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

MANAL MOHAMMAD YOUSEF a/k/a MANAL MOHAMAD YOUSEF,	CIVIL NO. ST-17-CV-342
Plaintiff,	ACTION FOR DEBT AND FORECLOSURE
v.	
SIXTEEN PLUS CORPORATION,	COUNTERCLAIM FOR DAMAGE
Defendant.	JURY TRIAL DEMANDED
SIXTEEN PLUS CORPORATION,	
Counterclaim Plaintiff,	
v.	
MANAL MOHAMMAD YOUSEF a/k/a MANAL MOHAMAD YOUSEF and FATHI YUSUF,	
Counterclaim Defendants.	

THIRD-PARTY DEFENDANT, FATHI YUSUF'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS DEFENDANT/THIRD-PARTY PLAINTIFF, SIXTEEN PLUS'S THIRD-PARTY CLAIM

Third-Party Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, and pursuant to Virgin Islands Rule of Civil Procedure 12(b)(6), hereby replies in support of his Motion to Dismiss Defendant/Third-Party Plaintiff, Sixteen Plus's "Third-Party Complaint" against him ("Motion") and, in support hereof, Mr. Yusuf states as follows.

I. INTRODUCTION & BACKGROUND FACTS

Sixteen Plus has filed an abysmally pled and unclear Third-Party Complaint against Mr. Yusuf. In its Opposition to Mr. Yusuf's Motion to Dismiss ("Opposition"), Sixteen Plus unsuccessfully tries to redeem the Third-Party Complaint by stating that its key allegation against Mr. Yusuf is that he is currently attempting to defraud Sixteen Plus by having Manal

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Yousuf foreclose her mortgage on the Diamond Keturah. Opposition, p. 8-9. That allegation does not save the Third-Party Complaint because: 1) if Mr. Yusuf engaged in fraud/fraudulent misrepresentation it took place in the late 1990s when the note and "sham" mortgage were approved by Sixteen Plus via a corporate resolution; and 2) any alleged current fraud was not pled with the particularity required by Virgin Islands Rule of Civil Procedure 9(b).

Additionally, as the Court is aware, a Sixteen Plus shareholder, Hisham Hamed, has brought a derivative action on behalf of Sixteen Plus against Mr. Yusuf, Ms. Yousuf and Isam and Jamil Yousuf, based on the same "sham" mortgage at issue in this case. Indeed, the factual allegations in the Third-Party Complaint are virtually identical to the allegations in the derivative case and the majority of the general factual allegations in the derivative case appear to have been "cut and pasted" verbatim into the Third-Party Complaint. A copy of the complaint in the derivative action ("Derivative Complaint") is attached to the Motion as **Exhibit 6**. Additionally, among the laundry list of causes of action in the derivative case, is a claim for the "tort of outrage/prima facie tort" which is identical to Count I in the Third-Party Complaint at issue herein.[1] Thus, Sixteen Plus's third-party claims in this matter are also barred by the first-filed doctrine. Sixteen Plus's third-party claims are further barred by the statute of limitations since Sixteen Plus, by its own admission in the derivative case, knew as early as 2005 that Mr. Yusuf had allegedly defrauded it and was treating the mortgage as a valid mortgage and insisting it get paid when the Diamond Keturah was sold. Therefore, since Sixteen Plus knew about the alleged fraud in 2005, it has waited far too long to bring any tort claims related thereto against Mr.

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[1] Sixteen Plus has also filed a declaratory judgment action against Manal Yousuf to have the "sham" mortgage at issue declared invalid: *Sixteen Plus Corporation v. Manal Mohammad Yousef*, Case No. SX-15-CV-65, assigned to the Honorable Harold W.L. Willocks.

Yusuf. Sixteen Plus's claims are also properly dismissed for failure to state a cognizable cause of action, and on the basis Judge Brady's July 21, 2017, laches ruling in the Main Case.

II. MEMORANDUM OF LAW

A. Motion to Dismiss Standard

As noted in the Motion, the Virgin Islands Supreme Court distinguished the new Virgin Islands Rule of Civil Procedure 12 from its inspiration, Federal Rule of Civil Procedure 12, by emphasizing the Virgin Islands' status as a "notice pleading" jurisdiction and rejecting the plausibility standard set forth in *Iqbal v. Ashcroft*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Consequently, it appears that the Rule 12 standard that existed prior to adoption of the Virgin Islands Rules of Civil Procedure remains largely intact—the court must identify the elements of the claim(s) a party is attempting to plead, exclude factual and legal conclusions, and determine if there are sufficient well-pled facts to support the claimed cause of action—with the exception that the Court should no longer undertake the plausibility analysis. *See Smith v. Law Offices of Karin A. Bentz, P.C.*, Civil No. ST-17-CV-116, 2017 WL 3123463, at *2 (Super. Ct. July 20, 2017) (noting the abrogation of the plausibility standard from the prior three part test and holding the first two steps remain in effect explaining, "[a] motion to dismiss a complaint should be denied if the factual allegations are enough to raise a right to relief above the speculative level and give the defendant fair notice of what the [] claim is and the grounds upon which it rests. Only after satisfying this analysis can a party survive motion to dismiss under [Virgin Islands Rule of Civil Procedure] []12(b)(6).") (internal quotation marks and cites omitted). This standard also comports with common sense. It plainly would be impermissible to merely state that a party was "negligent," or committed professional "malpractice" and have the claim survive a motion to dismiss. Although such a

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pleading technically would provide that party "notice" of the claim against it, *i.e.*, "negligence" or "malpractice," even a notice-pleading standard must require that facts be pled which, when taken as true, support the elements of the claimed cause of action. Indisputably, it is the well-pled facts which give the defendant fair notice of the claim and the grounds upon which it rests.

B. Sixteen Plus's Claims Are Barred by the First-Filed Doctrine

Sixteen Plus has reasserted the majority of the allegations in the derivative case, *Hisham Hamed v. Fathi Yusuf, Isam Yousuf, and Jamil Yousuf*, Civil Case No. 2016-SX-CV-650, verbatim in the Third-Party Complaint in this matter. *See* Derivative Complaint attached as **Exhibit 6**. Additionally, Sixteen Plus has brought a wholly duplicative claim for the "tort of outrage/prima facie tort" in the Third-Party Complaint at issue herein. In its Opposition, Sixteen Plus—without citing any law—claims that since this case is not absolutely identical to the derivative case that the first-filed rule does not apply. Opposition, p. 10. However, a case does not have to be absolutely identical for the first-filed rule to apply, the issues in the case merely need to be substantively identical, which the Superior Court of the Virgin Islands has defined as having a common question of law or fact. *See Bell v. Lee J. Rohn and Associates, LLC*, Case No. ST-14-CV-585, 2015 WL 4148315, at * 2 and n. 1 (Super. Ct. July 8, 2015). This case, like the first filed derivative case, rises and falls on the issue of whether or not Ms. Yousuf's mortgage is a sham, or a real mortgage. Thus, the issues in the two cases are substantively identical sharing common questions of both fact and law. As the Third Circuit Court of Appeal explained in *Crossley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941):

> In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid

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> the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.

Id. 929-30. Clearly, the priority of the efficient administration of cases is properly served by dismissing the Third-Party Complaint against Mr. Yusuf given that the factual allegations in the Third-Party Complaint are substantively identical to the factual allegations in the derivative case, and both cases attempt to assert an identical claim for the "tort of outrage/prima facie tort" against Mr. Yusuf.

Further, Sixteen Plus should not get a second bite at the apple in this matter where it has already brought a laundry list of claims—several CICO claims, conversion, breach of fiduciary duty, usurpation of corporate opportunity, civil conspiracy and the tort of outrage/prima facie tort—against Mr. Yusuf concerning the allegedly "sham" mortgage in the first-filed derivative case currently pending in this Court. Nor should the Court be burdened with adjudicating two cases that assert the same facts as their predicate for recovery. Therefore, Sixteen Plus's Third-Party Complaint is properly dismissed in its entirety on the basis of the first-filed doctrine.

C. Sixteen Plus's Claims Are Properly Dismissed For Failure to State a Cognizable Cause of Action

In the instant case, Sixteen Plus has asserted a third-party claim against Mr. Yusuf for allegedly tortious actions which are claimed to be "intentional, wanton, extreme and outrageous" (Count I) and a claim for a declaratory judgment that he is estopped from foreclosing on the mortgage—which he is not doing—and holding him liable for "injuries that would be suffered by Sixteen Plus" if he were "allowed to commit [] tax fraud, submit[] false documents and perjury" and "now state the opposite in this action." (Count II). Although Count I is so vague as to be incomprehensible, Count II veritably boggles the mind. As noted, Ms. Yousuf is foreclosing on

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her mortgage; Mr. Yusuf is not foreclosing on the mortgage, thus Sixteen Plus has no claim against him on that basis. Moreover, Mr. Yusuf was not a party to this action until Sixteen Plus brought a third-party claim against him and, after bringing him into the case, Sixteen Plus now attempts to hold him liable for "injuries that would be suffered by Sixteen Plus "if he were "allowed to commit [] tax fraud, submit[] false documents and perjury" and **"now state the opposite in this action."** (Emphasis supplied.) Prior to being brought in by Sixteen Plus he was not involved in this action so would not be "stating" anything herein. So, simply put, Sixteen Plus brought him into the action and then tries to proactively assert an indecipherable cause of action for potentially doing something in the future in this matter. Further, the allegations of "tax fraud," "false documents" and "perjury" are mere boilerplate allegations unsupported by any facts. Importantly, all of Sixteen Plus's allegations are so vague that it is impossible to tell what the claimed causes of action even are, other than perhaps some variety of tort claim. Thus, it is also impossible to determine the elements of the claims, or if there are sufficient well-pled facts to potentially support the claimed causes of action. In the Opposition, Sixteen Plus claims that the conclusory allegation that Mr. Yusuf and Ms. Yousuf are attempting to defraud Sixteen Plus out of its primary asset are the basis of its Third-Party Complaint. Opposition at p. 8. That allegation does not save the Third-Party Complaint because: 1) if Mr. Yusuf engaged in the alleged fraud, that fraud took place at the time the note and sham mortgage were approved by Sixteen Plus via a corporate resolution in the late 1990s; and 2) any alleged recent "fraud" is not pled with sufficient particularity.

In the Opposition, Sixteen Plus claims that it asserted a viable claim for Prima Facie Tort. Opposition, p. 6-8. 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,

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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 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."). Sixteen Plus's claim for "*prima facie* tort" does not add any additional factual allegations, rather merely incorporates the preceding paragraphs of the Third-Party Complaint and recites that the actions of Defendants were "intentional, wanton, extreme and outrageous … culpable and not justifiable under the circumstances." Third-Party Complaint ¶¶ 35-7.

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Accordingly, as Mr. Yusuf's alleged actions fit into the existing and defined torts of fraud and/or fraudulent misrepresentation—as evidenced by the Opposition itself where Sixteen Plus claims that the key allegation in the Third-Party Complaint is the allegation it has been "defrauded" and where Sixteen Plus has alleged Mr. Yusuf made a fraudulent misrepresentation in the late 1990s—and Sixteen Plus has not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations, the claim for *prima facie* tort is properly dismissed.

D. Sixteen Plus's Claims Are Barred by the Applicable Statute of Limitations

1. *All Tort Claims Are Subject to a Two Year Statute of Limitations*

A tort claim must be brought within two (2) years of the cause of action accruing. *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.). Thus, any tort claims allegedly arising from Mr. Yusuf's actions surrounding Sixteen Plus executing the $4.5 million dollar note and mortgage in favor of Ms. Yousuf accrued, at the latest, when the note and mortgage were signed in 1997. If Sixteen Plus claims that the discovery rule applies to toll the statute of limitations, this argument is foreclosed by the verified allegations in the derivative case which must be considered by the Court in deciding this motion to dismiss under the doctrine of judicial estoppel. Dispositively, in the derivative case Sixteen Plus claimed the mid-2000s were when Mr. Yusuf first refused to sell the Property unless the "sham" mortgage was paid off. Specifically, in the First Amended Verified Complaint, Hisham Hamed alleges that Sixteen Plus "lost [] [in 2005] . . . the benefit of such [potential] sales [of the Property] at the highest and best amount because of Fathi Yusuf's insistence the sham mortgage be paid upon the sale of the property." Derivative Complaint, ¶ 43; *see also id.* at p. 8, Section b ("The Value of the Sixteen Plus Property Dramatically Increases—2005). Thus, by its own admission—and not challenged

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in the Opposition—Sixteen Plus became aware of the alleged injury to it *vis-à-vis* the "sham mortgage," at the latest in the mid-2000s, over ten (10) years ago. Accordingly, when Sixteen Plus's allegation that Mr. Yusuf was claiming the mortgage was real in 2005 is considered in connection with the Motion, all tort claims relating to Sixteen Plus's execution of the note and mortgage in favor of Ms. Yousuf are barred by the statute of limitations given that it knew of the alleged injury and the alleged "fraud/fraudulent misrepresentation" in 2005.[2]

E. Judge Brady's Laches Ruling in the Main Case Bars The Third-Party Complaint

It is undisputed that in this case, Sixteen Plus alleged that it was solely partnership funds that were used to purchase the Diamond Keturah. To wit, "[o]n December 24, 1997, BNS was finally entitled to a conveyance of the Land [Diamond Keturah] from the Marshal of the Territorial (now Superior) Court[.] . . . BNS assigned its right to the conveyance from the Marshal to Sixteen Plus." *See* Counterclaim/Third Party Complaint at ¶¶ 20-21.[3] Sixteen Plus further alleges **"[a]ll funds used to buy the Land came from the Plaza Extra Supermarkets**

[2] The "continuing violations doctrine," mentioned by Sixteen Plus in a footnote, does not apply under the facts alleged by Sixteen Plus. This equitable doctrine is typically employed in cases involving ongoing nuisances and continuing trespassing, as illustrated by two of the cases cited by Sixteen Plus: *Goelet Development, Inc. v. Kemthorne* and *Bluebeard's Castle v. Hodge.* Plainly, the claimed harm to Sixteen Plus arose from the alleged "sham" mortgage being obtained and recorded on the Diamond Keturah. Sixteen Plus is merely alleging continuing ill effects—foreclosure of the mortgage—from the original violation, *i.e.*, the "sham" mortgage itself. *See Burton v. FirstBank of Puerto Rico*, Case No. CV 554/2005, 2007 WL 2332084, at *4 (Super. Ct. July 19, 2007) (dismissing tort claim pursuant to the statute of limitations stating, "[t]here is no basis for a "continuing harm" tort theory here because the bank statements were effects of the original alleged tort rather than independent torts. Therefore, Defendants' conduct can only be classified as the "ill-effects" of original wrongdoing" rather than "continuing wrongdoing.").

[3] These exact same allegations are also made in the derivative action, *Hisham Hamed v. Fathi Yusuf, Isam Yousuf, and Jamil Yousuf*, Civil Case No. 2016-SX-CV-650. *See* Derivative Complaint at ¶¶ 19, 29-30.

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partnership – and thus from Yusuf and Hamed as the only two partners." *Id.* at ¶ 12 (Emphasis supplied.)

Last September 30, 2016, Hamed and Yusuf submitted claims in *Hamed v. Yusuf, et al.*, Case No. SX-12-CV-370 and assigned to the Honorable Douglas A. Brady ("Main Case") to be decided as an initial matter by a Master, Judge Edgar Ross. In that submission, Hamed made a claim for $4.5 million dollars in partnership funds which Hamed claims were transferred to Isam Yousuf in 1996-1999 and used to purchase the Diamond Keturah. *See Exhibit A - Hamed Partnership Claims for 1986 Through January 1, 2012* at Section F Entitled "**Isam Yousuf was given $4.5M in Plaza Extra money to apply towards the Sixteen Plus mortgage for Diamond Keturah and it was further given to Manal Yousuf"** (stating, "In 1996-1997 Fathi Yusuf supplied Isam Yousuf with $4.5M in partnership cash[.] . . . Those funds were then supplied by Isam to Isam's sister Manal Yousuf, who in turn supplied the funds to Sixteen Plus subject to a mortgage. Neither Isam or Manal Yousuf contributed any of their own funds, or gave any consideration for the $4.5 million mortgage [on the Diamond Keturah]."), a copy of Exhibit A is attached to the Motion as **Exhibit 7**.[4]

In late July of 2017, Judge Brady ruled that all of the parties' respective counts asserted in the Main Case and counterclaim (conversion, misappropriation, breach of fiduciary duty) are to be treated as part of a single accounting claim asserted by each party. *See* July 21, 2017, Order. Judge Brady then decided under the doctrine of laches to limit each party's accounting claim to transactions that post-date September 17, 2006. *See id.* at pp. 33 and 34. **Judge Brady specifically stated that the accounting for the assets of the partnership "shall be limited in scope to consider only those claimed credits and charges to partnership accounts . . . based**

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[4] Hamed recently withdrew this claim in the Main Case.

on transactions that occurred on or after September 17, 2006." *Id.* at p. 34 (emphasis supplied).

That ruling also applies to this matter given that Sixteen Plus alleges that only partnership funds were used to purchase the Diamond Keturah and Judge Brady limited claims to transactions which occurred prior to September 17, 2016. Accordingly, this case should also be dismissed on the basis of Judge Brady's laches decision because $4.5 million in partnership funds were allegedly used—which would represent a $2.25 million dollar credit on behalf of the Hameds—to purchase the Diamond Keturah, which transaction occurred prior to September 17, 2006.

III. CONCLUSION

Sixteen Plus's third-party claims in this matter are barred by the first-filed doctrine given that the derivative case was filed first and concerns the same alleged facts and one of the same causes of action. Sixteen Plus's third-party claims are also barred in their entirety by the statute of limitations since Sixteen Plus, by its own admission in the derivative case, knew that Mr. Yusuf was treating the mortgage as a real mortgage, and insisting it got paid when the Diamond Keturah was sold, as early as 2005. These verified allegations are properly considered in this case on the grounds of judicial estoppel which prevents a party from taking inconsistent factual positions in different matters. Sixteen Plus's claims are also properly dismissed in their entirety for failure to state a cognizable cause of action, and on the basis Judge Brady's July 21, 2017, laches ruling in the Main Case.

WHEREFORE, Third-Party Defendant, Fathi Yusuf respectfully requests that the Court: 1) dismiss Sixteen Plus's Third-Party Complaint in its entirety; 2) award Mr. Yusuf the

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attorneys' fees and costs incurred in connection with defending this case; and 3) award him such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: January 29, 2018 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2018, that I served a true and correct copy of the foregoing, *THIRD-PARTY DEFENDANT, FATHI YUSUF'S REPLY IN SUPPPORT OF HIS MOTION TO DISMISS DEFENDANT/THIRD-PARTY PLAINTIFF, SIXTEEN PLUS'S THIRD-PARTY CLAIM*, which complies with the word and page limitations of Rule 6.1(e), via e-mail addressed to:

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