

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

HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

Plaintiff,)

vs.)

FATHI YUSUF, ISAM YOUSUF and)
JAMIL YOUSEF,)

Defendants,)

and)

SIXTEEN PLUS CORPORATION,)

a nominal defendant.)
_____)

Case No.: 2016-SX-CV-00650

DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
AND CICO RELIEF

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF’S OPPOSITION TO
PLAINTIFF’S MOTION TO AMEND HIS FIRST AMENDED COMPLAINT**

Defendant, Fathi Yusuf (“Mr. Yusuf”), through undersigned counsel, hereby files his Opposition to Plaintiff’s Motion to Amend His First Amended Complaint (“Motion to Amend FAC”) and shows that there currently remains pending since January 2017, Yusuf’s Motion to Dismiss Plaintiff’s First Amended Complaint (“FAC”), in its entirety, given that 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 also insufficiently pled—and fails to join an indispensable party, Manal Yousef. That Motion has been fully briefed and was argued in early 2017. Plaintiff had ample opportunity to attempt to rectify any deficiencies years ago (to the extent possible). However, since the statute of limitations has long since passed on these claims, there is nothing that can be done to resurrect the stale claims. Moreover, as to the late attempt to now add Manal Yousef, there is no excuse for such delay. Additionally, this is not a perfunctory addition of a few paragraphs here or there to add a party, including their name, but rather a wholesale revision of various pleadings impacting more than simply the addition of Manal Yusuf as a party, years after

the fact. Hence, Plaintiff's current Motion to Amend His FAC, is too little, too late and should be denied. In support, Mr. Yusuf states as follows.

I. PLAINTIFF SEEKS MORE THAN TO JUST ADD A PARTY

Procedurally, Plaintiff attempts to start over, while Mr. Yusuf's (and the other Defendants') Motion to Dismiss FAC remains pending before the Court. While Plaintiff attempts to couch the desire to amend as simply the addition of Manal Yousef—a problem addressed herein separately—the Motion to Amend FAC is much more. Peppered throughout the proposed “Second Amended Complaint” are substantive factual assertions seemingly unrelated to the proposed addition of Manal Yousef.¹ Hence, Plaintiff's Motion to Amend FAC is not perfunctory or ministerial, rather, it seeks to make substantive changes to the very allegations that are currently the subject of Mr. Yusuf's (and the other Defendants') pending Motion to Dismiss. The substance of the briefing fails to address the basis for these changes, focusing instead on the factors to be considered with the addition of a party.

II. FATAL DEFICIENCIES IN THE FIRST AMENDED COMPLAINT REMAIN, THUS, AMENDMENT WOULD BE FUTILE

Plaintiff's proposed Second Amended Complaint has several intractable problems that no amount of obfuscation on the part of Plaintiff can conceal and which, as was the case with Plaintiff's FAC, cannot be remedied. As to all of the counts—the two alleged CICO claims (one a conspiracy to violate 14 V.I.C. § 605(a)² and the other for violation 14 V.I.C. § 605(b)), breach of fiduciary duty, usurpation of corporate opportunity and the “tort of outrage”—are all barred outright by the statute of limitations. The limitations bar is disclosed on the face of the proposed

¹ See Exhibit B to Motion to Amend FAC—Proposed Second Amended Complaint, ¶¶ 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 38, 39, 44, 45, 52, 58, 59, 60, 62, 72, 73, 75, 76, 79, 80, 81.

² 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).

Second Amended Complaint (as was the case with the FAC), which reveals that Plaintiff knew in 2005 that Sixteen Plus's interests in the Property were impacted by the "sham mortgage" when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold. Further, all of the deficiencies that existed and were the basis for Mr. Yusuf's Motion to Dismiss the FAC, remain. Hence, for the reasons that the FAC should be dismissed, so too should any attempt to file the proposed Second Amended Complaint. To that end, Mr. Yusuf incorporates herein by reference his Motion to Dismiss FAC (filed on January 9, 2017) and his Reply in Support of his Motion to Dismiss Plaintiff's FAC (filed on February 6, 2017) as **Exhibits A** and **B** respectively, as if fully set forth herein verbatim as his reasons for denying the current Motion to Amend the FAC.

III. UNDUE DELAY AS TO THE ADDITION OF MANAL YOUSEF

As to the addition of Manal Yousef, Mr. Yusuf shows that his original position was that Manal Yousef's First Priority Mortgage was the subject of Plaintiff's claims in the FAC, that Plaintiff's failure to include her seemed "illogical" and such failure was a sufficient basis to dismiss this case as she was a necessary party. Plaintiff had alleged that the mortgage was invalid and that alleged invalidity was central to Plaintiff's claims but then refused to add her. Even when faced with her claim to foreclose, Plaintiff failed to add her. Plaintiff should not be allowed now, at this late date—years later—to attempt to rectify this failure. Nothing in the recent discovery which has taken place in this case has changed the fact that Plaintiff's claims relate to Manal Yousef's mortgage and that she was a necessary party. Plaintiff should not be afforded the ability to attempt to rectify this blatant failing so late in the litigation. Failure to have added her remains a basis for dismissal of the FAC and Plaintiff should not be able to now attempt to rectify this failing.

Conclusion

For the foregoing reasons, Plaintiff's Motion to Amend the FAC should be denied.

Respectfully Submitted,

DUDLEY NEWMAN FEUERZEIG LLP

DATED: January 23, 2022

By: /s/ Charlotte K. Perrell

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CERTIFICATE OF SERVICE

It is hereby certified that on the 23rd day of January, 2023, the foregoing Yusuf's Opposition to Motion to Amend First Amended Complaint, which complies with the page and word limitations set forth in Rule 6-1(e), with the Clerk of the Court with the electronic filing system, and served same upon opposing counsel by means of the electronic case filing system addressed to:

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DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, pursuant to V.I. Code Ann. tit. 14, §§ 604(j)(2)(B) and 607(h) and Federal Rules of Civil Procedure 12(b)(6), 12(b)(7) and 19, hereby moves the Court to dismiss Plaintiff, Hisham Hamed's First Amended Complaint ("Complaint") against him, in its entirety, given that it wholly fails to state a single claim upon which relief can be granted and fails to join an indispensable party, Manal Yousef. In support, Mr. Yusuf states as follows.

I. INTRODUCTION

This is a case regarding an allegedly "sham" loan made and mortgage recorded against the property of Sixteen Plus Corporation ("Sixteen Plus"), a corporation owned in equal shares by the Hamed and Yusuf families. The mortgage was signed by Plaintiff's brother, Waleed Hamed, and by Defendant, Fathi Yusuf and states on its face that it is securing a loan made to Sixteen Plus by Manal Yousef, a relative of Fathi Yusuf. Whether that loan and mortgage is valid is the subject of another case pending in the Superior Court, Division of St. Croix, styled as

Sixteen Plus Corporation v. Manal Mohammad Yousef, Case No. SX-15-CV-65 and assigned to the Honorable Harold W.L. Willocks. The instant case represents a superfluous, tortured and ill-conceived attempt to litigate those same issues by the Hamed shareholders in the context of a derivative action against one of the Yusuf shareholders.

Giving the lengthy and convoluted Complaint the most charitable reading possible, Plaintiff attempts to allege a CICO conspiracy to “embezzle” the “value of the Land.” (Complaint, ¶ 40) from a jointly owned business, Sixteen Plus, by virtue of a “sham mortgage” on real property owned by Sixteen Plus and refusing to sell the Land unless the “sham mortgage” was paid. *Id.* Notably, the CICO claim must be for a **conspiracy** to embezzle money, since Plaintiff does not—and cannot—claim that any money been received by Mr. Yusuf, or the other Defendants as a result of the mortgage. However, Plaintiff has failed to plead a viable CICO conspiracy claim given that the alleged conspiracy was complete in 1997 when the alleged “sham mortgage” was given by Sixteen Plus. Thus, even if Plaintiff’s CICO conspiracy claim was properly pled—which it is not—Plaintiff’s claim is barred by the five (5) year statute of limitations.¹

Additionally, Plaintiff has failed to meet the burden to plead facts which, if true, show that Defendants objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise through the commission of two or more predicate criminal acts. Such facts are necessary to properly plead a CICO conspiracy. Plaintiff also fails to allege the necessary criminal enterprise—which enterprise must have an existence separate and apart from the “pattern of criminal activity”—and further fails to allege facts which, if true, would establish

¹ The mortgage was recorded in 1999 and the power of attorney concerning the mortgage about which Plaintiff complains was received in 2010. Thus, these occurrences also both fall far outside the five (5) year statute of limitations.

the "pattern of criminal activity" needed to properly plead a CICO conspiracy. For all these reasons, Plaintiff's CICO conspiracy claim fails and is properly dismissed on each of these bases.

No doubt recognizing the fatal flaws in his CICO claim—which flaws were set forth in Mr. Yusuf's Motion to Dismiss the original Complaint and, unfortunately for Plaintiff, still remain in the First Amended Complaint—Plaintiff now attempts to allege additional and equally flawed claims for conversion, breach of fiduciary duty, usurpation of corporate opportunity, civil conspiracy and the tort of outrage. Plaintiff's new claim for conversion is properly dismissed as none of Sixteen Plus's assets have been converted, conversion cannot be asserted with respect to real property, and the claim is barred by the six (6) year statute of limitations. Plaintiff's new claim for breach of fiduciary duty should be dismissed on the grounds that Plaintiff failed to allege a legally cognizable breach of a duty, or harm arising therefrom, and the claim is barred by the two (2) year statute of limitations. Plaintiff's new claim for usurpation of corporate opportunity is properly dismissed for Plaintiff's failure to plead a legally cognizable "corporate opportunity" that was usurped or harm arising from the alleged usurpation of the alleged "corporate opportunity" and because it is barred by the two (2) year statute of limitations. The civil conspiracy claim is also properly dismissed for failure to state a claim upon which relief may be granted. The tort of outrage is properly dismissed as it is a claim for intentional infliction of emotional distress by another name. Sixteen Plus as a corporate entity cannot suffer or make a claim for emotional distress, and there are no allegations that Plaintiff, Hisham Hamed suffered any emotional distress. Finally, Plaintiff's Complaint should also be dismissed, in its entirety, due to Plaintiff's 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.

II. BACKGROUND FACTS

As the Court is likely aware, the Yusuf and Hamed families are engaged in protracted and acrimonious litigation related to the families' long-term joint business interests. The ongoing litigation encompasses multiple civil cases pending in the courts of the Virgin Islands, including the main case between the parties, which is styled *Hamed v. Yusuf, et al.*, Case No. SX-12-CV-370 and assigned to the Honorable Douglas A. Brady ("Main Case").²

The Hameds are truly grasping at straws with the filing of this latest lawsuit brought, primarily, pursuant to CICO. In enacting CICO, the Virgin Islands Legislature made clear in its legislative findings that the statute was intended to target "sophisticated criminal activity" and that the purpose of this act was "to curtail criminal activity and lessen its economic and political power in the Territory of the Virgin Islands" See 14 V.I.C. § 603(e) and § 601 respectively. Plainly, the Virgin Islands Legislature did not intend CICO to be used as a cudgel by parties seeking leverage in business disputes. However, that is the exact, and impermissible, purpose for which this lawsuit was filed. There is simply no other reason for Plaintiff to file this suit given that Sixteen Plus—notably without the approval of any of the Yusufs and undermining Plaintiff's claim of Mr. Yusuf's exclusive control over Sixteen Plus—has already brought a declaratory judgment action against Manal Yousef to have the "sham mortgage" at issue declared invalid. A copy of that Complaint is attached as **Exhibit 1**.³ That action is the appropriate way to address

² The Main Case, which has been to the Virgin Islands Supreme Court and back, is now in the partnership windup stage.

³ The exhibits attached to this motion are part of the public record, such as Exhibit 1, or produced in other cases between the parties, primarily by the Hameds, as evidenced by the Bates stamps located on the bottom of the documents. The Court can take judicial notice of—and consider for purposes of this motion to dismiss—the exhibits hereto. See, e.g., *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) ("In evaluating a motion to dismiss, we may consider documents that are attached to or submitted with the complaint and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the

the validity of the mortgage at issue, in contrast to the instant quasi-criminal action which attempts to gin up a CICO conspiracy related to the mortgage.

In the course of Plaintiff's strained attempt to create a CICO conspiracy where none exists, Plaintiff has misrepresented, "cherry picked" and omitted highly relevant facts, which will be helpful to the Court in understanding the fatal legal flaws in the Complaint and why it should be dismissed for failure to state a claim and failure to join an indispensable party. First, and crucially, Sixteen Plus borrowed money from Manal Yousef to purchase the Diamond Keturah property ("Property"). It is clear that the Yusuf/Hamed partnership wanted to borrow money to purchase the Property because a preexisting entity owned by the Yusufs and Hameds—Plessen Enterprises, Inc. ("Plessen")—made a request to the Bank of Nova Scotia for funds to purchase the same. *See* Commitment Letter from Bank of Nova Scotia, dated July 9, 1997, accepted by Waleed Hamed, approving a loan of two million two hundred thousand dollars to be used toward the purchase of the Property, to be secured by a mortgage on the same, attached as **Exhibit 2**. Second, it is abundantly clear that Plaintiff's oldest brother Waleed "Wally" Hamed,⁴ was fully engaged in the purchase of the Property. *See e.g.*, Letter from "Wally Hamed," dated February 4, 1997, on behalf of Plessen, to the Bank of Nova Scotia making an offer to purchase the Property attached as **Exhibit 3**. Moreover, speaking both to Waleed Hamed's involvement and Sixteen Plus's desire to borrow money to purchase the Property, Sixteen Plus subsequently passed a corporate resolution, executed by Waleed Hamed as President of Sixteen Plus, dated September 15, 1997, titled "Unanimous Consent of Directors in Lieu of a Meeting," which

case.")(citing 5B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2004)).

⁴ Since the inception of the 2012 Main Case assigned to Judge Brady, Waleed Hamed has served as his father, Mohammad Hamed's agent and attorney-in-fact. He has recently been substituted as a plaintiff in that case. It is no exaggeration to say he has been the main spokesman for the Hamed faction, and has filed numerous declarations in the Main Case.

resolved to borrow four million five hundred thousand dollars from Manal Yousef to purchase the Property and approving the Promissory Note and First Priority Mortgage between Sixteen Plus and Manal Yousef. A copy of that Corporate Resolution is attached as **Exhibit 4**. Additionally, Waleed Hamed, as President of Sixteen Plus, executed the Promissory Note and the First Priority Mortgage in the amount of four million five hundred thousand dollars. Copies of the Promissory Note and First Priority Mortgage are attached as **Composite Exhibit 5**. Further, after the First Priority Mortgage was recorded, Waleed Hamed, "per his request," was provided with a recorded copy of the same, via Certified Mail, by attorney Carl A. Beckstedt III. *See* Letter from C. Beckstedt and Certified Mail receipt attached as **Exhibit 6**. The fact that this derivative action is based on a transaction approved in writing by the Hamed son most engaged in the running of the Hamed/Yusuf businesses only underscores the lack of any legal basis for this derivative action.

III. MEMORANDUM OF LAW

A. Motion to Dismiss Standard

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must demonstrate that the plaintiff's claims are more than just "conceivable," but are in fact "plausible on [their] face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In applying this plausibility standard, the Court should disregard all conclusory statements, even when "couched as a factual allegation." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Rather, the question is whether the facts pled demonstrate that the claims cross the threshold from "conceivable" to "plausible," and therefore adequately state a claim for relief.

As the District Court of the Virgin Islands has explained:

To determine the sufficiency of a complaint . . . a court must take three steps: First, the court must 'take note of the elements a plaintiff must plead to state a claim.' . . . Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' . . . Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Watts v. Blake-Coleman, 2012 WL 1080323, at * 2 (D.V.I. 2012) (internal quotation marks and citation omitted).

B. The Complaint is Barred by the Applicable Statute of Limitations

A CICO claim "may be commenced within five years after the conduct made unlawful under section 605." 14 V.I.C. § 607(h). Normally, under Virgin Islands law, the "statute of limitations begins to run upon the occurrence of the essential facts which constitute the cause of action." *Simmons v. Ocean*, 544 F.Supp. 841, 843 (D.V.I. 1982). The Virgin Islands CICO statute is modeled after the federal RICO statute. *Gumbs v. People of the Virgin Islands*, 59 V.I. 784, n.2 (2013); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F.Supp. 961, 970 (D.V.I. 1994). The limitations period for RICO claims begins to run once a plaintiff discovers his injury. *See Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000). Because "CICO is cast in the mold of the federal RICO statute," the discovery rule applies to RICO claims in determining when plaintiffs' CICO claims accrued. *Pemberton*, 877 F.Supp. 961 at 970.

Importantly, this is a CICO conspiracy claim—a claim for a plan to embezzle, not a claim for actually embezzling—money from Sixteen Plus.⁵ Assuming, *arguendo*, Plaintiff properly alleged a CICO conspiracy to embezzle funds by getting a "sham mortgage" on the Property, that entire conspiracy was completed in September 15, 1997 when Sixteen Plus passed

⁵ To that end, there are no allegations in the First Amended Complaint that Mr. Yusuf—or either of his alleged co-conspirators, Isam Yousuf and Jamil Yousef—have received any funds as a result of the "sham mortgage."

its Corporate Resolution to borrow four and a half million dollars from Manal Yousef to purchase the Property, and executed the Promissory Note and First Priority Mortgage in favor of Manal Yousef (all three having been executed by Waleed Hamed as President of Sixteen Plus). At the very latest, the conspiracy was complete on February 22, 1999, some eighteen years ago, when the First Priority Mortgage was recorded against the Property.^{6 7}

Moreover, and dispositively, even if Plaintiff could plausibly allege that the Hameds were not aware that Sixteen Plus's interest in the Property was affected by the First Priority Mortgage given to Manal Yousef—and they cannot in light of Waleed Hamed's direct involvement in the transaction—the Complaint plainly alleges the mid-2000s as the time when Mr. Yusuf first refused to sell the Property unless the “sham mortgage” was paid. To wit, Plaintiff specifically alleges that Sixteen Plus “lost [] [in 2005] . . . the benefit of such sales at the highest and best amount because of Fathi Yusuf's insistence the sham mortgage be paid upon the sale of the property.” Complaint, ¶ 43; *see also id.* at p. 8, Section b (“The Value of the Sixteen Plus Property Dramatically Increases—2005). Thus, at the very latest, Plaintiff became aware of the alleged injury to Sixteen Plus *vis-à-vis* the “sham mortgage,” in the mid-2000s, over ten (10) years ago. Therefore, Plaintiff's CICO claim is barred by the five (5) year statute of limitations. *See Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000) (explaining that the limitations period

⁶ As noted above, even if Plaintiff attempts to rely on receipt of a power of attorney as a predicate criminal act in the “conspiracy,” Plaintiff alleges it was received in 2010, not within the last five (5) years.

⁷ Plaintiff claims that in 2016 Mr. Yusuf filed a civil lawsuit seeking to dissolve Sixteen Plus in an attempt to trigger payment of the “sham mortgage.” Complaint, ¶ 60. In fact, due to the total collapse of the relationships, business and otherwise, between the Yusufs and the Hameds, in 2016 Mr. Yusuf did file a lawsuit to dissolve two jointly owned corporations, Sixteen Plus and Peter's Farm Investment, Corporation. A copy of the Complaint in that action is attached as **Exhibit 7**. To the extent that Plaintiff attempts to cast this a “foreclosure” brought using a power of attorney for Manal Yusuf (Complaint, ¶ 74), Plaintiff is not being candid with the Court. *See id.* Moreover, the case was dismissed by stipulation of the parties in December of 2016. A copy of the order of dismissal is attached as **Exhibit 8**.

for RICO claims begins to run once a plaintiff discovers her injury). Accordingly, Plaintiff's CICO claim is properly dismissed on this basis.

C. Plaintiff Does Not, and Cannot, Properly Plead a CICO Conspiracy Claim

It appears Plaintiff is attempting to allege a violation of 14 V.I.C. § 605(a) and (d) (*see* Complaint, ¶ 84) which provide, respectively:

It is unlawful for any person . . . associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.

14 V.I.C. § 605(a).

It is unlawful for any person to conspire or attempt to violate, either directly or through another or others, the provisions of section 605 subsections (a), (b), and (c).

14 V.I.C. § 605(d).⁸

⁸ Plainly, the Complaint is not a model of clarity. However, Plaintiff appears to be "throwing in the kitchen sink" and, bizarrely, is alleging that by conspiring to embezzle money from Sixteen Plus by obtaining a "sham mortgage" on property owned by Sixteen Plus, Defendants violated also 14 V.I.C. § 605(b) and (c). *See* Complaint, ¶ 83(a) and (b).

14 V.I.C. § 605(b) provides:

It is unlawful for any person, though a pattern of criminal activity, to acquire or maintain, directly or indirectly, any interest in, or control of any enterprise or real property.

Plaintiff alleges that:

All Defendants are "person[s]" who through a pattern of criminal activity set forth in paragraphs 55 through 79 have "acquire[d] . . . directly or indirectly an "interest in" the Land which is "real property" within the meaning of the statute.

See Complaint, ¶ 83(a). This is patently absurd. Mr. Yusuf, Isam Yousuf and Jamil Yousef have not engaged in any pattern of criminal activity, but even if they had, they have not conspired to, or acquired, any interest in the Land. According to the allegations in the Complaint, only Sixteen Plus has an interest in the Property.

14 V.I.C. § 605(c) provides:

As noted above, the Virgin Islands CICO statute is modeled after the federal RICO statute. *Gumbs v. People of the Virgin Islands*, 59 V.I. 784, n.2 (2013); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F.Supp. 961, 970 (D.V.I. 1994). "CICO is cast in the mold of the federal RICO statute," thus, Virgin Islands courts should apply RICO analysis to CICO claims. *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp. 2d 545, 562 (D.V.I. 2004). The corollary subsection of the federal RICO statute, 18 U.S.C. § 1962(c), is virtually identical (with the exception of an effect on interstate commerce requirement), and a substantial body of federal case law has evolved to bring rationality and clarity to a statute that has proved difficult to interpret on its face.

It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of criminal activity in which he participated as a principal, to use or invest, directly or indirectly, any part of the proceeds thereof, or any proceeds derived from the investment or use of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.

Plaintiff further claims that:

All Defendants are "person[s] who have received proceeds derived directly or indirectly, from a pattern of criminal activity in which [they] participated as . . . principal[s], to use or invest, directly or indirectly . . . part of the proceeds thereof . . . in the acquisition of . . . [a] right, interest, or equity in" the Land, which is real property as set forth above.

See Complaint, ¶ 83(b). Again, this boilerplate allegation is patently absurd and unsupported by the allegations in the Complaint. Plaintiff has clearly stated that the alleged "predicate acts" for CICO are set forth in paragraphs 55 through 79. *See* Complaint, p. 12, Section d. Of course, Defendants have not engaged in a pattern of criminal activity at all, as will be discussed. However, Plaintiff does not even allege that Defendants attempted to, or generated proceeds, as a result of a pattern of criminal activity, or that proceeds born of such criminal activity were invested in the acquisition of an interest in the Land. In fact, it is clear from the Complaint that Sixteen Plus is the sole owner of the Property. Accordingly, any claim under 14 V.I.C. § 605(b) or (c), is properly dismissed for, *inter alia*, failure to state a claim upon which relief can be granted.

1. ***Plaintiff Fails to Properly Plead the Elements of a CICO Conspiracy***

The essential elements of both a RICO and CICO conspiracy are: (1) two or more persons agreed to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt (pattern of criminal activity under CICO); (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 racketeering activity or collection of unlawful debt, 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) (citing *Salinas v. United States*, 522 U.S. 52 (1997)). Thus, to properly plead a § 1962(d) conspiracy a plaintiff is required to "set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) (abrogated on other grounds by *Beck v. Prupis*, 529 U.S. 494 (2000)).

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.*

Among other things, Plaintiff has failed to meet his burden to plead facts which show that each Defendant: 1) objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise; 2) through the commission of two or more predicate acts. Rather than properly pleading the necessary facts, Plaintiff merely makes insufficient boilerplate allegations that a CICO conspiracy existed. Accordingly, Plaintiff's Complaint is properly dismissed on this basis as well.

2. *Plaintiff Also Fails to Properly Plead the Existence of a Criminal Enterprise*

The CICO conspiracy to embezzle money from Sixteen Plus is deficient on another basis as well: its failure to allege the requisite criminal "enterprise" with which Defendants are associated. An "enterprise" is defined in the CICO statute as including "any individual, sole proprietorship, partnership, corporation, trust, or other legal entity, or any union, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental as well as other entities." 14 V.I.C. § 605(h). Notably, Sixteen Plus is not a "criminal enterprise" as contemplated in the statute but rather, as pled by Plaintiff, the alleged victim of the "criminal enterprise."

Where the criminal enterprise is not coincident in structure with an existing legal entity and is, instead, an "association-in-fact" enterprise—as in this case—the U.S. Supreme Court has made clear that such enterprise must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009). Moreover, the "enterprise" is not the "pattern of racketeering activity" it is an entity separate and apart from the pattern of activity in which it engages. "The existence of an enterprise at all times

remains a separate element which must be proved . . ." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The Supreme Court in *Boyle* explained it thusly:

Under § 371, a conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy. Section 1962(c) **demand much more:** the creation of an "enterprise"—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.

Id. at 950 (emphasis added) (internal citation omitted).

Unlike a well-pled CICO conspiracy claim, the Complaint fails to provide any facts establishing the existence of a criminal enterprise between Mr. Yusuf, Isam Yousuf and Jamil Yousef. Rather, in a wildly generous reading, the Complaint alleges that Mr. Yusuf and Isam Yousef agreed to create a "sham mortgage," in 1997 (Complaint, ¶ 23) **which was signed by, and recorded on the property owned by Sixteen Plus, by Waleed Hamed.** There are not even any specific allegations against Jamil Yousef This is far from sufficient to properly allege the necessary "criminal enterprise" a shortcoming illustrated by cases which have found an association of individuals sufficient to satisfy the criminal enterprise requirement. For example, in *United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011), the indictment alleged an "association-in-fact" enterprise composed of an attorney and four other defendants who, over a six-year period, held various alleged roles in multiple criminal schemes, all of which were intended to further the enterprise's seven common purposes. The Third Circuit found that the indictment withstood defendants' motion to dismiss under Federal Rule of Criminal Procedure 12(b)(3)(B) because it "alleged facts that satisfy the *Boyle* requirements: purpose, relationships among the members, and longevity sufficient to enable the BLE to pursue its goals..." *Id.* at 269.

In contrast, the Complaint provides no facts sufficient to establish the criminal enterprise's structure, relationship amongst or roles of the members, or, most significantly, any

purpose that required the formation of a CICO enterprise to carry out its scheme. Moreover, even under the most liberal reading of the Complaint, Plaintiff has not alleged an enterprise “separate and apart from the activity in which it engages” and where its “various associates function as a continuing unit.” *Turkette*, 452 U.S. at 583. At best, Plaintiff has alleged “mere sporadic or temporary criminal alliance[s]” which is not sufficient to allege a CICO enterprise. *United States v. Henley*, 766 F.3d 893, 906 (8th Cir. 2014) (quoting *United States v. Leisure*, 844 F.2d 1347, 1363-64 (8th Cir. 1988)). The CICO statute is not intended to penalize sporadic or temporary criminal alliances such as this one, which do not demonstrate “a sustained and continuous effort” to accomplish the enterprise’s objectives, *Henley*, 766 F.3d at 906, or a sustained time period during which “the structure and personnel of the [enterprise] was continuous and consistent...”. *Leisure*, 844 F.2d at 1364.

There is, in short, nothing in the mishmash of boilerplate allegations and legal conclusions that a “criminal enterprise” existed sufficient to withstand the application of *Twombly* and *Iqbal*. See *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.”). Therefore, as Plaintiff has wholly failed to plead the necessary CICO “criminal enterprise” this failure alone also requires dismissal of Plaintiff’s CICO claim.

3. *The Complaint Fails to Properly Plead a “Pattern of Criminal Activity”*

Also crucial to properly pleading a CICO conspiracy is properly pleading the statute’s “pattern” element—*i.e.*, that each defendant participated in the affairs of the enterprise “through a pattern of criminal activity.” 14 V.I.C. § 605(a). 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). In turn, “criminal activity” is defined as engaging in one of a litany of offenses found in the Virgin Islands Code and enumerated in the statute, as well as federal criminal offenses constituting felonies. 14 V.I.C. § 604(e).

From the inception of the RICO statute, RICO’s “pattern of racketeering” element (“pattern of criminal activity” under CICO) has led to varying interpretations amongst the Circuits and increasing inconsistency in RICO jurisprudence. The U.S. Supreme Court sought to clarify the disarray in its opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). The U.S. Supreme Court first observed that the statutory requirement that a pattern include “at least two acts of racketeering activity,” means that “while two acts are necessary, they may not be sufficient.” *Id.* at 237. A pattern is not formed by “sporadic activity,” and a person cannot be subjected to RICO penalties simply for committing two “isolated criminal offenses.” *Id.* at 239. Rather, a pattern requires acts that are (1) related; and (2) amount to or pose a threat of continued criminal activity. *Id.* at 239.

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). The court in *Jackson* affirmed dismissal of a RICO indictment where the alleged pattern took place over a nine-month period, holding that: “[i]n view of the narrow scope of the alleged racketeering activity and the limited time frame in which it is said to have taken place,” the district court correctly held that the plaintiffs did not meet the continuity requirement necessary to sustain a RICO violation.” *Id.* The Second Circuit, in *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178 (2d Cir. 2008), noted that “although we have not viewed two

years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes [] continuity, particularly where...the activities alleged involved only a handful of participants and do not involve a complex, multi-faceted conspiracy.” *Id.* at 184. 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; *see also Tal v. Hogan*, 453 F.3d 1244, 1268 (10th Cir. 2006) (“To determine continuity we examine both the duration of the related predicate acts and the extensiveness of the RICO enterprise’s scheme.”); *W. Assocs. Ltd. P’ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633–37 (D.C. Cir. 2001) (affirming dismissal of an eight-year-long scheme of racketeering activity because the plaintiff alleged only “a single scheme, a single injury, and few victims”); *Menasco v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) (finding no continuity when predicate acts with a single goal occurred over a one-year period); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (finding seventeen-month period insufficient to show continuity); *Ferri v. Berkowitz*, 678 F. Supp. 2d 66 (E.D.N.Y. 2009) (“While closed-ended continuity is primarily concerned with the time period of the activities, the court also considers factors such as the ‘number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes’ as relevant when determining whether closed-ended continuity exists.”); *Ritter v. Klisivitch*, 2008 U.S. Dist. LEXIS 58818 (E.D.N.Y. July 30, 2008) (stating “where plaintiff alleges nothing more than a “single scheme of narrow scope . . . including one victim and a limited number of participants closed-ended continuity does not exist.”).

As noted above, 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). In the instant matter, Plaintiff has wholly failed to allege a pattern of criminal activity. Instead, Plaintiff has merely made insufficient boilerplate recitations that Defendants allegedly “committed multiple criminal acts including conversion, attempted conversion, perjury, attempted perjury, wire and mail fraud, and others” in furtherance of the conspiracy. *See e.g.*, Complaint, ¶ 59. Plaintiff has not alleged, other than by boilerplate recitations, that Isam Yousuf and Jamil Yousef engaged in any criminal activity at all with respect to obtaining the allegedly “sham” Promissory Note and First Priority Mortgage (or power of attorney).

Perhaps, in a very generous reading of Plaintiff's allegations, Plaintiff has alleged that Mr. Yusuf made false statements to the Hameds in order to get Sixteen Plus to execute the “sham mortgage.” This type of false statement is not a “criminal activity” as defined by 14 V.I.C. § 604(e), but, even if it were, it is exactly the type of “isolated activity” that does not constitute the “pattern of criminal activity” necessary to properly support a CICO claim. Plaintiff also makes additional allegations with respect to Mr. Yusuf—for example, in the mid 2000s Mr. Yusuf would not agree to a sale of the Property unless the mortgage was paid, and in 2010 Mr. Yusuf obtained a power of attorney for Manal Yousef—however, these **are not crimes** and, thus, cannot be part of a pattern of criminal activity. *See* Complaint at ¶¶ 40 and 45, respectively.

Plaintiff has also made allegations that, in 2016, Mr. Yusuf engaged in “perjury.” *See* Complaint, ¶¶ 66 and 75. However, as discussed above, the alleged **conspiracy** to embezzle was complete upon getting the “sham mortgage” in 1997. Moreover, Plaintiff's claim that Mr. Yusuf “perjured” himself in answering discovery responses in another civil matter in 2016, and signed

incorrect tax returns prepared by Sixteen Plus's accountant, are at most allegations of isolated crimes, years after the "sham mortgage" was obtained and, thus, wholly insufficient to properly plead the pattern of criminal activity necessary under CICO. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989) (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, Plaintiff's Complaint should also be dismissed for failing to properly plead the necessary pattern of criminal activity by any of the three defendants.⁹

D. Plaintiff Has Failed to Plead a Viable Claim for Conversion

Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *Ross v. Hodge*, Civ. Case No. 2010-89, 2013 WL 942746, at *8 (V.I. March 7, 2013) (citing Restatement (Second) of Torts § 222A(1) (1965)). In particular, the plaintiff must establish that: (1) it had an ownership interest in the property; (2) that it is entitled to immediate possession of the property; and (3) that the defendant unlawfully or without authorization retained the property. *Mayfair Jewelers, Inc. v. SAI Investment, LLC*, Case No. 2015-cv-12, 2016 WL 1069652, at * 2 (D.V.I. March, 17, 2016). As such, "[o]ne in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession, is subject to liability for its conversion." *See id.* (citing the Restatement (Second) of Torts § 237).

⁹ Of course, the case law requires at least two parties participation to have a conspiracy. Thus, since Plaintiff fails to specifically allege any criminal activity on the part of Mr. Yusuf's alleged co-conspirators, Plaintiff has not properly alleged a CICO conspiracy and Plaintiff's CICO claim is properly dismissed on this basis as well.

As a prefatory matter, Sixteen Plus only has two assets; the money in its bank account, if any, and the Diamond Keturah property. In the Complaint, Plaintiff does not, and cannot, allege that Mr. Yusef: 1) has taken and retained either money from Sixteen Plus's account to which Sixteen Plus has the right to immediate possession; or 2) taken and retained the Property to which Sixteen Plus has the right of immediate possession. Accordingly, Plaintiff's claim for conversion is properly dismissed on this basis.

Second, even if Plaintiff alleged that Mr. Yusuf has taken and retained Sixteen Plus's real property—which Plaintiff has not, and cannot—real property cannot be the subject of a conversion claim. *See Ross*, 2013 WL 942746 at * 12 n. 20 (noting “the well-established rule that real property is not subject to conversion.” (citing *Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 659 (Ariz. Ct. App. 2008) (explaining that interests in real property cannot be converted, because they are not chattels); *Roemer and Featherstonhaugh P.C. v. Featherstonhaugh*, 267 699 N.Y.S.2d 603, 604 (N.Y. App. Div. 1999) (explaining that real property cannot be converted); *Pierson v. GFH Financial Services Corp.*, 829 S.W.2d 311, 314 (Tex. App. 1992) (same)). Accordingly, Plaintiff's conversion claim is properly dismissed on this basis as well.

Finally, a conversion claim is subject to a six (6) year statute of limitations. *See* 5 V.I.C. § 31(3)(D) (“[A]ction for taking, detaining or injuring personal property, including an action for the specific recovery thereof” is subject to a six (6) year statute of limitations); *see also Whitaker v. Merrill Lynch*, Civ. Case No. 524/1992, 1997 WL 252747, *6 (Terr. Ct. April 21, 1997) (“An action for conversion is subject to a six year statute of limitations.”) (citing *Chase Manhattan Bank v. Power Prod., Inc.*, 27 V.I. 126 (Terr.Ct.1992) and 5 V.I.C. § 31(3)(D)). An action for conversion of property is considered complete when the property is first tortuously taken or

retained by the defendant. *Id.* (citing the Restatement (Second) of Torts § 899 cmt c (1979)). As noted above, there is no allegation that Mr. Yusuf took or retained any property belonging to Sixteen Plus. The only allegation made by Plaintiff which arguably impacts Sixteen Plus's real property—which Property, as discussed above, cannot be the subject of a conversion claim—is the “sham mortgage.” The sham mortgage was obtained in 1997, with the Hameds' participation, and recorded in 1999, with the Hameds' knowledge. As such, Plaintiff's claim for conversion is properly dismissed on statute of limitations grounds as well.

E. Plaintiff Has Failed to State a Claim for Breach of Fiduciary Duty

To establish a claim for breach of fiduciary duty: (1) there must be a fiduciary relationship; (2) the fiduciary must have breached the duty imposed by such relationship; (3) the plaintiff must have been harmed; and (4) the fiduciary's breach must be a proximate cause of the plaintiff's harm. *Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (Super. Ct. 2012).

As the basis for Plaintiff's claim of breach of fiduciary duty, Plaintiff alleges that Mr. Yusuf “negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation's principal asset, the Land, for the benefit of Sixteen Plus” and “later obtained a power of attorney from Manal Yousef giving himself control of and all rights in those assets” and the “corporation has been injured thereby.” Complaint, ¶¶ 96(b), (c) and ¶ 97, respectively. Plaintiff fails both to allege a breach of duty, or a specific harm.

Plainly, the mere fact that Manal Yousef executed a power of attorney in favor of Mr. Yusuf is not a breach of fiduciary duty. Mr. Yusuf has never used the power of attorney. Plaintiff alleges that in 2016 Mr. Yusuf filed a civil lawsuit seeking to dissolve Sixteen Plus in an attempt to trigger payment of the “sham mortgage.” Complaint, ¶ 60. In fact, due to the total collapse of the relationships, business and otherwise, between the Yusufs and the Hameds, Mr.

Yusuf did file a lawsuit to dissolve two jointly owned corporations, Sixteen Plus and Peter's Farm Investment, Corporation in 2016. *See* Exhibit 7. To the extent that Plaintiff attempts to cast this a "foreclosure" brought using a power of attorney for Manal Yusuf (Complaint, ¶ 74), Plaintiff is not being candid with the Court. *See id.* Moreover, the case was dismissed by stipulation of the parties in December of 2016. *See* Exhibit 8. Thus, there is no breach of fiduciary duty and a cause of action for the same fails. Moreover, Sixteen Plus has not suffered any harm by the mere existence of the power of attorney. Nor has Plaintiff specifically alleged any harm, solely making the boilerplate recitation that the corporation was "injured thereby." Accordingly, Plaintiff's claim for breach of fiduciary duty also fails for lack of harm to Plaintiff proximately caused by a breach of fiduciary duty.¹⁰

Plaintiff's breach of fiduciary duty claim also fails because it is barred by the statute of limitations. The claimed breach of fiduciary duty, the receipt of the power of attorney, occurred in 2010. Breach of fiduciary duty has a two year statute of limitations. *See* 5 V.I.C. § 31(5) ("[A]ny injury to . . . rights of another not arising from contract not herein especially enumerated" has a two (2) year statute of limitations.); *see also Guardian Ins. Co.*, 63 V.I. 3 at 18 (stating that a claimed breach of fiduciary duty by an insurer to its insured "sounded in tort" and had a "two-year statute of limitations."). Accordingly, Plaintiff's claim for breach of fiduciary duty is barred by the statute of limitations and properly dismissed on that ground as well.

¹⁰ Notably, it would be the existence of the mortgage foreclosed upon—to which mortgage the Hameds consented—that would be the cause of alleged "injury" to Sixteen Plus in a foreclosure action.

F. Plaintiff Has Failed to State a Claim for Usurpation of Corporate Opportunity

Prohibition of a corporate fiduciary's usurpation of a corporate opportunity precludes a corporate fiduciary from acquiring for himself a business opportunity that his corporation is financially able to undertake, and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest. *Borden v. Sinskey*, 530 F.2d 478, 489-90 (3d Cir. 1976) (citing *Equity Corp. v. Milton*, 221 A.2d 494, 497 (Del. Supr. 1966)).

Plaintiff alleges that the acts alleged "in paragraph 96 constitutes usurping of a corporate opportunity by Fathi Yusuf, an officer of the corporation acting in that capacity in dealing with Manal Yusuf[]" (Complaint, ¶100) and the boilerplate recitation that the "corporation has been injured thereby." *Id.* at ¶101. As set forth above, paragraph 96 alleges that Mr. Yusuf "negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation's principal asset, the Land, for the benefit of Sixteen Plus" and "later obtained a power of attorney from Manal Yousef giving himself control of and all rights in those assets[.]" Complaint, ¶¶ 96(b) and (c), respectively. Plainly, Plaintiff has failed to allege: 1) a business opportunity taken by Mr. Yusuf which Sixteen Plus was financially able to undertake; 2) which business opportunity falls into the line of Sixteen Plus's business. Once again, Plaintiff's attempts to "throw in the kitchen sink" fail to result in a viable claim against Mr. Yusuf for "usurpation of corporate opportunity." Accordingly, Plaintiff's claim for the same is properly dismissed on this basis.

Plaintiff's claim for usurpation of a corporate opportunity is also barred by the statute of limitations. Once again, a two year statute of limitations applies. *See* 5 V.I.C. § 31(5) ("[A]ny injury to . . . rights of another not arising from contract not herein especially enumerated" has a

two (2) year statute of limitations.). Given that the unused power of attorney obtained in 2010 is the alleged usurpation of corporate opportunity, this claim is barred by the statute of limitations and properly dismissed on that basis as well.

G. Plaintiff Has Failed to State a Claim for Civil Conspiracy

A civil conspiracy is made up of an agreement or combination to perform a wrongful act, or lawful act by unlawful means, that results in damage to the plaintiff. *Isaac v. Crichlow*, 63 V.I. 38, 65 (Super. Ct. 2015). Allegations of a conspiracy must provide a factual basis to support the existence of the elements of a conspiracy: agreement and concerted action. *Id.* at 66.

First, Plaintiff attempts to allege a civil conspiracy to commit the tort of conversion. Complaint, ¶ 104. However, Plaintiff's claim for civil conspiracy to commit the tort of conversion is properly dismissed given that there is no liability for conversion on the bases set forth in Section III(D), *supra*. *See id.* ("There is no liability for civil conspiracy where there is no liability for the act or acts underlying the conspiracy.") (citation omitted).

Second, Plaintiff attempts to "alternatively" allege that Defendants "entered into an agreement to obtain and prosecute a power of attorney to control a mortgage." Complaint, ¶ 105. Plaintiff's second civil conspiracy claim has three fatal flaws. One, Plaintiff has failed to set forth any allegations that Defendants conspired, *i.e.*, agreed to and took concerted action to, "prosecute" the power of attorney. *See generally*, Complaint. Two, as discussed above in Section III(E) *supra*, the power of attorney has never been used and the case for corporate dissolution brought by Mr. Yusuf was brought by him, individually. *See Exhibit 7*. Moreover, that case has been dismissed by stipulation of the parties. *See Exhibit 8*. Third, since the power of attorney has never been used, Plaintiff has not, and cannot, allege that it has suffered the requisite harm as a result of the "conspiracy" to "prosecute" the power of attorney. Thus,

Plaintiff's claim for civil conspiracy should be dismissed on the basis of each one of these failures.

H. Plaintiff Has Failed to Plead a Viable Claim for the Tort of Outrage

The tort of outrage is another name for a claim for intentional infliction of emotional distress. *See Diaz v. Ramsden*, Case No. SX-12-CV-369, 2016 WL 5475994, at *8 n. 23 (Super. Ct. Sept. 22, 2016) (unpublished) (analyzing Plaintiffs' claims for the intentional infliction of emotion distress, citing to, *inter alia*, *Hill v. McHenry*, 211 F. Supp. 2d 1267, 1284 (D. Kan. 2002) ("The tort of outrage ... "is not a favored cause of action under Kansas law."); *Thomas v. BSE Indus. Contractors*, 624 So. 2d 1041, 1044 (Ala. 1993) ("[Under Alabama law,] the tort of outrage is a very limited cause of action that is available only in the most egregious circumstances."); *McQuay v. Guntharp*, 963 S.W.2d 583, 585 (Ark. 1998) ("[The Supreme Court of Arkansas] gives a narrow view to the tort of outrage"). A cursory review of the cited cases confirms that the tort of outrage and intentional infliction of emotional distress are the same cause of action. *See e.g., Hill v. McHenry*, 211 F. Supp. 2d at 1284 ("The tort of outrage, also called intentional infliction of emotional distress . . .").

This matter is a derivative action brought by Plaintiff on behalf of Sixteen Plus, a corporation. A corporation does not have emotions, thus, it cannot experience emotional distress. Moreover, the Complaint does not contain any allegations that Plaintiff, Hisham Hamed suffered emotional distress. Accordingly, Plaintiff's claim for the tort of outrage is properly dismissed as well.

I. Plaintiff Has Failed to Join Manal Yousef Who is a Both a Necessary and Indispensable Party

Federal Rule of Civil Procedure 12(b)(7) permits the dismissal of a complaint for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). Federal Rule of Civil Procedure

19 ("Rule 19") requires the joinder of certain parties under certain enumerated circumstances.

Gen. Refractories Co. v. First State Ins. Co., 500 F.3d 306, 312 (3d Cir. 2007). In pertinent part,

Rule 19(a)(1) provides:

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). The party seeking joinder need only establish that one of the grounds under Rule 19(a)(1) exists. *George v. George*, 2013 U.S. Dist. LEXIS 10848, *6 (D.V.I. Aug. 2, 2013). In the event that a plaintiff has not originally joined a necessary party, ordinarily the proper remedy is to order joinder. *Id.* (citing Fed. R. Civ. P. 19(a)(2)). If, however, a necessary party cannot be feasibly joined, a district court may, in its discretion, order that the case be dismissed. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405 (3d Cir. 1993).

In the instant case, Manal Yousef is a necessary party given that she holds a four and a half million dollar (\$4,500,000.00) First Priority Mortgage on the Property the validity of which is the crux of this action. Plaintiff alleges that the First Priority Mortgage is invalid and that alleged invalidity is central to Plaintiff's claims against Defendants. Therefore, the Court will necessarily have to adjudicate the validity of the mortgage in the instant case if this case is

permitted to go forward. Accordingly, it is clear Manal Yousef has an interest relating to the subject of the action—her First Priority Mortgage on the Property which Plaintiff seeks to have invalidated—and, plainly, disposing of the action in her absence may, as a practical matter, impair or impede her ability to protect the interest. Therefore, Manal Yousef is a necessary party and should be joined. *See Hoheb v. Muriel*, 753 F.2d 24, 26-7 (3d Cir. 1985) (holding mortgagees were necessary parties as their security interest in the property could be affected by the litigation); *see also Dickson v. Murphy*, 202 Fed. Appx. 578 (3d Cir. 2006) (unpublished) (holding that co-obligees on agreements at issue were both necessary, and indispensable, parties to the action).¹¹

IV. CONCLUSION

In summary, Plaintiff has failed to properly plead a CICO conspiracy given that the alleged conspiracy; 1) was complete in 1997 when the alleged “sham mortgage” was obtained and; 2) Plaintiff knew that Sixteen Plus’s interests in the Property were impacted by the “sham mortgage” in 2005 when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold. Thus, even if Plaintiff’s CICO conspiracy claim was properly pled—which it is not—Plaintiff’s claim is barred by the five (5) year statute of limitations. Additionally, Plaintiff has failed to meet the burden to plead facts which, if true, show that Defendants objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise through the commission of two or more predicate criminal acts, which facts are necessary to

¹¹ If joinder cannot be accomplished, the case is properly dismissed as Manal Yousef is an indispensable party to the action. When a court determines that joinder is necessary under Rule 19(a) and that joinder is not feasible, the court must then determine whether the non-joined party is indispensable under Rule 19(b). *See HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1190 (3d Cir.1996). The question under Rule 19(b) is whether “in equity and good conscience” the court should proceed without the non-joined parties. Fed. R. Civ. P. 19(b). Accordingly, Mr. Yusuf respectfully reserves his right to submit further briefing establishing Manal Yousef as an indispensable party should the Court find her to be a necessary party and determine that she cannot be joined.

properly plead a CICO conspiracy. Plaintiff also fails to allege the necessary criminal enterprise—which enterprise must have an existence separate and apart from the “pattern of criminal activity”—and further fails to allege facts which, if true, would establish the “pattern of criminal activity” needed to properly plead a CICO conspiracy. For all these reasons, Plaintiff's CICO conspiracy claim fails and is properly dismissed on each of these bases.

Further, Plaintiff has failed to state causes of action for conversion, breach of fiduciary duty, usurpation of corporate opportunity, civil conspiracy, and the tort of outrage and each and every one is properly dismissed on that basis. Moreover, Plaintiff's Complaint is also 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.

Finally, even upon dismissal of this case in its entirety, the Hameds and Sixteen Plus will have their day in court with respect to the validly First Priority Mortgage on the Property as the issues regarding the validity of the loan and mortgage are currently pending before, and properly left for resolution by Judge Willocks in *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65. It makes no sense to try to re-litigate those same issues in this convoluted derivative case.

V. RELIEF REQUESTED

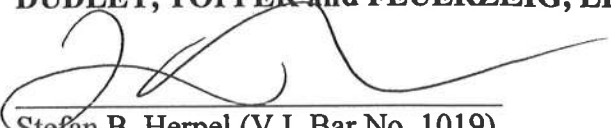
Fathi Yusuf respectfully requests that this Court: 1) dismiss Plaintiff, Hisham Hamed's First Amended Complaint in its entirety; 2) award Defendant the attorneys' fees and costs incurred in connection with defending this case; and 3) award Defendant such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: January 9, 2017

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2017, I served the foregoing *Defendant*,
Fathi Yusuf's Motion o Dismiss Plaintiff's First Amended Complaint via e-mail addressed to:

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EXHIBIT 1

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

SIXTEEN PLUS CORPORATION,
Plaintiff,

v.

MANAL MOHAMMAD YOUSEF,
Defendant.

Civil No. SX-15-CV- 605

16 FEB 12 12:54

ACTION FOR
DECLARATORY JUDGMENT

COPY

COMPLAINT

Sixteen Plus Corporation ("Plaintiff"), by and through its undersigned counsel, files this Complaint against Defendant Manal Mohammad Yousef ("Defendant") and states as follows:

PRELIMINARY STATEMENT

1. Plaintiff seeks judgment declaring a mortgage to be null, void and unenforceable for lack of consideration.

PARTIES

2. Plaintiff is a Virgin Islands corporation in good standing.
3. Defendant is an adult individual who, upon information and belief, is a citizen of St. Maarten.

JURISDICTION; VENUE; STATUTORY PREDICATE FOR RELIEF

4. The Court has *in personam* jurisdiction over Defendant pursuant to 5 V.I.C. § 4903(5) because Defendant purports to have an interest (specifically, a security interest pursuant to a purported mortgage) in real property located within the Territory of the United States Virgin Islands.

5. Venue of this Action is appropriate in the Division of St. Croix because the real property against which the invalid mortgage is recorded is located on the island of St. Croix.

6. Plaintiff seeks relief herein pursuant to Chapter 89 of Title 5 of the Virgin Islands Code.

FACTUAL BACKGROUND

7. Plaintiff is the fee simple owner of the following described real property (collectively, the "Property");

Parcel No. 8, Estate Cane Garden, consisting of approximately 2.6171 U.S. Acres;

Remainder no. 46A, Estate Cane Garden, consisting of approximately 7.6460 U.S. Acres;

Parcel No. 10, Estate Cane Garden, consisting of approximately 2.0867 U.S. Acres;

Road Plot No. 11, Estate Cane Garden, consisting of approximately 0.868 U.S. Acres;

Parcel No. 11, Estate Retreat, Matr. No. 37B of Company Quarter and Peter's Minde, Matr. No. 37A and 37BA, Company Quarter, and No. 54 Queen's Quarter all consisting of approximately 42.3095 U.S. Acres;

Remainder Matr. 32B, Estate Cane Garden of approximately 48.5175 U.S. Acres;

Parcel No. 9 Estate Cane Garden, consisting of approximately 11.9965 U.S. Acres;

Remainder Matr. 32A, Estate Granard, consisting of approximately 41.0736 U.S. Acres;

Parcel No. 40, Estate Granard, consisting of approximately 14.9507 U.S. Acres;

Remainder Matr. No. 31, Estate Diamond, consisting of approximately 74.4220 U.S. Acres;

Parcel No. 4, Estate Diamond, consisting of approximately 5.8662 U.S. Acres;

Parcel No. 1, Estate Diamond, consisting of approximately 61.2358 U.S. Acres;

Parcel No. 3, Estate Diamond, consisting of approximately 6.9368 U.S. Acres;

Parcel No. 2, Estate Diamond, consisting of approximately 6.5484 U.S. Acres;

Road Plot No. 12, Estate Cane Garden, consisting of approximately 0.4252 U.S. Acres;

Road Plot No. 41, Estate Granard, consisting of approximately 0.4255 U.S. Acres; and

Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.

8. On September 15, 1997, Plaintiff executed a mortgage on the Property to Defendant in the amount of \$4,500,000 (the "Mortgage").
9. Defendant did not have any funds to advance for the Mortgage.
10. Defendant simply agreed for her name to be used as a "straw" mortgagee, without any consideration given by her in exchange for the Mortgage.
11. The Mortgage was signed well over a year before the Property was purchased.
12. Defendant did not advance any funds or other consideration of any kind whatsoever to Plaintiff as consideration for the mortgage.
13. The Mortgage is unenforceable because Defendant did not give any consideration to Plaintiff in exchange for the Mortgage.

COUNT FOR RELIEF

14. Plaintiff incorporates each and every of the foregoing allegations as though fully set forth herein.
15. Plaintiff is a person interested under the Mortgage, which constitutes a contract, as contemplated in 5 V.I.C. § 1262.

16. Plaintiff is entitled to declaratory judgment declaring the Mortgage to be null, void and unenforceable.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant: (i) declaring the Mortgage to be null, void and unenforceable; (ii) granting to Plaintiff such other and further legal and/or equitable relief as is just and proper; and (iii) granting to Plaintiff its attorneys' fees and costs incurred in connection with this Action.

PLAINTIFF DEMANDS TRIAL BY JURY

Respectfully submitted,

HAMM ECKARD, LLP

By: 

Mark W. Eckard (VI Bar No. 1051)

5030 Anchor Way, Suite 13

Christiansted, VI 00820-4692

Telephone: (340) 514-2690

Facsimile: (855) 456-8784

Email: meckard@hammeckard.com

Counsel to Sixteen Plus Corporation

Dated: February 9, 2016

EXHIBIT 2

Scotiabank 
THE BANK OF NOVA SCOTIA

Sunny Isle Branch
P.O. Box 773, Christiansted, St. Croix, U.S. Virgin Islands 00821-0773
Tel: (809) 778-5350 / Fax: (809) 778-5898

July 9, 1997

Mr. Mohamad Hamed, President
Plessen Enterprises, Inc.
P.O. Box 763
Christiansted, VI 00821-0763

Dear Mr. Hamed:

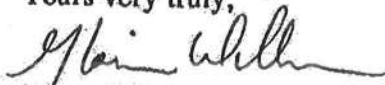
We are pleased to confirm that subject to acceptance by you, The Bank of Nova Scotia (the "Bank") will make available to Plessen Enterprises, Inc. (the "Borrower"), credit facilities on the terms and conditions set out in the attached Terms and Conditions Sheet and Schedule "A".

If the arrangements set out in this letter, and in the attached Terms and Conditions Sheet and Schedule "A" (collectively the "Commitment Letter") are acceptable to you, please sign the enclosed copy of this letter in the space indicated below, initial all pages and return the letter to us by the close of business on July 11, 1997 after which date this offer will lapse.

Your acceptance hereof shall constitute your agreement to pay or cause to be paid upon demand of the Bank, fees and expenses of the Bank in connection with the loan such as title searches and title insurance costs, including survey expenses, fees of our appraiser, credit reporting charges, recording fees, taxes and all such other out of pocket expenses which the Bank may incur in connection with the loan transaction, whether or not the loan transaction described herein is consummated.

This Commitment Letter is in addition to all previous commitments issued by the Bank to the Borrower.

Yours very truly,



Gloria Williams
Senior Account Manager



Ralph T. Chan
Vice President

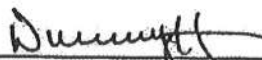
Fy.

Plessen Enterprises, Inc.
July 9, 1997

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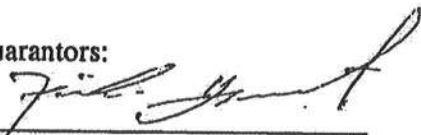
The arrangements set out above and in the attached Terms and Conditions Sheet and Schedule "A" (collectively the "Commitment Letter") are hereby acknowledged and accepted by:

Plessen Enterprises, Inc.

By: 
Mohamad Hamed, President
Walced Hamed Vice president

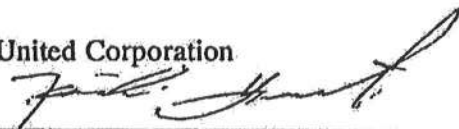
Date: 7-11-97

Guarantors:

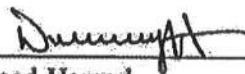

Fathi Yusuf

Date: 7-10-1997

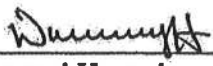
United Corporation


Fathi Yusuf, Secretary

Date: 7-10-1997


Walced Hamed

Date: 7-11-97


Mohamad Hamed
Walced Hamed

Date: 7-11-97

CREDIT NUMBER: 1 AUTHORIZED AMOUNT: \$2,200,000.00

TYPE

Non-revolving

PURPOSE

To be used to assist in the purchase of approximately 326 acres of undeveloped land known as the "Diamond Keturah" property.

CURRENCY

U.S. dollars

AVAILMENT

The Borrower may avail the credit by way of a direct advance evidenced by a Term Promissory Note.

INTEREST RATE

The Bank's U.S. Dollar Base Rate in New York, from time to time, plus 0.50% per annum with interest payable monthly.

"Base Rate (New York)" is a variable per annum reference rate of interest (as announced by the Bank from time to time) for United States dollar loans made by the Bank in the United States through its New York agency.

OTHER FEES

A Commitment Fee of \$15,000, which includes the Bank's legal fees (excluding title searches, title insurance and recording fees), is payable upon acceptance of this commitment.

74.

DRAWDOWN

The loan is to be fully drawn down by July 25, 1997.

REPAYMENT

The advance is repayable as follows, commencing 30 days after drawdown:

Year 1: \$ 29,000 plus interest monthly
Year 2: \$ 65,000 plus interest monthly
Year 3: \$ 89,333 plus interest monthly

PREPAYMENT

Provided 10 business days prior written notice has been given to the Bank, prepayment is permitted without penalty at any time in whole or in part.

Prepayments are to be applied against installments of principal in the inverse order of their maturities.

GENERAL SECURITY

The following security, evidenced by documents in form satisfactory to the Bank and registered or recorded as required by the Bank, is to be provided prior to any advances or avallment being made under the Credit(s):

1. First Priority Mortgage for \$2,200M on the following undeveloped properties:

Plot No. 26 Estate Diamond, consisting of approximately 75 acres of undeveloped land.

Matr. 39 & 5B Estate Diamond, consisting of approximately 75 acres of undeveloped land.

Matr. 28 & 29 Plessen, consisting of approximately 109 acres of undeveloped land.

2. Mortgagee Title insurance in the amount of \$2,200,000 issued by a title insurance company approved by the Bank, insuring the Bank as the holder of a valid First Priority mortgage lien over the properties described above, subject only to such exceptions as shall have been first approved by the Bank and its counsel. F-Y.
3. Letter of undertaking from Borrower not to pledge nor sell the "Diamond Keturah" property while any portion of this loan remains outstanding.

GUARANTEE

Guarantees given by the following (with corporate seal and resolution as applicable) in the amounts shown:

<u>NAME</u>	<u>AMOUNT</u>
Hamed, Mohamad	Unlimited
Yusuf, Fathi	Unlimited
Hamed, Waleed	Unlimited
*United Corporation	Unlimited

- * Together with supporting corporate documentation and authorizing resolutions in form and substance satisfactory to the Bank and its counsel and the legal opinion of counsel to the corporation covering all matters related to the execution and delivery of the guaranty by the corporation and its enforceability, said opinion to be in form and substance satisfactory to the Bank and its counsel.

GENERAL CONDITIONS

Until all debts and liabilities under the Credit has been discharged in full, the following conditions will apply in respect of the Credit:

1. All Banking business is to be conducted with the Bank, as long as the Bank's services and costs are competitive.
2. Without the Bank's prior written consent.
 - a) No change in ownership is permitted.
 - b) No mergers, acquisitions are permitted.
 - c) Assets are not to be further encumbered, guarantees or other contingent liabilities are not to be entered into.
 - d) No loans withdrawals, bonuses, advances to shareholders management or affiliates are permitted.
 - e) United Corporation cannot declare or pay any dividends or authorize or make any distribution of any shares of capital stock of the company, in excess of 50% of the company's net profit after taxes and debt servicing (to include servicing of Peter Farm Investment Corp.'s and Plessen Enterprises, Inc.'s debts).
3. A default on any loan to United Corporation is a default under this loan.
4. Sale of any portion of the collateral is subject to prior written approval of the Bank. In the event the Bank approves any such sale, the gross proceeds from such sale shall be applied to principal reduction of loan in inverse order of maturity and the Bank expressly reserves the right to impose additional conditions to the sale of any portion of the collateral at its sole discretion.

Plessen Enterprises, Inc.
July 9, 1997

Page 6

GENERAL BORROWER REPORTING CONDITIONS

Until all debts and liabilities under the Credit has been discharged in full, the Borrower will provide the Bank with the following:

1. Annual financial statements (CPA prepared) of United Corp. (Guarantor) within 120 days of fiscal year end.
3. Annual personal financial statements of the individual guarantors, duly signed.
4. Proof that all property tax payments are up to date.

EXPIRY OF OFFER

July 11, 1997

7-7.

SCHEDULE A

ADDITIONAL TERMS AND CONDITIONS APPLICABLE
TO ALL CREDITS

1. Interest on loans/advances made in U.S. dollars will be calculated on a daily basis and payable monthly on the 22nd day of each month, (unless otherwise stipulated by the Bank). Interest shall be payable not in advance on the basis of a 360 day year for the actual number of days elapsed both before and after demand of payment or default and/or judgment. The rate of interest based on a 360 day year is equivalent to a rate based on a calendar year of 365 days of 365/360 times the rate of interest that applies to the U.S. dollar loans/advances.

Waiver

2. Any waiver by either party or a breach of any part of this Agreement caused by the other party will not operate as or be interpreted as a waiver of any other breach. The failure of a party to insist on strict adherence to any term of the Agreement on one or more occasions is not to be considered to be a waiver of any of their rights under this Agreement or to deprive that party of the right to insist upon strict adherence to that term or any other term in the future. No waiver shall be of any effect unless it is in writing and authenticated by the waiving party.

Interest on Overdue Interest

3. Interest on overdue interest shall be calculated at the same rate as interest on the loans/advances in respect of which interest is overdue, but shall be compounded monthly and be payable on demand, both before and after demand and judgment.

Indemnity Provision

4. If the introduction of, or any change in, or in the interpretation of, or any change in its application to the Borrower of, any law or regulation, or compliance with any guideline from any central bank or other governmental authority (whether or not having the force of law) has the effect of increasing the cost to the Bank of performing its obligations hereunder or otherwise reducing its effective return hereunder or on its capital allocated in support of the credit(s), then upon demand from time to time the Borrower shall compensate the Bank for such cost or reduction pursuant to a certificate reasonably prepared by the Bank.

74.

(a) Prepayment without fee

In the event of the Borrower becoming liable for such costs, the Borrower shall have the right to cancel without fee all or any unutilized portion of the affected credit (other than any portion in respect of which the Borrower has requested utilization of the credit in which case cancellation may be effected upon indemnification of the Bank for any costs incurred by the Bank thereby), and to prepay, without fee the outstanding principal balance thereunder other than the face amount of any document or instrument issued or accepted by the Bank for the account of the Borrower, such as a Letter of Credit, a Guarantee or a Bankers' Acceptance.

Calculation and Payment of Standby Fee

5. Standby fees shall be calculated daily and payable monthly on the basis of a calendar year for Canadian dollar credits and on the basis of a 360 day year for U.S. dollar credits from the date of acceptance by the Borrower of this Commitment Letter.

Environment

6. The Borrower agrees:
- (a) to observe and conform to all laws and requirements of any federal, territorial, or any other governmental authority relating to the environment and the operation of the business activities of the Borrower;
 - (b) to allow the Bank access at all times to the business premises of the Borrower to monitor and inspect all property and business activities and to conduct, in the Bank's sole discretion, environmental remedial actions at the expense of the Borrower;
 - (c) to pay all the expenses of any environmental investigations or assessments that may be required by the Bank from time to time;
 - (d) to notify the Bank from time to time of any business activity conducted by the Borrower which involves the use or handling of hazardous materials or wastes or which increases the environmental liability of the Borrower in any material manner;

77.

Environment (Cont'd)

- (e) to notify the Bank of any proposed change in the use or occupation of the real property of the Borrower prior to any change occurring; and
 - (f) to provide the Bank with immediate written notice of any environmental problem and any hazardous materials or substances which have an adverse effect on the property, equipment, or business activities of the Borrower and with any other environmental information requested by the Bank from time to time.
7. If the Borrower notifies the Bank of any specified activity or change or provides the Bank with any information pursuant to subsections (d), (e), or (f), or if the Bank receives any environmental information from other sources, the Bank, in its sole discretion, may decide that an adverse change in the environmental condition of the Borrower has occurred which decision will constitute, in the absence of manifest error, conclusive evidence of the adverse change. Following this decision being made by the Bank, the Bank shall notify the Borrower of the Bank's decision concerning the adverse change.
8. If the Bank decides or is required to incur expenses in compliance or to verify the Borrower's compliance with applicable environmental or other regulations, the Borrower shall indemnify the Bank in respect of such expenses, which will constitute further advances by the Bank to the Borrower under this Agreement.

Acceleration

9. (a) All indebtedness and liability of the Borrower to the Bank payable on demand, is repayable by the Borrower to the Bank at any time on demand;
- (b) All indebtedness and liability of the Borrower to the Bank not payable on demand, shall, at the option of the Bank, become immediately due and payable, the security held by the Bank shall immediately become enforceable, and the obligation of the Bank to make further advances or other accommodation available under the Credits shall terminate, if any one of the following Events of Default occurs:
- (i) the Borrower or any guarantor fails to make when due, whether on demand or at a fixed payment date, by acceleration or otherwise, any payment of interest, principal, fees, commissions or other amounts payable to the Bank;

F.Y.

Acceleration (Cont'd)

- (ii) there is a breach by the Borrower of any other term or condition contained in this Commitment Letter or in any other agreement to which the Borrower and the Bank are parties;
- (iii) any default occurs under any security listed in this Commitment Letter under the headings "Specific Security" or "General Security" or under any other credit, loan or security agreement to which the Borrower is a party;
- (iv) any bankruptcy, re-organization, compromise, arrangement, insolvency or liquidation proceedings or other proceedings for the relief of debtors are instituted by or against the Borrower and, if instituted against the Borrower, are allowed against or consented to by the Borrower or are not dismissed or stayed within 60 days after such institution;
- (v) a receiver is appointed over any property of the Borrower or any judgement or order or any process of any court becomes enforceable against the Borrower or any property of the Borrower or any creditor takes possession of any property of the Borrower;
- (vi) any adverse change occurs in the financial condition of the Borrower or any guarantor.
- (vii) any adverse change occurs in the environmental condition of:
 - (A) the Borrower or any guarantor of the Borrower; or
 - (B) any property, equipment, or business activities of the Borrower or any guarantor of the Borrower.

74.

EXHIBIT 3

Borrower's Responsibilities

10. Neither the Bank nor the Bank's attorneys are responsible for the preparation, compilation, production or delivery of documents that are required from either the borrower or any parties (such as a seller, a landlord, a tenant, or another lender or lienholder) with whom the borrower is dealing, whether directly or indirectly. It is the responsibility of the borrower to ensure that all such documents, in form and substance satisfactory to the Bank and the Bank's attorneys, are provided to the Bank and the Bank's attorneys not less than forty-eight (48) hours before the time scheduled for closing. Please note that forty-eight (48) hours is the bare minimum. The borrower is strongly encouraged to submit documents to the Bank and the Bank's attorneys for approval sufficiently in advance as to allow adequate opportunity for amendment, substitution or replacement by the borrower of any documents submitted that do not prove satisfactory in form and substance to the Bank and the Bank's attorneys. Due to the technicalities and complexities involved in concluding a transaction of this nature, it is recommended that the borrower retain the services of a qualified attorney to assist in fulfilling the borrower's responsibilities.

Costs

11. All costs, including legal and appraisal fees incurred by the Bank relative to security and other documentation, shall be for the account of the Borrower and may be charged to the Borrower's deposit account when submitted.

74.

Plessen Enterprises, Inc.

P.O. Box 763
Christiansted, St. Croix, USVI 00821
Tel: (809) 778-6240 Fax: (809) 778-1200

February 4, 1997

Mr. Ralph T. Chan
Vice President
The Bank of Nova Scotia
P.O. Box 773
Christiansted, St. Croix, USVI 00821

Dear Mr. Chan:

Please accept this letter as our serious intent to purchase the Diamond Keturah Property in St. Croix.

PURCHASE PRICE: Your judgment amount plus costs, and interest through the end of redemption period (April 28, 1997). In no event will my offer exceed \$4,550,000.00 US.

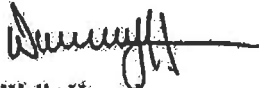
EARNEST DEPOSIT: \$100,000.00 US upon signing of the contract and an additional \$450,000.00 US within three (3) business days after the signing of the contract. The earnest money, is refundable only if the Bank cannot deliver clear title to the property.

TERMS & CONDITIONS: \$4,000,000.00 US additional cash upon closing.

CLOSING DATE: As soon as possible, after expiration of the redemption period.

Should you require any additional information, please do not hesitate to contact me at your earliest convenience. This offer expires on February 15, 1997.

Sincerely,



Wally Hamed
Vice President
Plessen Enterprises

EXHIBIT 4

SIXTEEN PLUS CORPORATION

**UNANIMOUS CONSENT OF DIRECTORS
IN LIEU OF A MEETING**

Pursuant to the provisions of Title 13, V.I.C. § 67b, the undersigned, constituting all of the Directors of Sixteen Plus Corporation (the "Company"), do hereby unanimously consent to the actions set forth below as though such actions had been taken at a meeting of the Board of Directors:

1. The Directors hereby approve the terms of a Promissory Note and First Priority Mortgage between the Company and Manal Mohamad Yousef.

2. The President or Vice President are authorized to execute any and all documents on behalf of the Corporation that they may deem necessary or appropriate to carry out the obligations of the Corporation, including, without limiting the generality of the foregoing, the execution of a Note and Mortgage substantially in the form attached as exhibits hereto.

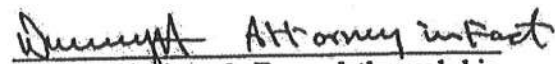
3. The Company agrees to borrow \$4,500,000 from Manal Mohamad Yousef in accordance with the terms of the aforesaid Promissory Note.

This written consent shall be filed with the minutes of the Corporation.

DATE: September 15, 1997.



Fathi Yusuf



Mohamad Hamed, By and through his
attorney-in-fact, Waleed M. Hamed



Waleed M. Hamed

295-1412

**COMPOSITE
EXHIBIT 5**

\$4,500,000

September 15, 1997
St. Croix, U.S.V.I.

PROMISSORY NOTE

FOR VALUE RECEIVED, Sixteen Plus Corporation ("Maker") promises to pay to the order of Manal Mohamad Yousef ("Holder") of 25 Gold Finch Road Pointe Blanche, St. Martin, N.A.;, or such other place as Holder may designate to Maker in writing from time to time, the principal sum of Four Million, Five Hundred Thousand Dollars (\$4,500,000) together with interest at 8% per annum in lawful money of the United States of America.

Such indebtedness shall be paid as follows:

Payments of interest only (\$360,000 per year) will be made on the anniversary of the date of this note for five years, with payment of the full principal due five years from the date of this note.

This Note is secured by a first priority mortgage ("Mortgage"), dated of even date, in favor of the Holder encumbering certain real property known as:

SEE EXHIBIT A

In further consideration for this loan, Maker agrees to pay to Holder 20% of the net profit received from the sale of the property described in Exhibit A at the time of sale.

Maker shall pay to holder a late charge in the event that any installment is not received by the Holder on the date that it is due. The late charge shall be computed as follows:

Principal Balance		then applicable		number of days
Outstanding on Note	x	prime rate of	x	between date
		<u>interest plus 1/2%</u>		installment due
				and date
				installment
				received.
	365			

All payments received by Holder shall be applied as follows: first, to any unpaid late fees, costs and expenses; second, to any unpaid accrued interest; and finally, the balance, if any, to principal.

This Note may be prepaid in whole or in part at any time without penalty or premium. Partial prepayments shall be applied as set forth herein and shall not cause a change in the due date or amount of the installments unless otherwise agreed by the Holder in writing.

It is hereby expressly agreed that should any default be made in the payment of principal and interest as stipulated above, and if such monetary default remains uncured for a period of fifteen (15) days, or if there is any default in any of the terms and conditions of the Mortgage, subject to the Notice provision, if any, in said instrument, then a default shall exist hereunder, and in such event the principal indebtedness evidenced hereby, and any other sums advanced or

due hereunder or under the Mortgage, at the option of the Holder without notice or demand, at once become due and payable and may be collected forthwith, and the entire unpaid principal balance of this Note shall thereafter bear interest at a per annum rate equal to eighteen percent (18.0%) per annum simple interest. A default shall be cured hereunder only upon the occurrence of the following:

- Payment of the sum and/or performance of the obligation which was the basis of the default; and
- Payment of all sums (including late fees and subsequent installments) and/or performance of all obligations which have become due hereunder as of the date of cure.

In the event this Note, or any part thereof, is collected by or through an attorney-at-law, Maker agrees to pay all costs of collection including, but not limited to, attorney's fees and court costs. Any notice sent in connection with this Note shall be sent in compliance with the notice provisions contained in the Mortgage.

Presentment for payment, demand, protest, notice of demand, protest and non-payment are hereby waived by Maker.

This Note is intended as a contract under and shall be construed, interpreted, and enforceable in accordance with the laws of the United States Virgin Islands.

As used herein, the terms "Maker" and "Holder" shall be deemed to include their respective heirs, successors, legal representatives and assigns, whether by voluntary actions of the parties or by operation of law. In the event that more than one person, firm or entity is a Maker hereunder, then all references to "Maker" shall be deemed to refer equally to each of said persons, firms, or entities, all of whom shall be jointly and severally liable for all of the obligations of Maker hereunder.

IN WITNESS WHEREOF, Maker has caused this Note to be executed by its duly authorized officer effective the date first above written.

DATED: 9/15/97

MAKER:

SIXTEEN PLUS CORPORATION

Waleed Hamed
Waleed Hamed, President

[Corporate SEAL]

ATTEST:

Fathi Yusuf
Fathi Yusuf, Secretary

EXHIBIT A

1. Parcel No. 8, Estate Cane Garden, of approximately 2.6171 U.S. Acres.
2. Remainder No. 46A, Estate Cane Garden, of approximately 7.6460 U.S. Acres.
3. Parcel No. 10, Estate Cane Garden, of approximately 2.0867 U.S. Acres.
4. Road Plot No. 11, Estate Cane Garden, of approximately 0.0868 U.S. Acres.
5. Parcel No. 11, Estate Retreat, Matr. No. 37B of Company Quarter and Peter's Mine, Matr. No. 37A and 37BA, Company Quarter, and No. 54 Queen's Quarter all of approximately 42.3095 U.S. Acres.
6. Remainder Matr. 32B, Estate Cane Garden of approximately 48.5175 U.S. Acres.
7. Parcel No. 9 Estate Cane Garden, of approximately 11.9965 U.S. Acres.
8. Remainder Matr. 32A, Estate Granard, of approximately 41.0736, U.S. Acres.
9. Parcel No. 40, Estate Granard of approximately 14.9507 U.S. Acres.
10. Remainder Matr. No. 31, Estate Diamond, of approximately 74.4220 U.S. Acres.
11. Parcel No. 4, Estate Diamond, of approximately 5.8662 U.S. Acres.
12. Parcel No. 1, Estate Diamond, of approximately 61.2358 U.S. Acres.
13. Parcel No. 3, Estate Diamond, of approximately 6.9368 U.S. Acres.
14. Parcel No. 2, Estate Diamond, of approximately 6.5484 U.S. Acres.
15. Road Plot No. 12, Estate Cane Garden, of approximately 0.4252 U.S. Acres.
16. Road Plot No. 41, Estate Granard, of approximately 0.4255 U.S. Acres.
17. Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.

Handwritten initials or signature

February 22, 1999

FIRST PRIORITY MORTGAGE

THIS MORTGAGE ("Mortgage") is made this 15 day of September, 1997, between Sixteen Plus Corporation, whose address is 4C & D Sion Farm, Christiansted, St. Croix, 00820, ("Borrower") and Manal Mohamad Yousef ("Lender") whose address is 25 Gold Finch Road, Pointe Blanche, St. Martin, N.A.;

WITNESSETH:

A. Borrower is justly indebted to Lender in the principal sum of Four Million, Five Hundred Thousand Dollars (\$4,500,000) or so much thereof as shall have been advanced and remains unpaid, which indebtedness is evidenced by a Promissory Note in such principal amount, dated of even date herewith and hereinafter referred to as the "Note" and bears interest at the rate or rates and under the terms set forth in the Note, (said Note is incorporated herein by reference and made a part hereof); and

B. Borrower wishes to secure the full and punctual payment of the Note and the indebtedness evidenced thereby, and interest thereon, and the full performance of all the provisions, conditions, covenants and agreements herein contained or in any other document executed in connection herewith, and also to secure the reimbursement to the Lender for any and all money which may be advanced as herein provided for, and for any and all costs and expenses herein provided for or which may arise in respect of this Mortgage or the indebtedness hereby secured or the Property herein mentioned (collectively "Obligations").

NOW, THEREFORE, the Borrower does hereby grant, convey and give to the Lender a first priority mortgage on the following described property (collectively "Property") to secure the full and punctual payment and performance of the Obligations:

SEE EXHIBIT A

Together with

(a) all improvements now or hereafter erected thereon, and all modifications, additions, restorations and replacements of such improvements; and all rights-of-way, uses, servitude, licenses, tenements, hereditament, appurtenances, rights, privileges, and easements now or hereafter belonging or pertaining thereto; and

(b) all the appliances, fixtures, equipment, building materials and other personal property now or hereafter owned by the Borrower and located on the premises described above, whether or not incorporated in the improvements constructed thereon, and necessary to the use and occupancy thereof; and

(c) all awards and other payments in respect of any taking (as described in Section 12 herein below) in respect of any of the foregoing, together with all amounts received by the Lender, or expended by the Lender pursuant to this Mortgage; and

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(d) . all of the Borrower's rights, benefits, title and interest as lessor, in and to any agreement to lease, leases, licenses, concession agreements and other agreements granting a right or privilege to use or occupy any portion of the Property (collectively "Leases") now or hereafter in existence and pertaining to all or any portion of the Property described above, together with any and all rents, issues, profits, revenues, income, earnest money or security deposits made pursuant to such Leases from the Property or any part thereof (collectively "Rents"), and any and all guarantees of performance under any such Leases.

IT IS HEREBY COVENANTED by the parties hereto that the Property is to be held and applied subject to the further terms herein set forth; and the Borrower, for the Borrower and Borrower's successors and assigns, hereby covenants and agrees with the Lender, as follows:

1. THE NOTE.

1.1 Issuance and Payment of the Note. The Borrower has issued the Note, and will duly and punctually pay the principal of the interest (if any) on the Note in accordance with the terms thereof, and will otherwise duly comply with the terms of the Note.

1.2 Prepayment on Taking of the Property. In case of any taking (as described in Section 11.2 hereof) of the Property, the portion of awards or other payments on account thereof shall be paid to the Lender and applied to the prepayment of the Note, together with interest (if any) on the principal amount of the Note so prepaid accrued to the date of such prepayment, and to the payment of all other indebtedness which this Mortgage secures. Any balance of such awards or other payments remaining after payment in full of the principal of and interest (if any) on the Note and all other indebtedness which this Mortgage by its terms secures shall be paid to the Borrower.

1.3 Replacement of Note. Upon receipt of evidence reasonably satisfactory to the Borrower of the loss, theft, destruction or mutilation of the Note and, in the case of any loss, theft or destruction, upon delivery of an indemnity agreement reasonably satisfactory to the Borrower or, in the case of any such mutilation, upon surrender and cancellation of such Note, the Borrower will issue, in lieu thereof, a new Note, dated the date to which interest has been paid on the lost, stolen, destroyed or mutilated Note and otherwise of like tenor, with appropriate variations.

2. AUTHORITY. The Borrower represents and warrants that the Borrower has good and lawful right and authority to execute this Mortgage and to mortgage the Property, and that the Borrower is well seized and possessed of a fee simple title to the Property. The Borrower, at the Borrower's expense, will warrant and defend to the Lender and its successors and assigns, for the benefit of the Lender, such interest and the lien and interest of the Lender on and in the Property against all claims and demands and will maintain and preserve such lien as long as the Note is outstanding.

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3. **RECORDATION; PRESERVATION OF LIEN.** The Borrower at its expense, will at all times cause this Mortgage and any supplements hereto, and such other instruments as may be required by applicable law, to be recorded, registered and filed and to be kept recorded, registered and filed in such manner and in such places, and will pay all such recording, registration, filing or other taxes, fees and charges, and will comply with all such statutes and regulation, as may be required by law in order to establish, preserve and protect the lien of this Mortgage on all of the Property and the rights of the Lender hereunder.

4. **COMPLIANCE WITH APPLICABLE LAWS.** Borrower shall comply with all applicable laws, ordinances, rules, regulations, and codes applicable to the Property, including the use and possession thereof and any business located thereon. Borrower has received no notice of, and neither knows of, nor suspects any facts which might constitute any violations of any federal or territorial health, safety or environmental laws, codes, ordinances, rules or regulations with respect to the Property, including the use or possession thereof and any business located thereon.

5. **HAZARDOUS WASTE.** There shall be no emission, spill, release or discharge into or upon the air, soil or any improvements located thereon, surface water or ground water, or the sewer, septic system or waste treatment storage or disposal systems servicing the property, of any hazardous or toxic substances or wastes at or from the Property or otherwise and the Property shall be kept free from all such hazardous or toxic substance or wastes.

6. **LITIGATION.** No litigation, arbitration, condemnation, re-zoning or administrative proceedings are presently pending or, to Borrower's knowledge, threatened, which if adversely determined might have a material adverse effect on the Borrower, the financial condition of Borrower or upon the respective property rights of Borrower. Notwithstanding anything to the contrary set forth herein the parties recognize that a proposed land and water use plan may adversely impact the value of the property.

7. **PAYMENT OF TAXES, ETC.** Subject to Section 9 relating to contests, the Borrower will pay or cause to be paid all taxes, assessments (including, without limitation, all assessments for public improvements or benefits, whether or not commenced or completed prior to the date hereof), water, sewer or other rents, rates and charges, excises, levies, license fees, permit fees, inspection fees and other authorization fees and other charges, in each case whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any character (including all interest and penalties thereon), which at any time may be assessed, levied, confirmed or imposed on or in respect of or be a lien upon (a) the Property or any part thereof or any rent therefrom or any estate, right or interest therein, or (b) any occupancy, use or possession of or activity conducted on the Property or any part thereof. Such payments will be made before any fine, penalty, interest or cost may be added for nonpayment, and the Borrower will furnish to the Lender, upon request, official receipts or other satisfactory proof evidencing such payments.

8. **CONSTRUCTION LIENS.** Subject to Section 9 relating to contests, the

Borrower shall not, without the Lender's prior written approval, directly or indirectly create or permit or suffer to be created or to remain, and will discharge, or cause to be discharged within thirty (30) days after issuance thereof, any construction lien with respect to the Property or any part thereof, or the Lender's interest therein.

9. PERMITTED CONTESTS. The Borrower or a tenant under any lease, at its expense, may contest (after prior written notice to the Lender) by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any mechanics' lien, construction lien, or taxes or other charges enumerated in Section 7 or lien therefor or the application of any instrument of record referred to in Section 8 provided, that (a) in the case of unpaid mechanics' liens, construction liens, or taxes or other charges enumerated in Section 7 or liens therefor, such proceedings shall suspend the collection thereof from the Borrower, the Lender and the Property; (b) neither the Property nor any part thereof or interest therein would be in any danger of being sold, forfeited or lost; (c) neither the Borrower nor the Lender would be in any danger of any additional civil or any criminal inablity for failure to comply therewith (except interest, or penalties in the nature of interest, and attorney's fees or court costs) and the Property would not be subject to the imposition of any additional lien as a result of such failure; and (d) the Borrower shall have deposited adequate monies with respect thereto with the lender, who shall have the power to pay such contested amounts in the event the Property is in danger of forfeiture or the Lender is in danger of being held civilly or criminally liable with respect thereto, or, in the event the contested matter is the subject of litigation, the Borrower shall have deposited in a fund administered by the court adequate moneys therefor (as determined by the Lender).

10. NOTICES CONCERNING THE PROPERTY. The Borrower will deliver to the Lender, promptly upon receipt of the same, copies of all notices, certificates, documents and instruments received by the Borrower which materially affect the Property.

11. TAKING; APPLICATION OF AWARD.

11.1. Borrower to Give Notice, etc. In case of any taking of all or any part of the Property, or any interest therein or right accruing thereto as the result of or in lien or in application of the exercise of the right of condemnation or eminent domain during the term hereof, the Borrower shall promptly give to the Lender written notice generally describing the nature of the proceedings and negotiations for such taking and the nature and extent of the taking which might result therefrom, as the case may be. The Lender may appear in any such proceedings and negotiation, and the Borrower shall promptly give to the Lender copies of all notices, pleadings, determinations and other papers in any such proceedings. The Borrower will in good faith and with due diligence file and prosecute any claim or claims for any award or payment on account of any taking of the Property, will pay all costs and expenses (including, without limitation, attorneys' fees and the expense of the Lender) in connection with any such taking and seeking and obtaining any award or payment on account thereof. Such costs and expenses shall constitute indebtedness secured by this Mortgage.

11.2 Taking. In the case of a taking of whatever nature, total or partial, of the Property or any portion thereof, any payment or award on account of such taking shall be collected and paid over in accordance with the provisions of Section 1.2 hereof.

12. INTENTIONALLY OMITTED.

13. INTENTIONALLY OMITTED.

14. NO CREDIT FOR PAYMENT OF TAXES. The Borrower shall not be entitled to any credit against the Principal of and interest, if any, on the Note, or any other sums which may become payable under the terms thereof or hereof, by reason of the payment of any tax on the Property or any part thereof.

15. EVENTS OF DEFAULT; DECLARATION OF NOTICE DUE. If one or more of the following events (herein referred to as "Events of Default") shall occur:

(a) if the Borrower shall fail to pay any principal of or interest, if any, on the Note when the same becomes due and payable (whether at maturity or on a date fixed for any interest payment, any installment payment, any prepayment or otherwise) and such default is not cured within fifteen (15) days after the payment due date; or

(b) If the Borrower shall fail to perform or comply with any of the other terms of this Mortgage and such default is not cured within thirty (30) days after the effective date of written notice from Lender to Borrower; or

(c) if the Borrower shall make an assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts as they become due, or shall file a petition in bankruptcy, or shall be adjudicated a bankrupt or insolvent, or shall file a petition seeking any arrangement, composition, readjustment or similar relief under any present or future statute, law or regulation, or shall file an answer admitting or not contesting the material allegations of a petition filed against it in any such proceeding, or shall seek or consent to or acquiesce in the appointment of any trustee or receiver; or

(d) if, within sixty (60) days after the commencement of any proceeding against the Borrower which seeks any arrangement, composition or similar relief under any present or future statute, law or regulation, such proceeding shall not have been dismissed, or if, within sixty (60) days after the appointment of any trustee or receiver of the Borrower, without the consent or acquiescence of the Borrower, such appointment shall not have been vacated; or

(e) If the Borrower assigns or sells, or further encumbers, its interest in all or any part of the Property or if the Beneficial Ownership of Borrower shall change in violation of paragraphs 30, 31 and/or 32;

Then and in any such event (regardless of the pendency of any proceeding which has or might have the effect of preventing the Borrower from complying with the terms of the Mortgage), the Lender may at any time, without notice to declare the entire unpaid principal balance and all other indebtedness evidenced by the Note and/or secured by this Mortgage to be immediately due and payable, without presentment, demand, protest or notice, all of which are hereby waived.

16. REMEDIES OF THE HOLDER OF THE NOTE.

16.1 Legal Proceedings. If an Event of Default shall have occurred, the Lender may proceed to foreclose this Mortgage and to protect and enforce its rights by any action at law, suit in equity or other appropriate proceeding, whether for the specific performance of agreement contained herein, or for an injunction against the violation of any of the terms hereof, or in aid of the exercise of any power granted hereby or by law.

16.2 Cost of Enforcement. The Borrower shall pay on demand all costs and expenses (including, without limitation, attorneys' fees and expenses) incurred by or on behalf of the Lender in enforcing this Mortgage, the Note, or any of the other documents executed in connection herewith, or occasioned by any default hereunder or thereunder. Such costs and expenses shall constitute indebtedness secured by this Mortgage.

16.3 No Waiver. Neither failure or any delay on the part of the Lender to exercise any right, remedy, power or privilege provided for herein or by statute or at law or in equity or otherwise shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, remedy, power or privilege preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

17. INTENTIONALLY OMITTED.

18. FORECLOSURE. If an Event of Default shall have occurred, the Lender may at any time proceed at law or in equity or otherwise to foreclose the lien of this Mortgage as against all or any part of the Property. Borrower hereby expressly waives all rights to require Lender to first resort to the sale of any portion of the Property before foreclosing upon and/or selling any other portion(s) of the Property which is subject to this Mortgage and Borrower hereby agrees that Lender, at Lender's sole discretion, may elect to sell any one or more portion of the property in one or more Marshal's sales.

19. APPOINTMENT OF RECEIVER. If an Event of Default shall have occurred, the Lender shall be entitled, as a matter of right without regard to the adequacy or inadequacy of the Lender's security, to the appointment of a receiver for all or any part of the Property, whether such receivership is incidental to a proposed sale of the Property or otherwise, and the Borrower hereby consents to the appointment of such a receiver and shall not oppose any such appointment.

20. PURCHASE OF PROPERTY BY THE HOLDER OF THE NOTE. The Lender may be a purchaser of the Property or of any part thereof or of any interest therein at any foreclosure sale thereof and may apply upon the purchase price the indebtedness secured hereby owing to the Lender. The Lender shall, upon any such purchase, acquire good title to the properties so purchased, free of the lien of this Mortgage and free of all liens and encumbrances subordinate to the Mortgage.

21. RECEIPT A SUFFICIENT DISCHARGE TO PURCHASER. Upon any sale of the Property or any part thereof or any interest therein pursuant to foreclosure, the receipt of the officer making the sale under judicial proceedings shall be sufficient discharge to the purchaser for the purchase money, and such purchaser shall not be obliged to see to the application thereof.

22. APPLICATION OF PROCEEDS OF SALE. The proceeds of any sale of the Property or any part thereof or any interest therein pursuant to foreclosure or otherwise hereunder, together with any other monies at any time held by the Lender pursuant to this Mortgage, shall be applied to pay:

FIRST: All costs and expenses of the sale of the Property or any part thereof or any interest in connection therewith, or all costs and expenses of entering upon, taking possession of, removal from, holding, operating and managing the Property or any part thereof, as the case may be, reasonable attorneys' fees, and any taxes, assessments or other charges, prior to the lien of this Mortgage, which the Lender may consider it necessary or desirable to pay;

SECOND: All amounts of principal and interest at the time due and payable on the Note (whether at maturity or on a date fixed for any installment payment or any prepayment or by declaration and acceleration or otherwise), and in case such monies shall be insufficient to pay in full the amount so due and unpaid upon the Note, then, first, to the payment of all amounts of interest at the time due and payable on the Note, without preference or priority of any installment of interest over any other installment of interest, and, second, to the payment of all amounts of principal at the time due and payable on the Note, without preference or priority of any amount of principal over any other amount of principal;

THIRD: Any other indebtedness secured by this Mortgage and at the time due and payable (whether by acceleration or otherwise);

FOURTH: Any indebtedness secured by any lien on the Property which is subordinate to the lien of this Mortgage; and

FIFTH: Any balance to the Borrower.

23. REMEDIES CUMULATIVE. Each right, power and remedy of the Lender

provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise of any one or more of such rights, shall not preclude the simultaneous or later exercise of any or all such other rights, powers or remedies.

24. NO WAIVER, ETC. No failure by the Lender or the holder of the Note to insist upon the strict performance of any term hereof or to exercise any right, power or remedy consequent upon a breach thereof, shall constitute a waiver of any such term or any such breach. No waiver of any breach shall affect or alter this Mortgage, which shall continue in full force and effect with respect to any other then existing or subsequent breach.

25. FURTHER ASSURANCES. The Borrower at its expense will execute, acknowledge and deliver all such instruments and take all such actions as the Lender from time to time may reasonably request for the better assurance to the Lender of the Property and rights now or hereafter subjected to the lien hereof or assigned hereunder or intended so to be subjected or assigned.

26. INDEMNIFICATION BY THE BORROWER. The Borrower will protect, indemnify and save harmless the Lender from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against the Lender by reason of (a) its Mortgage interest in the Property, or receipt of any rent or other sum therefrom; (b) any accident, injury to or death of persons or loss of or damage to property occurring on or about the Property; (c) any use, non-use or condition of the Property; (d) any failure on the part of the Borrower to perform or comply with any of the terms of this Mortgage or the terms of any other documents executed in connection herewith; or (e) performance of any labor or services or the furnishing of any materials or other property in respect of the property or any part thereof for construction or maintenance or otherwise. Provided, however, that the foregoing indemnification provision shall not be applicable to any occurrence arising after the Lender retakes possession of the Property in connection with a default by the Borrower. Any amounts payable to the Lender under this Section which are not paid within ten (10) days after written demand therefor by the Lender shall bear interest at the rate set forth in the Note from the day of such demand and shall be secured by this Mortgage. In case any action, suit or proceeding is brought against the Lender by reason of any such occurrence, the Borrower, upon the Lender's request, will at the Borrower's expense resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by the Borrower and approved by the Lender. Such obligations of the Borrower under this Section as shall have accrued at the time of any termination or satisfaction of this Mortgage shall survive any such termination or satisfaction.

27. RIGHT OF HOLDER OF THE NOTE TO PERFORM BORROWER'S COVENANTS, ETC. If the Borrower fails to make any payment or perform any act required

to be made or performed hereunder, the Lender, after such notice to the Borrower as may be reasonable under the circumstance, and without waiving or releasing any obligation or default, may (but shall be under no obligation or default, may (but shall be under no obligation to) at any time hereafter make such payment or perform such acct for the account and at the expense of the Borrower, and may enter upon the Property or any part thereof for such purpose and take all such action thereon as, in the opinion of the Lender, may be necessary or appropriate therefor. All sums so paid by the Lender and all costs and expenses (including, without limitation, attorney's fees and expenses) so incurred, together with interest thereon at the rate set forth in the Note, from the date of payment or incurring, shall constitute indebtedness secured by this Mortgage and shall be paid by the Borrower to the Lender on demand.

28. PROVISIONS SUBJECT TO APPLICABLE LAW. All rights, power and remedies provided herein may be executed only to the extent that the exercise thereof does not violate any applicable law, and are intended to be limited to the extent necessary so that they will not render this Mortgage invalid, unenforceable or not entitled to be recorded, registered or filed under any applicable law. If any term of this Mortgage shall be held to be invalid, illegal or unenforceable, the validity of other terms of the Mortgage shall in no way be affected thereby.

29. NOTICES. All notices and other communications hereunder shall be in writing and shall be deemed to have been given when hand delivered or mailed by first class certified mail, postage prepaid, return receipt requested, to the address given at the beginning of this Mortgage or at such other address as a party may have furnished to the other party by written notice.

30. ASSIGNMENT.

30.1. Assignment by Borrower. This Mortgage shall be binding upon the Borrower and the Borrower's successors and assigns, and all persons claiming under or through the Borrower or any such successor or assign, and shall inure to the benefit of and be enforceable by the Lender and the successors and assigns thereof; provided, however that the Borrower hereby agrees that the Borrower will not sell, assign or convey the Borrower's interest in the Property until all amounts of principal and interest at the time due and payable under the Note have been paid in full, without the prior written consent and approval of the Lender, which consent may be withheld for any reason or no reason at all. If legal or equitable title to the Property or any part thereof shall hereafter change by any means or if the Property or any part thereof shall be further encumbered without Lender's consent, then the indebtedness secured hereby shall become immediately due and payable upon demand of Lender and same shall constitute an Event of Default.

30.2. ASSIGNMENT BY LENDER. The Note and this Mortgage may at any time be assigned, in whole or in part, by the Lender and the benefits, advantages, rights and obligations of the Lender hereunder shall inure to the successors and assigns of the Lender.

31. - **TRANSFER OF THE PROPERTY; ASSUMPTION.** If all or any part of the Property or an interest therein is sold or transferred by the Borrower without the Lender's prior written consent (which consent may be withheld for any reason or no reason at all), the Lender may, at the Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable and same shall constitute an Event of Default.

32. **CHANGE OF OWNERSHIP.** In the event beneficial ownership of the Property shall change by any means without the Lender's consent (which consent may be withheld for any reason or no reason at all, then the indebtedness secured hereby shall become immediately due and payable upon demand of the Lender and same shall constitute an Event of Default. For the purposes of this provision, if the Borrower is a corporation, any sale or other change in the controlling or controlling beneficial interest of the corporate stock of Borrower to persons not shareholders of the Borrower as of the date hereof shall be considered a change of ownership requiring the Lender's consent.

33. **ASSIGNMENT OF RENTS.** Borrower hereby absolutely and unconditionally assigns and transfers to Lender all the Rents of the Property, including those now due, past due or to become due by virtue of any one or more of the Leases, regardless of to whom the Rents of the Property are payable. Borrower hereby authorizes Lender or Lender's agents to collect the Rents and hereby directs each tenant of the Property to pay such Rents to Lender or Lender's agents; however, prior to written notice given by Lender to Borrower of the default by Borrower of any covenant or agreement of Borrower in this Mortgage and the expiration of any period of cure therefor, Borrower shall have the right to collect and receive all Rents of the Property as trustee for the benefit of Lender and Borrower, to apply the Rents so collected to the sums secured by this Mortgage with the balance, so long as no such breach has occurred, to the account of Borrower, it being intended by Borrower and Lender that this assignment of Rents constitutes an absolute assignment and not an assignment for additional security only. Upon delivery of written notice by Lender to Borrower of the default by Borrower of any covenant or agreement of Borrower in this Mortgage and the expiration of any period of time therefor and without the necessity of Lender entering upon the taking and maintaining full control of the Property in person, by agent or by a court-appointed receiver, Lender shall be immediately entitled to possession of all Rents of the Property as specified in this paragraph as the same become due and payable, including, but not limited to Rents then due and unpaid, and all such Rents shall immediately be held by Borrower as trustee for the benefit of Lender only; however, the written notice by Lender to Borrower of the breach by Borrower shall contain a statement that Lender exercises its rights to such Rents. Borrower agrees that commencing upon delivery of such written notice of Borrower's breach by Lender to Borrower, each tenant of the Property shall make such Rents payable to and pay such Rents to Lender or Lender's agents on Lender's written demand to each tenant therefor, delivered to each tenant personally, by mail or by delivering such demand to each rental unit, without any liability on the part of the tenant to inquire further as to the existence of a default by Borrower.

33.1 Borrower hereby covenants that Borrower has not executed any prior

assignment of the Rents, that Borrower has not performed and will not perform any acts and has not executed, and will not execute, any instrument which would prevent Lender from exercising its rights under this paragraph, and that at the time of execution of this Mortgage there has been no anticipation or prepayment of any of the Rents of the Property for more than one (1) month prior to the due dates of such Rents. Borrower covenants that Borrower will not hereafter collect or accept payments of any Rents of the Property more than one (1) month prior to the due dates of such Rents. Borrower further covenants that Borrower will execute and deliver to Lender such further assignments of Rents of the Property as Lender may from time to time request.

33.2 Upon Borrower's default of any covenant or agreement of Borrower in this Mortgage, and upon the notice and expiration of period to cure, if any, Lender may in person, by agent or by a court-appointed receiver, regardless of the adequacy of Lender's security, enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases and subleases, the collection of all Rents of the Property, the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. In the event Lender elects to seek the appointment of a receiver for the Property upon Borrower's breach of the covenant or agreement of Borrower in this Mortgage, Borrower hereby expressly consents to the appointment of such receiver. Lender or the receiver shall be entitled to receive a reasonable fee for so managing the Property.

33.3 All Rents collected by Lender pursuant to this Section 33 shall be applied as provided in Section 22 hereof. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall not be liable to Borrower, anyone claiming under or through Borrower or anyone having an interest in the Property by reason of anything done or left undone by Lender under this paragraph.

33.4 If the Rents of the Property are not sufficient to meet the costs, if any, of taking control of and managing the Property and collecting the Rents, any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by this Mortgage. Unless Lender and Borrower agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law.

33.5 Any entering upon and taking and maintaining of Control of the Property by Lender or the receiver and any application of Rents as provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender under applicable law or as provided herein. This assignment of Rents of the Property shall terminate at such time

as this Mortgage ceases to secure indebtedness held by Lender.


34. **MISCELLANEOUS.** This Mortgage may be changed, waived, discharged, or terminated only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. The headings in this Mortgage are for convenience of reference only and shall not limit or otherwise affect the meaning hereof. This Mortgage shall be governed by and construed in accordance with the laws of the United States Virgin Islands.

35. **INTEREST AND ADVANCES TO PROTECT COLLATERAL.** This Mortgage secures and shall secure the Obligations. Without limiting the foregoing, this Mortgage secures any and all interest on the indebtedness, costs of collection, and any advances made by the Lender reasonably necessary for protection of the collateral or otherwise authorized hereby.

IN WITNESS WHEREOF, the Borrower has caused this Mortgage to be duly executed on the date first above written:


DATED: 9/15/97

IN WITNESS:

Waheed Hamed, President
Sixteen Plus Corporation

[CORPORATE SEAL]

ATTEST:


Rathi Yusuf, Secretary

EXHIBIT A

1. Parcel No. 8, Estate Cane Garden, of approximately 2.6171 U.S. Acres.
2. Remainder No. 46A, Estate Cane Garden, of approximately 7.6460 U.S. Acres.
3. Parcel No. 10, Estate Cane Garden, of approximately 2.0867 U.S. Acres.
4. Road Plot No. 11, Estate Cane Garden, of approximately 0.0868 U.S. Acres.
5. Parcel No. 11, Estate Retreat, Matr. No. 37B of Company Quarter and Peter's Minde, Matr. No. 37A and 37BA, Company Quarter, and No. 54 Queen's Quarter all of approximately 42.3095 U.S. Acres.
6. Remainder Matr. 32B, Estate Cane Garden of approximately 48.5175 U.S. Acres.
7. Parcel No. 9 Estate Cane Garden, of approximately 11.9965 U.S. Acres.
8. Remainder Matr. 32A, Estate Granard, of approximately 41.0736, U.S. Acres.
9. Parcel No. 40, Estate Granard of approximately 14.9507 U.S. Acres.
10. Remainder Matr. No. 31, Estate Diamond, of approximately 74.4220 U.S. Acres.
11. Parcel No. 4, Estate Diamond, of approximately 5.8662 U.S. Acres.
12. Parcel No. 1, Estate Diamond, of approximately 61.2358 U.S. Acres.
13. Parcel No. 3, Estate Diamond, of approximately 6.9368 U.S. Acres.
14. Parcel No. 2, Estate Diamond, of approximately 6.5484 U.S. Acres.
15. Road Plot No. 12, Estate Cane Garden, of approximately 0.4252 U.S. Acres.
16. Road Plot No. 41, Estate Granard, of approximately 0.4255 U.S. Acres.
17. Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.



20nd Feb
12:51 PM
Recorded and Entered in Recorder's Book for the
District of St. John, U.S. Virgin Islands of the U.S.A.
Page 304
No. 11181-156 and noted in Real Property Records
U.S. B.P. 126 Page 304, 305 & 306
[Signature]

EXHIBIT 6

BRYANT, BARNES & SIMPSON, P.C.

ATTORNEYS AT LAW

BRITAIN H. BRYANT
DARYL C. BARNES
ANDREW C. SIMPSON

C. BETH MOSS
BETHANEY VAZZANA
CARL A. BECKSTEDT III

47 KING STREET, 2ND FLOOR
POST OFFICE BOX 4589
CHRISTIANSTED, ST. CROIX
U.S. VIRGIN ISLANDS 00822-4589

TEL : 340-773-2765
FAX : 340-773-5427
E-MAIL: vlegal@viaccess.net

August 27, 1999

VIA CERTIFIED MAIL

Waleed Hamed, President
Sixteen Plus Corporation
c/o Plaza Extra
United Shopping Plaza
St. Croix, VI 00820

RE: Diamond Keturah Property

Dear Waleed:

Per your request, enclosed please find the original First Priority Mortgage filed on the Diamond Keturah Property. You will see that it was recorded on February 22, 1999 as Document No. 768/1999 at pc 679, page 33. I return the original to you to keep in a safe and fireproof place.

If you have any questions, please don't hesitate to contact me. Thank you.

Very truly yours,



Carl A. Beckstedt III

CAB/alg

cc: Andrew C. Simpson, Esq.

E:\UnitedDiamond Keturah\waleed.lu-8-27-99.wpd

HAMD596308

344-FY-1148

is your RETURN ADDRESS completed on the reverse side?

SENDER:
 a Complete items 1 and/or 2 for additional services.
 b Complete items 3, 4a, and 4b.
 c Print your name and address on the reverse of the form so that we can return this card to you.
 d Attach the form to the front of the envelope, or on the back if space does not permit.
 e Write "Return Receipt Requested" on the mailpiece below the article number.
 f The Return Receipt will show to whom the article was delivered and the date delivered.

3. Article Addressed to:
 Waleed Hamed, President
 Sixteen Plus Corporation
 c/o Plaza Extra
 United Shopping Plaza
 St. Croix, VI 00820

4a. Article Number
 Z 364 353 413

4b. Service Type
 Registered
 Express Mail
 Return Receipt for Merchandise
 COD
 Certified
 Insured

7. Date of Delivery

5. Received By: (Print Name)

6. Signature: (Address or Agent)
 X

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.

Z 364 353 413

US Postal Service
Receipt for Certified Mail
 No Insurance Coverage Provided.
 Do not use for International Mail (See reverse)

Sent to
 Waleed Hamed, President
 Street & Number
 c/o Plaza Extra, United Shopping Plaza
 Post Office, State, & ZIP Code
 St. Croix, USVI 00820

Postage \$ 1.77

Certified Fee 1.40

Special Delivery Fee

Restricted Delivery Fee

Return Receipt Showing to Whom & Date Delivered

Return Receipt Showing to Whom, Date, & Addressee's Address 1.25

TOTAL Postage & Fees \$ 3.42

Postmark or Date

PS Form 3800, April 1995

Fold at line over top of envelope to the right of the return address.

CERTIFIED

Z 364 353 413

MAIL

EXHIBIT 7

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

FATHI YUSUF,

Plaintiff,

v.

PETER'S FARM INVESTMENT CORPORATION, SIXTEEN PLUS CORPORATION, MOHAMMAD A. HAMED, WALEED M. HAMED, WAHEED M. HAMED, MUFEED M. HAMED, and HISHAM M. HAMED,

Defendants.

CASE NO. ST-15-CV- 344

ACTION FOR DISSOLUTION AND OTHER RELIEF

RECEIVED
SUPERIOR COURT
THE VIRGIN ISLANDS
JAN 28 2016

COMPLAINT FOR DISSOLUTION AND OTHER RELIEF

PARTIES AND JURISDICTION

1. Plaintiff Fathi Yusuf is a resident of the Virgin Islands.
2. Defendant Peter's Farm Investment Corporation ("Peter's Farm") is a U.S. Virgin Islands corporation.
3. Defendant Sixteen Plus Corporation ("Sixteen Plus") is a U.S. Virgin Islands corporation and.
4. Defendant Mohammad A. Hamed ("Mohammad Hamed") is a resident of the U.S. Virgin Islands.
5. Defendant Waleed M. Hamed ("Waleed Hamed") is a resident of the U.S. Virgin Islands.

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6. Defendant Waheed M. Hamed ("Waheed Hamed") is a resident of the U.S. Virgin Islands.

7. Defendant Mufeed M. Hamed ("Mufeed Hamed") is a resident of the U.S. Virgin Islands.

8. Defendant Hisham M. Hamed ("Hisham Hamed") is a resident of the U.S. Virgin Islands.

10. This Court has subject matter jurisdiction pursuant to V.I. Code Ann. tit. 4, § 76(a).

11. Venue is proper in this district under V.I. Code Ann. tit. 4, § 78 because, inter alia, Defendant Peter's Farm and Sixteen Plus own real property in St. Thomas, and Defendant Waheed Hamed resides in St. Thomas.

COMMON ALLEGATIONS

12. Defendant Peter's Farm was incorporated as a Virgin Islands corporation on or about March 6, 1995.

13. Defendant Sixteen Plus was incorporated as a Virgin Islands corporation on or about February 10, 1997.

14. The incorporators of Peter's Farm were Fathi Yusuf, Mohammad Hamed, and Yusef I. Jaber ("Jaber"). Jaber, Fathi Yusuf and Mohammad Hamed were named as directors of the corporation at the organizational meeting of the incorporators of Peter's Farm held on or about March 4, 1995. Mohammad Hamed was named President, Jaber was named Vice President, and Fathi Yusuf was named Secretary and Treasurer of Peter's Farm in that same organizational meeting. These three individuals

were named directors of Peter's Farm in that same organizational meeting. Upon information and belief there have been no subsequent meetings of the shareholders to elect directors of Peter's Farm.

15. The original shareholders of Peter's Farm were Jaber (33 and 1/3%), Fathi Yusuf (33 and 1/3%) and Mohammad Hamed (33 and 1/3%). On or about October 30, 2002, Jaber transferred one half of his shares to Fathi Yusuf and one half to Mohammad Hamed, with the result that Mohammad Hamed and Fathi Yusuf each became 50% shareholders of Peter's Farm and remain to this day 50% shareholders of the corporation.

16. The incorporators of Sixteen Plus were Maher F. Yusuf, Waheed Hamed, and Waleed Hamed. Upon information and belief, Fathi Yusuf, Mohammad Hamed, and Waleed Hamed are directors of Sixteen Plus.

17. The shareholders of Sixteen Plus and the percentage of shares owned by each are as follows: Fathi Yusuf (11.0%); Fawzia Yusuf (11.0%); Zayed Yusuf (7%); Yusuf Yusuf (7%); Maher Yusuf (7%); Nejah Yusuf (7%); Mohammad Hamed (10%); Waleed Hamed (10%); Mufeed Hamed (10%); Waheed Hamed (10%); and Hisham Hamed (10%). Mohammad Hamed has served as President, Waleed Hamed as Vice President, and Fathi Yusuf as Secretary and Treasurer of Sixteen Plus.

18. Zayed, Maher, Nejah, and Yusuf are the sons of Fathi Yusuf and his wife, Fawzia. Waleed, Waheed, Mufeed and Hisham Hamed are Mohammad Hamed's sons.

19. Upon information and belief, there have been no annual meetings of shareholders to elect directors of Sixteen Plus.

20. The assets of Peter's Farm consist almost entirely of unimproved land in St. Croix and St. Thomas. Likewise, the assets of Sixteen Plus consist almost entirely of unimproved land in St. Croix and St. Thomas.

21. The Hamed and Yusuf families are and have been in a state of irreconcilable conflict and dissension regarding the operation of businesses jointly owned by the families (or members of the families). Fathi Yusuf and Mohammed Hamed were, until very recently, partners for many years in a partnership that owned and operated three supermarkets in St. Croix and St. Thomas. Because of the deep acrimony and distrust between the partners, the partnership is being wound up and it no longer operates any of the three supermarkets. The acrimony between the two families has become intensified in the partnership litigation such that members of the two families do not speak to one another, and a physical altercation between the Hameds and Yusufs occurred earlier this year in St. Croix.

22. The chronic strife, deep mutual distrust, and dissension between the Hamed and Yusuf families make it impossible for them to jointly manage and operate any business that they jointly own.

COUNT I

ORDER COMPELLING SHAREHOLDERS MEETING TO ELECT DIRECTORS OF PETER'S FARM AND SIXTEEN PLUS

23. Plaintiff incorporates the allegations of paragraphs 1 through 22 above.

24. V.I. Code Ann. tit. 13, §193 ("section 193") provides that where there has been any failure to conduct an election of directors, the court "may summarily order an election to be held upon the petition of any stockholder . . ."

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25. The legislative history for this section states that it was based on, inter alia, a provision of the Delaware corporate code, and "was designed to fix the consequences of failure to hold election of directors. . ."

26. Upon information and belief, there have been no annual meetings of the shareholders to elect directors of Peter's Farm. Upon information and belief, there have been no annual meetings of the shareholders to elect directors of Sixteen Plus.

27. Under section 198, Plaintiff is entitled to a summary order directing the holding of a meeting of Peter's Farm and Sixteen Plus shareholders at which an election of directors for each corporation will be held.

COUNT II
DISSOLUTION OF PETER'S FARM AND SIXTEEN PLUS

28. Plaintiff incorporates the allegations of paragraphs 1 through 27, above.

29. There is a state of shareholder dissension and deadlock as to Peter's Farm and Sixteen Plus such that the business of both corporations can no longer be conducted to the advantage of the shareholders of each corporation.

30. This deadlock and dissension is grounds for dissolution of both corporations.

COUNT III
APPOINTMENT OF A RECEIVER FOR PETER'S FARM AND SIXTEEN PLUS

30. Plaintiff incorporates the allegations of paragraphs 1 through 30 above.

31. There exists an incorrigible deadlock and irreconcilable animosity between the shareholders of Peter's Farm and Sixteen Plus.

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32. Upon information and belief, neither Peter's Farm nor Sixteen Plus has conducted any annual shareholders meetings to elect directors, resulting in a self-perpetuating control of the board of directors of each corporation by the original directors.

33. All of these factors necessitate the appointment of one or more receivers to sell the real estate assets of Peter's Farm and Sixteen Plus.

PRAYER FOR RELIEF

Wherefore, Plaintiff Fathi Yusuf requests the following relief:

1. An order compelling the holding of a Peter's Farm shareholder's meeting to elect directors of the corporation;
2. An order compelling the holding of a Sixteen Plus shareholder's meeting to elect directors of the corporation;
3. An order dissolving Peter's Farm and Sixteen Plus and directing the windup of the corporations;
4. An order appointing a receiver for Peter's Farm and for Sixteen Plus to sell the real estate holdings of both corporations; and
5. An order awarding Plaintiff such other and further relief as is just and proper under the circumstances, including but not limited to an award of attorney fees incurred by Plaintiff in the litigation of this case.

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Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: July 27, 2015

By:


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STEFAN B. HERPEL (V.I. Bar No. 1019)

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Attorneys for Plaintiff, Fathi Yusuf

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EXHIBIT 8

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KADHI YUSUF,

Plaintiff,

vs.

**PETER'S FARM INVESTMENT CORPORATION,
SIXTEEN PLUS CORPORATION, MOHAMMAD A.
HAMED, WALEED M. HAMED, WAHEED M.
HAMED, MUFEED M. HAMED and HISHAM M.
HAMED,**

Defendants.

CASE NO. ST-2015-CV-0000344

ACTION FOR DISSOLUTION
AND OTHER RELIEF

ORDER OF DISMISSAL

THIS MATTER is before the Court on the Joint Motion for Entry of Stipulated Order of Dismissal between Plaintiff and Defendants filed on November 28, 2016.¹ The parties "jointly move for entry of the attached, stipulated order of dismissal without prejudice -- with each party to bear their own costs and attorneys' fees." The Joint Motion will be granted.

Accordingly, it is

~~ORDERED~~ that the Joint Motion for Entry of Stipulated Order of Dismissal is hereby is hereby **GRANTED**; and it is further

~~ORDERED~~ that this ~~matter~~ is hereby **DISMISSED** without prejudice; and it is further

~~ORDERED~~ that each party shall bear his/their own attorney's fees and costs; and it is further

~~ORDERED~~ that all pending motions are hereby **DENIED** as **MOOT**; and it is further

~~ORDERED~~ that a copy of this Order shall be directed to counsel of record.

DATED: December 15, 2016

Denise M. Francois
DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

¹ Plaintiff is represented by Dudley, Topper and Feilerzeig, LLP (Gregory H. Hodges and Stefan B. Herpel, of counsel), and Defendants are represented by the Law Offices of Joel H. Holt (Joel H. Holt, of counsel) and Carl J. Harmann III, Esquire.

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: **DONNA D. DONOVAN**
Court Clerk Supervisor

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

HISHAM HAMED, derivatively, on behalf)
of SIXTEEN PLUS CORPORATION,)

Plaintiff,)

vs.)

FATHI YUSUF, ISAM YOUSUF and)
JAMIL YOUSEF,)

Defendants,)

and)

SIXTEEN PLUS CORPORATION,)

a nominal defendant.)

17 FEB 19 10 43 AM
Case No.: 2016-SX-CV-650

DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF'S REPLY IN SUPPORT OF HIS
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, hereby replies in support of his motion to dismiss Plaintiff, Hisham Hamed's First Amended Complaint ("Complaint") against him, in its entirety, given that 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 also insufficiently pled—and fails to join an indispensable party, Manal Yousef. In support, Mr. Yusuf states as follows.

I. INTRODUCTION

In Plaintiff's Opposition to Mr. Yusuf'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, Mr. Yusuf has no need to, and does not, address those three claims in the instant reply. With respect to the remaining counts, Plaintiff's Complaint has several intractable problems that no amount of obfuscation on the part of Plaintiff can conceal. One, all

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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)), breach of fiduciary duty, usurpation of corporate opportunity and the “tort of outrage”—are all barred outright by the statute of limitations. The limitations bar is disclosed on the face of the Complaint, which reveals that Plaintiff knew in 2005 that Sixteen Plus’s interests in the Property were impacted by the “sham mortgage” when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold. Two, 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 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. MEMORANDUM OF LAW

A. Plaintiff’s 14 V.I.C. § 605(a) CICO Claim and 14 V.I.C. § 605(b) CICO Claim are Both Properly Dismissed

Plaintiff is attempting to allege a conspiracy to violate 14 V.I.C. § 605(a) and/or a violation of 14 V.I.C. § 605 (b). *See* Opposition, p. 8.

14 V.I.C. § 605(a) states:

It is unlawful for any person . . . associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.

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).

14 V.I.C. § 605(b) states:

It is unlawful for any person, though a pattern of criminal activity, to acquire or maintain, directly or indirectly, any interest in, or control of any enterprise or real property.²

Plaintiff's 14 V.I.C. § 605(a) conspiracy claim and 14 V.I.C. § 605(b) claim each represent separate violations of CICO with only a partial overlap in pleading requirements. Accordingly, each argument below concerning the proper dismissal of Plaintiff's CICO claims will specify to which CICO claim, or both, the individual argument applies.

In brief, with respect to 14 V.I.C. § 605(a), Plaintiff has failed to properly plead a CICO conspiracy given that his own allegations in the Complaint show that the alleged conspiracy; 1) was complete in 1997 when the alleged "sham mortgage" was obtained and; 2) **Plaintiff indisputably knew that Sixteen Plus's interests in the Property were impacted by the "sham mortgage" in 2005 when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold.** Thus, even if Plaintiff's CICO conspiracy claim was properly pled—which it is not—Plaintiff's claim is barred by the five (5) year statute of limitations. An independent ground for dismissal is that Plaintiff has failed to meet the burden to plead facts which, if true, demonstrate the necessary "criminal enterprise"—which enterprise must have an existence separate and apart from the "pattern of criminal activity"—and further fails to allege facts which, if true, would establish the "pattern of criminal activity" needed to properly plead a CICO conspiracy. For all these reasons, Plaintiff's 14 V.I.C. § 605(a) CICO conspiracy claim fails and is properly dismissed on each of these bases.

² With respect to 14 V.I.C. § 605(b), Plaintiff alleges that: All Defendants are "person[s]" who through a pattern of criminal activity set forth in paragraphs 55 through 79 have "acquire[d]. . . directly or indirectly an "interest in" the Land which is "real property" within the meaning of the statute. See Complaint, ¶ 83(a). (The "Land" is the Diamond Keturah property at issue (hereinafter, "Land" or "Property")).

Separately, Plaintiff's 14 V.I.C. § 605(b) claim is deficient and properly dismissed on several grounds. First, Plaintiff's claim is barred by the five (5) year statute of limitation for a CICO claim. Second, Plaintiff has failed to plead facts that, if taken as true, would support the allegation that Defendants engaged in the necessary "pattern of criminal activity." Third, Defendants have not acquired any interest in the Land by virtue of the 2010 power of attorney, which power of attorney is unrecorded and has never been used. The Property is titled in the name of Sixteen Plus, just as it has been since it was acquired in the late 1990s.

1. ***The CICO Statute of Limitations Began to Run in 2005 When Sixteen Plus Discovered that Mr. Yusuf Would Not Sell the Property Unless the Mortgage Was Paid and Bars Both CICO Claims - 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)***

A CICO claim "may be commenced within five years after the conduct made unlawful under section 605." 14 V.I.C. § 607(h). The Virgin Islands CICO statute is modeled after the federal RICO statute. *Gumbs v. People of the Virgin Islands*, 59 V.I. 784, n.2 (2013); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F.Supp. 961, 970 (D.V.I. 1994). **The limitations period for RICO claims begins to run once a plaintiff discovers his injury.** See *Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000). Because "CICO is cast in the mold of the federal RICO statute," the discovery rule applies to RICO claims in determining when plaintiffs' CICO claims accrued. *Pemberton*, 877 F.Supp. 961 at 970. Plaintiff agrees that a five (5) year statute of limitations is applicable and that the statute begins to run at the date of discovery of the alleged wrongdoing. Opposition p. 7 – Statute of Limitations: All Counts.

However, contrary to all logic, common sense, and the allegations in his own Complaint, Plaintiff states that the wrongful conduct began sometime in 2010³ (Opposition p. 7) and claims

³ Later in the Opposition, subsequent to Plaintiff's argument regarding the applicability of the statute of limitations to all counts, Plaintiff claims that the 2010 power of attorney gave Mr.

that a letter sent from a St. Martin lawyer in 2012 was “the first suggestion of any wrongdoing” with respect to the “sham mortgage.” *Id.* In fact, the Complaint plainly alleges that in the mid-2000s Mr. Yusuf refused to sell the Property unless the “sham mortgage” was paid. To wit, **Plaintiff specifically alleges that Sixteen Plus “lost [] [in 2005] . . . the benefit of such sales at the highest and best amount because of Fathi Yusuf’s insistence the sham mortgage be paid upon the sale of the property.”** Complaint, ¶ 43 (emphasis supplied); *see also id.* at p. 8, Section b (“The Value of the Sixteen Plus Property Dramatically Increases—2005). Thus, based on the facts unambiguously set forth in the Complaint, at the very latest, Plaintiff discovered the alleged injury to Sixteen Plus *vis-à-vis* the “sham mortgage,” in the mid-2000s, over twelve (12) years ago. Therefore, both of Plaintiff’s CICO claims are barred by the five (5) year statute of limitations and those claims are properly dismissal, in their entirety on that basis alone. *See Burton v. FirstBank of Puerto Rico*, 49 V.I. 16 (Super. Ct. 2007) (granting defendant’s motion to dismiss, explaining that the date of plaintiff’s “discovery” of the potential harm was clear on the face of her complaint and was outside the applicable statute of limitations). The statute of limitations bar, by itself, is a sufficient basis for dismissal of both the CICO claims. There are also a number of alternative bases for dismissal of both Plaintiff’s 14 V.I.C. § 605(a) and 14 V.I.C. § 605 (b) claims given Plaintiff has failed to satisfy the individual pleading requirements which alternative bases are addressed below.

Yusuf a “controlling interest” in the Property. Opposition at p. 8-9. However, the allegations in the Complaint discussed above—that in 2005 Mr. Yusuf refused to sell the Property unless the mortgage was paid—make it patently clear that if Mr. Yusuf is alleged to have what Plaintiff seeks to characterize as a “controlling interest” in the Property, such interest was created by the mortgage in 1997, and first learned about by Plaintiff in 2005, far before the power of attorney was executed in 2010.

1. ***Plaintiff Fails to Properly Plead the Elements of a CICO Conspiracy - 14 V.I.C. § 605(a)***

In the Opposition, Plaintiff does not—nor can he—argue that law cited in the Motion to Dismiss setting forth the CICO pleading requirements is inapplicable or incorrect. Instead, Plaintiff merely recites that his Complaint contains sufficient factual allegations. Moreover, as noted above, Plaintiff does not quote any “facts” from the Complaint that support his claim his 14 V.I.C. § 605(a) conspiracy claim is properly pled; he merely cites to the Complaint. However, when one actually looks at the allegations in the cited paragraphs, it is clear that they are mere conclusory allegations not the requisite facts. The law requires the supporting factual allegations “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.* Rather than properly pleading the necessary facts, Plaintiff merely makes insufficient boilerplate allegations that a CICO conspiracy existed. Accordingly, even if Plaintiff’s 14 V.I.C. § 605(a) claim was not time barred, it would be properly dismissed on this basis as well.

2. *Plaintiff Also Fails to Properly Plead the Existence of a Criminal Enterprise - 14 V.I.C. § 605(a)*

The CICO conspiracy to embezzle money from Sixteen Plus is deficient on yet another basis: its failure to allege the requisite criminal “enterprise” with which Defendants are associated. As discussed above, Plaintiff does not quote any “facts” from the Complaint that support his claim that his 14 V.I.C. § 605(a) conspiracy claim is properly pled; he merely cites to the Complaint. Of course, when one actually looks at the allegations in the cited paragraphs, it is clear that they are mere conclusory allegations, bereft of any necessary facts.

Notably, Sixteen Plus is not a “criminal enterprise” as contemplated in the statute but rather, as pled by Plaintiff, the alleged victim of the “criminal enterprise.” Moreover, the “enterprise” is not the “pattern of racketeering activity” it is an entity separate and apart from the pattern of activity in which it engages. “The existence of an enterprise at all times remains a separate element which must be proved . . .” *United States v. Turkette*, 452 U.S. 576, 583 (1981). Unlike a well-pled CICO conspiracy claim, the Complaint fails to provide any facts establishing the existence of an ongoing criminal enterprise between Mr. Yusuf, Isam Yousuf and Jamil Yousef. Even under the most liberal reading of the Complaint, Plaintiff has not alleged an enterprise “separate and apart from the activity in which it engages” and where its “various associates function as a continuing unit.” *Turkette*, 452 U.S. at 583. At best, Plaintiff has alleged “mere sporadic or temporary criminal alliance[s]” which is not sufficient to allege a CICO enterprise. *United States v. Henley*, 766 F.3d 893, 906 (8th Cir. 2014) (quoting *United States v. Leisure*, 844 F.2d 1347, 1363-64 (8th Cir. 1988)). The CICO statute is not intended to penalize sporadic or temporary criminal alliances which do not demonstrate “a sustained and continuous effort” to accomplish the enterprise’s objectives, *Henley*, 766 F.3d at 906, or a sustained time period during which “the structure and personnel of the [enterprise] was

continuous and consistent...". *Leisure*, 844 F.2d at 1364. Plaintiff has not pled facts which show that the requisite "criminal enterprise" existed sufficient to withstand the application of *Twombly* and *Iqbal*. See *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."). Therefore, as Plaintiff has wholly failed to plead the necessary CICO "criminal enterprise" this failure is yet another independent and alternative ground for dismissal of Plaintiff's 14 V.I.C. § 605(a) claim.

3. *Plaintiff Has Failed to Plead any Facts that Would Support the Boilerplate Allegation that Isam Yousuf and Jamil Yousef Engaged in any Criminal Activity - 14 V.I.C. § 605(a)*

Of course, the law also requires at least two parties' participation in a pattern of criminal activity to have a conspiracy. The essential elements of a CICO conspiracy being: (1) **two or more persons** agreed to conduct or participate, directly or 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) (emphasis supplied) (unpublished) (citing *Salinas v. United States*, 522 U.S. 52 (1997)). Plaintiff has not alleged, other than by boilerplate recitations like "Defendants committed mail fraud," that Isam Yousuf and Jamil Yousef engaged in any criminal activity at all with respect to obtaining the allegedly "sham" Promissory Note and First Priority Mortgage (or power of attorney). Thus, since Plaintiff fails to specifically allege any criminal activity on the part of Mr. Yusuf's alleged

co-conspirators, Plaintiff has not properly alleged a 14 V.I.C. § 605(a) claim which is yet another alternative and independent ground its dismissal.

4. ***The Complaint Fails to Properly Plead a "Pattern of Criminal Activity" - 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)***

Also crucial to properly pleading CICO claim under both 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b) is properly pleading the "pattern" element—*i.e.*, that each defendant participated in the affairs of the enterprise "through a pattern of criminal activity." 14 V.I.C. § 605(a). 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). The U.S. Supreme Court has observed that the statutory requirement that a pattern include "at least two acts of racketeering activity," means that "while two acts are necessary, they may not be sufficient." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237 (1989). A pattern is not formed by "sporadic activity," and a person cannot be subjected to RICO penalties simply for committing two "isolated criminal offenses." *Id.* at 239. Rather, a pattern requires acts that are (1) related; and (2) amount to or pose a threat of continued criminal activity. *Id.* at 239. 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); *see also W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633–37 (D.C. Cir. 2001) (affirming dismissal of an eight-year-long scheme of racketeering activity because the plaintiff alleged only "a single scheme, a single injury, and few victims"); *Ritter v. Klisivitch*, 2008 U.S. Dist. LEXIS 58818 (E.D.N.Y. July 30, 2008) (stating "where plaintiff alleges nothing

more than a “single scheme of narrow scope . . . including one victim and a limited number of participants closed-ended continuity does not exist.”).

Once again, Plaintiff does not quote any “facts” from the Complaint to support his claim that he has properly pled a “pattern of criminal activity;” he merely cites to the Complaint. Yet, when one actually looks at the allegations in the paragraphs to which Plaintiff cites, it is clear that they are mere conclusory allegations, not the requisite facts. Plaintiff has merely made insufficient boilerplate recitations that Defendants allegedly “committed multiple criminal acts including conversion, attempted conversion, perjury, attempted perjury, wire and mail fraud, and others” in furtherance of the conspiracy. *See e.g.*, Complaint, ¶ 59. However, conspicuously absent are factual allegations of any kind regarding what was allegedly converted and by whom?⁴ What was the content of the allegedly perjurious statements and why were they objectively not true? What constituted the alleged wire fraud, which, of course, needs to be pled with specificity? What about the alleged mail fraud, which also needs to be pled with specificity? Plaintiff cannot merely state that inchoate “crimes” were committed, without factual allegations to support those legal conclusions, and meet the applicable pleading standards set forth in *Twombly* and *Iqbal*. The pleading requirements rightfully call for far more than the conclusions and boilerplate in Plaintiff’s complaint to properly plead the “pattern of criminal activity” required when pleading a CICO cause of action.

Perhaps, in a very generous reading of Plaintiff’s allegations, Plaintiff alleged that Mr. Yusuf made false statements to the Hameds in order to get Sixteen Plus to execute the “sham mortgage.” In an equally generous reading, Plaintiff makes the additional allegation that 2010 Mr. Yusuf obtained a power of attorney for Manal Yousef—however, these are not crimes and,

⁴ Since Plaintiff has dropped his conversion claim, it is unclear if he intends to rely on alleged “conversion” as part of the necessary pattern of criminal activity.

thus, cannot be part of the requisite “pattern of criminal activity.” Even if they were, this is exactly the type of “isolated activity” occurring over ten (10) years apart that does not constitute the “pattern of criminal activity” necessary to properly support a CICO claim. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989) (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.”). Thus another independent and alternative ground for dismissal of Plaintiff’s CICO claims—both under 14 V.I.C. § 605(a) and 14 V.I.C. § 605(b)—is Plaintiff’s failure to properly plead the necessary pattern of criminal activity on the part of any of the three defendants.

5. *The 2010 Power of Attorney Did Not Give Defendants an Interest in the Property - 14 V.I.C. § 605(b)*

In the Opposition, Plaintiff, without citing to any law whatever, claims that the unrecorded 2010 power of attorney gave Mr. Yusuf a “controlling interest” in the Property. Opposition at p. 8-9. Notably, this jurisdiction is a “lien theory jurisdiction” with respect to mortgages. *See B.A. Properties, Inc. v. Gov’t of V.I.*, 299 F.3d 207, 219 (3d Cir. 2002) (citing *Royal Bank of Canada v. Clarke*, 373 F.Supp. 599, 601 (D.Vi.1974)). This means a mortgage does not provide the mortgagee with an ownership interest in, or control of, the mortgaged property; rather the mortgagee merely has a lien on the property. *See Armstrong v. Armstrong*, 266 F.Supp.2d 385, 394 (D.V.I., 2003). Beyond that, however, the allegations in the Complaint make it patently clear that if Mr. Yusuf is alleged to have what Plaintiff seeks to characterize as a “controlling interest” in the Property, such interest was created far before the power of attorney was executed in 2010 since, according to Plaintiff, in 2005 Mr. Yusuf refused to sell the Property unless the mortgage was paid. Accordingly, Plaintiff’s 14 V.I.C. § 605(b) is not only properly dismissed on statute of limitations grounds and because Plaintiff has failed to plead the requisite

pattern of criminal activity, it is also properly and alternatively dismissed because the power of attorney did not provide the Defendants with control of, or an interest in, the Property.

A. Plaintiff Has Failed to State a Claim for Breach of Fiduciary Duty

The parties agree that to establish a claim for breach of fiduciary duty: (1) there must be a fiduciary relationship; (2) the fiduciary must have breached the duty imposed by such relationship; (3) the plaintiff must have been harmed; and (4) the fiduciary's breach must be a proximate cause of the plaintiff's harm. *Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (Super. Ct. 2012).

The gravamen of Plaintiff's claim of breach of fiduciary duty is that Mr. Yusuf negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation's principal asset, the Land, for the benefit of Sixteen Plus but obtained a power of attorney with respect to the mortgage. Complaint, ¶¶ 96(b) and (c). As discussed in the Motion to Dismiss, Plaintiff fails both to allege a breach of duty, or a specific harm. Plainly, the mere fact that Manal Yousef executed a power of attorney in favor of Mr. Yusuf is not a breach of fiduciary duty. However, in the Opposition, the Plaintiff claims that "Yusuf has a POA that he is using contrary to interests of Sixteen Plus." Opposition p. 11. But, in keeping with Plaintiff's *modus operandi*, Plaintiff fails to plead any facts to support this conclusory allegation. Rather, Plaintiff cites to a paragraph in the Complaint which claims—without a single supporting fact—that Mr. Yusuf is using the power of attorney to defend the case brought by Sixteen Plus to void the mortgage it gave to Manal Yousuf. This is precisely the kind of conclusory allegation, entirely unmoored from any factual predicate, that the controlling law requires the Court to ignore. Accordingly, Plaintiff's claim for breach of fiduciary duty fails.

Plaintiff's breach of fiduciary duty claim also fails because, like the CICO claims, it is barred by the applicable statute of limitations. In the section of the Opposition addressing all Mr. Yusuf's statute of limitations arguments (Opposition. p. 7-8), Plaintiff claims that "the first suggestion of any wrongdoing took place in late 2012 when the letter from the lawyer in St. Martin was received." Opposition p. 7. Thus, even if the discovery rule applied, according to Plaintiff, the breach of fiduciary duty was discovered in 2012.⁵ Breach of fiduciary duty has a two year statute of limitations. *See* 5 V.I.C. § 31(5) ("[A]ny injury to . . . rights of another not arising from contract not herein especially enumerated" has a two (2) year statute of limitations.); *see also* *Guardian Ins. Co.*, 63 V.I. 3 at 18 (stating that a claimed breach of fiduciary duty by an insurer to its insured "sounded in tort" and had a "two-year statute of limitations."). Accordingly, Plaintiff's claim for breach of fiduciary duty is also barred by the statute of limitations and properly dismissed on that independent ground as well.

B. Plaintiff Has Failed to State a Claim for Usurpation of Corporate Opportunity

Prohibition of a corporate fiduciary's usurpation of a corporate opportunity precludes a corporate fiduciary from acquiring for himself a business opportunity that his corporation is financially able to undertake, and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest. *Borden v. Sinskey*, 530 F.2d 478, 489-90 (3d Cir. 1976) (citing *Equity Corp. v. Milton*, 221 A.2d 494, 497 (Del. Supr. 1966)).

Plaintiff claims that the acts alleged "in paragraph 96 constitutes usurping of a corporate opportunity by Fathi Yusuf, an officer of the corporation acting in that capacity in dealing with

⁵ Moreover, as discussed above, Plaintiff has alleged that in 2005 Mr. Yusuf insisted that the mortgage be paid if the Property was sold. Thus, Plaintiff knew of the alleged "breach of fiduciary duty" as early as 2005.

Manal Yusuf[.]” (Complaint, ¶100) and the boilerplate recitation that the “corporation has been injured thereby.” *Id.* at ¶101. Paragraph 96 alleges that Mr. Yusuf “negotiated the note and mortgage with Manal Yousef for the purpose of protecting the corporation’s principal asset, the Land, for the benefit of Sixteen Plus” and “later obtained a power of attorney from Manal Yousef giving himself control of and all rights in those assets[.]” Complaint, ¶¶ 96(b) and (c), respectively.

In the Opposition, Plaintiff states, once again, that the power of attorney was the requisite business opportunity. Opposition, p. 16. Predictably, Plaintiff has failed to allege a single fact establishing: 1) that Manal Yousef would have provided Sixteen Plus with a power of attorney identical to the one she provided her trusted uncle, Mr. Yusuf, with respect to her mortgage; or 2) that Sixteen Plus had the financial wherewithal to obtain a power of attorney by which it could release a multi-million dollar mortgage. Accordingly, Plaintiff’s claim for usurpation of corporate opportunity is properly dismissed as the alleged “business opportunity” was not available to—or affordable by—Sixteen Plus.

Plaintiff’s claim for usurpation of a corporate opportunity is also barred by the statute of limitations. Once again, a two year statute of limitations applies. *See* 5 V.I.C. § 31(5). In the section of the Opposition addressing all Mr. Yusuf’s statute of limitations arguments (Opposition, p. 7-8), Plaintiff claims that “the first suggestion of any wrongdoing took place in late 2012 when the letter from the lawyer in St. Martin was received.” Opposition p. 7. Thus, even if the discovery rule applied, according to Plaintiff, Plaintiff discovered that its “corporate

opportunity” was “usurped” in 2012.⁶ Thus, Plaintiff’s claim for usurpation of corporate opportunity is independently dismissed on this basis as well.

C. Plaintiff Has Failed to Plead a Viable Claim for the “Tort of Outrage”

Plaintiff now claims that, despite identifying Count Six as the “Tort of Outrage” (Complaint p. 23), and making no mention of a “*prima facie* tort,” or anything resembling one, that Count Six is really a claim for “*prima facie* tort.” Opposition p. 15-16. Unfortunately for Plaintiff, a claim for *prima facie* tort is also properly dismissed. A *prima facie* tort is a general tort. *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) (citing *Moore v. A.H. Riise Gift Shops*, 659 F. Supp. 1417, 1426 (D.V.I. 1987)). *Prima facie* tort claims typically provide relief only where the defendant’s conduct does not come within the requirements of one of the well-established and named intentional torts. As the Superior 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; *see also Sorber v. Glacial Energy VI, LLC*, Case No. ST-10-CV-588, 2001 WL 3854244, at * 3 (Super. Ct. June 7, 2011) (dismissing Plaintiff’s *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.”); *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

⁶ Moreover, as discussed above Plaintiff has alleged that in 2005 Mr. Yusuf insisted that the mortgage be paid if the Property was sold. Thus, Plaintiff knew of the alleged “usurpation” as early as 2005.

of tort . . . “[a]s the allegations in this case fit within defined tort categories, Garnett’s claim of prima facie tort must be dismissed.”); *Bank of Nova Scotia v. Boynes*, Case No. ST-16-CV-29, 2016 WL 6268827, at *4 (Super. Ct. Oct. 18, 2016) (dismissing Plaintiff’s claim for *prima facie* tort stating “[h]ere it is evident that Boynes relies on the same set of factual allegations to support his prima facie tort claims as he does to support his fraud, IIED, and NIED counterclaims.”). Plaintiff’s claim for “*prima facie* tort” does not add any additional factual allegations, rather merely incorporates the preceding paragraphs of the Complaint and recites that the actions of Defendants were “intentional, wanton, extreme and outrageous . . . culpable and not justifiable under the circumstances.” Complaint ¶¶ 108-9. Accordingly, as Defendants’ alleged actions fit into existing and defined torts—evidenced by the fact Plaintiff has brought two other tort claims: breach of fiduciary duty and usurpation of corporate opportunity—and has not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations, Plaintiff’s claim for *prima facie* tort is properly dismissed as well.

D. Plaintiff Has Failed to Join Manal Yousef Who is a Required Party

Predictably, Plaintiff has failed to cite any law that contravenes Mr. Yusuf’s position that Manal Yousef is a necessary party to this action (also called a “required” party under Federal Rule of Civil Procedure 19). Rather, Plaintiff claims *illogically* that Manal Yousef is not a required party because Mr. Yusuf has a power of attorney with respect to the mortgage. Opposition p. 19-20. First, the existence of a power of attorney does not affect the fact that Manal Yousef is a required party given that she holds a four and a half million dollar (\$4,500,000.00) First Priority Mortgage on the Property the validity of which is the crux of this action. Plaintiff alleges that the mortgage is invalid and that alleged invalidity is central to Plaintiff’s claims against Defendants. Therefore, the Court would necessarily have to adjudicate the validity of the

mortgage in the instant case if this case is permitted to go forward. As discussed in Defendant's initial brief, this adjudication is currently happening in another case before the Honorable Harold Willocks styled *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65. Accordingly, it is clear Manal Yousef has an interest relating to the subject of the action—her First Priority Mortgage on the Property which Plaintiff seeks to have invalidated—and, plainly, disposing of the action in her absence will, as a practical matter, impair or impede her ability to protect the interest. Therefore, even if the case is otherwise not subject to dismissal and allowed to proceed, Manal Yousef is required party and should be joined. *See Hoheb v. Muriel*, 753 F.2d 24, 26-7 (3d Cir. 1985) (holding mortgagees were necessary parties as their security interest in the property could be affected by the litigation); *see also Dickson v. Murphy*, 202 Fed. Appx. 578 (3d Cir. 2006) (unpublished) (holding that co-obligees on agreements at issue were both necessary, and indispensable, parties to the action).⁷ Moreover, Plaintiff's suggestion that even if Manal Yousef is a necessary party, and she cannot be joined, the case is not properly dismissed because: 1) Mr. Yusuf is obligated to use the power of attorney to defend her interest in the mortgage; 2) in a case where he, personally, is already a defendant, is wholly without logic or legal support.

III. CONCLUSION

All Plaintiff's remaining claims—the two alleged CICO violations, breach of fiduciary duty, usurpation of corporate opportunity and the tort of outrage/*prima facie* tort—are all barred by the statute of limitations and properly dismissed on that basis. Additionally, each

⁷ If joinder of a required party cannot be accomplished, this case is properly dismissed pursuant to Rule 19(b). When a court determines a person is a required party under Rule 19(a) and that joinder is not feasible, the court must then determine whether the non-joined party must be joined under Rule 19(b). *See HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1190 (3d Cir.1996). There are several factors to consider under Rule 19(b), including whether in whether “in equity and good conscience” the court should proceed without the non-joined party. Fed. R. Civ. P. 19(b). Accordingly, Mr. Yusuf respectfully reserves his right to submit further briefing addressing the 19(b) factors should the Court find Manal Yousef to be a required party and determines she cannot be joined.

and every remaining claim is also properly dismissed as insufficiently pled. Moreover, Plaintiff's Complaint is also 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 noted in the Motion to Dismiss, even upon dismissal of this case 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 regarding the validity of the mortgage are currently pending before, and properly left for resolution by Judge Willocks in *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: February 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2017, I served the foregoing
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