IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
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HISHAM HAMED. Individually, and derivatively on behalf of SIXTEEN PLUS CORPORATION,	)	**CIVIL CASE NO. SX-2016-CV-650**
Plaintiff,	)	**DERIVATIVE SHAREHOLDER SUIT ACTION FOR DAMAGES AND CICO RELIEF**
v.	)	
FATHI YUSUF, ISAM YOUSUF, JAMIL YOUSUF, and MANAL MOHAMMAD YOUSEF	)	**JURY TRIAL DEMANDED**
Defendants,	)	
v.	)	
SIXTEEN PLUS CORPORATION,	)	
Nominal Defendant.	)	

CONSOLIDATED CASES: Civil Case No. SX-2017-CV-342; Civil Case No. 2016-CV-065; Civil Case No. SX-2016-650

ISAM & JAMIL YOUSUF'S MOTION TO DISMISS SECOND AMENDED COMPLAINT & INCOPORATED MEMORANDUM

COME NOW Defendants **JAMIL YOUSUF** ("Jamil") and **ISAM YOUSUF** ("Isam"), by and through KELLERHALS FERGUSON KROBLIN PLLC, and pursuant to Rules 12(b)(2), 12(b)(5) and 12(b)(6) of the Virgin Islands Rules of Civil Procedure, hereby move to dismiss the Second Amended Complaint ("SAC") for three reasons. First, Isam and Jamil are not subject to personal jurisdiction because they have no connection whatsoever to the U.S. Virgin Islands ("USVI"). Second, the SAC should be dismissed pursuant to Rule 12(b)(5) because there was insufficient service of process. Third, the SAC fails to state a single claim upon which relief can be granted.[1]

[1] In contesting the jurisdiction of this Court, Isam and Jamil do not submit to the jurisdiction of the Court, do not waive their jurisdictional defense and defenses to service of process, and do not voluntarily appear in this action.

I. The Court Lacks Personal Jurisdiction Over Isam and Jamil

A court may exercise personal jurisdiction over a non-resident defendant if it comports with the long-arm statute of the forum and with the Due Process Clause of the United States Constitution. *Molloy v. Independence Blue Cross*, 56 V.I. 155, 173 (V.I. 2012) ("The Virgin Islands has a two-part test for a court to exercise personal jurisdiction. First, the plaintiff must show that there is a prima facie case for personal jurisdiction over the defendant under the Virgin Islands long arm statute, codified at title 5, § 4903 of the Virgin Islands Code. Second, the plaintiff must make a prima facia showing that the defendant's due process rights would not be violated by being haled into court in the Virgin Islands.") (internal citations omitted).

A. Burden of Proof

The plaintiff has the burden of establishing personal jurisdiction. *Molloy*, 56 V.I. at 172. Plaintiff must ultimately prove by a preponderance of the evidence that jurisdiction is proper. If the Court does not hold an evidentiary hearing, it is "plaintiff's burden to demonstrate the existence of every fact required to satisfy 'both the forum's long-arm statute and the Due Process Clause of the Constitution." *Molloy*, 56 V.I. at 173

Once a defendant has properly raised a jurisdictional defense, plaintiff cannot rely on allegations in the complaint alone but instead must establish that the Court has jurisdiction through affidavits and other competent evidence. *Molloy,* 56 V.I. at 173; *Time Share Vacation Club v. Atlantic Resorts, Ltd*, 735 F.2d at 66 n. 9; and *Unlimited Holdings, Inc.*, 49 V.I. at 1007. It is essential that the plaintiff proves the existence of a sufficient nexus between the defendant, the forum, and the litigation. "[A] defendant who alleges facts that would defeat the court's personal jurisdiction can invoke the court's discretion to order a pretrial evidentiary hearing on those facts." *Serras v. First Tennessee Bank Nat. Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989). If the trial court

holds an evidentiary hearing on the issue of personal jurisdiction, then the plaintiff must come forward with evidence to prove the court's jurisdiction by a preponderance of the evidence. *Molloy*, 56 V.I. at 172.

B. Personal Jurisdiction Is Inappropriate Under Virgin Islands Long-Arm Statute

The Virgin Islands long-arm statute provides in relevant part as follows:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
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> (1) transacting any business in this territory;
>
> (2) contracting to supply services or things in this territory;
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> (3) causing tortious injury by an act or omission in this territory;
>
> (4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory;
>
> (5) having an interest in, using, or possessing real property in this territory; or
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

5 V.I.C. § 4903.

Under the first prong of the long-arm statute analysis, the court determines: a) whether a defendant's contacts satisfies one of the categories under § 4903(a), and b) whether the plaintiffs claim arises from that contact as per § 4903(b). *Molloy*, 56 V.I. at 174.

The standard under § 4903(b) for determining whether a claim arises from one of the enumerated acts in § 4903(a) is a two-step process in which plaintiff must make a prima facie showing for each claim that: 1) one of defendant's contacts with the U.S. Virgin Islands is a but-for cause of that claim and 2) that the substantive obligations and privileges that accompany that contact with the U.S. Virgin Islands are closely related to that cause of action. *Id*. at 175 (sets forth "arising from" test as required in § 4903(b)).

Here, it is not alleged that Isam and Jamil engaged in any activity in the USVI or contracted to supply goods or services to the USVI. Accordingly, subsections (1)-(3) are clearly not applicable. Also, there is no allegation that Isam and Jamil have any interest in, own, use, lease, or possess the real property known as Diamond Keturah in St. Croix, U.S. Virgin Islands so subsection (5) is not applicable.

One loose allegation of the SAC states without specificity that Isam was involved in wiring money to the USVI from St. Martin on February 13th and September 4th of 1997. To the extent a wire transfer could be alleged to cause tortious injury in the USVI, which it cannot, Plaintiff would still be required under subsection (4) to establish facts showing that Isam and Jamil regularly do or solicit business, or engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered, in the USVI. This Plaintiff cannot do. For starters the SAC does not even allege facts to support such a finding. Moreover, Jamil Yousuf's Affidavit clearly establishes the unrebutted fact that Isam and Jamil live and work in St. Martin and have no business interests in the USVI. **Exhibit 1.**

The SAC makes no allegation that any of Isam's and Jamil's conduct, about which plaintiff complains, took place in the territory or had any territorial connection. This does not comply the long-arm statute requirements. Accordingly, for this reason the Court must dismiss the SAC for lack of personal jurisdiction over Isam and Jamil. [2]

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[2] As set forth below, the SAC fails to allege a CICO claim against Isam or Jamil, so 14 V.I.C. § 607(j) does not expand the Court's jurisdiction in any way. Also, Rule 4(f) provides the procedure for serving an individual located outside the Virgin Islands "[w]here 5 V.I.C. § 4903 or other applicable law provides for the assertion of personal jurisdiction over a person located outside the Virgin Islands . . . ." Moreover, where a statute conflicts with a rule of civil procedure, the conflict is "resolved in favor of the judiciary" with respect to procedural rules and in favor of the statute if the statute "creates substantive law." *Limetree Bay Terminals, LLC v. Liger*, 2024 VI 26, ¶ 13, 2024 WL 3634689, at *6 (V.I. 2024); *see also* 5B Fed. Proc., L. Ed. § 10:225; 4 V.I.C. § 32(f)(2); *Biofeedtrac, Inc. v. Kolinor Optical Enterprises & Consultants*, S.R.L., 817 F. Supp. 326, 331 (E.D.N.Y. 1993).

C. Alleged "Minimum Contacts" Do Not Meet Due Process Requirements

The Due Process Clause permits the exercise of *in personam* jurisdiction provided the defendant has sufficient contact with the forum jurisdiction such that maintaining the lawsuit does not offend "traditional notions of fair play" and "substantial justice." *International Shoe v. Washington,* 326 U.S. 310 (1945); *The Mandarin Group LLC,* 49 V.1. at 818 n. 4; *Four Winds Plaza Corp. v. Caribbean Fire and Associates, Inc.,* 48 V.I. at 906, 911; *Urgent,* 2004 U.S. Dist. LEXIS 12836 at *5; *Kressen,* 122 F.Supp.2d at 586. The Due Process Clause shields a person from the judgments of a forum with which he has established no substantial ties or relationship. Accordingly, to be subject to jurisdiction, a defendant's conduct in connection with the forum must be such that he may "reasonably anticipate" being haled into such forum's courts. *Worldwide Volkswagen Corp.,* 444 U.S. at 297. The court determines whether a defendant has had the "minimum contacts" with the forum necessary for the defendant to have reasonably anticipated being haled into court there. *Four Winds Plaza Corp.,* 48 V.I. at 906.

General jurisdiction is established when the out-of-state defendant's contacts with the forum are continuous and substantial or systematic. *Molloy, 56* V.I. at 182-83. No facts are alleged to support a finding of general jurisdiction in this case and Isam and Jamil deny having such contacts. **Exhibit 1** at ¶¶ 3-10.[3]

[3] Isam and Jamil do not own, lease, or rent real property known as Diamond Keturah in St. Croix, USVI. Isam and Jamil do not maintain any bank accounts, offices, places of business, or post office boxes in the USVI. Isam and Jamil do not have any employees in the USVI. Isam and Jamil have no registered agent upon whom process can be served in the USVI. Isam and Jamil do not transact any business or contract to supply services or things in or to the USVI. Moreover, Isam and Jamil do not solicit business, engage in any persistent course of conduct, or derive substantial revenue from goods used or consumed, or services rendered, in the USVI. *Id*. In other words, neither Isam nor Jamil transacted business in nor derived business revenue from the USVI. Isam and Jamil are not engaged in any activities in the USVI that might qualify them as acting in this territory or having continuous and systematic contact with the forum. Isam and Jamil are not at home in this territory. Isam and Jamil have had no substantial contacts with the

Specific jurisdiction is assessed pursuant to a three-part test: 1) defendant must have purposefully directed his activities toward the forum, 2) litigation must arise out of or relate to at least one of those activities, and 3) a court may consider whether the exercise of jurisdiction would comport with fair play and substantial justice. *Id.* at 183. The point of the specific jurisdiction test is to guarantee that the defendant has the requisite minimum contacts with a forum to receive "fair warning" that the defendant may be haled into court in that forum to answer for his actions in relation to those contacts. *Molloy,* 56 V.I. at 183-84. In other words, a finding of minimum contacts requires the demonstration of some act by which the defendant purposely availed himself of the privilege of conducting business within the forum State, thereby invoking the protection and benefits of its laws. *Four Winds Plaza Corp.*, 48 V.I. at 906; *Urgent,* 2004 U.S. Dist. LEXIS 12836 at *5.

Isam and Jamil do not have sufficient contacts with the U.S. Virgin Islands to support a finding of personal jurisdiction. *See* **Exhibit 1**. The SAC barely alleges, much less establishes, any facts to support a finding of actions by Jamil related to the USVI. As to Isam, the SAC loosely alleges in paragraph 23 that Isam transferred funds to Sixteen Plus's account in St. Croix in 1997. This allegation alone is not substantiated in any way and is insufficient evidence to establish minimum contacts. Even if it could be substantiated, the wiring of funds to a bank account in the USVI is not sufficient forum related conduct to subject someone to personal jurisdiction in the USVI, and a finding that it did would be against public policy as it would have a chilling effect on commerce.

The CICO and tort of outrage causes of action which are based upon the enforcement of an alleged "sham" mortgage do not relate to Isam's and Jamil's alleged activities in the U.S. Virgin

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USVI that would subject them to the general personal jurisdiction of the USVI courts.

Islands, activities which relate to an alleged decade's old money laundering scheme. Plaintiff's causes of action based on the allegedly wrongful enforcement of a note and mortgage simply do not arise out of purported forum-related activities by Jamil and Isam, and, therefore, the exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice.

All of Isam's and Jamil's alleged activities occurred in Sint Maarten. Isam and Jamil did not purposefully avail themselves of the benefits and protections of the USVI by any attenuate contacts. Isam and Jamil had no reason to expect to be haled into a Virgin Islands court. The allegation that Isam wired funds to St. Croix on February 13th and September 4th of 1997, even if true, is not a forum related activity by which the present causes of action arise. Indeed, the present alleged causes of action only arise from the claimed wrongful enforcement of the note and mortgage which occurred many years after the alleged wire transfers and was independent of those.

The USVI does not have a strong interest in adjudicating the actions of Sint Maarten residents occurring in Sint Maarten in the 1990s. The Court should grant Isam's and Jamil's motion to dismiss because specific personal jurisdiction over them cannot be established due to a lack of minimum contacts with the USVI. Accordingly, there being no sufficient contacts in connection with the case at hand between Isam and Jamil and the USVI, there is no basis for the exercise of personal jurisdiction in this action by the courts of the USVI.

II. Service of Process on Isam Insufficient

Plaintiff has the burden to prove service of process is proper once a defense of insufficient service is raised. *Flemming v. CULUSVJ, Inc.*, 2017 V.I. LEXIS 41, *2 (V.I. Super. Ct. March 7, 2017) (analyzing service of process under similarly worded Fed. R. Civ. P. 12(b)(5)). Pursuant to V.I. R. Civ. P. 12(b)(5) and V.I. R. Civ. P. 4(f), Defendant Isam challenges service of process because here process (1) was not personally served on Isam and (2) was not served at his residence

or usual place of abode.

A. Standard for Dismissal Pursuant to V.I. R. Civ. P. 12(b)(5)

Proper service is necessary to establish a Court's personal jurisdiction over a defendant. *Chiang v. U.S. Small Business Association,* 331 Fed. Appx. 113, 115 (3d Cir. May 4, 2009). Under Rules 12(b)(4) and 12(b)(5) of the V.I. Rules of Civil Procedure, service of process may be quashed or, and in certain cases, the action dismissed if the process or the service thereof is improper. Service of process under V.I. R. Civ. P. 12(b)(5) may be insufficient if the mode of delivery is invalid, if service is made on an improper person, or if delivery is either never accomplished or not accomplished within 120 days after commencement.

The burden of proof lies with the plaintiff to demonstrate sufficient service. When process or service is challenged, the plaintiff must make a prima facie showing that the court's personal jurisdiction is properly exercised. *Grand Entertainment Group, Ltd v. Star Media Sales, Inc.*, 988 F.2d 476 (3d Cir. 1993); *Friedberg v. Bare/001 Architect, Inc.*, 2014 U.S. List. LEXIS 178087, *4 (D.V.l. Dec. 30, 2014). The moving party, however, must set forth with specificity the alleged failure of process or service. *See 0'Brien v. R.J O'Brien & Associates, Inc.*, 998 F.2d 1394, 1400 (7th Cir. 1993) (holding that objections to the sufficiency of process must be specific and must identify how plaintiff failed to satisfy service). The courts may consider extrinsic materials produced by the parties (affidavits and other materials) when reaching determinations on sufficiency of service and process.

B. Service of Process was Insufficient under V.I. R. Civ. P. 4(t)

Isam submits that the Court should grant his Motion to Dismiss because of insufficient service of process due to Plaintiff's failure to comply with the procedural requirements set forth in V.I. R. Civ. P. 4(f). Rule 4(f) requires service be made under circumstances enumerated in 5

V.I.C. § 4911 under conditions wherein the service is reasonably calculated to give actual notice. Service pursuant to Rule 4(f) is necessarily grounded on defendant being personally served, or possibly by a defendant residing at a place where service of process is made, to be in compliance with the reasonably calculated to give actual notice requirement. V.I. R. Civ. P. 4(f); and 5 V.I.C. § 491 l(a). Service by leaving a copy of the summons and complaint at an address wherein defendant does not dwell or is not his usual place of abode is insufficient under Rule 4(f).

The requirements of Rule 4(f) were not complied with herein. A review of the record reveals service of process was not personally made upon Isam. The process server notations reveal process was served on an individual other than Isam, namely Jamil. *See* Plaintiff's Notice of Filing Proof of Service dated January 26, 2017 at Exhibit A. There is nothing in the record to indicate Jamil was authorized by appointment or by law to accept service. Nor can it be said that process was served at Isam's usual place of abode because a business/office is not his personal residence. **Exhibit 1** at ¶¶ 11, 12 and 13. Service upon Isam was improper, and the Motion to Dismiss under V.I. R. Civ. 12(b)(5) should be granted.

III. The SAC Fails to State Any Claims Against Isam and Jamil

To the extent the Second Amended Complaint is not dismissed for lack of personal jurisdiction or defective service, the SAC should be dismissed because it fails to state any claim against Isam or Jamil upon which relief can be granted. *See* V.I. R. Civ. P. 12(b).

A. Standard for Dismissal Pursuant to V.I. R. Civ. P. 12(b)(6)

The Virgin Islands is a notice pleading jurisdiction. *See Basic Services, Inc. v. Government of Virgin Islands,* 71 V.I. 652, 659 (V.I. 2019) (explaining that "[w]hen this Court adopted the Virgin Islands Rules of Civil Procedure effective March 31, 2017, the rules confirmed that the Virgin Islands is "a notice pleading jurisdiction" pursuant to V.I. R. CIV. P. 8(a), effectively

rejecting the heightened pleading standard applicable in the federal courts under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and its progeny in the federal courts.").

The pleading requirements are, however, more demanding where claims asserting fraud are involved. V.I. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). V.I. R. Civ. P. 9(b).

B. The SAC 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,* 19 V.I. 232, 235 (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.1. 784, n.2 (V.I. 2013); *Pemberton Sales & Serv. v. Banco Popular de P.R.,* 877 F.Supp. 961, 970 (D.V.l. 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 plaintiff's CICO claims accrued. *Pemberton,* 877 F.Supp. 961 at 970.

Importantly, this is a CICO <u>conspiracy</u> claim, a claim for a plan to embezzle, not a claim for actually embezzling-money.[4] 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 its Corporate Resolution to borrow four and a half million dollars from Manal Yousef to purchase the Property, and executed

[4] To that end, there are no allegations in the SAC that Isam and Jamil-or their alleged co-conspirator, defendant Fathi Yusuf-have received any funds as a result of the "sham mortgage."

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.

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, which they cannot in light of Waleed Hamed's direct involvement in the transaction, the SAC plainly alleges the mid-2000s as the time when defendant Fathi 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 of $30 million because of Fathi Yusuf's insistence the sham mortgage be paid upon the sale of the property." SAC at ¶ 44; *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-a-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 for RICO claims begins to run once a plaintiff discovers his injury). Accordingly, Plaintiff's CICO claim is properly dismissed on this basis.

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

The SAC alleges that by conspiring to embezzle money from Sixteen Plus through obtaining a "sham mortgage" on its property, Defendants violated 14 V.I.C. § 605(b) and (c). The SAC further alleges "[a]ll 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* SAC at ¶ 85(a). This is legally deficient because the Statute of Frauds would bar any such allegation absent a writing to the contrary conveying an interest in the land. *See* 28 V.I.C. § 241(a) (interest in real property shall not be created unless evidenced in writing with formalities required by law). Rather, the SAC's allegations merely establish that Sixteen Plus has an interest in the Property.

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

The essential elements of a 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, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997)).[5]

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)).

[5] "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.*, 45 V.I. 495, 513, 308 F. Supp. 2d 545, 562 (D.V.1. 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).

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 CICO enterprise through the commission of two or more predicate acts. *See Smith v. Jones, Gregg, Creehan & Gerace, LLP*, 2008 U.S. Dist. LEXIS 98530, *23, 2008 WL 5129916, at *7 (W.D. Pa. Dec. 5, 2008). Bare allegations of conspiracy described in general terms may be dismissed. *Id*.

Plaintiff 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, the SAC merely alleges, through generic language, that a CICO conspiracy existed. Accordingly, the SAC is properly dismissed on this basis as well.

E. SAC Fails to Properly Plead the Existence of a Criminal Enterprise

The CICO conspiracy to embezzle money from Sixteen Plus is also deficient because it fails to allege the requisite criminal "enterprise." 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. § 604(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 as follows:

> 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) demands 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.

556 U.S. at 946, 950 (emphasis added) (internal citation omitted).

Unlike a well-pled CICO conspiracy claim, the SAC fails to provide any facts establishing the existence of a criminal enterprise between Defendants. Rather, in a vastly generous reading, the SAC alleges that Fathi Yusuf and Isam Yousuf agreed to create a "sham mortgage," in 1997 (SAC at § 24) **which was signed by, and recorded on the property owned by Sixteen Plus, by Waleed Hamed**. Notably, there are no specific allegations against Jamil Yousuf.

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. There, the court 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 stark contrast, the SAC 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 SAC, it fails to allege an enterprise "separate and apart from the pattern of activity in which it engages" and where its "various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. At best, the SAC alleges "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 the SAC alleges, 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 1363. The SAC relies on unrelated alleged transfers of cash to support a factual basis for the "sham" mortgage but even if the allegations are true the transfers of cash and the mortgage were all part of another conspiracy in which the Plaintiff participated. The attempt to enforce the mortgage was a singular separate act not part of any other alleged acts. Accordingly, there are no alleged facts supporting the claimed conspiracy here.

F. The SAC 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, 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)(1). "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).

The U.S. Supreme Court in *HJ Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229 (1989), 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*; *but see People v. McKenzie*, 66 V.I. 3, 7-9 (V.I. Super. Ct. Jan. 30, 2017) (analyzing continuity under CICO and concluding a CICO pattern does not require continuity).

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 . . . '(t)he 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 Tai 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"); *Ritter v. Klisivitch*, 2008 U.S. Dist. LEXIS 58818, *32 (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)(1).

In the case at hand, Plaintiff has wholly failed to allege a pattern of criminal activity. Rather, Plaintiff has alleged facts which show that a pattern of conduct was not present. The vague 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 lack specificity. *See e.g.*, SAC at ¶ 60. Plaintiff has not alleged, other than by generic recitations, that Defendants Isam and Jamil 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, Plaintiff has alleged that defendant Fathi 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, however, "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 has also made allegations that, in 2016, defendant Fathi Yusuf engaged in "perjury." *See* SAC at ¶¶ 66-67 and 76. As discussed above, however, the alleged conspiracy to embezzle was complete upon getting the so called "sham mortgage" in 1997. Moreover, Plaintiff's claim that defendant Fathi 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 acts, years after the alleged "sham" mortgage was obtained and, thus, wholly insufficient to properly plead the pattern of criminal activity necessary under CICO. *See HJ Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 239 (holding that a pattern is not formed by "sporadic activity," and a person cannot be subjected to RICO penalties simply for committing two "isolated criminal offenses."). Accordingly, the SAC should also be dismissed for failing to properly plead the necessary pattern of criminal activity.

G. 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 V.I. LEXIS 151, *9 fn.13, 2016 WL 5475994, at *3 fn. 23 (V.1. 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"); *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 on behalf of Sixteen Plus. A corporation does not have emotions, thus, it cannot experience emotional distress. "Multiple federal courts, each applying state law, have found that a corporate plaintiff cannot suffer emotional distress because 'a corporation lacks the cognizant ability to experience emotions.'" *HM Hotel Properties v. Peerless Indem. Ins. Co.*, 874 F.Supp.2d 850, 854 (D. Ariz. 2012) (quoting *FDIC v. Hulsey,* 22 F.3d 1472, 1489 (10th Cir.1994) (applying Oklahoma law) and citing cases). Moreover, the SAC does not contain any allegations that plaintiff Hisham Hamed suffered emotional distress injuries. Accordingly, Plaintiff's claim for the tort of outrage is properly dismissed as well.

IV. CONCLUSION

Dismissal pursuant to V.I. R. Civ. P. 12(b)(2) is appropriate because there is no basis under the long-arm statute for jurisdiction over Isam and Jamil. Moreover, exercising jurisdiction over Isam and Jamil does not comport with traditional notices of fair play and substantial justice because Isam and Jamil do not have sufficient contacts with the USVI. The SAC should also be dismissed against Isam for insufficient service of process. Lastly, the SAC fails to properly plead a CICO conspiracy or facts supporting the tort of outrage.

WHEREFORE, Isam and Jamil respectfully requests that this Court dismiss the SAC and award Isam Yousuf and Jamil Yousuf attorneys' fees and costs incurred in connection with defending this case and any other further relief as the Court deems just and proper.

Respectfully,

Dated: September 16, 2024

/s/ Christopher Allen Kroblin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2024, a true and exact copy of the foregoing **Motion to Dismiss** was electronically filed with the Clerk of the Court using the VIJEFS system, which will send a notification of such filing to the following:

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Copy via email to:

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Alice Kuo, Esq. */s/ Christopher Allen Kroblin*

EXHIBIT 1

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

HISHAM HAMED, derivatively, on behalf of **SIXTEEN PLUS CORPORATION**,	
Plaintiff,	Case No.: 2016-SX-CV-650
vs.	DERIVATIVE SHAREHOLDER SUIT, ACTION FOR DAMAGES, CICO RELIEF, EQUITABLE RELIEF AND INJUCTION
FATHI YUSUF, ISAM YOUSUF and **JAMIL YOUSEF**,	
Defendants,	**JURY TRIAL DEMANDED**
and	
SIXTEEN PLUS CORPORATION,	
a nominal defendant.	

AFFIDAVIT OF JAMIL YOUSUF

I, **JAMIL YOUSUF**, being first duly sworn, deposes and states as follows:

1. I am an adult resident of Sint Maarten, and a party to this matter. As the result thereof, I am familiar with the pleadings and facts concerning this matter, and make this Affidavit in this capacity. I am of legal age and am legally competent.

2. Isam Yousuf ("Isam") is my father, is an adult resident of Sint Maarten, and is a co-defendant in this case.

3. Isam and I are not licensed to and do not do business, do not solicit business, and do not have any offices or places of business in the U.S. Virgin Islands.

4. Neither Isam nor I contract to supply services or things in the U.S. Virgin Islands.

5. Isam and I have not caused tortuous injury by an act or omission in the U.S. Virgin Islands.

6. Isam and I have not caused tortious injury in the U.S. Virgin Islands by an act or omission outside the U.S. Virgin Islands and do not participate in any business activity, do not

solicit business, do not engage in a persistent course of conduct in the U.S. Virgin Islands, and do not receive substantial revenue from any such activity or any goods or services in the U.S. Virgin Islands.

7. Neither Isam nor I have an interest in, own, use, or lease real property known as Diamond Keturah, located on St. Croix, U.S. Virgin Islands, referenced in this matter.

8. Neither Isam nor I write insurance policies in the U.S. Virgin Islands.

9. I have no agents, offices, post office boxes, and bank accounts in the U.S. Virgin Islands. Isam does not have agents or offices, and, upon information and belief, does not maintain active post office boxes or bank accounts in the U.S. Virgin Islands.

10. Neither Isam nor I have a registered agent upon whom process can be served in the U.S. Virgin Islands.

11. Neither Isam nor I currently, and did not in 2017, reside at 25 Gold Finch Road, Pointe Blanche, Sint Maarten.

12. Travel Inn Hotel, Airport Road #15, Simpson Bay, Sint Maarten is not my residence, place of abode, or dwelling nor is it Isam's.

13. I am not authorized by appointment or by law to receive service of behalf of Isam.

FURTHER AFFIANT SAYETH NOT.

DATED: June 5th, 2017

JAMIL YOUSUF

SUBSCRIBED and **SWORN TO** before me this fifth day of June, 2017.

a civil law notary

[NOTARY PUBLIC]

Commission Expires: is for life.

Commission No.: N/A

Seen for legalization of the signature **JAMIL ISAM YOUSUF**, who identified himself with a passport, issued by the United States of America, under number 499229108, by me, Marlène Françoise Mingo, LL.M., a civil law notary, established on Sint Maarten, on this 5th day of June, 2017. This declaration for the legalization of the signature, by the civil law notary, contains no opinion as to the contents of this document.