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

TUTU PARK, LIMITED, And P.I.D., INC. Plaintiffs, v. **HARTHMAN LEASING I, LLLP, And HARTHMAN LEASING, INC.,** Defendants.	CASE NO. ST-14-CV-456 ACTION FOR DAMAGES

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiffs' Motion to Strike Affirmative Defenses and Paragraph 21, pursuant to Fed. R. Civ. P. 12(f), and Plaintiffs' Motion to Dismiss Counterclaims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth herein the motions will be denied.[1]

BACKGROUND

Plaintiffs Tutu Park, Limited ("Tutu") and P.I.D., Inc. ("PID") are corporations formed under the laws of the Virgin Islands. Defendants Harthman Leasing I, LLLP and Harthman Leasing, Inc. (hereinafter jointly "Harthman") are businesses formed under the laws of the Virgin Islands. Harthman Leasing, Inc. is the general partner of Harthman Leasing, LLLP, and they are engaged in leasing properties in St. Thomas, Virgin Islands. In August of 1987, PID and members of the Harthman family

[1] Also pending is a Motion For Partial Judgment On The Pleadings. An opinion will be issued in due course.

entered into a forty-year lease (the "Lease"), under which PID would lease the premises at No. 26 Estate Charlotte Amalie, St. Thomas, Virgin Islands, from the Harthman family. At some point prior to the execution of the Lease, the members of the Harthman family contributed their respective interests in the lease to one or more of the Harthman entities engaged as Defendants in this action.

The issue in this case revolves around whether PID made rental payments as prescribed in the Lease. The Lease required Plaintiffs to pay rent to Harthman based on a percentage of actual "gross receipts."[2] The Lease further provides Harthman "full access to all of Lessee's and Master Subtenant's books and records."[3]

According to Harthman, Plaintiffs tendered rent payment to Harthman for "a period of years" and Harthman relied on Plaintiffs' assertions that said payments complied with the terms of the Lease.[4] In April 2013, Harthman notified Plaintiffs that they would assert their right of review and would retain a certified public accountant to participate in the audit. Harthman allege that Plaintiffs "created numerous obstacles to full and complete review of their records, and produced ledgers and documentation that were not in a readily accessible format.[5] The review allegedly demonstrated that Plaintiffs had paid substantially less in rent payments than the Lease prescribed. Harthman calculated that Plaintiffs owed unpaid rent in the amount of $863,112 for the years 2008 to 2013. Harthman allegedly sent a demand

[2] *See* Pl.s' Compl. Ex. 1, at 4 & 6.
[3] *See* Pl.s' Compl. Ex. 1, at 8.
[4] Def.s' Ans. And Countercl., at p. 58, ¶ 16.
[5] Def.s' Ans. And Countercl., at p. 59, ¶ 21.

letter to Plaintiffs on July 9, 2014, requesting payment of $863,112 in unpaid rent. Plaintiffs allegedly did not make the demanded payment. Harthman contends that upon further review, they discovered that the unpaid total was actually $1,237,203 and they allegedly demanded this sum plus statutory interest on September 5, 2014.

Plaintiffs paid Harthman $1,237,203 on October 1, 2014 under protest but did not pay the demanded statutory interest. Plaintiffs filed the instant action requesting a declaratory judgment from this Court to the effect that they were in compliance with the Lease prior to Harthman's demand and that they are entitled to recoup the $1,237,203 paid to Harthman in 2014. Harthman filed an answer, affirmative defenses, and counterclaims for debt and fraud.

Plaintiffs filed the instant Motion to Strike and Motion to Dismiss in a single document and the motions are fully briefed.

DISCUSSION

I. MOTION TO STRIKE AFFIRMATIVE DEFENSES AND PARAGRAPH 21 OF DEFENDANTS' COUNTERCLAIM

To begin, the Court would point out that in *Vanterpool v. Govn't of the V.I.*,[6] the Virgin Islands Supreme Court unmistakably indicated that federal rules of procedure supply *rules of last resort* for the Superior Court of the Virgin Islands.[7] Virgin Islands courts must first determine whether a statute, precedential opinion, or Superior Court Rule applies to the situation at hand and, if so, such rules displace

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[6] 63 V.I. 563 (V.I. 2015).
[7] *Id.* at 582. (emphasis added).

the federal rules.[8] To the extent no such rule exists, the Court must still not "reflexively and mechanistically" apply federal rules but instead must "independently determine[] whether the rule serve[s] a valid purpose when applied to the Superior Court."[9] Thus, before applying a federal procedural rule, the Superior Court must consider the fitness and purpose of applying such a rule in the Virgin Islands.[10]

No statute, precedential opinion, or Superior Court Rule exists which could be seen as parallel to or in conflict with Fed. R. Civ. P. 12(f). Furthermore, the Court finds that Rule 12(f) serves the valid purpose of allowing the Court to purge redundant, immaterial, impertinent, or scandalous matter from the pleadings before it; thus, the Court finds that Rule 12(f) aids the Court in efficiently expending its judicial resources. As a result of the Court's *Vanterpool Analysis*, it will apply Fed. R. Civ. P. 12(f) to these proceedings. Under Rule 12(f), the Court may strike from a pleading any insufficient defense, or redundant, immaterial, impertinent, or scandalous matter.

In order to succeed on a Rule 12(f) motion, the movant must demonstrate the impertinence, redundancy, or immateriality (the lack of possible relationship to the controversy) *as well as* prejudice to one of the parties or that the allegation confuses

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[8] *Id.*

[9] *Id.*; *see also Cianci v. Chaput*, 2016 V.I. Supreme LEXIS 24, *17 (V.I. 2016) ("In the Superior Court of the Virgin Islands, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort, and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other procedure."); *see also Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014).

[10] *See Vanterpool*, 63 V.I. at 582.

an issue.[11] "A motion to strike redundant, immaterial, impertinent or scandalous matter is also viewed with disfavor as a time waster,"[12] because a court will not strike matter from a pleading unless it lacks any possible relation to the dispute or could confuse the issues.[13]

A. Harthman's Fourth Affirmative Defense

Harthman's fourth affirmative defense states "The Complaint fails to state a cause of action upon which relief can be granted." Tutu argues that failure to state a claim is necessarily a general defense, not an affirmative defense, thus, it should be stricken from Harthman's Affirmative Defenses as impertinent, redundant, and immaterial. Harthman argues that Tutu has not demonstrated that there is no inferable set of facts which could prevent recovery under the challenged defense, and furthermore, that Tutu has not demonstrated that the defense could subject Tutu to prejudice.

While not binding on this Court's interpretation of Rule 12(f), this Court finds the District Court's holding in *Charleswell v. Chase Manhattan Bank, N.A.*,[14] persuasive on this issue. In *Charleswell*, the plaintiff moved to strike the defendant's affirmative defense of failure to state claim. The plaintiff argued that such a defense merely restates the Fed. R. Civ. P. 12(b)(6) standard rather than actually stating an affirmative defense. In reaching its decision to deny the motion to strike, the District

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[11] *See Flanagan v. Wyndham Int'l, Inc.*, 2003 U.S. Dist. LEXIS 24211, *4 (D.V.I. Apr. 21, 2003) (emphasis added).
[12] *Id.* (internal quotations omitted).
[13] *Id.*
[14] 2009 U.S. Dist. LEXIS 116358 (D.V.I. Dec. 8, 2009).

Court determined that the seminal U.S. Supreme Court cases *Bell Atlantic Corp. v. Twombly*[15] and *Ashcroft v. Iqbal*,[16]—which created the heightened pleading regime—applied only to pleadings under Fed. R. Civ. P. 8(a)(2) and did not extend to affirmative defenses plead under Fed. R. Civ. P. 8(c)(1). Thus, the Court reasoned, a defendant need only "affirmatively state any avoidance or affirmative defense" and need not "show any facts at all."[17] As such, demonstrating the impertinence, redundancy, or immateriality of an affirmative defense on a Rule 12(f) motion is a high standard to meet.[18] Furthermore, *Charleswell* held "because of the drastic nature of the remedy ... motions to strike are usually viewed with disfavor and will generally be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues."[19] In ultimately denying the plaintiff's motion to strike the defendant's affirmative defense of failure to state a claim, the district court concluded that the defense met the low bar for stating an affirmative defense under Fed. R. of Civ. P. 8(c) and bore some possible relation to the controversy.

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[15] 550 U.S. 544 (2007).
[16] 129 S. Ct. 1937 (2009).
[17] *Charleswell*, 2009 U.S. Dist. LEXIS 116358, at *13.
[18] *Id.* at *6 ("[I]t is well-established that '[b]ecause of the drastic nature of the remedy ... motions to strike are usually viewed with disfavor and will generally be denied unless the allegations have no possible relation to the controversy and may cause prejudice..."); *accord Merchants Commercial Bank v. Tillet*, 55 V.I. 121, 123 (V.I. Super. Ct. 2011).
[19] *Charleswell*, 2009 U.S. Dist. LEXIS 116358, at *6; *see also Flanagan*, 2003 U.S. Dist. LEXIS 24211, at *4 ("Mere redundancy, immateriality, impertinence or scandalousness is not sufficient to justify striking an allegation - the allegation must also be shown to be prejudicial to the moving party.").

Harthman's fourth affirmative defense states "The Complaint fails to state a cause of action upon which relief can be granted."[20] Thus, Defendants have successfully affirmatively stated their defense pursuant to Fed. R. of Civ. P. 8(c).

Furthermore, in their Motion to Strike, Plaintiffs' argue solely that failure to state a claim is not an affirmative defense but rather it is a denial. Plaintiffs have not claimed to be prejudiced by the affirmative defense. The Court finds that the Plaintiffs have not met the high bar of demonstrating impertinence, redundancy, or immateriality, nor have they argued that they will be prejudiced if the Court does not strike the fourth affirmative defense. Thus, the Court will deny Plaintiffs' Motion to Strike with respect to Harthman's fourth affirmative defense.

B. Harthman's Third Affirmative Defense

Harthman's third affirmative defense states:

> Plaintiffs' equitable claims are barred by virtue of the terms of their written contract which controls the amount due for rent, notwithstanding any false or inaccurate statement they may have sent over the years, purporting to show a lesser sum due, nor can there by (sic) an equitable right to enforce such false statements, merely because their inaccuracy was not immediately discovered.

Def.s' Answer and Counterclaim, at p. 56, ¶ 3. Plaintiffs argue that Harthman's third affirmative defense merely points out a defect in Plaintiffs' case-in-chief. Harthman contends that Plaintiffs have not argued that they will suffer prejudice if the Court does not strike the affirmative defense.

[20] Def.s' Answer and Counterclaim, at p. 56, ¶ 4.

As with the fourth affirmative defense, here Harthman has affirmatively stated their defense pursuant to Fed. R. of Civ. P. 8(c). Furthermore, Plaintiffs have not provided a compelling argument demonstrating the impertinence, redundancy, or immateriality and have not alleged that the third affirmative defense will visit prejudice on them if it is not stricken. Thus, the Court will deny Plaintiffs' Motion to Strike with respect to Harthman's third affirmative defense.

C. Harthman's Second Affirmative Defense

Harthman's second affirmative defense states that Plaintiffs' claims are barred by fraud because Plaintiffs knowingly concealed and/or misrepresented the actual gross receipts in order to mislead Lessor and underpay rent. Here, Plaintiffs argue that Harthman's second affirmative defense fails to meet the heightened pleading requirements for fraud laid out in Fed. R. Civ. P. 9(b). They argue that under Rule 9(b), a party alleging fraud must indicate the date and recipient of the fraud. Harthman argues that the fraud affirmative defense need only satisfy the low bar of Fed. R. Civ. P. 8(c)(1).

1. *Standard for pleading an affirmative defense of fraud*

First, the Court must resolve whether an affirmative defense of fraud must meet the low bar for stating an affirmative defense or, in the alternative, the heightened standard under Fed. R. Civ. P. 9(b).[21] No statute, precedential opinion, or Superior Court Rule exists which could determine the standard for pleading fraud as

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[21] *See Ross v. Hodge*, 58 V.I. 292, 314, n.2 (V.I. 2013) (Hodge, C.J., dissenting) (acknowledging that Fed. R. Civ. P. 9(b) applies to fraud claims via Superior Court Rule 7, but not discussing Rule 9(b)'s application to affirmative defenses).

an affirmative defense.[22] Because this issue has not been discussed in Virgin Islands courts, this Court will look to persuasive authority to inform its application of Rule 9(b) and determine whether Rule 9(b) serves a valid purpose for the Virgin Islands.

As Judge Posner explained in *Ackerman v. Northwestern Mut. Life Ins. Co.*,[23] the primary purpose of Rule 9(b) is to require a claimant to do more than the "usual investigation" before filing his fraud claim.[24] More investigation is needed because a frivolous fraud allegation may visit undue reputational harm on a business or an individual.[25] Furthermore, fraud charges often ask the presiding court to rewrite contracts between the parties and interrupt established relationships.[26] The Court finds the reasoning in *Ackerman* persuasive and, as such, finds that Rule 9(b) serves the valid purpose of curtailing unnecessary reputational harm which could result if fraud allegations are not cabined by heightened pleading requirements. Therefore, the Court will apply Rule 9(b) to all averments of fraud, including affirmative defenses.[27]

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[22] *See Vanterpool*, 63 V.I. at 582; *Henry v. Hovensa, LLC*, 2016 V.I. LEXIS 55, *11-12, n.12 (V.I. Super. Ct. May 19, 2016) (noting that the Virgin Islands Supreme Court has not issued a post-*Vanterpool* opinion recognizing the application of Rule 9(b)); *see also* notes 5-9 and accompanying text.
[23] 172 F.3d 467 (7th Cir. 1999).
[24] *Id.* at 469.
[25] *Id.*
[26] *Id.*
[27] *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) ("Such pleadings [pleadings of fraud or mistake] are subject to Rule 9(b)'s particularized requirements regardless of whether they are made by way of an affirmative defense or a claim."); *Allied Med. Assocs. v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 33576, *27-28 (E.D. Pa. Apr. 16, 2009) (applying Fed. R. Civ. P. 9(b) to affirmative defense of fraud); *accord Boardwalk Apts., L.C. v. State Auto Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 102301, *5 (D. Kan. July 24, 2012); *Johnson Outdoors Inc. v. Navico, Inc.*, 774 F. Supp. 2d 1191, 1196 (M.D. Ala. 2011); *Walters v. Performant Recovery, Inc.*, 124 F. Supp. 3d 75, 82 (D. Conn. 2015).

2. Harthman's second affirmative defense meets the 9(b) standard

Second, the Court must decide whether Harthman met the particularity requirement for pleading fraud. While the Supreme Court has not defined the specific parameters that must be met to properly plead fraud under Rule 9(b),[28] other courts provide persuasive holdings. In *Williams v. Leerdam*,[29] the Superior Court stated that a claimant "must clearly plead, the circumstances of the alleged fraud in order to place the defendant on notice of the precise misconduct alleged, and to safeguard the defendant against spurious charges of immoral and fraudulent behavior."[30] On the other hand, prior to discovery, courts should be sensitive in the application of the "particularity" requirement of Rule 9(b) because sophisticated parties may adequately conceal their fraud.[31] "Moreover, in applying the rule, focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'"[32]

Harthman's second affirmative defense sufficiently puts Plaintiffs on notice of the allegations. Harthman properly alleges the substantive subject of the fraud, "knowingly concealed and/or misrepresented the actual gross receipts."[33] The party committing fraud, "PID," as well as the recipient of the fraudulent statement, "the

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[28] *See Henry*, 2016 V.I. LEXIS 55, at *11-12, n.12.
[29] 2015 V.I. LEXIS 148 (V.I. Super. Ct. Dec. 16, 2015).
[30] *Id.* at *6 (internal quotations omitted); *see also Gallivan v. Power Save VI*, 2011 V.I. LEXIS 30, *9 (V.I. Super. Ct. Apr. 28, 2011); *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *23 (V.I. Super. Ct. Dec. 18, 2015).
[31] *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99-100 (3d Cir. 1983).
[32] *Id.* at 100.
[33] Def.s' Answer and Countercl., at p. 56, ¶ 2.

Lessor." Harthman's affirmative defense notifies Plaintiffs of the exact actions which Harthman avers to be fraudulent, "knowingly concealed and/or misrepresented the actual gross receipts derived from the premises."[34] "Rule 9(b) does not require omniscience; rather, the Rule requires that the circumstances of fraud be pled with enough specificity to put defendants on notice as to the nature of the claim."[35] Here, Harthman could not be expected, in an affirmative defense, to provide the names of the individuals sending each individual fraudulent statement over the years. There can be no questions from Plaintiffs as to exactly what Harthman alleges. As such, the Court finds that Harthman's second affirmative defense satisfies the particularity requirements of Rule 9(b).

Furthermore, Plaintiffs have not argued that the defense is redundant, immaterial, or impertinent; nor have Plaintiffs argued that Harthman's second affirmative defense will prejudice Plaintiffs. Thus, the Court will deny Plaintiffs' Motion to Strike with respect to Harthman's second affirmative defense.

D. Defendants' First Affirmative Defense

Harthman's first affirmative defense asserts that

> Plaintiff's (sic) claims are barred by the doctrine of unclean hands, in that they have, by their own conduct alluded to in the answer, knowingly concealed from the Lessor the actual gross receipts received from the leased Premises, in order to reduce, minimize and avoid payment of percentage rent due under the terms of the lease.

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[34] Def.s' Answer and Countercl., at p. 56, ¶ 2.

[35] *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1279-1280 (6th Cir. 1990) (internal quotations omitted).

Def.s' Answer and Countercl., p. 56, ¶ 1. Plaintiffs argue that Harthman's first affirmative defense should be stricken because the basis for the unclean hands defense is the same conduct for which Harthman alleges fraud.

Simply put, Fed. R. Civ. P. 9(b) provides heightened pleading requirements for pleading fraud or mistake. Plaintiffs' first affirmative defense does not allege fraud or mistake. Furthermore, Harthman's separate affirmative defense of fraud has no bearing on its first affirmative defense for unclean hands. Thus, Harthman's first affirmative defense will be subject to the standard set forth in Fed. R. Civ. P. 8(c)(1).

Harthman's first affirmative defense is sufficiently stated and Plaintiffs have not argued that the defense is redundant, immaterial, or impertinent; nor have Plaintiffs argued that Harthman's first affirmative defense will prejudice Plaintiffs. Thus, the Court will deny Plaintiffs' Motion to Strike with respect to Harthman's first affirmative defense.

E. Defendants' Reservation of Rights

In paragraph 5 of Harthman's affirmative defenses, Harthman attempts to reserve the right to add additional defenses as discovery proceeds. Plaintiffs argue that a reservation of affirmative defenses is not an affirmative defense.

But, as in the above analyses, Plaintiffs fail to argue how any prejudice will result if paragraph 5 of Harthman's affirmative defenses is not stricken. Thus, the Court will deny Plaintiffs' Motion to Strike with respect to Harthman's reservation of rights.

F. Paragraph 21 of Defendants' Counterclaim

Paragraph 21 of Harthman's Counterclaim states "[d]uring the course of Harthman's review, PID created numerous obstacles to full and complete review of records, and produced ledgers and documentation that were not in readily accessible formats." In conclusory fashion, Plaintiffs argue, "[p]ut simply, these statements are extraneous and unnecessary for Counter-Plaintiffs to establish their cause of action for debt, fraud, termination of lease, and joint and several liability. Moreover, paragraph 21 is both irrelevant and prejudicial."[36] Furthermore, Plaintiffs contend that paragraph 21 "scandalously besmirches Counter-Defendants" by inferring that Plaintiffs attempted to obstruct Harthman's ability to audit Plaintiffs' books.

Simply put, "reciting one or more of these terms [redundant, immaterial, impertinent or scandalous] does not justify striking the challenged language or document. Rather, the movant must *clearly* demonstrate that it will suffer prejudice if the item is not removed from the record."[37] Furthermore, "[s]candalous pleading for purposes of Rule 12(f) must reflect cruelly upon the defendant's moral character, use repulsive language or detract from the dignity of the court.[38] Plaintiffs' argument that paragraph 21 "scandalously besmirches" them by inferring fraud is wholly unconvincing because Harthman explicitly alleges fraud. In short, paragraph 21 does not meet the high bar for striking materials from the pleadings under Rule 12(f) as it

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[36] Pl.s' Mot. to Strike Affirm. Defenses and Para. 21 & Mot. to Dis. Def.s' Countercl., at 8.
[37] *Marsh-Monsanto v. St. Thomas-St. John Bd. of Elections*, 60 V.I. 41, 61 (V.I. Super. Ct. 2014) (emphasis added).
[38] *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1221 (D.N.J. 1984) (internal quotations omitted).

does not reflect cruelly upon Plaintiffs' character, use repulsive language, or detract from the dignity of the Court.[39] Thus, Plaintiffs' Motion to Strike will be denied with respect to paragraph 21 of Harthman's Counterclaim.

II. MOTION TO DISMISS COUNTERCLAIMS FOR FAILURE TO STATE A CLAIM

Plaintiffs move to dismiss each of Harthman's Counterclaims pursuant to Fed. R. Civ. P. 12(b)(6).[40]

"The adequacy of a complaint is governed by Rule 8 of the Federal Rules of Civil Procedure."[41] A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[42] When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court conducts its analysis under the assumption that all facts (as opposed to mere legal conclusions) pleaded by the non-movant are true.[43] In evaluating the sufficiency of pleadings, the Court identifies the legal elements of the claimant's cause of action; identifies well-pleaded factual allegations; and compares the well-pleaded allegations against the legal elements and assesses whether those allegations, if true, would plausibly lead to the conclusion

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[39] *See id.*

[40] Fed. R. Civ. P. 12(b)(6) is applicable to these proceedings by way of Virgin Islands Supreme Court precedent. The Supreme Court of the Virgin Islands has repeatedly applied Rule 12(b)(6), thus, no *Vanterpool* analysis is needed. *See e.g. Brady v. Cintron*, 55 V.I. 802, 822 (V.I. 2011); *Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015).

[41] *Brady*, 55 V.I. at 822. Fed. R. Civ. P. 8 is applicable to these proceedings by way of Virgin Islands Supreme Court precedent. The Supreme Court of the Virgin Islands has repeatedly applied Rule 8, thus, no *Vanterpool* analysis is needed. *See e.g. Fleming*, 62 V.I. at 710; *Brady*, 55 V.I. at 822 n.24.

[42] Fed. R. Civ. P. 8(a)(2).

[43] *See, e.g., Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011).

that the claimant is entitled to relief.[44] "[W]here there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief."[45] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[46]

To evaluate a 12(b)6 motion, all material allegations in the complaint are taken as true, and the Court must construe all facts in a light most favorable to the non-moving party.[47] When considering if there are facts in the Complaint sufficient to show plausible entitlement to relief, the Court disregards any allegations in the Complaint which are merely "labels and conclusions [or] a formulaic recitation of the elements."[48] If the remaining facts are sufficient enough for the court to draw a reasonable inference that the defendant is liable based on the elements the plaintiff must plead, then the claim is considered plausible.[49] Determining whether a complaint states "a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[50] When deciding whether to grant a 12(b)(6) motion to dismiss, a court may consider extrinsic materials attached to the pleadings.[51]

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[44] *Id.* at 649-650.
[45] *Brady*, 55 V.I. at 823.
[46] *Fleming*, 62 V.I. at 710 (citing *Twombly*, 550 U.S. at 678 (internal quotations omitted)).
[47] *L'Henri, Inc. v. Vulcan Materials Co.*, 53 V.I. 794, 798 (D.V.I. 2010) (citing *Christopher v. Harbury*, 536 U.S. 403, 406 (2002)).
[48] *Twombly*, 550 U.S. at 555.
[49] *Id.*
[50] *Iqbal*, 556 U.S. at 679.
[51] *See Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 566 (V.I. 2012).

A. Cured Default

To begin, Plaintiffs argue that the Court should dismiss all counterclaims because Plaintiffs cured the alleged default that underlies each counterclaim. Plaintiffs argue that the Court should dismiss all of Harthman's counterclaims because the Lease does not provide for the payment of statutory interest upon default;[52] thus, the nonpayment of statutory interest cannot be grounds for Harthman's counterclaims. Plaintiffs cite to a plethora of cases for the proposition that Courts should not rewrite litigants' contracts. They argue that the curing provision of the Lease fails to reference statutory interest; and, the Court would have to rewrite the Lease to find the statute providing prejudgment interest applicable.

But, the Court can quickly dismiss Plaintiffs' contention. In *Addie v. Kjaer*,[53] Third Circuit held that 11 V.I.C. § 951 applies to "all monies which have become due" whether the debt is the result of contractual obligations or otherwise.[54] Here, Harthman alleges that Plaintiffs are indebted to Harthman on account of Plaintiffs' breach of the contractual lease provisions. Accordingly, the Court will deny Plaintiffs' Motion to Dismiss all counterclaims.

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[52] Heading ii.1, on page 9 of Plaintiffs Motion to Dismiss, indicates that Plaintiffs will present three distinct sub-arguments as to why Plaintiffs cured the alleged default. But, the body of Plaintiffs' Motion to Dismiss presents a single argument relating to cure. And, while Harthman did attack all three sub-arguments in their opposition, they did not have adequate notice of the substance of Plaintiffs' second and third sub-arguments due to Plaintiffs' failure to develop said sub-arguments in the Motion to Dismiss. As such, the Court will not consider the second and third sub-arguments—which Plaintiffs only argued at length in their Reply—because movants may not raise new arguments for the first time in a reply brief. *Christopher v. People*, 57 V.I. 500, 513 n.7 (V.I. 2012) ("Any argument that is raised for the first time in a reply brief is considered waived, because the [opposing party] will not have a chance to respond.") (collecting cases); *see also Benjamin v. AIG Ins. Co. of P.R.*, 56 V. I. 558, 567-68 (V. I. 2012).

[53] 2016 U.S. App. LEXIS 16405 (3d Cir. 2016).

[54] *Id.* at 12 (citing 11 V.I.C. § 951(a)(1)) (allowing prejudgment interest in a breach of contract claim).

B. Counterclaim Count I—Debt

Count I of Harthman's Counterclaim alleges that Plaintiffs are indebted to Harthman in an amount to be shown by proof. It further alleges that the indebted amount consists of 15% of the Gross Receipts deriving from the leased premises between 1999 and the present, less the amount already paid, plus 9% per annum in statutory interest of all amounts unpaid.

1. Statute of limitations

Plaintiffs argue that the statute of limitations bars recovery for any and all debts prior to September 5, 2008. They contend that an action on a debt carries a six year limitation period, thus, they argue, Harthman must have commenced an action on the debt within six years of accrual of the action. It would follow that Harthman could only recover on debts accruing no more than six years prior to the commencement of the action here. In response, Harthman argues that the discovery rule tolls the statute of limitations on its debt counterclaim.[55] But Plaintiffs contend that the discovery rule does not apply because a debt action is an action rooted in contract not tort.

[55] Plaintiffs also argue that Harthman waived its argument with respect to whether the statute of limitations bars Counterclaim I because Harthman only discussed the issue in a footnote. Plaintiffs rely on ***Norton v. Sam's Club***, 145 F.3d 114 (2d Cir. 1998), for the proposition that an argument is waived if a party only raises the argument in a footnote. But, in ***Norton***, the Second Circuit considered a party's argument waived under the Federal Rules of Appellate Procedure. ***Id.*** at 117. The Court will not apply other courts' interpretations of appellate rules of procedure to proceedings that are not before this Court on appeal.

Under 5 V.I.C. § 31(3), an action for debt may only be commenced within six years after the cause of action has accrued.[56] But, the "discovery rule" tolls the applicable limitations period if "the injury or its cause is not immediately evident to the victim."[57] "Under the discovery rule, the focus is not on the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff."[58] Because "the statute of limitations is an affirmative defense" involving issues of fact, it typically cannot be decided on the pleadings alone.[59]

In *United Corp. v. Hamed*, the Virgin Islands Supreme Court construed the applicability of the discovery rule broadly, stating "The discovery rule tolls the statute of limitations when, despite the exercise of due diligence, the injury or its cause is not immediately evident to the victim."[60] Rather than cabining the use of the rule to fraud claims—as Plaintiffs would have this Court do—in *Hamed*, the Virgin Islands Supreme Court held that whether the discovery rule tolled the statute of limitations on the plaintiff's claims (which included a breach of contract claim) depended heavily on factual development of the record and necessarily was not fit for disposition on the pleadings.

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[56] 5 V.I.C. § 31(3)(A); *Mercer v. Islander Taxi Serv., Inc.*, 2010 V.I. LEXIS 118, *8 (V.I. Super. Ct. Mar. 25, 2010) (applying § 31(3) to actions for debt).
[57] *Santiago v. V.I. Hous. Auth.*, 57 V.I. 256, 298 (V.I. 2012).
[58] *Id.* at 273.
[59] *United Corporation v. Hamed*, 2016 V.I. Supreme LEXIS 1, *11-12 (V.I. 2016).
[60] *Id.* at *11.

This Court is bound to follow the Virgin Island Supreme Court's direction in *Hamed.* Like Hamed's breach of contract claim, Harthman's claim for debt is rooted in contract. Furthermore, like the movant asserting a statute of limitations defense in *Hamed*, here, Plaintiffs have not provided the Court with any evidence tending to support Harthman's discovery of Plaintiffs' alleged wrongdoing.[61] Consequently, the Court will deny Plaintiffs' Motion to Dismiss Counterclaim I on the basis of the statute of limitations.

2. Failure to Provide Effective Demand Letter

Plaintiffs cite to a plethora of non-jurisdictional cases for the proposition that Harthman failed to provide an effective demand letter because Harthman did not provide a monthly breakdown of the rents owed such that interest could be calculated.[62] Plaintiffs urge this Court to apply common law principles, such as that applied by the California Supreme Court almost 150 years ago in *Gage v. Bates*.[63]

When determining the common law applicable in the Virgin Islands, this Court cannot uncritically rely on non-binding authority.[64] This Court—and indeed the parties before it[65]—must conduct an analysis per the Virgin Islands Supreme Court's holding in *Banks* before the Court adopts a principle of common law not previously

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[61] *See Id.* at *20.
[62] *See* Mot. to Strike Affirm. Defenses and Para. 21 & Mot. to Dis. Def.s' Countercl., at 12.
[63] 40 Cal. 384, 385 (Cal. 1870) ("The rule is well settled at *common law*, and has been so held in this State, that to work a forfeiture the landlord must have made a demand for the precise sum due on the premises, or wherever the rent was payable, on the day it became due, and at a reasonable time before sunset.").
[64] *Banks v. Int'l Rental & Leasing Corp* 55 V.I. 967, 981 (V.I. 2011); *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 602 (V.I. 2014); *see also Benjamin v. Coral World VI*, 2014 V.I. LEXIS 35 at *13, n.38 (V.I. Super. Ct. June 12, 2014) (stating that parties before the Superior Court can no longer automatically rely on non-binding common law).
[65] *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, *44, n.13 (V.I. 2016).

foreclosed by the Virgin Islands Supreme Court. In fact, the Supreme Court of the Virgin Islands specifically stated in *Antilles School, Inc. v. Lembach* that litigants have the responsibility to brief all relevant questions of law.[66]

Here, Plaintiffs cite to a wide variety of non-jurisdictional cases without signaling to the Court that these authorities are merely persuasive. Furthermore, Plaintiffs fail to address the need to provide a *Banks* analysis on the common law issue at hand. Reaching a decision on a complicated legal question without proper briefing by the parties defeats the purpose of our adversarial system of law.[67] If a movant fails to attempt to identify applicable law to support its motion, this Court may strike the unsupported portion of the motion as deficient.[68] This Court will not address the relatively complex legal issue raised—albeit not properly briefed—by the

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[66] *Id.* This Court acknowledges *Antilles School* was issued after the subject motions were fully briefed, but *Banks* and *Connor* were issued before the subject motions were briefed.

[67] *See Carducci v. Regan*, 714 F.2d 171, 176 (D.C. Cir. 1983) (suggesting that, while courts are not precluded from reaching decisions on issues beyond the briefings, attempting to resolve complex legal questions without proper briefing by the parties deprives the court of the assistance of counsel necessary to properly develop the law in an adversarial system and declining to entertain appellant's argument); *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 121 (3rd Cir. 1997) (refusing to address complicated legal issues that were not properly developed by the parties in their briefs); *Schneider's Dairy v. Serv. Pers. & Emples., Teamsters Local Union No. 205*, 2013 U.S. Dist. LEXIS 174350, *5-6 n.1 (W.D. Pa. Dec. 10, 2013) (noting that "[i]t is not the Court's job to research and construct legal arguments open to parties ... In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate[.]") (internal citation omitted). The Supreme Court of the Virgin Islands has also spoken on the importance of this principle: "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[.]" *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012).

[68] see *Coral World VI*, 2014 V.I. LEXIS 35 at *13 n.38 (reminding parties that under LCRi 11.1, by signing a motion or supporting memorandum, an attorney certifies that the applicable law in this jurisdiction has been cited, including authority for or against the position being advocated by counsel and warning parties that motions not supported by proper legal authority may be struck by the court as fatally deficient); *accord IGY-AYH St. Thomas Holdings, LLC v. Cool Signs, LLC*, 2014 V.I. LEXIS 78, *4 n.8 (V.I. Super. Ct. Sept. 22, 2014); *Pate v. Gov't of the Virgin Islands*, 62 V.I. 271, 291 (V.I. Super. Ct. 2015); *V.I. Daily News v. PSC*, 45 V.I. 139, 146 (V.I. Terr. Ct. 2002) (finding attorney's failure to cite binding authority rendered it fatally deficient).

Plaintiffs on their Motion To Dismiss Harthman's Counterclaim for debt.[69] Therefore, the Court will deny that portion of Plaintiffs' Motion to Dismiss. In addition, we reject the holding in *Gage v. Bates* as good law for the Virgin Islands.

C. Counterclaim Count II—Fraud

Harthman's second counterclaim alleges that Plaintiffs committed fraud and includes by reference the earlier paragraphs of the Counterclaim. Paragraph 41 alleges that the limitations period did not begin to run until July 5, 2014. The claim goes on to state that Plaintiffs are indebted to Harthman "by virtue of fraud as alleged."[70] Plaintiffs offer a variety of bases for their motion to dismiss which will be considered in turn.

1. Statute of limitations

Plaintiffs argue that this Court should dismiss Harthman's fraud counterclaim because the two year statute of limitations has run. They further argue that Harthman's right to inspect Plaintiffs' books and records necessarily put Harthman on constructive notice of any alleged fraud. In response, Harthman invokes the

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[69] *See Carducci*, 714 F.2d at 176 ("courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them"); *Cenni v. Estate Chocolate Hole Landowners Ass'n*, 2016 V.I. LEXIS 98, *80-83 (V.I. Super. Ct. July 18, 2016) ("The Court will not make a movant's arguments for him [or her] when he [or she] has failed to do so."); *Nature Conservancy, Inc. v. Louisenhoj Holdings, LLC*, 2014 V.I. LEXIS 42, *2 (V.I. Super. Ct. July 8, 2014) ("[T]he court has the inherent power to control its docket and the responsibility to manage its cases to further the ends of justice. That power includes, inter alia, the right [to] strike items from the docket…"). The Court's authority to strike deficient motions derives from 4 V.I.C. § 83. Section 83 states "the Superior Court may issue all writs and make all orders necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law." *See also Pedro v. Ranger American of the Virgin Islands, Inc.*, 2015 V.I. Supreme LEXIS 19, *23-27 (V.I. 2015) (J. Gomez, dissenting in part) ("[A]s a matter of law, trial judges have the inherent power" to control the disposition of the causes on [the court's] docket with economy of time and effort for itself, for counsel, and for litigants.").

[70] Def.s' Ans. And Countercl., at p. 62-63, ¶ 42.

discovery rule and argues that whether they exercised the requisite diligence as to satisfy the discovery rule is a factual determination not ripe for decision at this stage of litigation.

An action for fraud may only be commenced within two years after the cause of action has accrued;[71] but, the cause of action does not accrue until discovery of the fraud.[72] "Under the discovery rule, the focus is not on the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff."[73]

The question for the Court is whether Harthman's contractual right to inspect Plaintiffs' books and records necessarily started the limitations clock on Harthman's fraud claim. The Virgin Islands Supreme Court recently held "more than bare access to necessary information is required to start the statute of limitations running [on a fraud claim]. There must also be a suspicious circumstance to trigger a duty to exploit the access."[74]

Here, Plaintiffs argue that Harthman had full access to Plaintiffs' books and records and did not exercise this right until April 2013.[75] But, Harthman's right to review Plaintiffs' books and records is exactly the type of "bare access to necessary information" contemplated by the Virgin Islands Supreme Court in *Hamed*.[76]

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[71] 5 V.I.C. § 31(3)(A).
[72] 5 V.I.C. § 32(c).
[73] *Hamed*, 2016 V.I. Supreme LEXIS 1, at *11.
[74] *Id.* at *19.
[75] *See* Pl.s' Mot. to Strike Affirm. Defenses and Para. 21 & Mot. to Dis. Def.s' Countercl., at 16.
[76] *See Hamed*, 2016 V.I. Supreme LEXIS 1, at *19.

Furthermore, Plaintiffs have not argued that Harthman developed the suspicion necessary to start the clock. Consequently, the Court will deny Plaintiffs' Motion to Dismiss Harthman's fraud counterclaim on limitations grounds.

2. Establishing Reliance on Plaintiffs' Misrepresentation

Plaintiffs argue that Harthman's fraud counterclaim must be dismissed because Harthman cannot establish that they relied on any alleged misrepresentation. Yet, Plaintiffs fail to direct the Court to any binding authority in order to reach a decision on the issue.

As the Court stated earlier, when determining the common law applicable in the Virgin Islands, this Court—and indeed the parties before it—cannot uncritically rely on non-binding authority.[77] While Plaintiffs recognize that fraud is a common law cause of action, they fail to provide the Court with a citation to any applicable authority regarding the elements of common law fraud. Furthermore, Plaintiffs fail to conduct the required *Banks* analysis to determine the elements of common law fraud.[78] As such, the Court will deny Plaintiffs' Motion to Dismiss with respect to their request to dismiss Counterclaim II for fraud on the basis of lack of reliance.[79]

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[77] *Connor*, 60 V.I. at 602.

[78] *Banks*, 55 V.I. at 981; *Connor*, 60 V.I. at 602.

[79] *See supra* notes 64-69 and accompanying text. The Court notes that resolving this particular issue would necessitate two separate *Banks* analyses. First, multiple Superior Court decisions have included *Banks* analyses to determine the best common law for the Virgin Islands regarding the elements of a common law fraud claim. But, those Courts rendered contrary decisions. *See Isaac v. Crichlow*, 63 V.I. 38, 62 (V.I. Super. Ct. 2015); *but see Merchants Commercial Bank*, 2015 V.I. LEXIS 146, at *19-20 (rejecting Crichlow's verbatim adoption of the Restatement due to its circularity and adopting a close alternative). Furthermore, assuming that reliance is a necessary element for a fraud claim, Plaintiffs cite to a case from the Western District of Kentucky for the proposition that Harthman cannot establish reliance because they enjoyed a right to inspection of Plaintiffs' records. But, Plaintiffs fail to address the counterpoint (adopted by other courts) that Harthman's right to inspect does not negate its right of reliance. *See e.g. Morrill v. Becton, Dickinson & Co.*, 747 F.2d 1217, 1224 (8th Cir. 1984) ("The opportunity

3. Satisfaction of Fed. R. Civ. P. 9(b) Pleading Standards

Plaintiffs argue that Harthman's fraud counterclaim fails to meet the heightened pleading requirements of Rule 9(b). As discussed above,[80] this Court held that a claimant alleging fraud must state with particularity the circumstances constituting fraud.[81]

Plaintiffs construe Fed. R. Civ. P. 9(b) to provide the substantive elements for a fraud claim in the Virgin Islands. They rely on the Virgin Islands Superior Court decision *Ringo v. Southland Gaming* for this proposition.[82] The Virgin Islands Supreme Court clarified in *Banks* and *Connor* that the Superior Court may not uncritically rely on non-binding propositions of common law.[83] An evaluation of *Ringo's* citation history reveals that its holding regarding the elements of fraud originates in a legal treatise rather than a precedential opinion of the Virgin Islands Supreme Court.[84] As such, this Court will deny this portion of Plaintiffs' Motion on account of its deficiency.[85]

Assuming *arguendo* that the Court had considered Plaintiffs' Motion to Dismiss Counterclaim II with respect to meeting the heightened pleading

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for investigation will not of itself preclude the right of reliance."). Thus, in order to determine the impact of Harthman's right to inspect Plaintiffs' books and records, a second *Banks* analysis would be necessary.

[80] *See supra* Part I.C.

[81] *See Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, at *23.

[82] *Ringo v. Southland Gaming of the United States V.I., Inc.*, 2010 V.I. LEXIS 62, *4 (V.I. Super. Ct. Sept. 22, 2010).

[83] See supra Parts II.B.2 & II.C.2.

[84] *See Ringo*, 2010 V.I. LEXIS 62 at *10 (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. N.J. 1997) (citing In re Westinghouse Sec. Litig., 90 F.3d 696, 710 (3d Cir. Pa. 1996) (citing *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir. N.J. 1992) (citing *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. Pa. 1983) (citing Clark, Code Pleading § 48, at 312 (2d ed. 1947))))))).

[85] *See supra* notes 64-69 and accompanying text.

requirements of Fed. R. Civ. P. 9(b), the result would have been the same. Fed. R. Civ. P. 9(b) merely provides a pleading standard that supplements the simple pleading requirements of Fed. R. Civ. P. 8(a). As discussed above, a claimant "must clearly plead, the circumstances of the alleged fraud in order to place the defendant on notice of the precise misconduct alleged, and to safeguard the defendant against spurious charges of immoral and fraudulent behavior."[86] On the other hand, prior to discovery, courts should be sensitive in the application of the "particularity" requirement of Rule 9(b) because sophisticated parties may adequately conceal their fraud.[87]

Here, Harthman sufficiently put Plaintiffs on notice of the allegations. Harthman properly alleges the substantive subject of the fraud, "PID was concealing its actual Gross Receipts from the Premises and fraudulently reporting its rents to Harthman..."[88] Harthman also alleges the party committing fraud "PID,"[89] as well as the recipient of the fraudulent statement "Harthman."[90] Harthman's counterclaim notifies Plaintiffs of the exact actions which Defendants aver to be fraudulent, "the representations of gross receipts."[91] "Rule 9(b) does not require omniscience; rather, the Rule requires that the circumstances of fraud be pled with enough specificity to

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[86] *Leerdam*, 2015 V.I. LEXIS 148 at *6 (internal quotations omitted); *see also Gallivan v. Power Save VI*, 2011 V.I. LEXIS 30, *9 (V.I. Super. Ct. Apr. 28, 2011); *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *23 (V.I. Super. Ct. Dec. 18, 2015).
[87] *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99-100 (3d Cir. 1983).
[88] Def.s' Answer and Countercl., at p. 61, ¶ 31.
[89] Def.s' Answer and Countercl., at p. 61, ¶ 31.
[90] Def.s' Answer and Countercl., at p. 61, ¶ 31.
[91] Def.s' Answer and Countercl., at p. 61, ¶ 31.

put defendants on notice as to the nature of the claim."[92] Prior to discovery, Harthman could not be expected to provide the names of the individuals sending each fraudulent statement over the years. As such, the Court finds that Counterclaim II satisfies the Rule 9(b) pleading requirement.

D. Counterclaim III—Termination of Lease

Plaintiffs ask this Court to dismiss Counterclaim III, titled Termination of Lease, because Defendants failed to provide an effective demand letter. But, the Court need not analyze this issue because it already concluded it will deny the portion of the Motion to Dismiss that seeks dismissal of Count I on the same grounds. Thus, the Court will deny Plaintiffs' Motion to Dismiss with respect to Counterclaim III.

E. Counterclaim IV—Joint Debt of PID and Tutu Park Mall

Plaintiffs' argument asking this Court to dismiss Counterclaim IV, titled Joint Debt of PID and Tutu Park Mall, hinges solely on the dismissal of Counterclaims I and II. Thus, because the Court already denied the Motion to Dismiss with respect to Counterclaims I and II, the Motion to Dismiss Counterclaim IV will be summarily denied.

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[92] *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1279-1280 (6th Cir. 1990) (internal quotations omitted).

CONCLUSION

In light of the foregoing analyses, the Court will deny Plaintiffs' Motion to Strike and Motion to Dismiss. An order consistent with this Opinion will follow.

DATED: September 27, 2016

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: **LORI BOYNES TYSON**
Court Clerk Supervisor 9/27/16