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

FATHI YUSUF and UNITED CORPORATION, Plaintiffs, v. THE ESTATE OF MOHAMMAD A. HAMED, THE MOHAMMAD A. HAMED LIVING TRUST, And WALEED HAMED, AS EXECUTOR OF THE ESTATE OF MOHAMMAD A. HAMED and SUCCESSOR TRUSTEE OF THE MOHAMMAD A. HAMED LIVING TRUST, Defendants.	)	Case No. ST-17-CV-384 ACTION TO SET ASIDE FRAUDULENT TRANSFERS

REPLY IN FURTHER SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO V.I.R.Civ.P. 12(b)(6)

Defendants,[1] pursuant to V.I.R.Civ.P. 12(b)(6), file this Reply in further support of their Motion to dismiss this Action for failure to state a claim upon which relief may be granted and, in further support of the Motion, state as follows in response to Plaintiffs' Opposition to Defendants' Motion to Dismiss (the "Opposition"):

I. INTRODUCTION

In their Opposition, Plaintiffs do not oppose or challenge the legal premise of the Motion: ***that Mr. Hamed's transfers to his revocable trust do not constitute "transfers" under the UFTA because assets transferred to Mr. Hamed's revocable trust remain available to satisfy the lawful claims of Mr. Hamed's creditors***. Rather than oppose Plaintiff's legal argument, the Opposition merely (i) restates the allegations of the Complaint; (ii) states that the Virgin Islands

[1] Capitalized terms not defined herein shall have the meanings ascribed thereto in the Motion.

has returned to pure notice pleading under the new V.I.R.Civ.P. 8 (a point which was already well discussed in the Motion); and (iii) states an off-the-wall argument concerning the meaning of Banks v. Int'l Rental and Leasing Corp., 55 V.I. 967 (V.I. 2011) ("Banks"). Having failed to oppose Defendants' legal argument set forth in the Motion, Plaintiffs have conceded the Motion. This Action must be dismissed.

II. PLAINTIFFS HAVE IMPLICITLY CONCEDED THE MOTION BY NOT OPPOSING – OR EVEN SUBSTANTIVELY ADDRESSING – THE FUNDAMENTAL PREMISE OF THE MOTION: *MR. HAMED'S TRANSFERS TO HIS REVOCABLE TRUST WERE NOT "FRAUDULENT TRANSFERS" UNDER THE UFTA BECAUSE ALL ASSETS TRANSFERRED TO HIS REVOCABLE TRUST REMAIN AVAILABLE TO SATISFY THE CLAIMS OF MR. HAMED'S CREDITORS.*

Plaintiffs did not argue or even substantively address the fundamental legal premise on which the Motion is based. The argument on which the Motion is based is stated in the Motion as follows:

> When Mohammad A. Hamed ("Mr. Hamed") transferred certain of his assets to the Trust, he did not "***dispose of***" or "***part with***" such assets because he retained the absolute power to revoke the Trust and other broad powers of control over Trust assets and administration. Because he did not "dispose of" or "part with" his assets when he transferred them to the Trust, there was no "transfer" as defined in 28 V.I.C. § 171(12). And, without a "transfer" as defined in the Virgin Islands uniform fraudulent transfer statute, there is no "fraudulent transfer.

See Motion at pp. 1-2.

A. Plaintiffs have Conceded Defendants' Argument for Purposes of the Motion in the Superior Court.

Having failed (or refused, for strategic reasons) to oppose (or even substantively address) the foregoing legal argument, Plaintiffs have implicitly conceded this premise and, therefore, the Motion. See, e.g., Barefoot Architect, Inc. v. Bunge, 2014 WL 12744795, at *5 (V.I. Super. Ct.

April 29, 2014) ("[Plaintiff] wholly fails to address the equitable factors, and thus implicitly concedes the propriety of a fee award to defendants"); Cubica Group, LLLP v. MAPFRE, 2012 WL 5331257, at *2 n.3 (D.V.I. October 29, 2012) ("Plaintiffs do not contest defendant's claim that an attorney-client relationship never existed between DTF and Cubica. In fact, plaintiffs implicitly concede the non-existence of such a relationship as their argument focuses solely on DTF's prior representation of Ocean Side."); Simpson v. Golden, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments, both [in the Supreme Court] and before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument before it is presented to [the Supreme Court]."); Joseph v. Joseph, 2015 WL 13579173, at *2 (V.I. Super. Ct. April 23, 2015) (internal citations omitted) (denying a litigant's request for relief because he "failed to make any arguments" in support of requested relief and stating, "[i]t is not the Court's job to research and construct legal arguments open to parties . . . In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate."); Charles v. CBI Acquisitions, LLC, 2016 WL 2905340, at *9 (V.I. Super. Ct. May 9, 2016) (denying requested relief for failure to adequately present argument and stating, "In general, the Court will not make a party's arguments for him [or her] when he [or she] has failed to do so.") (citing Joseph v. Joseph, 2015 WL 13579173, at *2)).

B. If Ever Appealed, Plaintiffs Will be Deemed to have Waived any Opposition to Defendants' Argument.

As addressed below, Plaintiffs incorrectly state that Banks means that the Superior Court cannot grant a motion to dismiss in the absence of squarely controlling law from the Supreme Court[2] and, therefore, this Action cannot be dismissed because the Supreme Court will be the ultimate arbiter of this issue. Plaintiffs' argument is circularly nonsensical. By not opposing or substantively addressing the arguments set forth in the Motion, Plaintiffs have waived any opposing argument they may have had on appeal. See e.g., Bryan v. Fawkes, 61 V.I. 201, 230 n. 20 (V.I. 2014) ("But this was not raised before the Superior Court, and it is raised on appeal in a perfunctory manner, rendering the issue waived.") (citing V.I.R.APP.P. 22(m)).

More specifically, by recognizing that there is no controlling law from the Supreme Court on the legal issues argued in the Motion, Plaintiffs have recognized that a Banks analysis of those issues is required. But by failing (or refusing, for strategic reasons) to provide a Banks analysis in opposition to the Banks analysis set forth by Defendants, Plaintiffs have implicitly conceded the result of Defendants' Banks analysis and will be deemed to have waived any such argument on appeal. As stated by the Supreme Court in 2016:

> Pursuant to Supreme Court Rule 22(m), "[i]ssues that were ... only adverted to in a perfunctory manner or unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal." When—as is the case here—the appellant recognizes that a Banks analysis is required, yet fails to even remotely attempt to brief the three Banks factors, Rule 22(m) provides this Court with the discretion to deem the issue waived. However, because the Superior Court's February 26, 2015 opinion may have misled Antilles School into believing that it was inappropriate for it to fully brief the Banks issue, we will nevertheless consider Antilles

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2 "This acknowledgement in and of itself defeats Defendants' Motion to Dismiss because, plainly, the Complaint cannot be dismissed based on the law of other jurisdictions or the Restatement." See Opposition at p. 3 (citing Banks).

> School's remittitur argument on appeal. ***Members of the Virgin Islands Bar, however, must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments, including a non-perfunctory analysis of all three Banks factors when one is required***.

Antilles School, Inc. v. Lembach, 64 V.I. 400, 428 n. 13 (V.I. 2016) (emphasis added).

Having failed to argue any opposition they may have in the Superior Court, Plaintiffs have waived any argument they may have had before the Supreme Court with regard to any opposition to Defendants' Banks analysis in the Motion.

II. PLAINTIFFS' INTERPRETATION OF BANKS IS INCORRECT.

Contrary to Defendants' argument in the Opposition, Banks most certainly does ***not*** stand for the proposition that the Superior Court cannot dismiss a case in the absence of clear controlling statutory law or case law from the Supreme Court. Plaintiffs incorrectly argue and cite Banks for the proposition that Defendants' acknowledgment that there is currently no clear Virgin Islands case law on point "in and of itself defeats [the Motion] because, plainly, the Complaint cannot be dismissed based on the law of other jurisdictions or the Restatement." See Opposition at p. 3. Then, noting that the Supreme Court is the ultimate arbiter of the law, the Opposition states that "since the [Supreme Court] has not decided when, if ever, a creditor can recover against the assets of a revocable trust, Hamed's transfer of all of his assets to the Trust ***may***, in fact, be a fraudulent transfer." Opposition at p. 4 (emphasis added).[3]

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[3] This statement, coupled with Plaintiffs' failure (or refusal for strategic reasons) to oppose the legal argument set forth in the Motion calls into question whether Plaintiffs filed a fraudulent transfer action based on nothing more than their belief (hope?) that there could be a possibility that the Supreme Court "***may***" rule Mr. Hamed's transfers to his revocable trust to be fraudulent transfers? See V.I.R.Civ.P. 11(b) ("By presenting to the court a pleading . . . an attorney . . . certifies that to the best of [her or his] knowledge, information and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law."). Plaintiffs do not argue in the Opposition for the extension, modification or reversal of existing law nor do they argue for the establishment of new law. Any pre-filing "inquiry reasonable under the

Plaintiffs' interpretation of the meaning of Banks is incorrect and flies in the face of the basic underpinnings of legal advocacy and the role of the courts. Plaintiffs' statement that the Supreme Court is the "ultimate arbiter" of the law in the Virgin Islands and that the Supreme Court ***may*** find in Plaintiffs' favor is an odd combination of unremarkable and irrelevant.[4]

Contrary to Defendants' interpretation, Banks and its progeny establish a simple[5] method for Virgin Islands courts to ***find*** the law in situations where there is no Virgin Islands common law on point with an argument. See Banks, 55 V.I. at 973-984; Government of the Virgin Islands v. Connor, 60 V.I. 597, 600 (V.I. 2014); and Antilles School, Inc. v. Lembach, 64 V.I. 400, 428 (V.I. 2016). As advocates, it is the parties' job (as represented by counsel) to help the Court ***find*** the law. Therefore, given that the Supreme Court has directed the Superior Court to apply a Banks analysis where there is no controlling Virgin Islands common law, it is the parties' job to provide the Superior Court with a Banks analysis in order to effective advocate to the Superior Court. See Antilles School, Inc. v. Lembach, 64 V.I. at 428 n. 13 ("Members of the Virgin Islands Bar, however, must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments, including a non-perfunctory analysis of all three Banks factors when one is required.").

Banks stands for the exact opposite of what Plaintiff's state in their Opposition. Banks does ***not*** mean that a case can never be dismissed in the absence of directly controlling Virgin

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circumstances" must surely have included legal research into the very basic points of estate planning and fraudulent conveyance law set forth in the Motion.

[4] Also, as discussed above, by not providing an opposing Banks analysis in opposition to the Motion, Plaintiffs have waived any argument they may have had on appeal. Aside from being in correct, none of the points raised by Plaintiffs in the Opposition oppose, argue, challenge, or even address the Banks analysis set forth in the Motion.

[5] As noted by Steve Jobs, "simple can be harder than complex."

Islands common law. To the contrary, Banks provides the Superior Court with the parameters for analysis necessary to ***find*** the law in such situations as necessary to decide a motion to dismiss. Indeed, that is the job of the courts: to find the law necessary to decide on a certain issue.

In compliance with Banks and its progeny, the Motion sets forth a thoroughly developed Banks analysis to show the Court that transfers to a revocable trust are not fraudulent "transfers" under the UFTA because assets transferred to a revocable trust remain available to satisfy the claims of the grantor's creditors. In addition to being incorrect, Plaintiffs' unique interpretation of Banks is ***not*** an argument against this central premise of the Motion. By failing to argue against the central premise of the Motion, Plaintiffs have conceded the Motion.

IV. CONCLUSION

This Action must be dismissed because "[Plaintiffs] can prove no set of facts in support of [their] claim which would entitle [them] to relief." In re Kelvin Manbodh Asbestos Litigation Series (Manbodh v. Hess Oil Virgin Islands Corp.), 2005 WL 3487851, *11 (V.I. Super. Ct. 2005) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Taking all allegations of the Complaint as true, Plaintiffs fail to state a claim upon which relief can be granted. Mr. Hamed's transfer of assets to his revocable trust was not a "transfer" under the UFTA because all such assets remain available to satisfy the lawful claims of his creditors. And Defendants have not shown – or even argued – anything to the contrary.

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WHEREFORE, for the reasons set forth herein and in the Motion, Defendants respectfully request that the Court enter an order dismissing this Action, with prejudice, and award to Defendants their costs incurred in connection with this Action, including attorneys' fees, and grant to Defendants such other and further relief as is just and proper.

Respectfully submitted,

HAMM ECKARD, LLP

Dated: January 29, 2018 By: FOR

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CERTIFICATE OF SERVICE

I certify that on January 29, 2018, I caused a copy of the foregoing document to be served via email to Gregory H. Hodges, Esquire; Stefan B. Herpel, Esquire; and Charlotte K. Perrell, Esquire, at ghodges@dtflaw.com, sherpel@dtflaw.com, and cperrell@dtflaw.com. I further certify that the foregoing document complies with the page or word limitation set forth in V.I.R.Civ.P. 6-1(e).

Judith Fernandez