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 REPLY IN SUPPORT OF THEIR 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 Virgin Islands Rule of Civil Procedure 12(b)(6), reply in support of their Motion to Dismiss Plaintiffs, Waleed Hamed ("Wally Hamed" or "Plaintiff") 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.

I. INTRODUCTION

The event underlying Wally Hamed's claims herein should not be lost or clouded by his current allegations. In fact, it was Wally Hamed who took nearly half a million dollars[1] from an account jointly owned by the Yusufs[2] without advising them[3] and used the money for his personal gain, purchasing real property and investing in a competing business. Both he and his brother, Mufeed Hamed, were sued by the Yusufs for this wrongful taking and that suit is still

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[1] Plaintiffs' Complaint provides that "Waleed Hamed...and Mufeed Hamed signed a check removing $460,000 from the Plessen account." Compl. ¶10.

[2] Plessen "is owned 50% by members of the Yusuf family, including the Yusuf Defendants, and 50% by members of the Hamed family, including the Plaintiff Hamed." Compl. ¶52.

[3] The Complaint further alleges that "[T]here was no signature of a Yusuf family member on the check." Compl. ¶ 54.

pending.[4] Wally Hamed now seeks to play the victim of the circumstances he created. Despite the fact there were multiple restrictions in place to prevent the unilateral removal of funds from the joint account, including: 1) the Bylaws which required one Hamed and one Yusuf signature by virtue of the officer titles the family members held;[5] 2) by practice and convention as all checks after mid-2011 bore two signatures from each family—one Hamed and one Yusuf; 3) by agreement as reflected in the Bank of Nova Scotia documents (both dated and undated) requiring one Hamed and one Yusuf signature; 4) that the designated purpose of the funds was Plessen's business expenses; and 5) by Plessen's historical practice not to distribute to the shareholders; Wally Hamed removed the funds without Yusuf authorization.

Shortly after being caught, and in response to the civil lawsuit brought by the Yusufs, Wally Hamed paid half of the funds into the registry of the Court—a clear admission he was not authorized to the remove the funds in the first place. Thereafter, the Yusufs went to the police. Fathi Yusuf, a shareholder, who has held the position of Secretary/Treasurer and title of director since the company's inception, along with Yusuf Yusuf and Mike Yusuf, who are also shareholders, took the information they had about Wally Hamed's wrongful taking to the Virgin Islands Police Department ("VIPD"). What they said and provided are set forth in the Police Report and the Affidavit of Sargent Corneiro—documents that Wally Hamed had in his possession prior to filing this suit and which are a matter of record in this case.[6]

Yet, Wally Hamed brings this retaliatory suit based on an immaterial fixation with Mike Yusuf's good faith belief that he was a formal director of Plessen at the time he met with the

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[4] The Yusufs' civil suit concerning the Hameds unilateral taking of the $460,000.00 is styled *Yusuf Yusuf et al. v. Mohammad Hamed et al, and Plessen Enterprises, Inc.*, SX-13-CV-120.

[5] Nowhere in the Opposition do Plaintiffs' address the clear requirements of the Bylaws to have either the President and Vice President on the one hand and a counter signature from the secretary and treasurer on all checks.

[6] The Affidavit of Sargent Corneiro is attached to the Complaint as Exhibit 3.

police, viewing this detail as a lynchpin issue and "super-fact" which is the sole basis for Wally Hamed's arrest (as opposed to the clear evidence of his improper taking). The issue is irrelevant. Mike Yusuf's status as a director, shareholder, witness, or merely concerned citizen, does not alter the fact Wally Hamed withdrew $460,000.00 ("Monies") from the bank account of 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 without the permission of the Yusufs. Oddly enough, Mike Yusuf was not alone in his mistaken belief that he was a formal director. Wally Hamed's father, Mohammad Hamed, the President and fellow a director of Plessen, also believed Plessen had four (4) directors. Mike Yusuf also acted and operated as a director with the knowledge and approval of Wally Hamed and the other directors, raising the question of whether Mike Yusuf was a *de facto* director.

This suit is simply Wally Hamed's effort to deflect culpability for his wrongful taking by concocting an elaborate and paranoid theory by which the Bank of Nova Scotia ("BNS"), through some phantom employee, assisted the Yusufs in manipulating bank documents years before Wally Hamed ever even took the funds. The alleged plot is better suited for a work of fiction than for crafting a well-pled complaint. Instead, the stubborn facts surrounding Wally Hamed's improper taking only point to his liability, rather than giving rise to causes of action for: 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"); or 6) a CICO conspiracy. Hence, Plaintiffs' claims all fail and this matter should be dismissed.

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II. MEMORANDUM OF LAW

Plaintiffs seek to insulate themselves with the rationale that "all facts" in a complaint "***must***" be deemed as true when challenged by a motion to dismiss. *See* Opposition, p. 2 (emphasis in original). The problem, however, is that this presumption does not grant Plaintiffs

an unfettered license to present conclusory statements and allegations as "facts." Quite the contrary, such conclusory statements are not vested with the presumption that they are true. Rather, the Court should disregard all conclusory statements, even when "couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court is required to "identify allegations that, because they are no more conclusions, are not entitled to the assumption of truth" and to be aware that "[t]hese conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement." *Brady v. Citron*, 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 2007).

By way of example, throughout the Complaint, Wally Hamed alleges that the Yusufs misrepresented to the police the signature requirements on the account. However, according to Sargent Corneiro's affidavit, the Yusufs provided the signature card as of August 17, 2009. *See* Exhibit 3 to Complaint. That document reveals three signatures: Waleed Hamed, Mike Yusuf and Fathi Yusuf. Hence, the Yusufs did not provide any of the allegedly forged documents when they met with the police. If the "forged documents" were part of the Yusufs elaborate scheme as Wally Hamed contends, the Yusufs surely would provided such a document to Sargent Corniero. Rather, Sargent Corneiro's affidavit reveals that the documents he received directly from BNS reflected six (6) authorized signatures and documents specifically reflected the "one Hamed and one Yusuf" signature requirement.[7] *See* Exhibit 3, ¶h to Complaint. Hence, the very evidence which Plaintiffs attach to their Complaint in support of their sensational allegations actually betray their contrived story. Such allegations and conclusory statements cannot be deemed true when it is clearly and patently obvious that they are not. Hence, the Court must remove from its

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[7] Later, the Yusufs received the same document directly from BNS and provided it upon request.

consideration such conclusory statements and allegations which do not merit the presumption of truthfulness.

A. Plaintiffs Fail to State a Claim for Malicious Prosecution

Notably, if even one of the elements of a cause of action is not present, the entire count fails. 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 "Initiate" or "Procure" Criminal Proceedings

First, the Yusuf Defendants did not "initiate" or "procure" a criminal proceeding within the meaning of the applicable law as they simply gave information to the VIPD who independently investigated the matter over many months and, at the conclusion of that independent investigation, referred the matter to the Virgin Islands Attorney General ("Attorney General"). After reviewing the information provided by the VIPD, the Attorney General then made an independent decision to bring criminal charges against Wally Hamed. Put simply, as a matter of common sense, anything the Yusuf Defendants said to the police months prior to the Attorney General bringing a criminal complaint against Wally Hamed—after the VIPD thoroughly and independently investigated the matter—was not what resulted in the prosecution. What resulted in the prosecution was both the VIPD's and the Attorney General's belief that Wally Hamed had committed a crime.

As a matter of law, under the circumstances at issue, where the choice to initiate the

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prosecution was left to the unfettered discretion of both the VIPD and the Attorney General, the Yusufs did not initiate or procure the criminal proceeding.[8] 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. Further,

> 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.**

See Section 653 of the Restatement of Torts at Comment f.

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 months-long, thorough, and independent investigation of the allegations, including obtaining and reviewing 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. Accordingly, as it was left to the VIPD's—and the Attorney General's—complete discretion as to whether charges would be brought against Wally Hamed after an independent investigation was conducted, the Yusuf Defendants did not "initiate" or "procure" them as a matter of law and the claim for malicious prosecution is properly dismissed on this basis.

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

Plaintiffs rely on a federal case out of the Northern District of Texas, *Duffie v. Wichita City*, 990 F.Supp.2d 695 (N.D. Tex. 2013), in an attempt to refute the principal that a party does not initiate or procure a criminal prosecution when the decision to prosecute is left to the total discretion of another person (in this case, two people). Clearly, this case is not applicable in this jurisdiction and the matter is addressed by the Comments to Section 653 of the Second Restatement of Torts which has been adopted by the Virgin Islands Supreme Court in *Palisoc*. Comment g to Section 653 deals with providing false information: "if, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." *See* Section 653 of the Restatement of Torts at Comment g. Importantly, Comment g demonstrates that the intelligent exercise of discretion by the police and/or prosecutor is the touchstone of whether or not a party has procured the criminal prosecution. In the instant case, accepting Plaintiffs' allegation that what the Yusufs Defendants told the police was false, the VIPD did a months-long independent investigation. Thus, the VIPD and the Attorney General were both able to—and did—intelligently exercise their discretion in bringing the criminal prosecution. Thus, the Yusuf Defendants did not initiate or procure the same.

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

Lack of probable cause is the "*sine qua non* of malicious prosecution." *See Illaraza v. HOVENSA LLC*, 73 F.Supp.3d 588, 612 (D.V.I. 2014). In this case, Wally Hamed himself has pled facts which demonstrate that the Yusuf Defendants had probable cause to report his unauthorized removal of $460,000.00 from the Plessen account. In the Complaint, Hamed 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

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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." Compl. ¶ 61 (emphasis supplied). 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 the funds" by depositing it in the registry of the Court. Thus, the claim for malicious prosecution is properly dismissed on this independent basis as well.

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. Importantly, Plaintiffs wholly ignore the case law cited by the Defendants which explains that 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

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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 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." Compl. ¶ 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 (where "[t]here is no evidence suggesting that the decision not to retry Weaver was taken because Weaver was believed 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, as failure of any one of the elements is sufficient for the claim to be dismissed.

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B. Plaintiffs Fail to State a Claim for Defamation

The *Banks* analysis undertaken by Plaintiffs regarding what communications are absolutely and conditionally privileged is wholly unnecessary. The Virgin Islands Supreme Court has already adopted the absolute and conditional privileges to allegedly defamatory statements set forth in the Second Restatement of Torts. *See Joseph v. Daily News Publishing Co.*, 57 V.I. 566, 586 (V.I. 2012). "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). Section 587 of the Second Restatement of Torts, and the Comments thereto, have been widely held, including by courts in the Virgin Islands, to provide an absolute privilege to statements made to law enforcement. *See Sprauve v. CBI Acquisitions, LLC*, Civ. Case No. 09-165, 2010 WL 3463308, at *12 (D.V.I. Sept. 2, 2010) (citing Restatement (Second) of Torts at §587, Comment b, and explaining that "[t]here 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, based on law established by the Supreme Court of the Virgin Islands, any statements made to the police are absolutely privileged and 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

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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 Bethea v. Merchants Commercial Bank*, 2014 WL 4413045, at* 19 (D.V.I. Sept. 8, 2014) ("The plaintiff must also specifically identify what defamatory statements were made, including who made them and to whom the statements were made."); *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 made, merely alleging that "the Yusufs" made statements to "off-island commercial entities." *See e.g.*, Complaint, ¶117. Certainly, which such alleged statements were made to whom is within Plaintiffs' purview. To bring the suit, Plaintiffs had to have heard or otherwise became aware of the statements that were made, who made them and when they were made. Yet, Plaintiffs fail to include them in their pleadings, instead relying upon conclusory statements, which are not properly considered in determining this motion. Accordingly, Plaintiffs' defamation claim is also properly dismissed—in its entirety—on this basis.

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C. Plaintiffs Fail to State a Claim for Trade Disparagement

Virgin Islands common law does not contain a cause of action for "trade disparagement." In the Opposition, Plaintiffs falsely claim that Defendants did not do a *Banks* analysis on Plaintiffs' "trade disparagement" cause of action. Opp. p. 14. Defendants' Banks analysis appears on pages twelve and thirteen of the Motion to Dismiss. Defendants concluded that 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. Motion to Dismiss, p. 13.

Plaintiffs have convincingly buttressed Defendants' conclusion by bringing the Court's attention to *Kantz v. University of the Virgin Islands*, Case No. 2008-0047, 2016 WL 2997115, at *21 (D.V.I. May 19, 2016). Opp. p. 14. Plaintiffs falsely claim that *Kantz* is a trade disparagement case. It is not; rather, it is a defamation case. *See id.* at *1 and *21-24. Kantz alleged defamation *per se* on the basis of statements made which allegedly impugned her professional reputation. *Id.* at *21 ("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."). Thus, the Virgin Islands already has a defamation *per se* cause of action which protects a party's business and professional reputation without the need to prove special harm as evidenced by *Kantz*. Accordingly, the soundest rule for the Virgin Islands is to not recognize a duplicative cause of action for "trade disparagement." Hence, it must be dismissed.

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

Plaintiffs' *prima facie* tort claim fails for two reasons. First, it fails because Plaintiffs have not alleged **a single different or additional factual allegation** in support of the same. Instead, Plaintiffs merely incorporate the preceding paragraphs of the First Amended Complaint and recite that the actions of Defendants were "intentional, wanton, extreme and outrageous ... culpable and not justifiable under the circumstances." Complaint ¶¶ 168-69.

Plaintiffs' *prima facie* tort claim also fails because the conduct about which Plaintiffs complain falls within the scope of other well established and named intentional torts: to wit, malicious prosecution and defamation. In the Opposition, Plaintiffs unpersuasively argue that a claim for *prima facie* tort is proper even when a defendant's conduct comes within the requirements of one of the well-established torts.

Oddly, Plaintiff cites *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) and *Bank of Nova Scotia v. Boynes*, Case No. ST-16-CV-29, 2016 WL 6268827, at *4 (Super. Ct. Oct. 18, 2016) in alleged support of the viability of its *prima facie* tort claim. However, in both *Edwards* and *Boynes* the Superior Court **dismissed** the plaintiffs' causes of action for *prima facie* tort because no additional facts had been pled in support of the *prima facie* tort cause of action and plaintiff had pled other tort claims. As the 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. In *Boynes*, the court explained the dismissal of plaintiff's *prima facie* tort claim as follows: "[h]ere it is evident that Boynes relies on the same set of

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factual allegations to support his prima facie tort claims as he does to support his fraud, IIED, and NIED counterclaims."

Plaintiffs also failed to discuss or distinguish the other cases Defendants cited which require dismissal of their *prima facie* tort claim, including *Sorber v. Glacial Energy VI, LLC*, Case No. ST-10-CV-588, 2001 WL 3854244, at * 3 (Super. Ct. June 7, 2011). In *Sorber*, the court dismissed a *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." *See also 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.").

As discussed above, Plaintiffs' claim for *prima facie* tort does not add any additional factual allegations. Accordingly, as Defendants' alleged actions allegedly fit into existing and defined torts—evidenced by the fact Plaintiffs have brought three other putative tort claims: malicious prosecution, defamation and trade disparagement—and Plaintiffs 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.

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

In the Opposition, Plaintiffs do not—and cannot—argue with any of the law cited by Defendants in the Motion to Dismiss setting forth the requirements to properly plead the various elements of CICO claims. Instead, Plaintiffs merely recite that they have pled sufficient facts to support their CICO claims. Opp. p. 18. However, as discussed in detail in the Motion to

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Dismiss, Plaintiffs have: 1) failed to allege what claimed predicate criminal acts were done by each defendant: 2) failed to properly plead the elements of a CICO conspiracy; and 3) failed to properly plead a pattern of criminal activity.

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 **any of the three 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" forged documents and provided them to police. *See* Complaint at ¶181.

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. The essential elements of a CICO conspiracy are: (1) two or more persons agreed to conduct or participate, directly or

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indirectly, in the conduct of an enterprise's affairs through a pattern of criminal activity; (2) the defendant was a party to or a member of the agreement; and (3) the defendant joined the agreement, knowing of its objective to conduct or participate in the conduct of the affairs of an enterprise through a pattern of criminal activity, and intending to join with at least one other co-conspirator to achieve that objective. *United States v. Massimino*, 641 Fed.Appx. 153, 160 (3d Cir. 2016) (unpublished). 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.*

Plaintiffs have failed to meet their burden. To wit, Plaintiffs merely state that "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"

Notably, to be held liable under CICO **each defendant** must engage in a "pattern or criminal activity." *See* 14 V.I.C. § 605(a) and (b). 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

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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). 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.

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

Plaintiffs all but formally abandon this claim, providing only a cursory response in the Opposition. The law is clear: 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). 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). Plaintiffs do not—and cannot—dispute the law cited by the Yusuf Defendants which establishes that for a corporation to be held liable for the actions of its agents or employee those agents or employees had to be acting within the scope of their employment. Moreover, Plaintiffs do not—and cannot—claim that they have made any factual allegations that would even tangentially suggest the Yusuf Defendants were acting within the scope of their employment with United when they allegedly engaged in the conduct about which Plaintiffs complain.

Instead, Plaintiffs just seek to avoid their burden to plead facts which would plausibly state a claim against United. In the Opposition, Plaintiffs state that "the individual defendants do not dispute that they are officers, directors or employees of United" (Opp. p. 19) and they "do not dispute that United is the entity in direct competition with the Hameds." *Id.* First, it is not a defendant's obligation to dispute facts in a complaint when moving to dismiss the same; rather, a defendant is required to demonstrate that the facts set forth by a plaintiff fail to state a claim upon which relief can be granted. Second, and dispositively, the facts set forth in Plaintiffs' Complaint fail to even faintly suggest that the Yusuf Defendants were acting within the scope of their employment when they allegedly engaged in the conduct about which Plaintiffs complain.

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Moreover, in a complaint replete with conclusory allegations, Plaintiffs fail to even make the conclusory allegation that the Yusuf Defendants were acting within the scope of their employment. Accordingly, all causes of action brought against United Corporation are also properly dismissed for failure to state a claim against United on which relief can be granted.

III. CONCLUSION

Simply put, Plaintiffs attempt to file this retaliatory suit to obscure the wrongfulness of Wally Hamed's taking falls short. Plaintiffs have failed to state a single claim against any of the defendants upon which relief can be granted and the Complaint should be dismissed in its entirety. Specifically, Plaintiffs' claim for malicious prosecution is properly dismissed on the grounds that: 1) Defendants did not initiate or 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

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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

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: April 12, 2017 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2017, I served the foregoing *DEFENDANTS, FATHI YUSUF, MAHER YUSEF, YUSUF YUSUF AND UNITED CORP.'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT*, which complies with the page and word limitations set forth in Rule 6-1(e), via e-mail addressed to:

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