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

MANAL MOHAMMAD YOUSEF,	)	
	)	**CASE NO. SX-2017-CV-342**
Plaintiff and Counter-Defendant,	)	
	)	**ACTION FOR DEBT AND FORECLOSURE; COUNTERCLAIM FOR DAMAGES; THIRD PARTY ACTION**
v.	)	
	)	
SIXTEEN PLUS CORPORATION,	)	
	)	
Defendant, Counter-Plaintiff, and Third-Party Plaintiff	)	**JURY TRIAL DEMANDED**
	)	
v.	)	
	)	
FATHI YUSUF,	)	
	)	
Third-Party Defendant.	)	
	)	

CONSOLIDATED CASES: Civil Case No. SX-2016-CV-650; Civil Case No. SX-2016-CV-00065; Civil Case No. SX-2017-CV-342

OPPOSITION TO SIXTEEN PLUS'S CROSS-MOTION FOR SUMMARY JUDGMENT & REPLY

COMES NOW Plaintiff **MANAL MOHAMMAD YOUSEF**, by and through KELLERHALS FERGUSON KROBLIN PLLC, and hereby opposes Sixteen Plus Corporation's Cross-Motion for Summary Judgment and simultaneously replies to Sixteen Plus's Opposition to Manal's Renewed Motion for Summary Judgment as follows:

I. Manal is Entitled to Judgment in Her Favor on Her Foreclosure and Debt Claims

Sixteen Plus's Opposition admits essential elements of a foreclosure claim: that Sixteen Plus executed a Promissory Note and First Priority Mortgage, both dated September 15, 1997 (hereinafter, "Note" and "Mortgage"), and that Sixteen Plus is now in default because it failed to make payments thereunder. For its defense, Sixteen Plus seeks to bring in evidence outside the four corners of the Note & Mortgage by alleging the Note & Mortgage were not meant to be

enforceable. Such extrinsic evidence should not be considered under the parol evidence rule or estoppel principles. Additionally, Sixteen Plus's reliance on expert opinions to rebut and support factual assertions is impermissible. Accordingly, summary judgment should be entered in favor of Manal and against Sixteen Plus on Manal's debt and foreclosure claims.

II. Summary Judgment Must be Entered on Manal's Debt and Foreclosure Claims

Manal is entitled to judgment in her favor on her debt and foreclosure claims because she has established each of the required elements.[1]

First, Sixteen Plus admits it executed the Note and Mortgage. *See* Sixteen Plus's Cross-Motion for Summary Judgment at 5, ¶ 25 ("On September 15, 1997, Sixteen Plus executed a $4.5 million note as well as a mortgage for the Diamond Keturah Property in favor of Manal Yousef.") and 14-15 (admitting Promissory Note and Mortgage were signed). Accordingly, Manal is entitled to judgment in her favor as a matter of law on the first element: the debtor executed a promissory note and mortgage.

Second, Sixteen Plus also admits that it never made any payments to Manal on the Note and that it failed to make interest only payments on or after September 15, 2001. *See* Sixteen Plus's Cross-MSJ at 16-17. Given its lack of payment, Sixteen Plus is in default under the Note and Mortgage. There is no dispute that Sixteen Plus is in default under the terms of the Note and Mortgage. Accordingly, Manal is entitled to judgment in her favor on the second element: that the debtor is in default under the terms of the note and mortgage.

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[1] To prove a debt and foreclosure cause of action, "the plaintiff must establish three (3) elements: 1) debtor executed a promissory note and mortgage, 2) debtor is in default under the terms of the note and mortgage, and 3) lender is authorized to foreclose on the property mortgaged as security for the note." *Brouillard v. DLJ Mortgage Capital, Inc*., 63 V.I. 788, 793 (V.I. 2015) (citing 28 V.I.C. § 531(a)); *see also Carrillo v. Citimortgage, Inc*., 63 V.I. 670, 674 (V.I. 2015); *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 625 (V.I. 2017) ("If the language clearly conveys the parties' lawful intentions, then . . . the court is obligated to enforce the agreement according to its terms.") (quoting 11 WILLISTON ON CONTRACTS § 32:2).

Third, there is no dispute that the terms of the Mortgage permit Manal to foreclose on the Diamond Keturah property. The Mortgage provides that "[i]f 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." *See* Manal's Renewed Motion for Summary Judgment at Statement of Fact ("SOF") 8; Sixteen Plus's Response to Manal's SOF 8 at page 15-16 of Sixteen Plus's Opposition & Cross-MSJ (admitting the Mortgage contains the terms referenced in Manal's SOF 8). Accordingly, Manal is entitled to judgment in her favor as a matter of law on the third element: the lender is authorized to foreclose on the property mortgaged as security for the note.

III. Expert Witness Evidence Cannot be Used to Establish Facts in Dispute & Testimony Relied on is Inadmissible

Sixteen Plus's Cross-Motion for Summary Judgment relies on expert reports prepared by two attorneys: Nathan Mirocha and Lawrence Schoenbach. These "experts" merely regurgitate the facts from discovery in this case (and other cases) without any personal knowledge. Their testimony is, therefore, not sufficient to rebut a factual assertion by Plaintiff. Moreover, neither report meets the standard for admissibility of expert witness evidence. Accordingly, both reports should be disregarded for purposes of this motion practice.[2]

The *Daubert* standard governs the admissibility of expert testimony. *Arvidson v. Buchar*, 72 V.I. 50, 75–76 (V.I. Super. 2019) (citing *Antilles School, Inc. v. Lembach*, 64 V.I. 400 (V.I. 2016)). Under *Daubert*:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

[2] This brief is not a motion to exclude expert testimony but merely to point out that Sixteen Plus cannot rely on such testimony to rebut or establish facts for purposes of summary judgment.

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Id. at 76 (citing V.I. R. EVID. 702). Rule 702 of the Virgin Islands Rules of Evidence is not limited to scientific expert testimony; it applies "to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Id*. at 77 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999)).

The first factor, whether the opinion will help the trier of fact, is also known as "fit." *Id*. at 82 ("Whether expert testimony 'is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute' has been described as 'fit.'") (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 591 (1993)).

Under the reliability factor, the Court is not obligated "to admit opinion evidence that is connected to existing data only by *ipse dixit* of the expert." *Id.* at 80-81 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997)). Additionally, under the relevancy standard, "[e]xpert testimony as to legal conclusions that determine the outcome of the case are inadmissible." *Id.* at 78 (quoting *Muniz v. Rexnord Corp*., Case No. 04 C 2405, 2006 WL 5153078, at *2 (N.D. Ill. Nov. 2, 2006)).

Sixteen Plus's "experts" intend to testify, based solely on personal experience in handling real estate matters and in litigating criminal cases respectively, and upon their review of witness testimony and documents produced in discovery in this and other cases. By labeling these witnesses as "experts," Sixteen Plus is attempting to obtain fact testimony from a witness who has

no personal knowledge, and by use of the "expert" label they attempt to unfairly bolster the witnesses' credibility. This is a plainly inappropriate expert testimony. Indeed, it is black-letter law that expert testimony on contract law or on the legal effect of an agreement is inadmissible. *See Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 508-510 (2d Cir. 1977); *TCP Indus., Inc. v. Uniroyal, Inc*., 661 F.2d 542, 549-550 (6th Cir. 1981); *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731, 737 (9th Cir. 1980).

In *Marx* the court warned against the possibility of allowing experts to usurp the function of the judge:

> It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge. As Professor Wigmore has observed, expert testimony on law is excluded because "the tribunal does not need the witness' judgment. . . . (T)he judge (or the jury as instructed by the judge) can determine equally well. . . ." The special legal knowledge of the judge makes the witness' testimony superfluous. VII Wigmore on Evidence s 1952, at 81. See 3 Corbin on Contracts s 554, p. 227 (1960). ("Construction (of a contract) is always a matter of law for the Court"). Accord, Loeb v. Hammond, 407 F.2d 779 (7th Cir. 1969) (testimony of attorney on legal significance of documents was properly excluded). "The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony." Id. at 781.

550 F.2d at 509–10. The expert in *Marx* based his testimony "merely on his examination of documents and correspondence, which were equally before the judge and jury." *Id*. at 510. Accordingly, the court concluded his testimony was superfluous. *Id*. (citing VII Wigmore on Evidence, § 1918). "As Professor McCormick notes, such testimony 'amounts to no more than an expression of the (witness') general belief as to how the case should be decided.'" *Id*. (quoting McCormick on Evidence, § 12 at 26-27). The *Marx* court concluded that the "admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to *decide the case.*" *Id.* (citing McCormick on Evidence § 12, at 27).

A. Attorney Schoenbach's Expert Opinions are Not Counter Facts or Admissible

Sixteen Plus's Cross-Motion for Summary Judgment heavily relies on expert opinion provided by Attorney Lawrence Schoenbach in the form of two letters: the 2016 letter and the 2024 letter. *See* Exhibits 4 and 5 to Sixteen Plus's Cross-MSJ (letter from Attorney Schoenbach dated September 19, 2016 and letter from Attorney Schoenbach dated December 14, 2024).

The 2016 letter states that Attorney Schoenbach has been asked to determine two issues: (1) "whether it is possible for the books and records of a business entity to be re-constructed after a business entity (here a partnership) has been deeply involved in a money laundering scheme such as the one presented here" and (2) "to review a series of documents related to the instant litigation [referring not to this litigation, but to *Mohammad Hamed v. Fathi Yusuf and United Corporation*, Civil No. SX-2012-CV-370], as well as the related criminal indictment, and to formulate an opinion based upon them."

The 2016 letter does not satisfy the "fit" and reliability factors under *Daubert*. Attorney Schoenbach's letter will not help the trier of fact understand the evidence or determine a fact in issue. Indeed, it is based in part on evidence from another case that will not even be presented in this case. Additionally, Attorney Schoenbach's 2016 letter is not based on any method, reliable or otherwise. In sum, as reflected by the language of the 2016 letter, Attorney Schoenbach simply reviewed documents, refers to and quotes some of the documents, and concludes that "it cannot be known, with any degree of legal or factual certainty, where or to whom the money went." Exhibit 4 to Sixteen Plus's Cross-MSJ at 10.

Where, as here, an expert opinion consists of "regurgitating" information that appears on the face of documents and the expert does not use any method at all to reach his conclusions, such testimony is inadmissible under *Daubert*. *See Arvidson*, 72 V.I. at 88–89 ("At rock bottom,

DiRuzzo's methodology consists of regurgitating percentages printed on tax forms. Based on this information, the Court is forced to conclude that the Arvidsons are asking the Court to admit DiRuzzo's expert opinion testimony addressing the Arvidsons' ownership of V.I. Chiropractic as a going concern based on his "*ipse dixit*." The Court is not empowered to do so—even under the abuse of discretion standard.").

Attorney Schoenbach's 2024 letter says it addresses six questions:

1. How the purchase of the Diamond Keturah properties could be fraudulently accomplished using tainted funds that were derived from a money laundering scheme?

2. How was the Indictment against United *et. al*. issued and did that Indictment cover any activity regarding the Diamond Keturah property on St. Croix?

3. Did federal prosecutors take any action against the property itself due to the Indictment?

4. Whether the fact that the Diamond Keturah property had a first priority mortgage recorded against it in favor of Manal Yousef deter the U.S. Government from seizing this asset?

5. What evidence have you identified as an expert in criminal law that was known to the federal prosecutors that would have supported a finding that the purchase of the Diamond Keturah properties was fraudulently accomplished using tainted funds that were derived from a money laundering scheme; and

6. What evidence have you identified as an expert in criminal law that was not known to the federal prosecutors that further supports a finding that the purchase of the Diamond Keturah properties was fraudulently accomplished using tainted funds that were derived from a money laundering scheme?

Exhibit 5 to Sixteen Plus's Cross-MSJ at 2-3.

Like the 2016 opinion letter, the 2024 letter does not identify any method Attorney Schoenbach uses to arrive at his conclusions. The 2024 letter is built on Attorney Schoenbach reading documents, such as deposition transcripts and an indictment in a criminal matter in which Manal is not a party, and giving his view on the import of those documents. Therefore, the 2024 letter is not admissible because does not satisfy *Daubert*'s reliability factor. There is no method for the Court to evaluate. Additionally, the 2024 report is not helpful to the trier of fact.

The 2024 letter makes legal conclusions that determine the outcome of the case. For example, the letter states "there is a plethora of evidence that is completely consistent with the money laundering charges surrounding the funds used to purchase the Diamond Keturah property, as alleged in the 2003 indictment." Exhibit 5 to Sixteen Plus's Cross-MSJ at 8-9. The letter further states: "In my expert opinion, those new facts show that the $4.5 million transfer of funds from Isam Yousuf to Sixteen Plus was, in fact, the proceeds of the charged criminal tax and money laundering conspiracy and not, as claimed by defendants, a legitimate purchase of real estate made with untainted money." *Id*. at 15. The 2024 letter also labels the Note and Mortgage a "sham" and a "fraud." *Id*. at 19 & 20; *see also id*. at 28 (stating that additional evidence Schoenbach reviewed "further supports the conclusion that the purchase of the Diamond Keturah properties was fraudulently accomplished through a money laundering scheme . . . .).[3]

Weighing testimony and finding facts is the province of the trier of fact, not an expert witness. By submitting Attorney Schoenbach's opinion letters as expert testimony, Sixteen Plus

[3] Attorney Schoenbach's legal opinions also lack foundation. For instance, he concludes that a Power of Attorney ("POA") given to Fathi Yusuf by Manal is evidence that the Note and Mortgage were a sham and that the POA gave "full and unfettered authority to do anything with the property – and to do it with absolute impunity." Sixteen Plus Cross-MSJ on page 8 at Statement of Fact 43 (quoting Attorney Schoenbach's 2024 letter). Attorney Schoenbach's view, however, ignores the fact that Fathi is Manal's uncle and fails to consider that "[a]bsent specific authority to do otherwise, an attorney in fact may act only for the benefit of the principal." *Martin v. Sealey,* Civ. No. 603/83, 1985 WL 1177602, at *2 (Terr. V.I. Feb. 7, 1985) (citing RESTATEMENT (SECOND) OF AGENCY § 39); *see also In re Chaput*, Case No. 14-10003 (MFW), Adv. P. No. 14-1001 (MFW), 2015 WL 1827496, at *3 (D.V.I. Apr. 17, 2015) (citing cases finding that power of attorney creates fiduciary relationship). "Furthermore, the fact that an agent is a fiduciary with respect to matters within the scope of his agency may not be ignored." *Id*. (citing RESTATEMENT (SECOND) OF AGENCY § 13). "Among the agent's fiduciary duties to the principal is . . . the duty not to act as, or on account of, an adverse party without the principal's consent, . . . and the duty to deal fairly with the principal in all transactions between them." *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 13 at comment a). Even if absolved from liability for his actions, Fathi would have lacked the legal power to act as suggested on page 30 of the Opposition.

is attempting to bolster its position by showing that a criminal defense attorney agrees with their version of the facts. Legal conclusions are also not admissible as expert testimony and it is the province of this Court to determine the law, not some so called "expert." The Court cannot "admit opinion evidence that is connected to existing data only by *ipse dixit* of the expert." *Arvidson*, 72 V.I. at 80-81 (quoting *Joiner*, 522 U.S. at 147).

Attorney Schoenbach's opinions are inadmissible under *Daubert* and regardless cannot be used to establish or rebut facts for purposes of summary judgment.

B. Attorney Mirocha's Opinions are also Not Counter Facts or Admissible

The expert opinion of Attorney Mirocha attached to Sixteen Plus's Cross-Motion for Summary Judgment is also not a counter statement of fact or admissible under *Daubert*. *See* Exhibit 3 to Sixteen Plus's Cross-MSJ.

Like Attorney Schoenbach's opinion letters, Attorney Mirocha's opinion letter does not employ any method in reaching its conclusions. Rather, the opinions are based on Attorney Mirocha reading documents and information relating to the title for the Diamond Keturah property. The opinion letter presents legal conclusions based on Attorney Mirocha's review of documents and related title information. There is no method for the Court to evaluate and Attorney Mirocha's expert opinion is simply not helpful to the trier of fact.

Additionally, the legal conclusions offered in Attorney Mirocha's opinion letter are far afield of the instant foreclosure action. Whether Sixteen Plus had any equitable or recorded interest in the Diamond Keturah property on the date of the Note and Mortgage is not relevant to any element of a debt claim or a foreclosure claim. Nor are Attorney Mirocha's opinions as to the procedures and steps taken in an arms-length transaction relevant to this case as this transaction was between related parties (Fathi Yusuf being Manal's uncle). Therefore, because Attorney

Mirocha's opinion letter does not satisfy *Daubert*'s "fit" factor, it is not admissible and regardless his opinions do not constitute facts to support the Opposition's counterstatement of facts or rebuttal.

IV. Extrinsic Evidence Must be Excluded

While there is no dispute as to the elements required for foreclosure, Sixteen Plus argues that the Note is not enforceable, and was never intended to be enforced, based on extrinsic evidence. That position is contrary to the unambiguous language of the Note and Mortgage. More importantly, while Sixteen Plus argues others never intended that the Note and Mortgage would be enforced there is no evidence to support a finding that Manal did not intend for the Note and Mortgage to be enforced. A meeting of the minds as to a contrary intent must necessarily be the minds of the parties to the contract at issue and not as to one side or third parties. Accordingly, Manal is entitled to judgment in her favor as a matter of law on her debt and foreclosure claims.

A. The Note is Clear and Unambiguous

As a preliminary matter, the Note itself states that it is enforceable. *See* page 1 of Exhibit 3 to Manal's Renewed MSJ (providing "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.") Moreover, "[w]here the language of a contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of its terms." *Phillip v. Marsh–Monsanto*, 66 V.I. 612, 625, 2017 WL 2334248, at *6 (V.I. 2017). "When a party to paper appears to be liable from the paper itself, parol evidence is not admissible to show an agreement that the party would never be held liable for payment of the paper." 5A ANDERSON U.C.C. § 3-101:65 (3d. ed.) (emphasis added). Accordingly, an alleged contemporaneous oral agreement or understanding that is at odds with a signed, written agreement is barred by the parol evidence rule.

"Evidence that at the time the maker signed the note it was distinctly understood that the maker would not have to pay the note is not permitted to compete with the written contents of the note which fails to contain the alleged stipulations." *Weintraub v. Cobb Bank & Trust Co*., 288 S.E.2d 553, 554 (Ga. 1982); *accord Smith v. Allison*, 349 S.E.2d 623, 624 (N.C. App. 1986) ("The promise to pay set forth in the notes could not be contradicted or destroyed by parol evidence that the maker thereof would not be called upon to pay in accordance with the terms of the notes."); *see also Blake v. Coates*, 294 So.2d 433, 434–35 (Ala. 1974) (addressing claim that there was an understanding that party would not be held personally liable on the notes and stating "If that be a defense to his liability on the notes, then his signing would be entirely pointless. It remains though that he did sign the notes. Such being the case, he is bound by the result of his act."); *Bank of Suffolk County v Kite*, 49 N.Y.2d 827, 828 (N.Y. Mar. 18, 1980) ("Defendants' averments that there existed an oral understanding that they would not be liable on the note did not therefore stand in the way of plaintiff's motion for summary judgment.") (internal citations omitted).

B. Extrinsic Evidence

In a footnote in *Phillip v. Marsh–Monsanto*, the Supreme Court of the Virgin Islands explicitly did not opine on when "extrinsic evidence may be admissible to demonstrate an intent different from that expressed in the contract." 66 V.I. at 626 n.7 (stating "[b]ecause Marsh–Monsanto did not challenge the validity of the second contract, we decline to address circumstances in which extrinsic evidence may be admissible to demonstrate an intent different from that expressed in the contract.").

After declining to address when extrinsic evidence may be admissible to demonstrate an intent different than what is provided in the contract, *Phillip* "note[s] that numerous courts recognize that a merger clause does not bar the introduction of extrinsic evidence amounting to

fraud, among other circumstances." *Id*. (citing cases). The cases cited in the *Phillip* footnote include one that says "extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality." *Id*. (citing *Tangren Family Trust v. Tangren*, 182 P.3d 326, 330–31 (Utah 2008)).

C. No Evidence That Note was a Sham

In the instant matter, Sixteen Plus alleges the Note was a sham agreement.[4] A sham contract, however, is one where neither party intended the agreement to be enforceable. Here, however, there is no competent evidence that Manal understood the Note to be anything other than enforceable. Even if Sixteen Plus believed the Note was not enforceable, more is needed to demonstrate a sham agreement, namely: evidence that *both* parties, not just one, believed they were entering into a sham agreement. Accordingly, because there is no evidence that Manal believed the Note was not enforceable, Sixteen Plus has failed to show the Note was a sham agreement.

A sham contract is a contract "not intended to create any legal relations between the parties, and is made for an ulterior purpose not disclosed in nor deducible from the terms of the agreement." *Sunshine Shopping Center, Inc. v. LG Electronics Panama, S.A*., Civil Action No. 2015-0041, 2018 WL 4558982, at *7 (D.V.I. Sept. 9, 2018) (quoting 71 A.L.R. 2d 382). "[T]he Restatement (Second) of Contracts ("the Restatement") discusses sham contracts in the context of the

[4] Sixteen Plus's sham argument goes to the enforceability of the Note, not the Mortgage. *See Celestin v. LLP Mortg. Ltd*., S. Ct. No. 2007-014, 2007 WL 5060414, at *1 (V.I. Nov. 9, 2007) (explaining that "[a] mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation."). "Consideration is not necessary to the enforceability of a mortgage." *Id*. (citing RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §§ 1.1 & 1.2(a) (1997)); *see also* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.2 (1997) (explaining that because "a mortgage is merely security, it is generally enforceable only to the extent that the underlying obligation is enforceable.").

requirement of mutual assent to the formation of a contract, and provides: "Where all the parties to what would otherwise be a bargain manifest an intention that the transaction is not to be taken seriously, there is no such manifestation of assent to the exchange as is required" for formation of a contract." *Id*. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 18, comment c).

In the instant matter, Sixteen Plus suggests the Note was a sham agreement that was not intended to be enforced. Even if Sixteen Plus believed the Note to be a sham, there is no evidence that Manal understood the Note to be anything other than a binding legal agreement. Any representation as to the unenforceability of the Note allegedly made by Fathi Yusuf is not relevant to Manal's belief or understanding.

As set forth in Manal's SOF 20, the Note was an investment her brother made on her behalf. *See also* CSOF 12. For a sham agreement, both parties to the agreement would have to know the Note was not intended to be enforceable. RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) comment c. ("If one party is deceived and has no reason to know of the joke the law takes the joker at his word."). Here, however, there is no competent evidence that Manal intended the Note to be a sham.

Additionally, the Note provides that Sixteen Plus will make an interest-only payment to Manal on the anniversary of the Note for five years. Exhibit 3 to Manal's Renewed MSJ at 1. Sixteen Plus made three of the five agreed on interest-only payments to Manal. *See* Renewed MSJ at SOF 12. Sixteen Plus's conduct, in making those three payments to Manal, demonstrates that Sixteen Plus understood and intended the Note to be a binding agreement. Accordingly, Sixteen Plus does not have sufficient evidence to support its argument that the Note was a sham.

D. Sixteen Plus is Estopped from Alleging the Note was Sham

Even if Sixteen Plus had evidence to support its claim, which it does not, it would be estopped from arguing the Note was a sham. For example, a New York court notes "public policy will estop a party from using the 'sham exception' to the parol evidence rule if he knowingly participates in a scheme to deceive tax or bank regulatory authorities." *W. L. Christopher v Seamen's Bank For Savings*, No. 56360, 144 A.D.2d 809, 811 (N.Y.A.D. 3 Dept., Nov. 10, 1988); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) comment c. ("where the parties to a sham transaction intend to deceive third parties, considerations of public policy may sometimes preclude a defense of sham.")

Sixteen Plus affirmatively states that it, through its officers, laundered money and used the Note and Mortgage to help cover up their tracks. Accordingly, it should be estopped from now arguing that the Note was a sham because as a matter of public policy Sixteen Plus should not get to avoid the consequences of entering an agreement it intended to use solely as a cover to aid a tax evasion scheme. Allowing it to do so would permit Sixteen Plus to use the Territory's legal system and the Recorder of Deeds to facilitate the commission of a crime and avoid the consequences of those actions.

V. There is No Evidence Manal Engaged in Fraud

Sixteen Plus's Opposition refers to fraud in relation to an exception to the parol evidence rule. *See* Sixteen Plus's Cross-MSJ and Opposition at 21-24. There is no evidence, however, that Manal engaged in any sort of fraud.

As a preliminary matter, fraud must be pled with particularity. V.I. R. CIV. P. 9(b) (providing that "[i]n alleging fraud or mistake, a party must state with particularity the

circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

A claim of fraudulent misrepresentation requires identifying a misrepresentation of material fact. *See Jahleejah Love Peace v. Banco Popular de Puerto Rico*, 75 V.I. 284, 291 (V.I. 2021) (concluding, after *Banks* analysis, "to prevail in her fraudulent misrepresentation claim, Love Peace was required to demonstrate that (1) Banco Popular misrepresented a material fact, opinion, intention, or law; (2) that it knew or had reason to believe was false; (3) and was made for the purpose of inducing Love Peace to act or refrain from acting; (4) which Love Peace justifiably relied on; and (5) which caused Love Peace a pecuniary loss."); *see also Erbey Holding Corporation v. BlackRock Financial Management, Inc*., 78 V.I. 206, 262, (V.I. Super. 2023) (noting that "courts use the definition of fraud that is consistent with the common law construction which establishes that 'a person "defrauds" another if he makes a representation of an existing material fact, knowing it to be false, intending one to rely and under circumstances in which such person does rely to his damage.") (internal quotations omitted) (quoting *Todmann v. People*, 59 V.I. 926, 941 (V.I. 2013)).

Fraud in the inducement also requires alleging a specific misrepresentation. *See Wilkinson v. Wilkinson*, 70 V.I. 901, 914 (V.I. 2019) (holding that "to prevail on a claim to rescind a contract based upon fraud in the inducement, a party must show that: (1) there was a misrepresentation, (2) the misrepresentation was fraudulent or material, (3) the misrepresentation induced the recipient to enter the contract, and (4) that the recipient's reliance on the misrepresentation was reasonable.").

To the extent Fathi Yusuf and Waleed Hamed were engaged in some sort of fraud on the government to avoid paying taxes, Manal was not. Manal is not alleged to have owed any taxes

to the Virgin Islands or the Federal Government. Moreover, as is clear from Waleed Hamed's Declaration (Ex. 1 to Sixteen Plus's Opposition), he and Fathi Yusuf fully participated together in mortgaging Sixteen Plus's property. Indeed, Fathi and Waleed both signed the Note and Mortgage. Manal is not alleged to have said or done anything upon which anyone relied to induce them to mortgage the property.[5] Manal is simply the beneficiary of the Note and Mortgage. Sixteen Plus cannot now say olly olly oxen free, we didn't mean it.

VI. Manal and Isam's Testimony is Admissible

The Statements of Fact in Manal's Renewed Motion for Summary Judgment numbered 18 through 22 are based on testimony given by Manal and by Isam at their respective depositions. Manal's testimony about the several miscarriages she experienced and Isam's testimony regarding the risk of divorce if a married couple is unable to have children would be admissible at trial. In their depositions, Manal and Isam referred to factual events concerning their father. The Renewed Motion for Summary Judgment does not depend on any inadmissible hearsay statements.

VII. Statute of Limitations is Not a Defense to Manal's Renewed Motion for Summary Judgment

Sixteen Plus devotes two short paragraphs in its brief to raise a statute of limitations defense as to summary judgment on the Note. Sixteen Plus does not raise the defense as to the Mortgage. In any event, the statute of limitations defense is without merit.

Both the Note and First Priority Mortgage were signed by Waleed Hamed as President of Sixteen Plus and both were attested to by Fathi Yusuf as Secretary of Sixteen Plus with reference to the corporate seal. Additionally, a notarized Acknowledgment for Corporation was attached to

[5] To clarify, POA given to Fathi Yusuf by Manal in 2010 was long after the mortgage was executed. Accordingly it did not retroactively make Fathi an agent of Manal and any statement by Fathi as to the legal effect of the Note and Mortgage cannot be attributed to her.

the First Priority Mortgage confirming the corporate officers and corporate seal. Accordingly, both the Note and First Priority Mortgage are sealed instruments.

> Although the presence of a seal does not affect negotiability, the seal is significant in determining whether a particular statute of limitations is applicable to commercial paper.[19] Thus it has been held that a six-year contract statute of limitations does not apply to a sealed note.[20]
> Statute of limitations for sealed instruments are generally much longer than statutes of limitations for other actions.[21]
> A sealed commercial paper is subject to a 20-year statute of limitations and is not subject to the defense of laches.
> When a person signs a promissory note on which the word SEAL is already printed following the signature line, a presumption arises that he intended to adopt the word as his seal… .

5A ANDERSON U.C.C. § 3-122:7 (3d. ed.); *see also* 97 A.L.R. 617 (originally published in 1935) ("The presence of a seal now has no influence on the substance or effect of the note as such, but is effective only for the purpose of determining the time within which an action may be brought to enforce the rights of the obligee or holder thereof.").

In the Virgin Islands, an action upon a sealed instrument must be filed within twenty years of the accrual of the action. 5 V.I. CODE ANN. § 31(a)(1)(C).

As is clear from the face of the Promissory Note, it was signed on September 15, 1997. As is also clear, the first payment was not due until one year later or September 15, 1998. As the instant action was filed in 2017, it is clear this case was filed prior to the accrual of the first breach and the running of the twenty-year statute of limitations. Accordingly, Sixteen Plus's statute of limitations defense fails.

VIII. Conclusion: Manal's Renewed Motion for Summary Judgment Must be Granted

"We didn't think she would try and enforce the agreement" is simply not a defense to Plaintiff Manal Yousef's Renewed Motion for Summary Judgment no matter what the Learned Schoenbach says. As demonstrated by the instant motion practice, this case is simple. There is a

writing setting forth the terms of the agreement and there is no competent evidence to undo those writings. Accordingly, judgment in favor of Plaintiff should be entered.

Respectfully,

Dated: January 24, 2025

/s/ Christopher Allen Kroblin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2025, a true and exact copy of the foregoing **Opposition to Cross-Motion for Summary Judgment & Reply** 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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