No. 23–_____

In the Supreme Court of the United States

WARREN MOSLER, CHRIS HANLEY,
AND CHRISMOS CANE BAY, LLC,

*Petitioner*s,

v.

JOSEPH GERACE AND VICTORIA VOOYS
D/B/A CANE BAY BEACH BAR,

*Respondent*s.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE VIRGIN ISLANDS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of the Virgin Islands ordered entry of judgment against Petitioners on a theory that

- was never pled;
- was not identified in the Final Pretrial Order;
- the jury was not instructed upon;
- did not appear on the jury verdict form;
- was not argued to the jury;
- was not raised in a post-trial motion; and
- was in favor of the Respondents even though they did not sustain the putative damages.

While the question presented *could* be, "Does the Rule of Law still apply in the U.S. Virgin Islands?" Petitioner will state it in a more traditional format:

The question presented is:

> Does Due Process allow an appellate court to shortcut the trial proceedings; the jury deliberations; and the verdict itself; and ignore the plaintiffs' corporate form and enter judgment in favor of a corporation's shareholders for damages putatively sustained by the corporation on a theory never tried or presented to the jury?

CORPORATE DISCLOSURE

Petitioner Chrismos Cane Bay, LLC is a limited liability company whose sole members are co-Petitioners Warren Mosler and Chris Hanley. No publicly-owned company owns any portion of Chrismos Cane Bay, LLC.

DIRECTLY RELATED PROCEEDINGS

- *Gerace, et al. v. Bentley, et al.*, Case No. SX-2005-CV-00368, Superior Court of the Virgin Islands. Order entered on Sept. 12, 2022. Judgment in conformance with the mandate of the Virgin Islands Supreme Court entered on Feb. 13, 2024.
- *Mosler, et al. v. Gerace, et al.*, S. Ct. Civ. No. 2022-0049, Supreme Court of the Virgin Islands. Judgment entered on January 3, 2024.

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The decision of the Supreme Court of the Virgin Islands appears in the Appendix to this petition at A-1.

JURISDICTION

The Supreme Court of the Virgin Islands entered its decision on January 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1260 to review the Supreme Court of the Virgin Islands's decision on a writ of *certiorari*. Specifically, the Court has *certiorari* jurisdiction "where any . . . right, . . . is . . . claimed under the Constitution . . . or statutes of . . . the United States." *Id.*

STATUTORY PROVISIONS AT ISSUE

The Due Process Clause of the United States Constitution, applicable to the Territory of the U.S. Virgin Islands by virtue of 48 U.S.C. § 1561, provides that no person shall be "deprived of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Shortly after graduating from a culinary school, Joseph Gerace and Victoria Vooys ("Respondents"), saw an Internet advertisement offering to sell the Cane Bay Beach Bar on St. Croix, U.S. Virgin Islands. Gerace impulsively bought the business in August 2003 even though: the seller did not have a lease or an assignable trade name; the landlord was selling the underlying land and buildings; and neither he nor Vooys even knew how utilities were split with other businesses on the property. Respondents formed a corporation, Barabus, Inc. ("Barabus"), five days after the purchase

to serve as the owner/operator of the beach bar, with Gerace and Vooys each owning half of the shares of Barabus. Gerace and Vooys treated Barabus as a separate business and reported the losses from Barabus, an S-corporation, on their tax returns.

In September 2003, one month after the beach bar sale closed, Petitioners Warren Mosler and Chris Hanley formed Petitioner Chrismos Cane Bay, LLC ("Chrismos") and bought the underlying property. Petitioners met with Respondents at this time and discussed potential lease terms, including the possibility of a seven-year lease; but, the parties did not reach an agreement on terms.

In March 2004, and again in November 2004, Mosler and Hanley proposed a lease that had only a two or two-and-a-half year term and had other terms that were not acceptable to Respondents. In March or April 2005, Mosler identified a new prospective tenant for the beach bar and the relationship between the parties deteriorated.

In June 2005, Respondents sued Chrismos, Mosler, and Hanley for a variety of claims, including, as relevant here, breach of agreement to enter into a lease (Count V; A-137 [against Chrismos only]); intentional misrepresentation (Count VIII; A-138); and breach of the contractual duty of good faith and fair dealing (Count X; A-139).[1] There was no count in the complaint

[1] The remaining counts of the complaint are not relevant to this petition. In addition to alleging that Petitioners defamed them, Respondents also sued the parties who sold the beach bar to them, alleging that Respondents had purchased the business for

based upon promissory estoppel. Shortly after filing suit, Respondents sold the business for $30,000.

In advance of the trial, the parties filed a joint final pretrial order in accordance with V.I. R. Civ. P. 16(e).[2] The joint final pretrial order provided that it could not be amended unless the court determined that manifest injustice would result if an amendment were not allowed. A-174. The trial judge signed the order. A-175. The joint final pretrial order described Gerace's and Vooys' breach of contract, misrepresentation, and breach of good faith/fair dealing claims against Chrismos, Mosler and Hanley, but made no mention of a promissory estoppel claim.

The case proceeded to trial on February 22, 2022. At the close of the case, the judge delivered his jury instructions (A-176), which included the elements of breach of contract and misrepresentation, A-188; and breach of the duty of good faith and fair dealing. A-189. No instruction on promissory estoppel was given and Gerace and Vooys did not request one.

As relevant to this petition, Questions 1 through 3 on the jury verdict form (A-247) related to the

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$45,000 but that the sellers had not owned most of the property that was transferred; that equipment Respondents had purchased from the sellers was being repossessed; and that the sellers had not even owned the trade name they sold to Respondents. A-130–31, ¶¶14–19.

[2] For all material purposes, V.I. R. Civ. P. 16(e) is identical to Fed. R. Civ. P. 16(e). Indeed, the final pretrial order, A-141, erroneously refers to the federal rule in its introductory statement.

determination of liability on the breach of contract, misrepresentation and good faith and fair dealing claims. A-247–48. There was no question on the verdict form relating to promissory estoppel.

Petitioners' moved for judgment as a matter of law on the breach of contract, misrepresentation, and breach of good faith/fair dealing claims, A-88, ¶43, arguing that they were not proven and that Gerace and Vooys, shareholders of Barabus, were not the proper parties to recover for the business losses of the corporation.[3] The Superior Court of the Virgin Islands agreed that Respondents had not proven breach of contract or good faith/fair dealing, A-53, A-88–92, but upheld the verdict on the misrepresentation claim, A-92–98, and rejected, in a footnote, the argument that shareholders could not sue for the corporation's losses. A-98, n.24.

Petitioners appealed to the Supreme Court of the Virgin Islands. That court upheld the dismissal of the breach of contract and good faith/fair dealing claims. But, Respondents argued for the first time in the case that the court should affirm the jury award on the alternative basis of an unpled promissory estoppel theory. The court, citing two cases that dealt with allowing—before judgment—a plaintiff to pursue legal theories reflected by the facts that were pled in the complaint, determined that it could recognize a legal theory *first raised at the appellate level and after the jury had been discharged*, based upon facts proven at

[3] Gerace and Vooys did not assert derivative claims on behalf of the corporation.

trial. Further, the court found it appropriate to order the entry of judgment on the jury verdict based upon this unpled legal theory that the jury had not considered. The court rejected (in a footnote) the argument that Respondents could not pursue the pecuniary losses of Barabus. It ignored the corporate form under the novel theory that Respondents were "essentially Barabus's alter ego." A-24, n.8.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* pursuant to Supreme Court Rule 10(a) and 10(c), as the Supreme Court of the Virgin Islands has "so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power," and has also decided important Due Process issues in ways that conflict with relevant decisions of this Court.

A. The decision of the Supreme Court of the Virgin Islands to enter—on appeal—a judgment against Petitioners on an unpled theory never considered by the jury is contrary to this Court's precedent and an abandonment of the usual course of judicial proceedings.

In the proceedings below, the Supreme Court of the Virgin Islands found that the evidence presented at trial met all of the elements of a claim for promissory estoppel and directed that on remand the trial court enter judgment on that theory in favor of Respondents. But that theory was never pled and never presented to

the jury. The trial court did not instruct the jury on a promissory estoppel theory and Respondents did not argue the theory to the jury. Respondents did not request that a promissory estoppel theory appear on the verdict form. The jury had no opportunity to find promissory estoppel was proven. And because the issue never arose until Respondents filed their opposition brief in the Supreme Court of the Virgin Islands, Petitioners never had the opportunity to present defenses to the theory.[4] It turns Due Process on its head to think that an appellate court can order the entry of a verdict against a party that was not on notice of the claim and never had the opportunity to present a defense to it.

The judicial system has erected barricades to prevent judges from supplanting the right to a jury trial. It is for this reason that there are rules that limit the power of appellate tribunals to review challenges to the sufficiency of the evidence to support a jury verdict. Appellate courts cannot consider such challenges unless they are properly preserved via pre- and post-verdict motions under Fed. R. Civ. P. 50 or its state/territorial equivalent.[5] *See, e.g., Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006)

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[4] Petitioners had potentially viable defenses to a promissory estoppel theory, including, *inter alia*, the statute of frauds, 28 V.I.C. § 242; waiver; and equitable estoppel based upon Respondents' pleadings and other conduct.

[5] Rule 50 of the Virgin Islands Rules of Civil Procedure is identical to its federal equivalent except that "Supreme Court of the Virgin Islands" is substituted for "appellate court" wherever the latter phrase appears in the federal rule.

(holding that appellate court could not review sufficiency of evidence challenge if the appellant did not first raise the issue before the case was submitted to the jury pursuant to Fed. R. Civ. P. 50(a) and then renew that motion under Fed. R. Civ. P. 50(b) after the verdict was returned). The failure to follow this process leaves an appellate court "without power to direct the [trial court] to enter judgment contrary to the one it had permitted to stand." *Cone v. W. Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947); *accord Global Liquor Co. v. San Roman*, 332 U.S. 571, 573–74 (1948). In the proceedings below, the Supreme Court of the Virgin Islands ran roughshod over the safeguards to the right to a jury trial recognized by this Court in *Unitherm Food Systems*, *Cone* and *Global Liquor*.

The rules of civil procedure afford litigants ample opportunity to amend or refine their theories even late in the game. For example, the final pretrial order may amend the complaint without a formal amendment. *Curtis v. Loether*, 415 U.S. 189, 190, n.1 (1974) (where a claim was not included in the complaint, but was included in the pretrial order, "it is irrelevant that the pleadings were never formally amended"). Even during trial, if "a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. Fed. R. Civ. P. 15(b)(1); V.I. R. Civ. P. 15(b)(1) (substantively identical to the federal rule). But, there are limits. *After* judgment has been entered, a court may allow the pleadings to be amended to conform to the evidence, but *only* when "an issue not raised by the pleadings is tried by the parties' express or implied consent." Fed. R. Civ. P. 15(b)(2); V.I. R. Civ. P. 15(b)(2) (substantively identical to the

federal rule). *See Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982) (holding that a judgment may not be based upon issues not presented in the pleadings and not tried with the express or implied consent of the parties); *accord Monod v. Futura, Inc.*, 415 F.2d 1170, 1173–74 (10th Cir. 1969).[6]

Further, it is well-settled that "each party must live with the legal theory reflected in instructions to which it does not object." *Will v. Comprehensive Accounting Corp*., 776 F.2d 665, 675 (7th Cir.1985), *cert. denied*, 475 U.S. 1129 (1986). While parties may pursue alternative contentions at trial, once the evidence is closed, if the party does not submit jury instructions on a particular theory, it has effectively chosen to waive that theory. *Cf. Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1456 (1st Cir.), *supplemented sub nom. Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1994 WL 717998 at *5 (1st Cir. 1994) (observing that when a party does not request an instruction submitting a particular theory to the jury, that party is "almost certainly preclud[ed]" from asserting the

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[6] Implied consent "will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some way was denied a fair opportunity to defend." *Cioffe*, 676 F.2d at 542. A defendant "cannot realistically be said to have given his implied consent to the trial of unpled issues" if its failure to recognize the unpled issue was reasonable. *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415, 421 (5th Cir. 1981). "A prime example of such a circumstances occurs when evidence is introduced that is relevant to an issue already in the case and there is no indication that the party who introduced the evidence was seeking to raise a new issue." *Id.* (footnote omitted).

omitted theory after the verdict). "No procedural principle is more familiar to this Court than that a . . . right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944)—yet the Supreme Court of the Virgin Islands departed from that principle.

The concept that a court cannot order entry of a judgment on a theory without giving the opposing party an opportunity to defend against it is so fundamental that this Court *summarily reversed* a court of appeals that had reviewed evidence in a case and remanded with instructions to enter summary judgment in favor of the appellee "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain v. Filson*, 336 U.S. 681, 683 (1949) (granting *certiorari* and reversing).

Although *Fountain* dealt with a court of appeals ruling on summary judgment (before there was a jury trial), the Supreme Court of the Virgin Islands effectively entered a post-verdict summary judgment against Petitioners, because the promissory estoppel theory was first raised in the case on appeal. The decision below is contrary to this Court's precedent in *Fountain* and is so far outside of the bounds of accepted judicial proceedings as to warrant granting *certiorari*, vacating the decision below, and summarily reversing the Supreme Court of the Virgin Islands.

B. The decision of the Supreme Court of the Virgin Islands to ignore the corporate form and allow Respondents to pursue damages on behalf of a corporation, particularly when combined with the decision to impose a verdict against Petitioners on an issue not presented to the jury, was such a far departure from the accepted and usual course of judicial proceedings as to justify this Court's intervention.

As if entering judgment on a jury verdict against Petitioners based upon a theory the Respondents had not asserted to the jury did not put a heavy enough thumb on the scales of justice, the Supreme Court of the Virgin Islands went further and allowed the Respondents to recover damages (under both the misrepresentation and promissory estoppel theories) that were ostensibly suffered by their corporation, Barabus. Once again, this is a far departure from the usual course of judicial proceedings, which require that claims be pursued by the real party in interest.

"[I]t is axiomatic that in general damages suffered by a corporation are recoverable by the corporation, not by its shareholders." *Statesman Sav. Holding Corp. v. United States*, 41 Fed. Cl. 1, 16 (1998) (citing *Twohy v. First Nat'l Bank*, 758 F.2d 1185, 1194 (7th Cir. 1985)). As the *Twohy* court noted, "the American rule barring shareholder damages actions arising out of corporate transactions with third parties has universal application among Western nations." *Twohy*, 758 F.2d at 1194. *Accord Cottingham v. Gen. Motors Corp.*, 119 F.3d 373, 378 (5th Cir. 1997) (recognizing that

corporation owned a cause of action and that the putative plaintiff—the sole shareholder and chief executive of the corporation—could not pursue the corporation's claims); *Gaff v. Fed. Deposit Ins. Corp.*, 814 F.2d 311, 315 (6th Cir.), *on reh'g in part*, 828 F.2d 1145 (6th Cir. 1987) (holding that "[a] suit for damages arising from an injury to the corporation can only be brought by the corporation itself or by a shareholder derivatively if the corporation fails to act); *Sherman v. Brit. Leyland Motors, Ltd.*, 601 F.2d 429, 440, n.13 (9th Cir. 1979) (stating that "[w]here there is an injury to the corporation, the cause of action should be brought by the corporation, or by the shareholders derivatively if the corporation fails to act; only for separate individual damage does an individual cause of action lie").

From a public policy standpoint, the rule makes eminent sense. It prevents a plaintiff from using "the corporate form both as shield and sword at his will."*Alford v. Frontier Enterprises, Inc.*, 599 F.2d 483, 484 (1st Cir. 1979) (footnote omitted). Because the corporate form shields the individual from corporate liability, the shareholder cannot deploy the sword of "disregard[ing] the corporate entity and recover[ing] damages for himself." *Id.* (footnote omitted). Otherwise, a corporation could avoid its creditors while the shareholders were enriched.

The Supreme Court of the Virgin Islands justified its departure from this well-established rule on the grounds that the Barabus was a closely-held, subchapter-S corporation and Respondents were it sole shareholders. Corporations are creatures of

state/territorial law and the Virgin Islands does not distinguish between corporations that elect to take advantage of federal tax laws under subchapter-S of the Internal Revenue Code and those that do not. *See generally* 13 V.I.C. §§ 1–473. Moreover, the legislative history of the development of subchapter-S does not support the notion that shareholders of subchapter-S corporations are treated like partners in a partnership for any purpose *other than* federal tax law. *See Wilhelm v. United States*, 257 F. Supp. 16, 19 (D. Wyo. 1966) (analyzing legislative history of subchapter-S and noting that subchapter-S "does not provide that corporations should be treated as partnerships, nor that the shareholders should be considered partners").

As the court stated in *R. S. Smero, Inc. v. Levine,* 51 A.D.2d 273, 276, 381 N.Y.S.2d 337, 339 (1976), subchapter-S is purely a federal income tax chapter providing income tax advantages which are accomplished in a manner which does not involve ignoring the corporate entity. In other words, electing one form of federal tax treatment or another does not change the state law. "[W]here parties have deliberately chosen to do business in corporate form for other reasons such as tax or accounting purposes, they cannot disregard the corporate form. *Keller v. Est. of McRedmond*, 495 S.W.3d 852, 882 (Tenn. 2016).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of *certiorari* to the Supreme Court of the Virgin Islands, vacate the decision of that court, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

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For Publication

IN THE SUPREME COURT
OF THE VIRGIN ISLANDS

Warren Mosler, Chris Hanley, and **Chrismos Cane Bay, LLC**, Appellants/Defendants v. **Joseph Gerace** and **Victoria Vooys d/b/a Cane Bay Beach Bar**, Appellees/Plaintiffs.	S. Ct. Civ. No. 2022-0049 Re: Super. Ct. Cs. No. 368/2005

On Appeal from the Superior Court
of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W.L. Willocks

Argued: March 8, 2023
Filed: January 3, 2024

Cite as 2024 VI 1

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice, and **I'VE ARLINGTON SWAN**, Associate Justice.

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OPINION OF THE COURT

HODGE, Chief Justice

¶1 Warren Mosler, Chris Hanley, and Chrismos Cane Bay, LLC (collectively "Defendants") appeal the Superior Court's September 13, 2022 opinion and order, which granted in part and denied in part their motion for judgment as a matter of law and denied their motion for a new trial. Joseph Gerace and Victoria Vooys (collectively "Plaintiffs") filed a cross-appeal, arguing that the Superior Court erred in vacating the jury's award for breach of contract, breach of good faith and fair dealing, defamation and punitive damages. For the reasons that follow, we affirm in part and reverse in part the judgment below.

I. BACKGROUND

¶2 Plaintiffs met in culinary school and upon graduation looked into buying a restaurant together. They found a posting online for Cane Bay Beach Bar

and Restaurant ("CBBBR") in St. Croix, U.S.V.I. They decided to buy CBBBR and move to St. Croix in August 2003. Shortly before arriving in St. Croix, the previous owner of CBBBR told the Plaintiffs that CBBBR did not have a lease for the restaurant premises. Despite not having a lease, Plaintiffs decided to continue with the move because they had already sold their property in Arizona and had packed up all their belongings. Once they arrived in St. Croix, Plaintiffs discovered that the landlord was selling the property where CBBBR is located.

¶3 The new landlord and owner of the property was Chrismos Cane Bay, LLC ("Chrismos"), a limited liability company formed by Hanley and Mosler. Plaintiffs met Hanley and Mosler a few weeks after Plaintiffs started operating the restaurant. During this first meeting, Plaintiffs requested that Defendants provide them with a seven-year lease. Defendants believed the request was reasonable, but articulated some conditions before Plaintiffs would get a lease. Defendants wanted Plaintiffs to replace screens and sinks, to paint the outside of the restaurant, to resurface the bar and do a general cleanup.

¶4 In March 2004, Defendants presented Plaintiffs with a two-and-a-half-year lease. Plaintiffs believed this lease to be terrible. The lease did not give Plaintiffs an option to extend, raised the rent from $1,500 to $2,000 and was not assignable to any other person. Under its terms, Plaintiffs would also have to give up their right to a jury trial if there was a conflict and had to perform all repairs on the building. Vooys testified that she shared their concerns with Hanley and he agreed that the lease was not good and he

would work on a new lease.

¶5 In August 2004, CBBBR suffered a fire in the kitchen and the restaurant part of CBBBR had to close, although the bar area still could be used. The cause of the fire was a ventilation hood over the kitchen stove that was too small. Before Plaintiffs invested more money in the restaurant, they again asked Defendants whether they would get a seven-year lease. Defendants told Plaintiffs if they fixed the damages caused by the fire that Defendants would discuss giving them a longer lease. Defendants also told Plaintiffs that they should focus on the repairs and not worry if rent was late. Plaintiffs therefore bought a new hood for the stove, which was the proper size, and re-painted the restaurant.

¶6 In November 2004, Defendants offered Plaintiffs another lease. This lease kept the rent at $1,500 per month at first but then increased the rent to $2,500 per month after six months. Per Gerace's request, the tenant's name was Barabus, Inc., a corporation that Plaintiffs formed. However, like the March 2004 lease, this November 2004 lease was not for seven years, but for two years. Plaintiffs gave this proposed lease to the attorney they had used to form Barabus. The lawyer, however, did not reach out to Defendants and Plaintiffs did not follow up with their attorney about the lease.

¶7 In March 2005, Mosler began to accuse Plaintiffs of being late with their rent and informed Plaintiffs that he did not like the direction the restaurant was going, that "[h]e had issues with the full moon parties and the crowds and element that the parties brought," and that "[h]e wanted to turn it in[to] a white, middle-class

restaurant." Mosler also met with Plaintiffs and told them that he had a buyer in place for the restaurant, Jim Jordan, and he wanted Jordan to take over. About a week later, Defendants and Plaintiffs sat down for a meeting at CBBBR. At the meeting, Mosler told Plaintiffs that they were not getting a lease and reiterated that he wanted a white, middle-class restaurant. According to Vooys, Mosler specifically stated that "[h]e thought [the restaurant] was dirty" and that "he didn't like ... the clientele we were bringing in and he wanted to be able to bring his clients to have meetings, more like a white, middle[-]class restaurant, and we needed to come up with an exit strategy." When the meeting ended, Plaintiffs were upset; Vooys left the table crying. A few days later, Hanley returned to CBBBR and offered Plaintiffs the seven-year lease they had requested, but only so they could sell the restaurant to Jordan.

¶8 On April 12, 2005, Chrismos served a letter on Plaintiffs stating that it was Defendants' understanding that Plaintiffs were vacating the premises by the end of the month. The letter also stated that any personal property that remained at that time would be deemed abandoned. Plaintiffs hired a new attorney, who sent a letter on Plaintiffs' behalf stating that they had no intention of leaving the premises.

¶9 After receiving the April 12, 2005 letter, Mosler went on a broadcast radio talk show hosted by Roger Morgan and began what Plaintiffs describe as a smear campaign. Mosler stated that Plaintiffs were always late with rent, and that they did not know how to run a restaurant, and otherwise talking negatively about

Plaintiffs. As a result of Mosler going on the radio, Vooys claims that the restaurant started to decline, and that people were not coming. Plaintiffs ended up selling the restaurant to Jordan on June 17, 2005, for $30,000. Jordan had initially offered $50,000.

¶10 Plaintiffs filed a lawsuit on June 8, 2005, against the Defendants, suing them for defamation, libel, slander, and defamation *per se*, fraud, misrepresentation, intentional or negligent infliction of emotional distress, and breach of the duty of good faith and fair dealing. Plaintiffs also sued Chrismos only for breach of contract.[1] Plaintiffs also pled for recovery of punitive damages and requested an award of pre- and post-judgment interest.

¶11 After more than 15 years of legal proceedings, including an earlier appeal to this Court, *see Gerace v. Bentley*, 65 V.I. 289 (V.I. 2016), a trial on Plaintiffs' claims began on February 23, 2022. Plaintiffs' main witness was Victoria Vooys. Defendants moved for judgment as a matter of law after Plaintiffs rested their case, which the Superior Court partially granted, partially denied, and partially took under advisement. The Superior Court granted the motion with respect to the claim for intentional or negligent infliction of emotional distress but denied it as to the breach of contract claim. Although Defendants also sought judgment as a matter of law as to the remaining claims, the Superior Court took that portion of the

[1] Plaintiffs initially also sued three other defendants, but the counts against them were dismissed and have no bearing on this appeal.

motion under advisement.

¶12 On March 1, 2022, after Defendants rested their case, Defendants again moved for judgment as a matter of law on all remaining counts. The Superior Court again took the matter under advisement. On March 4, 2022, the jury returned a verdict finding that Chrismos had an agreement with Plaintiffs and breached that agreement by not giving them a lease, that Defendants intentionally misrepresented to Plaintiffs that they would get a seven-year lease, and that Defendants also breached their duty of good faith and fair dealing. The jury awarded $100,000 in damages to the Plaintiffs. The jury also found that Mosler and Hanley had defamed Plaintiffs and awarded Gerace and Vooys $60,000 each on those claims. Finally, the jury found that the actions of Mosler and Hanley warranted punitive damages and awarded Vooys $100,000 on that claim.[2]

¶13 On March 22, 2022, Defendants renewed their motion for judgment as a matter of law, and on March 24, 2022, Plaintiffs moved the Superior Court to enter judgment. On June 9, 2022, Plaintiffs renewed their motion to enter judgment. (J.A. 461.) The Superior Court denied Plaintiffs' motion on July 9, 2022.

¶14 Ultimately, the Superior Court issued an opinion and order on September 13, 2022, that granted in part Defendants' motion for judgment as a matter of law,

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[2] Due to an apparent mistake in the verdict form, there was no opportunity for the jury to determine punitive damages for Gerace because this question was omitted from the form. Plaintiffs have not raised this issue as part of their cross-appeal.

but denied their motion for a new trial. In its opinion, the Superior Court upheld the jury's verdict on the intentional misrepresentation claim, but set aside its verdict on the claims for breach of contract, breach of the duty of good faith and fair dealing, and defamation, and also vacated the punitive damage award. The Superior Court then entered judgment later that same day.

¶15 Defendants timely filed their notice of appeal with this Court on September 27, 2022. *See* V.I. R. APP. P. 5(a)(1). On October 7, 2022, Plaintiffs timely filed their notice of cross-appeal. *Id.*

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶16 The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). The Superior Court's September 13, 2022 opinion and order disposed of all issues and claims between the parties and is a final order within the meaning of section 32. As such, this Court possesses jurisdiction over this appeal.

¶17 We exercise plenary review over applications of law and reviews finding of fact for clear error. *See St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). Additionally, this Court

> exercises plenary review of an order granting or denying a motion for judgment as a matter of law. When reviewing such motions, we apply the same standard as the Superior Court. Although judgment as a matter of law should be granted

> sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. A motion for judgment as a matter of law should be granted only when viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In performing this narrow inquiry, trial courts and appellate courts must refrain from weighing the evidence, determining the credibility of witnesses, or substituting their own version of the facts for that of the jury.

Charles v. Payne, 71 V.I. 638, 643 (V.I. 2019) (alterations omitted).

B. Motion for Judgment as a Matter of Law

¶18 Both Plaintiffs and Defendants raise issues with respect to the Superior Court's disposition of Defendants' motion for judgment as a matter of law. "This Court reviews the sufficiency of the evidence to support a damages award pursuant to the same standard under which it reviews a motion for a directed verdict—that is, we must consider the evidence in the light most favorable to [the plaintiffs], including giving [the plaintiffs] the benefit of all reasonable inferences to be drawn from that proof." *Atl. Human Res. Advisors, LLC v. Espersen*, 76 V.I. 583, 630 (V.I. 2022) (citing *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013)). Under this highly deferential standard, this Court is prohibited from independently weighing the evidence or determining the credibility of witnesses. *See Fontaine v. People*, 56 V.I. 571, 585-86

(V.I. 2012). Importantly, it is the quality of the evidence that controls, and not the number of witnesses or the type of evidence used. *LIAT (1974), Ltd. v. Cherubin*, 2022 VI 21, ¶25. Applying this standard, we discuss each claim in turn.

1. Breach of Contract

¶19 To succeed in a breach of contract case, "a plaintiff must allege: (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 473 (V.I. 2013) (quoting *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 135 (V.I. 2009)). Here, the Superior Court set aside the jury's verdict in favor of Plaintiffs on the contract claim because it concluded, as a matter of law, that there had been no enforceable agreement between the parties. Specifically, the Superior Court determined that, for an agreement to lease premises to be enforceable, it needs to have material information that is certain, such as the length of the lease, the names of the parties, and the rent amount.

¶20 The issue of what constitutes an enforceable agreement in the Virgin Islands is certainly a question of common law. This Court, however, has never resolved that question, let alone adopted the elements that the Superior Court applied in its September 13, 2022 opinion. As a result, the Superior Court possessed an obligation to conduct a *Banks* analysis regarding the best rule for application in the Virgin Islands—and its failure to do so constitutes reversible error. *See Banks v. International Rental & Leasing Corp.,* 55 V.I. 967 (V.I. 2011); *Toussaint v. Stewart*, 67 V.I. 931,

951-52 (V.I. 2017). Nevertheless, given that the underlying lawsuit has been pending for nearly 20 years, in the interest of judicial economy we exercise our discretion to conduct the *Banks* analysis in the first instance, rather than electing to remand the matter to the Superior Court. *Inniss v. Inniss*, 65 V.I. 270, 280 n.7 (V.I. 2016).

¶21 In conducting a *Banks* analysis, a court must "consider three non-dispositive factors: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 680-81 (V.I. 2012)). As we recently explained,

> While none of these three factors is individually dispositive, each plays an important role in the analysis. The first factor—whether other Virgin Islands courts previously adopted a particular rule—in effect requires a court to consider *stare decisis*; that is, whether the legal community and the public have reason to rely on a particular common law rule despite it not having yet been adopted by this Court. The second factor—the positions taken by other jurisdictions—informs the court of the existence of the majority and minority rules as well as the reasoning other jurisdictions relied upon to support them, thus ensuring that the court is not only aware of the potential possibilities but that it also may benefit from any national debate and how those rules may have operated

> in practice elsewhere. And the third and most important factor—determining the soundest rule for the Virgin Islands—requires a court to consider the practical implications of adopting a particular rule in the Virgin Islands as well as what rule is best in accord with the public policy of the Virgin Islands, including its consistency with related statutes, court rules, and judicial precedents. Notably, the ultimate goal of a *Banks* analysis is to ensure the creation of indigenous Virgin Islands law free of undue outside influence—as intended by Congress and the Virgin Islands Legislature in creating a local judiciary independent of the federal judiciary.

Robertson v. Banco Popular de P.R., 2023 VI 3, ¶28 (internal citations and quotation marks omitted).

¶22 A look at our case law reveals that no Virgin Islands court has definitively established the standards for an enforceable agreement. In *Phillip v. Marsh-Monsanto*, 66 V.I. 612 (V.I. 2017), this Court determined the elements of a breach of contract cause of action, one of which is that there needs to be an agreement. In determining the elements for a breach of contract claim, we also cited *Brouillard v. DLJ Mort. Capital Inc.*, 63 V.I. 788, 798 (V.I. 2015), which listed the first element for a breach of contract claim as there needing to be "a contract" which is different from the language used in *Marsh-Monsanto* of the first element being "an agreement." However, we cannot say that this fleeting reference, unaccompanied by any substantive analysis, constitutes a definitive determination by this Court that these terms may be used interchangeably. *See In re Moorhead*, 2022 VI 20,

¶17 n.1 ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.") (quoting *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985)),

¶23 A review of the jurisprudence from other jurisdictions reflects that seemingly all jurisdictions have determined that an agreement "is a manifestation of mutual assent on the part of two or more persons," and thus broader than a contract. *Int'l Bus. Machs. Corp. v. Khoury*, 177 A.3d 724, 731 (N.H. 2017) (citing RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981)); *see also Ames v. Ames*, 370 P.3d 246, 249 (Ariz. Ct. App. 2016) ("An agreement is formed only when a manifestation of mutual assent occurs."); *Reigelsperger v. Siller,* 150 P.3d 764, 767 (Cal. 2007); *Denver Truck Exch. v. Perryman*, 307 P.2d 586 (Colo. 1957); *Roberts v. Veterans Co-op. Housing Ass'n*, 88A.2d 324 (D.C. 1952); *Bd. of Educ. of Arbor Park Sch. Dist. No. 145, Cook Cty. v. Ballweber*, 451 N.E.2d 858, 861 (Ill. 1983); *Goldstein v. Miles*, 859 A.2d 313, 327 (Md. Ct. Spec. App. 2004); *Youngs v. Conley*, 505 S.W.3d 305 (Mo. Ct. App. 2016) (discussing that an agreement is reached when the minds of the contracting parties meet and assent to the same thing); *Carter v. Prairie Oil & Gas Co.*, 160 P. 319 (Okla. 1916); *Helpin v. Trs. of Univ. of Pa.*, 969 A.2d 601, 611 (Pa. Super. Ct. 2009); *Gaskins v. Blue Cross-Blue Shield of S.C.*, 245 S.E.2d 598 (S.C. 1978); *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 8323 (S.D. 2006); *Martin v. Martin*, 326 S.W.3d 741 (Tex. App. 2010); *Corbit v. J.I. Case Co.*, 424 P.2d 290, 296-97 (Wash. 1967); *Farmer's Auto. Ins. Ass'n v. Union Pac. R. Co*, 756 N.W.2d 461, 467 (Wis. Ct. App.

2008).[3]

¶24 Finally, we conclude that recognizing a distinction between an "agreement" and a "contract" constitutes the soundest rule for the Virgin Islands. As the analyses conducted by the above-cited courts reflects, these words possess different meanings both in common usage in the English language as well as in the law, and we can discern no legitimate reason to disregard those well-established meanings. Thus, we conclude that the terms "agreement" and "contract" are not synonyms, in that an agreement is a broader term than a contract. An agreement is "a coming together of parties in an opinion or determination, the union of two or more minds in a thing done or to be done." *See Gaskins*, 245 S.E.2d at 600. In contrast, a contract requires more than simply agreeing to do something: "a contract is created only when parties mutually assent to specific terms" in which there is "an offer and an acceptance" in which "the offer and acceptance must mirror each other in order for a contract to be legally formed." *Toussaint*, 67 V.I. at 951-52 (citing

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[3] See also *Sutherland v. Sutherland*, 28 A.3d 1093, 1100 (Del. Fam. Ct. 2010); *Luke v. Gentry Realty*, Ltd., 96 P.3d 261, 267 (Hawai'i 2004); *Kumberg v. Kumberg*, 659 P.2d 823, 831 (Kan. 1983); *Belanger v. Yorke*, 226 A.3d 215, 225 (Me. 2020); *Jordan Panel Sys., Corp. v. Turner Constr. Co.*, 45 A.D.3d 164 (N.Y. App. Ct. 2007); *Schwarz v. St. Jude Medical, Inc.*, 802 S.E.2d 783, 789 (N.C. Ct. App. 2017); *Bennet v. Heidinger*, 507 N.E.2d 1162, 1164 (Ohio Ct. App. 1986); *Kabil Devs. Corp. v. Mignot*, 566 P.2d 505, 507 (Or. 1977). *But see Fitzpatrick v. Vermont State Treasurer*, 475 A.2d 1074, 1077 (Vt. 1984) ("Although the terms 'agreement' and 'contract' do not precisely [have] the same meaning, they are frequently used as exact synonymous.").

Restatement (Second) of Contracts §§ 17, 22, 24, 35, 36, 38, 39).

¶25 Here, there certainly was not enough evidence to support the jury's finding that Plaintiffs had entered into a contract with Chrismos. Vooys testified that she and Gerace had discussed with Defendants that they wanted a seven-year lease. However, on March 1, 2004, six months after Plaintiffs had completed repairs to the restaurant, Defendants proffered a two-year lease to Plaintiffs.[4] This lease had a per-month rent increase to $2,500, which was $1,000 more than what Plaintiffs were at that time paying each month. The lease was in Plaintiffs' individual names and not in the name of Barabus, Inc., their business entity. It made Plaintiffs responsible for all repairs and made them forego a jury trial should any issues arise. All of these terms were either not discussed or were incorrect; Plaintiffs believed that this lease was terrible. While the jury certainly could conclude that the parties had made an agreement—that Chrismos would provide a long-term lease if Plaintiffs made the requested repairs—the absence of any mutual assent to specific terms establishes, as a matter of law, that the parties had not formed a contract.[5]

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[4] The March 1, 2004 lease was not what the parties had discussed, a seven-year lease.

[5] Plaintiffs also argue that Defendants owed them duties of good faith and fair dealing and that these duties were breached. Because we conclude that there was no contract between the parties, there was no duty of good faith and fair dealing. A duty of good faith and fair dealing exists solely in the performance of a contract and in its enforcement. *See* RESTATEMENT (SECOND) OF

¶26 But this does not end our analysis. Plaintiffs urge us to reinstate the jury verdict based on promissory estoppel, an alternate ground that was not pled in the complaint. They argue that the evidence in the record supports affirming the jury's verdict under a promissory estoppel theory. Defendants counter by stating that Plaintiffs did not plead promissory estoppel in their complaint and thus they cannot attempt to seek affirmance of the judgment under that new theory of liability. Defendants, however, are incorrect. Pursuant to Virgin Islands Rule of Civil Procedure 54(c), which was based on Federal Rule of Civil Procedure 54(c), a judgment that is not a default judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." V.I. R. Civ. P. 54(c). That is, "a party is not bound by his prayer for relief but may receive such relief as the proof shows him to be entitled to." *Glen Falls Indem. Co. v. Golden*, 148 F. Supp. 41, 43 (D.D.C 1957). Therefore, if a plaintiff pleads breach of contract, and fails to prove the existence of a contract, but nevertheless introduces evidence which establishes the elements of some other cause of action that had not been pled—such as quantum meruit or promissory estoppel—the plain text of Rule 54(c) allows the court to enter judgment on that unpled cause of action. *See Electrical Const. & Maintenance*

TORTS, § 205; *see also id*. cmt. c ("This Section ... does not deal with GOOD faith in the formation of a contract.") Here, a contract was not formed, and therefore Defendants could not have had a duty of good faith and fair dealing in their promise to provide a seven-year lease.

Co., Inc. v. Maeda Pacific Corp., 764 F.2d 619, 622 (9th Cir. 1985) (affirming dismissal of breach of contract judgment for lack of consideration but permitting recovery for promissory estoppel even though promissory estoppel had not been pled). Here the pleadings and the evidence provided the Defendants with adequate notice of the elements and supporting proof for a promissory estoppel ground for relief as a natural implementation of the contractual claim.

¶27 Having decided that the jury's verdict for breach of contract could be sustained if Plaintiffs proved the elements of an unpled cause of action, we must now decide whether Plaintiffs did in fact establish the elements of promissory estoppel. However, this Court has neither recognized a cause of action for promissory estoppel, nor established the elements for such a cause of action. Consequently, we must conduct a *Banks* analysis on these questions as well.

¶28 We need not engage in a detailed analysis, however, because we are persuaded by the *Banks* analysis performed by the United States District Court of the Virgin Islands in *Whitaker v. Martin*, where it considered the three *Banks* factors regarding promissory estoppel to assist it in predicting whether this Court would recognize a cause of action for promissory estoppel. 2020 WL 7481783 (D.V.I. Dec. 18, 2020) (unpublished). As to the first factor, the District Court determined that few cases in the Virgin Islands had dealt with claims of promissory estoppel but that those cases that did address it, referenced § 90 of the Restatement (Second) of Contracts. *Id.* at *4 (collecting cases). Section 90 provides that "[a] promise which the

promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." Next, the District Court determined that most of the other jurisdictions also followed the Restatement approach.[6]

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[6] *See Branch Banking & Trust Co. v. Nichols*, 184 So.3d 337 (Ala. 2015); *Thomas v. Archer*, 384 P.3d 791 (Alaska 2016); *Higginbottom v. State*, 51 P.3d 972 (Ariz. Ct. App. 2002); *Holmes v. Potter*, 523 S.W.3d 397 (Ark. Ct. App. 2017); *Jones v. Wachovia Bank*, 179 Cal. Rptr.3d 21 (Cal. Ct. App. 2014); *Patzer v. City of Loveland*, 80 P.3d 908 (Colo. Ct. App. 2003); *Chotkowski v. State*, 690 A.2d 368 (Conn. 1997); *Fanean v. Rite Aid Corp. of Del., Inc.*, 984 A.2d 812 (Del. Super. Ct. 2009); *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44 (D.C. 2008); *FCCI Ins. Co. v. Cayce's Excavation, Inc.*, 901 So.2d 248 (Fla. Dist. Ct. 2005); *Mitchell v. Ga. Dept. of Comty. Health*, 635 S.E.2d 798 (Ga. Ct. App. 2006); *Furuya v. Assoc. of Apartment Owners of Pacific Monarch, Inc.*, 375 P.3d 150 (Haw. 2016); *Profits Plus Capital Mgmt., LLC v. Podesta*, 332 P.3d 785 (Idaho 2014)*; Centro Medico Panamericano, Ltd. v. Benefits Mgmt. Gr., Inc.*, 61 N.E.3d 160 (Ill. App. Ct. 2016); *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007); *Kunde v. Estate of Bowman*, 920 N.W.2d 803 (Iowa 2018); *Templeton v. Kan. Parole Bd.*, 6 P.3d 910 (Kan. 2000); *Sawyer v. Mills*, 295 S.W.3d 79 (Ky. 2009); *Acurio v. Cage*, 257 So. 3d 824 (La. Ct. App. 2018); *Harvey v. Dow*, 962 A.2d 322 (Me. 2008); *Oliveira v. Sugarman*, 130 A.3d 1085 (Md. Ct. Spec. App. 2016); *Harrington v. Fall River Hous. Auth.*, 538 N.E.2d 24 (Mass. App. Ct. 1989); *McMath v. Ford Motor Co.*, 259 N.W.2d 140 (Mich. Ct. App. 1977); *Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757 (Minn. Ct. App. 2005); *Thompson v. First Am. Nat. Bank*, 19 So. 3d 784 (Miss. Ct. App. 2009); *Bauer Dev. LLC v. BOK Fin. Corp.*, 290 S.W.3d 96 (Mo. Ct. App. 2009); *S&P Brake Supply, Inc. v. STEMCO LP*, 385 P.3d 567 (Mont. 2016); *Hawkins Const. Co. v. Reiman Corp.*, 511 N.W.2d 113 (Neb. 1994); *Torres v. Nev.*

Finally, it found that the soundest rule was to follow the Restatement "[g]iven both the Territory's previous reliance on the Second Restatement of Contracts as well as its continued use by the majority of the states." *Whitaker*, 2020 WL 7481783 at *4. We agree with this analysis and thus recognize a cause of action under the promissory estoppel theory when a plaintiff proves the following three elements: "(1) the promisor made a promise that he should have reasonably expected to induce action; (2) the promisee took action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." *See* Restatement (Second) of Contracts § 90.

Direct Ins. Co., 353 P.3d 1203 (Nev. 2015); *Jackson v. Morse*, 871 A.2d 47 (N.H. 2005); *E. Orange Bd. of Educ. v. N.J. Schs. Const. Corp.*, 963 A.2d 865 (N.J. Super. Ct App. Div. 2015); *Magnolia Mountain Ltd., P'ship v. Ski Rio Partners, Ltd.*, 131 P.3d 675 (N.M. Ct. App. 2005); *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12 (N.Y. App. Div. 2015); *Miller v. Walsh Cty. Water Res. Dist*., 819 N.W.2d 526 (N.D. 2012); *Ford Motor Credit Co. v. Ryan*, 939 N.E.2d 891 (Ohio Ct. App. 2010); *Garst v. Univ. of Okla*., 38 P.3d 927 (Okla. Civ. App. 2001); *Hills v. Mayers*, 802 P.2d 694 (Or. Ct. App. 1990); *Sullivan v. Chartwell Inv. Partners, L*P, 873 A.2d 710 (Pa. Super. Ct. 2005); *Filippi v. Filippi*, 818 A.2d 608 (R.I. 2003); *N. Am. Rescue Prods., Inc. v. Richardson,* 769 S.E.2d 237 (S.C. 2015); *Canyon Lake Park, LLC v. Loftus Dental, P.C*., 700 N.W.2d 729 (S.D. 2005); *Kinard v. Nationstar Mortg*., LLC, 572 S.W.3d 197 (Tenn. Ct. App. 2018); *Davis v. Texas Farm Bureau Ins*., 470 S.W.3d 97 (Tex. App. 2015); *Cottonwood Imp. Dist. v. Qwest Corp*., 296 P.3d 754 (Utah Ct. App. 2013); *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466 (Vt. 1993); *Mongold v. Woods*, 677 S.E.2d 288 (Va. 2009); *Clipse v. Commercial Driver Servs., Inc.*, 358 P.3d 464 (Wash. Ct. App. 2015); *Champine v. Milwaukee C'ty*, 696 N.W.2d 245 (Wis. Ct. App. 2005); *Singer v. Lajaunie*, 339 P.3d 277 (Wyo. 2014).

¶29 Applying this test to the case here, we conclude that Plaintiffs established all elements of promissory estoppel. Vooys testified that she and Gerace had discussed with Defendants that they wanted a seven-year lease. Defendants told Plaintiffs, however, that they would only receive a lease from Chrismos if they completed a list of repairs and improvements. Based on this promise, Plaintiffs started to work on improving the restaurant in the manner Defendants requested. They invested their time and money, sanding down the bar, painting the restaurant, and buying equipment and advertisements. Yet while Defendants knew Plaintiffs had requested and expected a seven-year lease, Defendants never offered them the seven-year lease that they wanted; nevertheless, Defendants received the benefit of the improvements and repairs. On these facts, Plaintiffs established the elements of a promissory estoppel cause of action.

¶30 One issue, however, remains: the damages Plaintiffs are entitled to receive for promissory estoppel. Although the jury had awarded $100,000 to Plaintiffs, it did so on their breach of contract claim, and not for promissory estoppel. Yet there may potentially be instances where a monetary judgment for an unproven but pleaded cause of action cannot be sustained based on a proven but unpled cause of action. This, however, is not such a case. This Court has previously held that "[a] plaintiff claiming a breach of contract has available and need not choose between three types of damages—actual, consequential, and benefit-of-the-bargain." *Robertson*, 2023 VI at ¶21 (quoting *Catroppa v. Metal Bldg. Supply, Inc.*, 267

S.W.3d 812, 817 (Mo. Ct. App. 2008)). Courts in other jurisdictions, however, have observed that the damages a plaintiff may recover in a promissory estoppel action may potentially be broader: while "[a] promissory estoppel claim generally entitles a plaintiff to the same damages available on a breach of contract claim," *State Ready Mix, Inc. v. Moffatt & Nichol*, 181 Cal. Rptr. 3d 921, 926 (Cal. Ct. App. 2015), "the circumstances of the case" may entitle the plaintiff to recover other damages not necessarily traditionally awarded in breach of contract cases, such as for reputational harm, for the purpose of making the plaintiff whole. *See Tour Costa Rica v. Country Walkers, Inc.*, 758 A.2d 795, 802 (Vt. 2000). Here, because the jury awarded its $100,000 verdict for breach of contract based on the same evidence that sustains the promissory estoppel claim, and a successful promissory estoppel plaintiff is—at a minimum—entitled to the same damages for promissory estoppel as for breach of contract, this Court may simply reinstate the $100,000 verdict rather than remand the matter for a new trial for damages, given that Plaintiffs have not requested a damages award for promissory estoppel that exceeds the damages previously awarded for breach of contract.

2. Intentional Misrepresentation

¶31 Defendants argue that the Superior Court erred when it affirmed the jury's verdict on Plaintiffs' intentional misrepresentation claim. Defendants make three arguments in their brief as to why this Court should vacate the verdict on intentional misrepresentation. First, they argue that there "was never a promise to give Vooys and Gerace a lease with

all of the terms they deemed acceptable, and there was no representation here they have could [sic] reasonably relied upon." (Defendants' Br. 18.) Second, they argue that Plaintiffs failed to show a pecuniary loss because they personally did not incur a loss and that it was in fact Barabus, Inc. that incurred a loss. Finally, Defendants argue that "there was no evidence that supported a finding that the alleged promises of seven-year lease were knowingly false when made." (Defendants' Br. 20.)

¶32 Before addressing Defendants' issues, we must determine whether an intentional misrepresentation claim arises from contract or torts. *See Love Peace v. Banco Popular de Puerto Rico*, 75 V.I. 284, 288-89. (V.I. 2021). In *Love Peace*, this Court explained that when a party "seeks only to rescind an underlying contract based on an alleged misrepresentation, entitlement to that relief is determined according to the law of contracts, but where the claimant seeks damages arising from the misrepresentation, such a claim sounds in torts, rather than contracts." *Id.* at 289 (citing *Wilkinson v. Wilkinson*, 70 V.I. 901, 908 (V.I. 2019)). Here, Plaintiffs sought to recover damages, therefore the law of torts applies to their claim.[7]

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[7] The Superior Court determined that the intentional misrepresentation claim sounded in tort because there was no agreement between the parties. However, it is not whether there is an agreement or not that governs which type of law applies, but what type of remedy a party is seeking. This error is harmless as we determine above that the misrepresentation was in fact based on a tort. V.I. R. App. R. 4(i); *see also Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 438 n.23 (V.I. 2016) ("It is well established that, under the right result, wrong reason doctrine, where the

¶33 To prevail in an intentional misrepresentation claim based on tort, a plaintiff is "required to demonstrate that (1) defendant misrepresented a material fact, opinion, intention, or law; (2) that [the defendant] knew or had reason to believe was false; (3) and was made for the purpose of inducing [plaintiff] to act or refrain from acting; (4) which [plaintiff] justifiably relied on; and (5) which caused [plaintiff] a pecuniary loss." *Love Peace*, 75 V.I. at 291.

¶34 As established above, Defendants did promise Gerace and Vooys that they would give Plaintiffs a long-term lease if Plaintiffs completed certain improvements and repairs to CBBBR. All that Defendants wanted was for the repairs and improvements to get done. There is also testimony from Mosler that a lease was not important to him. Additionally, Plaintiffs provided evidence that despite their requests for a seven-year long lease, it was never given to them. They also showed that when another potential tenant appeared, Defendants gave him a lease for seven years. This evidence shows that Defendants never really wanted or intended to give Gerace and Vooys a long-term lease, despite explicitly agreeing to do so if Plaintiffs completed the contemplated improvements and repairs: initially, replacing screens and sinks, painting the outside of the restaurant, resurfacing the bar and doing a general cleanup; and subsequently, fixing the damages to the

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record otherwise supports the trial court's judgment, an appellate court may affirm that judgment for reasons other than those relied upon by the trial court, even if the trial court's reasons are erroneous.")

CBBBR kitchen and restaurant caused by the incorrectly-sized ventilation hood over the kitchen stove.

¶35 This promise of a seven-year lease was more than adequate, in fact, to induce Plaintiffs to act. The evidence showed that Plaintiffs were eager to get a lease. Defendants knew that Gerace and Vooys would act in order to get the lease as Plaintiffs bought the restaurant for $50,000 and wanted to stay to get a return on their investment. Finally, the evidence showed that Plaintiffs lost money because they invested money in order to fix and improve the restaurant.[8] Vooys testified that Plaintiffs had spent over $40,000 in repairs, over $20,000 in equipment and $50,000 in promotions and advertising. On the facts in the present record, this Court affirms the Superior Court's decision to uphold the jury's verdict as to the

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[8] Defendants argue that Plaintiffs did not suffer a pecuniary loss because it was their company, Barabus, Inc., that in fact spent the money in repairing the restaurant. Assuming that we agree, we find that the Superior Court properly allowed the evidence of the expenses incurred by Barabus. When the shareholder of an S corporation "is so actively engaged in the company's day-to-day operations that he is akin to the entity's alter ego, an S corporation may be treated differently from a C Corporation." *Bova v. Gary*, 843 N.E.2d 952, 958 (Ind. Ct. App. 2006). Here, Barabus is an S corporation, meaning that Gerace and Vooys are the sole shareholders; they are also the president and vice president respectively and, as such, are the primary decision makers. Plaintiffs worked on improving CBBBR, constantly trying to fix it to meet Defendants' expectations. Thus, Gerace and Vooys are essentially Barabus's alter ego and the expenses incurred by Barabus can serve to represent the losses Gerace and Vooys incurred.

intentional misrepresentation claim.

3. Defamation

¶36 Plaintiffs argue, on several grounds, that the Superior Court erred in vacating the jury's verdict on the claim for defamation. "In the Virgin Islands, a claim of defamation requires: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Espersen*, 76 V.I. at 614 (citing *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011)). We address each claim with respect to each defendant.

a. Hanley

¶37 The Superior Court determined that there was no evidence that Hanley had defamed either Vooys or Gerace, on the ground that Plaintiffs failed to link any purportedly defamatory statement to Hanley. We agree. Vooys testified that "Mosler started like a smear campaign on why he was getting rid of us on the radio and TV." (J.A. 1032.) She never mentioned any statements made by Hanley. John Woodson testified that he never heard Hanley on the radio. Michael Belcheff testified to only hearing Mosler on the radio but not Hanley. And John Reed, the bartender, testified about Mosler going on the radio show. While Hanley did admit to going on the Roger Morgan show and that he stated that Plaintiffs were not current with the rent, this statement was true as Plaintiffs went to

pay the outstanding rent after Hanley was on the show. On this record, the Superior Court correctly vacated the jury's verdict against Hanley for defamation.

b. Mosler

¶38 The Superior Court set aside the defamation verdicts against Mosler on two different grounds. It found that one statement—that Plaintiffs did not know how to run a restaurant—constituted an unactionable opinion and determined that all other statements attributable to Mosler were true.[9] Specifically, the

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[9] In their appellate brief, Plaintiffs first claim that the Superior Court improperly vacated the jury's defamation verdict against Mosler because the court vacated that verdict based on grounds that were not raised in Defendants' pre-verdict Rule 50(a) motion and were therefore waived. We agree. In *Charles v. Payne*, we determined that when an argument is not raised in a pre-verdict Rule 50(a) motion, it cannot be raised in a post-verdict motion for judgment as a matter of law. 71 V.I. 638, 648-49 (V.I. 2019). Although Mosler made a pre-verdict motion, he failed to argue in that pre-verdict motion that the statements made by him were merely his opinion and not actionable. Rather, Mosler only argued that the statements were true, that Plaintiffs failed to show special harm, and that Plaintiffs made themselves public figures by thrusting themselves into the limelight. While the issue of whether a statement is an opinion is a matter of law that a court must review de novo without any deference to the finder of fact, *Simpson v. Andrew L. Capdeville, P.C.*, 64 V.I. 477, 486 (V.I. 2016), the fact that an issue is reviewed de novo does not excuse a party's failure to preserve the issue for such review. *See Fischer v. Fischer*, 348 S.W.3d 582, 590 (Ky. 2011) ("Ultimately, it is the responsibility of the movant to put the legal ground before the court, because it is, after all, his motion, and he bears the burden of proof and persuasion. ... While it is correct that [the issue] is reviewed de novo ... such review is limited to the question of

Superior Court determined to be true Mosler's statements that (1) Plaintiffs were always late with rent, (2) that Plaintiffs borrowed $150,000 from family, (3) that Defendants had reduced Plaintiffs' rent, and (4) that drugs were around the property.

¶39 As noted above, a statement must be false to constitute defamation, and opinions and true statements thus are not calculated to form the basis for defamation liability because they are not provably false. *Espersen*, 76 V.I. at 614. But this does not necessarily mean that true statements cannot be defamatory, because "in certain circumstances even a technically true statement can be so constructed as to carry a false and defamatory meaning by implication or innuendo." *Martin v. Hearst Corp.*, 777 F.3d 546, 552 (2d Cir. 2015). As the Second Circuit explained,

> The classic example of defamation by implication is [a case] in which a newspaper reported that a woman, upon arriving at the home of another woman and finding her own husband there "first fired a shot at her husband

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interpretation presented."). Therefore, the Superior Court erred when it vacated the jury's defamation verdict against Mosler on grounds that the statements constituted an unactionable opinion, when Mosler failed to properly preserve such a claim. *See Gatz v. Otis Ford, Inc.*, 691 N.Y.S.2d 113, 114 (N.Y. App. Div. 1999) (holding that defense that statements which gave rise to defamation judgment were pure opinions is unpreserved for appellate review if not properly preserved in the trial court). Nevertheless, because we conclude that all Mosler's statements must be interpreted together to ascertain his liability for defamation, we exercise our discretion to overlook this waiver and consider the claim on the merits.

> and then at the other woman, striking her in the arm." The article neglected to mention, however, the additional facts that several neighbors and the husband of the other woman were also present, that all were sitting together in the living room talking, and that the shooting was accidental. Even though the statements in the article were all technically true, the article falsely implied that the husband and the other woman had been shot at because they were caught in an adulterous affair and had become targets of an enraged wife—a meaning both false and defamatory.

777 F.3d at 552-53 (citing *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978)) (internal citations and quotation marks omitted).

¶40 The same is true of statements framed as opinions. In reaching the conclusion that an opinion can never be defamatory, the Superior Court placed heavy emphasis on language in our decision in *Simpson v. Andrew L. Capdeville, P.C.*, stating that "hyperbole and expressions of opinion are typically not provable as false, and therefore not actionable," 64 V.I. 477, 486 (V.I. 2016), concluding that "saying that someone does not know how to run a business is an opinion and could never be defamatory." (J.A. 99.) But this Court in *Simpson* did not establish a *per se* rule that opinions may never give rise to defamation liability: we said that "expressions of opinion are typically not provable as false." 64 V.I. at 488 (emphasis added). "This Court has adopted the basic elements for a claim of defamation set forth in the Second Restatement of

Torts." *Joseph v. Daily News Pub. Co.*, 57 V.I. 566, 585-86 (V.I. 2012) (*citing Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011)). The Second Restatement expressly provides that

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion.

RESTATEMENT (SECOND) OF TORTS § 566. The comments to this Restatement provision further clarify that "if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability." *Id.* at cmt. c. As one court has succinctly summarized, "[t]he bottom line is [that] protected opinion exists if the reader is in as good a position as the author to judge whether the conclusion is correct." *Loftus v. Nazari*, 21 F.Supp.3d 849, 853 (E.D. Ky. 2014) (collecting cases).

¶41 The evidence in the present case, when viewed in the light most favorable to Plaintiffs, was sufficient for a rational jury to conclude that Mosler's statements were collectively false, even if some may have been technically true. People who heard Mosler's statements about Plaintiffs and their restaurant on the radio were certainly not "in as good a position" as Mosler "to judge whether the conclusion [was] correct," *Loftus*, 21 F.Supp.3d at 853—Mosler was, after all, not just a successful businessman, but also one of the two owners of Chrismos, the entity that leased the property to Plaintiffs. Mosler's statements, when viewed in this

context, establish an intent to defame Plaintiffs. Mosler's statement that Plaintiffs did not know how to run a restaurant—while nominally an opinion—must be considered together with his statements that (1) Plaintiffs were always late with rent, (2) that Plaintiffs borrowed $150,000 from family, (3) that Defendants had reduced Plaintiffs' rent, and (4) that drugs were around the property. While Plaintiffs were sometimes late with rent—calculated by the Superior Court as being late 42.86% of the time—they were not always late with rent, or even late most of the time. Although Plaintiffs received $45,000 from their family, they did not borrow $150,000. At no point did Defendants ever reduce Plaintiffs' rent. Nor was any evidence introduced by anyone at trial which provided even a hint that drugs had ever been on the premises, let alone that Mosler had reason to know there were drugs there—on the contrary, several witnesses described the restaurant as clean.

¶42 All the above statements, when read together and not analyzed in isolation divorced from context, would lead the radio audience to believe that Plaintiffs were essentially insolvent, having borrowed $150,000 from family yet never being able to pay rent on time, even after rent had been reduced.[10] A listener would also give enhanced credence to Mosler's claim that drugs were on the property, given that Mosler essentially

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[10] In fact, the emphasis that $150,000 had been borrowed from family enhances the impression that Plaintiffs were insolvent, in that it necessarily implies that Plaintiffs may not have been creditworthy enough to obtain a loan from a legitimate financial institution and had to seek assistance from family instead.

served as Plaintiffs' landlord, and could also reasonably conclude that Plaintiffs were turning a blind eye to—or even participating in—drug sales at the restaurant due to their seeming insolvency. It also transforms what otherwise might be a protected statement of opinion—that Plaintiffs did not know how to run a business—into a defamatory statement, in that it implies that Plaintiffs got to the point where they are severely in debt, unable to ever pay rent on time despite having their rent reduced, and permitted drugs in their restaurant due to their own bad business decisions as opposed to other factors, such as the fact that the restaurant had been closed for two months due to a fire, or that Plaintiffs had spent money on repairs and renovations they did not wish to make but paid for anyway because Defendants made them a precondition to receiving a long-term lease that was never offered. Accordingly, the evidence was sufficient to sustain the verdict on this claim, and we reinstate the jury's verdict on the defamation cause of action with respect to Mosler.

4. Punitive Damages

¶43 Plaintiffs further argue that the Superior Court erred in vacating the jury's punitive damages award for lack of sufficient evidence. Plaintiffs also argue that the Superior Court inappropriately reweighed the evidence.

¶44 "Punitive damages are damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly." *Cornelius*, 67 V.I. at 824 (internal quotation marks omitted). "Punitive damages must be based

upon conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured conduct that is outrageous and warrants special deterrence." *Id.* (collecting cases). "Plaintiffs must ... prove their entitlement to punitive damages by clear and convincing evidence." *Espersen*, 76 V.I. at 629. When determining whether there is sufficient evidence to support the jury's award, "[t]his Court must consider the evidence in the light most favorable to [Plaintiffs], including giving [them] the benefit of all reasonable inferences to be drawn from that proof. *Id.* at 630 (citing *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013)).

¶45 Because we uphold the Superior Court's decision to vacate the jury's verdict on the defamation claim against Hanley, we need to determine whether there was sufficient evidence to reinstate the punitive damages award against Hanley based on the intentional misrepresentation claim. When assessing the sufficiency of the evidence, we consider the evidence in the light most favorable to Plaintiffs. This includes the benefit of all reasonable inferences to be drawn from that proof. *Chestnut*, 59 V.I. at 475. The Superior Court concluded that the evidence only showed that Defendants misled Plaintiffs into thinking they would get a long-term lease, and that it was Mosler who made most of the misrepresentations, not Hanley.

¶46 We agree. The record reflects that Hanley seemed to have an amicable relationship with Plaintiffs. He frequented the restaurant, assisted Plaintiffs in trying to get a better deal in the sale to Jordan, agreed with

Plaintiffs that the proposed March 1, 2004 lease was terrible and offered to help them get a better one. We cannot say that Hanley's conduct was so outrageous or done with reckless indifference such as to warrant a punitive damages award. For these reasons, we affirm the Superior Court's decision to vacate the punitive damages award against Hanley.

¶47 We cannot say the same, however, with respect to the punitive damage award against Mosler. As mentioned above, punitive damages can be awarded when the conduct is so reckless or outrageous that it warrants special deterrence. *Cornelius*, 67 V.I. at 824. At trial, Plaintiffs established that Mosler essentially began a smear campaign against Plaintiffs with the intention to tarnish their reputations to such an extent that they could no longer have a successful business and would have no choice but to sell it to Jordan, Mosler's preferred purchaser. This, standing alone, constitutes more than a sufficient basis for a punitive damages award. *See, e.g., Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. Ct. 1995) (affirming punitive damages award where evidence established that defendant engaged in a "smear campaign" to "destroy [the plaintiff's] career"). However, Mosler's conduct is even more outrageous when we consider that Virgin Islands law vested him with legal means to attain his desired result, such as by initiating a forcible entry and detainer action predicated on nonpayment of rent, *see* 28 V.I.C. § 281 et seq., yet Mosler nevertheless chose to forego those legal means in favor of waging a defamation campaign. Accordingly, we reinstate the jury's punitive damages award against Mosler.

C. Closing Arguments

¶48 Defendants argue that the trial court erred in denying their motion for a new trial based on Plaintiffs' attorney's alleged misconduct during closing arguments. Defendants raise three issues: (1) that the closing arguments were inflammatory when Plaintiffs' attorney referred to Mosler wanting a "white, middle-class restaurant"; (2) that Plaintiffs' attorney improperly testified as a witness; and (3) that Plaintiffs' attorney misrepresented evidence to the jury.

¶49 Plaintiffs counter by arguing that Defendants' attorney failed to contemporaneously object to all of these statements and that review is therefore waived. In *R.J. Reynolds Tobacco Co. v. Gerald*, this Court stated that when reviewing a motion for a new trial based on an attorney's misconduct, we look at whether the conduct was improper and whether it was prejudicial in the context of the entire trial. 76 V.I. 657, 680-81 (V.I. 2022). We review for abuse of discretion when a contemporaneous objection is sustained and the party then moves for a mistrial. *Id.* at 681-82. A party can also preserve an argument if the Superior Court definitively denies a motion *in limine*. *See Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 233 n.1 (V.I. 2013) ("[T]he denial of the motion *in limine* alone is sufficient to preserve [an] issue for appeal because the motion *in limine* 'specifically raised the evidentiary issues' presented to [the Supreme Court], and the Superior Court definitely ruled on the motion before trial."). However, when there is no contemporaneous objection or denial of a motion for mistrial, this Court

reviews for plain error. *R.J. Reynolds,* 76 V.I. at 682-83.

¶50 We agree with Plaintiffs that Defendants waived most of their claims on these issues. Defendants failed to contemporaneously object to any of the complained-of statements. While Defendants state that this Court did not decide in *Espersen* or *R.J. Reynolds* whether an objection must be made after each offending statement, this Court has already determined that a contemporaneous objection means just that: an objection that occurs concurrently with the statement that is believed to be objectionable. For instance, in *R.J. Reynolds*, we looked at whether each distinct statement that was being complained of on appeal was objected to or not. *See, e.g., id.* at ¶¶31-45. *See also John Cheeseman Trucking, Inc. v. Dougan*, 853 S.W.2d 278 (Ark. 1993); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. Dist. Ct. App. 2012); *Dagne v. Schroeder*, 783 S.E.2d 426 (Ga. App. 2016); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dorsey*, 730 N.W.2d 17 (Mich. Ct. App. 2006).[11]

¶51 Therefore, we review the only claim that Defendants did preserve: Plaintiffs' attorney's reference to Mosler wanting a "white, middle-class

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[11] This is not a new practice in the Virgin Islands. The United States Court of Appeals for the Third Circuit when reviewing cases from the Virgin Islands has stated since the 1970s that a contemporaneous objection is required during closing arguments to avoid plain error review. *See e.g., Herman v. Hess Oil V.I. Corp.*, 12 V.I. 240, 248 (3d Cir. 1975); *Dunn v. HOVIC*, 28 V.I. 467, 474-75 (3d Cir. 1993).

restaurant." The Superior Court had denied Mosler's motion based upon these statements, determining that the statements could be relevant to reflect Mosler's motive as to why he did not want to give Plaintiffs a lease. The court also stated that "[d]efendants [were] free to argue against the relevance that race played in [Mosler's] actions with all the arguments developed in their motion and reply during trial." (J.A. 124.) The Superior Court definitively denied the motion and thus the issue was preserved for appeal.

¶52 We disagree that counsel's reference to a "white, middle-class restaurant" so inflamed the jury so as to warrant a new trial. "Using some degree of emotionally charged language during closing arguments in a civil case is a well-accepted tactic in American courtrooms." *Settlegoode v. Portland Pub. Sch.,* 371 F.3d 503, 518 (9th Cir. 2004). However, such arguments must not be so inflammatory that they "divert the jury's attention from its duty to decide the case on the evidence." *DeSilvia*, at 55 V.I. 872; *see also New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 318 (1929). But while Plaintiffs' attorney did refer to Mosler wanting Plaintiffs to leave the restaurant because he wanted a white, middle-class restaurant, there was evidence introduced at trial that Mosler made this statement to Vooys and Gerace. There was also testimony from Gary Anthony, a patron of CBBBR, that the clientele changed when Plaintiffs left, with Anthony testifying that there were "less locals." (J.A. 986-87.) Because an evidentiary basis existed for Plaintiff's counsel to make these statements, we find that the argument was

proper.[12]

¶53 Other than the reference to the "white, middle-class restaurant," Defendants failed to contemporaneously object to the any of the other statements made in Plaintiffs' closing argument that they now challenge on appeal. Thus we review the effect of these statements only for plain error. When plain error exists, this Court will determine whether the error, though affecting a substantial right, seriously affected "fairness, integrity, or public reputation of the judicial proceeding," thus warranting reversal. *Cornelius,* 67 V.I. at 816–17.

¶54 First, Defendants argue that Plaintiffs' attorney improperly testified during initial closing argument. Plaintiffs' attorney read a letter she sent to Defendants and then stated: "It is [Plaintiffs'] position that there was promise made to them to enter into a two-year lease – that's my mistake, I misunderstood because I had seen one of the leases ..." (J.A. 1850.) While it may be unusual for an attorney to read a statement made in a letter written by her fifteen years earlier, the April 20, 2005 letter had been admitted into evidence at trial and constituted part of the record. Therefore, we discern no error in permitting counsel to read from it as part of closing argument.

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[12] Even if it was an error to allow this argument, we would not find it was prejudicial. Plaintiffs' attorney referred to the white, middle-class restaurant about four times in an hour-long initial closing argument. See *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1130 (10th Cir. 2009). This is not so pervasive as to warrant a new trial.

¶55 Defendants also contend that Plaintiffs' attorney committed misconduct when she told the jury "that had they had a lease, had there been a promise for that maintained, we know from Miss Alex Myers, they could have sold the lease, like Mr. Jordan did, for $125,000," J.A. 1856, when the $125,000 figure had only been allowed as impeachment evidence. Impeachment evidence can be commented upon during closing argument, but only when it goes to the credibility of a witness and not a main issue in the case. *See Drake v. Caterpillar Tractor Co.*, 474 N.E.2d 291, 294 (Ohio 1984) (finding that a new trial was warranted because the jury used impeachment evidence to decide main issue in case). We thus agree that Plaintiffs' counsel should not have referenced the sum of $125,000 that Myers paid as part of the damages that could be awarded in the case. However, we can discern no way in which this isolated reference infringed upon Defendants' substantial rights, given that the jury only awarded $100,000 to Plaintiffs on the relevant count.

¶56 Defendants also argue that Plaintiffs' attorney misrepresented multiple facts in her rebuttal closing arguments. Among these were statements about: (1) Vooys adding a notation to a $2,000 rent check; (2) Plaintiffs intending to leave because there was no lease; (3) Defendants evicting Plaintiffs; and (4) Defendants not producing a witness.[13]

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[13] Defendants also challenge a statement with respect to whether CBBBR had been open in June 2005. But as the Superior Court stated, there was conflicting testimony as to whether they were open, and attorneys are given latitude in presenting evidence in the best light to their clients. *See James v. People*, 59 V.I. 866,

¶57 "[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence." *James v. People*, 59 V.I. 866, 888 (V.I. 2013) (quoting *United States v. Lopez-Medina,* 596 F.3d 716, 740 (10th Cir. 2010)). Defendants are correct that the first two cited statements misconstrue evidence adduced at trial, and that the last two statements misconstrued the law. However, the record reflects that the Superior Court issued curative instructions with respect to these issues in its final jury instructions. "When a jury is given an instruction, including a curative instruction, the presumption is that the jury will follow the instruction." *Monelle v. People*, 63 V.I. 757, 770 (2015) (citing *Francis v. People,* 59 V.I. 1075, 1080 (V.I. 2013); *Ostalaza v. People,* 58 V.I. 531, 555 (V.I. 2013)). Consequently, these statements, although improper, were not prejudicial, and certainly not so prejudicial as to constitute plain error. Therefore, we conclude that the Superior Court committed no error in denying Defendants' motion for a new trial.

D. Prejudgment Interest & Failure to Enter Judgment

¶58 Plaintiffs argue that they are entitled to prejudgment interest on the compensatory damages awarded to them on their breach of contract and

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888 (V.I. 2013) ("The purpose of closing argument is to mold the facts given during trial in the light most favorable to one's client.").

intentional misrepresentation claims[14] pursuant to title 11, section 951(a) of the Virgin Islands Code, yet the Superior Court failed to award prejudgment interest when it ultimately entered judgment. Defendants argue that Plaintiffs waived their entitlement to prejudgment interest by failing to request it in the joint final pretrial order as to Defendants and, in the alternative, that the damages were allegedly not ascertainable.

¶59 We first consider whether Plaintiffs waived their entitlement to prejudgment interest. Defendants argue that this Court stated in *Vlaun v. Briscoe*, 2022 VI 18, ¶19 that a party can waive prejudgment interest if that form of recovery is not asserted. While it is true that Plaintiffs failed to mention it in the joint final pretrial order, Plaintiffs did assert an entitlement to prejudgment interest in their complaint, and in their motion to enter judgment. *See Indemnity Ins. Co. of N. Am. v. Guidant Mut. Ins. Co.*, 99 So.3d 142, 157 (Miss. 2012) (holding that the party requesting prejudgment interest may demand it in its complaint); *Dixie Bell, Inc. v. Redd*, 656 S.E.2d 765 (S.C. Ct. App. 2007) (discussing that prejudgment interest may be pled in complaint). Therefore, we conclude that, having asserted a claim for prejudgment interest in the complaint, Plaintiffs did not waive their entitlement to prejudgment interest.

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[14] Plaintiffs do not claim an entitlement to prejudgment interest on the compensatory damages awarded on their defamation claim, nor to the portion of the award representing punitive damages.

¶60 Having found that Plaintiffs did not waive their entitlement to prejudgment interest, we turn to the question whether section 951(a) entitles Plaintiffs to prejudgment interest on the damages awarded. Plaintiffs assert that their entitlement to prejudgment interest began to run from March 1, 2004, the date that Plaintiffs assert that Defendants provided them with a lease agreement that did not provide for a seven-year lease term. There are only two provisions of section 951(a) that could possibly warrant an award of prejudgment interest in this case: section 951(a)(1) authorizing such interest on "all monies which have become due," and section 951(a)(4), providing for interest on "money due or to become due where there is a contract and no rate is specified."

¶61 We conclude, however, that neither provision is applicable, at least with respect to the period prior to the jury rendering its verdict on March 3, 2022. We previously recognized that "interest on monies owed but not paid is a necessary component of the damages incurred for breach of contract due to the time value of money, in that money in hand today is worth more than the same amount of money received at some future date because it can be invested and reap the benefits of compound interest." *Vlaun*, 2022 VI, ¶19 (collecting cases). But as explained above, there was no contract between Plaintiffs and Defendants that Defendants breached—rather, Defendants are liable to Plaintiffs only on theories of promissory estoppel and intentional misrepresentation. In this context, section 951(a)(4) cannot authorize a prejudgment interest award.

¶62 Section 951(a)(1), of course, differs from section 951(a)(4) in that it does not expressly require a contract. Thus, we recently concluded that section 951(a)(1) "is broader than similar statutes in other states limiting prejudgment interest to contractual damages only." *R.J. Reynolds*, 76 V.I. at 736. Nevertheless, "[t]he mere fact that a jury has determined an award does not mean it is automatically 'money due' " dating back to the time of the alleged wrongful conduct that gave rise to the defendant's liability. *Id.* at ¶134. Rather, we held that section 951(a)(1) only permits interest on "ascertainable sums," i.e., monetary damages for claims that were liquidated. *R.J. Reynolds*, 76 V.I. at 726.

¶63 We agree with Defendants that the compensatory damages in this case were not readily ascertainable on March 1, 2004, or any other date prior to the March 3, 2022 jury verdict. As a threshold matter, Plaintiffs acknowledge in their brief that at least some of the damages awarded by the jury were for "building good will" and "Plaintiffs' sweat equity." (Appellees' Br. 42.) These damages, however, are intangible and unliquidated, and thus cannot qualify for prejudgment interest under section 951(a)(1), at least with respect to any periods before announcement of the jury verdict. *R.J. Reynolds*, 76 V.I. at 736. But while some aspects of the compensatory damages award—such as $40,000 for repairs, $20,000 for equipment—may arguably be ascertainable, we agree with the courts that have held that to qualify for prejudgment interest on a claim the entire amount in controversy must be ascertainable, with litigants not entitled to partial prejudgment interest when one portion of the damages for a cause of

action is ascertainable but the plaintiff also seeks, and successfully recovers, other unascertainable damages. *See, e.g., Winston v. Guelzow*, 855 N.W.2d 432, 437 (Wisc. Ct. App. 2014) (holding no entitlement to partial prejudgment interest for a $33,300 debt that the defendant did not contest, when the plaintiff had sought and recovered other damages against the defendant on the same claim that were not ascertainable).

¶64 But this does not mean, however, that Plaintiffs possess no entitlement to any interest for any period prior to the September 13, 2022 judgment. As noted above, the jury rendered its verdict on March 3, 2022, and conclusively determined the extent of Defendants' liability to Plaintiffs, as well as the specific monies that Defendants owed Plaintiffs. Consequently, the previously unliquidated monies owed by Defendants to Plaintiffs all became liquidated—and thus ascertainable—when the jury announced its verdict on March 3, 2022. *See, e.g., Rogers v. City of Kennewick,* 2007 WL 9759254, at *4 (E.D. Wash. Aug. 15, 2007) ("Prejudgment interest is recoverable on liquidated damages. . . . In this case, the damages became liquidated when the jury rendered its verdict, therefore the date prejudgment interest began to run was the date of the verdict . . .The Court awards prejudgment interest on the amount of the verdict to the date of the judgment. Plaintiffs are entitled to post-judgment interest from the date of the judgment."); *Zeigler v. Goelzer*, 211 N.W. 140, 144 (Wisc. 1964) (awarding postverdict, pre-judgment interest for a tort claim accruing from the date of the initial jury verdict rather than the date of final judgment, despite an appeal and

a new trial on an issue unrelated to damages, because the tort damages "became liquidated" and ascertainable when the jury announced its verdict); *Kent v. Chapel*, 70 N.W. 2, 3 (Minn. 1897) ("In the case at bar the claim for damages became liquidated and determined by the verdict. There was no further uncertainty about the claim.").

¶65 This, of course, would be true with respect to any civil case tried before a jury. And in a typical case, that the damages become ascertainable upon the announcement of the jury verdict is merely academic: Rule 58(b) of the Virgin Islands Rules of Civil Procedure requires that entry of judgment on a jury verdict occur "promptly," and title 5, section 426 of the Virgin Islands Code provides that "[t]he rate of interest on judgments and decrees for the payment of money shall be 4 percent per annum." 5 V.I.C. § 426(a). Thus, when the Superior Court complies with the edicts of Civil Rule 58(b) and promptly enters a judgment on the jury verdict on the same day or the next day, the amount of prejudgment interest accrued at the 9 percent rate pursuant to section 951(a)(1) for the fleeting period between announcement of the jury verdict and entry of judgment on the verdict should be either zero or *de minimis*.

¶66 In this case, however, the Superior Court failed to enter judgment "promptly," electing to enter judgment on the verdict more than six months later, on September 13, 2022, despite both the plain text of Civil Rule 58(b) and the Plaintiffs even filing motions for entry of judgment. Because the March 3, 2022 jury verdict established that Defendants were liable to

Plaintiffs for a specific monetary amount, and judgment was not entered until September 13, 2022, Plaintiffs were entitled to postverdict prejudgment interest at the 9 percent per annum rate pursuant to section 951(a)(1) for the period from March 3, 2022, through September 13, 2022.

¶67 In making this holding, we are cognizant of two potential arguments against requiring postverdict prejudgment interest for this period. It is certainly true that Plaintiffs could not execute on the jury verdict until and unless the Superior Court entered judgment based on the verdict. *See* 5 V.I.C. § 471 (providing for a judgment for the payment of money to be enforced by writ of execution). However, section 951(a)(1) permits prejudgment interest on "all monies which have become due," without requiring that such monies be collectable by writ of execution or other judicial process. The reason for that is because imposing such a requirement would literally render section 951(a)(1) a complete nullity since its purpose is to provide for prejudgment interest, yet prejudgment interest could never be awarded in any case since no debt, no matter how ascertainable, can be judicially enforced prior to entry of a judgment. *Accord, R.J. Reynolds*, 76 V.I. at 736 (declining to interpret section 951 in a way that would require an award of prejudgment interest prior to verdict in every single case).

¶68 Likewise, we find unpersuasive the reasons the Superior Court set forth in its July 25, 2022 order denying Plaintiffs' motion to enter judgment. The Superior Court justified its refusal to enter judgment by stating that

> the Court still has under consideration the [Defendants'] Post-Trial Rule 50(b) and Rule 59(a) Motion. Entering judgment would implicitly deny the [Defendants'] motions, might constitute an abuse of discretion, and would likely cause further delay and invite additional costs and expense if [Defendants] simply refiled their motions after judgment had been entered. Moreover, if the motion for a new trial were granted, it would require vacating the judgment that [Plaintiffs'] want entered.

(J.A. 118.) This, however, constitutes a misinterpretation of Civil Rule 58(b) that is wholly inconsistent with our prior precedents interpreting that rule. As we previously explained, not only does Civil Rule 58(b) obligate a judge to promptly sign the judgment, but "[t]he Judges and Clerk of the Superior Court are without discretion in this matter." *World Fresh Markets, LLC v. Henry*, 71 V.I. 1161, 1180 (V.I. 2019). Moreover, entry of judgment pursuant to Civil Rule 58(b) cannot possibly constitute an implicit denial of a post-judgment motion filed pursuant to Civil Rules 50(b) or 59(a) because a post-judgment motion cannot take effect until *after the entry of the judgment it pertains to*. We held in *Charles v. Payne* that the limitations period for filing a motion under Civil Rules 50(b) or 59(a) does not commence until the Superior Court enters judgment under Civil Rule 58(b). 71 V.I. 638, 645 (V.I. 2019). Thus, when Defendants filed their renewed motion for judgment as a matter of law on March 22, 2022, they elected to do so before the start of the limitations period set forth in Civil Rules 50(b) and 59(a), since the deadline to file such a motion did not

begin to run until September 13, 2022, when the Superior Court later filed the judgment.[15] *See id.* Consequently, entry of judgment would not have implicitly denied Defendants' motion, nor would it have required Defendants to file their motion again, as the Superior Court suggests. To the extent the Superior Court was concerned with Defendants paying a judgment that might be changed by its determination of the post-judgment motions, Rule 62 of the Virgin Islands Rules of Civil Procedure provided it with a mechanism to stay execution of the judgment. *See* Reporter's Note, V.I. R. Civ. P. 62 ("Under subpart (b) the court may stay the execution of a judgment – or any proceedings to enforce it – pending the disposition of any of the specified post-trial motions, upon proper security.") Therefore, we conclude that the Superior Court erred when it declined to enter judgment promptly in accordance with Civil Rule 58(b), and that the effect of that error is that postverdict prejudgment interest accrued for the approximately six-month period from the announcement of the jury verdict on

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[15] Defendants argue that their renewed motion took effect on March 22, 2022, because it addressed a jury issue not determined by the verdict. They stated that they raised issues other than those decided by the verdict, such as the denial of their motion in limine, the impropriety of counsel's closing argument, the gist of the action doctrine and liability of LLC members. (Defendants' Rep. Br. 28-29.) However, Defendants are misconstruing the rule. Civil Rule 50(b) states that "if the motion addresses a jury issue not decided by a verdict," it should be filed no later than 28 days after the jury is discharged. The issues that the motion raised were not jury issues, but issues that needed to be decided by the court.

March 4, 2022, and the eventual entry of judgment on September 13, 2022.[16]

III. CONCLUSION

¶69 This Court agrees with the Superior Court that there was no contract between the parties, but because we nevertheless find that Plaintiffs introduced sufficient evidence to prevail on their claim for the same damages under a theory of promissory estoppel, we reverse that portion of the September 13, 2022 opinion and order vacating the damages awarded by the jury for breach of contract. We also affirm the portions of the Superior Court's decision which set aside the jury awards on the claims for defamation and punitive damages as to Hanley, and which upheld the jury's verdict and award as to the intentional misrepresentation claim. We, however, conclude that the Superior Court erred in vacating the jury's verdict in favor of Plaintiffs on the defamation claim with respect to Mosler, as well as the award of punitive damages as to Mosler, and therefore vacate those portions of the September 13, 2022 opinion and order and reinstate those portions of the jury verdict. And

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[16] As outlined earlier, not all portions of the jury's March 4, 2022 verdict remain valid in light of the subsequent decisions of this Court and the Superior Court. Moreover, as also noted earlier, Plaintiffs have not claimed an entitlement to any prejudgment interest on their defamation claim or the punitive damages award. Consequently, on remand the Superior Court shall calculate postverdict prejudgment interest for the period from March 4, 2022, to September 13, 2022, only based on the portion of the jury verdict that has not been set aside and for which Plaintiffs have requested prejudgment interest.

while we find that the Superior Court properly denied the motion for a new trial, we conclude that it erred in failing to award prejudgment interest for the compensatory damages awarded on the claims for breach of contract (recharacterized as promissory estoppel) and intentional misrepresentation for the period stemming from March 3, 2022, through September 13, 2022. Accordingly, we affirm in part and reverse in part the September 13, 2022 opinion and order, and remand the case to the Superior Court to calculate the amount of postverdict prejudgment interest owed to Plaintiffs.

Dated this 3rd day of January, 2024.

BY THE COURT:

/s/ Rhys S. Hodge

Rhys S. Hodge

Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.

Clerk of the Court

By: /s/Reisha Corneiro

Deputy Clerk II

Dated: January 3, 2024

For Publication

IN THE SUPREME COURT
OF THE VIRGIN ISLANDS

Warren Mosler, Chris Hanley, and **Chrismos Cane Bay, LLC**, Appellants/Defendants v. **Joseph Gerace** and **Victoria Vooys d/b/a Cane Bay Beach Bar**, Appellees/Plaintiffs.	S. Ct. Civ. No. 2022-0049 Re: Super. Ct. Cs. No. 368/2005

On Appeal from the Superior Court
of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W.L. Willocks

Argued: March 8, 2023
Filed: January 3, 2024

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice, and **I'VE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Joel H. Holt, Esq.

Law Offices of Joel Holt
St. Croix, U.S.V.I.
Attorney for Appellants,

Rhea R. Lawrence, Esq. (argued)
Lee J. Rohn, Esq.
Law Offices of Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellees.

JUDGMENT

HODGE, Chief Justice.

AND NOW, consistent with the Opinion of even date, it is hereby

ORDERED that the Superior Court's September 13, 2022 opinion and order are

REVERSED IN PART with respect to the portions addressing damages under a theory of promissory estoppel, the defamation claim against Warren Mosler, and prejudgment interest, and **AFFIRMED IN PART** with respect to the portions addressing the defamation claim against Chris Hanley, the intentional misrepresentation claim, and the denial of the motion for a new trial. This case is **REMANDED** to the Superior Court for the purpose of calculating the amount of damages to be awarded to Plaintiffs, which shall include postverdict prejudgment interest for the period set forth in the Opinion of this Court. It is further

ORDERED that copies be directed to the appropriate

parties.

SO ORDERED this 3rd day of January, 2024.

BY THE COURT:

/s/ Rhys S. Hodge
Rhys S. Hodge
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/Reisha Corneiro
Deputy Clerk II
Dated: January 3, 2024

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368

Joseph GERACE, Victoria Vooys, d/b/a Cane Bay Beach Bar, Plaintiffs,
v.
Maria BENTLEY; David Bentley; CB3, Inc.; Warren Mosler; Chris Hanley; and Chrismos Cane Bay, LLC, Defendants.
|
September 12, 2022

MEMORANDUM OPINION

WILLOCKS, Administrative Judge.

¶1 BEFORE THE COURT are the post-trial motions of Warren Mosler (hereinafter "Mosler"), Chris Hanley (hereinafter "Hanley"), and Chrismos Cane Bay, LLC (hereinafter "Chrismos") (collectively "Defendants" or "Chrismos Defendants") to vacate the jury's entire verdict or, in the alternative, for a new trial based on statements of opposing counsel during closing arguments. Joseph Gerace (hereinafter "Gerace") and Victoria Vooys (hereinafter "Vooys"), formerly doing business as Cane Bay Beach Bar (hereinafter "Beach Bar") (collectively "Plaintiffs"), oppose the Defendants' motions. For the reasons stated below, the Court will grant the motion for post-trial relief in part and set aside the jury's verdict on the breach of contract, breach of the duty of good faith and fair dealing, and defamation claims but otherwise affirm the verdict on

the intentional misrepresentation claim. Additionally, because the jury awarded a single amount in compensatory damages on all the business torts, the Court must affirm the entire award since the Court cannot reallocate damages and remittitur is not available in the Virgin Islands. The Court will also vacate the award of punitive damages because the evidence was insufficient for a rational trier of fact to have found that Mosler and Hanley acted with reckless disregard. Lastly, finding no prejudice to the Defendants from Plaintiffs' counsel's remarks, the Court will deny their alternate request for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 Gerace and Vooys met in culinary school in Arizona. They decided to go into business together and "came across Cane Bay Beach Bar on St. Croix, on the internet." (Trial Tr. 168:24-25.[17]) Gerace traveled to St. Croix in June of 2003 to check out the restaurant. He "looked at it and fell in love with the island[,]" he told the jury. *Id.* at 438:24-25. "It was everything a 25-year-old kid can dream for." *Id.* at 439:16-17. The first time Vooys saw the restaurant—and the first time she stepped foot on St. Croix was after she and Gerace had driven their belongings "down to Florida, got on a

[17] Unless otherwise noted, all citations to a transcript are from the transcripts of the trial. Additionally, the Court has omitted giving the day of the trial because the court reporter paginated the trial transcripts consecutively, even though each day of trial is contained in separate volumes.

plane, [and] landed." *Id.* at 169:20-22. They found out in Florida, just before leaving for St. Croix, that the previous owner of the Beach Bar did not have a lease for the restaurant. *See id.* at 172:14-17, Gerace and Vooys were engaged to be married. So, they continued on because they that "had gotten that far. We had sold a condo, packed up all our stuff.... So when we found out there was no lease, we thought we'd take a leap of faith and continue." *Id.* at 172:19-24. Not long after they arrived on St. Croix, Gerace and Vooys also learned "that the landlord was going to ... sell the property." *Id.* at 173:2-3.

¶3 Gerace closed on the sale of the restaurant on August 7, 2003, and started running it the same day, "A few weeks after that, Hanley and Mosler came to introduce themselves as the new landlords."*Id.* at 173:15-16. Mosler & Hanley had formed Chrismos, a limited liability company, on September 7, 2003, to purchase the property, on which the Beach Bar was situated, for $1,050,000. A dive shop, the Cane Bay Dive Shop (hereinafter "Dive Shop"), owned and operated by Hal and Susan Rosbach, was located to the back of the same building. The Beach Bar and the Dive Shop shared a cistern and electricity. One, contiguous roof also covered the entire structure.

¶4 During their initial discussions with Mosler and Hanley, Gerace and Vooys asked for a seven-year lease. "We were just taught in school, seven years. Five and five is okay, but seven years is the best lease for a restaurant ... [b]ecause the first three years you're not even making a profit yet, so if there's anything shorter than seven, you need time to stay there long enough to

recoup your investment[,]" she told the jury. *Id.* at 174.3-10.[18] The prior Beach Bar owner, Maria Bentley, had been paying the prior landlord $1,500 a month, which included a residential cottage on the property. Gerace and Vooys continued paying the same amount but were not given a cottage to live in. When they first discussed a seven-year lease, Mosler and Hanley "said that that seemed ... reasonable. We would work on that and we'd get one, you know. We'd talk more about it." *Id.* at 175:10-12.

¶5 Mosler and Hanley had conditions for getting a seven-year lease, however. Gerace and Vooys had to "make some improvements, general cleanup, some repairs, paint the place," *id.* at 175:23-24, repairs they "thought were the landlord's responsibility...." *Id.* at 175:25-176:1. Vooys explained that they "went ahead and ... replaced screens and plywood and the outside of the kitchen[,]" "resurfaced the bar[,]" "power washed and did general cleanup and ... painted." *Id.* at 176:9-11. They replaced ice coolers. They also hired more bartenders. *See id.* at 155:7-13. "We had to replace the sinks in the bathroom[,]" Vooys explained, even though "things that are fixture[s] should normally be the landlord's responsibility." *Id.* at 176:11-14. The Beach Bar also had to split water and electricity costs with the Dive Shop and Vooys said she asked Mosler and Hanley about getting separate meters installed. Rosbach had informed Gerace and Vooys after they purchased the Beach Bar that the Bar pays 2/3 of the

[18] "Five and five" refers to a five-year lease with an option to renew for a second five-year term. (Cf. Trial Tr. 235:18-20.)

bill and the Dive Shop pays 1.3. Vooys thought that might not be fair. Gerace and Vooys could not install separate meters because they did not own the building.

¶6 John Reed (hereinafter "Reed") worked for the Beach Bar as a bartender through multiple owners. He helped Gerace and Vooys with the repairs Mosler required for getting a lease: cleaning, power washing the deck, painting. "It went on for a while. Two to three weeks, at least, for the initial part. We kept doing more after we opened[,]" Reed recalled. *Id.* at 510:22-24. Gerace's younger brother, Edward, also moved to St. Croix in August 2003 at the age of 21, to help him and Vooys run the Beach Bar. He "was to be a barback ... [or] a bartender helper." *Id.* at 417:6-7. He also worked as a line clerk for Sunday brunches and helped with the full moon parties. He was there when Gerace and Vooys closed on the restaurant and described the state as "need[ing] some work. There was painting. There was maintenance issues. There was nails coming out of the floor boards." *Id.* at 418:6-8. Michael Belcheff (hereinafter "Belcheff") corroborated their testimony. He met Vooys and Gerace "when they took over the restaurant...." *Id.* at 400:24-25. He recalled that they went "crazy making all kinds of improvements, making the place better, just ... working their butts off." *Id.* at 401:3-5. Belcheff even helped with some of the repairs like "carpentry, some electrical work.... helping them with the lighting...." *Id.* at 402:6-8.

¶7 Vooys testified that Mosley [sic] and Hanley wanted them to prioritize the repairs to the restaurant over rent and were "pretty casual" about whether rent was paid on time. *See id.* at 193:13-14. At first, Hanley

"was going to come by and pick up the rent when he would stop by." *Id.* at 175:5-6. Later, Mosler and Hanley told Gerace and Vooys to drop the rent off at Hanley's real estate office, Farchette & Hanley, "whenever [they] went to run errands in town...." *Id.* at 193:7-11, 194:1. Hanley agreed that he had said Chrismos would be flexible on the rent. However, his deposition testimony, which was read to him, established both that rent was due on the 1st of the month, and late if not paid by the 2nd of the month, but also that if "they were current by the end of the month on the rent, we were completely fine with that. And that went for the dive shop as well." *Id.* at 651:5-7.

¶8 Sometime in the beginning of March 2004, Mosler and Hanley gave Gerace and Vooys a proposed lease. *Id.* at 184:19-21. Vooys testified that the lease was "terrible."

> We'd asked for seven years, because you need you won't make profit for at least three years. This lease was two or two and a half years. We couldn't assign it; so in the future if we did want to turn the bar over to someone else, we would have to have them get a new lease. There was a late fee, penalty[,] and attorney fees.... [W]e had to decline our right to a trial by jury if there was a conflict. And they were not obligated to do any repairs, like the repairs we'[d] been talking about, on the building.... [And rent] was going to go from [$]1,500 to [$]2,000. *Id.* at 186:22-187:9.

Later that month Vooys shared their concerns with Hanley who agreed, according to her, that "it was a terrible lease...." *Id.* at 187:11-12. Hanley told them

"they'd work on a better one." *Id.* at 187:13.

¶9 In August 2004, a fire broke out in the kitchen. The hood over the stove was too small for the size of the space. Vooys and Gerace "had to order and ship and install another hood, a larger hood, exhaust fan, new fire suppression Ansul system, electrical, backsplash for the kitchen." *Id.* at 190:24-191:1. The Beach Bar had to close for two months while they made the repairs and waited for parts to be shipped on-island. They approached Mosler & Hanley for assistance with the repairs or forgiveness on the rent but were only allowed to pay the rent late. Full rent had to be paid, Vooys told the jury, and she and Gerace had to do all the repairs and buy all the equipment themselves. Because of the fire, Vooys and Gerace asked Mosler, "before we do all these repairs, are we going to get a seven-year lease before we put a bunch of money into this place?" *Id.* at 187:20-22. According to Vooys, Mosler said "[t]hey wanted to wait until they fixed everything and got up and running and then we'd talk about it again." *Id.* at 191:16-17; *see also id.* at 192:1 (identifying Mosler as the person who made the assurances). Vooys estimated the repairs from the fire cost them between $15,000 and $20,000.

¶10 Mosler and Hanley offered Vooys and Gerace another lease in November 2004, but with few differences from the previous one in March. The name of tenant was changed from Joseph Gerace to Barabus, Inc., the corporation Vooys and Gerace had formed on August 12, 2003, and the rent was put back at $1,500, but would also increase sometime later to $2,500. The lease also was not for seven years as they had asked.

So Vooys and Gerace reached out to Gerald T. Groner, Esq., the attorney they had used to form Barabus, for advice about the second lease. Neither could recall if Attorney Groner reached out to Mosler and Hanley's attorney, and they never followed up with Attorney Groner. *See id.* at 467:22-468:13.

¶11 Sometime in February 2005, Rosbach, the Dive Shop owner, introduced Reed to James Jordan (hereinafter Jordan). Jordan asked Reed to meet him at Off the Wall, another bar and restaurant on St. Croix's north shore not far from the Beach Bar. They met after Reed finished work. Jordan told Reed that "[h]e was going to be taking over the lease and Warren Mosler was his boss...." *Id.* at 514:10-11. Jordan asked Reed if he "was interested in going to work for them." *Id.* at 514:12. Reed said yes because he needed the job. Jordan asked Reed "to keep everything low, don't tell anybody, which [Reed] didn't feel too good about, but [he] went with it." *Id.* at 514:13-15.

¶12 Beginning in March 2005, Mosler began to accuse Gerace and Vooys of being behind on their rent. He also visited the restaurant around the same time and told them that

> he did not like the direction [they] ... were taking the bar and restaurant. He had issues with the full moon parties and the crowds and element that the parties brought. He wanted to turn it in a white, middle-class restaurant and he had somebody in place to take over from ... [them] and [they] ... needed to make this transaction within a month. (201-23-202:4.)

Vooys disagreed, saying she was "pretty adamant about ... cleanliness, especially in a bathroom." *Id.* at 178:21-22. "If you're in a restaurant, if people see a dirty bathroom, they think your kitchen is dirty. So I was adamant about cleaning[,]" she said. *Id.* at 176:22-24. "My employees knew the bathrooms had to be spick and span." *Id.* at 176:25. Donna Christensen (hereinafter "Christiansen"), family physician and former delegate to Congress, corroborated Vooys's testimony, saying she had no problem with the cleanliness of the restaurant or the bathroom but had only patronized the Beach Bar a few times. John H. Woodson, III (hereinafter "Woodson") agreed. He owns a home in LaVallee on St. Croix, where he lived until 2011, when he moved to St. Thomas. He frequented the Beach Bar and attended most of the full moon parties when Gerace and Vooys owned it. He said he found the cleanliness of the bathrooms and the restaurant "normal.... Otherwise, [he] would not eat there." *Id.* at 390:19-24.

¶13 Gerace and Vooys called Hanley to ask what was going on because they had "just got back on [their] feet and ... [by] the beginning of 2005 ... were doing great." *Id.* at 202:15-17. Hanley told them that Mosler "had a guy in place ... and ... [he] wanted that guy to take over." *Id.* at 202:20-22. They told Hanley they did not want to sell and the four had a meeting about a week later. According to Vooys, "Mosler told us we were not getting a lease.... [H]e did not like the way we were running the restaurant. He thought it was dirty." *Id.* at 204:1-3. "He reiterated he didn't like the direction we were going and the clientele we were bringing in and he wanted to be able to bring his clients to have

meetings, more like a white, middle-class restaurant, and we needed to come up with an exit strategy." *Id.* at 204:14-18. Mosler also complained that "[t]here were too many dogs around[,]" *id.* at 205:3, and said that they "just weren't making a go of it, that [they] didn't know what [they] were doing."*Id.* at 205:6-7. Vooys walked away and went to the back of the restaurant and "wailed". *Id.* at 205:18. Gerace came back to check on her and console her and when they returned Mosler & Hanley had left. Belcheff corroborated their testimony. He said he saw Mosler and Hanley meeting with Gerace and Vooys, so he left, and returned about 30 minutes later. When he returned, he "saw V.I.C. § crying ... [and] Joe with like a stunned look on his face...." *Id.* at 405:9-10.

¶14 Hanley came back a few days later to discuss "facilitating th[e] transfer from [them] to the[ ] guy they wanted to come in and take over...." *Id.* at 207:10-12. Hanley offered to give Gerace and Vooys a lease but only so they could sell it to Jordan. Jordan insisted on having a lease before he would take over the Beach Bar. Chrismos then served a letter on Vooys and Gerace, dated April 12, 2005, saying that it was their understanding that Gerace and Vooys had agreed to vacate the premises by the end of the month and if not, their property would be confiscated. The letter concluded by asking Vooys and Gerace to confirm whether Mosler and Hanley's recollection of their discussion was accurate. Vooys and Gerace reached out to Lee J. Rohn, Esq. who sent a letter on April 20, 2005 on their behalf, stating that they had no intention of leaving the Beach Bar.

¶15 According to Vooys, Mosler then "started like a smear campaign on why he was getting rid of [them] on the radio and TV." *Id.* at 208:10-11. No one could recall exactly when, but Vooys recalled that it was after they received the April 12, 2005 letter. The talk show was hosted by Roger Morgan (hereinafter "Morgan"). Morgan read the April 12, 2005 letter on the radio and Mosler told listeners that he was "getting rid of [Gerace and Vooys] because [they] didn't know what [they] were doing ... were always late on rent ... were behind on rent, [and] ... didn't know how to run a restaurant." *Id.* at 210:1-4. Vooys also said she heard Mosler claim that he had reduced their rent, which she denied. Reed heard Mosler on the radio talking negatively about the Beach Bar and Gerace and Vooys, "saying that they didn't pay rent, that they supposedly loud parties were there. I think they even mentioned something about drugs or something in that area on the radio[,]" he said. "[I]t was always negative." *Id.* at 520:21-25. Christensen too heard about Mosler being on Roger Morgan's show talking about the Beach Bar but had not heard the show herself. Woodson went on the radio show to complain about Gerace and Vooys being put out of the Beach Bar. He told listeners the reason was not "noise ... [but] the music and type of clientele that that music probably brought." *Id.* at 392:18-20. Hanley too went on the radio show, and so did Vooys but only because Morgan called her for a rebuttal. Hanley said he went on the radio to "defend[his] ... character ... [his] position, and ... made statements that were basically countering the lies and inaccuracies that they were claiming on the radio." *Id.* at 624:2-5. Hanley said Vooys and Gerace were telling everyone that "they

were always current on their rent and that they were current at that time, and [he] stated that that's not true. They had been late a lot and that they were not current at that time, when [he] was on the radio." *Id.* at 624:8-11. Later that afternoon, after Hanley spoke on the Roger Morgan show, Vooys and Gerace arrived at Farchette and Hanley "with April's rent check." *Id.* at 624:18.

¶16 Business started to decline after Mosler went on the radio. Reed recalled that "for the last couple months ... Joe and V.I.C. § were there, this whole radio thing was going on and ... everybody that came in or I saw elsewhere was talking about it, not in a good way." *Id.* at 535:16-19. Vooys and Gerace signed an asset purchase agreement with Jordan, dated June 17, 2005, for $30,000. Jordan initially offered $50,000. "By the time we signed and left, we just felt like total failures[,]" Vooys testified. *Id.* at 222:6-7. "It's like we lost everything[,]" she explained. "And it's not just money, it's energy. You know, we were there like ten, 12 hours a day every day. You know, you put a lot of passion into it. We loved that place and the people that - that became our patrons and it just stunk." *Id.* at 205:21-25. Anthony recalled Vooys and Gerace "were majorly bummed," *id.* at 162:3, when they learned they had to leave. He also said the Beach Bar declined after they Gerace and Vooys left. "Less locals." *Id.* at 163:3. Anthony continued to attend and reggae music is still played at the bar though "not as often ..." *Id.* at 164:5. He stopped going as frequently because "[t]he food wasn't as good. We weren't having as much fun. Less and less of people that we used to hang out who were also locals were going there." *Id.* at 165:12-14.

¶17 Vooys testified that when they left at the end of June, they did not owe WAPA and did not owe anything to the Dive Shop. She estimated that they had spent $40,000 on repairs, $20,000 on equipment, and $50,000 in good will such as advertising and promotions. Vooys and Gerace left island for a time after leaving the Beach Bar but returned to start a new business, Club 54, in August or September of 2005. Vooys testified that she had not returned to the north shore until days before trial and never returned to the Beach Bar. "It was too emotional. Too emotional, too painful. Too embarrassed." *Id.* at 230:17-18.

¶18 In the interim, on June 8, 2005, Gerace and Vooys, doing business as Cane Bay Beach Bar, sued the former owners, Maria Bentley, David Bentley, and their company CB3, Inc. (collectively the "Bentleys"), as well as Mosler, Hanley, and Chrismos. From the Bentleys, Vooys and Gerace sought damages, including punitive damages, for breach of contract (Count I), fraud (Count II), and misrepresentation (Count III) for not having a lease and not owning the "Cane Bay Beach Bar" tradename. From Chrismos, Vooys and Gerace sought damages, including punitive damages, for breach of an agreement to enter into a lease (Count V). From Chrismos, Mosler, and Hanley, Vooys and Gerace sought damages, including punitive damages, for defamation, slander, libel, and defamation *per se* (Count VI), fraud (Count VII), misrepresentation (Count VIII), intentional or negligent infliction of emotional distress (Count IX), and breach of the duty of good faith and fair dealing (Count X). The demands for punitive damages were erroneously labeled as Counts IV and XI, respectively, as to the Bentleys and

the Chrismos Defendants.

¶19 Chrismos and Mosler appeared on July 12, 2005, and jointly answered the complaint but counterclaimed separately. Mosler asserted a counterclaim for defamation [check that] and Chrismos asserted a debt counterclaim for unpaid rent. Chrismos also asserted the affirmative defenses of failure to state a claim for relief, statute of frauds, laches, estoppel, waiver, unclean hands, and failure of consideration. Mosler did not assert any affirmative defense. David Bentley appeared on July 13, 2005, and answered the complaint. Hanley appeared on August 22, 2005, answered the complaint, and asserted the same affirmative defenses as Chrismos. He did not assert a counterclaim. The Court (Ross, J.) entered default against Maria Bentley and CB3, Inc. on December 29, 2005, and entered on January 2, 2006. Maria Bentley appeared *pro se* on January 23, 2006, answered the complaint, and asserted a counterclaim on her own behalf and on behalf of CB3, Inc. for the unpaid balance on the sale of the Beach Bar. On January 24, 2006, Bentley moved to vacate her default, which the Plaintiffs opposed. The case then went dormant for several years until the Chrismos Defendants moved to dismiss for failure to prosecute or for a stay pending the posting of a bond. The Court (Donohue, P.J.) later denied the motion to dismiss but also directed the parties to submit a propose scheduling order to get the case back on track.[19]

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[19] The case had been reassigned to the Honorable Julio A. Brady after the retirement of the Honorable Edgar D. Ross. It was reassigned to the Honorable Darryl Dean Donohue, Sr. after

¶20 After several extensions of discovery deadlines, David Bentley was dismissed, over Plaintiffs' objection, because Plaintiffs failed to file a motion within 90 days to substitute a personal representative for Mr. Bentley after he died in a plane crash. Discovery, and motions pertaining to discovery, continued for several years. Eventually the case was reassigned to this Court who, on April 14, 2016, dismissed the complaint after the Plaintiffs, who subsequently had moved off-island, failed to post a bond in accordance with Title 5, Section 547 of the Virgin Islands Code. *See Gerace v. Bentley*, 62 V.I. 254 (Super. Ct. 2015), *rev'd* 65 V.I. 289 (2016). On appeal, the Supreme Court of the Virgin Islands reversed and remanded, holding the statute unconstitutional. *See Gerace v. Bentley*, 65 V.I. 289 (2016), *writ dismissed sub nom. Vooys v. Bentley*, 69 V.I. 975 (3d Cir. 2018) (*en banc*). On remand, and after delays due in part to the COVID-19 pandemic, jury selection and trial commenced on February 24, 2022. Plaintiffs, Maria Bentley, and the Chrismos Defendants previously had submitted a proposed joint final pretrial order, which the Court approved on August 12, 2021, in which Mosler dropped his counterclaim for defamation. Plaintiffs, Maria Bentley, and CB3, Inc. also voluntarily dismissed their claims and counterclaims against each other before trial, leaving only the claims by and against Chrismos Defendants to be decided by the jury.

¶21 In addition to the testimony summarized above, the jury was also presented with documentary

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Judge Brady recused himself.

evidence. Plaintiffs' Exhibit 47 is a group of cancelled checks. The first two checks, numbered 355 and 357, were written by Vooys on her Bank of America account to the Farchette & Hanley Escrow Account, for $1,500.00 (for October 2003) and $3,000.00 (for November and December 2003). The remaining checks were issued by Cane Bay Beach Bar on a FirstBank VI account, also to the Farchette & Hanley Escrow Account. Collectively, the checks show rent the Plaintiffs paid from October 2003 to June 2005, but on an irregular basis. At least one rent check bounced but it was eventually covered. Vooys and Gerace also paid rent for June 2005 before vacating the premises at the end of that month. All checks were made out to Farchette & Hanley, not to Chrismos or to Hanley or Mosler directly.

¶22 Copies of some of the rent checks, specifically checks numbered 544 for $921.00 and 772 for $2,000.00, differed between the parties. On Defendants' copy of check number 544, the memo line reads: "Rent March — Plumber Bills", while on Plaintiffs' copy March is crossed out, "April" is written above March, and parentheses are added around the words "Plumber Bills." On Defendants' copy of check number 722, the memo line was blank, while on Plaintiffs' copy, the memo line reads: "July / August - 1000 for Roof)". Vooys did not have copies of receipts for the repairs done by Raycon Mechanical to the roof after the fire, or for repairs done by a plumber for the bathroom. She reiterated that both repairs were approved by Hanley and denied adding the notations on the memo lines to make it look like rent was current. Vooys explained on cross examination that she

only added to, or revised, the checks' memo lines for record-keeping purposes, explaining that she "wouldn't just write a weird number ... rent check for a weird number." (Trial Tr. 361:25-362:1.) Vooys conceded on redirect examination that she was not good about keeping receipts and that Gerace was "[e]ven worse." *Id.* at 370:15.

¶23 On direct and cross-examination, Hanley disputed that Chrismos would have agreed to pay for plumbing repairs but agreed that Chrismos would have paid for repairs to the Beach Bar's grease trap. He assumed that the $921.00 rent check (#544) was for the grease trap repairs. But when pressed why he did not object when the check for less than the full amount came without a receipt, he explained that he would have treated the check as a partial payment toward the rent. Chrismos never gave Plaintiffs receipts for rent or a statement showing a balance due. Hanley also admitted on cross-examination that he was mistaken when he testified that Vooys and Gerace paid rent late in October, November, and December of 2003, and January and February of 2004. Mosler also confirmed that he and Hanley "always acted in the capacity as members of Chrismos." *Id.* at 714:18-19.

¶24 After Plaintiffs rested, Defendants moved for judgment as a matter of law on all counts. As to Count V (breach of an agreement to enter into a lease), Defendants claimed that Vooys and Gerace failed to present any evidence that they incurred financial losses, as opposed to the company, Barabus, who owned and operated the Beach Bar. The Court denied the motion, finding a dispute of fact. Regarding Counts

VII (fraud), VIII (misrepresentation), and X (intentional or negligent infliction of emotional distress), Defendants argued that all three claims were barred by the gist of the action doctrine, as adopted by *Pollara v. Chateau St. Croix, LLC*, Case No. SX-06-CV-423, 2016 V.I. LEXIS 49, 2016 WL 2865874 (V.I. Super. Ct. May 3, 2016), which held that tort claims merge with contract claims when the dispute between the parties arises from a contract. Defendants also asserted a lack of evidence of fraud or intentional misrepresentation. Plaintiffs opposed, claiming Defendants waived gist of the action as an affirmative defense by not asserting it in their answers. The Court took the motion under advisement as to the tort claims. Mosler moved to dismiss Count VI (the defamation claims), contending that Plaintiffs thrust themselves into the limelight by being the first ones to go on the radio. The Court also took the motion under advisement as to Count VI. As to Count IX (intentional or negligent infliction of emotional distress), Plaintiffs, after hearing Defendants' arguments, agreed that they did not carry their burden of proof and agreed to withdraw the claim. Lastly, Mosler and Hanley argued that all counts against them failed because they were shielded from individual liability by the Virgin Islands' limited liability company laws, specifically Title 13, Section 1303(a) of the Virgin Islands Code. Plaintiffs again objected, claiming Mosler and Hanley failed to allege the individual immunity of the members of a limited liability company as an affirmative defense. The Court took Defendants' statutory immunity argument under advisement as well.

¶25 Defendants renewed their motion after they presented their defense and rested, and Plaintiffs called one witness in rebuttal. Defendants' arguments after the close of all evidence largely mirrored their earlier arguments. However, Defendants also moved to dismiss Plaintiffs' allegations of mental anguish and emotional distress within their breach of an agreement to enter into a lease claim (Count V), arguing that damages of this sort were unavailable in a contract action. The Court also *sua sponte* removed Plaintiffs' libel claim, finding no evidence of libel. Defendants renewed their gist of the action claim but further argued that the fraud and misrepresentation counts were duplicative. Mosler and Hanley also renewed their statutory immunity claim as members of Chrismos, a limited liability company. In addition to renewing their argument that the evidence Plaintiffs presented was insufficient as to all their claims, Defendants also argued that Plaintiffs failed to present any evidence to support punitive damages, noting that "punitive damages aren't allowed for the contract[claims]." (Trial Tr. 793:22-23.) Plaintiffs also moved for judgment as a matter of law on Chrismos's debt counterclaim for unpaid rent. The Court reserved ruling on both motions. After discussing the jury instructions and the verdict form, Plaintiffs informed the Court that they could only be awarded damages once whether for breach of contract, intentional misrepresentation, or breach of the duty of good faith and fair dealing.

¶26 After deliberating, the jury returned a verdict in Plaintiffs' favor, finding that Chrismos had an agreement with Plaintiffs and breached that

agreement by not giving them a lease, finding that all three Defendants made intentional misrepresentations to Plaintiffs, and that all three Defendants also breached their duty of good faith and fair dealing to Plaintiffs. The jury awarded $ 100,000 to Plaintiffs in damages. The jury also found that Mosler and Hanley had defamed Gerace and Vooys and separately awarded Gerace and Vooys $30,000 apiece from each defendant. Lastly, the jury found that Mosler and Hanley's actions warranted punitive damages and awarded Vooys $50,000 apiece from Mosler and Hanley. Defendants renewed their motion for judgment as a matter of law and also moved for a new trial based on statements made by Plaintiffs' counsel during closing arguments, which Defendants contend were prejudicial.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

¶27 "A party is entitled to judgment as a matter of law when, in considering all of the evidence, accepting the nonmoving party's evidence as true, and drawing all reasonable inferences in favor of the nonmoving party, the court concludes that a reasonable jury could only enter judgment in favor of the moving party." *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 409 (2016). " 'In performing this narrow inquiry, trial courts and appellate courts must refrain from weighing the evidence, determining the credibility of witnesses, or substituting their own version of the facts for that of the jury.' " Id. (brackets omitted) (quoting *Chestnut v. Goodman*, 59 V.I. 467, 475 (2013)). " 'Although

judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability.' " *Chestnut*, 59 V.I. at 475 (quoting *Corriette v. Morales*, 50 V.I. 202, 205 (2008) (*per curiam*)). Instead, " '[a] motion for judgment as a matter of law should be granted only when viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.' " *Id.* (brackets omitted) (quoting *Corriette*, 50 V.I. at 205).

B. Discussion

¶28 Before turning to the parties' arguments, the Court first must note some preliminary points. In addition to the claims against the Bentley Defendants, Plaintiffs also asserted one count against Chrismos, which counsel continuously referred to as a breach of contact claim, even though the complaint stated the claim as being for breach of an agreement to enter into a lease. The remaining counts—defamation, fraud, misrepresentation, intentional or negligent infliction of emotional distress, and breach of the duty of good faith and fair dealing were asserted against all three Chrismos Defendants. After Plaintiffs rested and Defendants moved for judgment as a matter of law, Plaintiffs withdrew Count IX, intentional or negligent infliction of emotional distress. Thus, the Court must enter judgment in favor of Chrismos, Mosler, and Hanley as to Count IX.

¶29 Additionally, after both sides had rested and Defendants renewed their motion for judgment as a matter of law, Defendants raised a new argument, that

Plaintiffs' fraud and misrepresentation claims were duplicative. (*See* Trial Tr. 778:2-5 ("And we respectfully submit those are the same counts and there's no separate count under Virgin Islands [law] for fraud and for misrepresentation. It's the same count.").) Plaintiffs initially disagreed. However, after reviewing the proposed jury instructions and hearing the arguments of Defendants counsel, Plaintiffs' counsel agreed that the damages were the same. *See generally id.* 824:16-826:7; *see also id.* at 837:1-7 ("MS. ROHN: Your Honor, if you'll recall earlier, I said you can take out 'fraud' and put in 'intentional misrepresentation.' So we don't intend to have a jury instruction on fraud because we are doing intentional misrepresentation because I agree with Attorney Holt that they're both that the damages are the same."). As Plaintiffs consented either to the dismissal of their fraud count, or its merger with their misrepresentation count, and because the jury was not instructed on the fraud count, the Court also must enter judgment in favor of Defendants as to Count VII.

i. Gist of the Action Doctrine and Immunity of Individual LLC Members

¶30 In their motion for judgment as a matter of law, Defendants incorporate their prior arguments regarding the gist of the action doctrine, which they first raised after the Plaintiffs had rested and then renewed at the close of all evidence. They also incorporate their prior arguments regarding the immunity of Mosler and Hanley under Title 13, Section 1303 of the Virgin Islands Code, as members of Chrismos, a limited liability company (hereinafter

"LLC"). Plaintiffs' response to both arguments is the same - the gist of the action doctrine and the immunity of individual LLC members are affirmative defenses that are waived. (*See generally* Trial Tr. 795:4-9 ("Even if not waived, the general rule of officers, directors and shareholder liability is that an officer or director of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries."); *id.* at 796:3-5 ("As to the gist of the action argument ... that defense has been waived.").) As both arguments raise unsettled questions of law, and do not necessarily concern the evidence admitted at trial, the Court will address these questions first.

¶31 Contrary to Plaintiffs' assertions, not every defense is affirmative. "A defense which demonstrates that plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (citing *In re: Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988)). Defenses that attack the plaintiff's complaint are called negative defenses. (*Cf.* Trial Tr. 783:16 ("[W]e would call them negative defenses....").) "A negative defense is an attack on the plaintiff's prima facie case, for example, a defense of no causation to a negligence claim. As one court put it, a negative defense is the equivalent of a defendant saying, I did not do it." Hon. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading,* 7 Fed. Cts. L. Rev. 152, 160 (2013) (internal quotation marks, footnotes, and footnoted citations omitted). "Indeed, it is well settled that 'a defense which points out a defect in the prima facie case is not an affirmative defense.' These defenses

are sometimes referred to as 'negative' defenses because they are simply an attack on a party's prima facie case." *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1339 (S.D. Fla. 2019) (brackets, ellipsis, and citations omitted).

¶32 "Unlike a negative defense, an 'affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability, in whole or in part, by new allegations of excuse, justification, or other negating matter.' " St. Eve, *et al.*, *The Forgotten Pleading*, 7 Fed. Cts. L. Rev. at 160 (footnoted citation omitted). "As one court explained, a 'true affirmative defense raises matters outside the scope of plaintiffs prima facie case and such matter is not raised by a negative defense.' " *Id.* at 161 (footnoted citation omitted). "The modem concept of the affirmative defense is 'derived from the common law plea of 'confession and avoidance.' ' " *Id.* (footnoted citation omitted). Thus, an "affirmative defense ... 'admits that the plaintiff has a claim (the "confession") but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the "avoidance").' " *Baraby v. Swords*, 851 N.E.2d 559, 571 (Ohio Ct. App. 2006) (quoting *Eulrich v. Weaver Bros.*, 846 N.E.2d 542, 546 (Ohio Ct. App. 2005)). The statute of limitations is a quintessential example of an affirmative defense because the defendant who asserts it admits, or confesses, to the truth of the plaintiff's claim, but seeks to avoid liability because the plaintiff delayed too long in bringing that claim to court. So too with other affirmative defenses such as *res judicata* or worker's compensation. All affirmative defenses concede the truth of the plaintiff's allegations but avoid liability for that claim based on facts not stated in the

complaint. *See In re: Top Flight Stairs & Rails, Ltd.*, 398 B.R. 321, 325 (Bankr. N.D. Ill. 2008) ("An affirmative defense 'requires a responding party to *admit* a complaint s allegations but then assert that for some legal reason the responding party is nonetheless excused from liability.' " (brackets and ellipsis omitted) (quoting *Reis Robotics USA, Inc. v. Concept Indus.*, 462 F. Supp. 2d 897, 906 (N.D. Ill. 2006))).

¶33 "Identifying whether a defense is negative or affirmative is often easy." St. Eve, *et al.*, *The Forgotten Pleading*, 7 Fed. Cts. L. Rev. at 161. Negative defenses do not have to be pled in an answer. *See id.* at 164 ("In contrast to affirmative defenses, negative defenses need not be affirmatively pleaded in the answer. Courts do not read the word 'defenses' in Rule 8(b)(1) as extending to negative defenses. Because a negative defense is an attack on the prima facie case—and not a separate defense to prove at trial—the plaintiff presumably already has sufficient notice of the basis for the negative defense, and the reasons underlying the requirement of pleading fall away." (footnotes omitted)). Failure to state a claim for relief is an example of a negative defense that does not have to be pled in an answer. *See, e.g., Unigestion Holding, S.A. v. UPM Tech., Inc.*, 305 F. Supp. 3d 1134, 1143-44 (D. Or. 2018) (" 'Failure to state a claim' is a negative defense that merely argues that plaintiff has not met its burden in establishing one or more elements of a claim, whatever that burden may be at a given stage of litigation."). Affirmative defenses must be alleged in an answer because they raise matters not alleged in the complaint.

¶34 "Although sometimes difficult to discern, the distinction between the two categories of defenses is crucial since affirmative defenses are generally waived if not plead." *Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986); *accord Coastal Air Transp. v. Royer*, 64 V.I. 645, 658 (2016) ("[A]ffirmative defenses are waived if not raised at the first opportunity in the Superior Court[.]") (citation omitted). Courts ask first whether the defense admits or denies the allegations in the complaint. Defenses that deny the complaint's allegations are negative or general defenses. Defenses that seek to avoid liability for reasons not stated in the complaint are affirmative defenses. "In determining whether a defense is an affirmative one, the starting point should be the list of affirmative defenses in Rule 8(c). A defense analogous to or a derivative of one of the listed defenses should generally be deemed an affirmative defense." *Ford Motor Co.*, 795 F.2d at 546; *accord Whyte v. Bockino*, 69 V.I. 749, 754-55 (2018) (courts look first to the plain language of Rule 8(c)(1) of the Virgin Islands Rules of Civil Procedure in reviewing affirmative defenses).

¶35 Neither the gist of the action doctrine nor Title 13, Section 1303 of the Virgin Islands Code are among the enumerated defenses listed in Rule 8(c) of the Virgin Islands Rules of Civil Procedure. That does not end the Court's inquiry, however. Instead, the Court must consider whether each defense admits to the allegations in the complaint or raises matters outside the complaint. If the defense merely denies the allegations in the complaint, it would be a negative defense and need not be listed in Rule 8(c). Plaintiffs would be mistaken in asserting that Defendants

waived the defense in that instance. However, if the defense requires proof of facts not alleged in the complaint, it would be affirmative, and the next question would be whether the defense is analogous or derivative of another affirmative defense.

¶36 Turning first to Mosler and Hanley's claim of their statutory immunity of individual LLC members, Section 1303 of Title 13 of the Virgin Islands Code does provide that "[a] member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager."13 V.I.C. § 1303(a). Additionally, "[t]he failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." *Id.* § 1303(b). LLC members may be liable in their capacity as members if provided in the articles of organization and the member consents in writing. *See generally id.* § 1303(c).

¶37 Clearly, the statutory immunity of an LLC member is an affirmative defense. The members of an LLC, and whether the consented to individual liability, will generally require proof of facts outside the complaint. As a form of immunity provide by statute it is analogous to the worker's compensation affirmative defense. Additionally, several courts in other jurisdictions have also held that the statutory immunity of individual LLC members is an affirmative defense. *See, e.g., Philp v. SE. Enterps., LLC,* No. M2016-02046-COA-R3-CV, 2018 WL 801663, *15

(Tenn. Ct. App. Feb. 9, 2018) ("[Tennessee statutes] provide limited liability to members, managers and agents of a limited liability company. As such, the statutes are affirmative defenses that must be pled in accordance with Tennessee Rule of Civil Procedure 8.03."); *Baraby*, 851 N.E.2d at ("We find the protection against individual liability afforded to members and managers of a limited liability company is an affirmative defense."); *Klaus v. United Equity, Inc.*, 2010-Ohio-3549, ¶27 ("The plain language of R.C. 1705.48 assumes the existence of a valid claim (the 'confession') by using the terms 'debts,' 'obligations,' and 'liabilities,' as well as 'judgment,' 'decree,' or 'order of a court.' The statute, then, provides 'the avoidance' by specifically exempting members and managers of limited liability companies from personal liability on these assumed, valid claims against the limited liability company. As such, the statute provides an affirmative defense, by definition, as we found in *Baraby*."); *accord Downing v. Goldman Phipps PLLC*, No. 4:13-CV-206 CDP, 2017 WL 1050980, 2017 U.S. Dist. LEXIS 39408, *18-19 (E.D. Mo. Mar. 20, 2017) (referring to immunity of individual member of former professional limited liability company as an affirmative defense); *Lieberman v. Mossbrook*, 208 P.3d 1296, 1312-13 (Wy. 2009) (referring to assertion that individual members were not proper parties as an affirmative defense and reversing imposition of individual liability and remand for correction of judgment to name LLC as defendant); *see also Keller Williams Consultants Realty v. Trio Custom Homes, Ltd.*, No. 12 CVH-09-11908, 2013 Ohio Misc. LEXIS 10959, *32 (Ohio Ct. Com. Pl. Dec. 23, 2013) (finding

defendant adequately raised lack of personal liability by moving to amend answer to allege he was acting as member of LLC at all times). *Cf. Joe Hand Promotions v. Davis*, No. C 11-6166 CW, 2012 WL 4803923, 2012 U.S. Dist. LEXIS 145402, *9-10, *18-20 (N.D. Cal. Oct. 9, 2012) (referring to individual LLC member immunity affirmative defense as failure to join an indispensable party or failure to state a claim);

¶38 "A limited liability company (LLC) is a hybrid of two basic business entities. It 'combines the organizational flexibility and pass-through tax treatment of a partnership with the limited liability protection of a corporation.' " *Shelter Mortg. Corp. v. Castle Mortg. Co., L.C.*, 117 F. App'x 6, 13 (10th Cir. 2004) (quoting 1A William Meade Fletcher, et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 70.50 (perm. ed. 2002)). Mosler and Hanley were entitled to claim the limited liability protection of Chrismos as its members. They did not. First, in the answer that Mosler and Chrismos filed on July 12, 2005, did not assert the statutory LLC immunity of Mosler as an affirmative defense. In fact, Mosler did not assert any affirmative defenses since their answer clearly provided that "Chrismos Cane Bay, LLC hereby asserts the following affirmative defenses...." (Ans. 5, filed July 12, 2005.) The Answer does not define both Mosler and Chrismos as "Chrismos" and the language just quoted is written in the singular tense: Chrismos "asserts", not Chrismos and Mosler "assert." Since Mosler did not assert any affirmative defenses, he clearly waived the LLC member immunity defense. So did Hanley. His answer, filed separately from the answer filed jointly by Mosler and Chrismos, asserted

the same affirmative defenses as Chrismos. Section 1303 immunity belongs to the members, not the LLC. Hanley did not assert it either. Thus, Plaintiffs are correct that Mosler and Hanley waived the affirmative defense of the statutory immunity afforded LLC members by waiting until the close of the Plaintiffs' case in chief to raise it. *See Coastal Air Transp.*, 64 V.I. at 658.

¶39 As for the gist of the action doctrine, it is clear that Plaintiffs are mistaken, the gist of the action doctrine is a negative defense. "The gist of the action doctrine is a theory under common law 'designed to maintain the conceptual distinction between breach of contract claims and tort claims.' The doctrine is policy-based, arising out of the concern that tort recovery should not be permitted for contractual breaches." *Addie v. Kjaer*, 60 V.I. 881, 897-98 (3d Cir. 2013) (citation omitted). The gist of the action doctrine is a negative defense because it does not require proof of any fact not already alleged in the plaintiff's complaint. Instead, the defendant asserting the gist of the action doctrine contends that the complaint alleges a contractual relationship between the plaintiff and the defendant and tort claims are not permitted. Instead, the plaintiff is limited to whatever rights the parties agreed to in their contact. However, contrary to what Defendants represented during oral argument, the Supreme Court of the Virgin Islands has not recognized the gist of the action doctrine yet.[20, 21] Thus, a *Banks* analysis would

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[20] Defendants' counsel represented multiple times that the Supreme Court of the Virgin Islands had recognized the gist of the action doctrine in Pollara. (See Trial Tr. 572:14-22 ("Your Honor,

under the Supreme Court holding in Pollara versus Chateau St. Croix ... this jurisdiction recognizes the gist of the action [d]octrine which states that if there is a contract claim, it can't be turned into a tort claim. And in particular, our Supreme Court adopted the gist of the doctrine as the law in the Virgin Islands after doing a Banks analysis.").) Pollara is not binding. It was decided by a Superior Court judge. There is a Pollara decision issued by the Virgin Islands Supreme Court, *Pollara v. Chateau St Croix, LLC*, 58 V.I. 455 (2013), but that decision was issued three years prior to the gist of the action *Pollara* decision. There is also a *Pollara* decision by the United States Court of Appeals for the Third Circuit, *see Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding*, LLC, 62 V.I. 758 (3d Cir. 2015), which does contend that the Virgin Islands Supreme Court has adopted the gist of the action doctrine. *See id.* at 769 n.11. However, as discussed in the following footnote, that contention was mistaken.

[21] In *Frank C. Pollara Group, LLC v. Ocean View Investment Holding*, LLC, 62 V.I. 759, 769 n.11 (3d Cir. 2015), the United States Court of Appeals for the Third Circuit rejected a request by the appellants "to hold that the gist-of-the-action doctrine does not apply under the law of the Virgin Islands." The Third Circuit rejected that request for two reasons. First, the court had previously held in *Addie*, 60 V.I. at 899, "that the doctrine is applicable in the Virgin Islands." Only the full appellate court sitting *en banc* could have overruled *Addie*. But the second, and more troubling, reason the Third Circuit gave for not revisiting *Addie* is because "the Supreme Court of the Virgin Islands has recently held that the gist-of-the-action (or barred-by-contract) doctrine does apply in the Virgin Islands." *Frank C. Pollara Grp. LLC*, 62 V.I. at 769 n.1l (citing *Cacciamani & Rover Corp. v. Banco Popular de P.R.*, S. Ct. Civ. No. 2013-0063, 2014 WL 4262098, *3 (V.I. Aug. 29, 2014)). *Cacciamani & Rover Corporation* did recognize the barred-by-contract doctrine. *See Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 253 (2014). Some of the reasoning behind *Cacciamani & Rover Corporation* could also be persuasive when analyzing the gist of the action doctrine. *Cf. id.* ("It is clearly the sounder rule to hold

be necessary. *Cf. Pollara*, 2016 V.I. LEXIS 49 at *11 ("Because this common law gist of the action doctrine is not the subject of any binding precedent, we perform an analysis pursuant to *Banks v. Intl Rental & Leasing Corp.*, 55 V.I. 967 (2011) to determine whether the doctrine applies in the Virgin Islands.").

¶40 In this instance, however, the Court declines to conduct a *Banks* analysis. Gerace and Vooys doing business as the Cane Bay Beach Bar were commercial tenants and Chrismos was their landlord. As other courts have explained, "[t]he existence of a landlord-tenant relation is contractual in nature and may be express or implied. Such a relationship can arise from the conduct of the parties and may be implied even in the absence of a written agreement under certain circumstances." *WG Assocs. v. Estate of Roman*, 753 A.2d 1236, 1238 (N.J. Super. Ct. App. Div.

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the parties to a contract to the terms of their agreement and the legal remedies provided for a breach of those terms...."). But the question in *Cacciamani & Rover Corporation* was not whether tort claims should be barred when the relationships between the parties is based on a contract. Instead, the question was whether parties could seek relief unjust enrichment rather than the contract they entered into. *See id.* (" 'Parties entering into a contract assume certain risks with the expectation of a beneficial return; however, when such expectations are not realized, they may not turn to a quasi-contract theory for recovery.' " (quoting *Balter, Capitel & Schwartz v. Tapanes*, 517 N.E.2d 1216, 1219 (Ill. 1987), parenthetically))). This Court has not found any decision other than *Frank C. Pollara Group, LLC* that equates the barred by contract doctrine with the gist of the-action doctrine. The Third Circuit was mistaken; the Supreme Court of the Virgin Islands has not held that the gist of the action doctrine applies in the Virgin Islands.

2000) (citations omitted); *Schuman v. Kobets*, 716 N.E.2d 355, 356 (Ind. 1999) ("Since a lease is a contract, the essence of the landlord-tenant relationship is contractual in nature."). *See also, e.g., Shwachman v. Davis Radio Corp.*, No. 93-01912, 1994 WL 879712, 1994 Mass. Super. LEXIS 710, *7 (Mass. Super. Ct. July 1, 1994) ("Originally at common law, a lease agreement created a property relationship between the landlord and tenant. Today, however, the landlord-tenant relationship is viewed as contractual in nature wherein the landlord promises to deliver and maintain the premises in a habitable condition and the tenant promises to pay rent for the use thereof. While a warranty of habitability is implied in residential leases, "no such warranty may be implied in the rental of commercial property." (citations and footnote omitted)). *Accord* 28 V.I.C. § 242 (referring to contracts for lease of land). *But cf. Nicholas v. Howard*, 459 A.2d 1039, 1040 (D.C. 1983) ("A landlord-tenant relationship does not arise by mere occupancy of the premises; absent an express or implied contractual agreement, with both privity of estate and privity of contract, the occupier is in adverse possession as a 'squatter.' ").

¶41 Chrismos inherited the Dive Shop and the Beach Bar tenants when it purchased the property from the former owner. Although Virgin Islands law is unclear on the effect of the sale of real property, residential or commercial, where tenants are in possession at the time of the conveyance, *but cf.* 28 V.I.C. § 752, other jurisdictions have held that a conveyance of a commercial property terminates the tenancy of the tenants. *See, e.g., Farris v. Hershfield*, 89 N.E.2d 636,

637 (Mass. 1950) (explaining that "tenancy at will ... terminated with the conveyance of the land" "[s]ince the premises were not occupied for dwelling Purposes...."); *Irving Oil Corp. v. Me. Aviation Corp.*, 704 A.2d 872, 874 (Me. 1998) ("A tenancy at will ... cannot be conveyed or assigned; it does not pass with the alienation of the underlying estate. When title to property occupied by a tenant at will is passed by deed or lease, the tenancy is terminated, and the tenant becomes a tenant at sufferance." (citations omitted)). The evidence clearly showed that the Beach Bar did not have a lease. The Bentley Defendants did not have a lease to sell to Gerace and Vooys and Gerace and Vooys, or Barabus, the company they formed to buy the Beach Bar business. And Vooys and Gerace repeatedly requested a lease from Mosler and Hanley. The fact that they did not have a lease is, after all, what this case is about. Vooys and Gerace were still tenants of Chrismos, in a month-to-month tenancy. Even if the Court were to conclude that the soundest rule for the Virgin Islands is to recognize the gist of the action doctrine, it would not matter here because Plaintiffs and the Chrismos Defendants were not parties to any contract at issue. The gist of the action doctrine might have barred the fraud (Count II) and misrepresentation (Count III) counts Plaintiffs asserted against the Bentley Defendants because Plaintiffs and the Bentley Defendants did sign a contract, the July 1, 2003 asset purchase agreement that Plaintiffs attached to their complaint. If the Bentley Defendants had moved to dismiss for failure to state a claim for relief based on the gist of the action doctrine it might have been sound to"hold the parties

... to the terms of their agreement and the legal remedies provided for a breach of those terms, and to reserve ... [tort claims] for those instances where there is no contract and other legal remedies are unavailable." *Cacciamami & Rover Corp.,* 61 V.I. at 253.

¶42 Here, Gerace and Vooys were tenants of Chrismos, but the claims they asserted in this action did not arise out of that tenancy. In other words, the gist of the action Vooys and Gerace brought against the Chrismos Defendants has nothing to do with the rent they paid each month or the duties the law imposes on commercial landlords. There was a contractual relationship between Chrismos and Gerace and Vooys, the landlord-tenant relationship. But that relationship was not the gravamen of this action and Defendants repeatedly denied having entered into any agreement with Plaintiffs other than a month-to-month tenancy. Instead, it was the request to enter into a new and long-term landlord-tenant relationship that is the gist of this action. "In some instances, 'it is possible that a breach of contract also gives rise to an actionable tort. To be construed as in tort, however, the wrong ascribed to the defendant must be the gist of the action, the contract being collateral.' " *Howe v. LC Philly, LLC*, No. 10-5495, 2011 WL 1465446, 2011 U.S. Dist. LEXIS 41534, *10 (E.D. Pa. Apr. 15, 2011) (quoting *Etoll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct 2002)). Here, the month-to-month tenancy, a contract implied in fact through the actions of the parties, is collateral to the wrongs Plaintiffs complained of, namely the time, money, energy, and passion they invested into the Beach Bar under the

expectation that they would be given a lease. The contract that existed between the parties, the month-to-month tenancy, is collateral to that claim and, for this reason, the Court finds it unnecessary to determine whether Virgin Islands common law should recognize the gist of the action doctrine. Even if the negative defense were recognized in the Virgin Islands, it would not apply here.

ii. The "Contract" Claims

¶43 Defendants move for judgment as a matter of law on three of Plaintiffs' claims, which they refer to collectively as the "contract" claims. (*See* Defs.' Post-Trial R. 50(b) & R. 59(a) Mot. 2, filed Mar. 22, 2022 ("The jury verdict form included three similar counts—one for breach of contract, one for intentional misrepresentation and one for breach of the duty of good faith and fair dealing (hereinafter collectively referred to as the "contract" claims)." (bold font omitted)).) Having reviewed all three claims, the Court agrees that it must set aside the jury's verdict as to the breach of contract claim and the breach of the duty of good faith and fair dealing. Both claims presume the existence of an agreement between the parties which the evidence did not show. The Court will uphold the jury's verdict as to intentional misrepresentation, however.

¶44 Count V of the Complaint alleged that Chrismos breached an agreement with Plaintiffs to enter into a lease. "There is a marked distinction in both the rights and liabilities of the parties between a lease and a mere agreement for a lease. The question whether an agreement is a lease or an agreement for a lease

depends upon the intent of the parties...." *Kilbride v. Wilson,* 8 V.I. 129, 133 (Mun. Ct. 1970) (citation omitted). "If parties intend that an agreement be one of leasing, it so operates notwithstanding a written formal lease is to be later executed. On the other hand, if they intend that an agreement should be as finally evidenced by a written lease, there is only an agreement for a lease." *Engle v. Heier*, 173 N.W.2d 454, 456 (S.D. 1970) (citation omitted). As the court in *Engle* explained:

> To be binding, an agreement for a lease must be certain as to the terms of the future lease. If it appears that any of the terms of the future lease are left open to be settled by future negotiation between the lessor and lessee "there is no complete agreement; the minds of the parties have not fully met...." *Id.* (quoting *Cypert v. Holmes*, 299 P.2d 650, 651 (Ariz. 1956)).

¶45 Count X of the Complaint alleged that the Chrismos Defendants breached their duty of good faith and fair dealing. " 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.' " *Basic Servs., Inc. v. Gov't of the V.I.*, 71 V.I. 652, 660 (2019) (citation omitted). In fact, "the implied duty of good faith and fair dealing arises by implication through the existence of a contract itself." *Chapman v. Cornwall*, 58 V.I. 431, 441 (2013). Although the Virgin Islands Supreme Court has not held that the existence of a contract—or a factual dispute for the jury to resolve as to whether a contract existed—is a prerequisite to asserting this claim, courts in the Virgin Islands and elsewhere

agree: "there can be no claim for breach of good faith and fair dealing when there is no contract to which such obligation attaches." *Geesey v. CitiMortgage, Inc.*, 135 F. Supp. 3d 332, 347 (W.D. Pa. 2015) (applying Pennsylvania law); *see also Estate of Burnett v. Kazi Foods of the V.I.*, 69 V.I. 50, 61 (Super. Ct. 2016) ("[T]he covenant of good faith and fair dealing is imposed upon parties by virtue of the existence of a contract."); *Webster v. CBI Acquisitions, LLC*, No. ST-11-CV-558, 2012 V.I. LEXIS 9 *9 (V.I. Super. Ct. Mar. 5, 2012) ("Plaintiff may not allege a claim for breach of the duty of good faith and fair dealing absent a contractual relationship."); *accord Macklin v. CitiMortgage, Inc.*, 2015-Ohio-97, ¶14 (Ct. App.) ("The covenant of good faith and fair dealing is part of a contract claim and does not stand alone as a separate claim from breach of contract." (citing *Lakota Local Sch. Dist. Bd. of Educ. v. Brickner*, 671 N.E.2d 578, 583-84 (Ohio Ct. App. 1996)); *Young v. Allstate Ins. Co.*, 198 P.3d 666, 691 (Haw. 2008) ("Absent a contract ... [the] claim for breach of the assumed duty of good faith and fair dealing must fail."); *Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ.*, 605 A.2d 776, 783 n.4 (N.J. Super. Ct. 1991) ("It is widely acknowledged that absent a contract, there can be no breach of the implied covenant of good faith and fair dealing." (citing *Noye v. Hoffmann-La Roche*, 570 A.2d 12 (N.J. App. Div. 1990)).

¶46 The evidence clearly shows that there was no agreement. Without an agreement, there is no contract and without a contract there can be no breach. *Cf. Coastal Air Transp. v. Lockhart*, 73 V.I. 672, 677 n.5 (2020) ("To establish a breach of contract claim, the

Plaintiff must show '(1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages.' " (quoting *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 621 (2017)). Vooys testified that when she and Gerace first discussed a seven-year lease with Mosler and Hanley, either Mosler or Hanley "said that that seemed ... reasonable. We would work on that and we'd get one, you know. *We'd talk more about it.*" (Trial Tr. 175:10-12 (emphasis added).) Vooys's own testimony shows that the four agreed to talk more about the terms of the lease. "Ordinarily, where the parties contemplate the further negotiation and execution of a formal instrument, a preliminary agreement does not create a binding contract...." *Citadel Broad Co. v. Renaissance 632 Broadway, LLC*, 2010 NY Slip Op 31482(U), ¶9 (Sup. Ct.)).

¶47 Either Mosler or Hanley, on behalf of Chrismos, eventually did give Vooys and Gerace a lease, but it was a two-year lease, not a seven-year lease. Vooys testified that it was a "horrible" lease, and she voiced her disagreement with to Hanley. He agreed, according to her, and said they would work on it. Then the kitchen fire occurred and Vooys and Gerace expressed their reservations to Mosler and Hanley about investing further in the business without the security of a long-term lease. Mosler, according to Vooys, wanted them to get back on their feet first before discussing the terms of the lease. A second lease was offered, but Vooys said it did not differ much from the first. Vooys and Gerace went to Attorney Groner, but they never followed up with him.

¶48 This evidence shows on-going negotiations between the parties but also that Chrismos, through Mosler and Hanley, did, in fact, offer Plaintiffs a lease, just not the lease they wanted. Even if there had been a preliminary agreement, which Vooys's own testimony contradicts, the parties' negotiations clearly show no agreement. When viewing all the evidence in the light most favorable to Plaintiffs, as the nonmoving parties, the Court cannot find sufficient evidence of an agreement. A "scintilla" is not enough. *See Chestnut,* 59 V.I. at 475. There was no certainty over the terms of the lease, apart from the parties' dispute as to the length. Vooys testified that the initial proposed lease was in Gerace's name, while the later lease was in the name of Barabus. The initial lease had Gerace waiving his right to a jury trial and indemnifying Chrismos. The amount of rent to be paid each month was not settled, with the initial lease increasing rent to $2,000 a month and the revised version leaving rent at $1,500 a month but eventually increasing it to $2,500. Clearly there was no meeting of the minds as to any of the terms of a lease for the Beach Bar. As a result, the Court must grant Defendants' motion to set aside the jury's verdict as to Counts V (breach of contract / agreement to enter into a lease), and Count X (breach of the duty of good faith and fair dealing). Both counts fail because there was no agreement.

¶49 The evidence was sufficient, however, for a reasonable jury to find the Chrismos Defendants liable on Count VIII (misrepresentation). As noted, Plaintiffs essentially agreed to the dismissal of their fraud claim as duplicative of their intentional misrepresentation claim. In instructing the jury, the Court relied on the

decision of the Supreme Court of the Virgin Islands in *Love Peace v. Banco Popular de Puerto Rico*, 75 V.I. 284 (2021). In *Love Peace*, the Virgin Islands Supreme Court explained that misrepresentation claims can sound both in contract and in tort. "[W]here a claimant seeks only to rescind an underlying contract based on an alleged misrepresentation, entitlement to that relief is determined according to the law of contracts...." *Id.* at 289. "[W]here the claimant seeks damages arising from the misrepresentation, such a claim sounds in torts, rather than contracts." *Id.* The Court has already determined that there was no agreement between Plaintiffs and the Chrismos Defendants. Thus, Plaintiffs' misrepresentation claim sounds in tort. The elements of an intentional misrepresentation claim are:[22] (1) that a material fact, opinion, intention, or law

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[22] Although Plaintiffs characterized their misrepresentation claim as being for intentional misrepresentation, courts in other jurisdictions have recognized that fraudulent misrepresentation and intentional misrepresentation are the same. *See, e.g., Thompson v. Bank of Am., N.A.*, 773 F,3d 741, 751 (6th Cir. 2014) ("[T]he Tennessee Supreme Court explained that the terms 'intentional misrepresentation,' 'fraudulent misrepresentation,' and 'fraud' all refer to the same tort, and expressed its preference for the term 'intentional misrepresentation.' " (citation omitted)); *Phila. Indem. Ins. Co. v. Ohana Control Sys.*, 289 F. Supp. 3d 1141, 1151 n.1 (D. Haw. 2018) ("The Hawai'i Supreme Court has referred to intentional misrepresentation as interchangeable with fraudulent misrepresentation." (citing *Ass'n of Apartment Owners of Newtown Meadows ex rel. its Bd. of Dirs. v. Venture 15, Inc.*, 167 P.3d 225, 256 (Haw. 2007)); *Kramer v. Petisi*, 940 A.2d 800, 806 n.9 (Conn. 2008) ("[A]t common law, fraudulent misrepresentation and intentional misrepresentation are the same tort."); *Doe 67C v. Archdiocese of Milwaukee*, 700 N.W.2d 180, 193 n.10 (Wis. 2005) ("'[W]e use "intentional misrepresentation," and "fraudulent

was misrepresented; (2) that the person making the misrepresentation knew or had reason to believe it was false; (3) that the misrepresentation was made for the purpose of inducing another to act or refrain from acting; (4) that the other person justifiably relied on the misrepresentation; and (5) that the other person suffered a pecuniary loss. *See id.* at 291.

¶50 Mosler and Hanley told Vooys and Gerace they would talk more about a lease and then gave them a list of improvements they wanted done to the restaurant. Gerace's brother, Edward, corroborated the testimony that Mosler and Hanley had conditions for getting lease and so did Reed, the longtime bartender of the Beach Bar. (*See* Trial Tr. 512:4-9 ("It lasted - well, it lasted until they were gone. I mean they — they never got a lease. And - and - and each time they were promised one, they had certain more things they had to do; and when they were getting these things done, they still hadn't gotten a lease.").) Conditioning improvements to the property to get a lease continued after the fire. According to Vooys, Mosler said "[t]hey wanted to wait until we fixed everything and got up and running and then we'd talk about ... [a lease] again." *Id.* at 191:16-17. In his deposition, which was read to him during cross-examination, Mosler acknowledged that leases did not matter much to him.

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misrepresentation," and "fraud" interchangeably.'" (citation omitted)). Since Plaintiffs withdrew their fraud claim, and since the Court instructed the jury based on the elements of fraudulent misrepresentation as provided in *Love Peace*, the Court assumes the Virgin Islands also views intentional misrepresentation and fraudulent misrepresentation as synonymous.

See id. at 739:7-11 ("I don't think it mattered much. Get the rent every month or you don't, If someone violates the lease, you can't go after anybody down here anyway so it didn't seem to be a big deal to me one way or the other."). He also testified that the short-term lease that he did offer

> would have been an improvement over what they already had. They were there on a month-to-month basis and they were there on a month-to-month basis before I got there where they could be asked any time to leave with 30 day's notice and lose their entire $80,000 purchase price. By having a two-year lease, they would at least have two more years. So it was an improvement over what they already had. And it was a draft lease, it was a proposal, to further negotiations. *Id.* at 723:19-724:3.

¶51 Having viewed the evidence in the light most favorable to the nonmoving party, the Court concludes that Plaintiffs clearly and convincingly established that Mosler and Hanley, and Chrismos through them, are liable for the tort of intentional misrepresentation. There is no dispute in the testimony that Vooys and Gerace wanted a long-term lease, seven-years according to them. What is disputed is whether Mosler and Hanley promised to give them a seven-year lease. The Court concluded above that the evidence does not support finding of a promise between the parties. But the evidence is undisputed that Vooys and Gerace asked for a long-term lease, that a Mosler and Hanley represented that it was a reasonable request, and they would talk more about it, but Vooys and Gerace had to

make repairs to the Beach Bar first.

¶52 Viewing Vooys's testimony in the light most favorable to Plaintiffs, Mosler and Hanley, on behalf Chrismos, represented that they would give, or at least consider giving, Vooys and Gerace a long-term lease, knowing they had no intention to honor that representation. They made the representation to induce Vooys and Gerace into make repairs to the building Chrismos owned. Vooys and Gerace may have purchased the Beach Bar business, but the building in which that business operated was owned by Chrismos. Mosler and Hanley did offer a lease, but they had to know that Vooys and Gerace would not have accepted that lease. By the time the first lease was offered in March 2004, Vooys and Gerace had been running the Beach Bar for approximately six months and made significant improvements to the building, including to the bathrooms and other parts of the structure. The March 2004 proposed lease would have required that Vooys and Gerace make all future repairs, pay the property taxes, obtain insurance and indemnity Chrismos, and pay the utilities. No mention was made of the Dive Shop or its responsibility for half of the utilities or for sharing in the payment of property taxes. The March 2004 proposed lease also did not give Vooys and Gerace a right to renew, but did Chrismos the right to show the property three months before the term ended and put "For Rent" signs up. (*See generally* Pls.' Ex. 7.)

¶53 A copy of the November 2004 proposed lease was not admitted into evidence, but the testimony

established that it did not differ much from the March 2004 proposal and further, that Mosler and Hanley waited to offer another lease until after Gerace and Vooys had already invested a substantial amount of money to repair the building after the fire. If Gerace and Vooys had decided to rent another location for the Beach Bar after the fire or to give up the restaurant, Chrismos would have had to cover the cost of the repairs to the structure itself because the parties did not have a lease that specified responsibility for repairs and there was no security deposit in place; the proposed lease would have added that requirement. (*Cf.* Trial Tr. 657:10-11.) Further, even though Mosler said he did not care about leases, he and Hanley did not have an objection to a long-term lease because Chrismos gave Jordan a seven-year lease with an option to extend for another three years. Clearly, Vooys and Gerace suffered pecuniary loss when they repeatedly made repairs to a building owned by Chrismos and were then deprived of the benefits and use of those improvements. *Cf.* 28 V.I.C. § 436. For these reasons, the Court finds that Plaintiffs submitted sufficient evidence to support the jury's verdict as to Count VIII. Defendants' motion for judgment as a matter of law will be denied and the award of $100,000 to Plaintiffs affirmed.[23], [24]

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[23] The verdict form asked the jury to award damages but only if they found liability as to breach of an agreement to enter into a lease, intentional misrepresentation, or breach of the duty of good faith and fair dealing. In other words, one amount was to be awarded for any of the three counts. Although the Court will grant the motion for judgment as a matter of law as to the two contract claims, the Court must presume that the jury followed the

instructions on the verdict form and concludes, therefore, that the $100,000 was awarded for the tort claim. Further, since the Court concludes that Plaintiffs asserted misrepresentation as a tort and not a contract claim, the damages the jury awarded were reasonable and the Court rejects Defendants' contrary arguments that the amount of Plaintiffs' loss had to be accounted for with mathematical precision.

[24] Defendants also argue, in essence, that any losses that might have been incurred were incurred by Barabus, Inc., the corporation Gerace formed. Plaintiffs' Exhibit 1 is an asset purchase agreement, effective July 1, 2003, between Gerace and CB3, Inc. Vooys testified that they closed on the sale of the Beach Bar on August 7, 2003, which is reflected on the signature page of the asset purchase agreement. Vooys's name does not appear in that agreement. Defense Exhibit 2 is a promissory note dated August 7, 2003, given by Gerace to Maria Bently as holder. Vooys name does not appear on the note. The articles of organization for Barabus, Inc., which is Defense Exhibit 5, is dated August 12, 2003. The incorporators were Gerace, June Davis, and Eileen des Jardin. Gerace was listed as president, Edward Gerace was vice-president, and Vooys was secretary and treasurer. None of documents pertaining to Barabus, which Defendants admitted at trial, show a transfer from Gerace to Barabus of his purchase of the Beach Bar from CB3, Inc., or an assignment or transfer of the promissory note to Barabus. The Barabus documents also do not show Vooys's financial interest in the business. She did not sign the promissory note or the asset purchase agreement and was listed simply as an officer of Barabus. But Vooys did testify that she provided some of the financing for the asset purchase. (*See generally* Trial Tr. 248:13-251:13.) And Vooys and Gerace are listed as the sellers on Plaintiffs' Exhibits 17 and 21, with Jordan listed as purchaser. Barabus, Inc. did not buy the Beach Bar from CB3, Inc., nor did Barabus, Inc. sell the Beach Bar to Jordan. When, or if, Vooys acquired a legal interest in the Beach Bar or Barabus, and what role Barabus played with respect to the claims Plaintiffs asserted should have been raised prior to trial. Furthermore, apart from challenging the evidence of the expenses

iii. Defamation

¶54 Mosler and Hanley move to set aside the jury's verdict finding them liable for defamation. As they point out in their motion, Vooys was the primary witness who testified as to any defamatory statements. No audio or video recording from the Roger Morgan show was presented at trial. Further, Christensen testified only that she had heard about Mosler going on the radio and talking about the Beach Bar. She did not testify as to what Mosler said and did not mention Hanley having been on the radio. Gerace was not asked whether he heard Mosler or Hanley on the radio.

¶55 In *Joseph v. Daily News Publishing Company,* 57 V.I. 566 (2012), the Supreme Court of the Virgin Islands established the elements of a defamation claim under Virgin Islands law:

> The first element is a false and defamatory statement concerning another. The truth or falsity of a statement is generally a question of fact for the jury, and [a] statement or communication is only defamatory if it tends so to harm the reputation of another as to lower

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Plaintiffs incurred, Defendants do not cite to any authority regarding the effect of claims brought by officers of a corporation instead of the corporation itself. Furthermore, persuasive authority recognizes that dismissal for misjoinder or is disfavored and proper parties can be substituted at any stage. *See generally Liberman*, 208 P.3d 1312-13, 1315 (affirming but finding error with trial court's disregard of corporate form and remanding for entry of amended judgment against company). Having considered Defendants arguments and objections, the Court finds no merit in them.

him in the estimation of the community or to deter third persons from associating or dealing with him.

The second element is an unprivileged publication to a third party. Publication means the communication intentionally or by negligent act to one other than the person defamed. There are two methods of publication: libel and slander. Libel is the [ ] publication of defamatory matter by written or printed words. Slander is the publication of defamatory matter by spoken words. The term unprivileged refers to the alleged defamer's inability to demonstrate that he was in some way privileged to make the defamatory communication. The types of privilege defenses available fall into two categories, absolute privileges, and conditional privileges. Privilege, however, can be abused in such a way as to subject to privileged defamer to liability despite his privilege.

The third element can generally be described as fault. The level of fault varies with the parties to the defamation action, but ... the minimum standard ... is[ ] fault amounting to at least negligence on the part of the publisher. It is the element of fault that is given a higher threshold when the defendant in a defamation action is a public official or public figure and the defamatory statements reference matters of public concern. In the case of a defendant who is not a public figure or official, the minimum standard applies, and the defendant need prove

only that the publisher acted at least negligently in failing to ascertain whether the statements concerning the defendant were true or false.

The fourth element is either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.... [S]pecial harm [i]s the loss of something having economic or pecuniary value which must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation. In essence, this element refers to two general categories of liability-producing statements. First, there are those that the Plaintiff is able to demonstrate caused him special harm. Second, there are those for which Plaintiff need not prove the existence of special harm because they are actionable on their face. This second category clearly begs the question, what makes a defamatory statement actionable on its face, or actionable *per se*? The answer to this question depends in part on whether the statement is either a libel or a slander. Specifically, oral defamation[,] i.e. slander[,] is tortious if the words spoken fall within a limited class of cases in which the words are actionable per se, or if they cause special damages. Written defamation[,] i.e. libel[,] is actionable *per se*. Thus, special damages need only be proven when the statement is slanderous and it does not fall into one of the limited classes of speech which is actionable *per se*. The classes of speech

> that are actionable *per se* are outlined in Restatement (Second) of Torts, §§ 570-574. *Id.* at 585-88 (quotation marks, brackets, ellipses, citations, and footnote omitted)

¶56 Contrary to Defendants' arguments, Vooys was not the only witness who testified to having heard Mosler on the radio. Reed testified that he heard Mosler on the radio "saying that they [Vooys and Gerace] didn't pay rent, that they - supposedly loud parties were there. I think they even mentioned something about drugs or something in that area on the radio. But it was always negative." (Trial Tr. 520:21-25.) Reed partially corroborated Vooys's testimony earlier in trial when she said she heard Mosler say on the radio "[t]hat he was getting rid of us because we didn't know what we were doing, we were always late on rent, we were behind on rent, we didn't know how to run a restaurant." *Id.* at 210:1-4. Counsel for Plaintiffs then testified, asking about the "accusation about the dogs in the restaurant, did you have dogs in your restaurant?" *Id.* at 210:7-8. Defendants did not object and Vooys acknowledged that there were dogs on the beach at Cane Bay but denied that there were dogs in the restaurant. The problem here is that only mention of dogs occurred shortly before when Vooys was testifying about the March 2005 conversation with Mosler where he expressed his disagreement with how they were running their business. *See id.* at 204:13-205:19. In other words, the jury never heard that Mosler said on the radio that the Beach Bar owners allowed dogs to be in the restaurant. Woodson denied seeing dogs in the restaurant, and no one asked him if he had heard it said on the radio that dogs were

in the restaurant. Hanley testified that he saw dogs in the restaurant, but no one said they heard him, or Mosler, publish that statement on the radio.

¶57 Furthermore, no one testified to any defamatory statements allegedly made by Hanley. Counsel for Plaintiffs testified, saying "So when Mosler and Hanley started going on the radio and TV and essentially declaring you deadbeats, what happened to your clientele?" *Id.* at 227:12-14. And, to be sure, Hanley did admit to going on the radio to defend his reputation and character. *See id.* at 624:2-5. But only Hanley testified to any particular statement he, himself, made on the radio and those statements were made to counter Vooys's statements that they were current on the rent. Based on Hanley's testimony only, it was not possible for the jury to find that he defamed Gerace or Vooys.

¶58 As for Mosler, other than the comment about dogs in the restaurant, all of what Mosler supposedly said was either true or his opinion. "Whether an allegedly defamatory statement is one of opinion or fact is ... a question of law...." *Simpson v. Andrew L. Capdeville, P.C.*, 64 V.I. 477, 486 (2016). Considering that Vooys and Gerace were running a business and that the allegedly defamatory statements concerned their fitness to run that business, the statements could be *per se* actionable, and damages would be presumed if they were, in fact, defamatory. *See Joseph*, 57 V.I. at 588 (citing RESTATEMENT (SECOND) OF TORTS §§ 570-74(1977)).

¶59 Section 573 of the Restatement (Second) of Torts explains that "[o]ne who publishes a slander that

ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business ... is subject to liability without proof of special harm." However, because damages are presumed in defamation *per se* cases—and in some jurisdictions, punitive damages can be awarded without an award of any other damages, *see, e.g., Lawnwood Med. Ctr. Inc. v. Sadow*, 43 So. 3d 710, 727 (Fla. Dist. Ct. App. 2010) ("[P]unitive damages may be the primary relief in a cause of action for defamation *per se*." (citing *Jones v. Greeley*, 6 So. 448, 450 (Fla. 1889)); *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982) ("In Minnesota, 'when words are defamatory per se punitive damages are recoverable without proof of actual damages.' " (ellipsis omitted) (quoting *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977))); *Collier v. Bryant*, 719 S.E.2d 70, 82 (N.C. Ct. App. 2011) ("To justify an award of punitive damages, nominal damages must be recoverable, but there is no requirement that nominal damages actually be recovered." (citing *Hawkins v. Hawkins*, 417 S.E.2d 447, 449 (N.C. 1992)) courts must independently determine whether allegedly defamatory statements are actionable. *See Simpson*, 64 V.I. at 486. " 'Hyperbole and expressions of opinion not provable as false' fail to meet this actionability element of a defamation claim...." *Id.* at 487 (quoting *Kendall v. Daily News Publ'g Co.*, 55 V.I. 781, 788 (2011)). For example, "[a] standalone statement that someone is 'dangerous' is a subjective opinion, not a provable fact, as instances of name-calling generally are. And 'a statement that is merely "rhetorical hyperbole," moreover, is considered nonactionable.' " *Alexander v.*

Strong, Ct. File No. 27-CV-20-2841, 2022 WL 3211586, 2020 Minn. Dist. LEXIS 357, *6 (Minn. Dist. Ct. Dec. 7, 2020) (citations omitted). As the Restatements explain,

> [d]isparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiffs business or profession.... Thus, a statement that a physician consorts with harlots is not actionable *per se*, although a charge that he makes improper advances to his patients is actionable; the one statement does not affect his reputation as a physician whereas the other does so affect it. RESTATEMENT (SECOND) OF TORTS § 573 cmt. e (1977).

Other examples include a statement that a merchant is either insane or insolvent, both of which would be actionable *per se*, as would saying that a lawyer is ignorant and unqualified to practice law. *See generally id.* cmt. c, illus. 4-6. However, saying that a bricklayer is a hypocrite or that a university professor is a drunk would not be defamatory *per se* because being forthright or sober, respectively, are not inherently part of being a bricklayer or a professor.

¶60 Similarly, saying that someone does not know how to run a business is an opinion that could never be defamatory because " 'only statements that are provable as false are actionable.' " *Simpson*, 64 V.I. at 487 (quoting *Kendall*, 55 V.I. at 788). *See also*, *e.g.*, *Miller v. Richman*, 592 N.Y.S.2d 201, 203 (App. Div. 4th Dept. 1992) ("The individual defendants'

unfavorable assessments of plaintiffs work are 'incapable of being objectively characterized as true or false[.]' " (citations omitted)); *see also id.* (collecting cases under state law where opinion was subject of defamation suit). Thus, the statements that Plaintiffs "didn't know what [they] were doing ... [and] didn't know how to run a restaurant[,]" (Trial Tr. 210:1-4), were expressions of opinion and not defamatory because they could be provable as false.

¶61 In addition, the statements on the radio that Plaintiffs "were always late on rent ... [and] were behind on rent[,]" *id.* at 210:2-3, were mostly true. Plaintiffs admitted that they had been late with rent, and cancelled checks admitted into evidence showed bounced checks, late payments, and checks that covered more than one month's rent. Plaintiffs' Exhibit 47 contains copies of cancelled checks from October 2003 through June 2005. Rent for October 2003 was paid on October 7, 2003. However, rent for November and December 2003 was not paid until December 19, 2003. Rent for January 2004 was paid on January 4, 2004; rent for February 2004 was paid on February 1, 2004; but rent for March 2004 was not paid until March 12, 2004. Rent for April 2004 was paid on March 22, 2004, minus the cost of plumbing repairs. Rent for May and June 2004 was paid on June 7, 2004. Rent for July and August 2004 was paid on August 2, 2004, with roof repairs deducted. Rent for September and October 2004 was not paid until January 23, 2005. The check for rent for November and December 2004 and January 2005 was written on February 7, 2005, but it bounced and did not clear until March 2, 2005. Rent for February and March 2005 was paid on March

15, 2005. Rent for April 2005 was paid on April 14, 2005. Rent for May 2005 was paid on May 3, 2005. Finally rent for June 2005 was paid on June 9, 2005. Out of the twenty-one months Plaintiffs rented from Chrismos, they were clearly late nine times: November 2003, May 2004, July 2004, September 2004, October 2004, November 2004, December 2004, January 2005, and February 2005. Given the uncertainty about when rent had to be paid, the Court excluded from its count rent that was paid by the middle or the end of the same month in which it was due. 9 out of 21 is 42.86%, close to half. It may have been an exaggeration for Mosler to say Plaintiffs were always late but not by much.

¶62 The Court does acknowledge Plaintiffs' frustration with a landlord who, on the one hand, tells them it is okay if they cannot pay rent on time and then, on the other hand, goes around broadcasting to everyone when they do not pay on time. The Court also understands Plaintiffs' disappointment with a landlord sharing with the general public concerns that it has over how its tenant operates its own business. Vooys and Gerace did not go into business with Mosler and Hanley to operate the Beach Bar. Chrismos leased a building to Vooys and Gerace on its property. How that business was run—what the atmosphere was like, what clientele frequented the restaurant, what music was played, or what food was served—was none of the landlord's concern so long as it did not subject the landlord to liability or violate the law. Mosler acknowledged that the Beach Bar was on a month-to-month tenancy. Chrismos could have evicted them at any time with thirty days' notice. Thus, it does beg the question why Mosler took to the radio to share

grievances about his tenants and air their "dirty laundry" if all he wanted was for them to leave.

¶63 However, Plaintiffs did not assert a business disparagement claim. They asserted a defamation claim. *Cf. McDonald Oilfield Operations, LLC v. 3B Insp., LLC*, 582 S.W.3d 732, 749 (Tex. Ct. App. 2019) (" 'Business disparagement and defamation are similar in that both involve harm from the publication of false information.' " (quoting *In re: Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015)); *see also id.* at 750 (" 'To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.' " (quoting *Lipsky*, 460 S.W.3d at 592)). Even when viewing the evidence in the light most favorable to Plaintiffs as the nonmoving parties, the Court cannot conclude that they proved defamation. No one testified as to what Hanley said except Hanley himself and no specific statements were attributed to him. The statements attributed to Mosler were either true or his opinion. Reed did mention that he heard Mosler say "something about drugs or something in that area...." (Trial Tr. 520:24-25.) But he did not connect Mosler's statement directly to the Beach Bar or Vooys and Hanley. No documentary evidence was introduced at trial. What's more, Plaintiffs did not question Gerace as to what he heard or Mosler as to what he allegedly said. Vooys's testimony, even when corroborated by Woodson and Reed, simply does not establish statements that rise to the level of slander. Accordingly, the Court must grant Mosler and Hanley's motion for judgment as a matter of law and set aside

the jury's verdict as to Count VI.

iv. Punitive Damages

¶64 Defendants also move for judgment as a matter of law on the award of punitive damages, challenging both the sufficiency of the evidence and the law. "Punitive damages are 'damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly — called also exemplary damages, smart money.' " *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 824 (2017) (citation omitted). "Punitive damages must be based upon conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured — conduct that is outrageous and warrants special deterrence." *Id.*

¶65 Defendants had argued after Plaintiffs rested that by law punitive damages are unavailable for contract claims. They renewed that challenge after both sides rested and again, after the jury returned its verdict. However, at no point did either side inform the Court that the law in the Virgin Islands was not settled on the question. *See id.* at 824-25 (emphasizing that "it is reversible error for the trial court to fail to conduct a '*Banks* Analysis' in the first instance" and noting that "the trial court and the parties entirely failed to consider whether the courts of the Virgin Islands have ever adopted a definition of punitive damages, failed to consider the majority rule among the jurisdictions of the United States, and failed to consider what rule is most appropriate for the Virgin Islands[.]" (citations omitted)). Defendants are correct that persuasive

authority does hold that " 'punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.' " *Ishimatsu v. Royal Crown Ins. Corp.*, 8 N. Mar. 1. 424, 439 (2010) (quoting *Restatement (Second) of Contracts* § 355 (1981)). "Punitive damages will not lie for breach of contract, even if it is proven that the breach is willful, wanton, or malicious.... [A] recovery of punitive damages can only be had where the alleged breach of contract 'merges with, and assumes the character of, a willful tort.' " *Bedell v. Inver Hous., Inc.*, 506 A.2d 202,206 (D.C. 1986) (citations omitted). However, Defendants failed to inform the Court that Virgin Islands law is unsettled and thus, the Court could deem it waived. *Cf. Cornelius*, 67 V.I. at 825 (citing *Ubiles v. People*, 66 V.I. 572, 589 (2017)). However, because the Court has already determined that the verdict on the contract claims must be vacated, further discussion as to whether Virgin Islands should permit punitive damages for contact claims would be academic at best.[25]

¶66 Nonetheless, after considering the arguments and the record, the Court concludes that the punitive damages award must be vacated. However, before addressing the sufficiency of the evidence, the Court must point out two errors with the jury verdict form that weigh in favor of setting aside the punitive damages award. First, even though both Vooys and

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[25] Additionally, the jury verdict form limited punitive damages to the defamation and intentional misrepresentation claims, which also renders Defendants' argument academic.

Gerace demanded punitive damages, and even though the jury verdict form asked the jury to determine whether Defendants acted with reckless disregard for the rights of the Plaintiffs to entitle them to punitive damages, the verdict form only gave the jury the option of awarding punitive damages to Vooys. In other words, the verdict form, inadvertently, did not ask the jury how much they might have awarded Gerace, if they found that he was entitled to punitive damages. Plaintiffs did not object so any error would be waived but it underscores a potential source of confusion to the jury. Second, the verdict form also asked the jury to consider whether Plaintiffs were entitled to punitive damages separate and apart from any particular claim. There is no way for the Court to determine which or claims the jury determined warranted punishing Mosler and Hanley for. Virgin Islands law is clear that punitive damages is not a separate or stand-alone claim but simply a form of damages. *See Der Weer v. Hess Oil Virgin Island Corp.*, 61 V.I. 87, 102 (Super. Ct. 2014) (citing *Anthony v. FirstBank V.I.*, 58 V.I. 224, 227 n.4 (2012)); *Maxell v. Amerada Hess Corp.*, Case No. SX-05-CV-846, 2010 V.I. LEXIS 128 *31 (V.I. Super. Ct. June 30, 2010) ("[P]punitive damages cannot be a stand alone claim...."); *Hodge v. Daily Hews Publ'g Co., Inc.*, 52 V.I. 186, 200 (Super. Ct. 2009) ("[I]is not proper so plead punitive damages as a separate cause of action." (citing *Urgent v. Havana*, Civ. No. 103/2006, 2008 U.S. Dist. LEXIS 77455, *31 (D.V.I. Oct. 2, 2008)). The verdict form did instruct the jury that they were not to consider punitive damages unless they found one or more Defendants liable for intentional misrepresentation, defamation as to

Gerace, or defamation as to Vooys. The jury found all three Defendants liable for intentional misrepresentation but only Mosler and Hanley liable for defamation and only imposed awarded punitive damages on Mosler and Hanley. Imposing punitive damages only on Mosler and Hanley but not Chrismos would correlate with the jury's defamation determination. Since the Court concluded that the verdict on defamation must be set aside, the award of punitive damages would also have to be set aside for the same reasons.

¶67 Yet, even if the Court were to assume that the jury imposed punitive damages on Mosler and Hanley, but not Chrismos, for the intentional misrepresentation, the Court still cannot find that Plaintiffs proved punitive damages by clear and convincing evidence. *Cf. Atlantic Human Resource Advisors, LLC, v. Espersen*, 2022 VI 11, ¶70 (citing 5 V.I.C. § 740(5)). To be sure, punitive damages is an appropriate sanction for fraudulent or intentional misrepresentation. *Cf. DeNofio v. Soto*, No. 00-5866, 2003 U.S. Dist. LEXIS 12225, *4 (E.D. Pa. June 24, 2003) ("Punitive damages may be imposed where there is 'sufficiently aggravated conduct contrary to the plaintiff's interests, involving bad motive or reckless indifference....' Fraudulent misrepresentation certainly meets this standard." (citation and ellipsis omitted)); *accord Naranjo v. Pauli*, 803 P.2d 254, 261 (N.M. Ct. App. 1990) ("Punitive damages is an appropriate sanction for common-law fraud."). But it is not mandatory that punitive damages be awarded because punitive damages punishes wrongdoers and makes an example out of them to others. *See Cornelius,* 67 V.I. at 824. In

fact, "the focus of punitive damages is not the individual plaintiff." *Duhon v. Conoco,* 937 F. Supp. 1216, 1220 (W.D. La. 1996) (" 'Punitive damages thus have more to do with the tortfeasor than with the victim.' " (quoting *Billiot v. B.P. Oil Co.,* 645 So. 2d 604, 612 (La. 1994)). Instead "a punitive damages award is about the defendant's actions. 'The purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval.' " *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145 (Ohio 2002).

¶68 First, "rather than assessing the reprehensibility of all defendants collectively, it is important to consider the role each defendant played in that conduct." *Espersen*, 2022 VI 11 at ¶82. Plaintiffs failed to distinguish between the conduct of Hanley and that of Mosler, with respect to the intentional misrepresentation claim. In fact, the evidence tended to show that Hanley was more willing to work with Plaintiffs than Mosler and, arguably, seemed to be more concerned for them overall, meeting with them to show them how to determine the value of the business, for example. The testimony also tended to show that Hanley was more involved than Mosler. But even when viewing all the evidence in the light most favorable to Plaintiffs, the Court cannot conclude that it shows, clearly and convincingly, that either Mosler or Hanley acted with "reckless indifference" or engaged in "conduct that is outrageous and warrants special deterrence." *Cornelius*, 67 V.I. at 824. At best, the evidence shows that a 25-year-old "kid," (Trial Tr. 439:16-17), and his fiancee, both new to the restaurant

industry, were taken advantage of by two older and more sophisticated businessmen. Mosler, an "economist" and "special[ist] in monetary operations[,]" *id.* at 710:15, 23, and Hanley, a seasoned relator, established a limited liability company to purchase several parcels of land on which a restaurant, residential cottages, and a dive shop were situated. They inherited not only the tenants of the prior landowners—but problems with those buildings. They encouraged Vooys and Gerace to make repairs to the restaurant while leading them to believe that they would give them a lease in return. As the Court noted earlier, Plaintiffs and the Chrismos Defendants were in a contractual relationship as tenants and landlord but were also negotiating a new relationship, a long-term landlord-tenant relationship. There was no duty to bargain or negotiate in good faith at that point. Vooys and Gerace took Mosler and Hanley at their word, ultimately to their detriment, because Mosler eventually began to look for a new tenant to replace them. He succeeded. That does not rise to the level of outrageous conduct that warrants special deterrence, however.

¶69 Admittedly, land is scare on an island and commercial space is at a premium. The Beach Bar could not easily relocate to a different location and retain its unique characteristics. But rather than insist, as Jordan did for example, on having a lease before making further improvements, Vooys and Gerace trusted Mosler and Hanley. Whether that was unwise is not clear under Virgin Islands law. *But cf. Parke-Hayden, Inc. v. Loews Theatre Mgmt. Corp.*, 91 Civ. 0215 (RWS), 1993 U.S. Dist. LEXIS 10318, *8-9

(S.D.N.Y. July 24, 1993) ("New York law still adheres to the common law doctrine of *caveat emptor* in real estate negotiations The lack of a duty to bargain in good faith has been considered part of the definition of freedom of contract...." (citations omitted)). The jury determined that the Chrismos Defendants intentionally misrepresented that they intended to give Vooys and Gerace a long-term lease. That misrepresentation, on its own, cannot rise to the level of warranting punitive damages, otherwise, punitive damages would always be awarded any time someone was found liable for fraudulent or intentional misrepresentation. There must be something more and it is the something more that was lacking here.

¶70 Vooys and Gerace knew before they moved to St. Croix that there was no lease for the Beach Bar. (*See* Trial Tr. 172:16-17 ("We actually found out that when we were in Florida, before we flew down.").) Vooys explained why they still decided to continue:

> [b]ecause we had gotten that far. We had sold a condo, packed up all our stuff. Word sent to Joe, went down end of June, we were daydreaming about it and what to do and what we would do and how great it would be for over a month. So when we found out there was no lease, we thought we'd take a leap of faith and continue. *Id.* at 172:19-24.

They could have delayed the move or even delayed the closing, which did not occur until August 7, 2003. They also learned soon after they arrived that the land under the Beach Bar was being sold. Although they would not have it known at the time, Chrismos was not

formed until September 7, 2003, so the closing on the land purchase had to have occurred sometime afterward. Vooys testified that they asked Mosler and Hanley about a long-term lease the same day they met them as the new owners, yet did nothing to speed up that process. She did testify that they "kept asking for a seven-year lease[,]" *id.* at 215:21, but what else they did, if anything, was not explained, nor was what Hanley or Mosler said in response. Thus, the evidence, even viewed in the light most favorable to Plaintiffs, shows only that Mosler and Hanley mislead Vooys and Gerace into thinking they would get a long-term lease. This is not conduct so outrageous that it must be punished by punitive damages. Accordingly, the Court will also set aside the jury's award of punitive damages against Mosler and Hanley.

III. Motion for New Trial

A. Legal Standard

¶71 "Virgin Islands Rule of Civil Procedure 59(a)(1)(A)(vi) provides in relevant part that: 'The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: for attorney or party misconduct that undermined the trial.' " *R.J. Reynolds Tobacco Co. v. Gerald*, 2022 VI 4, ¶24. Courts evaluating motions for new trial based on an attorney's remarks during closing arguments "must assess whether the closing arguments were both improper and prejudicial, meaning that they impacted the substantial rights of a party." *Id.* (collecting cases). Thus, for Defendants to prevail they "must show that the conduct complained of was in fact improper and that the improper argument was so highly prejudicial

and inflammatory that it denied the opposing party its right to a fair trial." *Id.* at ¶25.

B. Discussion

¶72 Defendants argue, in the alternative, that they should be given a new trial because of comments Plaintiffs' counsel during closing arguments that undermined the fairness of the trial. During her closing argument, Plaintiffs' counsel said, "And then had they had a lease, had there been a promise for that maintained, we know from Miss Alex Myers, they could have sold that lease .. for $125,000. So the failure to give them that lease that was promised, they lost the ability to sell that lease." The Court had to call a short recess before Plaintiffs' counsel had concluded, and Defendants during the break, Defendants moved for a mistrial based on the reference to Myers's testimony.

¶73 Alex Myers had been called by Plaintiffs as a rebuttal witness to impeach Jordan. Jordan had testified that he sold the Beach Bar (including the seven-year lease) for around $25,000.00 or $30,000.00 and denied that the total sales price was $120,00.00. Myers impeached his testimony when she told the jury she purchased the Beach Bar (including the lease) from Jordan for approximately $175,000.00. She also told the jury and that she had fallen behind on the rent owed to Chrismos. After Defendants moved for a mistrial, the Court reiterated that Myers's testimony was limited solely to impeachment and then deferred ruling until closing arguments were over. Once counsel finished, the Court ruled that Plaintiffs' counsel's

arguments were "not so egregious to declare a mistrial ... [and] final instruction would show and explain that argument by counsel is not evidence and that the[jury] must rely upon their memory as to the facts of this case." (Trial Tr. 1108:6-10.) However, the Court did emphasize that "[i]f there is another instance *like that,* I will review the record and if I find it is cumulative, the Court will find it's egregious and I will declare a mistrial." *Id.* at 1108:13-16 (emphasis added). After Defendants' counsel made his closing arguments and Plaintiffs' counsel gave her rebuttal, Defendants then renewed their motion for a mistrial based on misstatements of Plaintiffs' counsel. The Court took the matter under advisement. In their post-trial motion, Defendants renewed their request for a new trial.

¶74 The first statements Defendants point to concern check number 722 for $2,000.00. Plaintiffs' version, admitted as part of a group as Plaintiffs' Exhibit 47, had "July / August -1000 for Roof" written on the memo line, whereas the memo line on Defendants' copy of the same check was blank. Defendants' counsel argued in his closing that Vooys wrote the notation on the memo line to falsify the evidence. Plaintiffs' counsel in rebuttal claimed it was not falsification. Instead, according to her, Gerace had signed the check but simply forgot to add the notation on the memo line. However, Plaintiffs' counsel confused two different checks. Gerace had signed check number 544 for $921.00 with the notation "Rent March - Plumber Bills" which Vooys later corrected by crossing out "March" and writing "April." Vooys signed check number 772 for $2,000.00 and wrote "July / August

-1000 for Roof" on it after it was returned. She explained that she may have added the notation afterward to explain why the payment did not match the rent due. Plaintiffs' counsel did conflate two different pieces of evidence and thus, her argument was improper, but the Court does not find any prejudice here because the jury was instructed that their recollection of the facts controls.

¶75 The second statements Defendants' point to are Plaintiffs' counsel's summary of facts that—to put it plainly were not in evidence, " 'The cardinal rule of closing argument is that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence.' " *R.J. Reynolds Tobacco Co.,* 2022 VI 14 at ¶40 (brackets omitted) (quoting *James v. People*, 59 V.I. 866, 888 (2013), parenthetically)). Plaintiffs' counsel violated this rule when she spoke about Vooys and Gerace wanting to leave St. Croix and cut their losses but Mosler and Hanley convinced them to stay, promising to make a deal. (*See* Trial Tr. 1114:24-1115:5 ("[B]ut at some point they said, we don't get if we don't get a lease, this isn't going to work, we should take our losses and go. And that's when Mosler and Hanley say, no, don't do that, we'll make a deal for you to stay. And so they did. And they invested. And they made improvements.").) There was no testimony about Vooys and Gerace wanting to sell the Beach Bar, cut their losses, and leave island. "The purpose of closing argument is to mold the facts given during trial in the light most favorable to one's client[,]" *James*, 56 V.I. at 888, not to make up facts to enhance that light.

¶76 The third statements Defendants point to concern whether the Beach Bar was open in June 2005. Reed, the bartender, had recalled that the Beach Bar was closed "sometime towards end of May, maybe somewhere in that area...." (Trial Tr. 516:16-17.) When asked if he was guessing, he said he was. *See id.* at 516:20-22 ("I'm going to guess within a month period. I'm sorry. I'm going to that's all I can remember on that part."). On cross-examination, he reiterated that the Beach Bar was "open until the very end[,] *id.* at 532:21, but believed that "the end" was in May. During rebuttal, Plaintiffs' counsel referenced Reed s testimony, specifically that he was there till the end, and argued that the restaurant was open in June because Plaintiffs' paid rent. Defendants claim counsel misrepresented the evidence. However, that evidence was conflicting at best. Vooys did testify that they vacated the premises at the end of June 2005 and the restaurant was open that month. On cross-examination, she reiterated that the Beach Bar was open in June, but when pressed—and presented with contrary testimony from her deposition—Vooys backtracked, saying "I believe we were open in June. I don't know if it was 'til the end of June." *Id.* at 286:22-23. When pressed further, Vooys said "I have gross receipts for June so I made money...." *Id.* at 287:1. Vooys was later recalled so the Beach Bar's taxes could be admitted into evidence. On redirect, she stated that she believed the Beach Bar was open in June because they paid rent for June. However, after seeing no gross receipts for June, Vooys conceded that the restaurant must not have been open. Given the conflicting testimony, the Court does not find Plaintiffs'

counsel's characterization of the evidence prejudicial.

¶77 The fourth statement Defendants point to is Plaintiffs' counsel's characterization of the April 12, 2005 letter as an illegal attempt to evict Vooys and Gerace. During rebuttal, Plaintiffs' counsel characterized the letter as follows:

> So the idea that they that they didn't give them a notice to quit, that letter - when you serve someone with a letter and tell them that you've got on April 12th, which you got it April 18th, and they tell you you have to get out or we're going to take your stuff and throw it away by April 30th, that's illegal. You can't do that. *Id.* at 1125:9-15.

Defendants contend that "characterization of this letter and the applicable law is totally wrong, as the letter only sought to confirm they were leaving and asked to be corrected if they were not doing so." (Defs' R. 50(b) & R. 59(a) Post-Tr. Mots. 18.) However, Defendants overlook that Plaintiffs' counsel make similar remarks during her opening statement, which their attorney attempted to refute. (*Compare* Trial Tr, 125:23-126:13, *with id.* at 143:9-20.) Defendants also overlook testimony comparing the letter to an eviction notice: it was written by an attorney on behalf of a landlord and served by a process server, stating what would happen if the tenants did not leave. Gerace and Vooys referred to the letter as an eviction letter, which Hanley denied. "In attempting to convince a jury that a defendant's conduct was outrageous and should be punished, an advocate must go beyond the kind of arguments necessary to establish ordinary negligence." *Herman v.*

Hess Oil V.I. Corp., 10 V.I. 521, 538 (D.V.I. 1974) (footnote omitted), *aff'd* 12 V.I. 240 (3d Cir. 1975). The Court finds no prejudice from Plaintiffs' counsel characterization of the letter, particularly since the Court also instructed the jury as to the definition of a notice to quit or to terminate a tenancy.

¶78 The fifth statement Defendants point to concerns Plaintiffs' counsel's reference to Defendants' burden of proof regarding defamation. Plaintiffs' counsel argued in rebuttal that Defendants could have called Roger Morgan as a witness. (*See* Trial Tr. 1126:15-23 ("Now, and where's Roger Morgan? Well, first of all, the judge, I believe, will instruct you that no one is required to bring all the witnesses that there are. But there's no evidence in this case that anybody has the ability to bring Mr. Morgan here. So and if indeed they wanted to prove that they didn't say those things on Mr. Morgan's show, it would be they who would bring Mr. Morgan and they did not.").) Defendants correctly note that it is the plaintiff who has the burden of proof. By arguing, during rebuttal, that Defendants should have produced evidence in their defense, which they did get a chance to respond to, Defendants claim they were prejudiced. The Court disagrees. The jury was instructed on the burden of proof and further, that the court's instructions, not the arguments of counsel, must guide their deliberations.

¶79 The last statement Defendants point to concerns Plaintiffs' counsel's reference to Woodson having heard Mosler and Hanley defame Plaintiffs on the radio. In his closing, Defendants' counsel pointed out that Plaintiffs had "called John Woodson. Did John

Woodson say that he heard anything negative about them? No." *Id.* at 1084:24-25. During her rebuttal argument, Plaintiffs' counsel responded, saying

> And the statement that says Mr. Woodson didn't say that he heard bad things on being said by Hanley and Mosler. His testimony was, I called up the show to let me see if I got it. I called up the show to support it – to support them. Well, you wouldn't call up the show to support Vicki – V.I.C. § and Joe if people weren't saying bad things about them. So of course he heard people saying bad things about them. That's the reason he called to support them. *Id.* at 1126:24-1127:8.

Defendants argue that Plaintiffs' counsel misrepresented the evidence, claiming "Woodson only testified that he called in to support Reggae...." (Defs' R. 50(b) & R. 59(a) Post-Tr. Mots. 18.) Here, both sides are mistaken. Woodson had testified that he heard from Vooys and Gerace and on the airwaves that they were being put out of the restaurant. The Court raised and sustained its own objection to Woodson's statement that he heard it on the airwaves. Counsel then asked if Woodson himself had ever gone on the airwaves to complain about Vooys and Gerace being removed from the restaurant, and he said yes. He claimed, in his opinion, the reason "was not a noise issue at Cane Bay. It had to do with the music and type of clientele that that music probably brought." (Trial Tr. 392:18-20.) When asked directly if he ever heard Mosler or Hanley on the radio, Woodson said, "Not that I can recall." *Id.* at 395:20, 22. The word "support" does

not appear anywhere in his testimony and Woodson did not tell the jury that he called the radio in support of reggae music. Thus, Defendants are mistaken. Further, even though Woodson did not hear Mosler or Hanley on the radio, he did testify that he had heard from Plaintiff why they were being put out of the restaurant and, when coupled with the other testimony, the jury could reasonably infer that Woodson was of the opinion that the full moon parties and reggae music motivated Mosler and Hanley's decision. The Court finds no prejudice from Plaintiffs' counsel's arguments here.

¶80 Finally, Defendants argue that the cumulative effect of all the misstatements of Plaintiffs' counsel warrants a new trial. Courts "assume that juries for the most part understand and faithfully follow instructions." *Frett v. People,* 66 V.I. 399, 413 (2017). *See also Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006) (even where there has been misleading argument by counsel, juries are presumed to follow court instructions). More importantly, however, Defendants have failed to show how Plaintiffs' counsel's misstatements prejudiced them. It is not the duty of the Court to scour the record looking for support for a party's arguments Since the Court did in fact instruct the jury that either counsel's arguments are not to be considered as evidence and considering that courts assume that juries followed instructions, the Court concludes that the conduct of Plaintiffs' counsel, while certainly far from laudable, did not undermine the fairness of the trial.

IV. CONCLUSION

¶81 For the reasons stated above, the Court concludes that Plaintiffs failed to carry their burden of proof as to defamation, breach of the duty of good faith and fair dealing, and breach of an agreement to enter into a lease. The Court further concludes that the award of punitive damages is unwarranted here. Accordingly, the Court will grant Defendants' motion in part and set aside the jury's verdict as to all three counts and the award of punitive damages. The Court will deny Defendants' motion as to the verdict for intentional misrepresentation and deny the motion for a new trial. An order accompanying this Opinion, and a judgment, will follow.

DONE this 12th day of September, 2022.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368

Joseph GERACE, Victoria Vooys, d/b/a Cane Bay Beach Bar, Plaintiffs,

v.

Maria BENTLEY; David Bentley; CB3, Inc.; Warren Mosler; Chris Hanley; and Chrismos Cane Bay, LLC, Defendants.

HAROLD W.L. WILLOCKS, Administrative Judge

JUDGMENT

AND NOW, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that Count I, Count II, and Count III are **DISMISSED** as to Defendants David Bentley, Maria Bentley, and CB3, Inc. and judgment is further entered in favor of Defendants David Bentley, Maria Bentley, and CB3, Inc. on all three counts. It is further

ORDERED, ADJUDGED, AND DECREED the Count V is **DISMISSED** as to Defendant Chrismos Cane Bay, LLC and judgment is further entered in favor of Defendant Chrismos Cane Bay, LLC on Count V. It is further

ORDERED, ADJUDGED, AND DECREED that Count VI, Count VII, Count IX, and Count X are **DISMISSED** as to Defendants Warren Mosler, Chris

Hanley, and Chrismos Cane Bay, LLC and judgment is further entered in favor of Defendants Warren Mosler, Chris Hanley, and Chrismos Cane Bay, LLC on all four counts. It is further

ORDERED, ADJUDGED, AND DECREED that Count IV and Count XI are **CONSTRUED** as a demand for punitive damages. It is further

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of Plaintiffs Joseph Gerace and Victoria Vooys doing business as Cane Bay Beach Bar in the amount of **one-hundred thousand ($100,000.00) dollars** against Defendants Warren Mosler, Chris Hanley, and Chrismos Cane Bay, LLC, jointly and severally, on Count VIII, including post-judgment interest at 4% per annum per the statutory rate set by Title 5, Section 426(a) of the Virgin Islands Code. As no motion for attorneys' fees was filed, the Court will defer further consideration until after the time to appeal has passed or appellate proceedings have resolved. It is further

ORDERED, ADJUDGED, and DECREED that the counterclaim of Defendant Chrismos Cane Bay, LLC is **DISMISSED** and judgment is further entered in favor of Plaintiffs Joseph Gerace and Victoria Vooys doing business as Cane Bay Beach Bar on the counterclaim.

ORDER

AND NOW, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Post-Trial Rule 50(b) and Rule

59(a) Motion filed by Defendants Warren Mosler, Chris Hanley, and Chrismos Cane Bay, LLC is **GRANTED** in part as to the motion to set aside the verdict as to Count V, Count VI, and Count X, and the award of punitive damages, and **DENIED** as to the motion to set aside Count VIII and **DENIED** as to the motion for a new trial. It is further

ORDERED that the jury's verdict as to breach of an agreement to enter into a lease, breach of the duty of good faith and fair dealing, and defamation, and the award of punitive damages, are **SET ASIDE**.

DONE and so **ORDERED** this 12th day of September, 2022.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368

COMPLAINT

COME NOW Plaintiffs, by and through their undersigned counsel, file their Complaint against Defendants as follows:

1. This Court has jurisdiction pursuant to Title 4 V.I.C., § 76.
2. Plaintiff, Joseph Gerace, is a resident of St Croix, United States Virgin Islands.
3. Plaintiff, Victoria Vooys, is a resident of St. Croix, United States Virgin Islands.
4. Plaintiffs Gerace and Vooys did business as and ran a business known as Cane Bay Beach Bar.
5. Defendant , David Bentley, is a resident of St. Croix, United States Virgin Islands.
6. Defendant, Maria Bentley, is a resident of Buffalo, New York.
7. Defendants, David Bentley and Maria Bentley, did business as CB3, Inc.
8. Defendant, Warren Mosler, is a resident of St. Croix, United States Virgin Islands.
9. Defendant, Chris Hanley, is a resident of St. Croix, United States Virgin Islands.
10. Defendant, Chrismos Cane Bay, LLC., is a Virgin Islands Limited Liability Corporation and upon

information is owned by Chris Hanley and Warren Mosler.

11. Defendant Bentley and CB3 represented to Plaintiffs that they owned the Tradename Cane Bay Beach Bar and a lease to operate as Cane Bay Beach Bar among other representations.

12. The Plaintiffs wished to purchase Cane Bay Beach Bar and in reliance on the representations of Bentley and CB3 entered into negotiations to purchase the same.

13. Plaintiffs, the Bentleys, and CB3 entered into a Purchase Agreement effective July 1, 2003.

14. In that Purchase Agreement, the Bentleys and CB3 represented the following:

    a. that they owned the furniture, furnishings, equipment inventory, goodwill, contracts and the Tradename CANE BAY BEACH BAR, accounts receivables;

    b. that they were a corporation in good standing;

    c. there were no threatened actions affecting the property to be transferred, the validity of the lease;

    d. that they had a lease for the premises that was in good standing;

    e. they would provide a Bill of Sale at closing conveying the property to the Plaintiffs;

    f. they would assign, at closing, all contracts to the Plaintiffs;

g. they would provide an Assignment of the lease to the Plaintiffs approved by the landlord;

h. they would provide, at closing, an Assignment of the Tradename Cane Bay Beach Bar.

15. Plaintiffs, in good faith, signed the Purchase Agreement and paid to the Bentleys and CB3, at closing, $45,000.00 and agreed to pay additional funds on a monthly basis. (See Exhibits 1 and 2)

16. It has been determined that the Bentleys and CB3 did not have a lease to operate Cane Bay Beach Bar.

17. After the Plaintiffs began to operate Cane Bay Beach Bar, they learned that most of the property transferred was not owned by the Bentleys and CB3, rather it was indebted and the Bentleys and CB3 had failed to pay monies due on the property. In addition, the Bentleys had written checks for insufficient funds to pay for services or filings, owed for filings, and had Health Department citations that had not been paid and the like.

18. Plaintiff has recently learned that the Bentleys and CB3 did not own the Tradename either, as represented.

19. Equipment purchased by the Plaintiffs from the Bentleys and CB3 has been repossessed as a result of the Bentleys not having paid for the equipment.

20. Plaintiffs then entered into negotiations with the owner of the premises Chrismos Cane Bay, LLC., for a lease.

21. Defendant, Chrismos Cane Bay, LLC., represented to the Plaintiffs that upon completion of necessary repairs they would enter into a long term lease for the premises.

22. In reliance of the representations made by Chrismos Cane Bay, LLC., the Plaintiffs invested large sums of money in making improvements and betterments, building good will, and the like.

23. Defendant, Chrismos Cane Bay, LLC., failed and refused to provide the Plaintiffs with the agreed lease.

24. Defendant, Chrismos Cane Bay, LLC., repeatedly represented to the Plaintiffs that they understood the Plaintiffs were improving the property and building up the business and that it was not a problem if the Plaintiffs were late on the monthly rent.

25. The Plaintiffs relied on the representations of Chrismos Cane Bay, LLC., but nonetheless always paid their rent although not always on the first of the month.

26. On March 13, 2005, Defendant Chris Hanley, as an owner of Chrismos Cane Bay, LLC., came to the bar and announced that he did not like the direction the bar was going with the reggae shows and the type of crowd of people that such shows attracted and that Chrismos Cane Bay, LLC., had decided to turn the property into a "white, middle class restaurant."

27. Defendant Hanley admitted that Chrismos Cane

Bay, LLC., was already negotiating with a potential buyer for a lease. He agreed on behalf of Chrismos Cane Bay, LLC., to provide the Plaintiffs with the promised lease for seven (7) years so they could sell the lease, the equipment, and property and good will so the Plaintiffs could recoup their investment.

28. Defendant Hanley represented that the value of the lease and equipment and good will would be $185,000.00.

29. The next weekend Defendant Warren Mosler came to the bar. He informed the Plaintiffs that he had a different idea for the use of the property, did not like the type of crowds that reggae music brings as they were the "wrong type of people" and that the Plaintiffs should stop that type of entertainment.

30. On March 31, 2005, Defendants Hanley and Mosler, in their individual capacity and as representatives of Chrismos Cane Bay, LLC., and the Plaintiffs, had a meeting.

31. Plaintiffs were informed that they would not be given a lease and they "needed to go." They were told they should be out in a week but they could have no more than a month.

32. At that meeting Defendants Hanley, Mosler and Chrismos Cane Bay, LLC., falsely represented that the Plaintiffs were behind on their rent.

33. Plaintiffs specifically informed Hanley, Mosler and Chrismos Cane Bay, LLC., that all rent payments had been made by Plaintiffs and that two rent

checks received by Chrismos Cane Bay, LLC., remained uncashed.

34. In a subsequent call to Defendant Hanley by Plaintiffs, Plaintiffs again asked why they were not getting the promised lease

35. Defendant Hanley represented that he had discussed the lease with Mosler and whether the Plaintiffs should be given $50 000 00 toward their investment and Mosler said it was too much money and not to do it

36. In that conversation, Plaintiffs specially asked Defendant Hanley for any basis for the accusations that the Plaintiffs were behind in the rent. Defendant Hanley could not give any information and said he would check the records and get back to them. To date he has not.

37. Defendant Hanley and Mosler individually and on behalf of Chrismos Cane Bay, LLC., have falsely publicly stated on radio , newspapers, and to the public and to customers of the Plaintiffs that they have not made their rental payments and are way behind on their rent, that they had not paid April rent and they did not expect them to be able to do so and that they were not good tenants and that they had mismanaged the business.

38. Defendant Mosler placed an automatic response on his e-mail to anyone that inquired that the Plaintiffs were being evicted for nonpayment of rent. Such e-mails went to numerous persons and were false.

39. Defendants Mosler, Hanley and Chrismos Cane Bay, LLC., and their agents and employees then falsely stated to governmental authorities, the public, that the Plaintiffs had threatened to burn down the bar.

40. As a result, the Plaintiffs were questioned and investigated by governmental officials.

41. In an attempt to recoup some of their losses, the Plaintiffs attempted to negotiate with the person Chrismos Cane Bay, LLC., had agreed to enter into a lease with, James Jordan to purchase the Tradename, property, and goodwill.

42. Because of the actions of Chrismos Cane Bay, LLC., Plaintiffs were in an unfair bargaining position as they had no lease and were subject to eviction.

43. James Jordan originally agreed to purchase all the goodwill, Tradename, and equipment for $80,000.00. However, it was learned that CB3 had not owned the Tradename and, as such, the Plaintiffs had not actually purchased the Tradename and the purchase price was reduced to $50,000.00.

44. To date, Plaintiffs are still attempting to complete the negotiations to sell the equipment and good will.

Count I

45. Plaintiff re-alleges the allegations in paragraphs 1

through 44 above as though fully set forth herein.

46. The actions of the Bentleys and CB3 constitute a breach of contract.

47. As a result, the Plaintiffs suffered economic loss of paying to purchase items not purchased, and not having a lease, Tradename and being kicked out of the premises.

Count II

48. Plaintiff re-alleges the allegations in paragraphs 1 through 47 above as though fully set forth herein.

49. The actions of the Bentleys and CB3 constitute fraud as they knew or should have known that they did not own what they represented they did.

50. As a result, the Plaintiffs suffered damages of economic loss, mental anguish, suffering and loss of enjoyment of life.

Count III

51. Plaintiff re-alleges the allegations in paragraphs 1 through 50 above as though fully set forth herein.

52. The actions of the Bentley and CB3 constitute misrepresentation.

53. As a result, the Plaintiffs have suffered damages as alleged herein.

Count IV

54. Plaintiff re-alleges the allegations in paragraphs 1 through 53 above as though fully set forth herein.

55. The actions of the Bentleys and CB3 are so outrageous and done with such a reckless disregard for the rights of the Plaintiffs as to entitled the Plaintiffs to an award of punitive damages.

Count V

56. Plaintiff re-alleges the allegations in paragraphs 1 through 55 above as though fully set forth herein.

57. The actions of Chrismos Cane Bay, LLC., constitute a breach of an agreement to enter into a lease.

58. As a result, the Plaintiffs invested time and money into the facility that they would not have invested had they known they would not be getting a lease.

59. The Plaintiffs have also suffered mental anguish, physical and psychological injuries, medical expenses, pain and suffering and loss of enjoyment of life that are likely to continue into the foreseeable future as a result of seeing their life's work being taken away from them

60. Plaintiffs were deprived of the ability to sell a lease to a subsequent purchaser.

Count VI

61. Plaintiff re-alleges the allegations in paragraphs 1 through 60 above as though fully set forth herein.

62. Defendants Mosler, Hanley and Chrismos Cane Bay, LLC., engaged in defamation, slander, libel, and defamation per se.

63. As a result, the Plaintiffs have suffered loss of reputation, humiliation, loss of business opportunities and other damages as alleged herein.

Count VII

64. Plaintiff re-alleges the allegations in paragraphs 1 through 63 above as though fully set forth herein.

65. The actions of the Defendant Chrismos Cane Bay, LLC., Hanley and Mosler constitute fraud in that they never intended to keep the representations they made.

66. As a result, the Plaintiffs have suffered injuries as alleged herein.

Count VIII

67. Plaintiff re-alleges the allegations in paragraphs 1 through 66 above as though fully set forth herein.

68. The actions of Defendants Mosler, Hanley and Chrismos Cane Bay, LLC., constitute misrepresentation.

69. As a result, the Plaintiffs relied on the misrepresentation to their detriment and, as a result, they have suffered damages as alleged herein.

Count IX

70. Plaintiff re-alleges the allegations in paragraphs 1 through 69 above as though fully set forth herein.

71. The actions of Defendants Mosler, Hanley and Chrismos Cane Bay, LLC., constitute intentional infliction of emotional distress.

72. To the extent it was not intentional then they constitute negligent infliction of emotional distress.

73. As a result, the Plaintiffs have been damaged as alleged herein.

Count X

74. Plaintiff re-alleges the allegations in paragraphs 1 through 73 above as though fully set forth herein.

75. The actions of Hanley, Mosler and Chrismos Cane Bay, LLC., violate their duty of good faith and fair dealing.

76. As a result, the Plaintiffs have been damaged as alleged herein.

Count XI

77. Plaintiff re-alleges the allegations in paragraphs 1 through 76 above as though fully set forth herein.

78. The actions of Defendants Hanley, Mosler and Chrismos Cane Bay, LLC., were and are so outrageous as to entitle the Plaintiffs to an award of punitive damages.

WHEREFORE, the Plaintiffs pray for damages as they may appear, for costs and fees, for pre and post judgment interest and for such other relief as this court deems fair and just.

DATED: June 8, 2005

RESPECTFULLY SUBMITTED

LAW OFFICES OF ROHN AND

CAMERON, LLC

Attorneys for Plaintiff

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SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368

JOINT FINAL PRETRIAL ORDER

The following shall constitute the Final Pretrial Order pursuant to Rule 16(e) of the Federal Rules of Civil Procedure and this Final Pretrial Order shall govern the conduct of the trial of this case. Amendments to this order will be allowed only in exceptional circumstances to prevent manifest injustice.

APPEARANCES:

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Attorney For: Warren Mosler, Chris Hanley & Chrismos Cane Bay, LLC.
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1. NATURE OF ACTION AND JURISDICTION OF THE COURT:

The Court has jurisdiction over the parties and the subject matter.

2. FACTUAL CONTENTIONS OF THE PARTIES

Defendant Maria Bentley and CB3 represented to Plaintiffs, Joseph Gerace and Victoria Vooys, that they owned the trade name Cane Bay Beach Bar and had a lease to operate as Cane Bay Beach Bar, among other misrepresentations. In 2003, Plaintiff Joseph Gerace wished to purchase Cane Bay Beach Bar and in reliance on the representations of Mrs. Bentley and CB3 entered into negotiations to purchase it. On August 7, 2003, the Plaintiffs, Ms. Bentley and CB3 entered into an Asset Purchase Agreement. In that Asset Purchase Agreement, Bentley and CB3 represented the following:

1) that they owned the furniture, furnishings, equipment, inventory, goodwill, contracts and the Trade name Cane Bay Beach Bar and accounts receivables;

2) that they were a Corporation in good standing;

3) that they had no threatened actions affecting the property to be transferred, which would question the validity of the Lease;

4) that they had a Lease for the premises that was in good standing;

5) that they would provide a Bill of Sale at closing conveying the property to the Plaintiffs;

6) that they would assign, at closing, all contracts to the Plaintiffs;

7) that they would provide an Assignment of the lease to the Plaintiffs approved by the landlord; and

8) that they would provide, at closing, an Assignment of the Trade name Cane Bay Beach Bar.

Plaintiffs, in good faith, signed the Asset Purchase Agreement and at closing paid Mrs. Bentley $45,000.00 and agreed to pay additional funds on a monthly basis.

Prior to the closing, Chrismos had agreed to purchase the property where the bar was located. At the closing, it was determined that Bentley and CB3 did not have a lease to operate Cane Bay Beach Bar. However, Defendants Chrismos Cane Bay, Warren Mosler and Chris Hanley agreed they would give Plaintiffs a reasonable lease as they were going to be the new owners, so the closing took place. After the Plaintiffs began to operate Cane Bay Beach Bar, they learned that most of the furnishings transferred were not owned by Ms. Bentley or CB3. Rather, they were indebted and Ms. Bentley and CB3 had failed to pay monies due. In addition, the Bentleys had written checks for insufficient funds to pay for services or equipment, owed for services and equipment, and had Health Department citations that had not been paid and the like. Further Mr Gerace later learned that Ms Bentley and CB3 did not own the trade name Cane Bay Beach Bar as represented. Equipment purchased by the Plaintiffs from Bentley and CB3 was repossessed

as a result of the Bentleys not having paid for the equipment. CB3 has been defaulted, and its counter-claim stricken for lack of filing a proper answer through counsel.

Plaintiffs entered into negotiations with the new owner of the premises Chrismos Cane Bay, LLC ('Chrismos') for a lease. Defendant Chrismos, through Hanley and Mosler, represented to the Plaintiffs that upon completion of necessary repairs to be paid for by Plaintiffs they would enter into a long-term lease for the premises for at least seven (7) years. In reliance on those representations made by Chrismos, the Plaintiffs invested about $30,000 to $50,000 in making improvements and betterments, building good will, and the like.

The Plaintiffs, as Part of their operation of the restaurant began to have Full Moon Reggae Nights at the bar in about mid-2004. While there had been music and such parties previously by other bar tenants, they did not attract the same crowds as the reggae music events. Neighbors, most of whom were white, began to complain to Hanley and Mosler, as to the noise, the types of people, and the cars parking in the area. This continued over the months.

In March of 2004, Plaintiffs were presented with a lease that was for only two and a half years, had rentals of between $2,000 and $1,500, when Plaintiffs were only paying $1,500 in rent at the time, refused to make any repairs to the building, despite the fact the roof leaked, and the building was in need of serious repairs, charged high late fee amounts, did not allow any assignment or subletting of the lease, required

payment by Plaintiffs of the property taxes and other onerous clauses. Plaintiffs rejected the lease as not what had been agreed to. The parties continued with Plaintiffs as month to month tenants.

Because Plaintiffs were making repairs to the building and sometimes had cash flow problems, both Hanley and Mosler assured Plaintiffs that was not an issue as long as Plaintiffs paid when they could. Defendants accepted delayed or late rentals through

all of 2004 and early 2005. Chrismos continued to get complaints about the types of crowds at the bar and the music.

The Plaintiffs relied on the representations of Chrismos, but, nonetheless, always paid their rent, although not always on the first of the month.

In late 2004 or early 2005, Mosler met James Jordan who had come to St. Croix with his own yacht, at the Marina partially owned by Mosler. Jordan informed Mosler he was interested in making investments in St. Croix and buying a house. Mosler introduced Jordan to Hanley, who became his realtor on the investments.

Jordan learned of the bar owned by Defendants and expressed an interest in taking over the operations in around early 2005. In around March 2005, Hanley came to Plaintiffs and explained to Plaintiffs that they did not have a lease and that Jordan wanted to take over the bar, and he was willing to pay for a lease assignment and inventory and trade name and good will. Hanley told Plaintiffs that to facilitate the smooth transition into Jordan having the restaurant/bar,

Chrismos would give Plaintiffs a seven-year lease for the sole purpose of using it to sell and assign the lease to Jordan and explained how Plaintiffs should value the business as one and a half times the net income and assets and came up with a figure of around $185,000 as the amount that the rights to the bar and restaurant should be sold for. At that time, Hanley gave Plaintiffs a roughed-out lease that was for seven years to review. Plaintiffs agreed that Hanley could tell Jordan that they were willing to sell for that price, and Hanley told Plaintiffs he would get them such a final lease to sign and to be able to sell in exchange for allowing Jordan to buy them out. Plaintiffs gave that roughed out lease to Gerry Groner, their attorney, who lost it.

When Mosler found out from Jordan that Plaintiffs had, on Hanley's recommendation, requested $185,000 for Jordan to buy the restaurant, he became furious and assumed, without factual basis, that Plaintiffs were making a lot more at the restaurant than they were claiming, and decided he would not give Plaintiffs any lease, and he wanted them out immediately. After that Mosler's whole attitude towards the Plaintiffs changed. He criticized Plaintiffs, the type of people they were attracting, that he no longer wanted reggae music and he wanted to turn the restaurant/bar into a white middle-class restaurant.

On or around March 31, 2005, Chris Hanley and Warren Mosler came to the restaurant for a meeting with Plaintiffs. Mosler accused the Plaintiffs of lying about how much money they were making. Mosler informed Plaintiffs he was not going to give them a

lease, that they were month to month tenants. Mosler falsely claimed Plaintiffs were behind on their rent, and he wanted them out of the property in one week, but in no event more than by the end of the month and demanded to know what Plaintiffs' exit strategy was. He reiterated that he intended to give the bar to James Jordan who would attract a more 'middle class clientele', and there was no way he would allow Plaintiffs to stay at the restaurant/bar.

Plaintiffs specifically told Defendants that all rent payments had been given to Hanley, but two had not been cashed, and asked why they were not getting the promised lease. Hanley then admitted that he had discussed the proposed lease with Mosler, and Mosler said Plaintiffs wanted too much money from Jordan, and he would not give Plaintiffs a lease. Hanley said he had also discussed whether Plaintiffs should receive at least $50,000 from Jordan to vacate the premises, and Mosler responded that was still too much money. Mosler made it clear Plaintiffs would never get a lease, and he wanted them out of the premises. Plaintiffs were so hurt and angry that they got up and walked out of the meeting. Plaintiffs paid April rent and Defendants cashed the check. The same is true for May rent.

On April 12, 2005, Defendants had Hunt Logan write a letter to Plaintiffs that falsely represented Plaintiffs had agreed to vacate the premises by April 30, 2005, and that anything of Plaintiffs that were left at the premises, after that date, would be treated as abandoned, and would be disposed of by Defendants.

On April 16, 2005, a news story appeared in the St.

Croix Avis that the Full Moon Parties were about to end, and that Mosler and Hanley were kicking Plaintiffs out of the restaurant and bar. Mosler falsely stated that the reason Plaintiffs had been told to leave was because they were constantly behind on their rent, that Plaintiffs had agreed to vacate, and that Gerace had stiffed his parents for $150,000 in loans, and that there had never been an agreement to give Plaintiffs a lease

There was a public local backlash to Mosler and Hanley's shutting down the Full Moon Parties and they began to receive threats. As a result, Defendants increased their lies that the reason for the shutdown was not the clientele, but rather because Plaintiffs were deadbeats and drug users and sellers.

Thereafter, Defendants Hanley and Mosler individually, and on behalf of Chrismos, falsely and publicly stated on radio shows, newspapers, to the public, and to customers of the Plaintiffs that they had not made their rental payments, and were way behind on their rent; that they had not paid April 2005 rent, and they did not expect them to be able to do so; that they were not good tenants; and that they had mismanaged the business. Warren Mosler also claimed that Plaintiffs were drug dealers, drug users, and that Gerace's family belonged to an organized crime family. Defendant Mosler placed an automatic response on his email to anyone that inquired that the Plaintiffs were being evicted for nonpayment of rent Such e mails went to numerous persons and were false. Defendants Mosler, Hanley and Chrismos Cane Bay, LLC, and their agents and employees then falsely stated to

governmental authorities, and the public that the Plaintiffs had threatened to burn down the bar. As a result, the Plaintiffs were questioned and investigated by governmental officials. The reputation of Plaintiffs and the restaurant, and bar was destroyed, profitability decreased, and it became even more clear that Defendants were doing everything they could to ruin Plaintiffs, and the bars reputation until they went into bankruptcy .

Plaintiffs eventually agreed to leave. Mosler only allowed them to claim $30,000 for their inventory. Defendants then gave Jordan a seven-year lease with fair terms and began making repairs to the building Defendants should have made during Plaintiffs' tenancy.

The actions of the Bentleys and CB3 constitute a breach of contract, misrepresentation and fraud as they knew that they did not own what they represented they did.

Likewise, the actions of Chrismos Cane Bay, LLC constitute a breach of an agreement to enter into a lease. As a result, the Plaintiffs invested time and money into the facility that they would not have invested had they known they would not be getting a lease. The actions of the Defendants Chrismos Cane Bay, LLC, Hanley and Mosler constitute fraud in that they never intended to keep the representations they made. The actions of Hanley, Mosler and Chrismos Cane Bay, LLC, violated their duty of good faith and fair dealing.

Further, the actions of Defendants Warren Mosler,

Chris Hanley and Chrismos Cane Bay, LLC constitute intentional infliction of emotional distress. To the extent it was not intentional then they constitute negligent infliction of emotional distress.

The Plaintiffs relied on the misrepresentations of the Defendants to their detriment and, as a result, they have suffered damages as alleged herein. Further, Defendants Mosler, Hanley and Chrismos Cane Bay, LLC, engaged in defamation, slander, libel, and defamation per se. As a result, the Plaintiffs have suffered loss of reputation, humiliation, loss of business opportunities and other damages as alleged herein.

The actions of all Defendants are so outrageous and done with such a reckless disregard for the rights of the Plaintiffs so as to entitle the Plaintiffs to an award of punitive damages.

3. FACTUAL CONTENTIONS OF DEFENDANT MARIA BENTLEY:

The restaurant and bar at Cane Bay had been owned by CB3, Inc, a company my deceased husband managed. Pursuant to the divorce agreement with my deceased husband, I took over the business, which I listed for sale. The Plaintiffs contacted Linda Holt, the realtor who had the listing. They made an offer, which was accepted, and closed on the transaction with CB3, Inc., by paying $50,000 down, with $30,000 still owed. The Plaintiffs knew there was no written lease. They then began to operate the business, but they failed to pay their debts as they were due, including the failure to pay the amount owed to me. However, to try to work

with them, my deceased husband offered several compromise agreements to them, including full offsets for debts they claimed the old business still owed against the unpaid sums still due to me. Unfortunately my ex-husband died before he could finalize those negotiations.

4. FACTUAL CONTENTIONS OF DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY, LLC:

An entity named Chrismos LLC was formed by Warren Mosler and Chris Hanley to purchase the property at Cane Bay, where there was a restaurant and bar named the Cane Bay Beach Bar. The closing took place on September 7, 2003. Joe Gerace and Victoria Vooys represented they were the owners of this business, which they had purchased on August 7, 2003, from the prior tenant. However, it was subsequently discovered in this case that the business was actually operated by Barabus, Inc. and not by the Plaintiffs. The prior tenant did not have a written lease, so the new tenant did not have a written lease either.

Rent was routinely late, including bounced checks. Despite this fact, when the Plaintiffs requested a written lease, Chrismos had its counsel prepare one, which was presented to the Plaintiffs. However, it was never signed, nor were any comments sent back about it to Chrismos, much less a counterproposal.

The tax returns filed by the Plaintiffs always showed a loss, although they told others they made quite a bit of money. Indeed, their reported sales from

the restaurant always improved, despite their complaints that their business did not make any profits.

Over time, a mutual dissatisfaction with the landlord-tenant relationship developed between the Parties that had not previously existed, but had developed over time due to (1) late rent, (2) bounced checks, (3) poor operations at the restaurant requiring expenditures by Chrismos, (4) disputes between the Plaintiffs and the other tenant at the dive shop and (5) late night parties that led to multiple complaints from neighboring residents that the Plaintiffs failed to address.

Eventually the Parties met and discussed the situation, as Chrismos wanted to know what the Plaintiffs exit strategy was since they were behind on the rent. Rather than discuss any of the outstanding issues, the Plaintiffs abruptly left the meeting. The Defendants left the meeting with the impression that the Plaintiffs wanted to leave immediately , perhaps selling their business. However, the Plaintiffs retained counsel made it clear her clients would not agree to vacate the premises Rent was also made

current so no further action was taken by Chrismos as an eviction action was never filed.

The Plaintiffs had in fact already entered into a prospective sale of the business' assets to a new tenant, James Jordan. Chrismos eventually agreed to accommodate this transition by giving James Jordan a written lease so that he could complete a purchase of the restaurant assets. Jordan then paid the Plaintiffs

$30,000, which they would not have been paid if Chrismos had not been willing to assist the Plaintiffs in this transition. In any event, having sold the business, the Plaintiffs voluntarily left the premises.

The Plaintiffs promptly bought a new nightclub, Club 54, in Christiansted, which they successfully operated and sold for a profit. They then bought another nightclub and did equally well, eventually selling that business too.

5. ADMISSIONS AND STIPULATIONS:

As to Chrismos Cane Bay, LLC, Warren Mosler and Chris Hanley:

a) This Chas jurisdiction pursuant to 4 V I C § 76

b) Plaintiffs Joseph Gerace and Victoria Vooys did business as and ran a business known as Cane Bay Beach Bar;

c) Defendant, Maria Bentley, [is] a resident of Buffalo, New York;

d) Defendant, Warren Mosler, is a resident of St. Croix, United States Virgin Islands;

e) Defendant, Chris Hanley, is a resident of St. Croix, United States Virgin Islands;

f) Defendant, Chrismos Cane Bay, LLC, is a Virgin Islands limited liability corporation owned by Chris Hanley and Warren Mosler;

g) Maria Bentley did not have a lease to operate Cane Bay Beach Bar;

h) Plaintiffs and Chrismos, Mosler and Hanley had

discussions regarding obtaining a lease.

i) On March 31, 2005, Chris Hanley and Warren Mosler, and Plaintiffs had a meeting.

j) On that date, Chrismos, through Chris Hanley, told Plaintiffs that they were behind on the rent.

As to Maria Bentley:

a) Defendant, Maria Bentley, is a resident of Buffalo, New York.

b) Defendant, Maria Bentley did business as CB3, Inc.

c) Admit CB3, Inc. entered into an Asset Purchase Agreement with Plaintiffs effective July 1, 2003.

6. AMENDMENT TO PLEADINGS:

The Chrismos Defendants will move to amend their answer to add a response to allegation ¶16 that was inadvertently left out, admitting this allegation, but then changing the response to allegation ¶17 to 'Deny for lack of knowledge' as the response given was obviously an error due to the numbering mistake, as the Defendants would have no knowledge of any such alleged facts between the Plaintiff and Maria Bentley prior to this litigation. No other amendments to the pleadings shall be made. Plaintiffs will object to any attempt to move to amend Defendants' Answer as it is out of time and prejudicial to the Plaintiffs.

7. PLAINTIFFS STATEMENT OF DAMAGES:

As to Defendants Warren Mosler Chris Hanley and Chrismos Cane Bay:

In approximately April of 2005, Defendant Mosler represented to the entire community of St. Croix, when he went on Channel 8 and falsely stated that Plaintiffs were being thrown out of Cane Bay because back rent was owed for the establishment, and that Plaintiffs owed family members about $150,000.00. Thereafter, Defendant Hanley again represented to the entire St. Croix Community, when he went on the Roger Morgan Show, around the same time in April of 2005, and again falsely stated that the Plaintiffs owed back rent, and that Plaintiffs had been repeatedly asked to stop the Full Moon Parties and had refused. Defendant Mosler sent an email to the Roger Morgan Show in approximately April of 2005 that was read on the air, and which basically reiterated what he had said on the Channel 8 show. Roger Morgan read a document that had been sent to him on Attorney Hunt Logan's letterhead in April of 2005 which claimed that Plaintiffs were behind on their rent were being evicted from the establishment and owed family members thousands of dollars Further, Roger Morgan was told Plaintiffs used drugs, were drugs dealers, and the Gerace's family was mafia. These were statements obviously made to the entire community. Further, Defendant Mosler sent e-mails to some of Plaintiffs' customers around the same time falsely stating that Plaintiffs were unable to successfully run the business and he had someone in place that would. Defendant Mosler printed a full-page ad in the Avis implying that Plaintiffs were drug dealers. Defendants discovery requests in the instant matter even include questions as to Plaintiffs' use of illegal drugs and if Plaintiffs would submit to drug tests.

Defendants Hanley and Mosler stated several times to the Plaintiffs around mid- 2003, and going forward, that once certain improvements to the building were completed, that they were going to give Plaintiffs a lease. They promised their utilities would be separated from those of The Dive Shop. They made numerous misrepresentations to the effect that it was not a problem that the rent was occasionally late. Hanley told Plaintiffs not to worry about noise during the Full Moon parties and to turn the speakers towards the water and that he would take care of the neighbors. He also told Plaintiff that he had someone who wanted to buy the business, and that he would give Plaintiffs a 5-year lease with another 5-year option on the lease, or a 7-year lease, so that Plaintiffs could sell the same to the prospective buyer. Defendant Hanley also told Plaintiffs to deduct all costs from the rent that Plaintiff had paid for plumbing and other repairs.

Between July 2003 through March 2004, Plaintiffs paid a total of $58,112.50 to Ms. Bentley and CB3, which she was not entitled to receive.

Plaintiffs were forcibly evicted by the Chrismos Defendants, and expended time, monies and efforts to move their equipment. As of June 30, 2005, all Plaintiffs' property was removed from the premises at Cane Bay. In an attempt to recoup some of their losses, the Plaintiffs attempted to negotiate with Mr. James Jordon to enter into a lease to purchase the trade name, property and goodwill from the Plaintiff. However, because of the actions of Chrismos, Plaintiffs were in an unfair bargaining position as they had no lease and were subject to eviction. James Jordan

originally agreed to purchase all the goodwill, trade name, and equipment for $80,000.00. However, it was learned that CB3 had not owned the trade name. As such, the Plaintiffs had not actually purchased the trade name and did not have the benefits of the lease Thus the only asset that Plaintiffs had to sell was the equipment which they sold for $30,000.00 minus $3,000,00 that was held in escrow to pay any outstanding bills.

Plaintiff also suffered physical injuries, mental anguish, physical and psychological injuries, medical expenses, pain and suffering, and loss of enjoyment of life.

Plaintiffs also are entitled to a repayment to them of the $58,000.00 paid to Bentley, plus prejudgment interest, and attorney fees, and costs.

8. DEFENDANT MARIA BENTLEY'S STATEMENT OF DAMAGES:

I have not asserted a claim for any damages for myself, even though I have suffered losses due to the Plaintiffs' actions.

Additionally there is no evidence to support the Plaintiffs claim of damages

asserted against me particularly since (1) the Plaintiffs have admitted they knew there

was no lease when they bought the property (2) CBS Inc is a legal entity separate from

me so I am not liable for its actions and (3) the Plaintiffs used the tradename the entire

time they were in business.

At closing, the Plaintiffs owed money for the inventory and liquor. Joe Gerace said he deposited cash into my bank account, so I paid CB3 bills on the assumption that he had done so, but it turned out he never did deposit the funds for inventory as he said he did, so the checks bounced.

Finally, all the furnishings (tables/chairs, grills, fryers coolers etc) were owned by CB3 and were transferred in sale.

9. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S STATEMENT OF DAMAGES:

Chrismos has filed a counterclaim for rent consisting of $1500.

Additionally, there is no evidence to support the Plaintiffs' claim of damages asserted against the Chrismos Defendants, particularly since Joe Gerace stated under oath in his deposition that the entity operating the premises was Barabus, Inc., who is not even a party to this litigation. Indeed, Gerace and Vooys had their attorney form Barabus when they bought the bar and restaurant from CB3 and filed all of the tax returns in its name, so all of the claims for their business related damages fail as a matter of law, as the Plaintiffs were not the entity operating the business.

Indeed, the facts will show that the Plaintiffs suffered no damages, as there is no evidence to support the Plaintiffs allegations in each count asserted in this

case, nor is there any evidence to support the Plaintiffs' damage claims. By way of example, the Plaintiffs admit they knew there was no written lease when they bought the business and also admit they never met Mosler or Hanley prior to the closing, so they certainly cannot prove the reliance they now claim on some alleged representations. Additionally, only one Plaintiff, Victoria Vooys, submitted any medical records to support their claim of Reckless Infliction of Emotional Distress, which was treatment for acne. By way of another example, the Plaintiffs only identified one witness who supposedly heard any defamatory statements made by the Chrismos Defendants, without showing any resulting damages from that alleged statement. Likewise, the Plaintiffs sold this business and then opened a new nightclub, where they made money and sold it for a profit.

Other examples could be made, but as the Statement of Damages is limited to one page in the form attached to VI R Civ P 16 this section is limited accordingly However the evidence will show the Plaintiffs suffered no damages.

10. PLAINTIFFS' STATEMENT OF LEGAL ISSUES PRESENTED:

As to Chrismos Cane Bay, Chris Hanley and Warren Mosler:

a) Did Defendants breached their agreement to enter into a lease?

b) What damages did Plaintiff suffered?

c) Did Defendants defame, slander, libel and

defame Plaintiffs?

d) The scope and duration of Plaintiffs' damages.

e) Did the Defendants commit fraud in the inducement to get Plaintiffs to make repairs to the premises, and to take other actions?

f) The scope and duration of Plaintiffs damages.

g) Did Defendants make misrepresentations to Plaintiffs?

h) Did Plaintiffs' reasonably rely on the misrepresentation made by Defendants?

i) What are the scope and duration at Plaintiffs' damages?

j) Did Defendants intentionally inflict emotional distress on the Plaintiffs?

k) The extent and duration of Plaintiffs' damages.

l) Did Defendants breach their duty of good faith and fair dealing?

m) What is the scope and durations of Plaintiff's damages?

n) Were Defendants actions done with such reckless disregards to entitle of Plaintiffs to punitive damages?

As to Maria Bentley and CB3:

a) Did Defendants breach its contract with Plaintiffs?

b) The extent and duration of Plaintiffs' damages?

c) Did Maria Bentley and CB3 commit fraud when she claimed she had the ability to sell or transfer items she did not actually possess free, and clear?

d) The extent and duration of Plaintiffs' damages.

e) Did Maria Bentley and CB3 engage in misrepresentation to Plaintiffs?

f) Did Plaintiffs reasonably rely on those representations?

g) The extent and duration of Plaintiffs' damages.

h) Do the actions of Maria Bentley and CB3 constitute such reckless disregards as to entitled Plaintiffs to punitive damages?

i) Are Plaintiffs entitled to prejudgment interest?

11. DEFENDANT MARIA BENTLEY'S STATEMENT OF LEGAL ISSUES PRESENTED:

I was sued in four counts in this case. These counts also included claims against CB3, Inc. and David Bentley, my former husband who has since died. I believe both CB3, Inc. and David Bentley have been dismissed from this case. In addition to the lack of evidence to support the accusations asserted against me, CB3, Inc. is a legal entity separate from me, so I should not be held liable for its actions. The legal issues related to the defense of these counts include:

Count 1-Breach of the sales agreement - the agreement was with CB3, not me personally. Moreover, the contract was fully performed by CB3.

Count 2-Fraud in the inducement of the sales agreement - I never made any material misrepresentations to the Plaintiffs before they purchased the business that they relied upon nor did anyone else.

Count 3-Misrepresentation related to the sales agreement - I never made any material misrepresentations to the Plaintiffs that they relied upon to their detriment, nor did anyone else.

Count 4-Claim for punitive damages - I never engaged in any conduct that would warrant this type of damages as I understand them.

12. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S STATEMENT OF LEGAL ISSUES PRESENTED:

Chrismos has also filed a counterclaim for unpaid rent. The plaintiffs have asserted seven counts against the Mosler, Hanley and Chrismos ('Chrismos parties') alleging a garden variety of torts and contract claims. In addition to the lack of evidence to support each legal claim asserted against them the legal issues related to the defense of these counts include:

Count 5 - Breach of an agreement to enter into a lease - The Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort. In addition, when Chrismos bought the property and became the landlord for the tenant, there was a month to month tenancy in place. Joe Gerace stated under oath in his deposition that the entity operating the premises was Barabus, Inc., who is not even a party to

this litigation, so this Count fails as a matter of law, as the Plaintiffs were not the tenants.

Count 6 - The plaintiffs claim the Chrismos parties defamed them - the Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort.

Count 7 - Fraud related to the alleged failure to give the plaintiffs a lease - the Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort. In addition, when Chrismos bought the property and became the landlord for the tenant, there was a month to month tenancy in place. Joe Gerace stated under oath in his deposition that the entity operating the premises was Barabus, Inc., who is not even a party to this litigation, so this Count fails as a matter of law, as the Plaintiffs were not the tenants.

Count 8 - Misrepresentation related to the alleged failure to give the plaintiffs lease - the Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort. In addition, when Chrismos bought the property and became the landlord for the tenant, there was a month to month tenancy in place. Joe Gerace stated under oath in his deposition that the entity operating the premises was Barabus, Inc., who is not even a party to this litigation, so this Count fails as a matter of law, as the Plaintiffs were not the tenants.

Count 9 - Reckless infliction of emotional distress - the Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort. In

addition, only one plaintiff, Victoria Vooys, submitted any evidence of any medical treatment, which was one visit to a dermatologist for acne.

Count 10 - Violation of good faith and fair dealing - the Plaintiffs have failed to provide any evidence that would satisfy the elements of this tort. In addition, when Chrismos bought the property and became the landlord for the tenant, there was a month to month tenancy in place Joe Gerace stated under oath in his deposition that the entity operating the premises was Barabus Inc. who is not even a party to this litigation so this Count fails as a matter of law, as the Plaintiffs were not the tenants.

Count 11 - Claim for punitive damages against the Chrismos parties - Separate counts for punitive damages are barred, so this Count must be dismissed. Moreover, none of the Chrismos Parties ever engaged in any conduct that would warrant the imposition of punitive damages.

13. LEGAL ISSUES, DEFENSES OR CLAIMS TO BE ABANDONED:

Plaintiff: None.

Maria Bentley: None.

Chrismos Parties: Warren Mosler hereby drops his counterclaim for defamation.

14. PLAINTIFFS' EXHIBITS:

See Exhibit 'A';

15. DEFENDANT MARIA BENTLEY'S EXHIBITS:

I reserve the right to use any of the exhibits listed by the other Parties in Exhibit A and B attached hereto.

16. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S EXHIBITS:

See Exhibit 'B', attached hereto.

17. PLAINTIFFS' ADDITIONAL DISCOVERY:

None. Plaintiffs object to any attempt by Chrismos et al. to reopen discovery in this 16-year-old case. As this Court and Defendants know, this jurisdiction only requires notice pleadings. Defendants chose to take only a two hour deposition of the Plaintiff Vooys and only forty-five minutes of Plaintiff Gerace, and asked very few questions as to the contentions of the Plaintiffs. It clearly did so as a litigation strategy. Mosler himself testified to his anger at Plaintiffs in his deposition. as to his belief that Plaintiffs were making more money than they had told him.

18. DEFENDANT MARIA BENTLEY'S ADDITIONAL DISCOVERY:

None.

19. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S ADDITIONAL DISCOVERY:

The Chrismos Parties have moved to do a second deposition of the Plaintiffs, which is fully briefed and ripe for disposition.

The Plaintiffs have added new allegations in their Statement of Facts that were never disclosed in

discovery, so additional discovery is warranted if the Plaintiff is allowed to pursue these new allegations at trial, including but not limited to these new assertions:

- 'In around March 2005, Hanley came to Plaintiffs and explained to Plaintiffs that they did not have a lease and that Jordan wanted to take over the bar, and he was willing to pay for a lease assignment and inventory and trade name and good will. Hanley told Plaintiffs that to facilitate the smooth transition into Jordan having the restaurant/bar, Chrismos would give Plaintiffs a seven-year lease for the sole purpose of using it to sell and assign the lease to Jordan, and explained how Plaintiffs should value the business as one and a half times the net income and assets, and came up with a figure of around $185,000 as the amount that the rights to the bar and restaurant should be sold for.'
- 'At that time, Hanley gave Plaintiffs a roughed-out lease that was for seven years to review Plaintiffs agreed that Hanley could tell Jordan that they were willing to sell for that price and Hanley told Plaintiffs he would get them such a final lease to sign and to be able to sell in exchange for allowing Jordan to buy them out Plaintiffs gave that roughed out lease to Gerry Groner their attorney who lost it.'
- 'When Mosler found out from Jordan that Plaintiffs had, on Hanley's recommendation, requested $185,000 for Jordan to buy the restaurant, he became furious and assumed, without factual basis, that Plaintiffs were making a lot more at the restaurant than they were claiming, and decided he

would not give Plaintiffs any lease, and he wanted them out immediately '

- 'Hanley then admitted that he had discussed the proposed lease with Mosler, and Mosler said Plaintiffs wanted too much money from Jordan, and he would not give Plaintiffs a lease.'

20. PLAINTIFFS' EXPERT WITNESSES:

None.

21. DEFENDANT MARIA BENTLEY'S ADDITIONAL DISCOVERY:

None.

22. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S EXPERT WITNESSES:

None.

23. PLAINTIFFS' NON EXPERT WITNESSES:

a. Joseph Gerace
b. Victoria Vooys
c. Chris Hanley
d. Roger Morgan
e. Curt Otto
f, G. Hunter Logan, Jr.
g. Gerry Groner
h. Alexandria Myers
i. Custodians of Records of Dr. Merritt.
j. Dr. Carolyn Merritt
k. Christine Flobeck
l. Barris Lambert
m. Mike Belcheff

n. Edwards Gerace
o. Custodian of Records of St. Croix Avis
p. Leslie Morrison
q. Bernard Victor
r. Lloyd Daniel
s. Roger Bressi
t. Brian Updike
u. Steve Nisky
v. Dennis McCormick
w. John Reid
x. Carl Grina
y. Garry Anthony
z. John Woodson
aa. Donna Christiansen
bb. Linda Ayer Holt
cc. Dave Halcome
dd. Robert Jones
ee. Pat Loring

24. DEFENDANT MARIA BENTLEY'S NON-EXPERT WITNESSES:

Maria Bentley reserves the right to call Linda Holt, a witness listed by the Plaintiffs in this filing.

25. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S NON-EXPERT WITNESSES:

a) Warren Mosler
b) Chris Hanley
c) Kerri Hanley
d) G. Hunter Logan
e) James Jordan

f) Chris Howell
g) Hal Rosbach
h) Suzanne Rosbach
i) Jim Jordan
j) Roger Morgan
k) Gerry Groner

26. PLAINTIFFS' SPECIAL PROBLEMS:

Maria Bentley has refused to participate in this matter, and, as such, Plaintiffs will be filing for sanctions of default.

Plaintiffs oppose any attempt to re-depose the Plaintiffs as the Defendants had a full opportunity to depose the Plaintiffs in 2011 and chose not to do so. Defendants are legally barred from asking questions at any subsequent deposition that could have been asked at the first deposition.

The Defendants' claims of supposed new allegations by the Plaintiffs in their Statement of Facts have been known to Defendants for years, and were contained in demand letters to the Defendants, and other communications. Defendants chose not to depose Plaintiffs on those issues and are not entitled to do so now. The witnesses listed by Plaintiffs were either disclosed in their Rule 26 Disclosures or identified in depositions of the parties, and Defendants never made any effort to depose them.

Defendants Chrismos Cane Bay, Warren Mosler and Chris Hanley admitted the following in response to Plaintiffs' allegations:

a) After the Plaintiffs began to operate Cane

Bay Beach Bar they learned that most of the property transferred by Bentley was not owned by her, rather it was indebted, and Bentley had failed to pay monies due on the property. Bentley had written checks for insufficient funds to pay for services or filings, owed for filing, and had Health Department citations that had not been paid and the like;

b) At that meeting, Plaintiffs were told they had no lease or right to pass the property and were told to vacate the premises on or about that date

They have never amended those admissions and Plaintiffs would prejudiced if they were allowed to do so now.

Defendant Maria Bentley admitted Plaintiffs' allegations:

1. She owned the furniture, furnishings, equipment and inventory, good will contracts and tradename Cane Bay Beach Bar, and account receivables.
2. That CB3 was a corporation in good standing.
3. There were no threatened actions affecting the property to be transferred or the validity of the lease.
4. That she had a lease for the premises that was in good standing.
5. That she would supply a Bill of Sale at closing

conveying the property to the Plaintiffs.

6. That at closing she would assign all contracts to Plaintiffs.

7. That she would provide Plaintiffs with an assignment of the lease to the property, approved by the landlord.

8. That at the closing Bentley would assign to Plaintiffs the tradename Cane Bay Beach Bar.

Likewise, Maria Bentley has never amended that answer and Plaintiffs would be prejudiced by any attempt to do so.

27. DEFENDANT MARIA BENTLEY'S SPECIAL PROBLEMS:

I have not refused to participate in this matter. I live off-island and do not have the funds to pay a lawyer. I will be asking the Court to allow me to attend the pretrial by phone or zoom (or other similar method) due to the surge in COVID as well as the substantial travel costs. I will also need as much advance notice as possible of the trial date to make travel plans.

28. DEFENDANTS WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY'S SPECIAL PROBLEMS:

- The Chrismos Parties have moved to do a second deposition of the Plaintiffs, which is fully briefed and ripe for disposition;

- The Chrismos Defendants have filed a motion in

limine to prevent the Plaintiffs from trying to inject racial issues into the trial of this case;

- Depending on what witnesses will testify, there are multiple hearsay issues that may need to be addressed, including but not limited to (1) the Plaintiffs' claims the Gerry Groner spoke to someone about getting a lease from Chrismos prior to the completion of the sale of the restaurant and bar business from CB3; (2) the Plaintiffs' claims that third parties told them that Defendants Mosler and/or Hanley made defamatory statements about them; (3) the Plaintiffs' claims that James Jordan offered them $80,000 to buy their business.
- The Chrismos Defendants reserve the right to use the deposition testimony of either Plaintiff should (1) either one not show up at trial or (2) either one gives testimony at trial that differs from the testimony they gave in their deposition.
- The Plaintiffs have identified multiple witnesses whose contact information has never been produced. The Chrismos Defendants object to the Plaintiff calling any such witnesses, which may be a moot point, as it is doubtful any of these witnesses will actually be called at trial.
- The Chrismos Defendants object to any of the Plaintiff's proposed witnesses testifying at trial beyond what they have said in their respective depositions or what the proffer was as to their expected testimony.
- Aside from normal evidentiary objections, the Chrismos Defendants reserve all rights to object to

any exhibit on the Plaintiffs' proposed exhibit list, as many of the descriptions are not sufficient to identify what the exhibits are or whether they have ever been identified and produced in discovery Indeed the Parties need to exchange the actual exhibits not just the exhibit lists, so the Parties will know exactly what the opposing Parties' exhibits actually are.

- The Court needs to set a deadline for filing any additional motions in limine as well as for filing any special jury instructions.
- Due to travel issues and the ever changing COVID issues, trial video depositions by zoom, as deposition excerpts, may be needed for off-island witnesses or witnesses who cannot attend the trial.
- The Chrismos Defendants will move to amend their Answer, as noted in the section regarding 'Amendments' to the Pleadings.
- The Chrismos Defendants will seek to reopen discovery if the Plaintiffs are allowed to pursue the new allegations set forth in their Statement of Facts.
- This Court needs to address the privilege issues related to Gerry Groner, Plaintiffs' counsel, as the Plaintiffs have listed multiple factual issues that are dependent on his testimony, like (1) his alleged conversations with Hunt Logan before they purchased the restaurant/bar from CB3, (2) his losing the lease given to the Plaintiffs in 2004 by Chrismos that Plaintiffs claim they gave him and (3) his losing a 'roughed-out' lease for seven years

allegedly given by Hanley to Plaintiffs solely to help them sell their business to James Jordan, which they also claim they gave to Attorney Groner, who supposedly lost it as well.

29. ESTIMATED LENGTH OF TRIAL:

Plaintiff: The trial should take five (5) days.

Defendants: The trial should take no more than three (3) days.

CONCLUDING CERTIFICATION

WE HEREBY CERTIFY on this 9th day of August, 2021, by the affixing of our signatures to this Joint Final Pretrial Order that it reflects the efforts of all counsel and Maria Bentley, pro se, that we have carefully and completely reviewed all parts of this order prior to its submission to the Court. Further . it is acknowledged that amendments to this Final Pretrial Order will not be permitted except where the Court determines that manifest injustice would result if the amendment is not allowed.

Attorney for Plaintiffs:
By: /s/ Lee J . Rohn
Lee J Rohn Esquire
VI Bar No 52

By: /s/ Joel Holt
Joel Holt, Esquire
Attorney For: Warren Mosler, Chris Hanley & Chrismos Cane Bay, LLC.

By: /s/ Maria Bentley

Maria Bentley, Pro Se
155 Lakewood Pkwy
Buffalo, NY 14226-4074

Entry of the foregoing Joint Pretrial Order is hereby APPROVED this 12th day of August, 2021.

/s/ Harold W. L. Willocks
Hon. Harold Willocks
Presiding Judge of the Superior Court

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368
Jury Instructions (from trial transcript)

THE COURT: Members of the jury, now that you've heard all of the evidence, I shall instruct you on the law which applies to this case.

Before doing so, I want to thank each you, thank you for your willingness as citizens the community to assist the Court in administering justice. It is not an easy job but it is a solemn one, one which calls for the highest civic response and all of you have responded ln the highest fashion. You have been most cooperative, patient and attentive to these proceedings and have been courteous to counsel and the Court. For this we indeed grateful. Whatever your verdict is, we thank you.

This action arises from defendants' alleged breach of contract with the plaintiff excuse me. Excuse me.

This action arises from defendants' alleged breach of contract with the plaintiffs. The plaintiffs also alleges that the defendants defamed and slandered the plaintiffs. The plaintiffs further alleges defendants made intentional misrepresentations to the plaintiffs and breach of duty of good faith and fair dealing on the plaintiffs in order to induce the plaintiff to act -- to acts. As a result, the plaintiffs allege allegedly suffered emotional distress an damages. Plaintiffs are seeking both compensatory and punitive damages.

Defendants deny these allegations and Defendant Chrismos has filed a counterclaim for unpaid -- unpaid

rent which the plaintiffs have denied.

It is your duty to find the facts from all the evidence in this case. You are also required follow the law as stated in the instructions of the Court and to apply the law as given to the facts you find from all the evidence. The order in which I g1ve these instructions are -- has no significance and is no indication of their relative importance.

You shall consider my instructions as a whole and not pick out any particular instruction and place undue emphasis on it. Each instruction is equally important.

You must follow the law as I give it to you whether you agree with it or not. Any idea you may have had as -- of what the law is or should be or any statement by counsel of what the law may be: must be disregarded by you if those ideas or statements conflict with those -- with these instructions. It would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions.

In deciding the issues presented to you, you must not be persuaded or guided by bias, prejudice or sympathy for or against any of the parties to this case, or by public opinion. You are -- you are to carefully and impartially consider all the evidence, I follow the law as it is now stated to you and reach a just verdict without fear -without fear of, or regard to, the consequences. You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. For the purpose of this litigation, a limited liability company like Chrismos,

LLC is considered to be a person and is entitled to the same fair trial as a private individual. All persons, including corporations, stand equal before the law and are to be treated a equally

A limited liability company must act through people performing as its members, agents or employees. In general, any members, agents or employees of a limited liability company may bind the company by their acts and statements made while acting within the scope of their authority delegated to them by the company or within the scope of their duties for the company.

Any act or omission of a member, employee, or other agent of a limited liability company, in the performance of that person's duty, is considered to be the act or omission of the company. Under your oath as jurors, you're not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial, without regard to the consequences of your decision. You have been chosen to try the issues o fact and reach a verdict on the basis of the evidence or lack of evidence before you. If you let sympathy interfere with your clear thinking, there is a risk that you will not arrive at a just verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair an impartial decision so that you will arrive at a just verdict.

No statement, question, ruling or remark I which I may have made during the trial was intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.

At times I asked questions of witnesses. When I did so, it was to bring out matters which I felt should be brought out and not in any way to indicate my opinion about the facts or to indicate the weight I feel you should give to the testimony of the witness.

In the course of trial, it seems to you I that I am inclined to favor the case of either the plaintiff or the defendants, you must remove any such impression from your minds and not allow yourself to be influenced by any such impression, as none was intended to be created. Remember, at all times, you, as jurors, are the sole judges of the facts of this case and therefore disregard all comments of the Court in this regard but not as to the law.

During the course of this trial, you have seen counsel, both for the plaintiff and the defendants, make various objections to questions asked and evidence offered. It is not only the right, but the duty, of counsel for both sides to make objections when evidence or testimony offered which counsel believes is not admissible under the Rules of Evidence. You should not be influenced against their attorney or the client because the attorney has made an objection. In the Court's rulings during a trial, it is my function to decide the admissibility of the evidence either in or outside of your presence. These rulings involve questions of law, and whatever the rulings may ha e been to any particular instance, you should understand that it was not an expression or opinion by me on the merits of the case one way or the other. Do not attempt to interpret my rulings on objections as somehow indicating to you who I believe should win or lose the case.

Nor should you give any consideration to the testimony to that testimony or evidence which has been offered but which the Court has ruled is not admissible, nor to the -- to any statement made by counsel incorporated in a question asked of a witness. Evidence of facts come from the witnesses' testimony and not from the statement made by or questions asked by counsel. witness that is the evidence. It is the answer of the witness that is the evidence. Nor should you consider any evidence which has been stricken from the record by order of the Court and which you are instructed to disregard.

You may consider only the evidence admitted in this case. The evidence in this case always consists of the sworn testimony of the witnesses, regardless of who called them; all exhibits received in evidence, regardless of who produced them; and all the facts which have been admitted, stipulated to or by -- or judicially noticed.

The following items are not evidence an must be completely disregarded unless you have been otherwise instructed. The pleadings filed in this case; anything you may have seen or heard outside the courtroom; and questions, objections, statement and arguments of the lawyers. Remember, what the lawyers have said in their opening statements, closing statements and at other times is intended to help you interpret the evidence, but it is not evidence.

Any testimony as to which the Court sustained an objection and any testimony which the Court excluded or that you have been instructed to disregard is not evidence and must not be considered.

When you consider the evidence, you should keep in mind that the law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case or who may have appeared to have some knowledge matters at issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Evidence may be direct or circumstantial. Direct evidence means evidence that directly proves a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence; that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. In their arguments, the attorneys have asked you to infer on the basis of a reason, experience and common sense, from one or more established fact, the existence of some other fact.

I will give you a very simple -- I will give you a simple example. You are sitting in this courtroom and you cannot see outside. Assume that when you came in this morning it was a beautiful, sunny day. Assume also that someone just walked into the room with an umbrella that was wet and a raincoat that was dripping. You could, from such circumstantial evidence, infer that it was now raining outside.

You are to consider both -- both kinds of evidence, direct and circumstantial. The law makes no distinction between direct and circumstantial evidence.

You are to consider only the evidence In this case -- in the case. But in your consideration of the evidence, you

are not limited to the bald statement of the witnesses. In other words, you're not limited to what you see and hear as the witnesses testify. You are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you are permitted to draw, but not required to draw, from the facts which have been established by either direct or circumstantial evidence. In other words, when you consider the evidence, you are not permitted you are not limited solely to what you see and hear as the witness -- the witnesses testify. You are permitted to draw from the facts which you find have been proved, such reasonable inferences you feel are justified in light of your experience and common sense.

As the sole judges of the facts, you must determine the credibility of the witnesses. In doing so, you must decide which testimony to believe and which testimony not to believe. You may decide to believe all of the witness' testimony or only a portion of it or none of it. Stated otherwise, you may disbelieve all or any part of any witness' testimony. In making that decision, you may take into account a number of factors including the following: How good was the witness' ability to see or hear or know the things about which that witness

testified? How well could the witness reason and understand what he/she observed and testified about? How mature was the witness and what kind of judgment did he or she show? How well was the witness able to recall and describe those things? What was the I witness' appearance, manner and demeanor while testifying? Did the witness have an interest in the outcome of the case or any bias or prejudice concerning any party or any matter involved in the case? How reasonable was the witness' testimony considered in light of all the evidence in the case? Was the witness' testimony contradicted by what the witness has said or done at another time or by their testimony of other witnesses or by other evidence? Did the witness testify with intent to deceive you? And finally, you may also take into account any and all other matters in evidence which serve to highlight the witness' testimony to you. Inconsistencies or discrepancies in the testimony of a witness or among the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons looking at an event or a transaction may see or hear it differently. Innocent misrecollection, like failure to recollect, is not an uncommon exper1ence. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment concerning the believability of any witness, you will give the testimony of each witness such weight or importance, if any, that you may think it deserves. You may accept

or reject the testimony of any witness in whole or in part. The weight of the evidence is not necessarily determined by the number of witnesses I testifying to the existence or nonexistence of any fact. You may find that testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy. The testimony of a single witness which produces in your minds -- in your minds belief in the likelihood of truth is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater beliefs in the accuracy and reliability of the one witness.

During the trial of this case, certain testimony has been presented to you by way of deposition consisting of sworn, recorded answers to questions asked of the witness in advance of the trial by one or more attorneys for the parties to the case. The testimony of a witness who for some reason cannot be present to testify from the witness stand and may be presented in writing under oath. Such testimony is entitled to the same consideration and is to be judged as to the credibility and weighed and otherwise considered by the jury insofar as possible in the same way as if the witness has been present and testified from the witness stand. Your verdict must be based solely upon

the evidence developed at this trial. It would be improper for you to consider any personal feelings you may have about the race, religion, national origin, sex or age of the parties or their attorneys. It would be equally improper for you to allow any feelings that you may have about the nature of the claim against the defendant to influence you in any way.

The parties in this case are entitled to a trial free from prejudice. Our judicial system cannot work unless you reach your verdict through fair and impartial consideration of the evidence. You are further instructed that if any you have formed any opinion in this case based in whole or in part on any source, seen or heard, other than the evidence which has been offered in this courtroom during the course of this trial, you are to put such opinion out of your mind. You are to reach your verdict solely in accordance with these instructions and with the evidence before you and the reasonable inferences, which in the exercise of your sound, conscientious discretion, may be drawn from them.

Justice, through trial by jury, ladies and gentleman, must always depend upon the willingness of each individual juror to find the true facts by the same evidence presented to all the jurors and arrive at a verdict by applying the same rules of law being instructed in this case. The burden of proof is on the plaintiff in a civil action, such as this -- such as this one, o prove each -- to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiffs' claim by a preponderance of the evidence

in the case, the jury should find for defendant as to that claim. To establish by a preponderance of the evidence means to prove that something is more likely so than not -- than not so. In other words, a preponderance of the evidence means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind a belief that what is sought to be proved is more likely to be true than not true. In determining whether plaintiffs have met their burden, you cannot rely on guess, speculation or conjecture.

This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. If, after considering all of the testimony, you are satisfied that a party has carried its burden on each essential point as to which it has the burden of proof, then you should find for the party on its claims. If, after such consideration, you find that a party has failed to sustain its burden, then you must find for the other party.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the I witness testified falsely about some important fact or whether there was evidence that some other time the witness said or did something or failed to say or do something that was different from the testimony given at trial.

You should remember that a simple mistake by a witness does not necessarily mean that a witness was not willing (sic) to tell the truth. People may tend to forget some things or remember other things inaccurately. If a witness has made misstatement, you

must consider whether it was simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it concerns an important fact or an unimportant detail. A witness may be discredited or impeached by contradictory evidence by showing that he or she testified falsely concerning a material matter or the evidence that at some other time a witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, then it is in your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust that witness' testimony in other particulars and you may reject all of the testimony of that witness on the theory of false one, false in all.

Members of the jury, I will now explain the elements for the allegations or claims that each party has raised in this case.

The plaintiff has alleged that the Defendant Chrismos through its authorized -- through its authorized representatives have breached their con- -- their contract with the plaintiffs.

A contract is defined as a promise or series of promises for the -- for the breach of which the law gives a remedy or the performance of which the law ln some way recognizes a duty. A promise may e stated in words, either oral or written, or may be inferred wholly or partly from conduct.

A breach of contract is defined as simply a nonperformance of any contractual duty to perform.

To find -- to find for the plaintiff, you must find that the plaintiffs have proven each and every one of these elements by a preponderance of the evidence. If you find that the plaintiff has not proven each and every one of these elements, you must find for Defendant Chrismos.

These elements are, one, that Chrismos made a promise to the plaintiffs; and, two, that plaintiffs relied upon the promise to their detriment; and, three, that Chrismos failed to its promise to the plaintiffs; and, four, that the plaintiffs suffered specific economic loss.

Intentional misrepresentation. For the plaintiff to prevail on the allegation of intentional misrepresentation, the plaintiff must prove each and every element below by a preponderance of the evidence. One, that the defendants intentionally misrepresented a material fact, opinion, intention or law to the plaintiffs; and, two, that the defendant either knew or had reason to know the intentional misrepresentation s false; and, three, that intentional misrepresentation was made for the purpose of inducing the plaintiff to act or refrain from acting; and, four, that the plaintiff relied on th intentional misrepresentation; and, five, that the, plaintiff suffered a pecuniary loss from the intentional misrepresentation.

Pecuniary loss as it relates to this case means any damage that can be measured or calculated monetarily.

Duty of good faith and fair dealing. The plaintiffs have alleged the defendant violated a duty of good faith and fair dealing with the plaintiff -- with the defendant. Excuse me. I'm sorry. Let me read that over again, please.

The plaintiffs have alleged the defendant violated a duty of good faith and fair dealing in their dealing with the plaintiffs. A breach of contract can include a breach of -- a breach of the duty of good faith and fair dealing. This duty is implied. The duty of good faith and fair dealing is limited by the original bargain. It prevents a party's acts or omissions that are inconsistent with the contract purpose and deprive the other party of the contemplated value and reasonable expectations.

For the plaintiff to prove their allegation of breach of the duty of good faith and dealing, each of the elements below must be proven by a preponderance of the evidence. One, that a contract existed; and, two, that during the performance of the contract, the defendant engaged in conduct that was fraudulent, deceitful or otherwise inconsistent with the purpose of the agreement; and, three, that the plaintiff suffered economic damages as a result of defendants' conduct.

A notice to quit or notice to terminate a tenancy shall be in writing and shall be served upon the tenant or person in possession by being delivered to him or left at the premises in case of his absence from the premises.

The law of the Virgin Islands establishes that a month-to-month lease can only be terminated upon the service of a 30-day notice to terminate. The plaintiffs have alleged that the defendants have defamed them.

I shall now provide some definitions to help you in your analysis.

Defamation per se. Defamation per se is a disparaging remark that tends to harm someone in his or her business or profession is actionable in regardless of harm.

Publication. Publication means the communication intentionally or by negligent act to someone other than the person defamed.

Statement. A statement of communication 1s defamatory if it tends to harm the reputation of another as to lower him or her in the estimation of the community or to deter a third person from associating or dealing with him or her.

Slander is the publication of defamatory matter by spoken words.

Fault. Fault means to at least negligence on the part of the publisher.

Nominal damages are a trivial sum of money awarded to a party who has established a cause of action that has not estab- -- but has not established that he is entitled to compensatory damages.

Proof of defamation. To prove that the allegation or charge of defamation, the plaintiff must prove all of the following elements by a preponderance of the evidence. One, that the defendant made false and defamatory statements concerning the plaintiffs; two, that a publication was to a third party; and, three, that there was fault amounting to at least negligence or -- on the part of the publisher. Excuse me. And, four, that there

is either -- that there either accountability of the statement irrespective of special harm or the existence of -- or the existence of special harm caused by the publication.

To be defamatory, it's not necessary that the communication actually causes harm to another's reputation or deters a third person of association -- associating with him or her. It is enough if the communication tends to have that effect.

It is not necessary that a defamatory communication prejudices a person in the eyes of everyone in the community or even in the eyes of a majority of the community. It is enough that a communication would tend to prejudice him or her in the eyes of a substantial and respectable minority of the community.

The Court instructs you that neither liability nor damages is to be presumed by you but that a finding of liability or of damages must be supported by competent evidence. As to damages, you are instructed that damages cannot be presumed. But in order to find that there are damages, the party must prove it by competent evidence. The fact that something happened does not, standing alone, prove damages. Further, you should not consider the that the Court has instructed you relative to damages as meaning the Court means to -- means express an opinion on the point of liability.

The definition of special harm is the of something having economic or pecuniary value caused by the defamation. It is an element of defamation and it must be established by a preponderance of the evidence. Only after that liability does the assessment of actual

damages become relevant.

If, after considering all the evidence, you find that the plaintiff has proved their claims against the defendant by a preponderance of the evidence, then you must determine the damage to which the plaintiff is entitled to. You should not interpret the fact that I am giving you instructions about damages as an indication in any way that I believe that the plaintiff should or should not win his or her case. You must decide whether liability exists on the part of each party before you proceed to determine the issue of damages.

Compensatory damages are sums of money awarded to an injured party to compensate his or her loss. In awarding compensatory damages, if you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require plaintiff to prove the amount of his or her losses with mathematical precision but only as much definiteness and accuracy as the circumstances permit.

If you find, after considering all the evidence presented, that defendant was negligent but the plaintiff suffered no injury as a result of negligence, you may award the plaintiff nominal damages. Nominal damages are awarded as recognition that a plaintiff's rights have been violated. You would award nominal damages if you conclude that the only injury that the plaintiffs suffered were the deprivation of their rights without any resulting physical, emotional or financial damage.

You may also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing.

You may not award both nominal and compensatory damages to plaintiffs. Either you are measurably injured, in which case you must award compensatory damages, or else they were not, ln which case you may award nominal damages. Nominal damages may not be awarded for more than a token sum.

In the event that your verdict is for the plaintiffs, you may award that party only such damages as will fairly and reasonably complete compensate them for the injuries resulting from the occurrence in question. The proper amount of damages is again to be determined from the preponderance of all evidence in the case and the burden of proof is still on the plaintiff to show how much he or she is entitled to recover.

In arriving at the amount of damages, the jury is not entitled to guess or speculate or indulge in conjecture. If the plaintiffs fails to prove by a preponderance of the evidence the amount of his or her damages, if any, then no damage should be allowed and you should return a verdict in favor of the other party.

I remind you, however, that if you find for the plaintiffs and decide to compensate them for pain and suffering, mental anguish and loss of the enjoyment of life, then no evidence of the value of such intangible injuries has been or need be introduced. In that respect, it is not the value you are trying to determine, but an amount that

will fairly compensate the plaintiffs for the injuries they have suffered. There is no exact standard for fixing the compensation to be awarded on account of these latter injuries and any such award should be fair and just in light of the evidence.

Punitive damages are awarded in case of serious or malicious wrongdoing to punish or deter the wrongdoer from behaving similarly. Punitive damages must be based upon conduct that is not -that is not just negligent but shows, at a minimum, reckless indifference to the person injured.

Punitive damages are not a separate cause of action but is a claim incidental to another cause of action. Punitive damages must be proven by clear and convincing evidence.

The clear and convincing evidence standard requires evidence sufficient to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts 1n 1ssue, although it is not necessary that the evidence be uncontradicted, provided it carries conviction to the minds or carries a clear conviction of its truth.

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are g1ven for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in this case in accordance with the other instructions.

The Defendant Chrismos, LLC has alleged in their

counterclaim against the plaintiff for back rent in the amount of $1,500.

For the Defendant Chrismos, LLC to prevail on their charge, Chrismos, LLC must be shown must show by a preponderance of the evidence each of the following elements. One, that the plaintiffs were tenants of Chrismos; and, two, that the rent was due; and, three, the amount of the rent due; and, four, that the plaintiffs failed to pay the amount of rent due.

You should remember that in reaching your verdict in this case, the issues which you will have to determine are as follows: Did plaintiff breach a contract with plaintiffs? Did defendants' actions

[colloquy]

THE COURT: I'm sorry. Let me repeat that again, please. I'll start over again.

You should remember that in reaching your verdict in this case, the issues which you will have to determine are as follows.

Did defendants breach a contract with plaintiffs?

Did defendants' actions constitute intentional misrepresentation?

Did defendants engage in defamation, slander or defamation per se?

Did defendants violate their duty of good faith and fair dealing?

If the defendants are liable for plaintiffs' damages, were defendants' actions so outrageous as to entitle the

plaintiffs to an award of punitive damages?

Did plaintiff owe back rent to defendants? When you retire to the jury room, you will first select one of your members as a foreperson who will preside over your deliberations and will speak for the jury in court. Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions. Nothing in these instructions or verdict forms prepared for your verdict is to be taken as an indication that I have any opinion about the facts of the case. It is not my function to determine the facts but rather yours.

Should it become necessary during your deliberations to communicate with the Court, you may do so but only in writing. Under no circumstances should any of you attempt to communicate with the Court during deliberations by any means other than in writing. The foreperson or any member of the jury who wishes to communicate with the Court should write the message, sign it and date it and send it out with the marshal. I will respond either in writing or bring you out -- bring you back into the courtroom and respond orally.

The marshal and all other persons are strictly forbidden from communicating with any of you about any matter that concern the merits of this case. Bear in mind that you are also -- you are also never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise until you have reached a verdict.

Justice through trial by jury always depends upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all

and to arrive at a verdict by applying the same rules of law g1ven 1n the instructions of the Court.

You will be given a form for your verdict 1n this case. After you reach your verdict, the foreperson is to fill out -- fill in the answers to the questions on the form and each member of the jury must sign the verdict upon -- upon which you agree.

It is a very simple form and I shall read it Remember --

[colloquy]

THE COURT: I'm sorry, ladies and gentleman.

Remember, the verdict must represent the considered judgement of each juror. In order to --

[colloquy]

Remember, the verdict must represent the considered judgement of each juror. In order to return a verdict under Virgin Islands law, a unanimous verdict is not required in a civil case such as this, but only five of the six jurors must agree and sign the verdict form. In order to return a verdict, all of you -- excuse me -- your agreement upon -- just a second, please.

Your deliberations will be secret and you will never have to explain your verdict to anyone. It is your duty as jurors to consult one another and to deliberate with a view at reaching a verdict -- reaching an agreement if you can do so without violence to individual judgment. You must each decide the case for yourself but only after an impartial consideration of the evidence in the case with your fellow jurors. In the

course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it 1s erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth about -your sole interest is to seek the truth from the evidence in this case.

Ladies and gentleman of the jury, I'm go1ng to take a brief five-minute recess. When we return, I'm going to go over the verdict form.

[colloquy]

Ladies and gentleman of the jury, I will now read the jury verdict form. You have seen parts of it during the closing by counsels. read the entire document.

The jury form reads as follows: We, the jury, impaneled and sworn to determine the issue in this case, do render the follow verdict: Question Number 1: Do you find that Chrismos had an agreement with the plaintiffs and do you find that Chrismos breached that agreement by not giving them a lease? The answer would be either yes or no. If you answered yes to Question Number 1, go to Question Number 2. If you answered no to Question Number 1, still go to Question Number 2.

Question Number 2: Do you find that one or more of the defendants have intentionally made -have made intentional misrepresentations plaintiffs? excuse me --

to the Answer yes. Answer no. You fill ln either one that you have determined. If you have answered yes to Question Number 2, go to Question Number 3. If you've answered no to Question Number 2, go to Question Number 4.

Question Number 3: Which of the following do you find made intentional misrepresentations to the plaintiffs? Check all that apply. Chrismos Cane Bay, LLC. Warren Mosler. Chris Hanley. You may check whichever one that you have made a determination on. Go to Question Number 4.

Do you find that one or more of the defendants breached their duty of good faith and fair dealing to the plaintiffs? Again, space for yes, space for no. You decide which one that you have -which one that you wish. If you answered yes to Question Number 4, go to Question Number 5. If you answered no to Question Number 4, but yes to Question Number 1 or 2, go to Question Number 6. If you answered no to Questions 1 or 2 or 4, go to Question Number 7.

Question Number 5: Which of the following do you find breached their duty of good faith and fair dealings with the plaintiff? Check all that apply. Chrismos Cane Bay, LLC. Warren Mosler. Chris Hanley. If you checked one or more of the boxes answered -- if you checked one or more of the boxes and answered yes to Question 1 or 2 or 4, go to Question Number 6. If not, go to Question Number 7.

Question Number 6: What amount of money do you award to plaintiffs as a result of breach of contract or intentional misrepresentation, breach of good faith and

fair dealing? There is a spot with a dollar sign that you may put in whatever amount that you have deemed appropriate, if any. Go to Question Number 7.

Question Number 7: Do you find that one of -- one or more of the defendants defamed Plaintiff Joseph Gerace -- Gerace? Excuse me. Space, yes. Space, no. If you answered yes to Question Number 7, go to Question Number 8. If you answered no to Question Number 7, go to Question Number 10.

Question Number 8: Which of the following do you find defamed the Plaintiff Joseph Gerace? Check all that apply. Space for Chrismos Cane Bay, LLC. Space for Warren Mosler. Space for Chris Hanley. If you checked one or more of the boxes, go to Question Number 9.

Question Number 9: What is the amount of damages to Plaintiff Joseph Gerace caused by the defamation, as to each person you found defamed him? Space for -- dollar sign, space for Chrismos Cane Bay, LLC. Dollar sign, space for Warren Mosler. Dollar sign, space for Chris Hanley. Go to Question Number 10. Do you find that one or more of the defendants defamed Victoria Vooys? Space, yes. Space, no. If you answered yes to Question Number 10, go to Question Number 11. If you answered no to Question Number 10, but yes to Question Number 1 or 2 or 4 or 7, go to Question Number 13.

Question Number 11: Which of the following do you find defamed the Plaintiff Victoria Vooys? Check all that apply. Space, Chrismos Cane Bay, LLC. Space, Warren Mosler. Space, Chris Hanley. If you checked one or more boxes, go to Question Number 12. If not, go

to Question Number 13.

Question Number 12: What is the amount of damages to Plaintiff Victoria Vooys created (sic) by the defamation as to each defendant? Space, Chrismos Cane Bay. Space, Warren Mosler. Space, Chris Hanley. Do not answer these questions unless you have answered yes to Questions Number 2, 7 or 11.

Question Number 13: Do you find that one or more defendants acted with reckless disregard for the rights of the plaintiffs as to entitle them to an award of punitive damages? Space, yes. Space, no. If you answered yes to Question Number 13, go to Question Number 14. Question Number 16. If you answered no, go to

Question Number 14: Check as to which each defendant you find acted with reckless disregard for the rights of the plaintiffs such as to entitle them to an award of punitive damage damages? Excuse me. Check all that apply. Space, Chrismos Cane Bay, LLC. Space, Warren Mosler. Space, Chris Hanley. Go to Question Number 15.

Question Number 15: What is the amount of damages to Plaintiff Victoria Vooys Vooys -- excuse me -- caused by the reckless disregard as to each defendant? Space, Chrismos Cane Bay, LLC. Space, Warren Mosler. Space, Chris Hanley.

Question Number 16: Do you find that plaintiffs owe rent to Chrismos, LLC? Check one. Space, yes. Space, no.

Question Number 17: If you answered yes to Question

Number 17, what a- --what amount of rent do you find that the plaintiff owes Chrismos, LLC? There's a dollar sign and a space.

At the bottom of it, you will see to sign the jury verdict form and return to the courtroom. At the bottom of each -- there will be six lines well, there will be a number of lines for you to sign. Each one of you have to sign it and have it dated March and put the date at the bottom.

THE COURT: All right. Ladies and gentleman, I think that -- it is now 4:19. I think it would be a good time for us to break. When you return tomorrow, you'll be going straight into the jury room and you will have your exhibits along with the copy of the final jury instructions and the verdict form.

[End of Jury Instructions]

PLAINTIFFS' CLOSING ARGUMENT

MS. ROHN: Good morning.

THE JURY: Good morning.

MS. ROHN: We're finally at the end. I thank you on behalf of my team and myself for your attention and your putting up with long periods of time when there was not much happening. It is a civic juror -- duty to be a juror and we thank you. It's the necessity in our civilization that if we can't resolve disputes that this is the way we do so in an orderly fashion.

So I and initially there were opening arguments, and as some of you may have observed, I was writing down what the defendants' opening arguments were. And I submit to you that the defendant said to you in opening: I intend to prove these things and if I don't, you hold me to it.

And there were certain things that the defendant in his opening claimed the defendants were going to prove. The first one was that my clients were difficult tenants, they made no improvements to the restaurant and bar, and they didn't do anything to improve the property. I don't believe that they proved that to you.

In fact, the evidence is very clear that my clients were good tenants, they improved the bar, they improved -- made the improvements, they increased the clientele, they made it a popular place to go among the residents of the Virgin Islands, included -- made it a more diverse place to go. Both -- Mr. Belcheff helped in the improvements and he testified. Mr. Woodson testified as to the improvements and Mr. Gary Anthony

testified as to the improvements as did my clients. So there was overwhelming evidence that during the first six months of the tenancy that my clients made significant improvements. In fact, the improvements were in the range of $30,000.

The other evidence that the defendant intended to state they would prove was that my clients owed the Bentleys and therefore they -- that was one of the impediments to resolving the ultima t.c0 paying them off to leave the bar. And other than an email from Mr. Bentley, who says, I think this is why they're not doing something, there is no evidence of that. Miss Bentley didn't come in. Mr. Joe Gerace denied that. And in fact, a melee, I hear dis is true, is not evidence in this case. So they didn't prove that to you.

And they also -- the defendants opening also said that on March 31st, 2005 everything went haywire and people were calling on Roger Morgan, the plaintiffs called into the show. That's not really true. March 31st, 2005 is when my clients were told to get out of the restaurant. And then the evidence is that indeed Mr. Hanley and Mr. Mosler went on the Roger Morgan show, but Mr. Gerace was very clear, I didn't go on the show. They called me when I was at the bar and I answered questions.

So it wasn't my clients who instigated that. The evidence is, from the cross-examination of Mr. Hanley, that indeed it was they who were going on the Roger Morgan show. And all of that happened after the March 31st, 2005 meeting.

Then he said -- the defendant said they would prove to

you that because my clients didn't like them, this is what I'm going to give you to go away, that they took things out of the bar and restaurant. And the evidence is overwhelming that that's not true. We brought you John Reed, who was the bartender both during my clients' tenure and Mr. Jordan's tenure, and he was very clear, they did not remove anything in the bar and restaurant. We brought our clients to you who testified, we didn't remove anything from the bar and restaurant and in fact we had no place to put anything from the bar and restaurant and we left everything there. And we also gave you Mr. Woodson who testified that the bar and restaurant appeared the same both before and after. So they did not prove that as well.

They also said that they would prove that -- in fact, the only evidence that things were taken out of the restaurant was because Mr. Jordan went by when it was closed and all the wooden flaps were closed so he couldn't see in the restaurant and assumed that they had abandoned the premises and took the items with them. That was just an assumption. It_ wasn't a true assumption. It was just more of the melee of making false accusations against my clients.

And the final thing -- well, there's two more things. They said that they-- Jordan was given two months free rent because Jordan was going to fix the roof and the electrical. The evidence is clear that Jordan did not fix either the roof or the electrical. Mr. Mosler paid for both the roof and the electrical. And, finally-- well, next to finally, they claimed and this is the most egregious. They claimed that Hal Rosbach would come in and testify that Joe Gerace threatened to burn down the

bar.

MR. HOLT: I didn't say that.

MS. ROHN: That testimony never came in. He never said that. That's not true. So -- and then the last thing they said is they still owe one month's rent. However, the evidence is pretty clear they don't owe any rent and they haven't owed any rent. They even paid clear through June of 2005. And Mr. Hanley admitted, when he was cross-examined, that under oath that as of April of 2005, they were up to date on their rent. And then we produced the checks for May and June and nobody disputes those checks.

So in reality, there's this thing about, well, 17 years later, there's some deductions that we didn't complain about at the time, but now we want to claim that because 17 years later nobody has the bills, even though we accepted the deductions in 2005, you should reverse that acceptance and find that there's money owed. That's not right because they accepted those checks. They testified under oath that as of April of 2005 my clients were up to date on the rent, that my clients were up to date on the rent in March of 2005.

So there has been, throughout the dealings between my clients and Mr. Mosler and Mr. Hanley, an attempt to cast my client in a bad light my clients in bad lights, repeatedly. When my clients were really just two young adults out of culinary school trying to open a restaurant and trying to do the best they could. And one of them was 25 and one of them was 30 and they fell in love with the site and they came down here, moved everything they owned down here and became

Virgin Islanders, Crucians, and opened up a great restaurant and bar. It was very popular, with great diversity.

The evidence we believe shows that while my clients purchased the property in August -- well, actually, didn't purchase the property, purchased the right to go into the bar, that prior to the purchase by Mr. Mosler of the property, the million-dollar property itself, that Mosler knew, was informed by letter, which you will see in the jury room, that -- knew that there were new tenants in the restaurant and went -- he and Mr. Hanley went to them personally and spoke to them and said, you know, we're taking over the bar and restaurant and, yes, we want you to stay, we want somebody in here and, yes, it's perfectly fine if you're here. And then they purchased the property on September 3rd, 2003.

So my clients, as the evidence shows from their testimony, were on the fence because they didn't want to put a whole lot of money and time and energy into a restaurant if they didn't have a lease because they could very easily lose all that money and time and energy. And so early on, they had a discussion with Mr. Mosler that said, you know, we're thinking about, you know, trying to cut our losses here and we might have to just pick up and go. And he's like, no, I need somebody in this restaurant. Well, but then you have to agree that you're going to give us a seven-year lease. And he says, I will, but you have to show me that you're really committed to the restaurant and bar and you're going to make certain improvements, and there was a listing of what they were, and if you do that,

we'll give you a seven-year lease.

So we know from the testimony, not just from my clients who testified about the improvements and repairs, but also from Mr. Belcheff that came in and actually physically himself did some of the improvements, Mr. Reed who personally did the improvements and the repairs, that those improvements and repairs were completed, took them about six months. That would have been 'til June, around June of 2005.

And we know that in March 2004, which is about six months, they're handed a lease that is nothing what had been discussed. It's for two and a half years. They have to make all the repairs. They've got a leaking roof. They've got a building that Mr. Mosler and Mr. Hanley described as in shambles. And this is not what's being agreed to. And so they decline to agree to that lease.

Now, the evidence will show, first of all, on cross-examination from Mr. -- there we go, I'm getting the hang of this -- cross-examination of Mr. Hanley, I asked him, well, did they have any input whatsoever, or any negotiating power whatsoever, in the contents of the proposed lease? And the answer was, no, I don't recall that they did. So then Mr. -- then the defendants' position is, well, but they never got back to us, they never said anything about the lease. That's not the testimony of my client. My clients say, we went to them, we told them what was wrong with this lease. They told us, that's a form from our lawyer, we'll get back to you. And so the defendants' position was they never got back to them. But in the cross-examination

of Mr. Hanley, I cross-examined him on his prior testimony and I asked him:

Okay. And what was the response to that lease from my clients?

Answer, I guess they never signed it so I guess they rejected it. remember a response. I don't know. I don't

Question, Did you ever have any communications with them as to their signing or not signing that particular lease?

I don't recall.

Then: Did you ever -- did they ever indicate to you that there were other terms of the lease submitted to them that they just couldn't live with?

They very well may have. I just don't remember.

So clearly the testimony of my client, who does remember, clients, is that they did indeed have a conversation and say, this is not what you promised, these are the changes that need to occur.

So -- and we know that the -- my clients -- my clients did a lot of improvements and changes and he -- and they did full moon reggae parties and they did Two for Tuesdays and they did karaoke and they really became part of the community and the crowd and in the restaurant and bar changed, quite frankly. It changed over from predominantly people who live in La Vallee and close to the restaurant and bar to a diverse population of Hispanics and Puerto Ricans and down island, West Indians and local black clientele. In fact, I think Mr. Woodson said it was about 95 percent black

and Mr. Mosler didn't like that. And so we know that Mr. Mosler was unhappy and was looking for someone else to take over the restaurant and bar.

And so at that point, there's a fire. And unfortunately, there's a fire in the kitchen in August of 2004. The hood and the exhaust system was too small for the size of the kitchen, the way the restaurant came to them, and they have to close down for two months and make repairs. And the evidence is those repairs were about $20,000. And they were worried about the fact that they weren't getting any income in and they were making all this money on the repairs, had to borrow money from the family, $41,000 to help make those repairs and keep going and keep paying -- they were paying their help. You heard from Johnny Reed, no, they paid me during this time. They were paying people while they were closed. And they went to Mr. Hanley and said, we're worried about this, we're not going to be able to make rent. And the answer was, don't worry about it, we just want to see this place fixed and up and running and we don't really care about the rent as much as we do getting this restaurant back open. And so they were -- they did become behind on their rent.

And then we know that in January, late January, early February, Mr. Jordan comes to St. Croix on his yacht and he hires Hanley as his realtor and he meets Mr. Mosler at a party full of hedge fund people and they get to talking and he finds out that there's a restaurant and bar and he says, oh, I'm interested in that. And we know that this conversation occurred before -- in February. And we know that from the testimony of Mr.

Hanley on cross-examination:

How did you, Mr. Hanley, first come to meet Mr. Jordan?

Answer, He came to me. He had investors in real estate looking to invest in real estate here and I was his realtor.

And we also know from the cross-examination that I had of Mr. Mosler, when he was asked:

When did this meeting with Mr. Jordan take place?

Sometime before I discussed the meeting I had with Joe and Vicki at Cane Bay, maybe a month before or two weeks before. Well, if that was March 2005, late March, this would have been early March or a week or two sooner.

So indeed, sworn testimony of Mr. Mosler sometime in February, he sits down with Mr. Jordan and he decides that he would -- and well, let me go to this first.

And also from Mr. Hanley's cross-examination:

Did you ever have any conversation with Mr. Jordan concerning why he wanted to purchase or operate a bar in St. Croix?

Sorry.

He was looking for investments, so whether I mentioned to him there was an opportunity, I don't know. It's possible it came up in a conversation.

And then from the testimony of Mr. Hanley again in cross-examination, speaking of Mr. Jordan:

I think he might have actually learned about it through Warren, in discussions with Warren. He met Warren, Paul, Kevin, all those guys that own the marina.

And then there's a question:

And what is it that he may have learned about from Warren or the other gentlemen you named?

I don't know what transpired between them other than that we're looking for a new tenant at Cane Bay and he seemed interested in a business.

So in February, Mr. Mosler, Mr. Hanley and then I asked this, on Page 109:

Was the conversation such or was there a communication to the effect that Chrismos and/or you and/or Mr. Mosler were indeed looking for a new tenant to operate the Cane Bay Beach Bar? There may have been between them, yes. So in February, Mosler and Hanley -- or at least Mosler decides that they no longer want to do business with my clients, they don't like the clientele, and so they talk to Mr. Jordan, are you -- can we convince you to come in? He says, oh, yes, I've always wanted a restaurant and bar in the Caribbean.

And then shortly after that, in early March, there is a communication between Mr. Mosler and my clients by phone in which he calls them and tells them, you know, I'm not interested in the way that this restaurant and bar is turning out. I don't like the crowd. I really envision more a white, middle-class restaurant and bar and this is not working out.

My clients are stunned. They call Mr. Hanley. Mr. Hanley says, well, Mosler does have a new acquaintance he wants to move into this restaurant and bar.

And that is culminated by a meeting that occurs on March 31st, 2005, in which Mosler and Hanley come to the restaurant and bar and meet with Vicki -- I'm sorry Victoria and Joe Gerace. And they, contrary to the claim that they came and my clients were like, yahoo, let's sell, they came to kick my clients out, despite all the promises that had been made about a seven-year lease and all the money they put into the restaurant and all the profits that they fell back into the restaurant, all of those promises. And that's a contract. When someone says to you, if you do this, I'll do this, and you do this, they have to do that, that's a contract. That's a promise. You make a promise. You have to fulfill that promise.

So they decide to breach that contract and throw my clients to the side because they got somebody who is going to turn this into a white, middle-class restaurant. And so they come and come to this meeting. And the truth of the matter as I cross-examined Mr. Hanley, in his deposition:

All right. What happened at the meeting that you had with them, the one that you can recall attending with Mr. Mosler?

We asked them to leave.

That's what they said. They didn't say, my clients didn't say, oh, I got a buyer, can we have a sale? They asked them to leave.

And then cross-examining of Mr. Hanley continues and there's a question:

But the four of you are having a meeting at the table?

Answer, Yes. Well, until they got up and left and wouldn't come back.

And then he acknowledges: They were so upset that they got up and left and obviously were very mad.

And he's asked:

What were you trying to work out with them? And that's about leaving the bar.

And he says: I don't know. You know, at least finish the conversation and let them know, you know, that what was going to happen was our decision.

And then he's asked:

Did Mr. Mosler ever tell them anything to the effect that they needed to get her exit plan in order?

And the answer is:

Exit strategy, I believe it was.

So of course Victoria and Joe were devastated and they had just no clue what they were going to do because everything -- I mean they put everything in this restaurant and bar. And they had their dreams into this restaurant and bar, they built this community. And so by the time this meeting occurred, on March 31st, 2005, my clients had indeed worked hard and paid all of the back rent. They paid the first check in December and then another check I believe in January. You'll have the checks. And then on March, early

March, they paid the March rent and they were up to date. So they really worked hard to be good tenants and pay the rent and be good. And they were.

So the statement that says that they kicked them out -- they have two things. I didn't kick them out but if I did that's because they were behind on their rent. Mr. Hanley, in his testimony, claims, first of all, that my clients never paid rent on time ever, not from October, November, December, January, February. You will see the checks. My clients paid those rents on time or every month at that end point.

So -- so then instead of owning up to the fact that they want a change and their these decisions are made because, after all, they own this restaurant and bar and they want the kind of people that they like to hang out with at that restaurant and bar. So instead of that, they go on the radio and claim that my clients never paid the rent on time, are behind -- drastically behind in their rent, haven't paid rent for months. And they pretty much call my clients deadbeats on the radio, a lot. And they also defamed them as to how the restaurant looks. They claim that they've got dogs living in the restaurant, that the restaurant's filthy, bathrooms are dirty. And of course people hearing that are less likely to go to your restaurant after hearing all that. And that's what happened. They had a real downfall on who was coming to the restaurant.

And so we brought you Donna Christensen, John Woodson, Mr. Reed, my own clients, who all testified that's not true. That was they kept that restaurant shipshape. Victoria said, not on my watch we don't have a dirty bathroom. Not me. And John Reed talked

about how they're always cleaning. Donna Christensen talked about how nice it was. John Woodson. Mr. Anthony. So there's no evidence that this restaurant was nasty.

Mr. -- Mr. Hanley even went so far as to claim that when you walked up to the restaurant there was sewage. There's no evidence of that. I asked the witness, have you ever seen sewage coming into that restaurant'? No. So they completely defamed my client on the radio.

And at one point, Roger Morgan called at the restaurant and caught Victoria and she went on and tried to clear her name and say, no, we're not behind in the rent, we are paying rent, this is a clean restaurant, and the times that we were late on the rent, we had permission to be late on the rent.

So then the bullying begins. And because they're not going to roll over and play dead, Mr. Mosler's lawyer, Mr. Logan, writes a letter to my client on their behalf and has it served with a marshal -- by a marshal. Now, if you weren't trying to bully somebody and you've been talking to them and you're going to meetings at the restaurant with them, you would do what you always did, send them a letter, send them an email, go by and talk to them. But no, it's time for intimidation. It's time for bullying, because after all, we're the kind of people who can do that. And so they do.

And so you will see and have in the jury room the infamous Exhibit 10: This letter is to confirm the conversations and agreements between you and the owner through Mosler and Hanley that your rights to

occupy and use the Cane Bay Beach Bar shall terminate effective April 30th, 2005.

And then they falsely state:

And you agreed to vacate the premises no later than that date. Landlord accepted agreement.

Now, when I asked Mr. Mosler why that happened, he said, well, I was trying to check the temperature. There was no reason to try to find check the temperature. My clients had gotten up in tears and ran to the back of the restaurant crying. You knew what their temperature was. It was sad. It was astonished. The only reason to write a letter like that is to try to make a false record because we know, from Mr. Hanley's testimony, he had asked them, they had been asked to leave.

So there's only one reason to write a letter like that, to make it look like in the future that there had been an agreement when they knew, absolutely knew there was no such agreement.

So-- and then there's conversations between Mr. Hanley and Joe and Vic in which they say, look, you don't have a lease, we're not going to give you a lease, you're going to go one way or another, but you are going to go. We don't like the restaurant you're running. And he says, you know, we got another guy that's going to come in and we're going to give him the lease and his name is James Jordan. You should negotiate with him to sell your equipment and your fixtures and your stuff and at least get some money out of here because your choices are this, get out with no money or get out with a little money. And so what

person wouldn't say, well, I'd rather have a little than none?

And so there begins, well, Mr. Jordan, then you'll see from the emails, Mr. Jordan this whole time is talking to Mosler. This is what I'm going to do now. This is what I'm going to do now. This is what they're saying. Because this is a group deal. Mosler wants him in and he wants them out and here is my reporting to you about what I'm doing to get them out. So initially they're offered $50,000. And they're not happy with it but they don't really have any choice. And so they are still fighting. I have to say they are still fighting because this isn't right.

And so they hire a lawyer to continue to fight, even while all this is going on. And so we write the letter to Attorney Logan:

I represent the tenants of the Cane Bay Beach Bar, Joe Gerace, and Victoria Vooys, and this is in response to your letter of April 12th.

And received dated April 12th and received some days later. They didn't actually get served with that letter until April 18th.

My clients have never agreed to vacate the premises on April 30th, 2005 and will not do so. It is their position that there was a promise made to them to enter into a two-year that's my mistake; I misunderstood because I had seen one of the leases -- with them and they relied on that promise in expending funds to improve the premises. As you are well aware, self-help is not allowed in this jurisdiction and if you attempt to come in and take my clients' property, I will ask for

sanctions. My clients, in keeping with the promises for a long-term lease, have bookings through May they have to honor. Further, they intend to continue paying rent and occupying the premises. Further, the attempt to evict them will be met with a lawsuit for refusal to provide a lease, slander, defamation and fraud.

So it's clear, my clients are not leaving voluntarily.

And then what happens is Hanley calls my clients and curses them out and threatens them and tells them, I don't care what you or your lawyer says, you will be out of here by April 30th, come hell or high water.

And so, as a result, on April 20th, the same day my other letter went out, I write a letter to Mr. Hanley and Mr. Mosler, Exhibit 15:

My clients have informed me that upon receipt of my letter, you called them and threatened them and told them you would move them out one way or another by April 30th. Please be advised that self-help is illegal in the Virgin Islands and any attempts to touch their property will be illegal and result in criminal charges being filed against you. My clients are not interested in being harassed or threatened by you. As a result, requests that any further conversations be handled through me.

Because they had been so threatened that they don't want to do it anymore. So that goes on and they try to hold on and then there's only so much that can be done. They don't have a lease. They're not going to give them the lease they promised. So eventually they're going to be able to get them out, despite the contract that they had not to do that. And in spite of what we call

intentional misrepresentations. Intentional misrepresentations are you keep making these representations to me that you're going to give me a lease when you aren't and therefore I rely on them and do the improvements, put my soul into it, put my blood, sweat and tears into it, that's an intentional misrepresentation. When you make that representation and you get people to do those sorts of things, then you have to pay damages for that. Because that's not how things work. If you make a representation, you have to live with that representation. And we'll talk a little later about the damages for that.

And then what they did is also what's called a breach of the duty of good faith and fair dealing. And that is, is that when they made the promise to give them the seven-year lease, they had to act in good faith and fair dealing. And acting in good faith and fair dealing is not having them served with -- by a marshal with a letter that falsely claims that they had agreed to get out, try to use illegal self-help to evict them from the premises, threaten them to throw their valuables and their equipment and treat them abandoned if they're still in the premises by April 30th. That is not good faith. That is not the reasonable expectations of the parties when they entered into their agreement that my clients would better the restaurant and they would get a seven-year lease. That is bad faith.

And so you're going to-- eventually we'll get to the jury verdict form. You're going to be asked if the defendants committed those violations and we submit that the evidence is true that they did.

So we know that Mr. Jordan got -- we know that Mr. Jordan negotiated first-- you'll see Exhibit 17, which is an offer for the purchase at $50,000, and then he said, well, they don't have a leg to stand on, I don't have to do that. He falsely claims that the reason he pays them less is because they took equipment, but that's not true. He just was in a better bargaining position.

And then on June 20th, 2005, which is Exhibit 22, he pays a thousand dollars down on the purchase agreement. And we know on June 22nd, 2005, Exhibit 23, Mr. Mosler is given a seven-year with a three-year option to renew lease.

Now, the original two-year paltry lease recommended to my client or given to my client had my client making all the repairs. This lease, not only is this the correct period of time, but it also provides that the repairs, the structural repairs will be done by Mosler and Hanley, that they're going to make the roof repairs, the electrical repairs, and they're going to put a good deal of money into the restaurant. Not while my clients are there but only after the guy with the middle-class restaurant is there.

And so the evidence will show that on July 8th, 2005, Mr. Warren Mosler, care of Chris Hanley, does a deal with Rooftops to fix the roof for $9,800. And originally there's a --whoops, originally, there's an offer to also do the dive shop for $21,000; and though he says no, we know eventually they do pay for the dive shop as well, so they invested about $30,000.

Exhibit 29 there's more roof work done August 17th, 2005, for another -- let's see; there's the date on the top

for another $5,400.

In January, 2006, Mosler pays for the ADA work that's necessary to be legally opened in the restaurant and bar. And Griffin Electric, in September of 2005, does a series of repairs to the electrical starting in August -- starting in July of 2005. This is the August bill and this is the July bill. So a couple thousand dollars repairing the electrical and then doing the ADA.

Now-- and my client gets $30,000, which is not even what they put into the restaurant and bar. And you'll see Exhibit 25 showing that closing statement that occurred on June 30th, 2005, the end of June. And you'll also see the checks. And you also heard that $3,000 was held back in escrow to make sure that all of the bills from them were paid. That would include the rent, anything that they owe to the landlord. And same law firm as Hunt Logan that represents Mosler and Hanley, on October 3rd, 2005, releases the $3,000 because Hanley and Mosler have agreed there is no money owed.

My clients sue Chrismos, Mosler and Hanley. And they, as retaliation, file a counterclaim claiming we owe them money, $1,500. Just to bully them. They know that's not true. It's just to bully them. So my clients have, you know, suffered incredible mental anguish over this, the defamation, the losing their dream, people thinking they're deadbeats, people thinking they don't know how to run a restaurant and bar. So they go home to family to nurse their wounds. And then they come back and they can't go to the north shore they're so upset. They just can't bear to look at the restaurant and bar that was theirs that's not theirs

anymore.

And eventually, after about three months, they try to pick themselves up and they do try to open a new place. And to open a new place we've got to invest the money again. So they've lost their investment in the restaurant and they've lost their reputation.

So you're going to be asked to calculate damages. This decision is completely yours. It's -- I'm allowed to suggest what I think the damages are but the decision is completely yours. So from my calculation of the testimony, I have, as to the breach of the promise, the intentional misrepresentation -- oh, I'm too high, sorry (adjusting Elmo) -- the breach of the duty of good faith. I submit that the evidence supports the damages of $30,000 for improvements and repairs, the $20,000 for rebuilding the kitchen, the blood, sweat and tears and that comes out at $55,000 for rent, the $41,000 they borrowed, money for bands and specials of $100,000. And then had they had a lease, had there been a promise for that maintained, we know from Miss Alex Myers, they could have sold that lease, like Mr. Jordan did, for $125,000. So the failure to give them that lease that was promised, they lost the ability to sell that lease. And so my calculation says that their damages for that breach of contract, intentional misrepresentation, and failure to act in good faith is $275,000.

And one of the ways that we know that there was some talk about the fact that the reason that they didn't want to do business with my clients anymore, even though they denied that they were the ones that asked them to leave, was that they were behind on the rent.

Okay. Well, in June, they weren't -- in March, they weren't behind on the rent. So that's a bogus excuse to begin with.

But we know that when Jordan got another tenant, they let that tenant be not pay rent for over a year and didn't do anything to get rid of that tenant. So the rent issue in this case is bogus. This has nothing to do with rent. This has to do with what kind of restaurant Mr. Mosler wanted to have and what clientele he wanted in his restaurant. Because the only reason that he gave my clients, when he spoke to them, not one time, but two times, as to why he wanted them out was, I would rather have a white, middle-class restaurant. This isn't the type of restaurant I feel comfortable bringing my business clients to. That's the only reason he ever gave them. He didn't mention rent. He didn't mention anything else. He falsely claimed to them they were behind in the rent but they weren't.

So you're going to be asked those questions as damages and then you're going to also be asked questions as to whether or not there was defamation and, if so, who defamed them. I submit every one of them defamed them. Chrismos, Mosler, Hanley, they all defamed them.

And then you're going to be asked as to whether or not my clients were -- that Mr. Mosler and Mr. Hanley and Chrismos acted with a reckless disregard to the rights and interests of my clients. And I submit the evidence is overwhelming that that's exactly what happened. These people, these businessmen thought, well, I can -- I can just do what I want. I don't have to live by my promises. I don't have to live up to my representations.

And not only that, but I can make decisions that are illegal under racism in the Virgin Islands and I can go out and tell them that I don't have to go through the law of the Virgin Islands of how you evict somebody. I can just come tell you, get your heck out and -- by April 30th and then I can threaten you and try to make you do that. That's not acceptable behavior. That's not something that should be allowed. That is reckless disregard for the rights of my clients.

And so you will be asked whether or not to teach them a lesson. Punitive damages should be awarded. And I submit to you, but it's your decision, that the answer to that should be yes. This should not happen to anybody else, that this is not the kind of behavior that people in society should be in.

So this is kind of a rough draft of the jury verdict form because it's not finalized but it's pretty near what it's going to be. And so you're going to get a jury verdict form that asks:

Do you find that Chrismos had an agreement with the plaintiffs and do you find that Chrismos breached that agreement by not giving them a lease?

And of course, we're not talking any lease. We're talking the seven-year lease that they promised. That's what they promised. Not some other lease that nobody had any negotiation and nobody agreed to because nobody would. And we submit that the evidence to that is yes. Then you're going to be asked to go to the next question, which is Question Number 2:

Do you find that one or more of the defendants made intentional misrepresentations to the plaintiffs?

And we submit the answer to that should be yes based on the evidence of the promises to give the lease if they did the repairs and then they fixed the kitchen and the constant yes, yes, yes, let me string you along longer so I get what I want and we don't really care what you want but we're not going to tell you that. So we submit the answer to that should be yes.

And then you're going to go to Question Number 3. I am the worst of doing this screen. I've got to tell you. Then you're going to be asked:

Which one of the following do you find made intentional misrepresentations to the plaintiffs? And we submit that both Warren Mosler and Chris Hanley, on their own and on behalf of Chrismos, made those intentional misrepresentations.

And then you're going to be asked:

Do you find that one or more of the defendants breached the duties of good faith and fair dealing? And we submit that the answer to that based upon the evidence --whoops -- should be yes.

And then:

Which of the following do you find breached their duty of good faith and fair dealings with the plaintiffs? And we submit that we believe that the answer is every one of them did that.

And then you're going to be asked and so because there are three different claims that all have the same type of damages, if you find breach of contract or you find intentional misrepresentation, or you find breach of the duty of fair dealing, any one of those, my client's

entitled to damages. I submit to you that you should find all three based on the evidence. But you -- even if you don't find all three, but you find one, my client is entitled to damages. So that's why the instruction will say, if you checked one or -- if you answered yes to 1, 2, or 4, so that's 1 or 2 or 4, or all of them, go to Question 6.

And Question 6 is:

What amount of money do you award to plaintiffs as a result of the breach of contract or intentional misrepresentation or breach of the duty of good fair dealing? My -- we believe the evidence supports $275,000. It is your memory. You're the jurors. We're just suggesting.

And the next thing that you're asked is:

Do you find that one or more of the defendants defamed Plaintiff Joe Gerace? And we submit that the evidence says yes.

And then it says:

Which of the following do you find defamed Joe Gerace? And we submit that the evidence supports all three of them did that.

And then you're going to be asked:

What amount of damages to Plaintiff Joe Gerace caused by the defamations as to each party which can be found? That's totally up to you. That is something that's completely within the province of the jury. I mean, your reputation is all you have in life. The bullying and the -- what happened is certainly entitled

to compensation. The jury -judge will tell you that if you don't think there's really damages, you can give nominal damages of a dollar. What happened to these people is worth a lot more than a dollar.

You know, I have on this suit today because quite frankly, in our court system, the way we make amends for wrongs is with money. It's not -- won't give you back your rights. It won't give you back your reputation. But that's our system of justice. So I dressed today in the color of money because, unfortunately, that's how we right wrongs in this jurisdiction. And so my clients, I submit to you, deserve a recognition of the harm that was done to them as a result of the actions of Mr. Mosler, Mr. Hanley and Mr. Chrismos and that that number for them per defamation should be a significant number. Certainly shouldn't be a dollar. But that's up to you as jurors.

[colloquy]

MS. ROHN: Welcome back.

So I'm on the jury verdict form. So as to the people who defamed -- so the people who defamed, we would submit that all three. And then there's a space for you to put the amount of damages for Joe Gerace for that defamation. And that of course, as you'll note, is completely up to you.

And then you were asked -- you'll be asked: Do you find that one or more of the defendants defamed Plaintiff Victoria Vooys? I am really bad at this, aren't I? Victoria Vooys. And we submit the answer to that is yes.

What -- which of the following do you find defamed Victoria Vooys? We submit, again, it's all three. And then, again, you need to determine the damages to Victoria Vooys for the defamation.

And then you get to you only get to Question 13 if you found damages in the other questions. So if you don't find any liability, you don't find anybody did anything wrong, if you're answering nos instead of yeses, then you don't get to Question 13 because that's a punitive damage question. And you can only award punitive damage if you've awarded -- if you've awarded damages on the other claims. The judge will, I'm sure, instruct you on the law of that.

So do you find that one or more of the defendants acted with reckless disregard for the rights of the plaintiffs so as to entitle them to punitive damages? And we submit the answer to that should be yes.

What amount of damages to Plaintiff Victoria Vooys caused by the reckless disregard? I mean, who did those? We submit it's all three. And then what -- sorry. Sorry. I'm trying to go quickly. What amount of damages to Victoria Vooys? That's a number for you to fill out. Then there is the same question as to which defendants -- what are what is the amount to Victoria Vooys caused by the reckless disregard? And that's -- you know, that's up to you.

We've had some evidence as to the wealth of the defendants and it should be sufficient to punish them so that they don't do this again. We know they spent a million dollars cash for the property. We know they have other properties. But that's up for you to

determine what you think is sufficient to punish the defendants in this case.

And in Question Number 15, which is check as to each defendant who engaged in that, we submit all three.

And then, finally, you get a question that says, do you find that the plaintiffs owe rent to Chrismos, LLC? And we submit this is the only place you should say no because my clients clearly don't owe them any money. They've acknowledged that under oath. They didn't take the money from the deposit. This is just mean-spiritedness to have my client -- to find against this clearly frivolous language.

So I thank you for your time. Because my clients -- when you're finished, you're going to be asked to sign the jury verdict form. Only -- in the Virgin Islands, only five out of six have to agree. It's not unanimous like in a criminal case. I get to come back on rebuttal because I have the burden of proof so I will talk to you again after the defendant makes their closing. I thank you so much for your time and attention and for being here today.

PLAINTIFFS' REBUTTAL ARGUMENT

MS. ROHN: Good afternoon.

So I want to start, first, on the idea that the defendants still claim that my client owes money for rent. And so I'm going to show you a series of testimony which I elicited on cross-examination from Mr. Hanley, starting with Page 156 of his deposition. On Page 156, Line 17:

Okay. So if there is some type of a check that says that in July and/or August of 2004 they were given a thousand dollar -- well, let me rephrase that. Were they ever given a thousand-dollar credit against the July/August you 2004 rent due to roof repairs that they paid for?

Answer, It's possible.

Then Mr. Hanley's testimony, Page 148, Line 13:

Okay. Were there any bills that Chrismos contends my clients owed when the premises were vacated? Bills owed to Chrismos.

Answer, I don't think so.

Question, Okay. Is Chrismos or Mr. Hanley aware of the fact that when my clients did indeed sell their inventory and equipment to Mr. Jordan that $3,000 was put into Attorney Logan's escrow account to cover any bills --

Whoops, I'm missing Page 149. Can I have Page 149 of his deposition? Thanks. Sorry.

-- bills that may have been outstanding?

And the question said, Are you aware of the fact that $3,000 was put into Attorney Hunt's escrow account when my clients sold whatever it was they sold to Mr. Jordan?

Yes.

All right. All right. Are you aware that that money was placed into the escrow account in order to cover any unpaid bills that may have arisen?

I am aware now.

Well, what was your understanding of why the $3,000 put into the escrow account?

I assumed it was an earnest money deposit for the purchase of the bar.

So they were aware there was $3,000 in the account. They specifically testified under oath that my clients did not owe them for any other bills, which is the money that was billed, rent, and they consistently testified to that. The fact that at the time that the deductions were made, the deductions were accepted, there was never any email, note, anything to the client saying we don't accept this deduction, you still owe a thousand dollars, or we don't accept this deduction, you owe the plumbing bills. Nothing. So clearly there was an understanding that my client would pay for roof repairs that they are going to deduct and that my client would pay for plumbing repairs that they were going to deduct and that happened from 2004 clear to when they left the premises and no one said, oh, by the way, you owe roof and plumbing bills. Never happened. Why? Because they had accepted those bills.

And let's go to the letter, Exhibit 10, where the mistake is made about the two-year lease than the seven-seven-year lease. Okay. So the defendants in this case claim they never promised any lease at all. Never did. Never happened. So if their lawyer gets a letter saying that there's a two-year lease or a seven-year lease, where is the letter back saying my clients never promised a lease? There isn't one because everybody knew the two years was a mistake, that it was seven years, and nobody was disputing the fact there was a promise for a lease.

Now, the confusion about, oh, this is all Barabus and Barabus is the one that made the money and Barabus is the correct party, the defendants aren't suing Barabus for the back rent. They're suing Miss Vooys and Mr. Gerace because we all know those were the actual people who were paying the rent and the actual people who were going to get the promises. Otherwise, Barabus would have been sued by the defendants. They were not.

The allegation that my client falsified checks. My client's testimony was pretty clear: I usually write the checks, I put on them so I can know for my positions, for my accounting, if there's deductions, what they are, what they're paid for. Joe wrote that check. He didn't put it on it. When it came back from the bank for my records, I put it on it. I produced the checks for my reference in this case.

This is typical of the improper false accusations against my clients. There was no intent to defraud or change the document. It simply had the notation of why the amounts were what they were about.

Nobody ever said we want to make this a white, middle-class restaurant because Mr. Woodson didn't hear it and Mr. Anthony didn't hear it. Why in the world would Mr. Mosler tell two West Indians who didn't have a lease that that's what he was doing? There's no evidence he ever had a conversation with those people. Mr. Mosler and Mr. Hanley wouldn't tell those to any- -- those statements to anybody but the person they were kicking out, to explain why they were kicking them out. It isn't certainly the kind of thing that you would go around and proudly tell people you were saying. But my clients were white and they thought it was okay to say that to my clients. So they did.

So when he says there's no evidence that that was ever said, that would require you to disregard the sworn testimony of my clients that there is evidence.

The whole thing about the Bentleys. This is just a smokescreen. There -- there -- Miss Bentley didn't come in here and say they didn't pay me. There's no evidence that she didn't get paid. The only thing is an email from Mr. Jordan assuming that that's the reason. But Mr. Jordan assumed a lot of things that weren't true. So that's just melee between Mr. Jordan and Mr. Mosler as they snicker behind my clients' back about what they think my clients' up to because neither one of them liked my clients and neither one of them thought much of my clients.

So, and the statement that says they had -- they could have just walked away. At the time they met Mosler and Hanley, they had closed on the property on August -- mid July, early August. They met Mosler and Hanley

in August. At that point, all of their goods had just been shipped here. Their car, everything they owned had just been shipped here. So they weren't able at that point to decide whether or not they were going to walk away or not. They had to get their stuff here, get it unpacked, then try to figure out where they were going to go. So no, at that -- but at some point they said, we don't get -- if we don't get a lease, this isn't going to work, we should take our losses and go. And that's when Mosler and Hanley say, no, don't do that, we'll make a deal for you to stay. And so they did. And they invested. And they made improvements.

It is correct that the first time that my clients met Mosler, as he testified to, and they said can we have a lease right away, which was before he even purchased the property, he said no, I can't do that yet, I haven't purchased the property. What did happen was after they purchased the property and after my clients had decided they might leave and go back, that arrangement was agreed to, that agreement that you do this and we do that, that was agreed to.

So, and then there's Exhibit 7 which is clearly the lease for March 1st, 2004. But they keep making the statement that nothing was said to that. First of all, the evidence is clear and as he read from the testimony, they told Mr. Lorig, who was Mr. Mosler's assistant, what it was about the lease they didn't like, including the number of years, and expressed con- -- specifically said, expressed some concerns about the lease to Mr. Lorig. They never heard back from him. There was never -- what they were told was, okay, we agree this isn't right, we will get back to you with a

better lease, with the correct lease, and then the evidence is they never did. And then the evidence is a fire came and they didn't want to rock the boat because they weren't able to pay rent. And then when they were able to start paying rent, they then said where is my lease and they said again, don't worry, we're going to do it.

Now, the statement that says -- excuse me. The statement from Mr. Holt, with no evidence, that the reason that they were paying the rent in December and January and paying up was because they'd done a deal with Jordan and that's probably where they got the money, there is absolutely no evidence of that in this record. But what you will get is Exhibit 46 which is the amount of the earnings. And in December, their earnings increase. In January, their earnings increase significantly. And in February and March their earnings increase to where before they were between -- somewhere between average-wise 12- to 13- to 14,000, they're now average-wise in about 23- or 24,000. So clearly, the money for this didn't come from Mr. Jordan. It came from the fact that my clients were making more money because the restaurant was doing better because they were doing full moon parties and having increased income.

So it's that kind of statement without any support that should make you question what -- the arguments that are made and statements made by the defendants, because it's that kind of -- that kind of snide, little assumption that has no support.

So as to the leases are negotiable and my client should have, you know, negotiated what they wanted, you

know, that avoids -- that ignores the fact that this is their first business and about how they're not taking -- they're not doing withholding and contract labor, this is my clients' first business, both of them's first business. So they were learning as they went along. And they told Lorig what it is that they didn't like about the lease. They were told they would get another lease and they -- you know, they were not really sophisticated about going back and saying, well, where's my lease. Quite frankly, Mr. Mosler and Mr. Hanley are kind of formidable and they're new, young kids on the block, and they trust them, that eventually they're going to do what they say they're going to do. That trust was misplaced but they trusted them.

The -- what they spent because there are bills missing and receipts missing. So, again, my clients are new business people. Yeah, they testified honestly, we didn't really keep all our receipts. It was kind of -- particularly Joe. He was the worst. So when it came time for tax time and it came time for proving all that, they couldn't take those off on their taxes because they didn't save the receipts. But that doesn't mean it didn't happen. And the reason you know that is because all these people came in and testified because they saw the improvements being made. So to say that Mr. Reed, Mr. Belcheff, Mr. Woodson, Mr. Anthony and both of my clients are lying because there's not paper receipts is not what the law provides.

In fact, you're going to get a jury -- we suspect the judge is going to give you a jury instruction that says the failure to produce all exhibits is not detrimental to your case. So another smokescreen another sending

you off on some rabbit hole.

The tax returns, the ever repeated tax returns. The evidence is clear. Miss Vooys nor Mr. Gerace filled out those tax returns. They hired an export to do the tax returns. If they're wrong, they're wrong. However, the state1nent that they should have taken out withholding and FICA for contractors, that's not the law. You don't -- you do that for employees. But as you heard her testify, we had contractors, we paid them contract labor, so the con- -- they were responsible for their FICA and their Social Security.

So Exhibit 48 where we go into this thing that's an audit, if you recall from the evidence, it says this is an estimate. But then I showed you that that was an estimate for labor and then I showed you the -- and it wasn't for a hood. It was for the exhaust fans. And then we showed you the shipment of the exhaust fans at the same time as the estimate and the purchase of the exhaust fans at or near the time of the estimate. So - - so while he may have given them an estimate and never converted it to a bill, the reason they had it is because they ordered the exhaust fans, they shipped the exhaust fans and he installed the exhaust fans for what his original estimate was and they put it in as a bill. This is all just ways to try to make issues when there are no issues. If you look at that exhibit, right behind the estimate is a Tropical Shipping and then the purchase of the exhaust fans.

Now, how the hood caught on fire. There is no testimony to support Mr. Holt's argument that somehow it got grease and it was -- that -- and the grease caught the grease -- nobody came in here and

testified to that. Not a plumber, not a guy that does exhaust fans, nobody. The only person who testified was the people who were there who saw what happened. And which was that the hood was too small for the area and so because they couldn't afford to put a bigger hood in, it couldn't take very much cooking underneath it and it caught on fire. The problem with it was the size of the hood and nobody has testified that the problem was that it wasn't clean or that there was grease in it.

Now, there's no repairs, no improvements; of course that would require you to disregard Mr. Reed, Mr. Belcheff, Mr. Woodson, Mr. Anthony, my clients, and also you would have to disregard their own witness, because Hal Rosbach, their witness, testified that he saw them making roof repairs as an improvement. Their own witness.

Now, the statement on closing from Attorney Holt that says I think they were talking to Mr. Jordan in February, there is no evidence to support that. None whatsoever. Mr. Jordan doesn't say that. Our clients deny it. They didn't even meet Mr. Jordan until later. The only person who met Mr. Jordan in February was Mr. Reed, the bartender, who Mosler took and Rosbach took to the Off The Wall to introduce Mr. Reed to Mr. Jordan and for the benefit of Mr. Jordan making sure that when he took over the restaurant he would have the bartender who ran the restaurant in his employ. That's the only person who met Jordan.

Yeah, they were planning this in February, but my clients didn't know. And Mr. Reed told you on the stand he felt bad about not telling my clients. But they

told him not to tell them and he needed a job. So, yes, they were cooking this up as of February. But my clients didn't know and the people involved purposefully didn't tell my clients.

Now, the statement that says we already have bookings until May, obviously that statement meant, because they did live music, that they already had musicians, you have to book them ahead of time, they had musicians booked through May and they would have to honor those contracts and then when they found out they were told to leave in April, and there's no doubt about that, they were told to leave, and how do we know that? Well, Mr. Hanley admitted it. My client, Mr. Joe Gerace, and Mr. Reed testified to this, my client Joe Gerace, in a loud, southern utterance said they've kicked us out of the restaurant. And Miss Vooys went off crying and wailing. So the idea that they would come in front of you and tell you they were doing them a favor by giving someone else the lease they wanted because they wanted to sell their lease, they never wanted to sell their lease. The evidence is clear. They had no choice. Because Mr. Hanley and Mr. Mosler told them not once, not twice, not three times, but four separate occasions, you will be out of here by the end of April.

Now, fortunately, they got a lawyer and they were able to stall it, but the truth of the matter is, they had a month-to-month tenancy and sooner or later they were going to have to leave, so they had to get some money to do that. But that was not their choice.

Now, the email -- well, there was an email that said that they heard that he was going to burn down the

bar. That is just so ridiculous. That's just more of the defamation. You hear rumors and you put it in an email? And you have no proof of it. And the person who supposedly knew that he did, the person that opened it that said he would say that, Mr. Rosbach, didn't say any such thing. So it's just more examples of -- (cellular phone ringing.)

Sorry, Your Honor. I thought that was off.

So that's just more examples of the defamation. People doing rumors that my client 1s going to burn down the bar. This is the restaurant and bar that they love.

You know, if you believed their view of the story and you did it as a play, it would be they come to the restaurant and bar, my clients say, oh, hi, great, we want to sell the restaurant. They say, okay, and my clients go (making wailing noises) and go off crying. That's how ridiculous that story is. That is a bold-faced lie. They told our clients to leave. There was never any agreement by our clients to leave. And our clients never voluntarily agreed to sell the restaurant. They had no choice.

So clearly, in June, because they knew they were going to have to get out, they didn't book any bands in June. But both Mr. Reed and Mr. Anthony testified -- Mr. Reed testified that the only time the restaurant closed was when Jordan took it over and closed it to make repairs. And Mr. Reed was there through my clients, Mr. Gerace, Joe and V.I.C. §, and Mr. Jordan. So if that restaurant had closed when Mr. Reed was still working for my clients, he would have known that. He was very clear; the first time it closed, after -- when it was

changing hands, was when Mr. Jordan shut it down to make the repairs for two months. And then Mr. Reed worked for Mr. Jordan, helped him with repairs, albeit didn't get paid as he should have.

So, and the evidence is clear, my clients -- you're going to have the exhibit in the -- you're going to have the exhibit in the jury room that my clients paid rent for June oh, this isn't on again, whoops, there we go -- on June 9, 2005. Now, my clients wouldn't have paid June rent if they weren't in the restaurant in June.

And Mr. Jordan, took things out. If you recall that Mr. Jordan's trial testimony by video, he was asked, what did they take out? He couldn't tell anybody what they took out. I don't -- I don't recall but I know they took out something. But Mr. Reed was there through the time of V.I.C. § and Joe, through to the time that Mr. Jordan took over, and he testified not a single thing was taken out of that restaurant or bar. It all went to Mr. Jordan. So the credible evidence, I submit to you, is that that story about why they paid less is not true. The reasonable inference for why they paid less was because they had my clients over a barrel and they just paid them less.

So the idea that they-- that they didn't give them a notice to quit, that letter -- when you serve someone with a letter and tell them that you've got -- on April 12th, which you got it April 18th, and they tell you you have to get out or we're going to take your stuff and throw it away by April 30th, that's illegal. You can't do that. So what they actually tried to do is to evict my clients without a notice to quit and without obeying the law. That's what they actually did. So yes, that's illegal

activity.

Now -- and the statement that says because my name was on the purchase agreement, I was involved in the transaction. There is no evidence of that. Not a single person testified to that. Mr. Gerace said I don't know why her name was on it. And if I were involved in that action, there would have been a place for me to sign it. There's no signature for me. This is all this mumbo jumbo to try to confuse and put all these issues out that aren't issues.

Copy of the tape. My client testified someone showed her the tape. It was that person's tape, not my client's tape. My client didn't ever have it. Now, it's Mr. Jar- Mr. -- sorry Hanley and Mr. Mosler that are being accused of making these statements on the Roger Morgan show. If they wanted to prove they didn't make them, they would have gotten the tape. They don't want the tape because they say exactly what Miss Vooys says it says.

Now, and where's Roger Morgan? Well, first of all, the judge, I believe, will instruct you that no one is required to bring all the witnesses that there are. But there's no evidence in this case that anybody has the ability to bring Mr. Morgan here. So -- and if indeed they wanted to prove that they didn't say those things on Mr. Morgan's show, it would be they who would bring Mr. Morgan and they did not.

And the statement that says Mr. Woodson didn't say that he heard bad things on -- being said by Hanley and Mosler. His testimony was, I called up the show to -- let me see if I got it. I called up the show to support

it -- to support them. Well, you wouldn't call up the show to support Vicki V.I.C. § and Joe if people weren't saying bad things about them. So of course he heard people saying bad things about them. That's the reason he called to support them.

Now, was what they said defamatory? This appearance on the show, on the Roger Morgan show, happened in late March, early April, from the evidence. And the first thing they said was my client had borrowed $150,000 from the family. The bad news is that they did borrow $41,000 over a period of a year and a half, but certainly not $150,000, and it makes them seem a lot more inept if you say 150 instead of 41.

They also say they were always behind on the rent. Well, that really is defamation because they know when they said that, and as we know from the cross-examination of Mr. Hanley, they didn't have to pay their rent on time. There was an agreement to pay your rent as you can. That statement infers that they were supposed to pay the rent on time and they didn't. And that was not the truth. You will not see a single email, letter, anything, saying your rent is behind, you need to pay. The only testimony is Mr. Hanley admitting on cross-examination it really didn't matter to us when they paid.

And the statement that says they are behind on their rent was clearly false because they were paid up as of March 15th and they were paid up in April and they were paid up in May. And there was, according to Mr. Mosler, no particular date of the month that the rent was due.

Okay. So Ed Gerace, some 17 years later, when he's asked do you recall whether or not you put a grease trap in and he says I can't recall means that they didn't and when they got the deduction from the grease trap, 17 years before, and didn't complain that they really did owe it. It's that kind of sleight of hand, trying to swirl the evidence that's trying to confuse you rather than help you.

So I want to show you some instructions. Mr. Holt discussed the breach of good faith and fair dealing. You're going to be read these in a little bit. I thought I marked it. I think I took it out. Just a minute. Excuse me just one minute. So I can't find my jury instructions. Oh, I know where they are. The Court has them. So the breach of the duty --

THE COURT: Sustained. Counsel, please don't involve the Court --

MS. ROHN: Yes, sir.

THE COURT: -- when you're arguing.

MS. ROHN: The breach of the duty of good faith and fair dealing includes breach of the reasonable expectations of the parties. And a reasonable expectation of the parties, if you tell me I'm going to do-- if you do X, I'll do Y and then instead you try to improperly evict me and then go in and tell me to get out and then go on the radio and claim that I'm selling the lease and that I'm doing this voluntarily, that's a breach of the reasonable expectations of the parties. So yes, there is a claim for that. And also we expect the Court to tell you as to breach of contract, that a breach of contract is a series of breach of a promise or a series

of promises which are oral, which may be oral, form a contract. So yes, we do have breach of contract.

And intentional misrepresentation is simply saying if you do this, I'll do this, and they do the repairs, they do the build back out of the kitchen and then they get nothing for that. They don't get any lease, much less a seven-year lease. So, Your Honor -- ladies and gentleman, we hope that you understand our case and find in favor of the plaintiff on all counts, that you give fair but just damages since we don't have an opportunity to come back here again, and that you find that this kind of behavior is reckless disregard for the rights and interests of my clients and generally people in general, and that you award punitive damages. I thank you for your time.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
CASE NO. SX-2005-CV-00368

JURY VERDICT FORM

We, the jury impaneled and sworn to determine the issue in this case, do render the following verdict:

QUESTION #1:

Do you find that Chrismos had an agreement with the Plaintiffs and do you find that Chrismos breached that agreement by not giving them a lease?

__✓__ Yes

_____ No

If you answered "Yes", to **Question #1**, go to **Question #2**. If you answered "No" to Question #1, still go to **Question #2**.

QUESTION #2:

Do you find that one or more of the Defendants made intentional misrepresentations to the Plaintiffs?

__✓__ Yes

_____ No

If you answered "Yes", to Question #2, go to **Question #3**. If you answered "No" to Question #2, go to **Question #4**.

QUESTION #3:

Which of the following do you find made intentional misrepresentations to the Plaintiffs? (Check all that apply)

___✓_ Chrismos Cane Bay, LLC

___✓_ Warren Mosler

___✓_ Chris Hanley

Go to Question #4.

QUESTION #4:

Do you find that one or more of the Defendants breached their duties of good faith and fair dealing to the Plaintiffs?

__✓__ Yes

_____ No

If you answered "Yes", to Question #4, go to **Question #5**. If you answered "No" to Question #4, but "Yes" to Questions #1, or #2, go to **Question #6**. If you answered "No" to Questions #1, and #2, and #4, go to **Question #7**.

QUESTION #5:

Which of the following do you find breached their duty of good faith and fair dealing to the Plaintiffs?

(Check all that apply)

__✓__ Chrismos Cane Bay, LLC

__✓__ Warren Mosler

__✓__ Chris Hanley

If you checked one or more boxes and answered "Yes" to Questions # 1, or #2, or #4 go to **Question #6**. If not, go to **Question #7**.

QUESTION #6:

What amount of money do you award to Plaintiffs as a result of breach of contract, or intentional misrepresentation, breach of good faith and fair dealings?

$ 100,000.00

Go to Question #7.

QUESTION #7:

Do you find that one or more of the Defendants defamed Plaintiff Joseph Gerace?

__✓__ Yes

_____ No

If you answered "Yes", to Question #7, go to **Question #8**. If you answered "No" to Question #7, go to **Question #10**.

QUESTION #8:

Which of the following do you find defamed the Plaintiff, Joseph Gerace? (Check all that apply)

_____ Chrismos Cane Bay, LLC

__✓__ Warren Mosler

__✓__ Chris Hanley

If you checked one or more boxes go to **Question #9**.

QUESTION #9:

What is the amount of damages to Plaintiff Joseph Gerace caused by the defamation, as to each person you found defamed him?

$ _____ Chrismos Cane Bay, LLC

$ 30,000.00 Warren Mosler

$ 30,000.00 Chris Hanley

Go to Question #10.

QUESTION #10:

Do you find that one or more of the Defendants defamed Plaintiff Victoria Vooys?

__✓_ Yes

_____ No

If you answered "Yes", to Question #10, go to **Question #11**. If you answered "No" to Question #10, but "Yes" to

Questions #2, or #7, go to **Question #13**.

QUESTION #11:

Which of the following do you find defamed the Plaintiff, Victoria Vooys? (Check all that apply)

_____ Chrismos Cane Bay, LLC

__✓__ Warren Mosler

__✓__ Chris Hanley

If you checked one or more boxes go to **Question #12**. If not, go to **Question #13**.

QUESTION #12:

What is the amount of damages to Plaintiff Victoria Vooys caused by the defamation as to each Defendant?

$ _____ Chrismos Cane Bay, LLC

$ 30,000.00 Warren Mosler

$ 30,000.00 Chris Hanley

Do not answer the following Questions #13, #14, and #15, unless you have answered "Yes" to Questions #2, or #7, or #11.

QUESTION #13:

Do you find that one or more Defendants acted with reckless disregard for the rights of the Plaintiffs so as to entitle them to an award of punitive damages?

__✓__ Yes

_____ No

If you answered "Yes' to Question #13, go to **Question #14**. If you answered "No" go to **Question #16**.

QUESTION #14:

Check as to each Defendant you find acted with reckless disregard for the rights of the Plaintiffs such as to entitle them to an award of punitive damages? (Check all that apply)

_____ Chrismos Cane Bay, LLC

__✓__ Warren Mosler

__✓__ Chris Hanley

Go to Question #15.

QUESTION #15

What is the amount of damages to Plaintiff Victoria Vooys caused by the reckless disregard as to each Defendant?

$ _____ Chrismos Cane Bay, LLC

$ 50,000.00 Warren Mosler

$ 50,000.00 Chris Hanley

QUESTION #16

Do you find that the Plaintiffs owe rent to Chrismos LLC.? (Check one)

_____ Yes

__✓__ No

Go to Question #17.

QUESTION #17

If you answered Yes to question #17, what amount of rent do you find that the Plaintiffs owe Chrismos LLC?

$ _____

(Sign the jury verdict form by at least 5 jurors and return to the courtroom.)

[Verdict form signed by all six jurors]

Dated: March 3rd, 2022