persons are Mufeed H. Hamed and Wally Hamed. Bank documents also show that $460,000.00 was deposited on March 27, 2013 and on March 28, 2013 check No. 1893 was signed by Mufeed Hamed made payable to Waleed Hamed in the amount of $460,000.00.

j. An inquiry was done at Banco Popular de Puerto Rico (BPPR) for account No. 194602753 belonging to Waleed Hamed. That bank documents show that the account is a checking account and the sole authorized person is Waleed Hamed. That on March 28, 2013, $460,000.00 was deposited into said account. That the following checks listed below were written against said account after the deposit was made into BPPR account No. 194602753 belonging to Waleed Hamed.

Date	Check No.	Payee	Purpose	Amount
02APR13	2020	Carl Hartmann III	Legal Fees	$48,784.00
02APR13	2021	Joel Holt, Esq.	Legal Fees	$50,000.00
03APR13	2022	Arthur Pomerantz	Legal Fees	$20,000.00
11APR13	2026	Gerald Groner Trust Acct.	Galleria St. Thomas	$500,000.00
18APR13	2051	Clerk of the Superior Court	Plessen Enterprise Yusuf Share holder	$230,000.00
19APR13	2054	PRLP 2001 Holdings LLC	Closing Proceeds- Galleria	$620,562.98

k. That an inquiry was made at Cadastral in St. Thomas by Sgt. Linda Raymond of VIPD, Insular Investigation Bureau and she located documents that showed on April 13, 2013 that Five-H Holdings, Inc. purchased the following properties: 1.) Parcel No. 18A-2 Estate Smith Bay for $1,000,000.00, 2.) Parcel No. 18A-4 Estate Smith Bay for $1,000,000.00, and 3.) Parcel No. 18A-5 Estate Smith Bay for $500,000.00. Total cost was $2,500,000.00.

l. That investigation revealed that Mufeed Hamed and Waleed Hamed are signatories on Plessen Enterprise Inc. account. That two signatures are required on all checks drawn from Plessen Enterprise Inc. account and one has to be from the Yusuf family and the other from the Hamed family.

m. That Mufeed Hamed and Waleed Hamed signed check No. 0376 dated March 27, 2013, made it payable to "Waleed Hamed" in the amount of $460,000.00, and deposited it into a Scotiabank account belonging to Mufeed H. Hamed and Wally Hamed. Mufeed H. Hamed then wrote check No. 1893 payable to Waleed Hamed in the amount of $460,000.00 on March 28, 2013 which was deposited into a Banco Popular Account No. 194602753 belonging

to Waleed M. Hamed on March 28, 2013, and the funds were used for the final purchase of the "Galleria."

n. That Waleed Hamed with the assistance of Mufeed Hamed took the funds from Plessen Enterprise without authorization and when they were confronted about the matter and after the Yusufs sued them, they deposited $230,000.00 on April 19, 2013 with the Clerk of the Superior Court, through their Attorney Joel H. Holt, claiming that they divided the money and paid out the shares.

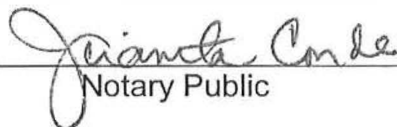
WHEREFORE, the Affiant has probable cause to believe and does believe that **Mufeed Hamed** has committed the following crimes of Embezzlement by Fiduciaries/Principals in violation of Title 14 V.I.C. §1091 & §1094(a)(2) & §11(a) and Grand Larceny in violation of Title 14 V. I. C. § 1083(1); and **Waleed Hamed** has committed the following crimes of Embezzlement by Fiduciaries/Principals in violation of Title 14 V.I.C. §1091 & §1094(a)(2) & §11(a) and Grand Larceny in violation of Title 14 V. I. C. § 1083(1).

The Affiant respectfully requests that this Court issue warrants for the arrest of **Mufeed M. Hamed** and **Waleed Hamed, aka "Wally Hamed"**.

Respectfully Submitted by

Mark A. Corneiro, Sergeant
Police-Sergeant
Economic Crime Unit

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 20 day of November 2015



Notary Public

120-YY-00293