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

DONALD EBNER, **Plaintiff,** **vs.** **JOSEPH PETROHAN and BERNITA CATHY PLUMMER,** **Defendants.**	))))))))	**CASE NO. ST-14-CV-537** **ACTION FOR DAMAGES**

MEMORANDUM OPINION

I. STATEMENT OF THE CASE

The matter came on for a Bench Trial on January 11, 2016, before Kathleen Mackay, Judge of the Superior Court.

Plaintiff Donald Ebner appeared with counsel, Vincent Colianni, II, Esq. Defendant Joseph Petrohan and Defendant Bernita Cathy Plummer both appeared pro se.

Default had been entered against Defendant Plummer. However, before the trial started, Plaintiff Donald Ebner advised the Court that he was dismissing his complaint against Defendant Bernita Cathy Plummer, but he would call her as a witness.

Plaintiff testified and called the following witnesses: Bernita Cathy Plummer and Link A. Edwin. Petrohan testified on his own behalf but called no witnesses. And Donald Ebner and Bernita Cathy Plummer testified again for Plaintiff on rebuttal. The Court then took the matter under advisement.

Plaintiff Donald Ebner contends that Defendant Joseph Petrohan, who managed the Southern Rent To Own ("SRTO") store for Ebner, misappropriated merchandise and repeatedly failed to deposit the store's cash proceeds into SRTO's bank account. Ebner further claims that when he realized cash deposits and merchandise were missing and he confronted Petrohan, Petrohan then falsely reported to Tropical Shipping that Ebner was involved in a company called Paradise Freight, a St. Croix-based shipping corporation, which would have been a violation of a noncompete agreement that Ebner had with Tropical Shipping. Ebner argues that Petrohan made this false report to Tropical Shipping to avert Ebner from pursuing the missing deposits.

Ebner's Complaint alleges conversion, breach of fiduciary duty and defamation.[1] Ebner denies the claims and avers he never took a penny from Ebner. This court has jurisdiction pursuant to V.I. Code Ann. tit. 4 § 76 (a).

II. FACTS

A. Southern Rent To Own

At all times material hereto, Plaintiff Donald Ebner was a resident of St. Croix, Virgin Islands. Ebner moved to St. Croix, around 2001, after retiring from the police department in St. Louis, Missouri with the rank of lieutenant. When he got to St. Croix he worked as a computer technician and he later purchased VI Cargo in 2007.

Plaintiff Donald Ebner and Defendant Joseph Petrohan met in 2001 and became trusted friends. In August 2009, Ebner started Southern Rent To Own ("SRTO") on St. Croix, Virgin Islands, which rented out and sold household goods, including furniture, appliances and electronics. In or about February 2011, Ebner opened a SRTO store on

[1] The Complaint contains a count for punitive damages, but punitive damages is not an independent cause of action.

St. Thomas, Virgin Islands. In preparing to open the St. Thomas store, Ebner asked Petrohan to travel from Missouri to St. Thomas to construct a customer counter in the new SRTO store in St. Thomas.

After that work was done, Ebner kept Petrohan on to be Ebner's "eyes and ears" in the St. Thomas store and to make the daily bank deposits. Ebner established an accounting system for the store and purchased a rent-to-own software package that was capable of tracking all the merchandise and producing a daily printout that showed a breakdown of all transactions, including a breakdown of cash, checks and payments made by credit cards. Store managers were responsible for overseeing the off-loading of merchandise and comparing the invoices with merchandise received, and entering the inventory in the database. Employees were required to enter the necessary data, including sales and rentals and every new customer into the database. Ebner only visited the St. Thomas store a few times. However, Ebner did have the ability to remotely monitor the store by logging into the computer system and view the security cameras from St. Croix.

Eventually, by January 2012, Petrohan was given the title of General Manager of the St. Thomas store. His duties were to oversee the day to day operations. At that time the St. Thomas store had three or four employees. Ebner instructed Petrohan to put all cash and checks in the safe deposit box in the store and then make the deposits the following day.

Later in 2012, Defendant Joseph Petrohan hired Defendant Cathy Plummer to serve as Office Manager. Her duties included supervising employees, filing collection cases against customers who owed monies on rented furniture, preparing bank deposit slips and ensuring all cash was turned over to Petrohan. Once Plummer was hired it became her responsibility to complete the bank deposit slips. Petrohan and Plummer generally went to the bank together to make deposits, but when Petrohan went to the bank alone he turned over the deposit slips to Plummer upon his return to the office. Sometimes, however, the deposit slips were stamped by the bank and sometimes they were not. Deposits were not always done daily. Sometimes Petrohan took the deposits home and deposited them the next day. Petrohan told Plummer that if Ebner ever had any questions about missing deposits, Plummer should simply reply, "I know you are involved with Paradise Freight", as Petrohan believed that would deter Ebner from investigating or pursuing the missing deposits. For whatever reason, Ebner did not typically review the books to determine if things were in order. Instead, he relied on the store managers to review the books. (Tr. 135).

Sometime in June 2013, Ebner discovered that he had not received any of the bank deposit slips for May 2013. After calling the St. Thomas office, certain deposits slips were sent to him. Ebner then discovered that other deposits were not made and confronted Petrohan and Plummer about those missing deposits in early July 2013.

A total of 35 deposits never made it to the bank between October 2012 and June 2013. Of the 35 missing deposits, 25 deposits were for May and June 2013. Exhibit 2. (Tr. 167-168). The total sum of missing deposits is $28,853.67. Exhibit 2.

Around the same time that Ebner discovered the missing deposits he came to believe that a considerable amount of merchandise was missing or unaccounted for. Link Edwin, an employee in the St. Croix store, who was in the process of purchasing the SRTO stores from Ebner, estimated the value of the missing merchandise between

$160,000 and $180,000.[2] Ebner testified that the fair market value of the missing merchandise totaled $172,000, but his cost was half of the fair market value, or $86,000. However, Ebner never verified through the inventory management system whether Mr. Edwin's figures were correct. He never even obtained a copy of the report Edwin printed from the system, nor confirmed for himself the value of the missing merchandise. (Tr. 181, 182 and 230). However, there was merchandise in the store that was not entered in the computer database. (Tr. 84). For example, at some point Ebner bought used furniture in bulk from a local hotel in order to re-sell the used furniture and that used furniture was never entered in the SRTO's database.

Petrohan did not return to work after Ebner confronted him about the missing deposits during the first week of July 2013.

B. <u>VI Cargo/Tropical Shipping/Paradise Freight</u>

In the interim, in 2010, Ebner sold his shipping company, V.I. Cargo, a freight forwarder, to Tropical Shipping. In conjunction with the sale of V.I. Cargo to Tropical Shipping, Ebner signed a non-compete agreement where Ebner agreed to not engage in the business of shipping or serving as an employee, agent or consultant to any shipping business for a period of five years.

In May 2013, Matthew Leonard, a friend of Ebner's and former employee of V.I. Cargo, opened Paradise Freight in St. Croix, to engage in the freight forwarding business.

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[2] Link Edwin conducted the inventory or audit of the St. Thomas store with another employee from the St. Croix SRTO.

Matthew Leonard engaged Ebner to set up the computers for Paradise Freight, and Ebner did so.

Sometime in April 2013, in preparation for the start-up of Paradise Freight, Petrohan was engaged to build out the offices of Paradise Freight, and Petrohan traveled to St. Croix to do that. He arranged with Ebner to take work in St. Croix at Paradise Freight and Ebner paid him for all his time in St. Croix, even though it stretched to five weeks.[3] Petrohan stayed in Ebner's guest house in St. Croix for the entire five weeks, and Ebner arranged to ship Petrohan's truck from St. Thomas to St. Croix for Petrohan's use and SRTO paid for the shipping.

Less than one month later Ebner called the St. Thomas store to confront Petrohan and Plummer about missing deposits, Petrohan gave an Affidavit to Tropical Shipping, which included several statements asserting that Ebner was involved in Paradise Freight and was actually the true owner of Paradise Freight.

III. <u>ANALYSIS OF CLAIMS</u>

A. <u>Petrohan Converted Certain Bank Deposits.</u>

Conversion is defined as an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *35-36, 64 V.I. 3, 31-32.

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[3] Petrohan's testimony sometimes described his time in St. Croix as four weeks, and on at least one occasion he described it as five weeks. Ebner testified that Petrohan came to St. Croix in early April and returned to St. Thomas on May 8, 2013. Therefore, the Court will describe the period Petrohan spent in St. Croix as five weeks.

The Court finds that sometimes deposit slips were returned to the store without the bank stamp showing proof of deposit. Petrohan was the General Manager of the SRTO store and had the duty to deposit the funds into SRTO's bank account or to otherwise supervise and ensure that they were duly deposited. When Petrohan was warned that Ebner was calling to inquire about the missing funds, Petrohan never denied the missing funds but instead stated that he would take care of it. Overall, there is strong evidence that deposits totaling $28,853.67 went missing.[4]

Except for Petrohan's statement that he never took a penny from Ebner, the Court received no contradictory evidence regarding the missing deposits, except Petrohan pointed out that some of the missing deposits covered the period that he was in St. Croix working at Paradise Freight in April 2013.

There strong evidence that Petrohan controlled the deposits and never deposited those missing funds, except Petrohan cannot be held responsible for four missing deposits from April 2013 since he was in St. Croix for that period.[5] The Court finds that Petrohan wrongfully and intentionally converted the remaining missing deposits to his

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[4] Ebner also claimed that Petrohan used SRTO funds to post bail when he was arrested for DUI. However, even if true, that sum is included in the claim for missing deposits. To make an additional award for $1,000 purportedly used to post bail would result in a double award to Ebner.

[5] Plummer testified that she flew to St. Croix to bring cash deposits to Petrohan while he was in St. Croix in April 2013. Petrohan denied that claim and testified that the purpose of Plummer's trip to St. Croix while he was there was to bring cash funds to settle certain lawsuits. The Court finds Plummer's testimony too far-fetched and not credible. Plummer was the store manager in April 2013. There is no logical reason for her to travel to St. Croix to deliver cash deposits to Petrohan and risk Ebner finding out that she was diverting funds to Petrohan. The Court notes that Plummer was a defendant in this case and the claims against her were only dismissed moments before the trial started. More importantly, criminal charges for embezzlement at SRTO were still pending against Plummer when she testified in this case and so she would have had a motive to not take responsibility for any allegedly missing deposits.

personal use. The failure to deposit those funds into SRTO's bank account was a loss to Ebner.

The 35 missing deposits totals $28,853.67, including the four April deposits. The April deposits total $4,567.62. Therefore, after subtracting the April deposits, the balance of the missing deposits totals $24,286.05. Petrohan is liable to Ebner for the sum of $24,286.05.[6]

The second prong of Ebner's claim for conversion is for SRTO furniture that Ebner claims Petrohan had in his apartment. However, Ebner gave no testimony as to the precise items and the value thereof. Therefore, the Court cannot award damages for those items. Therefore, the Court need not evaluate Petrohan's statement that the furniture in his possession was used furniture that renters had returned and which would otherwise be discarded. (Tr. 243)

The third prong of Ebner's claim for conversion is for the furniture that was missing or unaccounted for when the audit was done in June 2013. Ebner's estimate of the value of missing merchandise is based upon the estimate that Link Edwin and another employee provided. Edwin estimated the value of the missing merchandise between $160,000 and $180,000. Ebner testified that the fair market value was $172,000, and his cost was one-half the fair market value, or $86,000. Incredibly, however, Ebner never verified (through the inventory management system or otherwise) that Edwin's figures were correct; he never obtained a copy of the report Edwin printed from the system. (Tr.

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[6] Ebner also claimed that Petrohan used the SRTO credit card to buy $6,000 worth of merchandise at Home Depot for the Paradise Freights operation, as well as other unauthorized charges. But, Ebner ultimately withdrew those claims during the trial. (Tr. 213-216)

182 and 230). Ironically, there was merchandise in the store that was not entered in the computer database. (Tr. 84). And Petrohan testified that the inventory was "not right" from the time he started. (Tr. 243-244). He also testified two prior managers had been fired. Plummer also testified that he was not computer literate and he often "begged" Ebner for training on how to enter information in the database. There was no testimony on whether those pieces of furniture that were not in the system may have off-set the missing merchandise, or whether or not the furniture that was not in the system was the hotel furniture. In addition, Petrohan gave an example of an occasion when an employee made an error in entering the furniture in the database and entered a five piece bedroom set five times. (Tr. 239), which would have falsely increased the inventory.

Ebner claims the missing merchandise affected the ultimate sales price of the business to Edwin. However, Ebner never offered any corroborating evidence of the value of the missing merchandise. He did not offer any proof of the value of any merchandise that he bought for the store. Likewise, he offered no testimony or exhibits on the value of the used hotel furniture nor how much was missing. Instead, Ebner simply testified that the fair market value of the missing merchandise was $172,000, and it affected the price for which he sold SRTO. However, Ebner did not have personal knowledge of the value of the missing merchandise, as he never verified (through the inventory management system or otherwise) that Edwin's figures were correct; he never obtained a copy of the report Edwin printed from the system. (Tr. 182 and 230). Ebner was merely repeating Link Edwin's alleged findings and testimony. Meanwhile Edwin was in the process of buying the SRTO business, so the less merchandise in the store, the lower his purchase price.

The Court finds that some furniture was missing and unaccounted for and that it was Petrohan's responsibility to keep track of the furniture. However, the Court finds that Ebner's testimony that was built on Link Edwin's estimate is not proper and sufficient proof to determine the value thereof. Therefore, the Court finds that Ebner did not meet his burden of proving the value of the missing merchandise. The Court finds that Ebner had easy access to these figures in light of the capability of the software program he described and his testimony that Edwin printed a report on the missing furniture in July 2013, but Ebner did not introduce it into evidence.

Ebner also did not give any testimony on how much he sold the business for, or how much he and Edwin had agreed upon or considered before the missing merchandise was discovered. The Court may not speculate on the loss.

Therefore, the Court is precluded from awarding any damages for the prong of the claim for conversion regarding the missing merchandise. But as stated earlier, Petrohan is liable to Ebner for the sum of $24,286.05 for the missing deposits. The Court will also award prejudgment interest at the statutory rate on this award of $24,286.05, commencing on August 1, 2013.

B. Petrohan Breached His Fiduciary Duty To Ebner.

Since issuing its opinion in *Banks Int'l Rental & Leasing Corp.*, 55 V.I. 967, 2011 V.I. Supreme LEXIS 46, the Supreme Court of the Virgin Islands has not defined the elements of a claim of breach of fiduciary duty. Therefore, none of the previous Virgin Islands cases on this topic is controlling.

In *Banks*, "the Supreme Court of the Virgin Islands held that, while the Restatements may be persuasive authority in determining the common law, they 'no longer constitute binding legal authority in this jurisdiction' pursuant to 1 V.I.C. § 4." *Isaac v. Crichlow*, 63 V.I. 38, 58, 2015 V.I. Supreme, LEXIS 15 (quoting *Banks* at 984). Further, in *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 603, 2014 V.I. Supreme LEXIS 17, the court established that "the Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks*."

> In addressing issues of Virgin Islands common law, this Court — and courts addressing issues of Virgin Islands common law that this Court has yet to address — must engage in a three-factor analysis: first examining which common law rule Virgin Islands courts have applied in the past; next identifying the rule adopted by a majority of courts of other jurisdictions; and then finally — but most importantly — determining which common law rule is soundest for the Virgin Islands.

Better Building Maintenance of the Virgin Islands, Inc. v. Lee, 60 V.I. 740, 757 (V.I. 2014) (citations omitted)). Therefore, this Court will now perform a *Banks* analysis to determine the soundest elements for a claim of breach of fiduciary duty in the Virgin Islands.

i. <u>Virgin Islands Case Law</u>

Courts in the Virgin Islands have relied on the principles set forth in the Restatement (Second) of Torts § 874 when addressing breach of fiduciary duty claims.[7]

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[7] *Watts v. Blake-Coleman*, 2012 U.S. Dist. LEXIS 43454, *12-13 (D.V.I. Mar. 29, 2012) (quoting Restatement (Second) of Torts § 874 (1979)); *Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (V.I. Super. Ct. 2012) (citing *Watts* at *12-13); *Walsh v. Daly*, 2014 V.I. LEXIS 36, *26 (quoting *Guardian Ins.* (citing Restatement (Second) of Torts § 874 (1979)); *Firstbank P.R. v. Webster*, 2013 V.I. LEXIS 5, *1 (citing Restatement (Second) of Torts § 874); *Roebuck v. V.I. Hous. Auth. & Gov't of the V.I.*, 60 V.I. 137, 147 (V.I. Super. Ct. 2014) (quoting *Watts*); *James v. Guardian Ins. Co.*, 2015 V.I. LEXIS 85, *23

Per the Restatement of Torts (Second) § 874, "[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Restat (2d) of Torts, § 874 (2nd 1979). In looking to the Restatement for guidance, the courts have determined that "to establish a claim for breach of fiduciary duty: (1) there must be a fiduciary relationship, (2) the fiduciary must have breached its duty imposed by such relationship, (3) the plaintiff must have been harmed, and (4) the fiduciary's breach must be a proximate cause of the plaintiff's harm." *3RC & Co. v. Boynes Trucking Sys.*, 2018 V.I. LEXIS 62, *20 (quoting *Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (V.I. Super. Ct. 2012)) (citing *Watts v. Blake-Coleman*, 2012 U.S. Dist. LEXIS 43454, *12-13 (D.V.I. Mar. 29, 2012))).

ii. Practices in Other Common Law Jurisdictions

With slight variations, practices in other common law jurisdictions are nearly identical to those established in the Virgin Islands.[8] In general, most U.S. jurisdictions combine the third and fourth elements set forth in the Virgin Islands and require just three elements to establish a claim for breach of fiduciary duty: 1) the existence of a fiduciary relationship, 2) breach of the duty created thereby, and 3) harm proximately caused by

(quoting *Roebuck* at 147) (citing *Watts* at 12-13; *Chaput v. Cianci (In re Chaput)*, 2015 Bankr. LEXIS 1370, *5-7, 2015 (quoting *Watts*); *3RC & Co. v. Boynes Trucking Sys.*, 2018 V.I. LEXIS 62, *20 (quoting *Guardian*.)

[8] One state, Connecticut, has an almost identical standard to that used in the Virgin Islands: "A plaintiff has the burden of establishing four essential elements with respect to a claim of breach of fiduciary duty: (1) that a fiduciary relationship existed which gave rise to a duty of loyalty, an obligation to act in the best interests of the plaintiff, and an obligation to act in good faith in any matter relating to the plaintiff; (2) that the defendant advanced his or her own interests to the detriment of the plaintiff; (3) that the plaintiff sustained damages; and (4) that the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." *Rendahl v. Peluso*, 173 Conn. App. 66, 69, 162 A.3d 1, 5 (2017).

said breach.[9] In these jurisdictions, plaintiffs bringing a claim of breach of fiduciary duty are required to show the same elements of proof as plaintiffs in the Virgin Islands must currently prove.

Courts in the vast majority of states have, like the courts in the Virgin Islands, historically relied upon the Restatement (Second) of Torts, § 874 in addressing violations of fiduciary duty.[10] In addition, there are a handful of jurisdictions with variations on the above practices.[11]

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[9] *E.g., Friedman v. Kelly & Picerne, Inc.*, 2010 R.I. Super. LEXIS 183, *39 ("To prevail on a claim for breach of fiduciary duty, a plaintiff must establish (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." (internal citations omitted)); *Gracey v. Eaker*, 837 So. 2d 348, 353, 2002 Fla.; *UWork.com, Inc. v. Paragon Techs., Inc.*, 321 Ga. App. 584, 594, 2013; *Hibbs v. Berger*, 430 S.W.3d 296, 312, 2014 Mo. App. LEXIS 513; *Swift v. Swift*, 2016 Haw. App. LEXIS 316, *9; *Insight Ky. Partners II, L.P. v. Preferred Auto. Servs.*, 514 S.W.3d 537, 546, 2016 Ky. App.; *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (2004); *Aliant Bank v. Four Star Invs., Inc.*, 2017 Ala. LEXIS 75, *1.

[10] *E.g., Wirum & Cash, Architects v. Cash*, 837 P.2d 692, 713 (Alaska, 1992); *AM-ERCO v. Schoen*, 184 Ariz. 150, 907 P.2d 536, 540, 541 (Ariz. App. 1995); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761, 762, 767 (1996); *Richelle L. v. Roman Catholic Archbishop*, 106 Cal.App.4th 257, 272 (2003); *Moses v. Diocese of Colorado*, 863 P.2d 310, 321, cert. denied 511 U.S. 1137 (Colo. 1993); *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002); *McLane v. Atlanta Market Center Mgmt.*, 225 Ga.App. 818, 486 S.E.2d 30, 36 (1997), reversed 269 Ga. 604, 503 S.E.2d 278 (1998); *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 854 P.2d 280, 289 (1993); *Bank One, N.A. v. Borse*, 351 Ill. App.3d 482, 487 (2004); *Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer*, 840 F.Supp. 1270, 1278 (N.D. Ind. 1993); *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 52 (Iowa, 2003); *Eckholt v. American Business Information, Inc.*, 873 F.Supp. 526, 534 (D. Kan. 1994); *Bryan r. v. Watchtower Bible & Tract Soc.*, 738 a.2d 839, 845, cert. denied 528 U.S. 1189 (Me. 1999); *Kann v. Kann*, 344 Md. 689, 690 (1997); *Doe v. Harbor Schools, Inc.*, 63 Mass.App.Ct. 337, 346 (2005); *MS Dev. V. Auto Plaza (Aft. Rem.)*, 220 Mich.app. 540, 560 (1996), reversed 456 Mich. 935 (1998); *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 301 (2006); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 719 (1993); *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002); *GCM, Inc. v. Kentucky Central Life Ins. Co.*, 124 N.M. 186 (1997); *Zumpano v. Quinn*, 6 N.Y.3d 666, 686 (2006); *L.C. v. R.P.*, 1997 ND 96; *Nesvig v. Nesvig*, 2004 ND 37, appeal after remand 2006 ND 66, 712 N.W.2d 299 (2006); *Granewich v. Harding*, 329 Or. 47 (1999); *Hendricks v. Clemson University*, 339 S.C. 552, 561 (2000), reversed 353 S.C. 449 (2003); *Chem-Age Industries, Inc. v. Glover*, 2002 SD 122; *d'Elia v. Rice Development, Inc.*, 2006 UT App 416; *Cooper v. Cooper*, 173 Vt. 1 (2001); *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 (1994); Church *of Scientology Intern. V. Eli Lilly & Co.*, 848 F.Supp. 1018,1019, 1028 (D.D.C. 1994); *Harmon v. Masoneilan Intern., Inc.*, 442 A.2d 487, 500 (Del. Super. 1982).

[11] *E.g., Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 33, 381 S.W.3d 21, 43 ("A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship."); *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 892, 243 P.3d 1069, 1080 (2010) (requiring only the establishment of a fiduciary duty and breach thereof); Jaffri v. JPMorgan Chase Bank, N.A., 26 N.E.3d 635, 636 (Ind. App. 2015) (requiring only that there be harm to the plaintiff, not explicitly requiring proximate cause).

iii. The Best Rule for the Virgin Islands

A plaintiff in the Virgin Islands must currently prove the same elements when bringing a claim for breach of fiduciary duty that it would have to prove in most other United States jurisdictions. The four elements for establishing a breach of fiduciary duty claim in the Virgin Islands are founded in the Restatement (Second) of Torts § 874 and are as clear and comprehensive a reading of § 874 as that of any other common law jurisdiction in the United States. Therefore, the Court finds that the Restatement (Second) of Torts § 874 represents the soundest rule for establishing a breach of fiduciary duty claim in the Virgin Islands and will adopt the following elements for such a claim, as set forth in *Guardian Ins. Co.*: 1) that a fiduciary relationship exists, 2) that the fiduciary breached the duty imposed by said relationship, 3) that the plaintiff must have been harmed, and 4) that the fiduciary's breach was a proximate cause of said harm.

iv. Petrohan Breached His Fiduciary Duty to Ebner.

As the General Manager Petrohan was responsible for depositing funds into SRTO's bank account. He was also responsible for overseeing the day to day operations and ensuring that all merchandise was accounted for and that none was converted or otherwise sold off the books. As such Petrohan owed Ebner a duty of care. As discussed above, Petrohan failed to deposit certain funds and failed to keep track of some merchandise. These failures were a breach of Petrohan's fiduciary duty to Ebner. Ebner suffered financial harm as a result of Petrohan's failure to deposit the funds and failure to keep track of the merchandise. These failures were the direct cause of losses suffered by Ebner, as he lost those deposits and the value of the missing furniture. Therefore, Ebner has met the requirements for his claim for breach of fiduciary duty. The

Court finds Petrohan breached his fiduciary duty to Ebner. The Court awards $5,000 to Ebner as damages for the breach of fiduciary duty as it relates to the missing deposits and $5,000 as damages for the breach of fiduciary duty as it relates to the missing merchandise.

C. <u>Petrohan Did Not Defame Ebner.</u>

To succeed on a defamation claim under Virgin Islands law, a party must show: (1) "a false and defamatory statement concerning another"; (2) "an unprivileged publication to a third party"; (3) "fault amounting at least to negligence on the part of the publisher"; and (4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 585-87 (V.I. 2012).

Additionally, because the First Amendment to the United States Constitution protects the freedom of expression in the Virgin Islands, a party cannot succeed on a defamation claim if doing so would infringe on this fundamental right. *Simpson v. Capdeville*, 64 V.I. 477, 485 (V.I. 2016) (citing *New York Times Sullivan*, 376 U.S. 254, 298 (1964)).

Only statements that are provable as false are actionable. *Simpson v. Capdeville* at 487 (quoting *Kendall*, 55 V.I. at 788 (citing *Farah v. Esquire Magazine*, 736 F.3d 528, 534-35 (D.C. Cir. 2013) ("Where a statement is so imprecise or subjective that it is not capable of being proved true or false, it is not actionable in *defamation*.") (citing *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624-26 (D.C. Cir. 2001)))). "[H]yperbole and expressions of opinion not provable as false" fail to meet this actionability element of a defamation claim, and are also constitutionally protected. *Kendall*, 55 V.I. at 788. To cross this constitutional threshold, Ebner has the burden of proving that the statements were false as part of his case-in-chief at trial. *Simpson v. Capdeville,* 64 V.I. at 487 (quoting *Bose*, 466 U.S. at 511).

Ebner's claim of defamation is based upon an affidavit that Petrohan gave to Tropical Shipping. Ebner had sold his freight forwarding business, V.I. Cargo, to Tropical Shipping and entered into a non-compete agreement with Tropical Shipping when he did so. Petrohan furnished Tropical Shipping with an Affidavit that stated Ebner was the true owner of Paradise Freight, the new freight forwarding business.[12] Therefore at the crux of the defamation claim is whether Petrohan libeled Ebner when he furnished that affidavit to Tropical Shipping.

The pertinent portions of the Affidavit states:

> Paragraph 2. "Ebner's finances Paradise's operations, supervised construction of its office and has taken numerous steps to conceal his involvement in Paradise out of fear that it would be learned of by VI Cargo Services."
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> Paragraph 5. "In April of 2013, Ebner instructed me that he would need me to move to St. Croix for a period of time to personally construct the office of Paradise."
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> Paragraph 6. "I designed and constructed the offices of Paradise at the instruction of Ebner."

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[12] The affidavit may have been the impetus of Tropical Shipping's lawsuit against Ebner. The affidavit is dated August 9, 2013, and bears a case caption of *V.I. Cargo Services, LLC f/k/a GBT 489, LLC v. Donald L. Ebner, Paradise Freight, LLC and Matthew Leonard*, Case No. 13-026842 CA 09, in the Circuit Court Of The 11th Judicial District In And For Miami-Dade County, Florida. But this Court has no information on the date the Tropical Shipping lawsuit was filed, nor its status. At the time of the trial in this matter, in January 2016, that case was still pending.

Paragraph 7: [Matthew] "Leonard and Ebner worked together in establishing Paradise and its cargo shipping business."

Paragraph 8: "Ebner told me that he was involved in the establishment of Paradise and its financing, but that no one was to know about his involvement. On a number of occasions, Ebner specifically told me that it was important that VI Cargo not learn of his involvement in Paradise."

Paragraph 10: "I lived in Ebner's guest house while I was involved in constructing Paradise's offices. Ebner did not charge me rent while living at his home during my construction of Paradise's offices."

Paragraph 11: "In constructing Paradise's offices, I needed materials and supplies. I was instructed by Ebner to use my Visa business credit card from Southern for those purchases and I did so. I spent over $10,000.00 at Home Depot in St. Croix on this Visa credit card for this purpose. I never used a Paradise credit card, nor did Paradise ever reimburse me for the purchase of materials or supplies in constructing their offices."

Paragraph 12: "Leonard was often on site as I built the Paradies offices. I would sometimes ask questions of Leonard about details of the construction. Although Leonard held himself out to the public as the owner and principal of Paradise, he would always have me contact Ebner for answers to my questions and for direction. In fact, my work was constructing the Paradise offices was directly managed by Ebner."

Paragraph 13: "We shipped my personal truck from St. Thomas to St. Croix to be used for my drive to the Paradise offices, solely to conceal Paradise's connection to Ebner."

Paragraph 14: "[Ebner] arranged for us to meet on a number of occasions at a parking lot at the Sunny Isles Shopping Center in St. Croix. On one of those occasions, Ebner delivered to me office equipment, including fax machines and copiers, which he had just purchased at the shopping center's Office Max. He had me put this office equipment in my

> truck for delivery to Paradise's offices. He told me that we were handling the delivery in this fashion so that he would not be seen as connected to Paradise."
>
> Paragraph 15: "There were a couple of occasions where Ebner did appear at Paradise's offices. On those occasions, Ebner would conceal his truck from public view."
>
> Paragraph 16: "Ebner told me that he was operating Paradise from the "background" and that he was in charge of all of its finances. In about the third week of April 2013, I was personally present during a phone call Ebner had in which he obtained a $50,000.00 loan for Paradise. Ebner and I were in his truck driving to Home Depot in St. Croix. He was speaking on his cell phone and I heard him state that he needed to obtain the loan to cover Paradise's payroll, including for Leonard and Marisia Thomas."

Petrohan Affidavit. Exhibit 4.

The statements in the Petrohan Affidavit are statements that may be verified as true or proven false. Therefore, they do not qualify as protected speech. To succeed on this defamation claim, Ebner has the burden of proving Petrohan's statements in the Affidavit are false. *Simpson v. Capdeville* at 487.

Of course, the parties disagree on whether Ebner was involved with Paradise Freights. At trial, Petrohan testified that Ebner invited Petrohan to St. Croix to do some work for Paradise Freights, Ebner paid for Petrohan's flight to St. Croix, and Ebner accompanied Petrohan to Home Depot to buy materials for Paradise Freights. He testified that Ebner bought supplies from Office Max for Paradise Freights and had Petrohan deliver the supplies to Paradise Freights so Ebner would not be seen at the premises. He testified that while in St. Croix, he used Ebner's truck for a few days, but Ebner was concerned about his truck being seen at Paradise Freights, so Ebner paid to have

Petrohan's truck shipped from St. Thomas to St. Croix. He further testified that Ebner told him he was operating Paradise Freights from behind the scenes.

On the other hand, Ebner testified that Paradise Freights was owned by Matthew Leonard and he admits he installed the computers for Paradise Freights. He testified he was concerned about the non-compete agreement with Tropical Shipping so he asked his attorney if installing the computers would be a violation of that agreement. According to Ebner his attorney told him it would not be a violation. He says Petrohan asked for two weeks' vacation, in April 2013, so that he could do a side job, and Ebner agreed and approved his leave, but cautioned Petrohan he had a non-compete agreement and did not want to have anything to do with Paradise Freights. Ebner admitted there were already rumors in St. Croix that he was involved in Paradise Freight even before Petrohan traveled to St. Croix to work for Paradise Freight. (Tr. 155-157). He testified that Petrohan actually spent four to five weeks in St. Croix, during which Petrohan stayed in Ebner's guest house. He further testified that he paid Petrohan for the entire time he was in St. Croix and that Petrohan returned to St. Thomas on May 8, 2013.

Ebner claims Petrohan damaged his reputation and his finances, that Petrohan discredited him and made him look like "a sneaky, lying, cheating, conniving scoundrel," and that he felt "mentally disabled" and suffered "mental malaise."

Ebner testified that he and his wife were greatly impacted, that he could not retire, and that he still has to work and went from living in a regular house to living in trailer park in Iowa.

The Court was presented with completely contradictory testimony regarding Ebner's involvement or non-involvement in Paradise Freights. The Court found no basis upon which to believe Ebner over Petrohan, or Petrohan over Ebner on this issue. Severely lacking was any other witness who could testify to Ebner's involvement or non-involvement in Paradise Freight. Neither party called any other witness with independent knowledge to testify on this issue.[13] However, Ebner bore the burden of proof on this issue. Even though Ebner claims that Matthew Leonard is the owner of Paradise Freight, and Leonard would have been the best witness to buttress Ebner's claim that Ebner had nothing to do with Paradise Freight, Ebner did not call Leonard as a witness.

Without any independent witness with personal knowledge the Court can only evaluate Ebner and Petrohan's testimony. Most troubling for the Court is Ebner's testimony that he granted Petrohan two weeks' vacation to work for Paradise Freight, that he paid Petrohan for the entire five weeks he spent working for Paradise Freight, that he arranged to ship Petrohan's truck to St. Croix for Petrohan's convenience, and that Petrohan stayed in Ebner's guest house for those five weeks.[14] According to Petrohan, Ebner even paid for his ticket to St. Croix, which Ebner did not dispute. Therefore, the Court is not persuaded that the statements in the Petrohan Affidavit are necessarily false. The Court does not conclude that the statements are true, but concludes that Ebner did not meet his burden of proving them false.

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[13] Plummer testified that Ebner never told her he had any involvement in Paradise Freight. But this does not prove Petrohan's statements false.

[14] Ebner testified that Matthew was willing to pay for the additional time Petrohan spent in St. Croix upon receipt of an invoice. However, there was no evidence that such an invoice was presented or that Matthew ever reimbursed Ebner for the additional time Petrohan spent in St. Croix. Neither was there evidence that Matthew paid Petrohan directly for the first two weeks when Petrohan was allegedly on vacation from SRTO, although the latter evidence was not as critical to the Court's decision as the treatment for the additional time Petrohan spent in St. Croix.

Ebner argues that Petrohan created all these falsities to try to dissuade Ebner from pursuing the missing deposits. However, perhaps Petrohan saw and heard certain things in St. Croix and realized that Ebner was indeed involved in Paradise Freight and thought he could use it against his employer. That would explain the great uptick in the missing deposits after Petrohan returned from St. Croix.[15] Though it would not be an honorable act to use that information against his employer, particularly one who considered him a trusted friend, that alone does nothing to prove the statements in the Petrohan Affidavit are actually false.

Because the Court finds that Ebner did not meet his burden of proving that the statements in the Petrohan Affidavit are false, Ebner is not entitled to damages on his claim for defamation and the Court need not address Ebner's claim for damages to his reputation and expenses incurred in defending the Tropical Shipping lawsuit.

D. <u>Ebner Is Entitled To Punitive Damages.</u>

The Superior Court conducted a *Banks* Analysis in *Segura v. Meyer*, 2014 V.I. LEXIS 130, (V.I. Super. 2014) to determine the best rule for the Virgin Islands regarding the standard of conduct necessary to garner an award for punitive damages. The *Segura* Court adopted the RESTATEMENT (SECOND) OF TORTS § 908(2) as the best rule for the Virgin Islands. Section 908(2) provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Libien v. MIFR, Inc.*, 2016 V.I. LEXIS 193, *18-19.

[15] Of the 35 missing deposits spanning 9 months, 24 of the missing deposits occurred in the two months after Petrohan returned from St. Croix in May 2013.

The Court repeats its finding in *Libien* that it is satisfied that *Segura* determined the soundest rule for determining the conduct necessary to garner punitive damages in the Virgin Islands and consequently adopts *Segura's* analysis as though it were set forth in this Opinion.

The Court finds the conversion of the missing bank deposits was not an outrageous act or of an evil motive. However, the conversion was done with a reckless indifference to the rights of Ebner. Petrohan's repeatedly failure to deposit the cash proceeds, especially the 24 deposits in May and June 2013, shows a reckless disregard for Ebner's entitlement to those funds as the owner of SRTO. Therefore, the Court finds that Ebner is entitled to punitive damages for Petrohan's conversion of the missing deposits. The Court will award $10,000 to Ebner for punitive damages.

V. CONCLUSIONS OF LAW

Petrohan was the General Manager of SRTO from January 2012 until July 2013. As the General Manager, Petrohan had overall responsibility for the store and frequently made runs to the bank to make the cash deposits. During that time 35 cash deposits never made it to the bank. Except for the four deposits missing from April 2013 when Petrohan was in St. Croix, he failed to deposit the remaining 31 deposits that total $24,286.05. Petrohan is liable to Ebner for conversion of that sum.

Ebner did not give sufficient proof of the value of the furniture that Petrohan used in his apartment or the value of the furniture missing from the SRTO. Therefore, there is no award for those portions of the claim for conversion.

Ebner provided sufficient proof to find that Petrohan breached his fiduciary duty to Ebner by not making certain bank deposits and by failing to keep track of the merchandise. Therefore, the Court will award $5,000.00 in damages for the breach of fiduciary duty related to failing to make bank deposits and $5,000 for in damages for the breach of fiduciary duty related to failing to keep track of the merchandise.

The Court finds that Ebner did not prove that Petrohan defamed him, therefore no damages will be awarded on the claim for defamation.

Ebner is entitled to punitive damages for Petrohan's conversion of the missing deposits and the Court will award $10,000 in punitive damages on that claim.

The total sum awarded to Ebner is $44,286.05, including $10,000 in punitive damages. The Court will award prejudgment interest at the statutory rate on the award of sum of $24,286.05, commencing on August 1, 2013.

The Court will enter judgment consistent with this Memorandum Opinion.

DATED: August 14, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
DONNA DONOVAN
Court Clerk Supervisor 8 / 15 / 2018