IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

WALEED HAMED and KAC357, INC.,	)	
	)	**CIVIL NO. SX-16-CV-429**
Plaintiffs,	)	
v.	)	
	)	**ACTION FOR DAMAGES**
BANK OF NOVA SCOTIA, d/b/a SCOTIABANK, FATHI YUSUF, MAHER YUSUF, YUSUF YUSUF, and UNITED CORPORATION,	)	
	)	
Defendants.	)	**JURY TRIAL DEMANDED**

PLAINTIFFS' OPPOSITION TO THE BNS MOTION TO DISMISS

The Plaintiffs filed a First Amended Complaint (the "FAC") on January 30, 2017. On March 9, 2017, the defendants, Fathi Yusuf/United Corporation ("Yusuf") and the Bank of Nova Scotia ("BNS") filed two separate Motions to Dismiss the Amended Complaint. The United/Yusuf motion is being responded separately. The BNS motion is based on four Rule 12(b)(6) arguments and two other points:

1. The claim has been waived (by routine banking forms);
2. The claim is barred by the statute of limitations;
3. The bank's acts were absolutely privileged (as report to police);
4. The claim is Insufficient claim under the Twombly and Iqbal standard;
5. The jury demand should be stricken
6. Claims for punitive damages & consequential damages must be stricken

For the reasons set forth herein, the motion should be denied.

In addition, as set forth in more detail below, to the extent that BNS has attempted to insert new facts and/or documents in violation of Rule 12 and convert this to a vastly premature Rule 56 motion, Plaintiffs request discovery and protection from this obvious 'tactic' under Rule 56(d).

I. Factual Background

BNS misstated some of the facts underlying the FAC, requiring a response before addressing its motion. As this Court knows, under the applicable Rule 12 standard, all facts pled in the FAC are deemed to be true for the purpose of this Rule 12(b)(6) motion. *See, Brady v. Cintron, M.D.*, 2011 WL 4543906, at *9 (V.I. Sept. 27, 2011). The One cannot "add" new facts outside of the complaint. *Ferranti v. Dixon*, No. CV 14-3331 (NLH), 2017 WL 680259, at *3 (D.N.J. Feb. 21, 2017) ("In reviewing the sufficiency of a complaint under Rule 12(b)(6), 'we disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements.'") *citing James v. City of Wilkes–Barre*, 700 F.3d 675, 679 (3d Cir. 2012).

Thus, what follows are the facts in the FAC which must be taken, for the purpose of this opposition, as true:

- Plaintiffs have averred (which Defendant does not contradict) that the contractual documents establishing the banking relationship between Plessen and BNS in 1997, there was (1) no waiver of the right to a jury trial with regard to dealings between Plessen and BNS, (2) no waiver of any right of Plessen to make claims against BNS for tort or negligence, (3) no provision that BNS could unilaterally alter the contractual relationship between the parties by simply typing new contractual provisions onto the face of routine banking forms it supplied for use by customers such as Plessen and (5) no provision that "signors" on the account could, without Board approval or approval of the President of Plessen, agree to changes in the contractual relationship between the parties. FAC ¶¶ 23-30.

- At some time prior to 2009, the 1997 Signature Card was placed into BNS' retail signature computer system as the true and correct reflection of the Plessen Board approved account signor status. FAC ¶¶ 31-35.

- On August 17, 2009, that signature card entry in the computer system was accessed and reviewed, and updated in the computer system to show that review. FAC ¶¶ 37 and 67.

- As of August 17, 2009, that computer based signature information did not provide that "two signatures where one of the signatures had to be from the Hamed family and one had to be from the Yusuf family." FAC ¶ 33.

- At no time prior to March 27, 2013, did the BNS that computer based retail signature information system contain any document or notation reflecting a requirement that to withdraw from the account there had to be "two signatures where one of the signatures had to be from the Hamed family and one had to be from the Yusuf family." FAC ¶ 39.

- Yusuf Yusuf has admitted in filings in the Superior Court that he met with one or more BNS employees between March 27, 2013 and May 17, 2013 to discuss the March 27, 2013 withdrawal. FAC ¶ 65.

- Plaintiffs have also alleged that BNS employees (1) had verbal communications with the investigating officer, (2) gave bank records to the investigating officer, and then, (3) later produced additional documents in a formal production. These communications and documents discussed and contained (1) the undated handwritten, non-computer, paper signature card listing the titles and positions of the officers in United Corporation, not Plessen and (2) the first, undated "information gathering form". FAC ¶ 78.

- Moreover, it is uncontested that at the time of the production of these documents, BNS had corporate documents showing the officers and directors of Plessen. FAC ¶¶ 80-84.

- At the time of the production of these documents, BNS had corporate documents showing the directors of United Corporation. FAC ¶¶ 80-84.

- At the time of the production of these documents, BNS knew that the names and positions on the undated signature card supplied to the investigating officer were those of United, not Plessen. FAC ¶¶ 80-84.

- BNS had in its possession at that time, March 27, 2013 to May 17, 2013, corporate documents of Plessen which showed that the Hameds had two directors and Yusufs had one. FAC ¶¶ 80-84.

- Two Superior Court judges have determined that at that time, Plessen's corporate documents showed that the Hameds had two directors and Yusufs had one. FAC ¶ 83-84. Two Superior Court judges have determined that at that time, Mike Yusuf was not a director of Plessen. FAC ¶ 83-84.

- Finally, plaintiffs have alleged that to assist the Yusuf family, as favored clients, in trying to have Waleed Hamed arrested, a BNS employee negligently placed clear forgeries into the bank's records and negligently failed to provide the results of its May 2013 search which showed that the updated computer signature card information in the bank's computer system was what was in use when the check was cleared, supplying the investigator instead with an undated information

> gathering form indicating that all checks on the Plessen account had to have one Hamed signature and one Yusuf signature. FAC ¶¶ 95 and 164.

Two other facts averred in the FAC should also be noted. First, BNS has made certain factual representations to Plaintiffs through counsel which resulted in a reduction in the allegations against BNS. FAC ¶¶ 107-110. However, in their motion to dismiss, the Yusufs contest these facts – putting those facts and legal matters at issue. Second, when the complete Plessen account file was produced by BNS on February 2, 2016, there was no second, dated information gathering form. Thus, On February 2, 2016, Plaintiffs first discovered that the Bank and the Yusufs had not produced the correct information to the police and had incorrectly identified a paper signature card or the dated information gathering form as reflecting the valid signatures requirement at this time. FAC ¶¶ 114-15. With these facts in mind, a response to BNS's motion is in order.

II. The Standard Applicable to a Rule 12(b)(6) Motion

The Supreme Court of the Virgin Islands stated the applicable standard in this jurisdiction in *Brady v. Cintron, M.D.*, 2011 WL 4543906, at *8:

> Under Federal Rule of Civil Procedure 12(b)(6), a party may move to have a claim dismissed "for failure to state a claim upon which relief can be granted." The adequacy of a complaint is governed by the general rules of pleading set forth in Rule 8 of the Federal Rules of Civil Procedure. In *Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal,* the United States Supreme Court interpreted Rule 8 to require a complaint to set forth a plausible claim for relief, and articulated the proper standard for evaluating motions to dismiss for failure to state a claim: "a claim requires a complaint with enough factual matter (taken as true) to suggest the required element." (citations omitted)

The Supreme Court then described the correct analysis as follows:

> 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. *Id.* at *9 (citations omitted).

Finally, the Supreme Court held that a court must look for the well-pleaded facts, not just unsupported conclusions ("hype"), and thereafter proceed as follows:

> 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. *Id.* (citations omitted).

Recently Judge Dunston provided an analysis of this Rule 12 standard in negligence cases. *Osborne v. PSMT, LLC*, Case No. ST–16–CV–24, 2017 WL 391475 (V.I. Super. Ct. Jan. 19, 2017) ("The Virgin Islands Supreme Court has further instructed that "[t]he plausibility determination is a 'context-based' determination which should be guided by the court's 'judicial experience and common sense.'")

III. Argument

A. The claim has NOT been waived (by subsequent, routine banking forms)

BNS does not dispute the factual averments in the FAC – that the contract by which the parties entered into the banking relationship and created the accounts waived such an action. Instead, it argues that *boilerplate form language* on *subsequent, unrelated* banking *forms* effected such a waiver. However, the proposition BNS cites, and the cases proffered to support its argument deal with explicit waivers in formal "contracts". For example, at page 6 of the motion, BNS states: "No genuine issue of material fact exists when it is shown that a plaintiff contractually waived liability on the part of a named defendant." It cites four decisions in support: *Prudential Insurance Co. of America, Inc. v. Bentley*, 2011WL4758708 (D.V.I. 2011); *Oran v. Fair Wind Sailing, Inc.*, 2009WL43493219 (D.V.I. 2009); *Piche v. Stockdale Holdings*, LLC, 2009WL799659 (D.V.I. 2009) and *Booth v. Bowen*, 2007WL3I24687 (D.V.I. 2007).

But, as detailed below, these cases do not support that contention in a situation where *boilerplate form language* is added to *subsequent, unrelated forms*. The factual allegations in BNS motion do not mention the original contract – and it is clear why: there was no such waiver in the actual CONTRACT between the parties. At page 2 of the motion BNS states, as part of its "new facts" (i.e. facts not in the FAC) that at some time long after the initial contract and documents, a SIGNOR on the account filled in a form agreement for an unrelated purpose that contained, as boilerplate language, an alleged waiver.

> 2. Plessen is owned jointly by various members of the Yusuf and Hamed families. (First Amended Complaint at 10.) Consequently, Plessen's accounts list various members of both families, who are also officers and/or representatives of Plessen, as check signers on Plessen's account ending -0l2. (**See, IGF dated 4-5-10**, attached hereto as Exhibit A.)
>
> 3. When he applied to be a check signer for Plessen, the Plaintiff agreed to the following provision, contained in BNS's "Information Gathering Form - Account For A Private Corporate Entity" (IGF):
>
> .

That argument is without merit for several reasons.

First, this is material outside of the FAC and should be disregarded. Second, the referenced documents are not a "contract". Third, the "signor" of the subsequent forms was not on the board of the corporation – nor has BNS shown who had the authority to alter the corporation's "contracts" with BNS. Fourth, the first three items are issues of fact, not susceptible to Rule 12 motions.

As for BNS's supporting authority, none of the cases are apposite. None deal with an alleged boilerplate adhesion contract, none deal with unauthorized persons acting for a corporate board and none deal with "modifications" of contracts by

unilaterally executed forms **being submitted for other purposes**. As stated in the Rule 56 (d) Declaration of Plessen's Vice-President, Waleed Hamed, attached as **Exhibit 1**.

a. The Plessen Board never passed such a resolution as to waiver

b. The Plessen Board never authorized any other person to do so.

c. The signatories were not empowered to alter the banking relationship

Thus, in the facts set forth in the FAC, there was no contractual modification of the relationship effected such a waiver. Indeed, form contracts with boilerplate language are a form of adhesion agreement and their application in this jurisdiction is a contested issue of fact and law. In short, this argument is in the nature of a summary judgment motion and Plaintiff should be allowed to pursue discovery pursuant to Rule 56(d). BNS cites *Oran v. Fair Wind Sailing, Inc.*, No. CIV.A. 08-0034, 2009 WL 4349321, at *9 (D.V.I. Nov. 23, 2009) which is directly on point ***against*** BNS's position here. After noting the explicit contract there, the court specifically warns about exactly the sort of *alleged* waiver that BNS attempts here – at footnote 6:

> Distinct from the Release in the present case is the release at issue in Xu v. Gay. See 257 Mich.App. 263, 668 N.W.2d 166, 172-74 (Mich.Ct.App.2003) (comparing the language of the releases in Cole and Skotak to that of defendant's, and finding that defendant's purported release was ineffective due to failure to include "language that would clearly indicate to the reader that by accepting its terms he is giving up the right to assert a negligence claim."). **The release in Xu appeared at the top of a gym sign-in sheet, and read as follows**:
>
> > I understand that Vital Power Fitness Center reserves the right to revoke my membership for failure to respect the center's rules and policies. I also understand that Vital Power Fitness Center assumes no responsibility for any injuries and/or sicknesses incurred to me or any accompanying minor person as a result of entering the premises and/or using any of the facilities. I additionally understand that I am not entitled to [a] refund on my membership fee or daily

> visit. MEMBERSHIP AND DAILY FEES ARE NEITHER REFUNDABLE NOR TRANSFERABLE.
>
> 668 N.W.2d at 171. The Michigan Court of Appeals found that this **language is insufficient to constitute a waiver of liability, since conspicuously absent from the release are "the words 'waiver,' 'disclaim,' or similar language" that would put the reader on notice that his assent to the agreement would result in the waiver of a negligence claim.** Unlike the release in Xu, the Release before this Court contains encompassing and unequivocal language that informs the Plaintiff that he waives any claim against Fair Wind. (Emphasis added.)

Thus, Plaintiffs fully agree with BNS that this Court *should* apply the *Oran* logic here.

BNS then cites *Piche v. Stockdale Holdings*. There, on the morning of a tourist excursion the plaintiff met at the location of a boat and when the passengers and crew assembled on the sidewalk near the water, a crew member passed around a document (the "Release") to the passengers. The document contained language purporting to release defendant and its owners from liability to passengers on the excursion – the plaintiff signed. The boat hit a wave, and the plaintiff hit the floor. That court looked to several factors inapposite here: (1) it was an Admiralty case, and there was a discussion of a long line of admiralty cases with many exceptions and considerations, and (2) the explicit language in the release which contained the statement

> hereby hold harmless and release forever Stockdale Holdings, LLC dba Captain Nautica, the owners and operators of Stockdale Holdings, LLC dba Captain Nautica, the vessel ... "Ocean Rider" and its successors, assigns, heirs, employees, and agents from all rights, claims, demands, damages, costs and causes of action of whatever kind or nature arising from any damages, liabilities, or injuries I may sustain, however caused, as a result of any such activities. . . .

Again, a specific signed contract was involved, with explicit mention of a waiver of rights – in a situation where the essence of the negotiation for the service at hand was the waiver of the liability.

Finally, and in what is perhaps the worst possible authority for BNS, it cites the first of the three almost mythically problematic *Booth v. Bowen* decisions. The plaintiff, Booth, had no previous scuba diving experience. Before beginning the course, Booth completed and signed a document, the second page of which contained a section entitled "Liability Release and Assumption of Risk Agreement". The court upheld the waiver because it saw the circumstances and intent of the parties to an explicit, signed contract as being pretty clear:

> In this case, paragraph 11 of the Release-one of only two paragraphs **in all capital letters**-expressly releases the Defendants "from all liability or responsibility whatsoever for personal injury, property damage or wrongful death, however caused, including but not limited to the negligence of [the Defendants], whether passive or active." (Defs.' Mot. for Summ. J., Exh. 1 at 2). Courts have routinely held that the word "negligence" in a waiver contract is sufficient to indemnify a party for its own negligence. . . .
>
> Paragraphs five and seven broaden the Defendants' insulation from liability for negligence. **Paragraph five asks the signor to accept "responsibility** ... for any injury, death or other damages to me, my family, estate, heirs or assigns...."4 (Defs.' Mot. for Summ. J., Exh. 1 at 2). In **paragraph seven, the signor agrees to "further release and hold harmless [the Defendants] from any claim or lawsuit by me, my family, estate, heirs or assigns**...." (Emphasis added.)

Id. at 2007 WL 3124687, at *2–3. Compare this to the circumstances and language BNS cites in its (improper) factual recitation. The document was a signature card. There is no mention of "waiver" or "release".

> Disclosure of information:
>
> While the Bank is committed to protect the privacy and security of the information provided, it may be necessary to disclose information:
>
> In response to credit enquiries from qualified legal financial institutions (usually with respect to the customer's application at said financial institution); If the Bank in its discretion reasonably deems such disclosure necessary or desirable in furtherance of the customer's business; Pursuant to legal process or subpoena served on the bank, and If

> disclosure is reasonably necessary to protect the Bank's interests (the bank will usually notify the customer where permissible under the applicable legal process)
>
> The Customer hereby consents to and authorizes such disclosure, and the Bank shall not become liable by reason of the giving of any such information or of its being inaccurate or incomplete.

Even the phrase "the Bank shall not become liable" can be read ambiguously as a statement of the bank's position on the situation as opposed to a waiver of a right to sue. Even if this language were properly before the Court on a Rule 12 motion, it was obviously crafted to specifically avoid the use of any terms which would give away the fact that it was trying to be a "waiver" or a "release" of the right to sue.

More to the point, the BNS language is not a matter that is before the Court on the averments of the FAC. Again, if the Court instructs Plaintiffs to do so, they will certainly file an opposition to a motion for summary judgment – but asks that the Court not allow this until discovery and further proceedings occur, pursuant to Rule 56(d).

B. The claim is NOT barred by the statute of limitations

While BNS correctly recites the statute of limitations, it ignores the effect of the "Discovery Rule". Hamed has averred as fact that he did not, and could not with reasonable diligence, discover the salient facts before 2015. The averments allege that Yusuf and BNS both failed to provide disclosure.

The USVI Supreme Court has recently stated – in a related case – that once facts regarding the discovery of the wrong are at issue, it is a matter for the jury to decide. *United v. Waheed Hamed,* 2016 WL 154893 (2016) ("the nonmoving party cannot be required to definitively prove its case at summary judgment, or to even provide the most

convincing evidence supporting its case. Its only burden is fact for a jury to resolve.") Thus, this argument must be summarily rejected.

C. The Bank's acts were NOT absolutely privileged (as a report to police)

First, there is a factual dispute as to whether and what BNS employees "said" as opposed to "gave" to police. See **Exhibit 1**. Second there is a question as to "when" this was done – before or after there was a subpoena. Third, there is a factual dispute as to whether there was negligence is assisting the Yusufs in falsifying or inserting documents into the bank records that were supplied. See Exhibit 1.

In addition, it is not at all clear that the scope of the absolute privilege is as described by BNS. BNS would not get such a defense if it is found, as alleged in the FAC, that (as Yusuf Yusuf has admitted in filings in the Superior Court) he and Fathi Yusuf met with one or more BNS employees between March 27, 2013 and May 17, 2013 and that BNS employees (1) had verbal communications with the investigating officer, (2) gave bank records to the investigating officer, and then, (3) ***later*** produced additional documents in a formal production. This is particularly true if, as alleged, BNS was doing favors for a valued client and broke the rules in assisting in the prosecution.

The Supreme Court of the Virgin Islands has not addressed the issue of whether there is an absolute or qualified privilege for unsolicited false statements made to the police prior to the institution of a judicial proceeding. Because this Court has not resolved this issue of common law, a *Banks* analysis is required. *Banks v. Int'l Rental & Leasing Corp.,* 55 V.I. 967, 976–80 (V.I. 2011).

> In addressing issues of Virgin Islands common law, this Court–and courts addressing issues of Virgin Islands common law that this Court has yet to address—must engage in a three-factor analysis: first examining which

> common law rule Virgin Islands courts have applied in the past; next identifying the rule adopted by a majority of courts of other jurisdictions; and then finally—but most importantly—determining which common law rule is soundest for the Virgin Islands. *Connor,* 2014 WL 702639, at *3; *see also Palisoc v. Poblete,* S. Ct. Civ. No. 2013–0041, —— V.I. ——, 2014 WL 714254, at *3 (V.I. Feb. 25, 2014); *Thomas v. V.I. Bd. of Land Use Appeals,* S. Ct. Civ. No. 2013–0001, —— V.I. ——, 2014 WL 691657, at *5–6 (V.I. Feb. 24, 2014); *Simon v. Joseph,* 59 V.I. 611, 623 (V.I. 2013); *Matthew v. Herman,* 56 V.I. 674, 680–81 (V.I. 2012); *Faulknor v. Gov't of the V.I.,* Super. Ct. Civ. No. 137/2013 (STT), —— V.I. ——, 2014 WL 787217, at * 10 (V.I. Super. Ct. Feb. 19, 2014).

Better Bldg. Maint. of the Virgin Islands, Inc. v. Lee, 60 V.I. 740, 757, 2014 WL 1491559, at *7 (V.I. Apr. 15, 2014).

A. Majority Rule

In *Gallo v. Barile*, 284 Conn. 459, 935 A.2d 103, 2007 WL 4099056 (2007), the Supreme Court of Connecticut concluded that statements made to the police prior to the institution of a judicial proceeding are covered only by a ***qualified*** privilege.

The Court's rationale for choosing a qualified privilege over an absolute privilege for statements made to the police prior to the start of judicial proceedings included (1) finding no benefit in protecting those who make intentionally false and malicious defamatory statements, (2) the importance of protecting against the irreparable consequences of destroying a person's reputation by false accusations, (3) qualified immunity affords sufficient protection for those who cooperate with the police, and (4) qualified immunity does not serve as a deterrent to those whose help is really needed by the police. As the Supreme Court of Connecticut stated:

> We agree with the Supreme Court of Florida that "a qualified privilege is sufficiently protective of [those] wishing to report events concerning crime.... There is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police. The countervailing harm caused by the malicious

> destruction of another's reputation by false accusation can have irreparable consequences.... [T]he law should provide a remedy in [such] situations...." (Citation omitted; internal quotation marks omitted.) *Fridovich v. Fridovich,* 598 So.2d 65, 69 (Fla.1992); accord *Caldor, Inc. v. Bowden,* 330 Md. 632, 653, 625 A.2d 959 (1993); see also *Pope v. Motel 6,* 121 Nev. 307, 114 P.3d 277, 283 (2005) ("[t]he competing public policies of safeguarding reputations and full disclosure are best served by a qualified privilege"); *DeLong v. Yu Enterprises, Inc.,* supra, 334 Or. at 173, 47 P.3d 8 ("a citizen making an informal statement to police should not enjoy blanket immunity from action; instead, such statements should receive protection only if they were made in good faith, to discourage an abuse of the privilege"). In view of the potentially disastrous consequences that may befall the victim of a false accusation of criminal wrongdoing, we are unwilling to afford absolute immunity to such statements. We also are persuaded that qualified immunity affords sufficient protection for those who cooperate with the police. Indeed, as we have explained, statements to police investigators long have been afforded qualified immunity; e.g., *Petyan v. Ellis,* supra, 200 Conn. at 252, 510 A.2d 1337; *Flanagan v. McLane,* supra, 87 Conn. at 223–24, 87 A. 727; and there is nothing to suggest that that level of protection has operated as a deterrent to those whose assistance is needed by law enforcement.

Gallo v. Barile, 284 Conn. at 471–72

In doing so, the Supreme Court of Connecticut pointed out that the majority of courts agreed with its decision to provide only a qualified privilege to statements made to the police prior to the institution of a judicial proceeding.

> Our conclusion comports with the rule adopted by a majority of the states that have addressed this issue. See, e.g., *Fridovich v. Fridovich,* supra, 598 So.2d at 67–68 & n. 4 (surveying case law of various jurisdictions); *Caldor, Inc. v. Bowden,* supra, 330 Md. at 653–54, 625 A.2d 959 (same); *Toker v. Pollak,* 44 N.Y.2d 211, 220, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978) ("Far removed from a judicial proceeding, however, is a communication made by an individual to a law enforcement officer such as a policeman. *The majority of [s]tates afford a communication of this nature a qualified privilege, rather than absolute immunity."); see also annot., 140 A.L.R. 1466, 1471 (1942) ("[although] in a few cases the view has been expressed that a communication to an officer respecting the commission of a crime is absolutely privileged, at least [when] made to a prosecuting attorney ... the majority of the cases expressly dealing with this question hold that the privilege is qualified or conditional, not absolute" [citation omitted]); 50 Am.Jur.2d 631, Libel and Slander § 275 (2006)

> ("[f]or defamation purposes, only a qualified privilege attaches to reports made to law enforcement authorities for investigation"); 2 R. Smolla, Defamation (2d Ed. 2007) § 8:58, p. 8–40 ("[t]he majority position appears to embrace only a qualified privilege [for reports made to the police]"). Although some states have concluded that the statements of complaining witnesses are subject to absolute immunity; e.g., *Starnes v. International Harvester Co.,* 184 Ill.App.3d 199, 203–205, 132 Ill.Dec. 566, 539 N.E.2d 1372, appeal denied, 127 Ill.2d 642, 136 Ill.Dec. 607, 545 N.E.2d 131 (1989); *Correllas v. Viveiros,* 410 Mass. 314, 323–24, 572 N.E.2d 7 (1991); *McGranahan v. Dahar,* 119 N.H. 758, 769, 408 A.2d 121 (1979); we disagree that an absolute privilege for such statements is warranted.

Gallo v. Barile, 284 Conn. at 472–73. Gallo gets to this majority conclusion solely on public policy. Although Gallo does discuss Restatement section 587, it does not discuss comment e to Restatement section 587, which is analyzed below. That comment provides that there is no absolute privilege where the false statement was not "contemplated in good faith."

B. Minority Rule

A minority of states provide absolute privilege for statements made to law enforcement prior to the institution of judicial proceedings. In Texas, the Supreme Court in *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 659, 165 Lab. Cas. P 61592, 40 IER Cases 43, 58 Tex. Sup. Ct. J. 956, 2015 WL 2328678, at *8 (Tex. 2015), held that

> [W]hen Shell provided its internal investigation report to the DOJ, Shell was a target of the DOJ's investigation and the information in the report related to the DOJ's inquiry. The evidence is also conclusive that when it provided the report, Shell acted with serious contemplation of the possibility that it might be prosecuted. . . .Shell's providing its report to the DOJ was an absolutely privileged communication.

Although relying on a 1900 case, *Shinglemeyer v. Wright,* 124 Mich. 230, 82 N.W. 887 (1900), the Michigan Court of Appeals also affirmed that reports of crimes to the police are absolutely privileged. The court noted:

> *Shinglemeyer,* however, has never been overruled. Furthermore, our Supreme Court has repeatedly cited it for this exact proposition: that reports of crimes or of information about crimes to the police are absolutely privileged. *People v. Pratt,* 133 Mich. 125, 133–135, 94 N.W. 752 (1903) (Grant, J., dissenting); *Flynn v. Boglarsky,* 164 Mich. 513, 517, 129 N.W. 674 (1911); *Wells v. Toogood,* 165 Mich. 677, 679–680, 131 N.W. 124 (1911); *Powers v. Vaughan,* 312 Mich. 297, 305–306, 20 N.W.2d 196 (1945); *Simpson v. Burton,* 328 Mich. 557, 562–563, 44 N.W.2d 178 (1950). In the latter case, our Supreme Court additionally emphasized that the privilege attached even if the reporting party made the report maliciously. *Simpson,* 328 Mich. at 562, 44 N.W.2d 178.

Eddington v. Torrez, 311 Mich. App. 198, 202, 874 N.W.2d 394, 397, 2015 WL 3874813, *appeal denied,* 498 Mich. 951, 872 N.W.2d 474, 2015 WL 9449526 (2015)

C. Restatement

On a very superficial reading, the *Second Restatement of Torts might appear to provide for* an absolute privilege for statements made to law enforcement prior to the start of the judicial proceeding:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Restatement (Second) of Torts § 587 (1977). The District Court of the Virgin Islands discussed this view. *See e.g.,* ("[T]he Court Finds that the Virgin Islands, through its recognition of the Restatements as its rules of decision, embraces an absolute privilege for statements made to law enforcement for the purposes of reporting a violation of criminal law." *Sprauve v. CBI Acquisitions, LLC*, No. CIV.A 09-165, 2010 WL 3463308, at *9 (D.V.I. Sept. 2, 2010))(Statements to VIPD and the prosecutor about a theft protected by "absolute privilege accorded to parties who make statements to law

enforcement in order to report purported violations of criminal law." *Illaraza v. HOVENSA LLC*, 73 F. Supp. 3d 588, 604–05, 2014 WL 5859168 (D.V.I. 2014)).

However, *comment e* to the Restatement makes it clear that that the issue of "good faith" ***must*** be taken into consideration—which provides for a specific, detailed qualification of the basic rule:

> *e*. As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding **that is contemplated in good faith** and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Restatement (Second) of Torts § 587(e) (1977) (emphasis added). Neither *Sprauve* nor *Illaraza* discusses *comment e* or its possible meaning.

In analyzing *comment e*, courts have likened this requirement that the proceeding be contemplated in good faith to part of a two-step process:

> First, the occasion of the communication must be examined to determine if the statement was made "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding." Restatement § 587, at 248. Second, a court must evaluate the content of the statement to determine if it "has some relation to a proceeding that is contemplated in good faith and under serious consideration." Restatement § 587 comments c and e, at 249-50.

Sanford E. Levy, LLC v. Five Star Roofing Sys., Inc., No. 14-CV-253-JMH, 2015 WL 6964274, at *7 (E.D. Ky. Nov. 10, 2015). Thus, while this Restatement section ***appears*** and was interpreted by *Sprauve* as creating an absolute privilege, **it is clear from *comment* e that there is an explicit, mandatory good faith component.** *See e.g., First W. Bank, N.A. v. Hotz Corp.*, No. CIV. N-84-619 WWE, 1990 WL 150450, at *1 (D. Conn. Sept. 28, 1990)

> Here, the jury clearly concluded that **the letters circulated by the Bank's attorneys were not related to a proceeding brought in *good faith*** and *under serious consideration* and therefore not absolutely privileged. In light of the existence of ample evidence to support the jury's conclusion. . . . (Emphasis added, but emphasis on "good faith" in the original)

Courts have also interpreted *comment e* to mean that the privilege applies only when the entire judicial proceeding itself is contemplated "in good faith" and already "under serious consideration":

> [T]he privilege applies *only* when there is a reasonable nexus between the publication in question and the litigation under consideration. Further, the comments provide that "[a]s to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies ***only*** when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration." [Restatement (Second)of Torts § 586 cmt. e.] Accordingly, the "bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." [Restatement (Second) of Torts § 586 cmt. e.] *These requirements accurately reflect the parameters of the privilege as we have adopted it.*

Unarco Material Handling, Inc. v. Liberato, 317 S.W.3d 227, 237, 2010 WL 744394 (Tenn. Ct. App. 2010)(emphasis in the original, *citing Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 2007 WL 2350244 (Tenn. 2007)); *accord Shafizadeh v. Naumann*, No. 2006-CA-002605-MR, 2009 WL 413753, at *2 (Ky. Ct. App. Feb. 20, 2009)("There is no indication that the appellees acted in bad faith by entering the information via the contract into the proceedings.")

D. This is NOT and Insufficient claim under Twombly and Iqbal

The instant FAC is hardly the type of insufficient factual recitation the Iqbal and Twombly address. It is 35 pages long and contains 192 averments. It is a matter involving intentional hiding of the facts by both the Yusufs and BNS – and thus, **facts have been kept from Plaintiffs by the very parties that allege a lack of these facts**!

More to the point, as Judge Dunston discussed in *Osborne v. PSMT*, at *4, each element of the cause of action has been supported by a specific factual averment. BNS's duty is described, it is a bank in a confidential trust-based relationship with Plesse. It also entered into (as yet unproduced) contracts with Plessen. If the facts alleged are true, that it gave a favored client access to and the ability to alter its document for the Yusufs, that is a breach of that duty. If the facts alleged are true, that it falsely reported and intentionally withheld information to the police BEFORE any subpoena was issued, that is a breach. And though it raises a defense, that is a factual defense, and required additional discovery before it can be heard.

E. The jury demand should NOT be stricken

This is an inappropriate time for such a motion and Plaintiff's should not be required to respond here. Moreover, BNS relies on the same sort of boilerplate waiver in a 'not really a contract document' as discussed above in response to the "waiver of claims" argument.

More importantly, the standard for waiver of the right to a jury is a significant one, and has not been met here *See, e.g., JnLouis v. Pueblo Int'l Inc.*, No. 164211981, 1983WL952738, at *1 (Terr. V.I. June 7, 1983) and 9 C. *Wright & A. Miller, Federal Practice and Procedure: Civil*, Section 2334 at 116 (1971). The following USVI case law should be kept in mind: "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any, seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Collins v. Government of the Virgin Islands*, 5 V.I. 622, 632, 366 F.2d 279, 284 (3d Cir. 1966) (*quoting Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)).

F. Claims for punitive damages/consequential damages need NOT be stricken

Again, this is an inappropriate time for such a motion and Plaintiff's should not be required to respond here. Moreover, BNS relies on the same sort of boilerplate waiver here as discussed above in response to the "waiver of claims" argument.

IV. Rule 56(d)

The entire BNS filing is one huge effort to circumvent Rule 12 and proceed directly to Rule 56 – without discovery—based on one-sided "facts" provided by BNS. Attached as **Exhibit 1** is Waleed Hamed's Rule 56(d) declaration. In *Doe v, Abington Friends School*, 480 F.3d 252, (3d Cir. 2007) the Third Circuit instructed:

> It is well established that a court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record. See FED.R.CIV.P. 56(c) (instructing that summary judgment be decided on the basis of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any") ... In this vein, the [U.S.] Supreme Court has explained that "[a]ny potential problem with ... premature summary judgment] motions can be adequately dealt with under Rule 56(f)."
>
> Therefore, if the non-moving party believes that additional discovery is necessary, the proper course is to file a motion pursuant to Rule 56(Đ. District courts usually grant properly filed Rule 56(f) motions as a matter of course. . . . If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion.

Id. at 257 (some citations and quotes omitted); *Bethea v. Merchants Commercial Bank*, Civil Case No. 11-51, 2011 V/L 4861873, at * 2 (D.V.I. Oct. 13, 2011).

As set forth above, BNS has made factual representations to both this Court and Plaintiffs which must be examined and understood. The facts are not developed and

the intentions of BNS and its employees are a factual issue not ripe for summary judgment.

V. Conclusion

For the reasons set forth herein, it is respectfully submitted that the Rule 12(b)(6) motion should be denied. Moreover, if the FAC were deficient in any way, leave to amend should be freely granted at this juncture. *See, e.g., Fowler v. UPMC Corp.*, 578 F.3d 203, 212 n. 6 (3rd Cir. 2009) (a party should be given "an opportunity to amend" their complaint so as to provide "further specifics" in the event the Court found such details needed.)

Dated: March 22, 2017

Joel H. Holt, Esq. (Bar # 6)
Counsel for Plaintiffs
Law Offices of Joel H. Holt
2132 Company Street,
Christiansted, VI 00820
Email: holtvi@aol.com
T: (340) 773-8709/ F (340) 773-8677

Carl J. Hartmann III, Esq.
Co-Counsel for Plaintiffs
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
email: carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2017, I served a copy of the foregoing by mail and email, as agreed by the parties, on:

Gregory H. Hodges
Stephen Herpel
Law House, 10000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00802
ghodges@dtflaw.com

Charles Lockwood
Newman Logan & Grey, PC
1131 King Street, Suite 204
Christiansted, VI 00820
clockwood@nnldlaw.com

RULE 56(d) DECLARATION OF WALEED HAMED

I, Waleed Hamed, declare under penalty of perjury pursuant to 28 U.S.C. Section 1746, as follows:

1. I am the Defendant of record in this cause and have personal knowledge of the facts set forth herein.

2. I am a member of the Board of Directors of Plessen and have knowledge of the actions of that Board.

3. Additional discovery is essential in this matter. I am unable to respond to the BNS allegations and factual averments outside of the facts set forth in the FAC because:

   a. The background information as to documents and actions BNS alleged are known only to them.
   b. The background information as to documents and actions BNS alleges as to the Yusufs are known only to the Yusufs.
   c. The background information as to documents and actions by the VIPD and the USVI AG alleged are known only to them.

4. The Plessen Board never passed resolution as to waiver of negligence or other claims against BNS.

5. The Plessen Board never authorized person to waiver of negligence or other claims against BNS.

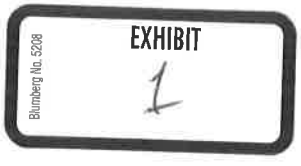
6. The Plessen Board did authorize persons to sign checks on that account – but not to otherwise alter the banking relationship without Board approval.

7. Based on a charging affidavit given by the Yusufs, I was criminally charged with embezzlement -- in *People v. Waleed Hamed*, 15-CR-352. Additional discovery is necessary to determine the BNS involvement in soliciting this prosecution.

8. There is a factual dispute as to whether and what BNS employees "said" as opposed to "gave" to police.

9. There is a question as to "when" this was done – before or after there was a subpoena.

10. There is a factual dispute as to whether there was negligence is assisting the Yusufs in falsifying or inserting documents into the bank records that were supplied.



11. After the true facts of the matter became known, the prosecutor did file a Motion to Dismiss that action in which he stated: "the People will be unable to sustain its burden of proving the charges against the Defendants beyond a reasonable doubt."

12. I did personally attend the hearing on that Motion to Dismiss.

13. In agreeing to enter the Order of Dismissal, the Court asked the prosecutor if it was understood that because the statutory time limit on these charges had run, this would effectively be a complete dismissal with no ability to re-file the charges.

14. On June 1, 2016, the Court did enter an Order which stated: "The premises considered, for good cause shown, and the People having dismissed all charges against the Defendants, the Superior Court Marshal is hereby ORDERED to return firearms and property that were surrendered by Defendants at the time of their release from custody.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 22, 2017

Waleed Hamed