

No. 26-

IN THE
Supreme Court of the United States

FIRSTBANK PUERTO RICO,

Petitioner,

v.

HARTHMAN LEASING III, LLLP,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause, as extended to the Virgin Islands by § 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, permits a court to impose liability, over the objection of the party held liable, on a claim that arose after the pleadings closed and was never asserted or amended or pleaded supplementally.

PARTIES TO THE PROCEEDING

Petitioner FirstBank Puerto Rico was the Plaintiff-Appellant below. FirstBank Puerto Rico is a banking institution organized under the laws of the Commonwealth of Puerto Rico with its principal place of business in the Commonwealth of Puerto Rico.

Respondent Harthman Leasing III, LLLP was the Defendant-Appellee below. Harthman Leasing III, LLLP is a United States Virgin Islands limited liability partnership and is not a publicly traded entity with a stock ticker label.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner FirstBank states that it is a non-governmental party. First BanCorp (NYSE: FBP) is FirstBank's parent corporation and is a publicly held corporation owning ten percent (10%) or more of its stock.

RELATED PROCEEDINGS

FirstBank Puerto Rico v. Harthman Leasing III, LLLP, No. ST-2013-CV-2012, Superior Court of the Virgin Islands. Judgment entered June 4, 2021.

Harthman Leasing III, LLLP v. FirstBank Puerto Rico as assignee of East End Plaza, LLC, ST-2015-CV-00533, Superior Court of the Virgin Islands. Judgment entered March 9, 2016.

Harthman Leasing III, LLLP v. FirstBank Puerto Rico as assignee of East End Plaza, LLC, ST-2016-RV-00002, Superior Court of the Virgin Islands, Appellate Division. Order (Judgment) entered March 12, 2024.

FirstBank Puerto Rico v. Harthman Leasing III, LLLP, S.Ct. Civ. No. 2025-00218, Supreme Court of the Virgin Islands.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner FirstBank Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the Virgin Islands in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the Virgin Islands is reproduced at App. A and is reported at *FirstBank Puerto Rico v. Harthman Leasing III, LLLP*, 2025 VI 18 (Aug. 29, 2025).

The Judgment of the Superior Court of the Virgin Islands, its Memorandum Opinion and Order on FirstBank's Motion for a New Trial and to Amend Judgment, and its Amended Findings of Fact and Conclusions of Law are unreported and are reproduced at App. D, B, and F, respectively.

The Superior Court's Order dated July 19, 2019 ruling on the Omnibus Motion in Limine is unreported and is reproduced at App. E.

JURISDICTION

The Judgment of the Supreme Court of the Virgin Islands was entered August 29, 2025.

A timely Petition for Rehearing was filed on September 12, 2025, and denied on July 2, 2026. App. H.

This petition is timely filed under United States Supreme Court Rules 13.1 and 13.3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1260.

**CONSTITUTIONAL, STATUTORY,
AND RULES PROVISIONS INVOLVED**

Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, provides in pertinent part: “No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Section 3 also extends to the Virgin Islands “the second sentence of section 1 of the fourteenth amendment,” 48 U.S.C. § 1561, which provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

Federal Rule of Civil Procedure 15 provides in pertinent part:

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that

the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

* * *

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. P. 15(b), (d).

Virgin Islands Rule of Civil Procedure 15 provides in pertinent part:

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpled issue. But failure to amend does not affect the result of the trial of that issue.

* * *

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the

pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

V.I.R.Civ. P. 15(b), (d).

Virgin Islands Rule of Civil Procedure 8 provides in pertinent part:

(a) Claim for Relief. Except as otherwise provided in these Rules, a pleading that states a claim for relief must contain: * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief—because this is a notice pleading jurisdiction—and the pleading shall be set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts and defenses for each claim identified in the pleading . . .

V.I.R.Civ. P. 8(a)(2).

STATEMENT OF THE CASE

This matter originated from the filing of an action for declaratory judgment by Petitioner in the Superior Court of the U.S. Virgin Islands wherein Petitioner sought a declaration that Respondent had improperly increased the square footage of a ground lease (by adding what was known as “Parcel 17-E”) thus inflating the sums due under the lease upon which Petitioner held a leasehold mortgage.

A First Amended Complaint was filed thereafter. On September 14, 2012, Respondent filed an Answer to Amended Complaint with Counterclaims.

Approximately two years after the filing of the Answer to Amended Complaint with Counterclaims, Petitioner began escrowing its rent payments for what were known as “Parcels 17B, 17C, and 17D,” which were parcels undisputedly part of the ground lease.

Trial was commenced on July 23, 2019.

The issue being appealed here initially stemmed from a ruling on Respondent’s Omnibus Motion in Limine dated July 19, 2019 and entered just days before trial. Therein the Superior Court ruled that the Respondent’s Counterclaims, filed at a time when rents had been fully paid, could be expanded to include claims for unpaid rent arising two years after the filing of Respondent’s Counterclaims. The unpaid rent was escrowed by Petitioner because of disputes that arose two years after the Counterclaims. These new claims were never pleaded by amended or supplemental pleading. They instead dropped out of nowhere, and without notice, days before the case was tried. Nevertheless, the Superior Court ruled that Respondent could submit these new never-pleaded claims to the jury.

After the jury rendered its verdict against Petitioner on the new never-pleaded claims, the Superior Court affirmed its ruling allowing those claims in its Amended Findings of Fact and Conclusions of Law entered November 8, 2021 and its Memorandum Opinion on Petitioner’s Motion for a New Trial and to Amend Judgment entered November 2, 2021.

The Supreme Court of the Virgin Islands affirmed the Superior Court's ruling in its Opinion dated August 29, 2025. The Court held that

Harthman's counterclaim clearly references a broad range of disputed fees for all parcels, and this should have placed FirstBank on notice that disputes could arise [in the future] concerning all parcels. Although FirstBank had not begun to escrow rent payments when Harthman filed the counterclaim, the counterclaim encompassed damages for all parcels. Because this issue was sufficiently pled concerning rental payments for all parcels, the jury was entitled to hear evidence about FirstBank's actions to escrow the rent payments [occurring years after the filing of the counterclaim].

FirstBank Puerto Rico v. Harthman Leasing III, LLLP, 2025 VI 18, ¶ 46 (Aug. 29, 2025).

FirstBank raised the lack of notice and the denial of an opportunity to defend at every stage below. Before trial, it objected repeatedly to Harthman's attempt to recover rent that FirstBank began escrowing two years after the counterclaims were filed. Joint Appendix, *FirstBank Puerto Rico v. Harthman Leasing III, LLLP*, S.Ct. Civ. No. 2021-0026 (V.I.) ("J.A.") 199-201, 233, 236, 238-239, 253-254, 288, 346-347. At the May 22, 2019 motions hearing, the Superior Court itself observed that "[n]othing in the complaint or in the counterclaim speaks to the withholding of rent [treated by Harthman as unpaid rent], and neither the counterclaim or the complaint have since been amended to include such a claim," and Harthman's

counsel conceded that “[t]he counterclaim has not been amended to specifically say a claim for B, C, and D.” Tr. of May 22, 2019 Mot. Hr’g (“Tr.”) 24:2-7, 24:23-25. FirstBank objected that the escrowed rent, cast by Respondent as unpaid rent, was “not part of this case,” Tr. 28:19, asked that the case be stayed if Harthman sought damages based on the escrow, Tr. 34:7-11, and told the court that “if they want to bring in other stuff that’s not even in the pleadings, then I think we need to continue this matter,” Tr. 37:9-11. Harthman confirmed that it was “seeking damages” for all of the escrowed rent, Tr. 37:12-16, and stated it would move to “clarify” its Omnibus Motion in Limine, Tr. 65:5-19. The court ruled orally on certain portions of the motion and left the escrowed-rent request pending. App. E, at 64a & n.1; App. G. The Superior Court overruled those objections in its July 19, 2019 Order, which also barred FirstBank from offering any justification for the escrow, while acknowledging that “[i]t is true that at the time the complaint and counterclaims were filed, FirstBank had not yet begun to withhold rent on Parcels 17B, 17C, and 17D.” And when the counterclaims were filed, everyone agreed no rent was due on Parcels 17B, 17C, and 17D. The alleged nonpayment, i.e., rent that was escrowed by Petitioner, arose two years after the counterclaims were filed. App. E, at 68a, J.A. 515, 520. FirstBank thus renewed its objection at trial to having these never-pleaded rent disputes that arose two years later presented to the jury, J.A. Vol. 1, 1121-1145, and raised it again in its Motion for New Trial and to Amend Judgment and its Renewed Motion for Judgment as a Matter of Law, which the Superior Court denied. App. B, C.

On appeal, FirstBank argued that the July 19 Order expanded the case on the eve of trial to reach claims that

were never pleaded, and that FirstBank was denied the opportunity to take discovery on, or assert defenses to, those claims. Appellant’s Br. 21-25; Appellant’s Reply Br. 19-20. The Supreme Court of the Virgin Islands decided the notice question on the merits, holding that the counterclaim “should have placed FirstBank on notice.” App. A, ¶ 46.

FirstBank then timely petitioned for rehearing, arguing that construing boilerplate in the counterclaim as notice of claims that arose years later “deprives FirstBank of notice and due process” and “violates the constitutional guarantee of fair notice.” App. I, at 111a, 115a; *see also id.* at 113a-114a, 116a (citing *Matter of Doe II*, 492 P.3d 1129 (Idaho 2021)). Because the Virgin Islands has no constitution of its own, the only constitutional guarantee of due process that applies there is the federal guarantee extended to the Territory by Section 3 of the Revised Organic Act, 48 U.S.C. § 1561. The Supreme Court of the Virgin Islands denied rehearing without opinion on July 2, 2026. App. H.

REASONS FOR GRANTING THE WRIT

The decision below holds that a court may impose liability on a claim that did not exist when the pleadings closed, that was never asserted by amended or supplemental pleading, and that was placed before the jury over objection four days before trial. The Supreme Court of the Virgin Islands sustained that result on the theory that general language in a 2012 counterclaim “should have placed FirstBank on notice that disputes could arise [in the future].” App. A, ¶ 46. That holding cannot be squared with the notice and opportunity to be heard

that due process guarantees, with this Court's decision in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), or with the decisions of the federal courts of appeals. The question is important, recurring, and cleanly presented. Review is warranted under Rule 10(b) and (c).

I. The Decision Below Conflicts with This Court's Due Process Precedents.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In civil litigation, the pleadings are the instrument that supplies that notice. They define the claims a party must answer, frame the defense it may raise, and set the boundaries of discovery and trial.

The Supreme Court's affirmance of the Superior Court's order allowing unpleaded claims on the eve of trial directly conflicts with *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467, 120 S. Ct. 1579, 1585, 146 L. Ed. 2d 530 (2000) ("Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served.")

Nelson applied that principle to the procedures for changing the pleadings. There, the district court permitted an amendment adding a new party and, in the same stroke, entered judgment against Nelson. This Court reversed, holding that due process required that he be given an opportunity to respond to the amended pleading

and contest his liability before judgment was entered against him. As the Court explained, “a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served.” 529 U.S. at 467. The same is true of a claim. A party cannot fairly be required to defend against a claim that no pleading has ever framed.

Federal Rule of Civil Procedure 15(d) and Virgin Islands Rule of Civil Procedure 15(d) are identical and are collectively referred to as Rule 15. Rule 15(d) differs from the rest of Rule 15 because of its elective nature. As Rule 15(d) concerns events or causes of action occurring after the filing of the original pleading, the party with the later-arising claim has the option of adding the claim to the existing lawsuit or filing a separate claim. “While claim preclusion bars relitigation of the events underlying a previous judgment, it does not preclude litigation of events arising after the filing of the complaint that formed the basis of the first lawsuit.” *Atchley v. Pepperidge Farm, Inc.*, No. CV-07-0277-FVS, 2008 WL 5377770, at *3 (E.D. Wash. Dec. 22, 2008) (citing *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996)); see also, *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 739 (9th Cir. 1984) (holding that if defendant engages in actionable conduct after a lawsuit is commenced, plaintiff’s election not to seek leave to file a supplemental pleading is not penalized by application of claim preclusion to bar a later suit on that subsequent conduct). Owing to this, a party cannot be deemed to have consented to a claim when the holder of a claim has not elected to bring the claim by supplementing its pleadings or, more importantly here, where the holder of the claim already brought its claim in another forum.

Rule 15(d), in both its federal and Virgin Islands forms, supplies the procedure for claims that arise after the pleadings are filed. It permits supplementation only “[o]n motion and reasonable notice,” only “on just terms,” and it allows the court to “order that the opposing party plead to the supplemental pleading.” Fed. R. Civ. P. 15(d); V.I.R. Civ. P. 15(d). Those requirements are how the rules deliver the notice and opportunity to respond that due process demands.

None of that happened here. Harthman filed its counterclaim in September 2012. FirstBank did not begin escrowing rent on Parcels 17-B, 17-C, and 17-D until September 2014. Harthman never moved to supplement its counterclaim. Instead, it elected to file a separate forcible entry and detainer action seeking possession of the premises based on the escrow. Then four days before trial, the Superior Court ruled that the 2012 counterclaim already encompassed the escrowed rent. It did so while acknowledging that “at the time the complaint and counterclaims were filed, FirstBank had not yet begun to withhold rent on Parcels 17B, 17C, and 17D.” App. E, at 68a, J.A. 520. At a hearing two months earlier, the court had likewise observed that “[n]othing in the complaint or in the counterclaim speaks to withholding rent,” and Harthman conceded that its counterclaim “has not been amended.” Tr. 24:2-7, 24:23-25. The July 19 Order nonetheless barred FirstBank from offering any justification for the escrow. App. E, at 69a.

The only “notice” FirstBank received of the escrowed rent claim came through an evidentiary motion in limine. A motion in limine is not a pleading. It does not frame a claim, it does not trigger a duty to answer, it does

not permit affirmative defenses, and it does not open discovery. FirstBank therefore never answered the escrowed rent claim, never asserted defenses to it, and never took discovery on it. It was nonetheless held liable on that claim, with interest and late fees.

The Supreme Court of the Virgin Islands did not hold that the counterclaim pleaded the escrowed rent claim. It held that general language about “disputed fees for all parcels” should have alerted FirstBank that “disputes could arise [in the future].” App. A, ¶ 46. Notice that some future dispute might arise is not notice of a claim. Under that reasoning, any general damages clause becomes standing authority to litigate whatever claims accrue during the life of a case, without a motion, without leave, and without a responsive pleading. That is precisely the procedure *Nelson* rejected.

II. The Decision Below Conflicts with Decisions of the Federal Courts of Appeals.

The failure to plead and the failure to give notice are not separate defects; they are the same one. The pleading is the instrument through which due process notice of a claim is given. The decision below also conflicts with the consistent approach of the federal courts of appeals, which require notice and an opportunity to be heard before a court alters the basis of a party’s liability.

Federal courts of appeals consistently hold that a court may not *sua sponte* alter the disposition or basis of liability without first providing notice and an opportunity to respond. *See, e.g., Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 412 (1st Cir. 2000); *Ethridge v. Bell*, 49 F.4th 674,

682 (2d Cir. 2022); *Moore v. Equitrans, L.P.*, 27 F.4th 211, 227 (4th Cir. 2022); *S.R. Nehad v. Browder*, 929 F.3d 1125, 1142 (9th Cir. 2019).

The Rule 15(b)(2) implied-consent doctrine also reflects a universal baseline: a court cannot treat an unpleaded issue as having been tried unless the parties recognized the unpleaded issue entered the case, evidence supporting it was introduced without objection, and a finding of trial by consent would not prejudice the opposing party's opportunity to respond. *Portis v. First Nat. Bank of New Albany, Miss.*, 34 F.3d 325, 331 (5th Cir. 1994). The Eighth Circuit applies its own closely related standard, requiring actual notice of the unpleaded issue and an adequate opportunity to cure any surprise resulting from the change in the pleadings, with prejudice analyzed as a separate inquiry. *Am. Fam. Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 348-349 (8th Cir. 2013). The Third Circuit has adopted the three-part test as well. *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 326-327 (3d Cir. 2012). The First Circuit has gone further, holding that lack of consent is itself sufficient grounds for denying an amendment to conform pleadings to the evidence. *In re Fustolo*, 896 F.3d 76, 84 (1st Cir. 2018).

The implied consent doctrine under Rule 15(b)(2) is a critical battleground in this conflict. Courts across all circuits agree that consent may be implied when evidence relevant to an unpleaded issue has been introduced at trial without objection—but only if the non-objecting party was fairly apprised that the evidence went to the unpleaded issue. *See Portis v. First Nat. Bank of New Albany, Miss.*, 34 F.3d 325 (5th Cir. 1994); *Am. Fam. Mut. Ins. Co. v. Hollander*, 705 F.3d 339 (8th Cir. 2013); *Trip Mate, Inc. v.*

Stonebridge Cas. Ins. Co., 768 F.3d 779 (8th Cir. 2014). The Eighth Circuit has emphasized that evidence relevant to a pleaded issue generally will not by itself provide notice to a non-moving party that an unpleaded issue is being tried. *Trip Mate, Inc. v. Stonebridge Cas. Ins. Co.*, 768 F.3d 779 (8th Cir. 2014). The Fifth Circuit has similarly held that a party does not consent to try a new issue by introducing evidence or failing to object to evidence when the evidence is relevant to pleaded issues in the case. *Portis v. First Nat. Bank of New Albany, Miss.*, 34 F.3d 325, 332 (5th Cir. 1994) (emphasis added). “Recognition of whether an unpleaded issue has entered the case at trial ‘depends on whether the evidence supporting the issue is also relevant to another issue in the case.’” *Id.* (citation omitted). “If the evidence overlaps in this fashion, it does not equate to implied consent ‘absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.’” *Id.* (citations omitted).

The decision below goes further than any of these courts would permit. FirstBank objected at every stage, so there was no consent. Harthman never sought leave to supplement, so there was no Rule 15(d) pleading. The courts below closed that gap by construing a 2012 pleading to reach a claim that arose in 2014, a result no federal court of appeals would allow.

The decision below also disregards the election that Rule 15(d) gives the holder of a claim that arises after the pleadings. The Tenth Circuit has recognized that a counterclaim acquired after an answer may be asserted by supplemental pleading, but supplementation is permissive; a defendant who elects not to supplement remains free to pursue the claim separately. *Morgan v. Carrington Mortg. Servs.*, 719 F. App’x 735, 741-742 (10th Cir. 2017).

Harthman made exactly that election. It chose not to supplement its counterclaim and instead simultaneously litigated the escrow in a different forum, a forcible entry and detainer action seeking possession, where the legality of the escrow was then on appeal. The courts below nonetheless allowed Harthman to recover the escrowed rent in this case on a pleading that never asserted it. That result denies the opposing party the notice that the election rule and Rule 15(d) are designed to secure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE SUPREME
COURT OF THE VIRGIN ISLANDS,
FILED AUGUST 29, 2025**

IN THE SUPREME COURT
OF THE VIRGIN ISLANDS

S. Ct. Civ. No. 2021-0026
Re: Super. Ct. Civ. No. 273/2012 (STT)

FIRSTBANK PUERTO RICO

Appellant/Plaintiff,

v.

HARTHMAN LEASING III, LLLP,

Appellee/Defendant.

Considered: October 11, 2022
Filed: August 29, 2025

OPINION OF THE COURT

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Kathleen Mackay

BEFORE: RHYS S. HODGE, Chief Justice; MARIA M. CABRET,
Associate Justice; and IVE ARLINGTON SWAN,
Associate Justice

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CABRET, Associate Justice.

¶ 1 Appellant, FirstBank Puerto Rico (“FirstBank”) seeks reversal of the Superior Court’s denial of its Rule 59 motion for a new trial and to amend the judgment, the Superior Court’s grant of possession of certain disputed land parcels to Appellee, Harthman Leasing III LLLP (“Harthman”), and the Superior Court’s order granting Harthman’s motion in limine to present evidence on damages. Harthman filed a cross-appeal, arguing that the Superior Court erred in finding that a disputed parcel was not added to the parties’ lease. For the reasons that follow, we affirm in part and reverse in part the judgments of the Superior Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 FirstBank is a banking corporation licensed to conduct business in the United States Virgin Islands (“USVI”) with a branch office located on St Thomas. Harthman is a limited liability partnership that owns Parcel 17-B, 17-C, 17-D, and 17-E, Estate Smith Bay, Nos 1, 2, and 3, East End Quarter, St. Thomas, U.S.V.I. East End Plaza (“EEP”) was a limited liability company that sought to rent and develop land on the East End of St. Thomas for commercial purposes.

¶ 3 On July 15, 2003, EEP and Harthman executed a lease for Parcel 17-B, which became effective on September 1, 2003.¹ The lease was for an initial term

1. The lease was originally executed between EEP and the owners of Parcel 17B, Harthman’s predecessor in interest;

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of thirty years with options to renew for two additional terms of ten years each. EEP was responsible for base monthly rent including late fees and interest, as well as most taxes and assessments levied against the property. The lease also granted EEP an option to lease the parcels abutting Parcel 17-B, depending on whether the premises could be rezoned from agricultural to commercial use.² The lease specified that all modifications had to be in writing and signed by the parties. Section 37 of the lease specifically stated that the “[l]ease (including any exhibits or schedules attached hereto) constitutes the entire agreement of the parties on the subject matter hereof and may not be changed, modified, discharged or extended except by written instrument duly executed by the parties hereto.

however in 2007, the owners formed Harthman Leasing, LLLP and the lease was assigned to the partnership.

2. Section 7 of the lease provides that:

Beginning with the date of this Lease, Lessee shall have an option for ten (10) years to lease part of Parcel No. 17 which abuts Parcel 17-B, that Lessor may rezone for Commercial use. Lessee agrees to lease such property at the then current fair market value for Commercial Real Estate, to be determined at that time by negotiations between Lessor and Lessee. Lessor shall notify Lessee of such rezoning and Lessee shall have a period of sixty (60) days to commence negotiations with Lessor. Provided, however, that if an agreement satisfactory to both parties has not been negotiated and signed within one (1) year following the expiration of the initial sixty (60) days, this option shall automatically terminate.”

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¶ 4 On December 11, 2003, Harthman and EEP signed a letter (“2003 Amendment Letter”) amending the lease to include Parcels 17-C and 17-D. The 2003 Amendment Letter specifically referenced the addition of Parcels 17-C and 17-D; however, it made no reference to Parcel 17-E.³ Although the 2003 Amendment Letter did not explicitly incorporate Parcel 17-E into the lease, EEP proceeded to insure that parcel and pay its associated property taxes and rent. Additionally, EEP excavated Parcel 17-E to prepare the land for subsequent commercial use and placed a construction trailer on the property.

¶ 5 On September 9, 2005, EEP entered into a Construction Loan Agreement with FirstBank to finance construction on the property. FirstBank agreed to lend EEP \$16.6 million dollars for the development of parking, retail, and commercial structures. The Construction Loan Agreement was secured by a Priority Leasehold Mortgage against EEP’s interest in the lease. Harthman executed an official consent (“2005 Consent”) to the loan agreement between EEP and FirstBank, which provided that:

In the event the Bank elects to foreclose its Leasehold Mortgage or elects to make the Assignment effective, the Bank shall thereafter be liable to perform all obligations of the Lessee under the Lease, including but not limited to (a)

3. According to the 2003 Amendment Letter, the addition of Parcel 17-C was contingent on obtaining the proper commercial zoning requirements approved by the government. On December 2, 2005, the zoning change was approved by the governor and Parcel 17-C officially became a part of the lease.

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payment of rent arrearages existing at the time of such election, and (b) the due and punctual payment of all rent thereafter coming due as provided in the Lease, but said election shall not relieve the Lessee of said obligations.

¶ 6 Exhibit A of the 2005 Consent described the lease “as dated July 15, 2003, effective September 1, 2003, as modified by letter dated December 11, 2003.” The lease and the 2005 Consent still made no mention of Parcel 17-E.

¶ 7 On January 18, 2008, EEP and FirstBank executed an Amendment to the Construction Loan Agreement to increase the loan amount by an additional five million dollars, from \$16.6 million dollars to \$21.6 million dollars. Harthman simultaneously consented to the mortgage modification and executed another consent agreement with FirstBank (“2008 Consent”). The terms remained the same under both the 2005 and 2008 Consents. Once again, none of the documents made any reference or mention of Parcel 17-E.

¶ 8 On April 29, 2008, Harthman sent EEP a letter, which proposed amending the ground lease for a second time (“2008 Proposed Amendment”). The 2008 Proposed Amendment sought to include Parcels 17-B, 17-C, 17-D, and 17-E in the description of the leased premises. EEP did not sign the Proposed Amendment due to a disagreement regarding the amount of back rent due.

¶ 9 On November 1, 2010, EEP and Harthman executed a Conditional Agreement to Amend Lease in the hopes that

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a hotel entity would sublet the parcels. The parties agreed that EEP's rent would be deferred while the Conditional Agreement remained in effect. Like the 2008 Proposed Amendment, the Conditional Agreements described the leased premises to include Parcels 17-B, 17-C, 17-D, *and* 17-E. The Conditional Agreement would expire if EEP failed to secure an agreement with a hotel entity within six months. Ultimately, EEP was unable to secure an agreement with a hotel entity within the time prescribed and the Conditional Agreement expired. Harthman notified EEP of the Conditional Agreement's expiration in a letter dated May 20, 2011, and subsequently terminated the Conditional Agreement.

¶ 10 Following the Conditional Agreement's expiration, EEP failed to deliver the deferred rent payments that were due to Harthman and subsequently defaulted on its obligations under the lease. On June 3, 2011, Harthman sent EEP and FirstBank a Notice of Non-Payment of Rent and claimed that EEP had an obligation to pay back rent in the sum of \$715,336.34 to cure its defaults. EEP disputed Harthman's calculation of back rent as overinflated and never cured any of its defaults. On July 26, 2011, Harthman sent a Notice of Default to EEP and FirstBank. On November 22, 2011, FirstBank commenced its own action for debt, foreclosure of leasehold mortgage, and enforcement of guaranty against EEP for its default on the loan for \$21.6 million dollars.

¶ 11 In the end, FirstBank decided to accept an assignment instead of foreclosing on the lease and on March 27, 2012, EEP and FirstBank executed a Multi

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Credit Settlement Agreement (“Settlement Agreement”) and an Assignment of Lease in Lieu of Foreclosure (“Assignment of Lease”). The Settlement Agreement and Assignment of Lease provided that FirstBank would assume the rights, obligations, and interest of EEP in the ground lease of the property. The Assignment also stated:

This Assignment is made pursuant to the terms of the Settlement Agreement and in accordance, to the extent necessary, with the requirements of the Mortgage and Consent. It is understood that there are no considerations, verbal or otherwise, between the parties other than those set forth herein and therein. This Assignment may not be modified or altered except [*sic*] in writing signed by the parties hereto.

Exhibit A of the Assignment described the “Leased Premises” as Parcel 17-B and 17-D and the lease as “dated July 15, 2003, effective September 1, 2003, as modified by letter dated December 11, 2003.”

¶ 12 Shortly after EEP assigned its rights, Harthman and FirstBank disputed the amount of money required to cure EEP’s debts. Harthman and FirstBank specifically disputed whether Parcel 17-E ever became part of the lease and whether FirstBank had any obligations regarding Parcel 17-E. On May 17, 2012, FirstBank issued Harthman a check for \$344,055.17, claiming that amount encompassed the entirety of EEP’s debts for all parcels as of May 1, 2012. On the same day, Harthman terminated the lease for failure to timely cure or satisfy earlier notices

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of default and FirstBank responded by filing a complaint in the Superior Court seeking a declaratory judgment that Parcel 17-E was never part of the lease. Despite the parties' disputes regarding Parcel 17-E, FirstBank continued to pay rent for Parcels 17-B, 17-C, and 17-D through August 2014. Since September 2014, FirstBank placed the monthly rent in an escrow account of one of its attorneys, instead of paying Harthman directly for Parcels 17-B, 17-C, and 17-D.

¶ 13 On August 10, 2012, FirstBank amended its single count complaint to add unjust enrichment, breach of the 2005 Consent, breach of the 2008 Consent, and impairment of security interest. On September 14, 2012, Harthman answered FirstBank's amended complaint and filed counterclaims for breach of contract, debt, possession of the premises, and breach of warranty to defend. In 2019, three issues were tried by the Superior Court and the remaining issues were tried by the jury. The Superior Court decided: (1) FirstBank's claim for Declaratory Judgment as set forth in Count I of its complaint; (2) FirstBank's claim for unjust enrichment as set forth in Count V of its complaint; and (3) Harthman's claim for possession of the premises as set forth in Count III of its counterclaim.

¶ 14 The jury returned a verdict on July 29, 2019, and awarded Harthman \$6,257,275.39 in damages.⁴ On June

4. Breakdown of award:

Base Rent for Parcels 17-B, 17-C, and 17-D (9/2014-7/2019): \$3,680,755.34

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4, 2021, the Superior Court issued its initial findings of fact and conclusions of law on whether Parcel 17-E became part of the lease, FirstBank's claim for unjust enrichment, and Harthman's claim for possession of the premises. The Superior Court concluded that Parcel 17-E never became a part of the lease according to any document and therefore, FirstBank acquired no rights or obligations regarding Parcel 17-E. The Superior Court also found that Harthman was entitled to possession of Parcels 17-B, 17-C, and 17-D based on FirstBank's failure to pay rent on those parcels since 2014. On July 2, 2021, FirstBank timely filed a motion for new trial and to amend judgment pursuant to Rule 59 of the Virgin Islands Rules of Civil Procedure ("Rule 59 Motion") and a renewed motion for judgment as a matter of law pursuant to Rule 50 of the Virgin Islands Rules of Civil Procedure ("Rule 50 Motion").⁵ FirstBank argued that the jury award was excessive and should be set aside while Harthman maintained that there was sufficient evidence on the record to support the jury's findings.

12% interest 9/2014-7/2019: \$1,028,409.23

5% late charges accumulated from 9/2014 to 7/2019:
\$184,037.77

Rent for Parcel 17-E until May 2012: \$1,364,073.05

5. On November 8, 2021, the Superior Court lost its authority to rule on this motion pursuant to Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure as it did not issue its findings within 120 days. Nonetheless, the Superior Court intended to deny the motion. Pursuant to Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure, we will deem the Rule 50 Motion as denied for the purposes of this appeal.

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¶ 15 On November 2, 2021, the Superior Court issued its memorandum opinion and order denying FirstBank’s Rule 59 Motion. The Superior Court did not grant a new trial and did not disturb the jury’s verdict award, reasoning that it was not erroneous or excessive. Then, on November 8, 2021, the Superior Court amended its conclusions of law to find that possession of Parcels 17-B, 17-C, and 17-D was awarded to Harthman based on FirstBank’s failure to cure EEP’s defaults rather than non-payment of rent. FirstBank timely filed its first amended notice of appeal on December 1, 2021, and Harthman timely filed its first amended notice of cross-appeal on December 15, 2021.

II. DISCUSSION**A. Jurisdiction and Standard of Review**

¶ 16 “The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law.” V.I. CODE ANN. tit. 4, § 32(a); *Pelle v. Certain Underwriters at Lloyd’s of London*, 66 V.I. 315, 318 (V.I. 2017). A final order conclusively adjudicates all disputes between the parties, ends the litigation on the merits, and leaves nothing to do but execute the judgment. *Brathwaite v. Xavier*, 71 V.I. 1089, 1095 (V.I. 2019). Here, both parties appeal several judgments and orders from the Superior Court proceedings including the judgment entered on June 4, 2021, the Superior Court’s November 2, 2021 memorandum opinion and order denying FirstBank’s Rule 59 Motion, and the November 8, 2021 order denying FirstBank’s Rule 50 Motion. As the above-mentioned

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judgments and orders “conclusively adjudicated all disputes between the parties, [they are] final order[s] within the meaning of 4 V.I.C. § 32(a).” *Brathwaite*, 71 V.I. at 1095.

¶ 17 “[This Court’s] standard of review in examining the Superior Court’s application of law is plenary, while findings of fact are reviewed only for clear error.” *Alexander v. Alexander*, 65 V.I. 372, 377 (V.I. 2016) (citing *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 263 (V.I. 2012)). “Under clear error review, [the Supreme Court] defer[s] to the Superior Court unless [its] determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.” *Tutein v. Arteaga*, 60 V.I. 709, 721 (V.I. 2014) (quoting *Bradford v. Cramer*, 54 V.I. 669, 673 (V.I. 2011)). “[The Supreme Court] review[s] the trial court’s denial or grant of a motion for a new trial only under an abuse of discretion standard.” *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 696 (V.I. 2022). That said, “[w]hen reviewing the denial of a timely filed Rule 59[] motion, an appellate court may consider the correctness of the underlying judgment even if it is not expressly identified in the notice of appeal.” *Chavayez v. Buhler*, S. Ct. Civ. No. 2007-060, 2009 WL 1810914, at *2 (V.I. June 25, 2009) (unpublished); *see also Bernhardt v. Bernhardt*, 51 VI. 341, 346 (V.I. 2009). This Court also reviews a trial court’s grant or denial of leave to amend a pleading for abuse of discretion. *Toussaint v. Stewart*, 67 V.I. 931, 941 (V.I. 2017). “An abuse of discretion arises when a decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application

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of law to fact.” *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 622 (V.I. 2017).

B. Waived Issues

¶ 18 FirstBank identified thirty-two issues in its First Amended Notice of Appeal; however, it only argued four issues in its appellate brief. In the Virgin Islands, “[a]ppellate courts will only review a claimed error that . . . is supported by argument and citations to legal authority.” *Anthony v. FirstBank V.I.*, 58 V.I. 224, 230 n.8 (V.I. 2013) (quoting *Bernhardt*, 51 V.I. at 345). “[I]ssues raised in a notice of appeal which are not argued in the appellant’s brief are waived.” *Bernhardt*, 51 V.I. at 346. Accordingly, we will only consider issues FirstBank properly briefed with supporting arguments and citations to legal authority, those issues being: (1) whether the Superior Court erred in denying FirstBank’s Rule 59 Motion regarding the jury’s damages award for Parcel 17-E; (2) whether the Superior Court erroneously granted dispossession of Parcels 17-B, 17-C, and 17-D based on FirstBank’s failure to cure debts or pay rent for Parcel 17-E; (3) whether the Superior Court erroneously expanded the scope of Hartman’s counterclaim to include Parcels 17-B, 17-C, and 17-D; and (4) whether the Superior Court erred in automatically denying FirstBank’s Rule 50 Motion regarding the jury’s findings for the remaining issues.

¶ 19 Harthman also presents several issues in its cross appeal, nearly all of which concern whether the Superior Court erred in its application of the Statute of Frauds and subsequently erred in finding that Parcel 17-E never

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became a part of the Lease. Harthman asserts that it presented sufficient evidence at trial, such as EEP's rental payments for Parcel 17-E, to find that it satisfied at least one of the several defenses to the Statute of Frauds. Harthman also claims that FirstBank did not have the right to assert the Statute of Frauds before being assigned the rights to the Lease. Unlike FirstBank, Harthman's arguments were thoroughly briefed with citations to legal authority; thus, they will be addressed under a plenary standard of review.

C. Parcel 17-E

¶ 20 Because the addition of Parcel 17-E is the basis of the parties' dispute, we will begin by addressing all issues concerning Parcel 17-E and then move on to FirstBank's claims regarding the remaining parcels.

¶ 21 The biggest point of contention in this case is whether Parcel 17-E ever became part of the leased premises and whether FirstBank acquired any rights or obligations regarding Parcel 17-E. FirstBank's argument is simple: Neither EEP, Harthman, nor FirstBank included the addition of Parcel 17-E in writing in compliance with the terms of their agreements, and therefore Parcel 17-E never became part of the lease. In contrast, Harthman presents a myriad of complex legal arguments regarding defenses to the Statute of Frauds in an attempt to prove that Parcel 17-E was included in the lease even though Parcel 17-E was never added to the lease in a written document. To support its argument, Harthman cites to EEP's trial testimony that it was leasing Parcel 17-E, EEP's payment of rent

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and possession of Parcel 17-E, and a collection of writings and letters referring to Parcel 17-E, including the 2008 Proposed Amendment and the Conditional Agreement. While Harthman is correct that the agreements with EEP and FirstBank fall under the Statute of Frauds,⁶ Harthman conveniently avoids the plain language of the lease, which contains an unambiguous merger clause. Section 37 of the lease specifically states that the “Lease (including any exhibits or schedules attached hereto) *constitutes the entire agreement of the parties on the subject matter hereof and may not be changed, modified, discharged or extended except by written instrument duly executed by the parties hereto.*” (Emphasis added).

¶ 22 We have previously held, “[i]f the language of a clear and unambiguous contract includes a merger clause, that clause precludes consideration of extrinsic evidence used to demonstrate an intent that contradicts or adds to the intent expressed in the [contract].” *Phillip*, 66 V.I. at 625 (quoting *Nelson v. Elway*, 908 P.2d 102, 107 (Colo. 1995) (internal quotation marks omitted)). A “merger

6. The Virgin Islands’ Statute of Frauds, 28 V.I.C. § 242, declares that

Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.

Because the ground lease was for a term of 30 years, it falls within the purview of 28 V.I.C. § 242.

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clause confirms that the contract is . . . a complete and exclusive statement of the terms of the agreement,” and limits the parties solely to the contract’s written terms. *Phillip*, 66 V.I. at 627 (quoting *Hoeker v. Dep’t of Soc. & Rehab. Servs.*, 765 A.2d 495, 499 (Vt. 2000)). Consequently, when parties include a merger clause, “evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.” *Phillip*, 66 V.I. at 626 (quoting *Cosgrove v. Mademoiselle Fashions*, 292 N.W.2d 780, 784-85 (Neb. 1980)).

¶ 23 In *Phillip*, this Court specifically mentioned the exclusion of “*antecedent* understandings and negotiations” in the face of an unambiguous merger clause, *Phillip*, 66 V.I. at 626, however, it is well established in other U.S. jurisdictions that a merger clause also excludes the introduction of *contemporaneous* negotiations as well.⁷

7. There are jurisdictions that do not bar extrinsic evidence for contemporaneous *collateral* agreements. The Alabama Supreme Court explained the doctrine well in *Ritter v. Grady Auto. Grp., Inc.*, 973 So. 2d 1058, 1062 (Ala. 2007). In *Ritter*, the Alabama Supreme Court adopted the *Mitchill* test, *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928),

a leading case, which gave three requirements for an agreement to be beyond the scope of a merger clause: (1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing.

Ritter, 973 So.2d at 1062 (quoting *Hartford Fire*, 270 Ala. at 154, 117 So. 2d at 353). Here, we decline to discuss this doctrine because

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See UAW-GM Human. Res. Ctr. v. KSL Rec. Corp., 579 N.W.2d 411, 414 (Mich. Ct. App. 1998) (“[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.”); *Ritter v. Grady Auto. Grp., Inc.*, 973 So.2d 1058, 1062 (Ala. 2007) (“A merger clause invokes the parol evidence rule, which precludes a court from considering extrinsic evidence of prior or contemporaneous agreements in order to change, alter, or contradict the terms of the integrated contract.”) (internal quotation marks omitted); *Portsmouth Redevelopment & Hous. Auth. v. Ison*, 66 Va. Cir. 336, 353 (Portsmouth Cir. Ct. 2005) (“The legal effect of a determination that the agreement is integrated, according to the Restatement Second, is that ‘evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict a term of the writing.’”); *Carrollton Hosp., LLC v. Kentucky Insight Partners II, LP*, Civ. No. 13-21, 2014 WL 2506463, at *15 (E.D. Ky. June 3, 2014) (“[I]n the absence of ambiguity, the terms in a written contract cannot be varied by parol evidence, which ‘consists of evidence of agreements between or the behavior of the parties prior to or contemporaneous with the contract’, including ‘evidence of a contemporaneous oral agreement on the same subject matter, verifying, modifying, contradicting, or enlarging a contract.’”) (quoting *Luttrell v. Cooper Indus.*, 60 F. Supp. 2d 629, 631 (E.D. Ky. 1998)).

neither of the parties raised any argument of a contemporaneous collateral agreement.

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¶ 24 Here, the merger clause in the lease is unambiguous and the parties' intent is clear: the lease "constitutes the entire agreement of the parties." For this reason, the Court is precluded from considering extrinsic evidence that contradicts the written terms of the lease. The lease and subsequent relevant written agreements describe the leased premises as 17-B, 17-C, and 17-D. Consequently, any of EEP's oral representations or admissions concerning Parcel 17-E contradict the express written terms of the lease and must be excluded. *See Phillip*, 66 V.I. at 625. Harthman also places emphasis on the 2008 Proposed Amendment and Conditional Agreement; however, EEP openly denied executing the 2008 Proposed Amendment and the Conditional Agreement expired. Accordingly, those pieces of evidence were never incorporated into the lease and must also be excluded. *Id.*

1. Harthman's Statute of Frauds Arguments

¶ 25 In the Virgin Islands, "[e]very contract for . . . leasing for a longer period than one year from the making thereof . . . shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority." 28 V.I.C. § 242. Under this implementation of the Statute of Frauds, an oral agreement must be reduced to writing and signed by the party to be charged. *Agueda v. Marciano*, 2024 V.I. 22, ¶ 29 (V.I. 2024). We have stated that a collection of writings can satisfy the statute's requirement of a written memorandum to establish the existence of a lease. *Bogin v. Smith*, 11 V.I. 225, 229-232 (V.I. Terr. Ct. 1977); *Cintron v. Andrews*, 7 V.I. 316, 323

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(D.V.I. 1969). A party is precluded from arguing that the Statute of Frauds applies if it admits to the existence of a contract in its pleadings or testimony. *See Claytor v. Chenay Bay Beach Resort*, 42 V.I. 379, 387 (D.V.I. 2000) (citing *Flight Sys., Inc. v. Electronic Data Sys. Corp.*, 112 F.3d 124, 127 (3d Cir. 1997)). Additionally, the doctrine of part performance “can be invoked . . . to prevent an inequity to a party when that party has relied on (by inducement or acquiescence) an oral agreement which normally would be voided by the Statute of Frauds.” *Virgin Islands Distributor, Inc v. Durkee Foods*, 19 V.I. 85, 92 (D.V.I. 1982) (citing *Henderson v. Resevic*, 262 F. Supp. 36 (D.V.I. 1966)).

¶ 26 Here, Harthman argues that a collection of writings, admission by a party at trial, and part performance demonstrate that Parcel 17-E was added to the lease. However, Harthman overlooks the unambiguous merger clause that the parties included in the lease. Because the merger clause clearly provides that any amendment to the lease must be accomplished in writing, Harthman’s defenses to the Statute of Frauds must necessarily fail.⁸

¶ 27 Harthman argues that the Superior Court erred because a collection of writings, primarily the Conditional Agreement, showed that Parcel 17-E was

8. If any of the defenses to the Statute of Frauds applied, we would have conducted a *Banks* analysis to determine Virgin Islands common law. *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). However, because the parties’ contract included a clear merger clause, we will not reach this issue.

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added to the lease. Harthman contends that the specific inclusion of Parcel 17-E as a part of the leased property in the Conditional Agreement proves that Parcel 17-E was added to the lease. We are not persuaded by this argument because the Conditional Agreement expired on May 1, 2011, and there is no collection of writings in the record that overcomes the Statute of Frauds. Moreover, Harthman overlooks the terms of the Conditional Agreement that states that it “shall in no manner be deemed to have created an amendment or modification of the Lease. All existing terms, conditions and provisions of the Lease shall remain unchanged and in full force and effect, until such time as an Amendment to the Lease is executed by and between the undersigned parties.” There is no signed writing that added Parcel 17-E to the lease. Although Virgin Islands courts have found an enforceable agreement from writings such as a series of letters or a paper acknowledging the receipt of money, here the parties are sophisticated business entities that contractually agreed on an unambiguous merger clause to amend the lease. *See Bogin v. Smith*, 13 V.I. 225, 229-32 (V.I. Terr. Ct. 1977) (finding the existence of a lease agreement from a series of letters that described the leased premises and payment method); *Cintron v. Andrews*, 7 V.I. 316, 323 (D.V.I. 1969) (holding that a paper acknowledging receipt of payment was a sufficient note or memorandum under the Statute of Frauds to entitle the payor to the subject property). The Conditional Agreement states that it does not amend the terms of the lease and therefore it cannot be used to prove that Parcel 17-E was added to the lease.

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¶ 28 Next, Harthman argues that EEP’s owner, Mr. William Otto, admitted at trial that Parcel 17-E was added to the lease.⁹ However, the record belies this argument. At trial, Mr. Otto testified that EEP was interested in Parcel 17-E as part of the plans to build a hotel on the property.¹⁰ Additionally, Mr. Otto stated that in 2008, EEP paid rent, property taxes, and insurance on Parcel 17-E along with the other parcels. However, Mr. Otto definitively stated that he was not aware of any document that added Parcel 17-E to the written lease.¹¹ Mr. Otto’s admissions that

9. On cross examination, counsel for Harthman asked Mr. Otto about Parcel 17-E:

“Q. And so you accepted Parcel E in the leasehold?
You accepted Parcel E?”

...

A. Yes, in the sense that we needed it. We were negotiating with the hotel room and it was a crucial part of going further with the hotel.”

10. On cross examination, Mr. Otto testified about EEP’s plans for Parcel 17-E:

“Q. And did you not also want a portion - - to use a portion of E for a parking lot?”

A. It wasn’t for parking. The parking was going to be underneath the hotel. The hotel was elevated above the upper level, but we needed - - we felt if we did the hotel, if we needed laundry facilities or staff quarters or any other kind of structures that would facilitate the hotel, we needed the land for that.”

11. On direct examination, Mr. Otto testified about the parcels included in the lease:

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Parcel 17-E was vital to any potential deals with a hotel entity and that EEP paid taxes and insured the property do not amount to recognition of an oral contract to add Parcel 17-E to the contract. Especially in light of the merger clause, an amendment to add Parcel 17-E to the lease needed to be in a writing signed by the parties. No such document exists on this record.

“Q. It was a certain parcel of land that you leased?

A. Yes, the primary parcel was 17-B as in “boy”.

Q: Okay. And did there come a time where you amended the lease to include additional parcels?

A. Yes. At a certain point that we added two additional parcels which were designated as 17-C like Charles and “D” like David.

Q. Okay. And were any other parcels that were added to the lease?

A. I don’t believe the document that incorporated it different - - did an additional parcel was ever executed, but there was another parcel that was contiguous so as that we were interested in.”

On redirect, Mr. Otto stated that there was no signed document that included Parcel 17-E in the lease:

“Q. Okay. And you provided testimony earlier that you’re not aware of any written lease anywhere that includes Parcel 17-E with Parcel 17-B, C and D; is that correct?

A. No.”

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¶ 29 Harthman further argues that the Superior Court erred by failing to conclude that EEP's payment of rent, taxes, and insurance demonstrates partial performance to include Parcel 17-E in the lease. To begin, "the doctrine of part performance is applicable as a defense to the [S]tatute of [F]rauds." *See Mod. Day Constr, Inc. v. Carty*, No. ST-09-CV-608, 2013 WL 2996549, at *3 (V.I. Super. Ct. June 13, 2013). Under the doctrine of part performance, the terms and subject matter of the contract must be clear and definite. *Matter of Estate of Pitterson*, 40 V.I. 13, 18 (V.I. Terr. Ct. 1998). The party asserting part performance must demonstrate that the opposing party "proposed to honor the oral agreement." *Id.* Additionally, the party asserting part performance "must have relied on this representation, either in performance or pursuance of his contract, so that he would incur an unjust and [unconscionable] injury and loss if the [opposing party] is allowed to rely on the statute." *Id.* The standard under part performance is whether the purchaser's actions are "unequivocally referable to the oral agreement." *Mod. Day Constr., Inc.*, 2013 WL 2996548, at *3 (citations omitted).

¶ 30 Here, Harthman is asserting that EEP paying rent, taxes, and insurance and its excavation efforts on the land demonstrate that Parcel 17-E was added to the lease. Although EEP was contractually obligated under the lease to pay rent, taxes, and insurance on all of the covered parcels, their payments for Parcel 17-E do not overcome the glaring omission of a written document that would have added Parcel 17-E to the lease. We are not persuaded that EEP's payments on Parcel 17-E are unequivocally referable to the oral agreement. As Mr. Otto testified to

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at trial, Parcel 17-E was an integral part of the plans for a hotel entity. EEP desired to secure that parcel in the event that a hotel entity agreed to take over the lease. Instead, a plausible explanation for the payment of rent, taxes, and insurance for Parcel 17-E is that EEP rented Parcel 17-E on a month-to-month basis while attempting to locate an interested hotel entity to take over the entire property including Parcel 17-E. Harthman has therefore not demonstrated that the doctrine of part performance applies.

¶ 31 As Harthman states, “[t]he [S]tatute of [F]rauds . . . has as its principal purpose the prevention of fraud.” *Hodge v. Hodge*, 15 V.I. 154, 169 (D.V.I. 1979), *aff’d*, 621 F.2d 590 (3d Cir. 1980). EEP, Harthman, and FirstBank are all sophisticated parties and “[t]hey certainly understood and appreciated the meaning and role of the merger clause they chose to include in the [Lease].” *In re Brookland Park Plaza, LLC*, No. 09-34495-KRH, 2009 WL 3297801, at *7 (Bankr. E.D. Va. Oct. 13, 2009) (holding that a merger clause prevented a party from introducing oral evidence to support a Statute of Frauds defense of equitable estoppel). If Harthman and EEP intended for Parcel 17-E to become incorporated into the Lease, they would have executed an effective amendment to the lease, as they did with Parcel 17-C and 17-D. On the contrary, if the parties intended for oral agreements to influence the agreement’s written terms, they would not have included the merger clause. Although the Superior Court should have placed more emphasis on the merger clause’s effect on the cognizability of extrinsic evidence, it did not err in finding that Parcel 17-E never became part of the lease and

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that FirstBank never acquired any rights or obligations concerning Parcel 17-E.

¶ 32 Additionally, Harthman briefly argues that FirstBank should be equitably estopped from arguing that Parcel 17-E was not added to the lease. We have previously held that “[i]n the Virgin Islands, equitable estoppel requires an asserting party to demonstrate that (1) the party to be estopped made a material misrepresentation (2) that induced reasonable reliance by the asserting party and (3) resulted in the asserting party’s detriment.” *Browne v. Stanley*, 66 V.I. 328, 335 (V.I. 2017) (citing *Joseph v. Inter-Ocean Ins. Agency, Inc.*, 59 V.I. 820, 838 (V.I. 2013)). In a case concerning real property, the doctrine of equitable estoppel should be applied with “great caution.” *Id* On this record, Harthman has not satisfied any of the elements of equitable estoppel. EEP did not make a material misrepresentation to Harthman that Parcel 17-E was added to the lease. Instead, EEP and Harthman proposed a plan, memorialized in the Conditional Agreement, to pursue a deal with a hotel entity for all of the parcels. In the interim, EEP paid rent, taxes, and insurance for Parcel 17-E. Subsequently, the Conditional Agreement expired when EEP could not secure a hotel deal. Harthman received compensation for the property and would have financially benefited if a hotel deal had been finalized. It is far from clear how this arrangement was to Harthman’s detriment as required by the doctrine of equitable estoppel. *See Browne*, 66 V.I. at 337 (“A party seeking a permanent equitable interest in land must demonstrate *substantial* detriment.”).

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Harthman failed to prove that the doctrine of equitable estoppel applies.

2. FirstBank's Authority to Assert the Statute of Frauds

¶ 33 Although Harthman is precluded from introducing extrinsic evidence to establish its defenses to the Statute of Frauds, the merger clause does not prevent Harthman from challenging FirstBank's ability to invoke the Statute of Frauds. Harthman correctly argues that, as EEP's successor, FirstBank lacked the ability to assert the Statute of Frauds *pre-assignment*.

¶ 34 Generally, "a stranger to a contract lacks standing to enforce compliance with the [S]tatute of [F]rauds." *Palmer v. Bahm*, 128 P.3d 1031, 1035 (Mont. 2006); *Hill v. GM Acceptance Corp.*, 525 N.W.2d 905, 908-09 (Mich. Ct. App. 1994) ("[T]he [S]tatute of [F]rauds is a personal defense available only to parties to a contract."); *Harbor Fin. Mortg. Corp. v. Hurray*, 277 A.D.2d 693, 694 (N.Y. App. Div. 3rd Dept. 2000) ("[A]s the sale was between the Referee and Bordell, plaintiff would lack standing to assert the Statute of Frauds."); *Fritz v. Iowa State Highway Com.*, 270 N.W.2d 835, 840 (Iowa 1978) ("[N]one but the parties to the transaction may rely upon the [S]tatute of [F]rauds."); *Commercial Union Ins. Co. v. Padrick Chevrolet Co.*, 196 So. 2d 235, 237 (Fla. Dist. Ct. App. 1967) ("The defense of the Statute of Frauds cannot be claimed by one who is not a party or privity to the oral contract."); *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 634 (Mo. Ct. App. 2005) ("Plaintiffs cannot challenge the

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validity of that assignment on the basis that it violated the Statute of Frauds because they were not parties to the assignment.”). As FirstBank was not a party to any lease agreements between EEP and Harthman until EEP assigned its rights to FirstBank, it lacked authority to assert the Statute of Frauds prior to 2012.

¶ 35 Nevertheless, once EEP assigned its rights to FirstBank, FirstBank acquired the right to assert the Statute of Frauds and any other defenses EEP may have had under the lease. *First-Citizens Bank & Tr. Co. v. Greater Austin Area Telcoms. Network*, 318 S.W.3d 560, 566 (Tex. App. 2010) (citing *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 420 (Tex. 2000)) (“An assignee stands in the shoes of the assignor and may assert those rights that the assignor could assert.”); *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E.2d 860, 864 (Ill. App. Ct. 2010) (citing *Community Bank of Greater Peoria v. Carter*, 669 N.E.2d 1317 (Ill. App. Ct. 1996)) (“The assignment operates to transfer to the assignee all of the assignor’s right, title or interest in the thing assigned, such that the assignee stands in the shoes of the assignor.”). In addition, Harthman only challenges FirstBank’s capacity to assert the Statute of Frauds; however, as discussed above, the dispositive issue in this case is the merger clause, not the Statute of Frauds as Harthman argues. Even if FirstBank were unable to assert the Statute of Frauds prior to 2012, it still had every right to challenge the addition of Parcel 17-E under the express terms of the assigned lease. Under the Assignment and Consent’s terms, FirstBank was only required to cure EEP’s defaults under the lease.

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Consequently, Harthman is incorrect in its brief when it states that FirstBank as an assignee of the lease - could not challenge *any* debts EEP incurred for Parcel 17-E pre-assignment because FirstBank never agreed to those terms. FirstBank agreed to cure defaults under the lease, and if Parcel 17-E never became part of the lease, FirstBank can dispute those debts.

3. Denial of FirstBank's Rule 59 Motion

¶ 36 This Court will now review the Superior Court's decision to deny FirstBank's Rule 59 motion for a new trial and to amend the judgment. At trial, the jury found FirstBank responsible for outstanding rent, late fees, and penalties for *all* Parcels, and awarded Harthman a total of \$6,257,275.39. Of that sum, \$1,364,073.05 was for outstanding rent and subsequent fees that EEP incurred on Parcel 17-E *before* the lease was assigned to FirstBank. Despite the jury's award regarding Parcel 17-E, the Superior Court found, as a matter of law, that Parcel 17-E never became part of the lease because Parcel 17-E was never added to the lease. FirstBank then filed its Rule 59 Motion on the premise that the jury's award was excessive for including damages on Parcel 17-E.¹² The Superior Court eventually upheld the entire jury award despite agreeing with FirstBank that the jury award included rent for Parcel 17-E pre-assignment. FirstBank specifically argues that it is only responsible for what is

12. FirstBank also argued there was a change in controlling law that warranted a new trial based on the Superior Court's findings; however, FirstBank only challenges the sufficiency of the evidence on appeal.

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contained in the lease post-assignment. In considering FirstBank’s claims, we must first look to the standards governing Rule 59 motions.

¶ 37 There are different standards for granting Rule 59 motions for jury trials and non-jury trials. As FirstBank’s first issue on appeal regards the jury’s damages award, this Court will look to Rule 59’s standards governing jury trials. The relevant portions of V.I.R. Civ. P. 59 provide:

(a) In General.

(1) The court may, on motion, grant a new trial on all or some of the issues and to any party — as follows:

(A) after a jury trial, for any one of the following reasons:

...

(iv) excessive or inadequate damages

¶ 38 In other words, the court may grant a new trial if the jury returns an excessive or inadequate damages award. *Id.* The Virgin Islands recognizes an excessive damage award in tort to be one that “no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded.” *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 694 (V.I. 2022) (citing *Creative Minds, LLC*, No. ST-11-CV-131, 2014 WL 4908588, at *11 (V.I. Super. Ct. Sept. 24, 2014)). In its November 2, 2021,

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memorandum opinion, the Superior Court also quoted similar Virgin Islands law, stating “[a] damages award is ‘inviolable,’ unless the award is ‘so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.’” *Cherubin v. LIAT* (1974), 70 V.I. 558, 570 (V.I. Super. Ct. 2019) (citations omitted). The Superior Court then went on to reference *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 437-38 (V.I. 2016), a landmark Virgin Islands decision refusing to recognize the doctrine of remittitur. The Superior Court interpreted *Antilles* to “effectively grant[] the jury sole authority in determining damages awards.” While it is true that this Court has longstanding precedent respecting the province of the jury, the Superior Court here misinterpreted the holding in *Antilles*. 64 V.I. at 435, 438. This Court in *Antilles* declined to recognize remittitur; however, the opinion expressly “permit[s] a jury’s verdict to be altered by a judge only if it is *not supported by sufficient evidence in the record*, or if a reduction is compelled under the United States Constitution.” *Id.* at 437-38 (emphasis added). This Court in *Atlantic Human Resource Advisors, LLC v. Espersen*, 76 V.I. 583, 621 (V.I. 2022) reaffirmed the holding in *Antilles* and stated the following:

Thus, the promulgation of Rule 59(a)(1)(A)(iv) does not overturn the decision of *Antilles School* or otherwise resurrect remittitur, but rather acknowledges that *Antilles School* nevertheless authorizes courts to set aside damage awards and grant a new trial for other reasons. In *Antilles School*, we identified, at

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a minimum, three such reasons: situations where the evidence is insufficient to support the jury's damages award, where the verdict is against the weight of the evidence, or where the damages awarded by the jury are so excessive as to violate the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution.

(quoting *Antilles Sch.*, 64 V.I. at 435, 438 (internal quotations omitted)).

¶ 39 Here, FirstBank was not arguing that the jury's award was so excessive it "shock[ed] the judicial conscience," but rather that the jury's award was excessive because there was insufficient evidence to support the inclusion of back rent for Parcel 17-E. For this reason, the appropriate test to apply for FirstBank's Rule 59 Motion is "whether sufficient evidence existed on the record which, if accepted by the jury, could sustain the verdict." *Lembach v. Antilles Sch., Inc.*, No. ST-12-CV-613, 2015 WL 2120508, at *3 (V.I. Super. Ct. Apr. 1, 2015), *aff'd*, 64 V.I. 400 (2016) (quoting *Hourston v. Harvlan, Inc.*, 45 7 F.2d 1105, 1107 (3d Cir. 1972)). As stated above, Parcel 17-E never became a part of the leased premises, and the parties were precluded as a matter of law from using extrinsic evidence to prove otherwise based on the unambiguous language of the lease. Further, the terms of the 2005 and 2008 Consents were clear: FirstBank was only responsible for curing EEP's defaults under the lease. If Parcel 17-E never became part of the ground lease, FirstBank was not responsible for curing those debts. Consequently, there

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was no basis for the jury to award damages on Parcel 17-E and the Superior Court abused its discretion by failing to grant FirstBank's Rule 59 motion.

D. Possession of the Parcels

¶ 40 The next issue FirstBank presents on appeal is whether the Superior Court had a proper basis for granting possession of Parcels 17-B, 17-C, and 17-D to Harthman. FirstBank argues that the Superior Court erred by granting possession of the parcels to Harthman based on FirstBank's failure to fully cure EEP's defaults or pay rent on Parcel 17-E.

¶ 41 In its initial findings of fact and conclusions of law, entered on June 4, 2021, the Superior Court reasoned that Harthman was entitled to possession based on FirstBank's failure to "pay rent to Harthman for *Parcels 17-B, 17-C, and 17-D* since September 2014." (emphasis added). On November 8, 2021, the Superior Court amended its findings of fact and conclusions of law to conclude that "[d]ue to FirstBank's failure to cure EEP's default, as set forth in the Assignment of Lease, Harthman is entitled to possession of *Parcels 17-B, 17-C, 17-D.*" (emphasis added).

¶ 42 Neither the initial findings or the amended findings make any mention of Parcel 17-E. FirstBank's argument - that it was improperly dispossessed based on its failure to cure EEP's defaults or pay rent on 17-E - is simply incorrect. Instead, the Superior Court definitively found that "FirstBank's tender of \$344,055.17, on May 17, 2012 failed to cure EEP's default on Parcels 17-B, 17-C, and

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17-D.” FirstBank points to a footnote in the Superior Court’s November 2, 2021 opinion¹³ that outlines the jury’s award of damages but fails to support its argument that the Superior Court granted dispossession because of rental arrears on Parcel 17-E. Because FirstBank did not advance any other arguments supported by citation to legal authority or explain how dispossession was premised on Parcel 17-E, we will not address this issue further and consider it waived. *See* V.I.R. APP. P. 22(m)(3) (“Issues that. . .are only adverted to in a perfunctory manner or unsupported by argument and citations to legal authority are deemed waived for the purposes of appeal.”); *Simpson v. Golden*, 56 V.I. 272, 279 (V.I. 2012) (“To properly obtain review, an appellant has a duty to outline in his main appellate brief the issues for which review is sought, and the issues thereby listed shape the parameters of the appellate court’s consideration. Moreover, an appellant is bound to submit arguments in support of the issues presented, supported by legal authorities and applied

13. Footnote 3 of the Superior Court’s November 2, 2021 memorandum opinion denying FirstBank’s Rule 59 Motion states:

Harthman successfully argued to the jury that it was entitled to the sum of \$6,257,275.39, and provided the following breakdown to support that sum:

Base Rent for Parcels 17-B, 17-C, and 17-D (9/2014-7/2019): \$3,680,755.34

12% interest 9/2014-7/2019: \$1,028,409.23

5% late charges accumulated from 9/2014 to 7/2019: \$184,037.77

Rent for Parcel 17-E until May 2012: \$1,364,073.05

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to the facts reflected on the record.) (quoting *Ibrahim v. Gov't of the V.I.*, 47 V.I. 589, 594 (D.V.I. App. Div. 2005)).

E. Sufficiency of the Pleadings

¶ 43 Next, FirstBank challenges the sufficiency of Harthman's pleadings and the Superior Court's July 19, 2019, order allowing certain claims to proceed to trial. FirstBank argues that Harthman's counterclaims only included claims regarding Parcel 17-E and, therefore, the pleadings were not broad enough to include claims for unpaid rent on the other three parcels. FirstBank specifically argues that the Superior Court erred in allowing the issue of escrowing rent for Parcels 17-B, 17-C, and 17-D to proceed to trial as those issues were not properly before the Superior Court.

¶ 44 It is well settled that the Virgin Islands is a notice pleading jurisdiction. *Basic Servs., Inc. v. Gov't of the V.I.*, 71 V.I. 652, 659 (V.I. 2019). "When this Court adopted the Virgin Islands Rules of Civil Procedure effective March 31, 2017, the rules confirmed that the Virgin Islands is 'a notice pleading jurisdiction' pursuant to V.I. R. Civ. P. 8(a),¹⁴ effectively rejecting the heightened pleading standard applicable in the federal courts under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and its progeny in

14. The Advisory Committee Note to V.I. R. Civ. P. 8(a) states that "[the] practice in the Virgin Islands continues to adhere to the traditional 'notice' pleading ethos as many states and territories have chosen to do, applying an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief."

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the federal courts.” *Id.*; see also *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017). “Effectively, the court takes a more liberal approach when reviewing the sufficiency of a pleading. The Supreme Court has a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules.” *Bank of Nova Scotia v. Flavius*, No. SX-16-CV-125, 2018 WL 745958, at *6 (V.I. Super. Ct. Feb. 2, 2018).

¶ 45 To satisfy notice pleading requirements in the Virgin Islands, “a plaintiff must provide a short and plain statement showing that the pleader is entitled to relief.” *Great St. Jim, LLC v. ProSolar Sys.*, No. ST-19-CV-57, 2020 WL 13532747, at *2 (V.I. Super. Ct. Feb. 13, 2020) (quoting *In re Adoption of the VI Rules of Civil Procedure*, No. 2017-001, 2017 WL 1293844 at * 19 (V.I. Apr. 3, 2017)). “A complaint has been sufficiently stated when it adequately alleges facts that put [a party] on notice of claims brought against it.” *Id.* (quoting *Brathwaite v. H.D.V.I. Holding Co.*, No. ST-16-CV-764, 2017 WL 2295123 at *2 (V.I. Super. Ct. Apr. 3, 2017)).

¶ 46 Looking at the pleadings, paragraphs 26 and 27 of Harthman’s counterclaims specifically state:

FirstBank was obliged and obligated to continue paying rent without protest in the same manner and fashion as EEP for property EEP deemed necessary for its project. FirstBank failed and refused to pay rent due from May, 2012, specifically for Parcel 17-E, *but for that and in*

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conjunction with late fees, penalties, interest and related damages to be proven at trial for all parcels, Harthman has been damaged.

(emphasis added). Harthman's counterclaim clearly references a broad range of disputed fees for all parcels, and this should have placed FirstBank on notice that disputes could arise concerning all parcels. Although FirstBank had not begun to escrow rent payments when Harthman filed the counterclaim, the counterclaim encompassed damages for all parcels. Because this issue was sufficiently pled concerning rental payments for all parcels, the jury was entitled to hear evidence about FirstBank's actions to escrow the rent payments. Consequently, the Superior Court did not abuse its discretion in allowing Harthman's claims to proceed for all parcels. Under our liberal pleading standards, the Superior Court did not abuse its discretion in determining that Harthman's counterclaim was sufficiently broad to encompass unpaid rent on all the parcels.

F. Rule 50 Motion

¶ 47 The final issue that FirstBank raises on appeal is the Superior Court's denial by default of FirstBank's Rule 50 motion for a directed verdict. At trial, FirstBank moved for judgment as a matter of law on each of Harthman's counterclaims, arguing that there was insufficient evidence to support each count. On July 2, 2021, FirstBank renewed its motion for judgment as a matter of law. In an order dated November 8, 2021, the Superior Court stated that it "intended to deny the Motion" but "the time to do

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so has expired” pursuant to V.I.R. APP. P. 5(a)(4). Rule 5(a)(4) states that:

If any party timely files in the Superior Court a motion for judgment as a matter of law. . .the time for filing the notice of appeal for all parties is extended until 30 days after entry of an order disposing of the last such motion; provided, however, that the failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal.

¶ 48 Accordingly, we will treat the Rule 50 Motion as denied for the purposes of this appeal. However, FirstBank fails to cite to any legal authority in support of its argument that it was entitled to a directed verdict. FirstBank’s arguments on this matter are waived because it merely listed each jury question and stated that a directed verdict should be entered in its favor. *See* V.I.R. APP. P. 22(m)(3); *Simpson*, 56 V.I. at 279 80 (V.I. 2012); *Percival*, 62 V.I. at 490. This form of conclusory argument deprives this Court of any meaningful opportunity to review an allegation of error.

III. CONCLUSION

¶ 49 Accordingly, we affirm in part and reverse in part the judgments of the Superior Court. We affirm the Superior Court’s July 19, 2019 order granting Harthman’s motion in limine to present evidence of damages relating

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to all parcels because Harthman's counterclaim was sufficiently broad to satisfy the Virgin Islands' liberal pleading standard. And we hold that FirstBank's remaining arguments on the possession of the parcels and FirstBank's Rule 50 motion are waived because FirstBank failed to fully brief these issues with citation to legal authority and argument. We reverse the Superior Court's November 2, 2021, opinion and order denying FirstBank's Rule 59 motion because Parcel 17-E was never added to the lease and FirstBank only incurred the duty to cure EEP's defaults under the terms of the lease. We remand the case to the Superior Court to amend the judgment to recalculate the damages award and exclude the jury's erroneous damages award for Parcel 17-E.

Dated this 29th day of August, 2025.

By the Court:

/s/ Maria M. Cabret

Maria M. Cabret
Associate Justice

**APPENDIX B — MEMORANDUM OPINION AND
ORDER ON MOTION FOR A NEW TRIAL AND TO
AMEND JUDGMENT OF THE SUPERIOR COURT OF
THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS
AND ST. JOHN, FILED NOVEMBER 2, 2021**

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

ST-2012-CV-00273

FIRSTBANK PUERTO RICO,

Plaintiff,

v.

HARTHMAN LEASING III, LLLP,

Defendant.

Filed November 2, 2021

MEMORANDUM OPINION

THIS MATTER is before the court on Plaintiff FirstBank Puerto Rico's Motion for a New Trial and to Amend Judgment, filed July 2, 2021. Defendant Harthman Leasing III ("Harthman") opposes this motion.¹ FirstBank's motion comes following the entry of the Judgment and Findings of Fact and Conclusions of Law entered on June 4, 2021 (the "Judgment").² For

1. This matter is fully briefed.

2. The Judgment confirmed a jury verdict, rendered on July 29, 2019, in the sum of \$6,257,275.39. In addition the Court

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the reasons set forth herein, the Motion will be granted in part and denied in part.

**BACKGROUND FACTS AND
PROCEDURAL POSTURE**

Harthman entered into a lease agreement (“Lease”) with East End Plaza, LLC (“EEP”) in September 2003, for Parcel 17-B, Estate Smith Bay, St. Thomas, Virgin Islands. Ultimately, said parties executed agreements to add Parcels 17-C and 17-D to the Lease. EEP obtained a construction loan from FirstBank for commercial development of the parcels. FirstBank and EEP entered into an agreement granting FirstBank priority of assignment of the Lease, as security for repayment of the construction loan. Harthman consented to the agreement through execution of a Consent Agreement (“2005 Consent”). The 2005 Consent stated, in part, that upon EEP’s default, FirstBank would become liable for all of EEP’s obligations under the Lease. EEP and Harthman never executed a lease agreement regarding Parcel 17-E, but EEP used Parcel 17-E and paid rent, property taxes, and insurance on Parcel 17-E for multiple years, with intentions of using it to expand its development and to protect the parcel from other commercial developers.

In June 2011, EEP defaulted on its rental payments, at which point Harthman sent a Notice of Nonpayment of

awarded prejudgment interest from August 1, 2019 (to the date of the judgment). Lastly, the Judgment granted possession of Parcel Nos 17-B 17-C, and 17-D Estate Smith Bay, St. Thomas, V.I. to Defendant Harthman Leasing III, LLLP.

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Rent to both EEP and FirstBank. EEP still failed to pay the outstanding amount, so in July 2011 Harthman sent a Notice of Default to EEP and FirstBank. In November 2011, FirstBank initiated an action against EEP for defaulting on the construction loan. FirstBank and EEP ultimately entered a Multi Credit Settlement Agreement and an Assignment of Lease in Lieu of Foreclosure to resolve the dispute. These agreements provided that FirstBank would assume the rights, obligations, and interest of EEP. On May 17, 2012, Harthman issued a Notice of Termination, on the basis that neither EEP nor FirstBank had cured EEP's default. On the same date FirstBank paid Harthman \$344,055.17 for undisputed rent arrearages, as of May 1, 2012.

FirstBank initiated this lawsuit in 2012 seeking, in part, declaratory judgment on the parties' rights and obligations under the Lease and a finding that FirstBank either timely cured its default or did not default at all. Harthman answered, denying FirstBank's accusations, and filed a counterclaim including a claim for possession of the premises, arguing that FirstBank failed to timely cure EEP's default.

This matter went to trial in 2019; some issues were tried to the court and some issues were tried to the jury. The jury returned a verdict on July 29, 2019 and awarded Harthman \$6,257,275.39 in damages.³ The three issues tried to the Court were: (1) FirstBank's

3. Harthman successfully argued to the jury that it was entitled to the sum of \$6,257,275.39, and provided the following breakdown to support that sum:

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claim for Declaratory Judgment, (2) FirstBank's claim for unjust enrichment, and (3) Harthman's claim for possession of the premises.⁴ This Court issued findings of fact and conclusions of law and entered Judgment on June 4, 2021. This Court ultimately concluded that (1) the contested Parcel 17-E was never part of the Lease, but rather was leased on a month to month basis by EEP, (2) Harthman was not unjustly enriched when it accepted rent payments on Parcel 17-E, and (3) Harthman was entitled to possession of Parcels 17-B, 17-C, and 17-D because FirstBank has not paid rent owed on those parcels since 2014.

FirstBank now asks this Court to grant a new trial or amend the Judgment, claiming there has been an intervening change in controlling law, excessive damages, and that the grant of possession to Harthman was improper.

Base Rent for Parcels 17-B 17-C and 17-D (9/2014 – 7/2019): \$3,680,755.34

12% interest from 9/2014 to 7/2019: \$1,028,409.23

5% late charges accumulated from 9/2014 go 7/2019:
\$ 184,037.77

Rent for Parcel 17-E until May 2012: \$1,364,073.05

4. Upon the request of the parties, the jury was asked to give an advisory verdict on the issues tried to the Court.

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LEGAL STANDARD

Pursuant to Virgin Islands Rule of Civil Procedure 59, FirstBank moves for a new trial and amendment to the Judgment. There are separate standards for granting a new trial for jury trials and nonjury trials.

ANALYSIS

I. MOTION FOR NEW TRIAL FOLLOWING A JURY TRIAL

A. LEGAL STANDARD

V.I. R. Civ. P. 59(a)(1)(A) provides the basic standard for granting a new trial following a jury trial. The pertinent portion of V.I. R. Civ. P. 59(a)(1)(A) provides:

“(1) The court may, on motion, grant a new trial on all or some of the issues and to any party as—follows:

(A) after a jury trial, for any one of the following reasons:

(iv) excessive or inadequate damages:

(v) an intervening change in controlling law:

The authority to grant a new trial following a Jury trial is at the court’s discretion and “must be exercised

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with care and circumspection.” *Henry v. World Fresh Markets*, No. SX-10-CV-557, 2018 WL 4002725, at *2 (VI Super. Ct. Aug. 20, 2018), *aff’d* 71 VI 1161 (2019) (citing *Lembach v. Antilles Sch.*, No ST-12-CV-613, 2015 WL 2120508 at *2 (V.I. Super. Ct. Apr. 7, 2015)). Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the Court or a party — is ground for granting a new trial.” *Id.* “If the movant alleges insufficiency of the evidence, “[t]he appropriate test to be applied by the court in considering [a] motion for a new trial [is] ... whether sufficient evidence existed on the record which, if accepted by the jury, could sustain the verdict.” *Id.* Unless the Court is “convinced that the jury reached a seriously erroneous result because its verdict was against the clear weight of the evidence, [the Court has] no discretion to order a new trial.” *Id.*

B. INTERVENING CHANGE IN CONTROLLING LAW

Pursuant to V.I. R. Civ. P. 59(a)(1)(A)(v), following a jury trial, a motion for new trial may be granted if there has been an intervening change in controlling law impacting the judgment. Absent a decision from an appellate court or the United States Supreme Court or the passage of new legislation, any of which undermines a lower court decision, there has not been any intervening change in controlling law. *See Blyden v. Gov’t of the Virgin Islands*, 64 V.I. 367, 379 (V.I. 2016).

FirstBank asserts that this Court’s finding that Parcel 17-E was never part of the Lease constitutes an

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intervening change in controlling law to the jury verdict because the jury based its decision on an assumption that Parcel 17-E was included in the Lease, based on this Court's 2015 grant of summary judgment, stating as much. Harthman counters that the "intervening change in controlling law" standard allows a court to revisit or correct a judgment in the event of new substantive or procedural law from a higher court or the legislature. Harthman argues, therefore, that this Court's Judgment cannot be an "intervening change in controlling law." This Court agrees that entry of the Judgment is not an intervening change in controlling law. Further, the Court finds that the jury was not aware of the Court's 2015 ruling and did not assume that Parcel 17-E was included in the lease because the issue was tried to the Court and the jury even gave an advisory verdict on the issue.⁵ The question having been presented to the jury for a verdict refutes FirstBank's argument that the jury based its decision on an assumption that Parcel 17-E was included in the Lease.

Given that FirstBank has not notified the Court of any changes in controlling law, the Court finds there has been no intervening change of controlling law pursuant to V.I. R. Civ. P. 59(a)(1)(A)(v).

5. See Question No. 1 on the Verdict form: Do you find by a preponderance of the evidence that Parcel 17E Smith Bay St. Thomas, VI was added to or included in the leasehold premises?"

*Appendix B***C. EXCESSIVE DAMAGES**

Pursuant to V.I. R. Civ. P. 59(a)(1)(A)(iv), a motion for new trial may be granted if jury-awarded damages are found to be excessive or inadequate. “In reviewing a damages award for excessiveness, the Court is guided by the principle that “it is within the virtually exclusive purview of the jury to evaluate credibility and fix damages. *Cherubin v. LIAT* (1974), 70 V.I. 558, 570 (Super V.I. 2019) (quoting *United Int’l Holdings v. Wharf*, 210 F.3d 1207, 1230 (10th Cir. 2000)). A damages award is “inviolate,” unless the award is “so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.” *Id.* (citing *Gulf Coast Shippers v. DHL Express (USA)*, No. 2:09-cv-00221-RJS, 2016 WL 6821798 at *1 (D. Utah. Sept. 6, 2016)). Additionally, the Virgin Islands Supreme Court removed the common law remedy of remittitur⁶ from use in the Virgin Islands courts, which effectively granted the jury sole authority in determining damages awards. *See Antilles School v. Lembach*, 64 V.I. 400, 433 (V.I. 2016) (stating that remittitur is wholly inconsistent with this Court’s longstanding jurisprudence that questions of fact should be resolved by the jury, that

6. Remittitur is a common law doctrine in which a court will reduce the damages award indicated in a jury verdict after concluding that no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded such a large sum as damages.” *Antilles School v. Lembach*, 64 V.I. 400, 427 (V.I. 2016) (quoting *Thomas Hyll Funeral Home, Inc. v. Bradford*, 233 F Supp 2d 704, 710 (D.V.I. App. Div. 2002)).

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a jury’s factual determinations should be respected so long as there is a sufficient evidentiary basis, and that it is not the role of the judge to weigh the evidence when it has been submitted to a jury for a determination”)).

FirstBank argues that the damages awarded by the jury are excessive because Parcel 17-E was never part of the Lease, so FirstBank should not have to pay the back rent, fees, and interest associated with the parcel.⁷ FirstBank states that damages on harm not caused are clearly excessive. Harthman counters that neither the Jury verdict nor this Court’s Judgment requires FirstBank to pay rent and interest it does not owe; instead FirstBank was obligated to cure EEP’s default and was therefore only obligated to pay the outstanding rent EEP accrued on Parcel 17-E prior to FirstBank assuming control.

First, the Court does not find the damages award to be excessive or prejudicial because Harthman presented evidence supporting the \$6,257,275.39 award, as well as its calculations for that sum. As a result, the Court finds the jury’s damages award was not “so excessive as to shock the judicial conscience,” or “raise an irresistible inference that [any] improper cause invaded the trial.” *Cherubin*, 70 V.I. at 570.

The Court agrees with FirstBank, however, that a portion of the jury award—specifically, the sum of \$1,364,073.05—included rent for Parcel 17-E, which

7. The amount contested by FirstBank for Parcel 17-E is \$1,364,073.05.

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EEP incurred and owed to Harthman *before* FirstBank assumed EEP's rights, obligations, and interest under the Assignment of Lease in Lieu of Foreclosure and corresponding Settlement Agreement.⁸ However, the jury award did not contain any rent for Parcel 17-E *after* FirstBank agreed to take over EEP's rights, obligations, and interest. Even if FirstBank is ultimately found not liable for the rent that accrued on Parcel 17-E before FirstBank assumed EEP's rights, obligations, and interest, the sum of the potentially necessary adjustment in the award is easily identifiable and such a correction or adjustment does not justify a new trial.

Second, no error by the Court or a party is grounds for granting a new trial, unless justice requires otherwise. *Antilles School*, 2015 WL 2120508, at *2 The apparent conflict between the jury award and the court's finding of no liability as to Parcel 17-E is not due to error by the Court. Instead, the jury decided the issue tried to the jury and the Court decided the issue tried to the Court. The results contain a contradiction, but it is not caused by error of the Court. Therefore, the Court discerns no good grounds to grant a new trial.

As explained above, there was no change in controlling law, no finding of excessive damages, and there is sufficient proof to support the sum awarded by the jury, FirstBank has not persuaded the Court it is entitled to a new trial.

8. The breakdown for the sum of the jury award can be found in footnote 3, above.

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The motion for new trial on the issues tried to the Jury will be denied.

II. MOTION FOR NEW TRIAL AND TO AMEND JUDGMENT FOLLOWING NON-JURY TRIAL

Regarding the issues tried to the Court, FirstBank requests that this Court amend the Judgment on the issue of possession or in the alternative, order a new trial

A. LEGAL STANDARD

When considering a motion for new trial and to amend judgment after a nonjury trial, Virgin Islands Rules of Civil Procedure 59(a)(1)(B) and 59(a)(2) govern, respectively. The pertinent portions of VI R. Civ. P. 59(a) provide:

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues -- and to any party -- as follows:

...

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in non-jury cases.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered,

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take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.”

V.I. R. Civ. P. 59(a).

These local rules are substantively identical to the corresponding Federal Rules of Civil Procedure.⁹ Therefore, while Virgin Islands courts have not yet interpreted these local rules, federal cases interpreting the corresponding Federal Rules are persuasive. *Victor-Perez v. Diamondrock Frenchman’s Owner*, No ST-15-CV-387, 2017 WL 4538920, at *7 n. 50 (V.I. Super. Ct. Aug. 31, 2017) (finding “decisions interpreting the [Fed R. Civ. P.] are persuasive authority where the V.I. R. Civ. P. and the [Fed R. Civ. P.] are substantively identical”).

The District Court of the Virgin Islands interpreting F. R. Civ. P. 59(a)(1)(B), has said that a “motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should

9. Federal Rule of Civil Procedure 59(a)(1)(B) states: “The court may on motion grant a new trial on all or some of the issues—and to any party—as follows: . . . (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.” Federal Rule of Civil Procedure 59(a)(2) states: “(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.”

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not be set aside except for substantial reasons.” *Nelson v. Long Reef Condo. Homeowners Assoc.*, No. 2011-0051, 2017 WL 1823040, at *3 (D.V.I. May 5, 2017) (quoting *Glemser v United States*, 2010 WL 1688544, at *1 (D.N.J. Apr. 29, 2010)). The District Court further stated that “[r]ule 59 is not a vehicle for relitigating old issues, or otherwise taking a ‘second bite at the apple.’” *Id.* at *4 (quoting *Ashraf-Hassan v. Embassy of France*, 185 F. Supp 3d 94, 112 (D.D.C. 2016)). Other federal courts have held that “[c]ourts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial.” *Hicks v. R.H. Lending*, No. 3:18-CV-0586-D, 2020 WL 2065637 at *3 (N.D. Tex. Apr. 29, 2020) (quoting *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir 1999)).

Federal courts interpreting F.R. Civ. P. 59(a)(2), including the District Court of the Virgin Islands, have recognized three grounds for granting a new trial following a nonjury trial: “(1) manifest error of law; (2) manifest error of fact, and (3) newly discovered evidence.” *Nelson*, 2017 WL 1823040, at *3 (quoting *Glemser*, 2010 WL 1688544 at *1).

A. NEW TRIAL OR AMENDMENT OF JUDGMENT ON THE ISSUE OF POSSESSION

The issue of possession was tried to the Court and the Court granted Harthman possession of Parcels 17-B, 17-C, and 17-D based upon FirstBank’s nonpayment

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of rent.¹⁰ The Court does not find a manifest error in its determination on the issue of possession but will amend the reasoning for Judgment on this issue.

First, FirstBank argues that the grant of possession was in error because the damages award includes damages associated with Parcel 17-E, which FirstBank claims it should not have to pay. Harthman counters that even without considering the outstanding payments due on Parcel 17-E, FirstBank did not cure EEP's default, because it paid only a portion of the sum FirstBank owed for Parcels 17-B, 17-C, and 17-D, and that FirstBank admitted it had not fully cured the outstanding rent on these three parcels. Harthman points out that FirstBank first admitted that the sum of \$471,137.78 was due on Parcels 17-B 17-C and 17-D in the April 2, 2012 letter to Harthman's attorney from Edward Reynolds, on behalf of FirstBank.¹¹ Subsequently, during trial, Sharmane Brookes, then employed as vice president of FirstBank, testified that "\$471,137.78 is the rent that's due to the landlord. Rent paid to the landlord for 17-B, C, and D[I, and] it excludes rent for 17-E."¹² However, FirstBank

10. The jury provided advisory verdicts on the following issues: (1) FirstBank's claim for Declaratory Judgment, (2) FirstBank's claim for unjust enrichment, and (3) Harthman's claim for possession of the premises. The jury's advisory verdict granted possession of Parcels 17-B 17-C and 17-D to Harthman.

11. Edward Reynold's letter was admitted as Plaintiff's Exhibit 11.

12. Trial Transcript, Vol. 1, P. 79. The Court notes that on rebuttal, FirstBank recalled Sharman Brookes to the witness

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only paid \$344,055.17.¹³ Harthman presented sufficient evidence for the Court to find that FirstBank did not cure the default for Parcels 17-B, 17-C, and 17-D, which is sufficient grounds to support the award of possession of those premises to Harthman, even if other sums are outstanding or if there are other bases to support the award of possession. Accordingly, the question of damages owed on Parcel 17-E alone cannot be determinative on the issue of possession

Further, as has been discussed, the award of damages was done at the discretion of the jury, so this Court lacks authority to amend the damages award. *See* Cherubin, 70 V.I. at 570. As also discussed above, the apparent discrepancy in the award of damages, as compared to the Court's ruling on 17-E, is not a reason for a Court to order a new trial, and the Court is not persuaded by FirstBank's argument regarding the need to amend the Judgment on such basis. Accordingly, the Court does not find manifest error in the grant of possession on the basis of damages owed for Parcel 17-E.

stand and she gave different testimony When asked "was a check for \$471,137.78 delivered to the Harthmans?", she replied "No, a check for three hundred and forty four and change was delivered to the Harthmans . . . because it took into consideration overpayments which were made . . . because 17-E was being included." Counsel asked "and the bank paid for 17-E?" To which Ms. Brookes replied, "Originally, but the bank took into consideration that payment, hence the check for three forty four instead of four seventy one." Trial Transcript, Vol. 3, P.151.

13. A copy of FirstBank's check for \$344,055.17, dated May 17, 2012, was admitted as Defendant's Exhibit 2.

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Second, FirstBank asks the Court to amend its findings of fact and conclusions of law to find that FirstBank properly cured EEP's default and that possession of Parcel 17-E cannot be awarded to Harthman in this case. It further argues the Court ruling should not have extended to the post pleading event of escrowing rent by FirstBank and doing so is manifestly unjust and legal error. Ultimately, FirstBank argues that Harthman is not entitled to possession because this Court premised its grant of possession on the nonpayment of rent, finding that FirstBank's escrowing the rent money was tantamount to withholding rent, an issue which was not addressed by this action. FirstBank states that nonpayment and escrowing rent was at issue in another court addressing a forcible entry and detainer ("FED") action, under which restitution of the premises to Harthman has been stayed pending appeal.¹⁴ FirstBank further argues it properly cured EEP's default, so grant of possession was an unnecessary remedy. Harthman suggests that the Court could clarify its conclusions of law to say the grant of possession is based not on the nonpayment of rent, but on FirstBank's failure to cure EEP's default.

14. First Bank cites to *Harthman Leasing III v. FirstBank Puerto Rico*, ST-2016-RV-00002 (Re: ST-2015-CV-00533) and asserts that Honorable Renee Gumbs Carty entered a stay of payment of rent and allowance of FirstBank to continue to escrow rent, pending the outcome of the appeal filed by Harthman on March 16, 2016. This Court disagrees with FirstBank's interpretation of Judge Carty's ruling. Despite its findings in the body of the order the order only stayed restitution of the premises. See Order dated July 19, 2019.

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The Court finds that there was sufficient evidence to show that FirstBank did not cure EEP's default, and that possession of the premises may be awarded on that basis. However, the Court agrees that it committed an error in its findings when it based the grant of possession of the premises to Harthman on the continuing nonpayment of rent on 17-B, 17-C, and 17-D. So, the Court will grant the portion of FirstBank's motion that seeks an amendment of the Judgment and will amend its reasoning for the grant of possession. This Court based the grant of possession to Harthman on FirstBank's "nonpayment of rent," while it should be premised on FirstBank's failure to fully cure EEP's default on the payment of rent and related Charges.¹⁵

The Court finds that FirstBank has not met its burden to prove the grant of possession was erroneous. The Court finds that FirstBank failed to fully cure EEP's original default when it only paid Harthman \$344,055.17 rather than \$471,137.78. Thus, the Court will amend those findings. However, the overall conclusion on possession will not change. *See Hicks*, 2020 WL 2065637, at *3. The

15. In addition, the jury's advisory verdict granted possession of the Lease premises to Harthman. Harthman points out that the parties made an error of law when they agreed the issue of possession should be tried by the Court. Harthman points out they had a statutory right to a jury trial on possession although they only noted this after the close of trial. Therefore, the Court finds that Harthman waived the right to a jury trial on that issue when they advised the Court that issue must be tried to the Court. Thus, the Court will not enter judgment on the jury's advisory verdict.

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Court will amend its conclusions of law at paragraphs 30 through 34 to rectify the error in language, as follows:

30. FirstBank's tender of \$344,055.17 on May 17, 2012, failed to cure EEP's default on Parcels 17-B, 17-C and 17-D.

31. Due to FirstBank's failure to cure EEP's default, as set forth in the Assignment of Lease, Harthman is entitled to possession of Parcels 17-B, 17-C, 17-D.

32. Harthman is entitled to the unpaid fees and interest for Parcels 17-B, 17-C, and 17-D associated with the partial payment of rent.

33. [Retracted]

34. [Retracted]

With the foregoing amendments to the conclusions of law, the Court finds no basis to order a new trial or substantive amendment. Harthman is still entitled to possession of Parcels 17-B, 17-C, and 17-D.¹⁶

16. The Court notes that under separate order the Court will grant FirstBank's motion to stay enforcement of the portion of the Judgment that granted possession to Harthman. So, possession shall be stayed pending the outcome of this matter on appeal.

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CONCLUSION

There was no intervening change in controlling law and the jury's damages award was not clearly erroneous or excessive. So, this Court finds no grounds upon which to grant a new trial for the contested issues decided by the jury. Further, this Court's finding that possession should be awarded to Harthman was not clearly erroneous. However, the Court will amend its conclusions of law to update the findings regarding possession as the Court agrees that the grant of possession was premised on FirstBank's failure to cure EEP's default rather than FirstBank's nonpayment of rent. The conclusions of law will be amended accordingly.

An Order consistent herewith will immediately follow.

Dated: November 2, 2021

/s/ Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

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**APPENDIX C — ORDER OF THE SUPERIOR
COURT OF THE VIRGIN ISLANDS, DIVISION
OF ST. THOMAS AND ST. JOHN, ON RENEWED
MOTION FOR JUDGMENT AS A MATTER OF LAW,
FILED NOVEMBER 8, 2021**

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

Case No. ST-2012-CV-00273

FIRSTBANK PUERTO RICO,

Plaintiff,

vs.

HARTHMAN LEASING III, LLLP,

Defendant.

Filed November 8, 2021

**ACTION FOR DECLARATORY JUDGMENT,
BREACH OF CONTRACT, IMPAIRMENT OF
SECURITY INTEREST, AND
UNJUST ENRICHMENT**

ORDER

THIS MATTER is before the court on Plaintiff
FirstBank Puerto Rico's Renewed Motion For Judgement
As A Matter of Law, filed July 2, 2021.

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The Court intended to deny the Motion. However, it no longer has jurisdiction to rule on said Motion as the time to do so has expired. V.I. R. APP. P. 5(a)(4).

Therefore, Plaintiff's Renewed Motion For Judgement As A Matter of Law is treated as denied for purposes of appeal.

ORDERED that copies of this Order shall be directed to counsel of record.

DATED: November 8, 2021

/s/ Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

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**APPENDIX D — JUDGMENT OF THE SUPERIOR
COURT OF THE VIRGIN ISLANDS, DIVISION OF
ST. THOMAS AND ST. JOHN, FILED JUNE 4, 2021**

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

Case No. ST-2012-CV-00273

FIRSTBANK PUERTO RICO,

Plaintiff,

vs.

HARTHMAN LEASING III LLLP,

Defendant.

Filed June 4, 2021

JUDGMENT

**ACTION FOR DECLARATORY JUDGMENT;
BREACH OF CONTRACT; IMPAIRMENT OF
SECURITY INTEREST; AND
UNJUST ENRICHMENT**

IN ACCORDANCE with the Findings of Fact and
Conclusions of Law entered on this day, it is hereby

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ORDERED that Declaratory Judgment is entered in favor of Plaintiff First Bank Puerto Rico (“FirstBank”) on Parcel No. 17E Estate Smith Bay, St. Thomas, Virgin Islands; and it is further

ORDERED that Parcel No. 17E Smith Bay was not included in area defined as the Leased Premises, and as a result, FirstBank has no liability to Defendant Harthman Leasing III, LLLP (“Harthman”), for Parcel No. 17E Smith Bay; and it is further

ORDERED that Harthman is entitled to possession of Parcel Nos. 17B, 17C and 17D Estate Smith Bay, St. Thomas, VI, and accordingly, possession of Parcel Nos. 17B, 17C and 17D Estate Smith Bay, St. Thomas, VI is hereby awarded Harthman; and

IN ACCORDANCE with the jury verdict rendered in this matter, it is hereby

ORDERED that Harthman is awarded the sum of Six Million Two Hundred Fifty-Seven Thousand Two Hundred Seventy-Five and 39/100 Dollars (\$6,257,275.39);

ORDERED that FirstBank is liable to Harthman for the sum of Six Million Two Hundred Fifty-Seven Thousand Two Hundred Seventy-Five and 39/ 100 Dollars (\$6,257,275.39); and it is further

ORDERED that Harthman is entitled to pre judgment interest on the aforesaid sum beginning on August 1, 2019; and it is further

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ORDERED that copies of this Judgment and the Findings of Fact and Conclusions of Law shall be distributed to counsel of record.

DATED: June 4, 2021

Nunc pro tunc 7/29/2019

/s/ Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

**APPENDIX E — ORDER OF THE SUPERIOR
COURT OF THE VIRGIN ISLANDS, DIVISION
OF ST. THOMAS AND ST. JOHN, ON OMNIBUS
MOTION IN LIMINE, FILED JULY 19, 2019**

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

CASE NO. ST-12-CV-0000273

FIRSTBANK PUERTO RICO,

Plaintiff,

vs.

HARTHMAN LEASING III, LLP,

Defendant.

Filed July 19, 2019

ACTION FOR: DECLARATORY JUDGMENT

NOTICE OF ENTRY OF ORDER

Please take notice that on July 19, 2019 a(n) ORDER dated July 19, 2019 was entered by the Clerk in the above-entitled matter.

Dated: July 19, 2019

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Estrella H. George
Clerk of the Court

/s/ Hermina Scotland
HERMINA SCOTLAND
COURT CLERK II

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Appendix E

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

CASE NO. ST-12-CV-273

FIRSTBANK PUERTO RICO,

Plaintiff,

vs.

HARTHMAN LEASING III, LLLP,

Defendant.

**ACTION FOR DECLARATORY JUDGMENT,
BREACH OF CONTRACT, IMPAIRMENT
OF SECURITY INTEREST, AND UNJUST
ENRICHMENT**

ORDER

This matter is before the Court on Defendant's Omnibus Motion In Limine, filed April 15, 2019, where Defendant asks the Court to prohibit FirstBank Puerto Rico from offering certain evidence at trial.

The Court orally ruled on certain portions on the motion.¹ Still pending is the request for an order

1. On May 22, 2019, the Court orally granted the request to prohibit reference to or testimony by Plaintiff's experts, any

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prohibiting any evidence at trial of “any argument, reference to or testimony that FirstBank was/is justified in withholding rent for Parcels 17B, 17C or 17D, or that the leasehold estate did not include Parcels 17B, 17C or 17D” or that those rents are not due and owing. Harthman argues that FirstBank is collaterally estopped from those arguments due to the Memorandum Opinion and Judgment in *Harthman v. FirstBank*, Case No. ST-15-CV-533; dated March 7, 2016. That case, an action for forcible entry and detainer, held that FirstBank wrongfully withheld rent due to Harthman on Parcels 17 B, 17C and 17D, and that court granted restitution of Parcels 17B, 17C and 17D to Harthman.

FirstBank does not deny that the leasehold includes Parcels 17 B, 17C and 17D. However, FirstBank objects to the any reference or argument that it has been withholding rent for Parcels 17B, 17C and 17D from Harthman or that is/ was wrongful. FirstBank states that it has regularly tendered every monthly payment to its attorney’s escrow account, and the monies are not in the possession of FirstBank.² It claims it had the right to withhold those rents, but also concedes the monies in its attorney’s escrow account belong to Harthman. Nevertheless, FirstBank argues 1) this Court wrongfully denied FirstBank’s 2015

reference to Warthman’s financial resources or amount of real property owned by Harthman and any improper argument of efforts made to punish Harthman.

2. FirstBank started directing payments to its attorney’s escrow account sometime in 2014. The sum held in escrow now totals approximately \$6 million.

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motion to transfer the FED action and consolidate it with this case, and as a result the Court should not now allow any testimony regarding rents that this Court earlier ruled had no impact on this case; 2) FirstBank's appeal of the Judgment granting restitution of Parcels 17 B, 17C and 17D to Harthman is on review before the Appellate Division of the Superior Court, and thus the judgment is not a final order that may be granted collateral effect, and 3) Harthman's counterclaim does not make a claim for rents due on Parcels 17 B, 17C and 17D and thus those rents are not an issue in the case. Each of FirstBank's arguments is evaluated in turn here.

Denial of the Motion To Transfer does not bar this Court from considering the evidence.

FirstBank claims an order dated December 8, 2015 had far reaching and costly consequences that put the parties on an irreversible course from which this Court should not now depart. The Court could find no order dated December 8, 2015, but fully acknowledges its Order of November 16, 2015 that denied FirstBank's motion to transfer and consolidate the FED matter with this case. However, that Order did not make any findings regarding whether the cases were completely distinct. This Court merely declined to transfer the matter. On further review, this Court likely had no authority to transfer the FED matter from the magistrate to whom it was assigned as the Magistrate Division has original jurisdiction of actions for forcible entry and detainer. Title 4 V.I.C. § 123(a)(6).³

3. See also *Vanterpool v. Government of the Virgin Islands*, 63 V.I. 563, 2015 V.I. Supreme LEXIS 23 (V.I. 2015).

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Furthermore, transferring the matter from the FED court and consolidating it with this case would have deprived Harthman their right to a summary proceeding under Title 5 V.I.C. § 781 et. seq.

Consequently, nothing contained in the November 16, 2015 Order is a bar to this Court now considering Harthman's claims for rent for Parcels 17B, 17C, and 17D.

The Magistrate Decision collaterally estops FirstBank from arguing to the contrary.

FirstBank argues the Judgment in the FED eviction action is not final since it is on review with the Appellate Division of the Superior Court. However, this Court is persuaded by Harthman's Banks analysis on the issue of collateral estoppel⁴, adopts it herein, and finds that the best rule for the Virgin Islands is to adopt the majority rule that collateral estoppel attaches to a final judgment even if it is on appeal. The Court also finds that the parties in the FED action were the identical parties in this matter, and the parties had a full and fair opportunity to litigate the issue. The decision in the FED action considered FirstBank's arguments that it had the right to withhold rent, rejected those claims, found that FirstBank did not have the right to withhold or escrow rent for Parcels 17B, 17C and 17D, and the court granted restitution of Parcels 17B, 17C and 17D to Harthman for non-payment of rent on those parcels.⁵ This Court finds the March 7, 2018

4. See Harthman's Reply Omnibus Motion *In Limine*, filed May 31, 2019.

5. The actual eviction is stayed pending review by the Superior Court judge, which remains pending.

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Judgment and accompanying memorandum opinion that made those findings collaterally estops FirstBank from arguing otherwise, even if that decision is on review before the Appellate Division of the Superior Court.⁶

Harthman's Counterclaim includes a claim for late fees, penalties, interest and related damages on all parcels.

Paragraphs 26 and 27 of Harthman's Counterclaim alleges, *inter alia*, that "FirstBank was obliged and obligated to continue paying rent without protest in the same manner and fashion as EEP for property EEP deemed necessary for its project. FirstBank failed and refused to pay rent due from May 2012, specifically for Parcel 17-E, but for that *and in conjunction with late fees, penalties, interest and related damages to be proven at trial for all parcels*, Harthman has been damaged." (emphasis added). Therefore, Harthman clearly made a claim for late fees, penalties, interest and related damages for all parcels. In order for the jury to calculate late fees, penalties, interest and related damages, it must hear evidence of when the payments were made and or when they were due. It is true that at the time the complaint and counterclaims were filed, FirstBank had not yet begun to withhold rent on Parcels 17B, 17C and 17D. However, Harthman's counterclaim is sufficiently broad to include

6. The Court finds that the reviewing judge's finding that FirstBank has a likelihood of success on review, which stayed restitution of the premises, does not trump nor override the findings in the *Banks'* analysis.

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rent payments that became due on all the parcels after the counterclaim was filed.

Therefore, Harthman has a right to present evidence regarding what rents are outstanding for all four parcels and FirstBank is collaterally estopped from arguing that it had a right to withhold or escrow rent.

Accordingly, it is hereby

ORDERED that Defendant's Omnibus Motion In Limine, filed April 15, 2019, is **GRANTED**;

ORDERED that FirstBank is collaterally estopped from making any argument, reference to or offering testimony that FirstBank was/is justified in withholding rent for Parcels 17B, 17C or 17D, or that the leasehold estate did not include Parcels 17B, 17C or 17D;

ORDERED that Harthman has a right to present evidence regarding what rents are outstanding for all four parcels; and it is further

ORDERED that copies of this Order be directed to counsel of record.

DATED: July 19, 2019

/s/ Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court of
the Virgin Islands

70a

**APPENDIX F — AMENDED FINDINGS OF
FACT AND CONCLUSIONS OF LAW OF THE
SUPERIOR COURT OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS AND ST. JOHN,
FILED NOVEMBER 8, 2021**

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

Case No. ST-2012-CV-00273

FIRSTBANK PUERTO RICO,

Plaintiff,

vs.

HARTHMAN LEASING III, LLLP,

Defendant.

Filed November 8, 2021

**AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW¹**

1. The Findings of Fact and Conclusions of Law entered on June 4, 2021, are amended to comport with the Memorandum Opinion and Order entered on November 2, 2021 that addressed FirstBank's Motion for a New Trial and To Amend Judgment. The only changes herein are to paragraphs 30 through 34 of the Conclusions of Law.

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ACTION FOR DECLARATORY JUDGMENT;
BREACH OF CONTRACT; IMPAIRMENT
OF SECURITY INTEREST; AND UNJUST
ENRICHMENT

This case came on for a jury trial on July 23-29, 2019, with certain issues tried to the Court, before the Kathleen Mackay, Judge of the Superior Court of the Virgin Islands.

Plaintiff FirstBank Puerto Rico (“FirstBank”) appeared and was represented by Christopher Allen Kroblin, Esq. and Edward B. Reynolds, Jr., Esq. Defendant Harthman Leasing III, LLLP (“Harthman”) appeared and was represented by Treston E. Moore, Esq. and Kanaan L. Wilhite, Esq.

Plaintiff called the following witnesses: Sharmane Brookes, A. James Casner, III, Esq., Hector Ostolaza and William R. Otto.

Defendant called the following witnesses: Sammy Harthman, Jr., James Hindels, Esq., Ryan Wisehart and Lee Harthman.

The parties gave closing arguments on July 29, 2019, and the Court took the matter under advisement:²

The following three issues were tried to the Court: 1) FirstBank’s claim for Declaratory Judgment as set forth in Count I of its complaint, 2) FirstBank’s claim for unjust

2. The jury rendered its verdict on July 29, 2019.

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enrichment as set forth in Count V of its complaint, and 3) Harthman's claim for possession of the premises as set forth in Count III of its counterclaim.³ The remaining issues were tried to the jury.⁴ Herein the Court makes findings on the three issues tried by the Court.

Based on the testimony and other evidence introduced at trial, the Court finds the following:

FINDINGS OF FACT

1. FirstBank is a banking corporation organized under the laws of the Commonwealth of Puerto Rico and licensed to conduct business in the United States Virgin Islands and having a branch office at Waterfront, Charlotte Amalie, Virgin Islands.

2. Harthman is a U.S. Virgin Islands limited liability limited partnership and is the owner of Parcels 17B, 17C, 17D and 17E, Estate Smith Bay, Nos. 1, 2 and 3, East End Quarter, St. Thomas, Virgin Islands.

3. At all times material hereto, East End Plaza, LLC ("EEP") was a U.S. Virgin Islands limited liability

3. Upon stipulation of the parties, the jury rendered an advisory verdict on the three issues tried to the Court.

4. On the issues tried to the jury, it rendered an award of damages of \$6,257,275.39 in favor of Harthman, as of July 29, 2019. That award will be included in the judgment entered contemporaneous with these findings of fact and conclusions of law.

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company. EEP was owned and operated by William Otto and Ricardo Charaf.

4. In or around 2002, EEP wanted to develop real estate on the East End of St. Thomas, and in connection with those plans, EEP engaged in discussions with Harthman to lease unimproved real estate. The first phase of development called for the construction of a commercial building, and the second phase of development involved the marketing of and possible construction of a hotel.

Lease

5. On September 1, 2003, the then owners of Parcel 17B, Estate Smith Bay, St. Thomas, Virgin Islands, and EEP executed a Lease for said parcel (hereinafter "Lease").

6. Sometime in 2007, the owners of the property formed Harthman Leasing III, LLLP, and the Lease was assigned to the limited liability partnership, which is the Defendant herein.

7. The Lease was for an initial term of thirty years, with an option to renew for two additional terms of ten years.

8. The Lease obligated EEP to pay base monthly rent plus other charges. Additionally, the Lease required a late payment charge of five percent for rent paid more than fifteen days late, and a twelve percent, per year,

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interest charge for any rent not paid within thirty days of its due date.

9. Section five of the Lease required EEP to pay most taxes and assessments levied against the premises.

10. Section seven of the Lease granted EEP a ten-year option to lease parcels abutting Parcel 17B, specifically stating:

Beginning with the date of this Lease, Lessee [, EEP,] shall have an option for ten (10) years to lease part of Parcel No. 17 which abuts Parcel 17-B, that Lessor may rezone for Commercial use. Lessee agrees to lease such property at the then current fair market value for Commercial Real Estate, to be determined at that time by negotiations between Lessor and Lessee. Lessor shall notify Lessee of such rezoning and Lessee shall have a period of sixty (60) days to commence negotiations with Lessor. Provided, however, that if an agreement satisfactory to both parties has not been negotiated and signed within one (1) year following the expiration of the initial sixty (60) slays, this option shall automatically terminate.

11. The parcels abutting Parcel 17B were later designated as Parcels 17C, 17D and 17E Smith Bay.⁵

5. Parcels 17B, 17C, 17D and 17E may be imagined as four differently sized quadrants with 17B in the southeast, 17C in the

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12. Section fourteen of the Lease required EEP to maintain liability insurance on the leased premises of no less than Five Million Dollars (\$5,000,000.00) and to provide proof of such insurance to Harthman.

13. Section twenty-three of the Lease states that “[n]either party has made any representations or promises, except as contained herein, or in some further writing signed by the party making such representations or promise.”

14. Section twenty-five of the Lease states:

Lessee shall, from time to time, upon not less than ten (10) days prior written request by Lessor, execute, acknowledge and deliver to Lessor a written statement certifying that this Lease is unmodified and in full force and effect (or if modified, that the same is in full force and effect as modified, listing the instruments of modification), and the dates to which the rent and other charges have been paid, it being intended that any such statement delivered pursuant to this Section may be relied upon by a prospective mortgagee of Lessor’s interest or assignee of any mortgage upon Lessor’s interest in the Premises.

northeast, 17D in the southwest, and 17E in the northwest. Parcels 17E and 17B do not share a border of any length, but rather only touch at the single point where the four corners of the four parcels converge in the center.

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15. Similarly, Section twenty-six of the Lease states:

Lessor shall, from time to time, upon not less than ten (10) days prior written request by Lessee execute, acknowledge and deliver to Lessee a written statement certifying that the Lease is in full force and effect; that the Lease has not been modified or amended (or if modified, listing the instruments of modification); that other than the Lease there are no agreements between Lessor and Lessee with respect to the Premises and/or the Lease (or, if there are such agreements, listing them); and the dates to which the rent and other charge have been paid! it being intended that any such statement delivered pursuant to this Section may be relied upon by a prospective mortgagee of Lessee's interest, or assignee of Lessee or assignee of any mortgage upon Lessee's interest in the Premises.

16. Section thirty of the Lease states that the "Lease may not be varied, modified, terminated or surrendered, except in writing subscribed to by both of the parties."

17. Section thirty-seven of the Lease states that the "Lease (including any exhibits or schedules attached hereto) constitutes the entire agreement of the parties on the subject matter hereof and may not be changed, modified, discharged or extended except by written instrument duly executed by the parties hereto."

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Amendment to Lease

18. On December 11, 2003, at EEP's request, Harthman presented EEP with a letter amendment to the Lease to add Parcel 17D upon execution of said amendment ("Letter Amendment").

19. The Letter Amendment also provided that Parcel 17C would be added to the Lease, effective immediately upon rezoning.

20. The Letter Amendment was executed by Harthman and EEP.

Construction Loan Agreement and Related Documents

21. Thereafter, EEP sought to develop the leased premises and obtained a loan from FirstBank to assist in financing the construction.

22. On September 9, 2005, EEP and FirstBank entered into a Construction Loan Agreement which provided for an initial loan to EEP in the amount of \$16,600,000.00, and an additional loan of \$5,000,000.00, and EEP executed a Construction Mortgage Note, in favor of FirstBank, for the sum of \$16,600,00.00.

23. Per the Construction Loan Agreement, the purpose of the loan was "the development and the construction of a commercial project consisting of parking, retail and commercial structures with related

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improvements and equipment, to be known as East End Plaza.”

24. On September 9, 2005, EEP and FirstBank also entered into a First Priority Leasehold Mortgage and Construction Security Interest (“First Priority Leasehold Mortgage”) and an Assignment of Leases and Rents against EEP’s interest in the Lease, as security for repayment of the Construction Mortgage Note and in accordance with the Construction Loan Agreement.

25. Section eleven of the First Priority Leasehold Mortgage states that “[t]he Mortgagor[, EEP,] will deliver to the Mortgagee, [FirstBank,] promptly upon receipt of the same, copies of all notices, certificates, documents and instruments received by the Mortgagor which materially affect the Mortgaged Property, specifically including but not limited to, Mortgagor’s interest in the Lease.”

2005 Consent

26. Harthman, as landlord, consented to the First Priority Leasehold Mortgage by executing a Consent to First Priority Leasehold Mortgage and Construction Security Interest, Assignment of Leases and Rents and Estoppel Certificate (“2005 Consent”).

27. Paragraph one of the 2005 Consent states that “[t]he Leasehold Mortgage shall not survive a termination of the Lessee’s rights under the Lease on account of the Lessee’s default,” and further provides that Harthman will send a copy of default notices to FirstBank and give

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FirstBank “the right, but not the obligation, to cure such default(s) and/or to make the Assignment effective or elect to foreclose on the Leasehold Mortgage” within the timeframe stated in the default notices.

28. Paragraph two of the 2005 Consent states that if FirstBank elects to foreclose the leasehold mortgage or elects to exercises its assignment right, FirstBank will “be liable to perform all obligations of the Lessee under the Lease, including but not limited to (a) payment of any rent arrearages existing at the time of such assignment and (b) the due and punctual payment of all rent thereafter coming due as provided in the Lease.”

29. In Paragraph six of the 2005 Consent, Harthman agreed:

[T]hat, without the prior written consent of [FirstBank], the Lease shall not hereafter be modified or amended to (a) increase the rent (except with regard to increases now provided for in the Lease), (b) change the description of the leased premises (from that now set forth in the Lease), or (c) shorten the term of any optional renewal term of the Lease (except as now permitted by the Lease).

30. The 2005 Consent described the lease premises as Parcels 17B and 17D and described the Lease as “Lease Agreement . . . dated July 15, 2003, effective September 1, 2003, as modified by letter dated December 11, 2003.”

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Rezoning of Parcels 17C, 17D and 17E

31. On November 18, 2005, the Twenty-Sixth Legislature of the Virgin Islands re-zoned Parcels 17C, 17D and 17E from Agriculture to Commercial.

32. On December 2, 2005, the zoning change was approved by the Governor of the Virgin Islands.

33. Parcel 17C became a part of the Lease, effective December 2, 2005.

First Amendment to Construction Loan Agreement

34. In January 2008, FirstBank released \$5,000,000 to EEP, as previously agreed, and EEP executed a First Amendment to Construction Loan Agreement and Security Instruments (“First Amendment to Construction Loan Agreement”) and a Modification of First Priority Leasehold Mortgage and Construction Security Interest and Assignment of Leases and Rents (“Modification of First Priority Leasehold Mortgage”), increasing the amount of the Loan secured by the modified mortgage from \$16,600,000 to \$21,600,000.

35. Exhibit A of the Modification of the First Priority Leasehold Mortgage, which was made a part of the modification, identified the Mortgaged Property as Parcels 17B and 17D and described the lease as the “Lease Agreement . . . dated July 15, 2003, effective September 1, 2003, as modified by letter dated December 11, 2003.”

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2008 Consent

36. On January 17, 2008, Harthman consented to the mortgage modification by executing a Landlord's Consent to Modification of Mortgage and Assignment of Leases and Rents and Request for Notice ("2008 Consent").

37. In the 2008 Consent, Harthman "affirm[ed] its agreements under the 2005 Consent with respect to the Tenant's current indebtedness to [FirstBank]."

38. The 2008 Consent stated that "Whereas, the Lease has not been amended or otherwise modified since September 9, 2005."

39. The 2008 Consent identified Harthman as the owner of Parcels 17B and 17D and stated "that [EEP] has a valid leasehold interest in the Leased Premises pursuant to a Lease Agreement dated July 15, 2003, effective September 1, 2003, and as amended by letter agreement dated December 11, 2003, all executed between the Landlord and the Tenant (collectively, the "Lease")."

Attempted Second Amendment to Lease

40. On April 29, 2008, Harthman sent EEP a letter and a Second Amendment to Lease. The Letter discussed rent arrearages and updating the description of the leased premises by executing the Second Amendment to Lease.

41. The April 29, 2008 Letter refers "to that certain lease dated July 15, 2003, and effective September 1, 2003,

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as amended by letter agreement dated December 11, 2003, (hereinafter, collectively, the “Lease”).”

42. The April 29, 2008 Letter states that:

[T]he Second Amendment to Lease, . . . incorporates the terms set forth in the December 11, 2003 letter agreement by (i) including the now rezoned Parcel Nos. 17C and 17D . . . ; [and] (ii) including the now rezoned Parcel No. 17E . . . (which East End Plaza has built upon) . . . for purposes of establishing the rent due under the Lease, such rental amounts having become effective as of December 11, 2003 as to Parcel Nos. 17B and 17D . . . , and effective as of December 2, 2005 as to Parcel Nos. 17C and 17E.

43. The April 29, 2008 Letter expressed that “[b]y execution of [the April 29, 2008 Letter,] . . . [EEP] . . . [does] . . . hereby acknowledge . . . the amount [of rent] due being based on the amended square footage of the Leased Premises as described above and as delineated in the attached Second Amendment to Lease.”

44. The Second Amendment to Lease said the amendment applied to Parcel 17D “as of December 11, 2003” and Parcels 17C and 17E “as of December 2, 2005.”

45. The Second Amendment to Lease sought to amend and modify the Lease, and specifically described the Leased Premises as Parcels 17B, 17C, 17D and 17E.

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46. This unexecuted Second Amendment to Lease stated that:

[T]o the extent not modified or changed by the provisions of this Second Amendment, all remaining terms, conditions and provisions of the Lease shall remain in full force and effect, except that, upon full execution of this Second Amendment, the above-referenced letter agreement dated December 11, 2003 shall be of no further force and effect, its terms having been incorporated into this Second Amendment to the satisfaction of the undersigned parties.

47. The signature block of the Second Amendment to Lease identified the parties as “LESSOR: HARTHMAN LEASING III, LLLP”; LESSEE: EAST END PLAZA, LLC”; and “**CONSENTED TO AND APPROVED:** By: FIRSTBANK PUERTO RICO, Lender.”

48. The April 29, 2008 Letter was never accepted or signed by EEP.

49. The proposed Second Amendment to Lease was never signed by Harthman or EEP.

50. On May 21, 2008, EEP wrote to Harthman regarding the April 29, 2008 Letter and Second Amendment to the Lease.

51. In the May 21, 2008 Letter, EEP stated that it was concerned about signing the April 29, 2008 Letter

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and Second Amendment to Lease until disagreements regarding rent payments were resolved.

Conditional Agreement

52. EEP and Harthman signed a Conditional Agreement to Amend Lease (“Conditional Agreement”) dated November 1, 2010, to facilitate the subletting by EEP of the parcels to a Hotel Entity.

53. A whereas clause in the Conditional Agreement described the original leased premises as 17B, and described the leased premises as amended by the “December 11, 2003 letter agreement and subsequent rezoning of certain parcels” and described the Leased Premises a 17B, 17C, 17D and 17E.

54. A whereas clause in the Conditional Agreement described the original leased premises as 17B, and described the leased premises as amended by the “December 11, 2003 letter agreement and subsequent rezoning of certain parcels” and described the Leased Premises a 17B, 17C, 17D and 17E.

55. Another whereas clause of the Conditional Agreement stated that EEP intended to sublease a portion of the leased premises, including parts of 17B, 17C, 17D and 17E, to a hotel entity.

56. The Conditional Agreement required EEP to execute an agreement with a hotel entity to build on

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the leased premises within 6 months, failing which the agreement would terminate.

57. The Conditional Agreement stated that the agreement:

[S]hall in no manner be deemed to have created an amendment or modification of the Lease. All existing terms, conditions and provisions of the Lease shall remain unchanged and in full force and effect, until such time as an Amendment to the Lease is executed by and between the undersigned parties.

58. EEP was unable to secure a signed agreement with a hotel and the Conditional Agreement expired.

59. On May 20, 2011, Harthman sent a letter to EEP giving notice that the Conditional Agreement was terminated on May 1, 2011.

60. The May 20, 2011 Letter described the Lease as “dated July 15, 2003, as amended on September 1, 2003, and as further amended by letter agreement dated December 11, 2003 (the “Lease”).”

Use of Parcel 17E

61. After Parcel 17E was rezoned from agriculture to commercial, EEP paid rent, insurance and taxes for the parcel for multiple years to protect the parcel from other commercial developers.

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62. EEP paid property taxes on Parcel 17E for 2005, 2006 and 2007.

63. EEP did not want Parcel 17E to be sold or rented to another entity. EEP wanted the opportunity to expand and build a hotel, which would require the use of Parcel 17E.

64. EEP placed a trailer, conducted some excavation and sold dirt from Parcel 17E. However, EEP did not conduct any substantial alterations or building on the property.

65. EEP wanted the option of first right of refusal for Parcel 17E, but no formal agreement was executed.

66. Neither EEP nor Harthman presented FirstBank with any written notice that EEP was leasing, using or paying taxes on Parcel 17E.

67. EEP unsuccessfully tried to find a hotel to build.

68. EEP had an interest in renting 17E, even short-term, to prevent other entities from leasing the land and to possibly expand and build a hotel.

Notice of Non-payment of Rent

69. On June 3, 2011, Harthman sent a Notice of Non-Payment of Rent indicating that as of June 1, 2011, EEP was obligated to pay arrearages of "Fixed Annual Rent . . . in the sum of \$715,336.34, exclusive of any late

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charges and accrued interest,” and further stating that the failure to tender all payments due within thirty days of the notice would “constitute a Default under the Lease.”

70. The June 3, 2011 Notice of Non-Payment of Rent was sent to EEP and its legal counsel, and a photocopy was directed to FirstBank.

71. The Notice of Non-Payment of Rent described the Lease as “dated July 15, 2003, as modified by letter agreement dated December 11, 2003.”

72. On June 16, 2011, EEP wrote to Harthman and disputed the sum of outstanding rent due to Harthman. EEP stated that it owed only \$593,145.50 as of July 1, 2011.

73. EEP copied First Bank on its June 16, 2011 Letter to Harthman.

74. On July 11, 2011, Harthman responded to EEP by expressing that EEP had failed to properly calculate rent and explaining the errors. Harthman concluded that the rental arrears had increased to \$776,014.47 through June 30, 2011.

Notice of Default

75. On July 26, 2011, Harthman sent a Notice of Default to EEP and FirstBank.

76. In the Notice of Default, Harthman reduced its demand for all past due rents by focusing on the recently

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executed Conditional Agreement and the admissions and acknowledgments by EEP within the Agreement.

77. Harthman demanded that EEP pay \$611,109.22 plus a late fee of \$30,555.46, to cure the default sum past due as of May 1, 2011, and noted interest continued to accrue.

78. The Notice of Default concluded that late rent, interest and late charges were “required to be tendered to [Harthman] within the thirty (30) days as provided in the Lease to cure the default sum past due as of June 1, 2011.”

79. The Notice of Default described the Lease as “dated July 15, 2003, as modified by letter agreement dated December 11, 2003.”

**Multi-Credit Settlement Agreement and
Assignment in Lieu of Foreclosure**

80. On or about November 22, 2011, FirstBank commenced an action for debt, foreclosure of leasehold mortgage and enforcement of guaranty against EEP for defaulting on its FirstBank loan.

81. On March 27, 2012, EEP and FirstBank settled the lawsuit by executing a Multi-Credit Settlement Agreement (“Settlement Agreement”) and an Assignment of Lease in Lieu of Foreclosure (“Assignment of Lease”) instead of continuing litigation.

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82. In the Settlement Agreement, FirstBank agreed, *inter alia*, to pay a \$50,000 cooperation fee to each EEP owner if the owners, among other things, “support[ed] [FirstBank’s] position regarding the Lease between EEP and the Harthman family and trust, including support for (i) the fact that Parcel 17E never became part of the Lease by means of any executed written modification of the Lease,” (ii) the fact that lessor permitted a reduction of the base rent due to a reduction in square footage of Parcel 17B caused by a taking by the Department of Public Works, and (iii) “the fact that Parcels 17C and 17D were components of the original leased premises.

83. The Settlement Agreement described the Lease as “dated September 1, 2003, as amended December 11, 2003 . . . (the “Lease”).”

84. Exhibit A of the Assignment of Lease described the “Leased Premises” as Parcels 17B and 17D and the Lease as “dated July 15, 2003, effective September 1, 2003, as modified by letter dated December 11, 2003.”

85. The Settlement Agreement and Assignment of Lease provided that FirstBank would assume the rights, obligations, and interest of EEP in the Lease.

86. FirstBank continued to pay rent to Harthman for Parcels 17B, 17C and 17D until August 2014. Since September 2014, FirstBank has paid rent for Parcels 17B, 17C and 17D into an escrow account controlled by FirstBank’s legal counsel.

*Appendix F***Notice of Termination**

87. On February 21, 2012, Harthman sent a letter to FirstBank that stated the following:

Prior to FirstBank's interest as Leasehold Mortgagee, and over the course of lease negotiations, EEP requested that my client[, Harthman,] make application for a change to the zoning from Agricultural to Commercial of a portion of Parcel 17 Remainder . . . abutting the leased premises as stated in the Lease and Letter dated December 11, 2003, executed by the parties, and more fully established in SECTION SEVEN — "Option to Lease Part of parcel 17 Abutting Parcel 17-B, if Rezoned for Commercial Use." Subsequent to the execution of the Lease, and by virtue of Act No. 6806, . . . the requested zoning change was made for parcels Nos. 17C, 17D and 17E . . . Upon the effective date of the zoning change, EEP took constructive as well as actual physical possession of the Abutting Property as contemplated by and described in Section Seven of the Lease including physical alterations thereof. Rent, Real Property Taxes and insurance for the rezoned/reconfigured parcels became binding obligations of EEP, which obligations EEP assumed and paid."

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88. Along with the February 21, 2012 Letter, Harthman forwarded copies of EEP’s insurance certificates and real property tax bill payments.

89. On April 2, 2012, FirstBank advised Harthman that, in lieu of foreclosure, EEP assigned its rights under the Lease to FirstBank, and FirstBank “is now fully prepared to undertake its duties in accordance with, among others, the Base Loan Documents.”

90. The April 2, 2012 letter questioned the square footage of the “Leased Premises” and whether rent was overpaid or in arrears. The Letter also opined that Parcel 17E was not part of the Leased Premises.

91. The April 2, 2012 Letter states that upon “FirstBank’s initial analysis[,] . . . the claimed arrears (taking into account the adjusted payments, any overpayments and recalculated amounts of interest and penalties) is actually \$471,137.78.”

92. The April 2, 2012 Letter described the Lease as “dated September 1, 2003, as modified December 11, 2003 (the “Lease”).”

93. On May 17, 2012, FirstBank issued a check to Harthman for \$344,055.17 for “undisputed rent arrearage[s] as of May 1, 2012,” to cure EEP’s default.”

94. On the same day, May 17, 2012, Harthman sent a Notice of Termination of Lease (“Notice of Termination”) to EEP and FirstBank.

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95. The Notice of Termination gave notice that Harthman elected to terminate the Lease for failure to timely cure or satisfy earlier notices of default.

96. The Notice of Termination stated that the Lease termination would become effective on June 17, 2012.

97. The Notice of Termination described the Lease as “that certain Lease Agreement dated July 15, 2003, as modified by letter agreement dated December 11, 2003 . . . (collectively referred to herein as, the “Lease”).”

Parcel 17E as Part of Lease

98. The Lease between Harthman and EEP contains a merger clause explicitly stating that the Lease is the entire agreement and cannot be modified without a “written instrument duly executed by the parties hereto.”⁶

6. See *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 627 (V.I. 2017) (“the second contract . . . includes an unambiguous merger clause, which provides that: “[the second contract] constitutes the *entire agreement* between the parties hereto and no representations, agreements, inducements or provisions other than those expressly set forth herein shall be binding.” Additionally, “[a]ll changes, additions or deletions to this contract must be inwriting and signed by all parties”); *Id.* (quoting *Weary v. Long Reef Condo. Ass’n*, 57 V.I. 163 (V.I. 2012)) (citing *Nelson v. Elway*, 908 P2d 102, 107 (Colo. 1995)) (“Where, as here, the parties — by their own unambiguous terms — manifest their intent that a writing represent the entire agreement between them, ‘we will follow [the] plain meaning [of that writing] and abstain from imputing language or interpretations that are not in accordance with [such writing’s] plain meaning’”); Pl.’s Ex. 1, § 37. In *Philip v. Marsh-Monsanto*, the Virgin Islands

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99. Shortly after taking over responsibility for the Lease, FirstBank sent a letter to Harthman stating that Parcel 17E was not part of the Lease.

100. After First Bank assumed EEP's duties and obligations under the Lease, Harthman asked FirstBank to pay rent in arrearages for Parcel 17E, but First Bank refused.

CONCLUSIONS OF LAW

Declaratory Judgment

1. The signed Conditional Agreement, that arguably could have added 17E to the Lease, terminated on May 1, 2011.

2. The 2005 Consent did not include any reference to Parcel 17E.

3. The 2008 Consent did not include any reference to Parcel 17E.

Supreme Court analyzed whether a promissory note, signed before a second contract, should be considered in conjunction with the contract, which had an unambiguous merger clause stating the contract was the entire agreement and could only be modified by a signed writing. In this case, the Court believes *Philip* is also instructive when analyzing subsequent documents that, a party argues, modifies a contract that contains an unambiguous merger clause with specific instructions on how to modify the contract. *See Philip*, 66 V.I. at 617, 626.28.

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4. Parcel No. 17E never became part of the Leased Premises defined in the written documents.

Statute of Frauds

5. The addition of Parcel 17E to the Lease would violate the statute of frauds.⁷

6. The terms of the Lease and the Letter Amendment were in excess of one year and were in writing and signed.

7. The Lease and the Letter Amendment only encompass Parcels 17B, 17C and 17D.

8. No signed writing(s) made Parcel 17E Part of the 30-year Lease.

7. See 28 V.I.C. § 241(a)(2) (“(a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, surrendered, or declared,” except “(2) by a deed of conveyance or other instrument in writing, signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law”); 28 V.I.C. § 244(1) (“[E]very agreement shall be void unless such agreement, or some note or memorandum thereof is in writing, and subscribed by the party to be charged . . . , or by his lawful agent under written authority: (1) An agreement that by its terms is not to be performed within one year from the making”).

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Collection of Writings

9. There is no collection of writings that overcomes the Statute of Frauds regarding Parcel 17E.

10. Tax and insurance documents for 17E do not constitute signed writings that modify the Lease.

11. The April 29, 2008 Letter and Second Amendment to Lease are not binding on FirstBank as they were never signed.

12. There are no writings that plausibly overcome the clear and unambiguous terms of the merger agreement, and other similar provisions, of the Lease.

13. The Conditional Agreement was terminated on May 1, 2011 because EEP failed to execute an agreement with a hotel entity within 6 months.

Equitable Estoppel

14. Harthman did not suffer substantial detriment by EEP paying rent, insurance and taxes on Parcel 17E.

15. Harthman received compensation while EEP was paying rent for Parcel 17E.

16. Harthman would likely have benefited if EEP was able to find a hotel to build.

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17. EEP did not materially misrepresent to Harthman that Parcel 17E was part of the Lease.

18. FirstBank did not materially misrepresent to Harthman that Parcel 17E was part of the Lease.⁸

19. FirstBank is entitled to declaratory judgment on Parcel 17E because Parcel 17E was never included in the Leased Premises.⁹

20. First Bank is not indebted to Harthman for any rent on Parcel 17E after First Bank accepted the Assignment of Lease in lieu of foreclosure and otherwise assumed control of the Lease Premises and the rights and obligations under the written documents.

8. *See Browne v. Stanley*, 66 V.I. 328, 335 (V.I. 2017) (citing *Joseph v. Intr-Ocean Ins. Agency, Inc.*, 59 V.I. 820, 838 (V.I. 2013)) (“In the Virgin Islands, equitable estoppel requires an asserting party to demonstrate that (1) the party to be estopped made a material misrepresentation (2) that induced reasonable reliance by the asserting party and (3) resulted in the asserting party’s detriment”).

9. The Court does not adopt the advisory verdict of the jury on this issue. And to the extent this finding is contrary to the Court’s November 20, 2015 decision where it held that Harthman had breached its duty to FirstBank when it leased Parcel 17E to EEP without FirstBank’s consent, the Court hereby reverses that November 20, 2015 decision. *See Firstbank Puerto Rico v. Harthman Leasing III, LLLP*, Case No. ST-12-CV-273, 2019 V.I. LEXIS 5, at *3 (V.I. Super. Ct. Jan. 28, 2019) (unpublished). However, the Court must point out that it later clarified that the November 20, 2015 decision made no finding on whether Parcel 17E is part of the leased premises under the Lease. *See id.* at *3-4.

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21. Equitable estoppel does not overcome the statute of frauds regarding Parcel 17E.

Part Performance

22. EEP's payment of taxes and rent on Parcel 17E did not rise to the level of part performance sufficient to overcome the statute of frauds.

23. Harthman has not met its burden to prove the elements of part performance sufficient to overcome the statute of frauds regarding Parcel 17E.¹⁰

10. Since there are no authoritative V.I. cases regarding the elements of part performance, the Court conducted a partial *Banks* analysis. Only a partial analysis was conducted because the facts of this case are not sufficient to meet the first element. A majority of states recognize that acts done in pursuance of an oral contract must be referable to that contract. Nine states require acts to be unequivocally referable to the contract. *Owns v. M.E. Schepp P'ship*, 182 P.3d 664, 668 (Ariz. 2008); *In re Marriage of Benson*, 116 P.3d 1152, 1160 (Cal. 2005) (citations omitted) ("unequivocally refer[] to the contract, or 'clearly relate' to its terms"); *Cecil Sand & Gravel v. Jones*, 644 A.2d 529, 535 (Md. 1994) (citation omitted) ("unequivocally in a position different from that which[] . . . they would be in if there were no contract"); *Zier v. Lewis*, 218 P.3d 465, 470 (Mont. 2009) (citation omitted); *Alvarez v. Alvarez*, 383 P.2d 581, 585 (N.M. 1963) (citation omitted); *Wills v. Wills*, 28 N.Y.2d 645, 647 (N.Y. 1971); *Cardillo-Kelsall v. Cardillo*, No. PC-07-620, 2011 R.I. Super. LEXIS 30, at *20 (R.I. Super. Ct. February 24, 2011) (unpublished) (citations omitted) ("must unequivocally indicate"); *Player v. Chandler*, 382 S.E.2d 891, 894 (S.C. 1989) (citations omitted) ("relate clearly and unequivocally"); *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426-27 (Tex. 2015). Eleven states require the same

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standard as unequivocally referable, but use different wording, *e.g.*, clearly inferable, exclusively referable, referable solely. *SS-II, LLC v. Bridge St. Assocs.*, 977 A.2d 189, 195 (Conn. 2009) (citation omitted); *Ficke v. Wolken*, 868 N.W.2d 305, 311 (Neb. 2015) (citation omitted); *Epstein v. Fleck*, 57 A.2d 395, 397 (N.J. 1948) (citation omitted) (“exclusively referable”); *Lahue v. Pio Costa*, 623 A.2d 775, 790 (N.J. Super. Ct. App. Div. 1993) (citation omitted) (“clearly referable”); *Niles v. Eldridge*, 828 N.W.2d 521, 525 (N.D. 2013) (citation omitted); *Brannon v. Edman*, 2018-Ohio-70, ¶¶ 10-11 (Ohio Ct. App. 2018) (citation omitted); *Venator v. Quier*, 589 P.2d 731, 738 n.6 (Or. 1979) (“referable solely”); *Mukai Living Trust v. Lopez*, 111 P.3d 1150, 1152 (Or. Ct. App. 2005) (citations omitted) (“clearly and unequivocally referable”); *Kurland v. Stolker*, 533 A.2d 1370, 1373 (Pa. 1987) (citation omitted); *Foust v. Carney*, 329 S.W.2d 826, 829 (Tenn. 1959) (“clearly inferable”); *Sweeney v. Tenney*, No. E2011-00418, COA-R3-CV, 2011 Tenn. App. LEXIS 530, at *6 (Tenn. Ct. App. 2011) (citation omitted) (“clearly referable”); *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002) (citation omitted) (“exclusively referable”, although the standard can be lax with direct proof), *overruled on other grounds by Tangren Family Trust v. Tangren*, 182 P.3d 326, 331 n.20 (Utah 2008); *Cottrell v. Nurnberger*, 47 S.E.2d 454, 463 (W. Va. 1948) (citation omitted); *Simek v. Tate*, 231 P.3d 891, 899 (Wyo. 2010) (citation omitted). Six states require a lower standard, *e.g.*, directly, referable. *Nelson v. Elway*, 908 P.2d 102, 108 (Colo. 1995) (citation omitted) (“fairly referable to no other theory”); *Sec. Inv’r Fund LLC v. Crumb*, 443 P.3d 1036, 1044 (Idaho 2019) (citation omitted) (“directly referable”); *Summa Corp. v. Greenspun*, 607 P.2d 569, 572-73 (Nev. 1980) (citation omitted), *overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 35 P.3d 964 (Nev. 2001); *Winecellar Farm, Inc. v. Hibbard*, 27 A.3d 777, 785 (N.H. 2011) (citation omitted) (“not readily explainable”); *Va. Home for Boys & Girls v. Phillips*, 688 S.E.2d 284, 287 (Va. 2010) (citations omitted); *Pardee v. Jolly*, 182 P.3d 967, 972-73 (Wash. 2008) (citation omitted). Only one

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24. EEP's payment of rent, taxes and insurance for parcel 17E and excavation and placement of a trailer on

V.I. case discusses the referable standard of part performance. In *Modern Day Constr., Inc. v. Carty*, the Superior Court of the Virgin Islands quoted the Restatement (Second of Contracts) to establish the referable standard:

Where specific enforcement is rested on a transfer of possession plus either part payment of the price or the making of improvements, it is commonly said that the action taken by the purchaser must be unequivocally referable to the oral agreement. But this requirement is not insisted on if the making of the promise is admitted or is clearly proved.

Modern Day Constr., Inc. v. Carty, Civil No. ST-09-CV-608, 2013 V.I. LEXIS 36, at *7-*8 (V.I. Super. Ct. June 13, 2013).

In this instance, the Court agrees with the restatement stated in *Modern Day Constr. Inc.* and similarly stated in, the Utah case, *Spears v. Warr*: “[T]he more conclusive the direct proof of contract, the less stringent the requirement of exclusively referable acts.” *Spears*, 44 P.3d at 751; see *Modern Day Constr., Inc.*, 2013 V.I. LEXIS 36, at *7-*8. The Court finds that this standard is more akin to justice than requiring that proof is only sufficient if it is unequivocally referable because relationships, and actions related to those relationships, are often complex and may offer multiple theories on why acts were performed. The Court finds that the interest of setting a high standard to prevent a party from being forced to perform a contract they did not agree to is balanced by lowering that standard if sufficient direct proof of the oral contract is available. To be clear, the Court rules that the first element of part performance is that the acts must be unequivocally referable to the contract; however, “the more conclusive the direct proof of contract, the less stringent the requirement of [unequivocally] referable acts.” *Spears*, 44 P.3d at 751; see *Modern Day Constr., Inc.*, 2013 V.I. LEXIS 36, at *7-*8.

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17E are not unequivocally referable to the Thirty-year Lease.¹¹

25. EEP leased Parcel 17E on a month-to-month basis.

Unjust Enrichment

26. Harthman was not unjustly enriched by accepting rent from EEP for Parcel 17E.¹²

27. While EEP was paying rent for 17E, Harthman did not sell or rent the parcel to any other entity.

28. FirstBank did not provide evidence of a sum certain by which Harthman was unjustly enriched. Regardless, Harthman was not unjustly enriched. FirstBank's claim for unjust enrichment fails as a matter of law.

11. See Def.'s Ex. 32; Def.'s Ex. 34; Def.'s Ex. 36; Def.'s Ex. 37; Def.'s Ex. 38; Def.'s Ex. 79; Jury Trial Tr. vol. 1, 284; Jury Trial Tr. vol. 3, 37-39.

12. *Walters v. Walters*, 60 V.I. 768, 779-80 (V.I. 2014) (Under unjust enrichment, the plaintiff must "prove (1) that the defendant was enriched, (2) that such enrichment was at the plaintiffs expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff").

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Possession of Premises

29. FirstBank has been in possession of Parcels 17B, 17C and 17D since 2012.

30. FirstBank's tender of \$344,055.17, on May 17, 2012, failed to cure EEP's default on Parcels 17-B, 17-C, and 17-D.

31. Due to FirstBank's failure to cure EEP's default, as set forth in the Assignment of Lease, Harthman is entitled to possession of Parcels 17-B, 17-C, 17-D.

32. Harthman is entitled to the unpaid fees and interest for Parcels 17-B, 17-C, and 17-D associated with the partial payment of rent.

33. [Retracted]

34. [Retracted]

35. FirstBank is not in possession of Parcel 17E.

36. First Bank never acquired any rights, interest, duties or obligations concerning Parcel 17E.

37. Harthman is entitled to possession of Parcels 17B, 17C and 17D.

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Judgment consistent with these findings of fact and conclusions of law, as well as the jury verdict on the issue tried before the jury will immediately enter.

DATED: November 8, 2021

Nunc pro tunc 11/2/2021

/s/ Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

**APPENDIX G — RECORD OF PROCEEDINGS OF
THE SUPERIOR COURT OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS AND ST. JOHN,
MOTIONS HEARING, DATED MAY 22, 2019**

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

CASE NO ST-12-CV-0000273

FIRST BANK PUERTO RICO,

Plaintiff,

VS.

HARTHMAN LEASING III LLP,

Defendant.

Dated May 22, 2019

RECORD OF PROCEEDINGS

ACTION FOR DECLARATORY JUDGMENT

Commenced: 10:00 a.m.

Adjourned: 11:40 a.m.

Civil ☒ Domestic Relations ☐ Small Claims ☐

Date of Trial: Motions Hearing—Wednesday, May 22, 2019

Plaintiff Appeared: Yes ☒ No ☐

Defendant Appeared: Yes ☒ No ☐

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Defendant Acknowledged Debt: Yes ☐ No ☐

Witnesses Sworn: Yes ☐ No ☐

Witnesses Sequestered: Yes ☐ No ☐

Amount Sued For: \$ _____

Case Postponed To: Thursday, July 18, 2019 @ 10:00 a.m.
& Jury Selection, Monday, July 22, 2019 @ 9:00 a.m.

ATTORNEY FOR PLAINTIFF
ERIKA A. KELLERHALS &
CHRISTOPHER KROBLIN-PRESENT

ATTORNEY FOR DEFENDANT
TRESTON E. MOORE &
KANAAN WILHITE-PRESENT

WITNESSES FOR PLAINTIFF

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____

WITNESSES FOR DEFENDANT

1. _____
2. _____

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3. _____
4. _____
5. _____
6. _____
7. _____
8. _____

Findings of the Court Judgment Rendered for: _____

By Default: Yes ☐ NO ☐

Case Dismissed: Yes ☐ No ☒

Amount Judgment \$ _____

Court Cost \$ _____

Attorney's Fee \$ _____

Miscellaneous Entries

MATTER CAME ON FOR MOTIONS HEARING IN COURTROOM 4. SHARMANE BROOKS FIRST BANK REPRESENTATIVE WAS PRESENT AT PLAINTIFF COUNSEL S TABLE THE COURT GAVE THE PARTIES A BRIEF SUMMARY OF THE MATTER THUS FAR AS TO JURY SELECTION SCHEDULED FOR JUNE 3, 2019. FROM THE COURT, PROSPECTIVE IT IS READY TO GO FORWARD ON JUNE 3, 2019. THERE WERE ISSUES RAISED LAST WEEK FOR MOTION FOR SUMMARY JUDGMENT. THE COURT IS PREPARED TO DISCUSS THE PENDING MOTION & MOTION IN LIMINE THEREAFTER. ATTY. MOORE GAVE THE COURT A BRIEF SUMMARY OF THE ISSUES. ATTY. KROBLINE ADVISED THE COURT THAT THEY

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DON'T WANT A JURY TRIAL, GAVE THE COURT A BRIEF SUMMARY OF THE ISSUES & PLACED ARGUMENTS ON THE RECORD IN SUPPORT THEREOF. THE COURT ADVISED THE PARTIES THAT PLAINTIFF'S MOTION IN LIMINE FILED IS DENIED. PARTIES WERE ADVISED THAT DEFENDANT OMNIBUS MOTION IN LIMINE IS GRANTED. THEREAFTER ATTY. KROBLIN REQUESTED A CONTINUANCE. THE COURT HEARD A SUMMARY OF THE MATTER & ARGUMENTS BY ATTY. WILHITE & HE CITED TWO CASES IN SUPPORT THEREOF. THE COURT ORDERED THAT THE PARTIES GO TO MEDIATION BETWEEN NOW & THEN. PRETRIAL CONFERENCE IS SCHEDULED IN THIS MATTER FOR THURSDAY JULY 18, 2019 @ 10:00 A.M. DEFENSE HAS TEN DAYS TO REPLY TO THE PENDING MOTIONS. ATTY. KROBLIN WILL DO A SER REPLY. DEADLINE FOR THE PARTIES TO MEDIATE IS JUNE 14, 2019.

COMMENCED: _____
 ADJOURNED: _____

Judge Presiding: Honorable Kathleen MacKay
 Court Reporter: Suzette Aubain-Descartes

/s/ Estrella H. George
 Clerk of the Superior Court

/s/ Hermina Scotland
 Court Clerk II

**APPENDIX H — ORDER OF THE SUPREME COURT
OF THE VIRGIN ISLANDS DENYING PETITION
FOR REHEARING, FILED JULY 2, 2026**

IN THE SUPREME COURT
OF THE VIRGIN ISLANDS

S. Ct. Civ. No. 2021-0026
Re: Super. Ct. Civ. No. 273/2012 (STT)

FIRSTBANK PUERTO RICO,

Appellant/Plaintiff,

v.

HARTHMAN LEASING III, LLLP,

Appellee/Defendant.

On Petition for Rehearing

ORDER

THIS MATTER comes before the Court pursuant to a petition for rehearing brought pursuant to Rule 31 of the Virgin Islands Rules of Appellate Procedure. Pursuant to the Internal Operating Procedures of this Court:

A petition for panel rehearing is sent to the members of the panel, with the request that each member notify the presiding justice of the panel within eight days of the date of the Clerk's

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letter forwarding the petition whether they vote to grant the petition or desire that an answer be filed. Non-response will be considered a vote against rehearing.

V.I. S. Ct. I.O.P. 8.1. Because the time to provide such notification has lapsed and no Justice has voted to order an answer or grant the petition, it is hereby

ORDERED that the petition for rehearing is **DENIED**. It is further

ORDERED that copies be directed to the appropriate parties.

SO ORDERED this 2nd day of July 2026.

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

**APPENDIX I — PETITION FOR REHEARING
OF APPELLANT FIRSTBANK PUERTO RICO,
FILED IN THE SUPREME COURT OF THE
VIRGIN ISLANDS, SEPTEMBER 12, 2025**

IN THE SUPREME COURT
OF THE VIRGIN ISLANDS

S. Ct. Civ. No. 2021-0026
RE: Super. Ct. No. ST-12-CV-273

FIRSTBANK PUERTO RICO,
APPELLANT ON REVIEW,
(Plaintiff below)

v.

HARTHMAN LEASING III, LLLP,
APPELLEE ON REVIEW,
(Defendant below).

PETITION FOR REHEARING

**CHRISTOPHER A. KROBLIN, ESQ.
SHARI N. D'ANDRADE, ESQ.**

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Facsimile: (888) 316-9269
Email: ckroblin@kellfer.com
sdandrade@kellfer.com

Counsel for Appellant

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TRESTON E. MOORE, ESQ.
KANAAN L. WILHITE, ESQ.

V.I. Bar Nos. 10 & 1227

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P.O. Box 310

St. Thomas, U.S.V.I. 00804

Telephone: (340) 777-5490

Facsimile: (340) 777-5498

Email: tresmoore@aol.com

kanaan@mdrvi.com

Counsel for Appellee

COMES NOW, Appellant **FIRSTBANK PUERTO RICO** (“FirstBank”), by and through its undersigned Counsel, and pursuant to V.I. R. App. P. 31, petitions this Court for rehearing of its August 29, 2025 Opinion (the “Opinion”). Rehearing is warranted because the Opinion overlooked or did not fully address: (1) the absence of any pleaded factual allegations concerning escrowed rent and the Superior Court’s acknowledgement that escrowing began years after the counterclaim was filed; and (2) the mandatory procedure of V.I.R.Civ.P. 15(d) for asserting claims based on post-pleading events. These points go to fundamental notice, due process, and the continued vitality of V.I.R. Civ. P. 15(d).

Moreover, the lower court erred in finding that FirstBank failed to cure EEP’s debts, and this Court made plain error by not reversing that Order considering

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the now reversed portion of the judgment based on Parcel 17-E.

In support thereof, FirstBank states as follows:

I. ESCROWED RENT

This Court’s Opinion overlooked and misapprehended key points of law and fact in affirming the Superior Court’s July 19, 2019 Order and concluding that Harthman Leasing III LLP’s (“Harthman”) counterclaim was broad enough to encompass escrowed-based rent claims for Parcel 17-B, 17-C, and 17-D. That result conflicts with V.I.R. Civ. P. 15(d) deprives FirstBank of notice and due process and risks undermining the proper operation of res judicata.

When Harthman filed its counterclaim in 2012, FirstBank had not yet begun escrowing rent for parcels 17-B, 17-C, and 17-D until September 2014—two years later. V.I.R. Civ.P. 15(d) provides the mechanism for addressing such post-pleading conduct: a party must seek leave of court to serve a supplemental pleading. Harthman had that right yet elected not to exercise it. Instead, it left its counterclaim unamended and pursued other remedies, including a separate forcible entry and detainer action, docketed as Civil Number ST-15-CV-533, where it actively litigated the issue of escrowed rent.

Despite the Opinion’s finding, a counterclaim cannot reach into the future—boilerplate cannot transform future events into pleaded claims, nor can it substitute

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for the notice required by Rule 8. Moreover, since it was Harthman's right to elect to supplement its pleading, or not, the lower court had no right to do so on its own accord on the eve of trial. Accordingly, there was no abuse of discretion, just plain error, because the choice to supplement was for Harthman, not the court, to make.

A. Boilerplate Cannot Supply Notice of Later Arising Escrow Claims

The Court's Opinion erroneously concludes that Harthman's counterclaim was broad enough to reach escrow-related claims for Parcels 17-B, 17-C, and 17-D. Respectfully, that reading elevates generic "all parcels" language over the bedrock requirement of factual notice. At the time of the filing, FirstBank had not yet begun escrowing rent, so there were necessarily no factual allegations tied to escrowed rent in any pleading. The Superior Court recognized as much on July 19, 2019, noting: "It is true that at the time the complaint and counterclaims were filed, FirstBank had not yet begun to withhold rent on Parcels 17B, 17C, and 17D."

It is axiomatic that trial courts may not grant relief on claims that are not pleaded. *See, e.g., Rahmani v. Sadeghian*, No. 05-22-00759-CV, 2024 WL 1046365, at *4 (Tex. App. Mar. 11, 2024) (reversing trial court's judgment that awarded relief never pleaded, underscoring that courts exceed their authority when granting relief on unpleaded claims); *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co.*, 223 S.W.3d 1, 19 (Tex. App.-El Paso 2005, pet. denied) (Trial court properly declined to award recovery

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for unpleaded cause of action.); *Rieman v. Swope*, 79 P.3d 399 (Or. App. 2003) (trial court errs in granting relief on an unpleaded theory); *Ted Lansing Supply Co. v. Royal Aluminum & Construction Corp.*, 277 S.E.2d 228 (Va. 1981) (Defendant moved to strike for failure to prove pleaded breach of expressed warranty, trial court *sua sponte* ruled plaintiff could recover on unpleaded theory of implied warranty; no new or amended pleading filed; Supreme Court reversed, holding no judgment could be had upon facts not alleged or a right not pleaded and claimed); *Oil Field Haulers Ass'n v. R.R. Comm'n*, 381 S.W.2d 183, 191 (Tex. 1965) (party may not sustain a favorable judgment on an unpleaded cause of action).

Even under the Virgin Islands' liberal notice-pleading standard, V.I.R.Civ.P. 8(a) requires more than vague boilerplate. A pleading must allege facts identifying the scope of the claim and provide fair notice of the conduct at issue. *Brathwaite v. H.D.V.I. Holding Co.*, No. ST-16-CV-764, 2017 WL 2295123, at *2 (V.I. Super. Ct. Apr. 3, 2017). Courts consistently reject "naked" allegations that fail to inform the opposing party of what it must defend. *See, e.g., Matter of Doe II*, 492 P.3d 1129, 1137 (Idaho 2021) (notice pleading "requires more than a naked recitation of facts from which a hyper-vigilant attorney could possibly foresee the possibility of a given cause of action," and petition containing no factual allegations giving rise to the grounds alleged deprived the opposing party of both factual and legal notice sufficient to satisfy due process.); *Smith v. Glenns Ferry Highway Dist.*, 462 P.3d 1147, 1161 (Idaho 2020) (notice pleading requires that a complaint state an underlying cause of action *and the facts from*

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which that cause of action arises.”) (emphasis added and internal citation omitted).

The Idaho Supreme Court’s decision in *Matter of Doe II*, 492 P.3d 1129 (Idaho 2021), underscores the due process violation inherent in granting relief on unpleaded claims. There, the guardians’ petition to terminate parental rights contained only generic statutory references and no factual allegations tied to the parties’ alleged conduct. *Id.* The court held that such bare pleading failed to provide factual or legal notice of the ground pursued, thereby depriving the parents of due process. *Id.* The same defect is present here. Harthman’s counterclaim, like the petition in *Matter of Doe II*, offered only boilerplate language and contained no factual allegations regarding escrowed rent. Indeed, escrowing the rent had not yet occurred at the time the counterclaim was filed. By later construing vague language to encompass claims that arose years afterward, the Superior Court and the Opinion deprived FirstBank of due process in precisely the way *Matter of Doe II* condemned: forcing a party to defend against claims of which no factual or legal notice was given.

Here, Harthman’s counterclaim alleged unpaid rent “specifically for Parcel 17-E,” followed by boilerplate reference to “damages . . . for all parcels.” That language cannot reasonably be stretched to mean FirstBank should have anticipated defending escrow-based claims for other parcels two years later. When FirstBank later placed rent into escrow in 2014, Harthman elected not to supplement its counterclaim to add those claims; instead, it pursued a separate forcible entry and detainer action. By treating

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this generic language as constructive notice of claims that arose years after the counterclaim was filed, the Opinion misapprehends both the facts and the procedural posture. The conduct underlying the escrowed rent was never pleaded in the counterclaim. Treating boilerplate as constructive notice of later arising escrow claims and to permit relief under such circumstances not only undermines the purpose of V.I.R. Civ.P. 8, but also violates the constitutional guarantee of fair notice.

**B. Allowing Post-Pleading Claims Without
Supplementation Nullifies V.I.R.Civ.P. 15(d)**

The Opinion affirms the Superior Court’s decision to adjudicate claims based on FirstBank’s decision to escrow rent in 2014—conduct that arose two years after Harthman filed its counterclaim. FirstBank submits that this result cannot be squared with the plain language of V.I.R.Civ. P. 15(d). That Rule provides in unambiguous terms that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” V.I.R.Civ. P. 15(d) (emphasis added).

Here, no motion to supplement was filed, and no leave was granted. Yet, the Superior Court permitted the case to go to trial—and this Court’s Opinion affirmed—on claims derived entirely from post-filing conduct. That is flatly inconsistent with V.I.R. Civ.P. 15(d).

V.I.R.Civ.P. 15(d) is not a technicality; it is a carefully designed safeguard. As the Ninth Circuit Court of

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Appeals explained, “[i]t is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted.” *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). But that usefulness presupposes compliance with the Rule’s requirement of court permission.

By allowing post-pleading events to be litigated absent supplementation, the Opinion strips Rule 15(d) of meaning and reduces it to a procedural formality that courts may disregard at will. Such a process undermines not only the orderly framework of civil procedure but also the core guarantees of due process.

C. Awarding Escrowed Rent Creates Improper Res Judicata Consequences

Res judicata applies only to claims that are properly pleaded, so that judgment bars matters actually joined in the pleadings. As the Minnesota Supreme Court recognized, even under liberal standards, pleadings must give fair notice of the claims asserted to res judicata to apply. *Roberge v. Cambridge Co-op Creamery Co.*, 67 N.W.2d 400, 402 (Minn. 1954) (“While pleadings are to be more liberally construed . . . , they must still be framed so as to give fair notice of the claim asserted and permit the application of the doctrine of Res judicata”).

Here, Harthman’s counterclaim alleged only unpaid rent for Parcel 17-E, with boilerplate referencing “all parcels.” The issue of escrowed rent for those parcels

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began in 2014, two years after the counterclaim was filed. The Superior Court, nonetheless, on the eve of trial, issued its July 19, 2019 Order construing the counterclaim to include escrow-related claims. That ruling afforded FirstBank no discovery on these unpleaded, later-arising claims and left it to defend them at trial.

Instructive is the Second Circuit’s decision in *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1463 (2nd Cir. 1996). There, the court stated that “[u]nder the claim preclusion branch of res judicata, ‘[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.’” *Id.* (quoting *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981)).

Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Id.* (quoting *Nevada v. United States*, 463 U.S. 110, 129–30, 103 S.Ct. 2906, 2918, 77 L.Ed.2d 509 (1983)) (emphasis added).

With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive, *see*,

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e.g., *Prime Management Co. v. Steinegger*, 904 F.2d 811, 815 (2d Cir.1990); nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues, *see, e.g.*, *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1259–60 (2d Cir.1983). A first judgment will generally have *1464 preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is, “whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first.” *NLRB v. United Technologies Corp.*, 706 F.2d at 1260; *see also Nevada v. United States*, 463 U.S. at 128–30, 103 S.Ct. at 2917–19 (court must determine whether same “cause of action” is sued on); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955) (“a prior judgment is res judicata only as to suits involving the same cause of action”); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S.Ct. 977, 122 L.Ed.2d 131 (1993); *Saud v. Bank of New York*, 929 F.2d 916, 919 (2d Cir. 1991).

If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim

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preclusion. *See, e.g., Lawlor v. National Screen Service Corp.*, 349 U.S. at 328, 75 S.Ct. at 868–69 (no res judicata bar to claim for anticompetitive conduct occurring subsequent to first suit); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d at 168–70 (same re different financial transactions); *Prime Management Co. v. Steinegger*, 904 F.2d at 816 (same re subsequent breaches of contract); *NLRB v. United Technologies Corp.*, 706 F.2d at 1260 (same re subsequent labor conflicts over same type of employee activity at different times and places, involving different employees). For example, when a contract was to be performed over a period of time and one party has sued for a breach but has not repudiated the contract, res judicata will preclude the party’s subsequent suit for any claim of breach that had occurred prior to the first breach-of-contract suit, but will not preclude a subsequent suit for a breach that had not occurred when the first suit was brought. *See id.*; *Restatement (Second) of Judgments* § 24 comment *d*.

Id. at 1463–64.

“If a defendant engages in actionable conduct after a lawsuit is commenced, the plaintiff may seek leave to file a supplemental pleading to assert a claim based on the subsequent conduct.” *Id.* at 1464. “But he is not required to do so, and his election not to do so is not penalized

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by application of res judicata to bar a later suit on that subsequent conduct:

The scope of litigation is framed by the complaint at the time it is filed. *The rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action* which might have been, but which were not, required to be litigated.... Plaintiffs may bring events occurring after the filing of the complaint into the scope of the litigation by filing a supplemental complaint with leave of the court, ... but there is no requirement that plaintiffs do so.”

Id. (quoting *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 739 (9th Cir. 1984)) (internal quotation marks omitted) (emphasis added), *cert. denied*, 474 U.S. 919, 106 S.Ct. 247, 88 L.Ed.2d 256 (1985); *see also Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir.1992) (decision whether or not to attempt to assert claims that arose subsequent to the filing of the action “is optional for the plaintiff; the existence of the doctrine of res judicata does not make the filing of supplements mandatory”).

Here, Harthman’s escrow-based claims—arising in 2014—could not have been encompassed in a 2012 counterclaim without Harthman’s election to supplement. Even if the July 19, 2019 Order was construed as a grant of Harthman’s informal request to supplement, it was improperly issued on the eve of trial and failed to give

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FirstBank an opportunity to conduct discovery on the supplementation and prepare a case for trial on that issue.

Allowing judgment on such claims creates the worst of both worlds: FirstBank was forced to defend claims never pleaded, and yet a final judgment may now (arguably) carry res judicata effect against it. This is precisely what *Roberge* and *First Jersey* forbid. Rehearing is warranted to correct this error.¹

IV. Failure to Cure Finding Cannot Stand

It is undisputed that the trial court awarded only two categories of damages: (1) rent for Parcel 17-E; and (2) escrowed rent for Parcels 17-B, 17-C, and 17-D, together with late fees and interest. The Opinion sets forth the breakdown of the award:

Breakdown of award:

Base Rent for Parcels 17-B, 17-C, and 17-D
(9/2014-7/2019): \$3,680,755.34
12% interest 9/2014-7/2019: \$1,028,409.23
5% late charges accumulated from 9/2014 to
7/2019: \$184,037.77
Rent for Parcel 17-E until May 2012:
\$1,364,073.05

See Op. at 7 n.4 (emphasis added).

1. It should be noted that the issue of escrowing rent is already being litigated in the related FED action filed by Harthman.

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No other damages were awarded. It is equally undisputed that FirstBank tendered a check in the amount of Three Hundred Forty-Four Thousand Fifty-Five Dollars and Seventeen Cents (\$344,055.17) to cure East End Plaza, LLP (“EEP”)’s debt.

Yet, the Opinion affirmed the finding that FirstBank failed to cure EEP’s debts, even though the only damages ever tied to an alleged failure to cure were those for Parcel 17-E. That award—\$1,364,073.05—has now been reversed. With that reversal, there is no longer any damages award that can be attributed to a failure to cure.

The escrowed rents for Parcels 17-B, 17-C, and 17-D cannot serve as a substitute. Those funds were deposited into escrow beginning in September 2014—two years after the counterclaim was filed—and were never due to Harthman at the time the cure was demanded by Harthman in 2012 and paid by FirstBank.

Thus, the only possible basis for the trial court’s finding that FirstBank failed to cure was the award for Parcel 17-E. With that award reversed on appeal, nothing remains in the record to support the conclusion that FirstBank failed to cure any obligation. To allow the finding to stand now is clear error: it affirms a failure to cure determination where no damages exist to sustain it.

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CONCLUSION

For the foregoing reasons, FirstBank respectfully requests that this Court grant rehearing, reverse its affirmance of the Superior Court's July 19, 2019 Order, and hold that the Superior Court erred in allowing Harthman to proceed to trial on unpled claims. Additionally, it is requested that the finding that FirstBank failed to cure be reversed, as not a single cent was awarded to Harthman for the failure to cure, and, therefore, there is no basis for finding FirstBank failed to cure.

Dated: September 12, 2025

Respectfully,

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