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 UNITED/YUSUF'S MOTION TO DISMISS

The Plaintiffs filed a First Amended Complaint (hereinafter referred to as the "FAC") on January 30, 2017. On March 9, 2017, defendants, United/Yusuf ("Yusuf") and the Bank of Nova Scotia ("BNS"), filed two separate Motions to Dismiss the Amended Complaint based on Rule 12(b)(6). The response to the BNS motion is being filed separately. As for the United/Yusuf motion, it argues:

1. Failure to state a claim as to Malicious Prosecution
2. Failure to state a claim as to Defamation
3. Failure to state a claim as to Trade Disparagement
4. Failure to state a claim as to the Prima Facie Tort/Outrage
5. Failure to state a claim as to CICO / CICO Conspiracy
6. Failure to state a claim as to United Corporation

As noted herein, it is respectfully submitted that the United/Yusuf motion should be denied.

I. Factual Background

United/Yusuf misstated many of the facts underlying the FAC, requiring a response before addressing the motion. In addition, as always, they have presented an

entire, long, unsupported rendition of "alternative facts" -- which must be ignored. 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). Thus, the following are the facts—taken from the FAC--that ***must***, for the purpose of this opposition, taken as true.

1. The Yusufs approached the police with a formal complaint and signed a charging affidavit as to criminal acts -- for the sole purpose of initiating a criminal prosecution. FAC ¶¶ 71-77, 86.

2. Prior to any existing police investigation or involvement, the Yusuf's lied to the police about Mike Yusuf being a director of Plessen. FAC ¶¶ 71-77.

3. Prior to any existing police investigation or involvement, the Yusuf's gave the police forged documents. FAC ¶¶ 40-46, 90, 94, 106-113.

4. Prior to any other existing police investigation or involvement, the Yusufs made false statements to the police to secure the prosecution. FAC ¶¶ 47, 71-77, 94, 106-113.

5. The Yusufs also withheld salient contrary information from the police. FAC ¶¶ 89, 145 and 155.

6. As a direct result, Waleed Hamed and Mufeed Hamed were investigated and criminally charged. FAC ¶¶ 100-103, 116.

7. The Yusufs forged additional documents and provided them to the prosecution to keep the prosecution going when the police questioned their stories. FAC ¶¶ 135.

8. Those charges have been dropped by the prosecutor who did so while acknowledging that the statutory time period had passed. FAC ¶¶ 138-140.

9. United and the Yusufs then used the false arrest and added additional lies in attempting to discourage competing suppliers, merchants and customers from doing business with the Plaintiffs. FAC ¶¶ 117-124.

II. The Applicable Standard for Rule 12(b)(6) Motions

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).

In short—the standard is simple: Are there sufficient facts pled to make the claim plausible based on the elements of the claim?

III. Argument

1. Plaintiffs stated a claim as to Malicious Prosecution

Defendants completely confuse the elements of the tort of malicious prosecution. In virtually all jurisdictions, "assisting" the police or prosecutor with an ongoing investigation is completely different than intentionally providing *'false information'* to

attempt to initiate a criminal investigation -- because "a person who provides false information cannot complain if a prosecutor acts on it."

> Merely aiding or cooperating with the authorities cannot "cause" a criminal prosecution. Id. Nor does a person "procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another person" such as law enforcement or a grand jury. Id. But even if the decision is ultimately left to law enforcement, when a person knowingly provides false information which causes a criminal prosecution, they have effectively procured the prosecution and may be liable. Id. at 292, 294 ("What is true is that a person who provides false information cannot complain if a prosecutor acts on it.").

See, e.g., Pettit v. Maxwell, No. 08-14-00241-CV, 2016 WL 4538535, at *6 (Tex. App. Aug. 31, 2016).

The V.I. Supreme Court set out the elements of malicious prosecution in this jurisdiction in *Palisoc v. Poblete*, 60 V.I. 607, 615-16, 2014 WL 714254, at *4 (V.I. Feb. 25, 2014),

> we find that the soundest rule for the Virgin Islands is to adopt the following elements for a malicious prosecution cause of action: (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. We also adopt Restatement (Second) of Torts § 653 for its commentary analysis in applying these elements. This rule we now adopt protects an important public interest, specifically, the interest in citizens making good faith reports of criminal conduct to the authorities. **This interest is balanced by the elements requiring the absence of probable cause and the *presence of malice, which prevent an individual from using the legal system in a vindictive or harmful way.*** Furthermore, while jurisdictions vary in the language and number of elements used in their respective descriptions of the prosecution cause of action, most of them essentially incorporate all the elements we have adopted. (Emphasis added.)

The first element is binary – it can be satisfied in one of two ways: "initiating of" ***or*** "procuring" a criminal proceeding. There is no question that the Yusufs "initiated" the criminal proceeding when they made a criminal complaint by filing a sworn charging

affidavit as to a matter about which the police had no prior information or interest. To better understand "initiated v. procured" distinction, the holding in *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 292, 1994 WL 236455 (Tex. 1994) is instructive:

> The Restatement formulates the causation element as "initiates or procures". Restatement § 653.2 **A person initiates a criminal prosecution if he makes a formal charge to law enforcement authorities**. Id. cmt. c. A person procures a criminal prosecution if his actions are enough to cause the prosecution, and but for his actions the prosecution would not have occurred. Id. cmts. d, f–h. In other words, procurement requires that a person's actions be both a necessary and a sufficient cause of the criminal prosecution. Thus, a person cannot procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another person, a law enforcement official or the grand jury. Id. An exception, which we discuss below, occurs when a person provides information which he knows is false to another to cause a criminal prosecution. Id. cmt. g. (Emphasis added.)

Thus, Yusuf/United initiated the criminal case against Waleed Hamed and Mufeed Hamed. Moreover, even if they did not, they certainly "procured" it.

Under defendants' definition of "procure" no initiating statements to the police or prosecution could ever be procuring a malicious prosecution. While the mere giving of information might not be procuring, if there are lies, forged documents and withholding – it is certainly a tort. The word "procure" does not, as Defendants suggest, mean that all cases where a prosecutor goes on to act interdicts the necessary causation. Many jurisdictions recognize that such a position would do away with the tort – for an excellent analysis of this point see *Moore v. United States*, 213 F.3d 705, 710–12, 341 U.S. App. D.C. 348, 353–55, 2000 WL 674773 (D.C. Cir. 2000):

> As the first element indicates, in theory not only the prosecutor who initiates criminal proceedings, **but also a person who "procures" a criminal proceeding may be liable for malicious prosecution.** See also Restatement (Second) of Torts § 653. **In fact, those who procure malicious prosecutions are usually the only potential defendants because, as here, prosecutors enjoy absolute immunity.** See W. Page

> Keeton et al., Prosser and Keeton on Torts § 119, at 873 (5th ed. 1984). . . . .In order to find that a defendant procured a prosecution, **the plaintiff must establish "a chain of causation" linking the defendant's actions with the initiation of criminal proceedings.** Dellums v. Powell, 566 F.2d 167, 192 (D.C.Cir.1977) ("Dellums I").
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> * * * *
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> If this were enough to break the chain of causation, if the "discretionary function" of presenting evidence to the grand jury or prosecuting the plaintiff shielded prior misconduct from liability, a plaintiff would never be able to make out a malicious prosecution claim. . . .

But even in states where generally the term "procure" **can** be interrupted by a decision by the prosecutor, an ***exception*** exists when a person provides information which he knows is false to cause a criminal prosecution with malicious intent.

> A defendant "procures" a criminal prosecution if her actions were enough to cause the prosecution and if the prosecution would not have occurred but for her actions. See Browning–Ferris Indus., Inc. *719 v. Lieck, 881 S.W.2d 288, 292 (Tex. 1994). Generally, "a person cannot procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another person, a law enforcement official or the grand jury." Id. **However, "[a]n exception ... occurs when a person provides information *which he knows is false* to another to cause a criminal prosecution.**" Id. (citation omitted). (Emphasis added.)

Duffie v. Wichita Cty., 990 F. Supp. 2d 695, 718–19, 2013 IER Cases 144795, 2013 WL 6869374 (N.D. Tex. 2013). In other words, provision of knowingly false information to the police or prosecutor is the key. And, in any case, where that is alleged, factual issues as to the exception are presented -- that cannot be dealt with under Rule 12.

Defendants also allege that they had probable cause to make the criminal complaint. That too is a wholly factual, not a legal issue – and therefore, cannot be addressed in a Rule 12 motion. Moreover, it is not the case.

Finally, Yusuf/United alleges that a required element of malicious prosecution is that the criminal matter had to be dismissed because of the criminal defendants'

"innocence." That is not what the cause of action requires – and, again, would obviate 95% of malicious prosecution cases that arise because of pre-trial dismissals as only a jury trial would do this. The V.I. Supreme Court stated the fourth element clearly: "(4) termination of the proceeding ***in favor of*** the plaintiff." No mention of a finding of "innocence."

Here, the prosecutor did an affirmative act – he filed a motion to dismiss attesting that: "In support of this Motion, the People submit that, at this time, the *People will be unable to sustain its burden* of proving the charges against the Defendants beyond a reasonable doubt" and the court then pointed out that because the limitations period had run, this ended the case. FAC ¶ 140. Thus, as the Yusufs admit at page 8 of their motion, the formal abandonment of the proceedings by a prosecutor is sufficient to be a dismissal in favor of a party. Dismissal of a criminal charge after the date of the statute of limitations is, as the court pointed out, a formal abandonment of the case – and this Court can also take judicial notice that the statute of limitations period has run, effecting abandonment.

2. Plaintiffs stated a claim as to Defamation

The gravamen of Defendants' argument as to defamation is that their statements to the police and prosecutor, even if false and motivated by clear malice, were absolutely privileged. 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.")

3. Plaintiffs stated a claim as to Trade Disparagement

Defendants neglected to address the recent USVI District Court case on trade disparagement which held that unlike cases of regular defamation, specific damages need not be proved when there is trade disparagement. *Kantz v. Univ. of the Virgin Islands*, No. CV 2008-0047, 2016 WL 2997115, at *21 (D.V.I. May 19, 2016). While the civil tort of trade disparagement might be considered <u>very</u> similar to defamation – as it ***is*** essentially "commercial defamation" -- the big advantage to a plaintiff is that it does not require specific proof of direct damages.

> "A disparaging remark that tends to harm someone in his business or profession is actionable **irrespective of harm as such a remark falls within the definition of slander or defamation per se**." *Illaraza v. Hovensa, LLC*, 2010 U.S. Dist. LEXIS 77402, at *13, 2010 WL 3069482 (D.V.I. July 30, 2010) (citing *VECC, Inc. v. Bank of Nova Scotia*, 296 F. Supp. 2d 617, 623 (D.V.I. 2003)). Statements that are deemed to harm an individual's business or professional reputation either "impugn the integrity of the individual with respect to their job performance" or "attack the competence or skill of the employee in carrying out his or her duties." *Wilson v. V.I. Water & Power Auth.*, 2010 U.S. Dist. LEXIS 129229, at * 19, 2010 WL 5088138 (D.V.I. Dec. 7, 2010) (citing *VECC, Inc.*, 296 F. Supp. 2d at 623).

Thus, both this tort and its special twist on damages have been addressed here. In any case, to the extent that Defendants argue that it is not a cognizable tort in the USVI despite a 2016 district court decision, for the purposes of Rule 12, ***they*** must present a *Banks* analysis. When addressing a Rule 12(b)(6) motion in this jurisdiction, it is necessary to perform a *Banks* analysis to determine whether the cause of action is recognized in this jurisdiction, and if so, what its elements are. That burden is on the movant.

As Yusuf did not perform such an analysis, the Plaintiff need not do so. In *Walters v Walters*, 2014 WL 1681319 (V.I. Apr. 28, 2014) the Supreme Court stated that courts must be mindful that "Tort law serves two fundamental purposes: 'deterrence and

compensation'." *Id.* at *5. There is nothing about not allowing a tort because defendants raise it in a Rule 12 motion but do no analysis.

4. Plaintiffs stated a claim as to the Prima Facie Tort/Outrage

The *Tort of Outrage* is also referred to as the *Prima Facie Tort.* Contrary to Yusuf's argument. Yusuf argues that this is just a tort that gets used when nothing else fits. However, the *Prima Facie Tort* is well recognized in its own right. As noted by Judge Dunston in *Edwards v. Marriott Management Corp. (Virgin Islands), Inc.,* No. ST-14-CV-222, 2015 WL 476216, at *6 (V.I. Super. Ct. Jan. 29, 2015), a "prima facie tort is a general tort." Judge Dunston recently reiterated this point again in *Bank of Nova Scotia v. Boynes,* No. ST-16-CV-29, 2016 WL 6268827, at *3 (V.I.Super. Ct. 2016)("[i]n the Virgin Islands, prima facie tort is recognized as a cause of action").

Both *Edwards* and *Boynes* cited *Glenn v. Dunlop,* 423 Fed. Appx. 249, 255 (3d Cir. 2011), which analyzed Virgin Islands law in recognizing this tort in the Virgin Islands. Judge Dunston noted that the Third Circuit did not do a real *Banks* analysis, so he did so in *Boynes*, *supra* at *3 (referring to it in n.15 and then doing it in n.16):

> While the Supreme Court of the Virgin Islands has not yet weighed in on the issue, the Third Circuit, the District Court of the Virgin Islands, and the Superior Court have all recognized prima facie tort as a viable cause of action. In addition, many other jurisdictions also recognize prima facie tort as actionable. *See, e.g., The Modern Prima Facie Tort Doctrine*, 79 Ky. L.J. 519, 525–27 (1990/1991) ("twenty-one states, including New Jersey, plus the Virgin Islands and District of Columbia recognize prima facie tort"). Given that prima facie tort fills in gaps in the law and grants relief where there may not be any available, the Court finds that recognition of prima facie tort as a cause of action represents the soundest rule for the Virgin Islands and is in accord with local public policy.

In short, this tort has been recognized within the Virgin Islands.[1] It has also been recognized by most other jurisdictions as well. Moreover, the Prima Facie Tort serves the two goals of tort law—"deterrence and compensation"—which is the guiding principle in establishing the soundest rule for the Virgin Islands under the Supreme Court holding in *Walters v Walters,* 2014 WL 1681319, at *5.

The cases citing this tort generally all reference § 870 of the *Restatement (Second) of Torts*, which provides:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Indeed, the United States Supreme Court cited § 870 with approval in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657, 128 S.Ct. 2131, 2143, 170 L.Ed.2d 1012 (2008) ("the Restatement (Second) of Torts sets forth as a "[g]eneral [p]rinciple" that "[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances").

Applying the elements of this tort here, the Plaintiff certainly has described conduct alleging that Yusuf has engaged in intentional conduct that is both "generally culpable and not justifiable under the circumstances" that caused injury.

The cited Virgin Islands cases have generally held that the "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.'" *Edwards,*

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[1] *See, e.g., Government Guarantee Fund of Finland v Hyatt Corporation,* 955 F. Supp. 441, 463 (D.V.I. 1997) (Prima Facie tort is recognized in the Virgin Islands).

2015 WL 476216, at *6. *Edwards* then cites three cases from the Virgin Islands, in footnote 43, supporting this qualification, adding an additional comment as follows:

> This is also in line with our jurisdiction's recognition of the gist of the action doctrine, which "is designed to maintain the conceptual distinction between breach of contract claims and tort claims" and that, "[a]s a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Pediatrix Screening, Inc. v. TeleChem Intern., Inc., 602 F.3d 541, 548 (3d Cir. 2010) (quoting eToll, Inc v. Elias/Savion Adver., Inc., 811 A.2d 10, 14 (2002)). The doctrine prevents parties from unfairly seeking a second bite at the same apple.

However, (1) it is simply too early to say this is the case at this early stage, and (2) this Court need not decide whether this qualification is required in adopting the *Prima Facie Tort* here, as it is clear that Count VI as alleged is distinctly different from the other remaining Counts in the FAC.

5. Plaintiffs stated a claim as to CICO / CICO Conspiracy

Plaintiffs have averred a statutory claim based on the CICO statute permitting civil CICO claims, 14 V.I.C. § 607, so that no *Banks* analysis is required. To plead a claim under § 607, one needs only to allege facts sufficient to support a finding that the Defendants have violated one of the subsections under 14 V.I.C. § 605, which provide in part:

> (a) It is unlawful for any person employed by, or 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.
>
> (b) It is unlawful for any person, through a pattern of criminal activity, to acquire or maintain, directly or indirectly, *any* interest in, or *control* of, any enterprise or real property. (Emphasis added.)

Violations of all sections are pled as part of the Plaintiff's claim.

Yusuf challenges three specific aspects of the sufficiency of the pleadings as to the Plaintiff's § 605(a) CICO claim.

1. Plaintiffs fail to allege what allegedly predicate criminal acts were done by each defendant.
2. Plaintiffs fail to properly plead the elements of a CICO conspiracy
3. Plaintiffs fail to properly plead a "pattern of criminal activity"

After one wades through all of the general rhetoric in Yusuf's motion, these are all revealed to be cases where the allegations have been found to be "inadequate." However, a plain reading of the referenced paragraphs in the FAC confirms that these CICO elements were properly pled.

First, despite many, many efforts in discovery in other cases, Defendants have failed to properly describe their own criminal acts. Thus, all that can be done at a Rule 12 stage is to (1) state that the criminal acts took place, (2) that these defendants did them and (3) that the defendants are intentionally hiding and covering up exactly which of them did what—all of which is succinctly and clearly pled in the FAC.

Second, all of the elements are clearly pled – under notice pleading standards they do not have to be named correctly or formally described.

Third, if this is not a "pattern" of criminal activity, nothing ever will be. It is alleged that the Yusufs and United started forging documents years in advance to make it appear that Mike was a director of Plessen – and inculcating them into the Department of Consumer Affairs and BNS. They then used those forged documents to change the signature status at BNS, and then relied on those forged documents to try to take over the Plessen Board. They then used all of that to try to get the Hameds arrested. This was a long, organized criminal effort.

Thus, once the specific factual allegations are reviewed, United/Yusuf's Rule 12 objections to the § 605(a) claim fails, as sufficient facts, **deemed to be true at this juncture**, have been pled. The Plaintiff has alleged numerous predicate criminal acts. The FAC also alleges that each act within this criminal activity is specifically related to the enterprise and was done with a common purpose. Finally, the FAC alleges that these acts were not isolated.

In summary, under the Rule 12 standard set in *Walters, supra,* it is respectfully submitted the none of Yusuf's objections to the CICO count warrant dismissal, as the well-pled facts meet each of the required CICO criteria under § 605 (a) and (b).

6. Plaintiffs stated a claim as to United Corporation

The individual defendants do not dispute that they are officers, directors or employees of United. They do not dispute that United is the entity in direct competition with the Hameds – not them as individuals. They do not dispute the allegations that when they acted to injure the Plaintiffs it was their closely-held, family-controlled competing business – United – that would benefit.

Thus, as was the case above, a Rule 12 motion is not the place to explore the factual averments in the Yusuf's memorandum that the individuals did not act for United.

D. Conclusion

For the reasons set forth herein, it is respectfully submitted that Yusuf's 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.)

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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
Tele: (340) 773-8709
Fax: (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 E. Lockwood, Esq
Nichols Newman Logan Grey & Lockwood, P.C.
Attorneys for Defendant BNS
No. 1131 King Street, Suite 204
Christiansted, U.S. Virgin Islands 00820-497
(340) 773-3200 / FAX (340) 773-3409
clockwood@nicholsnewman.com