IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

DR. TYLUR ARVIDSON and DR. TYGUE ARVIDSON, Plaintiffs, v. **DR. WILLIAM L. BUCHAR,** Defendant.	)	**CASE NO. ST-16-CV-410**

CERTIFIED A TRUE COPY
DATE: 02-03-17
ESTRELLA H. GEORGE
Acting Clerk of the Court
By:
Cameil A. Clarke
Court Clerk II

MEMORANDUM OPINION

Pending before the Court is Plaintiffs' October 20, 2016, Conditional Motion to Dismiss Certain Counterclaims.[1] Plaintiffs' Motion will be granted in part and denied in part.

FACTUAL & PROCEDURAL HISTORY

Plaintiffs filed a Verified Complaint on July 12, 2016, alleging that Defendant, as manager of VI Chiropractic, LLC, breached fiduciary obligations to Plaintiffs, as members of the Company. On September 19, 2016, Defendant moved for an extension of time to answer the Complaint, which the Court denied without prejudice as inadequate on September 27, 2016.[2] Notably, Defendant filed a Second Motion to Extend Time to Answer, to which Plaintiffs responded before the Court's September 27, 2016, Order was entered. After receiving the Court's Order, Defendant then filed his third motion, the October 4, 2016, Revised Motion to Extend Time to Answer. Additionally,

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[1] Defendant responded on November 2, 2016, and Plaintiffs replied on November 10, 2016.

[2] Although the Order was signed by the Superior Court Judge on September 23, 2016, the Clerk did not enter the Order until September 27, 2016. *See* V.I.S.CT.R. 5(a)(9) ("A judgment or order is entered within the meaning of this Rule when it is entered in the docket in compliance with Superior Court Rule 49.").

Plaintiffs filed a Motion for Entry of Default and Order Deeming the Complaint Admitted on September 29, 2016, before Defendant filed his October 4, 2016, Motion. Plaintiffs then moved on October 11, 2016, for the Court to Strike Defendant's Answer, Affirmative Defenses, and Counterclaims alleging that the responsive pleading was untimely and that the case was in default. After filing their October 20, 2016, Conditional Motion to Dismiss Certain Counterclaims, Plaintiffs filed an answer to counterclaim and affirmative defenses on October 25, 2016, On January 11, 2016, the Court granted Defendant an extension of time, denied Plaintiffs' Motion for Entry of Default and to Strike Defendant's Answer, and deemed Defendant's Answer, Affirmative Defenses, and Counterclaims filed as of October 4, 2016.

STANDARD

A party may test the sufficiency of the pleadings under Fed. R. Civ. P. 12(b)(6) by seeking dismissal for the opposing party's "failure to state a claim upon which relief can be granted."[3] "In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider 'the allegations contained in the complaint, exhibits attached thereto, and matters of public record.'"[4] The Court may also consider "items of unquestioned authenticity that are referred to in the challenged pleading and are integral to the pleader's claim for relief."[5]

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[3] FED. R. CIV. P. 12(b)(6); *see Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015)("[T]he Court relies on the principles espoused in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and construes pleading requirements under Rules 8(a) and 12(b)(6) of the Federal Rules Civil Procedure. Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7....").

[4] *Lockhart v. Treasure Bay V.I. Corp.*, 2015 V.I. LEXIS 101, *5 (V.I. Super. Ct. 2015) (citing *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999)); *E.g. First Bank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *5 (V.I. Super. Ct. 2015) (citations omitted); *Nicholas v. Damian-Rojas*, 2015 V.I. LEXIS 11, *2-4 (V.I. Super. Ct. 2015); *Manbodh v. Hess Oil V. I. Corp.* (In re Kelvin Manbodh Asbestos Litigation Series), 47 V.I. 375, 381-384 (V.I. Super. Ct. 2006) (citations omitted); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 232 (3d Cir. V.I. 2015).

[5] *Manbodh*, 47 V.I. at 382 (citations omitted).

Generally, when considering such a motion, the Court must first identify the elements of a claim and identify the items that must be sufficiently pled.[6] The Supreme Court of the Virgin Islands has explained that "a claim requires a complaint with enough factual matter (taken as true) to suggest the required element."[7] Thereafter, the Court can liberally construe the pleadings to the extent permitted by the pleading requirements of Fed. R. Civ. P. 8[8] and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.[9] While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation."[10] The Virgin Islands Supreme Court has further instructed that "[t]he plausibility determination is a 'context-based' determination which should be guided by the court's 'judicial experience and common sense.'"[11] "Plausibility requires that the plaintiff allege facts that are more than simply 'consistent with a defendant's liability' and must permit the court to infer more than the mere possibility of misconduct."[12] Only after satisfying this multi-step analysis can a party survive a motion to dismiss.

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[6] *Pollara v. Chateau St. Croix*, LLC, 58 V.I. 455, 458 (V.I. 2013).

[7] *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011); *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 494 (V.I. 2008)(citations and internal quotations omitted).

[8] *Iqbal*, 556 U.S. at 678 ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[9] *Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649-50 (V.I. 2011)(internal quotations and citations omitted); *see also Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom* ("[I]n considering a motion to dismiss under Rule 12(b) (6), the Court must accept as true the well-pleaded allegations in the complaint . . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . .") (internal citations omitted).

[10] *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. Ct. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

[11] *Joseph*, 54 V.I. at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)) (quoting *Iqbal*, 129 S. Ct. at 1950).

[12] *Id.* (citing Fowler, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949).

ANALYSIS

Plaintiffs contend Defendant's counterclaims for Necessary Joinder (Count I), Tortious Interference with Contractual Relations (Count III), Defamation (Libel) (Count IV), Collusion (Count VI), Fraud (Count VIII), and Action for Injunction (Count X) must be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs correctly note that Defendant's Counterclaims mistakenly lists two causes of action as Count II. In order to avoid confusion, the Court will follow the numbering of the Counterclaims as listed, and will grant Defendant leave to amend to correct the numbering. Further, Plaintiffs allege Defendant's Counterclaims should be summarily rejected because they were filed out of time. However, since the Court deemed the Counterclaims filed as of October 4, 2016, in its January 11, 2016, Order, that argument is now moot.

I. Necessary Joinder (Count I)

Plaintiffs allege Count I should be dismissed because necessary joinder is not a cause of action, but rather is governed by Fed. R. Civ. P. 19 and is a request directed to the Court, rather than to Plaintiffs. The Court agrees. Under Fed. R. Civ. P. 19(a)(2), the Court may Order joinder of a required party.[13] In his response Defendant acknowledges that joinder is a procedural mechanism rather than a cause of action, but maintains that the Court should join VI Chiropractic for judicial efficiency and to prevent unnecessary motions practice since the issue has already been litigated. Although the Court disagrees that the issue has been previously litigated, the Court recognizes VI Chiropractic requested to join the action to file claims against Plaintiffs in

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[13] Since both parties agree that Defendant is the sole manager of the company, nothing under 13 V.I.C. § 1404(c) prevents the manager of a manger-managed company from independently adding the company as a party to litigation. Pls.' July 12, 2016, Compl., Ex. A, Operating Agreement of VI Chiropractic, LLC.

conjunction with Defendant's October 4, 2016, Answer, Affirmative Defenses, and Counterclaims.

Typically a party seeking to join an action is required to file a separate motion since the burden is on the moving party to prove that the party is necessary and indispensable.[14] Notably, Plaintiffs did not oppose the joinder of VI Chiropractic as a party, instead opposing joinder as a cause of action, and Plaintiffs filed a conditional Answer on October 25, 2016, responding to both Defendant and VI Chiropractic, collectively, as Counterclaim Plaintiffs.[15] Here, the Court finds it appropriate to dismiss Count I as a cause of action, but will consider whether VI Chiropractic is an indispensable party. Although the Court previously indicated that "any request by VI Chiropractic, LLC, to join this action must be filed as a separate motion with appropriate legal analysis and citation supporting the representation of the company," absent any explicit statutory or constitutional authority to the contrary, the Superior Court possesses the authority to rescind or revise an interlocutory order at any time,[16] and will now consider whether VI Chiropractic is a necessary party.

Rule 19(a)(1) governs the required joinder of parties and provides "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

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

[14] *Hendricks v. Clyne*, 2016 V.I. LEXIS 177, *3-5 (V.I. Super. Ct., Oct. 27, 2016); *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument").

[15] Pls.' Oct. 25, 2016, Answer, at 3, n. 1.

[16] *See Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (V.I. 2012) ("Therefore, so long as the Superior Court possesses the authority to issue an order granting or denying relief, it unquestionably possesses the authority to alter its decision prior to entry of judgment.").

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect the interest . ..."[17][18]

VI Chiropractic has a principle place of business in the Virgin Islands and is organized under the Virgin Islands Code; therefore, the company is subject to service of process and its joinder will not deprive the court of subject-matter jurisdiction.[19] But, in an action between members of a limited liability company, the joinder of the company is not always required because, under 13 V.I.C. § 1410, "a member of a limited liability company may maintain an action against that company or another member for legal or equitable relief…."[20]

Here, although Plaintiffs' action for breach of fiduciary obligations by Defendant as manager of the Company is proper between members, Defendant's counter-claims in conjunction with VI Chiropractic's Complaint assert interests relating to the subject matter of this action. For example, Defendant and VI Chiropractic allege claims for unjust enrichment, breach of contract, and contribution against Plaintiffs, which Plaintiffs answered and did not move to dismiss. As a result, based on the pleadings for the contribution claim alone,[21] VI Chiropractic has "a clear interest relating to the subject of the action and is so situated that disposing of the action in [the company's] absence may … impair or impede the [company]'s ability to protect the interest."[22] As

[17] Fed. R. Civ. P. 19(a)(1)(A)-(B)(i); *Hendricks,* 2016 V.I. LEXIS 177, *3.
[18] *Cenni v. Estate Chocolate Hole Landowners Ass'n,* 2016 V.I. LEXIS 98, *18 (V.I. Super. Ct., July 18, 2016). "Currently, the Superior Court does not have a rule addressing the issue of required joinder of parties and the Court looks to doctrines developed under Fed. R. Civ. P. 19(a) to determine the issue." *Abdallah v. Abdel-Rahman*, 2015 V.I. LEXIS 102, *8 (V.I. Super. Ct., Aug. 20, 2015)
[19] Def.'s Oct. 4, 2014, Answer, Affirmative Defenses, Counterclaims, Action for Contribution and VI Chiropractic LLC's Complaint against Pls. and Request to Join the Action, ¶¶ 37-39.
[20] 13 V.I.C. § 1410; *Abdallah*, 2015 V.I. LEXIS 102, at *14.
[21] Under the cause of action for contribution, VI Chiropractic asserts that the Company must defend Defendant "in this suit premised upon his managerial election. As members, under the Operating Agreement, the Arvidson brothers are required to contribute when profits do not cover the costs of the Company. They have not contributed to the Company accordingly…." Def.'s Oct. 4, 2016, Answer, ¶ 95.
[22] Fed. R. Civ. P. 19(a)(1)(B).

a result, the Court finds that VI Chiropractic has an interest in the action and must be added as a required party since the Court will be unable to accord complete relief without the company as a party. The Court will now consider the remainder of Plaintiffs' Motion to Dismiss in relation to both Defendant's counter-claims and VI Chiropractic's Complaint, but will collectively refer to Defendant and VI Chiropractic as Counter-Plaintiffs.

II. Tortious Interference with Contractual Relations (Count III)

At the outset Plaintiffs note that this jurisdiction recognizes a cause of action for intentional interference with existing contractual relations as well as one for intentional interference with prospective business relations. To state a claim for "intentional interference with existing contractual relations, a party must plead the existence of a contract between itself and a third party."[23] To state a claim for intentional interference with prospective business relations, a party must plead "a professional or business relationship that is reasonably certain to produce an economic benefit for [itself]."[24] Although Counter-Plaintiffs do not distinguish between these causes of action, based on the pleadings, the Court will construe Count Three as a cause of action for intentional interference with existing contractual relations. To establish a claim for intentional interference with existing contractual relations a party must prove:

> (1) the existence of a contract between the plaintiff and a third party; (2) that the defendant knew of that contract (3) that the defendant interfered with the contract using improper means or with an improper motive; and (4) that the plaintiff was damaged as a result.[25]

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[23] *Kiwi Construction, LLC v. Pono*, 2016 V.I. LEXIS 1, *12 (V.I. Super. Ct., Jan. 15, 2016) (citations omitted).
[24] *Id. (citations omitted).*
[25] *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 288 (Super. Ct. 2015).

Here, in addition to liberally construing the pleadings, the Court can also consider the Operating Agreement since the Operating Agreement was attached to Plaintiffs' Complaint and is referred to as an integral part of the claims for relief.[26]

Plaintiffs first contend Count III must be dismissed because Counter-Plaintiffs failed to plead the existence of a contract. Count II, seeking relief for breach of contract, asserts that the "parties are in agreement that the OA was a valid contract",[27] and Counter-Plaintiffs incorporate by reference into Count III all of the previous allegations made in the Complaint.[28] However, for intentional interference with existing contractual relations, the Counter-Plaintiffs are required to plead the existence of a contract between themselves and one or more third parties (presumably patients). Counter-Plaintiffs merely allege "[t]he Arvidson brothers intended to induce Dr. Buchar's and the Company's patients to breach their contractual or beneficial business relationships."[29] Although Counter-Plaintiffs have sufficiently pled that the operating agreement served as a contract between Plaintiffs and Defendant, as well as between the parties and the company, and even though a contractual relationship may have existed between Counter-Plaintiffs and their patients, the Court is unable to infer from the imprecise language of the Answer and Counter-claim that Counter-Plaintiffs intended to plead that a contract existed between Counter-Plaintiffs and their patients, as third parties.

[26] *Lockhart v. Treasure Bay V.I. Corp.*, 2015 V.I. LEXIS 101, *5 (V.I. Super. Ct. 2015) (citing *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999)); *e.g. First Bank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *5 (V.I. Super. Ct. 2015) (citations omitted); *Nicholas v. Damian-Rojas*, 2015 V.I. LEXIS 11, *2-4 (V.I. Super. Ct. 2015); *Manbodh v. Hess Oil V. I. Corp.* (In re Kelvin Manbodh Asbestos Litigation Series), 47 V.I. 375, 381-384 (V.I. Super. Ct. 2006) (citations omitted); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 232 (3d Cir. V.I. 2015).
[27] Def.'s Oct. 4, 2014, Answer, ¶ 60.
[28] *Id.* at ¶ 66.
[29] *Id.* at ¶ 67.

That determination notwithstanding, reviewing the allegations in favor of Counter-Plaintiffs, the Court believes Counter-Plaintiffs have sufficiently pled enough to suggest that Plaintiffs interfered with the company using improper means or with an improper motive.[30] Counter-Plaintiffs allege that,

> [p]rior to Dr. Buchar's decision to dissolve the Company, the Arvidson brothers left and solicited patients to come be treated by them instead of by the Company. The Arvidson brothers misrepresented that the Company was operating without a business license. At least 35 patients left the Company due to this solicitation.[31]

Further Counter-Plaintiffs assert that Plaintiffs "tampered with the breakers at the office location, interrupted visits by entering without permission, and stole the patients' database."[32] As a result, taking these allegations as true, the Court finds Counter-Plaintiffs have sufficiently pled the third factor.

Turning to the fourth factor, the Court finds that, liberally construing the pleadings as a whole, Counter-Plaintiffs' statements contain enough factual matter taken as true to suggest that Defendant and VI Chiropractic have been damaged as a result of potential interruptions in business operations through patients leaving. As a result, the Court will grant Counter-Plaintiffs leave to amend to more specifically identify the appropriate contract, and to indicate if the cause of action is for intentional interference with existing contractual relations or with prospective business relations, or both.[33]

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[30] *Id.* at ¶¶ 49-51.
[31] *Id.* at ¶ 49.
[32] *Id.* at ¶ 50 .
[33] *See* SUPER. CT. R. 8 ("The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper."). An amendment can be considered futile if the proposed amendment is frivolous, would be barred by the statute of

III. Defamation (Libel) (Count IV)

To prove a claim for defamation, a party must allege:

> 1) the existence of 'a false and defamatory statement concerning another;' (2) the existence of 'an unprivileged publication [of the false and defamatory statement] to a third party;' (3) 'fault amounting to at least negligence on the part of the publisher;' and (4) 'either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'[34]

"Publication" means the communication is made either as an intentional or negligent act to someone other than the person defamed.[35] Specifically, there are two methods of publication depending on whether the party is claiming defamation by libel or slander. Libel is the "the publication of defamatory matter by written or printed words."[36] In contrast, slander is "the publication of defamatory matter by spoken words."[37]

To support the claim for libel, Defendant Buchar alleges Plaintiffs made derogatory statements regarding Defendant to patients and members of the public with respect to him personally and professionally, as well as misrepresenting that the Company was operating without a business license.[38] However, Plaintiffs correctly note that Defendant has failed to allege facts indicating that Plaintiffs published any defamatory statements by written or printed words, and the Court agrees. Additionally, simply stating that Plaintiffs "made derogatory statements regarding

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limitations, or would otherwise not survive a motion to dismiss. *Peters,* 58 V.I. at 53-54; *Choate v. Skinner*, 19 V.I. 399, 407 (Terr. Ct. 1983); *see also Rodriguez v. U.S.*, 286 F. 3d 972, 980 (7th Cir. 2002).

[34] *Donastorg*, 63 V.I. at 223; *see also Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 586 (V.I. 2012) (citations omitted).
[35] *Joseph*, 57 V.I. at 586 (citations omitted).
[36] *Id.*
[37] *Id.*
[38] Def.'s Oct. 4, 2014, Answer, ¶¶ 48 & 49.

Defendant to patients and members of the public with respect to him personally and professionally," is insufficient to meet the pleading requirements. Nevertheless, since the counterclaim sufficiently pleads allegations to support a claim for slander, including the statements by Plaintiffs to patients that the company was operating without a business license, with at least negligent intent, resulting in the loss of patients, the Court will grant Defendant leave to amend to either provide further factual allegations to support a claim for libel or to amend the claim to one for slander.[39]

IV. Collusion (Count VI)

Plaintiffs allege Count VI must be dismissed because collusion is not a claim recognized in the Virgin Islands and Counter-Plaintiffs did not oppose the dismissal of the collusion claim in their opposition. Plaintiffs cite three cases from other jurisdictions to support their argument that collusion does not exist as a separate cause of action. Although the Court agrees with Plaintiffs that this jurisdiction has not explicitly identified collusion as a cause of action and that not all jurisdictions acknowledge collusion, the Supreme Court of the Virgin Islands has implied its willingness to recognize collusion as a cause of action.[40] Nevertheless, it is unclear to the Court whether Counter-Plaintiffs intended to plead collusion as a separate cause of action or if Counter-Plaintiffs intended to use factual allegations of collusion to support a different cause of action, for example, a claim relating to a breach of duty such as one for the breach of implied covenant of

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[39] *See supra*, n. 33.

[40] "Despite Bryan having brought these issues directly before it, the Superior Court failed to make any factual findings or issue any conclusions of law based on the collusion claim." *Bryan v. Fawkes*, 61 V.I. 416, 475-76 (V.I. 2014) (remanding the case to the Superior Court to make findings on the claim for collusion). *But see Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 593 n.18 (2015) ("And, as stated earlier, [the action for quantum meruit] must fail if *Vanterpool* knew or should have known that the contract was illegal, if he contributed to the violation of the statutory contracting procedures, or the contract involved any form of fraud or collusion.").

good faith and fair dealing.[41] As a result, the Court will dismiss Count VI, but will grant Counter-Plaintiffs leave to amend to either incorporate the factual material in that claim as support for one of the other recognized causes of action or to provide a legal analysis[42] demonstrating why this jurisdiction should recognize collusion as a cause of action, including the requisite elements.[43]

V. Fraud (Count VIII)

Plaintiffs argue that Counter-Plaintiffs' fraud claim must be dismissed because Counter-Plaintiffs failed to plead with particularity according to the requirements of Fed. R. Civ. P. 9(b), including when or where the alleged fraud occurred. Plaintiffs further contend that, even if true, such misrepresentation expressed an opinion and not a false statement of fact. Defendant alleges Plaintiffs induced Defendant into initiating dissolution of VI Chiropractic, LLC, with the intention of demanding unreasonable sums for Plaintiffs' share of the company, as well as ignoring the non-compete clause regarding the Company and filing a legal action against Defendant.[44]

At the outset, the Court agrees with Plaintiffs that, when alleging fraud, a party is subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b) and must "state with particularity

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[41] "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 797 n.2 (V.I. 2015) (citing *Chapman v. Cornwall*, 58 V.I. 431, 441 (V.I. 2013)). The Court notes the V.I. Supreme Court cites the duty of good faith and fair dealing in the *Brouillard* case as a recognized principle of contract law in the Virgin Islands, but cites to the *Chapman* case which relies on Section 205 from the Restatement (Second) of Contracts. Even though the Supreme Court has cautioned this Court that the "mechanistic and uncritical reliance on the Restatements has the effect of inappropriately delegating the judicial power of the Virgin Islands to the American Law Institute and to the governments of other jurisdictions, without any regard for determining the best rules for the Virgin Islands. *Gov't of the V.I. v. Connor*, 60 V.I. 597, 602 (V.I. 2014) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 980 (V.I. 2011). Nevertheless, since the Supreme Court has clearly recognized and applied the "duty of good faith and fair dealing," this Court will recognize this duty in contract cases.

[42] *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011).

[43] *See supra*, n. 33.

[44] Def.'s Oct. 4, 2014, Answer, ¶¶ 43-45 & 85-89.

the circumstances constituting fraud ...."[45] When construing pleadings under this standard, this Court is able to consider Third Circuit precedent, which provides

> "the purpose of Rule 9(b) [is] 'to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior ... allegations of 'date, place or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'"[46]

Further, with regard to a tort claim for fraudulent misrepresentation, this Court has adopted the following standard as the soundest rule for the Virgin Islands:

> One who makes a misrepresentation of fact, opinion, intention, or law that he or she either knew or had reason to know was false, and that was made for the purpose of inducing another to act or refrain from acting on it, is subject to liability to the other for pecuniary loss caused by the other's justifiable reliance on the misrepresentation.[47]

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[45] *Fenster v. Dechabert*, 2016 V.I. LEXIS 214, *40 (V.I. Super. Ct. Aug. 8, 2016) (citing *Mayhem Enters., LLC v. Powell*, 2015 V.I. LEXIS 132, *7 (V.I. Super. Ct. Oct. 30, 2015) (citing Fed. R. Civ. P. 9(b)). Fed. R. Civ. P. 9 is applicable, as a last resort, through Super. Ct. R. 7. *See Vanterpool*, at 576 (citing *Sweeney*, 60 V.I. at 442)).

[46] *Fenster v. Dechabert*, 2016 V.I. LEXIS 214, *40-41 (V.I. Super. Ct. Aug. 8, 2016) (citing *Merchants Commercial Bank*, 64 V.I. 3, 2015 V.I. LEXIS 146, *22-24 (citing *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984) (internal quotation marks omitted)).

[47] *Id.* At *40 (citing *Merchants Commercial Bank*, 64 V.I. 3, 21-22 (conducting *Banks* analysis with respect to a claim for fraudulent misrepresentation)). Plaintiffs argue Defendant is required to plead "(1) a specific false representation of material fact; (2) knowledge of its falsity by the person who made it; (3) ignorance of its falsity by the person to whom it was made; (4) the maker's intention that it should be acted upon; and (5) detrimental reliance by the Plaintiff." *Ringo v. Southland Gaming of the United States V.I., Inc.*, 2010 V.I. LEXIS 62, *10 (V.I. Super. Ct., Sept. 22, 2010) (citing *Nicholas v. Wyndham Int'l, Inc.*, 301 F.Supp.2d 407, 409 (D.V.I. 2002) (citing *In re: Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1421 (3d Cir. 1997))). Although this Court has considered these elements in the past, they are not explicitly required under Rule 9, and this Court has not consistently considered them as pleading requirements. *See e,g,, Mayhem Enters., LLC v. Powell*, 2015 V.I. LEXIS 132, *7 (V.I. Super. Ct., Oct. 30, 2015).

However, here it is unclear to the Court whether Defendant intended to allege fraud in the context of the contract[48], as an affirmative defense[49], or as fraudulent misrepresentation.[50] Even still, the Court finds that taking the allegations as true, Counter-Plaintiffs have sufficiently pled a misrepresentation by Plaintiffs on May 27, 2016, when they indicated in an email to Defendant, "based on the fact that neither party wishes to purchase the other shares the only solution would be to dissolve the company,"[51] intending for Defendant to act upon this representation, while also planning to demand large sums of money as compensation for their shares in addition to dissolution.[52] As a result, the Court will grant Counter-Plaintiffs leave to amend this Count as well.[53]

VI. Action for Injunction (Count X)

Count X alleges, as a separate cause of action, a right to unspecified injunctive relief. However, injunctive relief is a remedy and not a cause of action and must be filed as a separate

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[48] "The duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations. A successful claim ... requires proof of acts amounting to fraud or deceit...." *Chapman.* 58 V.I.at 441 (citations omitted).
[49] Fraud is recognized as an affirmative defense under Fed. R. Civ. P. Rule 8 (c)(2). Further, "[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Fed. R. Civ. P. 8(c). *See Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 794 (V.I. 2015) (citation omitted) ("A voidable contract is a contract challenged by one of the parties because of 'fraud, misrepresentation, or mistake.').
[50] "An aggrieved party has options for recovery. If the harm incurred arose from the breach of a duty established within the four corners of a contract, then the aggrieved party's remedies are governed by contract law. If the harm is separate and distinct from the contract, creating a viable, stand-alone tort claim, then the gist of the action doctrine will not prevent the tort claim from being litigated. *See e.g Air Prods.*, 256 F. Supp. 2d at 341 (the "distinction between fraud in the inducement and fraud in the performance claims with regard to the gist of the action doctrine is crucial... [as] ...fraud to induce a person to enter into a contract is generally collateral to (i.e., not 'interwoven' with) terms of the contract itself.")." *Pollara v. Chateau St. Croix, LLC,* 2016 V.I. LEXIS 49, *16 (V.I. Super. Ct., May 3, 2016).
[51] Def.'s Oct. 4, 2014, Answer, ¶ 44.
[52] *Id.* at ¶¶ 86-88.
[53] *See supra,* n. 33.

motion with appropriate legal analysis.[54] "In contrast to legal remedies like money damages, injunctive relief is an equitable remedy."[55] "[C]ourts of equity developed these remedies in order to provide relief that was unavailable in courts of law, [i]t is axiomatic that equitable relief is only available where there is no adequate remedy at law."[56] As a result, the Court is unable to grant relief based on a cause of action for an injunction and must dismiss Count X.

CONCLUSION

For the forgoing reasons, Plaintiffs' October 20, 2016, Conditional Motion to Dismiss Certain Counterclaims is granted in part and denied in part and Counter-Plaintiffs are granted leave to amend their Counterclaims in accordance with this Opinion.[57] The Court reminds Counter-Plaintiffs of the importance of precisely distinguishing between claims between members of the Company and claims of members of the Company against the Company, or vice versa. An Order consistent with this Memorandum Opinion shall issue.

Dated: February 2, 2017

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court ___/___/___

by: ______________________
Lori Boynes-Tyson
Court Clerk Supervisor 2/3/17

[54] *Alleyne v. Diageo USVI, Inc.*, 2015 V.I. LEXIS 110, *54-55 (V.I. Super. Ct., Sept. 17, 2015) (citing *Birdman v. Office of the Governor*, 677 F.3d 167, 172, 56 V.I. 973 (3d Cir. 2012) ("[A]n injunction is a remedy, not a cause of action.")); *White v. White*, 2013 V.I. LEXIS 64, *2 (V.I. Super. Ct., Oct. 10, 2013).

[55] *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 553 (V.I. 2015)

[56] *Id.* at 554.

[57] Fed. R. Civ. P. 15 offers further guidance on the amendment of pleadings and advises that a court "should freely give leave [to amend the pleadings] when justice so requires." FED. R. CIV. P. 15(a)(1)-(2). The Court should be "guided by the policy that a party ought to be afforded the opportunity to test the claim on the merits." *Anthony v. Independent Insurance Advisors, Inc.*, 56 V.I. 516, at *9 (V.I. 2012) (citations omitted); *Daniel v. Government of the Virgin Islands*, 30 V.I. 134, 140 (D.V.I. 1994).

ORDERED that copies of this Order and Memorandum Opinion shall be directed to counsel of record and to the IT Division of the Virgin Islands Superior Court.

Dated: February 2, 2017

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court 2/4/
by:
Lori Boynes-Tyson
Court Clerk Supervisor 2/3/17

CERTIFIED A TRUE COPY
DATE: 02-03-17
ESTRELLA H. GEORGE
Acting Clerk of the Court
By:
Carnell A. Clarke
Court Clerk II