

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

HISHAM HAMED, individually, and
Derivatively, on behalf of **SIXTEEN
PLUS CORPORATION**,

Plaintiff,

vs.

**FATHI YUSUF, ISAM YOUSUF and
JAMIL YOUSEF**,

Defendants.

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant,

CIVIL NO. SX-16-CV-650

DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES
AND CICO RELIEF

JURY TRIAL DEMANDED

**DEFENDANTS ISAM YOUSUF'S AND JAMIL YOUSUF'S REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendants, Isam Yousuf ("Isam") and Jamil Yousuf, incorrectly identified as Jamil Yousef ("Jamil"), by and through their undersigned counsel, respectively request the Court grant their motion to dismiss plaintiff, Hisham Hamed's First Amended Complaint against them, in its entirety, given that Isam and Jamil are not subject to personal jurisdiction in this Court because they did not act within this territory, it fails to state a single claim upon which relief can be granted – both because all claims are barred by the statute of limitations and are additionally insufficiently plead – and it fails to join an indispensable party, namely, Manal Yousef. Isam and Jamil leave plaintiff to his proof that service upon them in Sint Maarten is sufficient for this

Court to exercise personal jurisdiction over them and in compliance with V.I. R. Civ. P. 4 especially as to Isam. In contesting the jurisdiction of this Court, Isam and Jamil do not submit to the jurisdiction of the Court, do not waive their jurisdictional defenses and defenses to service of process, and do not voluntarily appear in this action. In support, Isam and Jamil state as follows.

I. INTRODUCTION

It is undisputed Defendants Isam Yousuf and Jamil Yousuf are nonresidents of the U.S. Virgin Islands. [See First Amended Complaint at ¶¶ 4 and 5.] Plaintiff's claim for relief does not arise from Isam's and Jamil's activities in the forum. Plaintiff complains about activities of Isam and Jamil that allegedly occurred on Sint Maarten, not within the U.S. Virgin Islands. Isam and Jamil submit the plaintiff does not refute the assertions set forth in the Affidavit of Jamil Yousuf. [See Defendants Isam and Jamil's Exhibit 1.] Likewise plaintiff does not contest that there may be insufficient service of process upon Isam and Jamil.

In plaintiff's opposition to Isam and Jamil's Motion to Dismiss, plaintiff withdraws three of the claims set forth in the First Amended Complaint: 1) violation of 14 V.I.C. § 605(c) of the Criminally Influenced and Corrupt Organizations Act ("CICO"); 2) conversion; 3) and civil conspiracy. Accordingly, Isam and Jamil have no need to, and do not, address those three claims in this reply. With respect to the remaining counts, plaintiff's First Amended Complaint has several intractable problems that no amount of obfuscation on the part of plaintiff can conceal. One, all remaining counts—the two alleged CICO claims (one a conspiracy to violate 14 V.I.C.

§ 605(a)¹ and the other for violation 14 V.I.C. § 605(b)), and the “tort of outrage”—are all barred outright by the statute of limitations. The limitations bar is disclosed on the face of the First Amended Complaint, which reveals that plaintiff knew in 2005 that Sixteen Plus’s interests in the Property were impacted by the “sham mortgage” when defendant Fathi Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold. Two, the pleading requirements are more demanding where claims asserting fraud and necessarily corruption are involved. V.I. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”). Plaintiff has failed to plead actual facts—as opposed to conclusory allegations—sufficient to support his claims. Significantly, in his opposition, rather than quoting the (albeit insufficient) allegations in the First Amended Complaint to demonstrate the “facts” pled, plaintiff merely cites to the paragraphs purportedly containing “facts” that support his case. A review of those paragraphs shows that they merely contain conclusory statements which are insufficient to survive the Motion to Dismiss.

II. THE COURT LACKS PERSONAL JURISDICTION OVER ISAM AND JAMIL

A. Isam And Jamil Asserted Defense Of Lack Of Personal Jurisdiction In Initial Motion Before Any Responsive Pleading And Thereby Preserved These Defenses

Isam and Jamil did not submit to the Court’s jurisdiction. Isam and Jamil contend a notice of appearance of Kye Walker, Esquire on March 13, 2017, was not a general appearance and thereby neither waived service of process nor conferred personal jurisdiction over their persons. Furthermore Isam and Jamil did not authorize Kye Walker, Esq to submit to the Court’s jurisdiction by making a purported “general appearance” in the action. Isam and Jamil did not

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

make a “general appearance” because their initial motion or responsive pleading, in this case a pre-answer motion, after their prior counsel filed a Notice of Appearance, was to question the jurisdiction of the Court - filing the instant Motion to Dismiss premised upon lack of personal jurisdiction over their persons as well as insufficiency of service of process. Stated differently, Isam and Jamil appeared to challenge and object to personal jurisdiction in accordance with V.I. R. Civ. P. 12(h) and 12(b). That is, since Isam and Jamil’s participation in this action is limited to challenging the Court’s personal jurisdiction, they did not make a general appearance. The filing of a Notice of Appearance by Kye Walker, Esquire coupled with filing a Motion to Dismiss based upon lack of personal jurisdiction and improper service of process pursuant to V.I. R. Civ. P. 12(b) and 12(h) is uncontroverted evidence of Isam and Jamil’s intention to not submit to the jurisdiction of the Court and Attorney Walker lacked authority to do so.

1. Filing A Notice Of Appearance Is Not A Waiver Of Personal Jurisdiction

The Notice of Appearance submitted by Kye Walker, Esquire on March 13, 2017, states in pertinent part: “COMES NOW, Kye Walker, Esq., of the Walker Group and hereby enters her appearance as counsel for Defendants, Isam Yousuf and Jamil Yousef, in the above-captioned matter. Please direct copies of all future proceedings, pleadings, briefs, correspondence and other papers filed in this proceeding prior to and subsequent to this date to the undersigned counsel at 16AB Church Street, 2nd Floor, Christiansted, St. Croix, USVI 00820.” Isam and Jamil submit the language of this notice of appearance is nothing more than a request that all documents be sent to the attorney. It does not request affirmative relief. It does not answer or respond to the first amended complaint. It does not raise any defense. Its language is not a submission to the jurisdiction of the Court. Isam, Jamil, and Attorney Walker did not participate

in the proceedings or attend any hearing before the instant motion to dismiss challenging personal jurisdiction was submitted to the Court.

An appearance is coming into court as a party or interested person and involves a submission or presentation to the court by which a party shows his intention to submit himself to the jurisdiction of the court. A defendant may take part in an action formally by filing a motion or answer, informally by actively litigating the merits of an issue without raising any jurisdictional objection, or impliedly by taking, seeking or agreeing to some step in the proceedings that is beneficial to him or is detrimental to the plaintiff. APPEARANCE, BLACK'S LAW DICTIONARY (8th Edition 2004). A "general appearance" is defined as a "general-purpose appearance that waives a party's ability to later dispute the court's authority to enter a binding judgment." GENERAL APPEARANCE, BLACK'S LAW DICTIONARY (8th Edition 2004). The term "special appearance" (or "limited appearance") means a defendant's pleading that contends the court lacks personal jurisdiction over the defendant or objects to improper service of process, and also means a "defendant showing up in court for the sole purpose of contesting the court's assertion of personal jurisdiction over the defendant." SPECIAL APPEARANCE, BLACK'S LAW DICTIONARY (8th Edition 2004). A "voluntary appearance" is defined as an "appearance entered by a party's own will, without the service of process." VOLUNTARY APPEARANCE, BLACK'S LAW DICTIONARY (8th Edition 2004).

Ordinarily a general appearance is made when a person or the person's attorney comes into court and submits the party to the jurisdiction of the court. "However, the filing of a notice of appearance by counsel does not constitute a waiver of personal jurisdiction." 4 AMJUR2D APPEARANCE § 2; *Mesa v. Bank of New York*, 180 So.3d 222, 223-25 (Fla. 3d DCA 2015) (citing *Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1027 (Fla. 1982)); and *Mason v. Hunton*,

816 So.2d 234, 235 (Fla. 5th DCA 2002) (citing *Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1027 (Fla. 1982)).

The case of *Mesa v. Bank of New York*, 180 So.3d 222 (Fla. 5th DCA 2015), is illuminating on the point that the filing of a notice of appearance by counsel does not waive a party's right to claim lack of jurisdiction over its person. In *Mesa* the court held a notice of appearance by counsel to the Mesas did not constitute a waiver of the Mesas' right to challenge personal jurisdiction. *Mesa v. Bank of New York*, 180 So.3d 222, 223 (Fla. 5th DCA 2015) (citing *Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1027 (Fla. 1982) (attorney filing a notice of appearance did not constitute a general appearance thereby waiving the defendant's right to challenge the jurisdiction of the court over it)). The notice of appearance did not request any affirmative relief. Neither the Mesas nor their counsel participated in the proceedings, filed any motions or pleadings, or sought any affirmative relief until filing the motion contesting personal jurisdiction. *Mesa v. Bank of New York*, 180 So.3d 222, 224 (Fla. 5th DCA 2015).

The Florida court sets forth Florida Rule of Civil Procedure 1.140(b) as follows:

b) How Presented. --Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Mesa v. Bank of New York, 180 So.3d 222, 224 (Fla. 5th DCA 2015) (citing to Fla. R. Civ. P. 1.140(b)). It should be noted the language of Florida Rule of Civil Procedure 1.140(b) is similar to the corresponding Virgin Islands and federal civil rules relating to defenses to claims, namely, V.I. R. Civ. P. 12(b) and Fed.R.Civ.P. 12(b) respectively.

Under Rule 1.140(b) the party may raise by either motion or pleading the defense of lack of personal jurisdiction, insufficient process, and insufficient service of process. These defenses are waived if the party does not raise these defenses in its initial motion or responsive pleading. *Mesa v. Bank of New York*, 180 So.3d 222, 224 (Fla. 5th DCA 2015) (citing Fla. R. Civ. P. 1.140(h)). The Mesas raised their defenses of lack of personal jurisdiction in their initial motion prior to any responsive pleading. The only filed document that preceded the motion was a notice of appearance filed by the Mesas' attorney. The notice of appearance did not answer or respond to the complaint, raise any defense, seek any affirmative relief, or by its terms submit the Mesas to the jurisdiction of the court. Instead the notice of appearance merely served as formal notice that counsel was representing the Mesas in the action, and requested that counsel be served with copies of any future pleadings, motions, and notices. *Mesa v. Bank of New York*, 180 So.3d 222, 224 (Fla. 5th DCA 2015).

The *Mesa* court held the filing of a notice of appearance does not waive the right to challenge personal jurisdiction including the ability to object to the sufficiency of service of process. *Mesa v. Bank of New York*, 180 So.3d 222, 224-25 (Fla. 5th DCA 2015). The court reasoned filing a neutral and innocuous notice of appearance, which reflects no acknowledgment of the court's authority, sets forth no request for the assistance of its process, and indicates no submission to its jurisdiction, should not constitute a waiver given the spirit and letter of the rules of procedure and its policy. *Mesa v. Bank of New York*, 180 So.3d 222, 225 (Fla. 5th DCA 2015). The trial court misunderstood the term "general appearance" when it equated the filing of a notice of appearance with a "general appearance." An attorney's neutral and innocuous notice of appearance does not effect a general appearance. The court acknowledged, by comparison, that a party's active participation in the trial court proceedings without raising the defense of lack

of personal jurisdiction constitutes a party's "general appearance." So too the filing of a responsive pleading or motion that does not raise the lack of personal jurisdiction is considered a party's "general appearance," that is, submission to the jurisdiction of the court, and waiver of the right to later challenge to personal jurisdiction.

The Florida Rules of Civil Procedure discarded the need for and the distinction between general and special appearances. The term general appearance has been misconstrued with a general notice of appearance. The *Mesa* court noted "general appearance" is a term of art used to describe the conduct or conditions by which a party is regarded to have submitted itself to the jurisdiction of the court, and should not be considered tantamount to the filing of a general notice of appearance. *Mesa v. Bank of New York*, 180 So.3d 222, 224 fn. 1 (Fla. 5th DCA 2015). The *Mesa* court determined the legal effect of filing a notice of appearance is that it is not considered a general appearance and does not waive the right of the party to protest personal jurisdiction.

A party may consent to the court's personal jurisdiction over him. *In re Najawicz*, 52 V.I. 311, 338 (V.I. 2009). The *Najawicz* court recognized that a party-defendant may confer personal jurisdiction upon a court "where defendant has entered an appearance by filing a motion or otherwise." *In re Najawicz*, 52 V.I. 311, 338 (V.I. 2009) (citing *Zelson v. Thomforde*, 412 F.2d 56, 59 (3d Cir. 1969)). Miller's attorney appeared at a hearing on motions filed by other defendants. The V.I. Supreme Court remarked, "the record reveals that Miller's attorney entered a general appearance rather than a special or limited appearance." *In re Najawicz*, 52 V.I. 311, 338 (V.I. 2009). An attorney's appearance at a hearing without asserting the defense of lack of personal jurisdiction over his client, as done by Miller's attorney, is distinct from simply filing a notice of appearance. A notice of appearance is not synonymous with a general appearance.

Isam and Jamil submit the case of *In re Najawicz*, 52 V.I. 311 (V.I. 2009), does not hold otherwise.

In reaching its conclusion the V.I. Supreme Court cites to cases, fairly and reasonably distinguishable from the present case, where the party-defendant made an appearance before the court without contesting the jurisdiction of the court over the defendant and thereby made a general appearance. In *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980), defendant's attorney made a general appearance when he participated in a conference in the judge's chambers without objecting to lack of jurisdiction over defendant when it was an appearance for a purpose in the cause, not one merely collateral to it. *Williams v. Williams*, 46 N.C. App. 787, 788-89 266 S.E.2d 25, 27-28 (1980). In *Springs v. Springs*, 234 A.D.2d 552, 651 N.Y. S.2d 579, 579 (N.Y. App. Div. 1996), defendant's counsel seemingly appeared in court to answer the complaint without asserting an objection to personal jurisdiction. *Springs v. Springs*, 234 A.D.2d 552, 651 N.Y. S.2d 579, 579 (N.Y. App. Div. 1996). In *Nixon v. Rowland*, 192 Va. 47, 63 S.E.2d 757 (Va. 1951), defendant Rowland, Jr.'s attorney made a general appearance when he appeared in court and pleaded general issue – denied the material allegations of the pleading – without objecting to personal jurisdiction of the court. *Nixon v. Rowland*, 192 Va. 47, 49-50, 63 S.E.2d 757, 758-59 (Va. 1951).

The courts in the U.S. Virgin Islands still recognize, even after *In re Najawicz*, 52 V.I. 311 (V.I. 2009), the ability of a defendant to contest personal jurisdiction over the person and object to insufficiency of service of process in his initial motion or responsive pleading. A motion seeking dismissal under Rule 12(b)(5) for insufficient service of process necessarily invokes Rule 12(b)(2) because insufficiency of service of process precludes the court from obtaining personal jurisdiction over the defendant. *Barnes v. GCI Operations, LLC*, 2017 V.I.

LEXIS 10, *2 (V.I. Super. Ct, Div. STT&STJ January 20, 2017) (citing to similarly worded Rules 12(b)(2) and 12(b)(5) of the Federal Rules of Civil Procedure then in effect in the U.S. Virgin Islands); and *St. Croix Federation of Teachers, Local 1826 v. Government of the Virgin Islands, Department of Education*, 2016 V.I. LEXIS 213, *3 (V.I. Super. Ct. December 21, 2016). In accordance with Rule 12(h), “an affirmative defense based upon defective service of process is waived if it is not challenged in the first defensive pleading.” *Barnes v. GCI Operations, LLC*, 2017 V.I. LEXIS 10, *3 (V.I. Super. Ct, Div. STT&STJ January 20, 2017) (citing *Ross v. Hodge*, 58 V.I. 292, 311 fn. 22 (V.I. 2013); and *Pate v. Government of the Virgin Islands*, 62 V.I. 271, 281 (V.I. Super. Ct. 2015)); and *St. Croix Federation of Teachers, Local 1826 v. Government of the Virgin Islands, Department of Education*, 2016 V.I. LEXIS 213, *3-*4 (V.I. Super. Ct. December 21, 2016). A defendant preserves the defense of lack of personal jurisdiction including insufficient service of process by raising it in its first defensive pleading or initial motion, its answer in the former or motion to dismiss contesting personal jurisdiction over the person or objecting to insufficiency of process or service of process in the latter. *Barnes v. GCI Operations, LLC*, 2017 V.I. LEXIS 10, *3 (V.I. Super. Ct, Div. STT&STJ January 20, 2017) (GCI raised the issue of insufficient service of process in its answer and counterclaim, so the defense was not waived); and *St. Croix Federation of Teachers, Local 1826 v. Government of the Virgin Islands, Department of Education*, 2016 V.I. LEXIS 213, *4 (V.I. Super. Ct. December 21, 2016) (defendant DOE raised the issue of insufficient service of process in its motion to dismiss, which was its initial responsive pleading to the complaint).

Isam and Jamil submit V.I. R. Civ. P. 12(b) and similarly worded Fed.R.Civ.P. 12(b) have eliminated the age-old distinction between general and special appearances in courts where these rules are enacted. 4 AMJUR2D APPEARANCE § 3; *Neifeld v. Steinberg*, 438 F.2d 423, 429

(citing *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944)), Under V.I. R. Civ. P. 12(b), like that of the Fed.R.Civ.P. 12(b) and Fla. R. Civ. P. 1.140(b), there is no longer the necessity to appear specially to contest the court's jurisdiction. The dichotomy of special and general appearances is no longer as significant as it once was. All objections to jurisdiction and process may be advanced by way of motion or answer without waiving any of them. Isam and Jamil did this when they raised the defenses of lack of personal jurisdiction and insufficient service of process in their preliminary motion, that is, motion to dismiss plaintiff's first amended complaint.

Isam and Jamil did not submit by of a voluntary appearance to the jurisdiction of the Court. The Virgin Islands Legislature enacted a provision, codified at 5 V.I.C. § 115, specifying when the court acquires jurisdiction and the effect of a voluntary appearance. Title 5 V.I.C. § 115 states in its entirety: "From the time of the service of the summons or the allowance of a provisional remedy the court shall be deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him." 5 V.I.C. § 115. The court acquires jurisdiction upon proper service of a summons. 5 V.I.C. § 115; and *Joseph v. Bavarian Motor Works*, 20 V.I. 231, 233 (D.V.I. 1983). As stated previously, a voluntarily appearance by a party-defendant is defined as an appearance entered by a party's own will without the service of process. VOLUNTARY APEARANCE, BLACK'S LAW DICTIONARY (8th Edition 2004). A voluntary appearance results in the waiver of defenses to service of process.

Plaintiff's citation to *In re Catalyst Third-Party Litigation*, 2015 V.I. LEXIS 144 (V.I. Super. Ct. December 16, 2015), is distinguishable. There the third-party defendant filed a motion to dismiss based upon service of process not in compliance with the 120-day period of

Rule 4(m). Thereafter third-party defendant filed various notices and motions. In *In re Catalyst Third-Party Litigation*, 2015 V.I. LEXIS 144 (V.I. Super. Ct. December 16, 2015), the Court found third-party defendant voluntarily appeared pursuant to 5 V.I.C. § 115 and thereby waived any defenses relating to service of process because it participated in the litigation when it filed numerous notices and motions including notice of appearance, notice of additional time to respond to discovery, motion for stay of mediation referral order, and motion for protective order. *In re Catalyst Third-Party Litigation*, 2015 V.I. LEXIS 144, *8-*9 (V.I. Super. Ct. December 16, 2015). See also *Rivera-Moreno v. Government of the Virgin Islands*, 61 V.I. 279, 299 fn. 7 (V.I. 2014) (V.I. Supreme Court rejected the Government's assertion of insufficient service of process, raised for the first time on appeal, because the Government fully participated in the proceedings, and had therefore waived any defects to service of process by its voluntary appearance pursuant to 5 V.I.C. § 115); and *Ross v. Hodge*, 58 V.I. 292, 311 fn. 22 (V.I. 2013) (a party may waive the defenses of insufficient service of process or lack of personal jurisdiction by voluntarily appearing and participating in the litigation, citing 5 V.I.C. § 115 without deciding whether party being deposed constitutes participating in litigation for voluntary appearance purposes). In the instant matter, plaintiff does not make any such similar contention in their opposition. Isam and Jamil have steadfastly maintained the court lacks jurisdiction over their persons.

2. Attorney Walker Was Unauthorized To File A "General Appearance"

The *Najawicz* court found there is a rebuttable presumption that an attorney has the authority to enter a general appearance on behalf of a client. *In re Najawicz*, 52 V.I. 311, 339 (V.I. 2009). An attorney may enter a general appearance on behalf of his client, submitting the client to the jurisdiction of the court, if the appearance is authorized. *In re Najawicz*, 52 V.I.

311, 338 (V.I. 2009) (*citing* 7A CJS Attorney & Client § 292, formerly § 239). There is a presumption that an attorney has authority to appear and act on behalf of his client unless it is shown conclusively that the attorney was not authorized to do so. *In re Najawicz*, 52 V.I. 311, 338 (V.I. 2009) (*citing* 7A CJS Attorney & Client § 292, formerly § 239). Isam and Jamil assert this presumption is rebutted because a “general appearance” was not authorized, that is, Attorney Walker was not authorized to and they did not intend to submit themselves to the jurisdiction of the Court. Jamil was unsuccessful in his attempts to learn Attorney Walker’s recommendations on how to proceed in the matter. Isam and Jamil questioned the efforts of Attorney Walker and were deciding to retain other counsel when, on the eve of termination of her retainer, the notice of appearance was filed on March 13, 2017. Isam and Jamil, as nonresidents of the U.S. Virgin Islands who are unfamiliar with its legal process and were served in a foreign country, did not intend to submit to the jurisdiction of the Court, did not intend to waive the right to challenge personal jurisdiction, and did not authorize Attorney Walker to submit them to the jurisdiction of the Court.

3. Civil Proceedings Under CICO Are Governed By A Two-Part Test To Exercise Personal Jurisdiction Over A Nonresident Defendant

Isam and Jamil submit plaintiff’s assertion that 14 V.I.C. § 606(j) of the Criminally Influenced and Corruption Organizations Act overrides and negates the necessity to establish a personal jurisdiction over them is without merit. Title 14 V.I.C. § 607 is titled “Civil Remedies.”

Section 607(j) states in its entirety,

Personal service of any process in a proceeding or action under this section may be made upon any person outside the Territory of the Virgin Islands if the person was a principal in any conduct constituting a violation of this chapter in this Territory. The person shall be deemed, by having engaged in such conduct within this Territory, to have thereby

submitted himself to the jurisdiction of the courts of this Territory for the purposes of this section.

14 V.I.C. § 607(j). However, the V.I. Supreme Court in *Najawicz* determined when it was presented with what was essentially a civil proceeding within a CICO case, the court must conduct a 2-part analysis to establish personal jurisdiction over a nonresident defendant: a statutory basis in accordance with V.I. long-arm statute (5 V.I.C. § 4903), and minimum contacts sufficient to satisfy constitutional due process and that it comports with notions of fair play and substantial justice. *In re Najawicz*, 52 V.I. 311, 336 (V.I. 2009) (in a criminal forfeiture CICO-based case prosecuted under 14 V.I.C. § 606, the V.I. Supreme Court determined an *ex parte* temporary restraining order is a civil equitable remedy and the civil rules of procedure and the territorial long-arm statute governed when determining personal jurisdiction over a nonresident defendant). Moreover, Isam and Jamil contest that they engaged in conduct within this territory. Isam and Jamil submit the crux of their position is that they have not engaged in conduct within this territory whereby the Court should impose personal jurisdiction over their persons. Even the case cited by plaintiff, *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476 (3d Cir. 1993), which is not a CICO case but rather a contract action, employed the traditional two-prong test to establish personal jurisdiction over a nonresident defendant.

4. Service Of Process May Be Insufficient

Plaintiff does not address and therefore does not contest Isam and Jamil's position that service of process may be deficient in this matter.

III. DISMISSAL PURSUANT TO RULE 12(b)(6) IS APPROPRIATE

For the sake of brevity, Isam and Jamil incorporate by reference defendant Fathi Yusuf's Reply in Support of His Motion to Dismiss Plaintiff's First Amended Complaint dated February

6, 2017, including facts and the legal authorities as if fully set forth herein, which establishes plaintiff fails to state a claim upon which relief can be granted because all claims are barred by the statute of limitations and are insufficiently pled, and has fails to join an indispensable party, Manal Yousef.

Isam and Jamil amplify the reply by noting, ordinarily a statute of limitation defense cannot be raised in a motion to dismiss. Nonetheless when it appears on the face of the complaint that the statute of limitations has expired, the complaint may be dismissed at the pretrial stage. Plaintiff mentions the continuing violations doctrine in his opposition. The continuing violations doctrine is an equitable exception to the timely filing requirement of the statute of limitations (making a date-of-accrual determination). Plaintiff cites to no authority that the continuing violation doctrine is applicable to a CICO case as an exception to the statute of limitations. Neither does plaintiff conduct a full factual analysis in support of applying the continuing violation doctrine to the instant case. Isam and Jamil submit plaintiff does not even address the availability of the equitable doctrine through the distinction of a continuing violation occasioned by a continual unlawful act versus a continual ill effect from an original violation. *Anthony v. Firstbank Virgin Islands*, 58 V.I. 224, 230 (V.I. 2013) (“a continuing violation is occasioned by continual unlawful acts, not continual ill effects from original violation.”) Plaintiff merely cites to factually and consequently legally distinguishable cases.

Isam and Jamil submit an affidavit of Jamil in another matter (*Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65) that plaintiff references does not perpetrate a criminal fraud, is not a “wrongful act in this criminal conspiracy,” and does not toll the statute of limitations date of accrual. The affidavit of Jamil was made in defense of pending litigation, not for a nefarious purpose. Plaintiff acknowledges the affidavit was filed in an effort

to challenge service of process upon Ms. Manal Yousef, but does not contend that the factual assertions of Jamil are inaccurate. A reading of the affidavits reveals nothing inconsistent when defendant Fathi Yusuf qualifies his statement with, “to the best of my knowledge” Moreover, the Hameds are deemed to have knowledge of St. Martin as Ms. Manal Yousef’s last known address and the possibility that her address may have changed because Ms. Manal Yousef executed a power of attorney in favor of defendant Fathi Yusuf based upon her intention to possibly relocate from St. Martin at the behest of Waleed Hamed. [Defendant Jamil Yousef’s Responses to Plaintiff’s First Request for Interrogatories at Interrogatory No. 7 attached as **Exhibit “A”**.] The continuing violations doctrine is inapplicable based upon the briefs.

IV. CONCLUSION

All plaintiff’s remaining claims – the two alleged CICO violations and the tort of outrage/*prima facie* tort – are all barred by the statute of limitations and properly dismissed on that ground. Moreover each and every remaining claim as to Isam and Jamil is also properly dismissed as insufficiently pled. Also plaintiff’s First Amended Complaint is properly dismissed, in its entirety, due to the failure to join Manal Yousef, the holder of the First Priority Mortgage at issue herein, who is both a necessary and indispensable party to this action.

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

V. **RELIEF REQUESTED**

Isam Yousuf and Jamil Yousuf respectfully requests that this Court: 1) dismiss plaintiff Hisham Hamed's First Amended Complaint in its entirety as to them; 2) award Defendants Isam Yousuf and Jamil Yousuf attorneys' fees and costs incurred in connection with defending this case; and 3) award Defendants Isam Yousuf and Jamil Yousuf such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DATED: August 8, 2017.

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CERTIFICATE OF SERVICE

I hereby certify this document complies with the page or word limitation set forth in V.I. R. Civ. P. 6-1(e) and that on this the 8th day of August, 2017, I caused an exact copy of the foregoing "*Defendants Isam Yousuf's and Jamil Yousuf's Reply in Support of Motion To Dismiss Plaintiff's First Amended Complaint*" to be served electronically by e-mail, and by mailing same, postage pre-paid, to the following counsel of record:

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EXHIBIT “A”

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

HISHAM HAMED , individually, and Derivatively, on behalf of SIXTEEN PLUS CORPORATION ,)	
)	
Plaintiff,)	CIVIL NO. SX-16-CV-650
)	
vs.)	DERIVATIVE SHAREHOLDER SUIT, ACTION FOR DAMAGES AND CICO RELIEF
)	
FATHI YUSUF, ISAM YOUSUF and JAMIL YOUSEF ,)	JURY TRIAL DEMANDED
)	
Defendants.)	
)	
and)	
)	
SIXTEEN PLUS CORPORATION ,)	
)	
a nominal Defendant,)	
)	

**JAMIL YOUSUF'S RESPONSE TO PLAINTIFF HISHAM HAMED'S
FIRST REQUEST FOR INTERROGATORIES TO DEFENDANT JAMIL YOUSEF**

The Defendant, **JAMIL YOUSUF** (incorrectly referred to in the caption as Jamil Yousef"), by and through his undersigned attorney, James L. Hymes, III, does not voluntarily appear in this matter, does not submit to the jurisdiction of the Court, and does not waive any objections to subject matter jurisdiction, personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted, or any other defense or objection which may be presented whether by pleading or motion in this action, hereby responds to Plaintiff's First Request For Interrogatories to Defendant Jamil Yousef, as follows:

Interrogatory 7:

Regarding the Power of Attorney ("POA") attached as Exhibit 2, please state:

- a) What, if anything, did you do to assist in having this POA signed by Manal Mohammad Yousef; and
- b) What, if anything, did Fathi Yusuf or Isam Yousuf tell you about this POA.

Response:

I did not do anything to assist in having the Power of Attorney signed by Manal Mohammad Yousef. I had no discussions with Fathi Yusuf about the Power of Attorney. I was told by my father that it was sent to Manal Mohammad Yousef for execution by her by Waleed Hamed, since my aunt was preparing to return to Palestine. Mr. Hamed expected to receive an offer to purchase the land against which my aunt had recorded her mortgage. This Power of Attorney would facilitate a sale if one should occur and assist my aunt being paid the money she was owed by the Sixteen Plus Corporation.

VERIFICATION

I hereby certify under penalty of perjury that the facts contained in each of the foregoing responses to interrogatories are true and correct to the best of my knowledge, information and belief.

Dated: July 14, 2017 _____
Jamil Yousuf

Emmaplein, Philipsburg, _____)
_____) ss.
Sint Maarten, Dutch Caribbean _____)

On this, the 14th of July day of 2017, before me, the undersigned officer, personally appeared Jamil Yousuf, ~~known to me~~ (or satisfactorily proven) to be the person whose name is subscribed to the within document and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

 _____
Notary Public (a civil law notary)
Marlene Francoise Mingo

Seen for legalization of the signature of JAMIL ISAM YOUSUF, who identified himself with a passport, issued by the United States of America, under number 499229108, by me, Marlene Françoise Mirgo, LL.M., a civil law notary, established on Sint Maarten, on this 14th day of July, 2017. This declaration for the legalization of the signature, by the civil law notary, contains no opinion as to the contents of this document.