

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

<b>UNITED CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>CASE NO. ST-13-CV-101</b>
<b>WAHEED HAMED, a/k/a WILLY OR WILLIE</b>	)	
<b>HAMED</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**MEMORANDUM OPINION**

Pending before the Court is Defendant Waheed Hamed’s April 15, 2013, Motion for Judgment on the Pleadings.<sup>1</sup> For the following reasons, Defendant’s Motion will be granted in part and denied in part without prejudice.

**FACTUAL AND PROCEDURAL HISTORY**

Plaintiff United Corporation filed a Complaint on March 5, 2013, alleging that during Defendant Waheed Hamed’s employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets of Plaintiff in two separate instances. Specifically, Plaintiff alleges (1) that on October 7, 1995, Defendant converted Seventy thousand dollars (\$70,000.00) by conveying it to a third party through a certified check without Plaintiff’s approval; and (2) that in at least 1992 and for a following unknown period of time, Defendant operated a wholesale grocery business called “5 Corner’s Mini Mart,” converting Plaintiff’s inventory and personal property without Plaintiff’s knowledge.

<sup>1</sup> Plaintiff responded on May 1, 2013. Defendant replied on June 4, 2013.

## STANDARD

Pursuant to Fed. R. Civ. P. 12(c), made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, a party may move for judgment on the pleadings, “[a]fter the pleadings are closed – but early enough not to delay trial.”<sup>2</sup> The standard applied under Fed. R. Civ. P. 12(c) mirrors that of Fed. R. Civ. P. 12(b)(6),<sup>3</sup> under which a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff’s “failure to state a claim upon which relief can be granted.”<sup>4</sup> In considering the motion, the Court must first liberally construe the pleadings,<sup>5</sup> and “accept as true all well-pleaded allegations in the complaint” in favor of the plaintiff.<sup>6</sup> While “the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation.”<sup>7</sup> Second, once the legal and factual allegations have been distinguished, the Court must decide whether “the plaintiff

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<sup>2</sup> Fed. R. Civ. P. 12(c).

<sup>3</sup> *See, e.g., Sanders v. Gov't of the V.I.*, 2009 WL 649888, at \*2 (D.V.I. Mar. 9, 2009); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011). An essential difference between a motion under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) is that a motion under Fed. R. Civ. P. 12(b)(6) must be made before a responsive pleading is allowed, while Fed. R. Civ. P. 12(c) applies after a responsive pleading has been filed.

<sup>4</sup> Fed. R. Civ. P. 12(b)(6).

<sup>5</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

<sup>6</sup> *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) (“[I]n considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations in the complaint. . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a) . . . .”) (internal citations omitted).

<sup>7</sup> *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at \*1 (V.I. Super. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

pleads factual content that allows the court to draw the reasonable inference”<sup>8</sup> that the claim is plausible on its face.

Considering that a motion to for judgment on the pleadings challenges the sufficiency of the pleadings rather than disputed factual allegations, a Court will not generally grant a motion to dismiss based on either Fed. R. Civ. Pro. 12(c) or Fed. R. Civ. P. 12(b)(6) that solely asserts an affirmative defense.<sup>9</sup> However, a Court may consider such a motion to dismiss where “the relevant facts are . . . readily apparent on the face of the complaint.”<sup>10</sup> For instance, while “the expiration of the [s]tatute of [l]imitations often presents a question of fact [for the jury], where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law.”<sup>11</sup> When conducting such an analysis the Court primarily relies on the factual allegations plead in the Complaint, but may also consider “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint . . . .”<sup>12</sup> For instance, in *Burton v. First Bank of Puerto Rico*, the court considered the plaintiff’s

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<sup>8</sup> *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446).

<sup>9</sup> See, e.g., *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008) (“Where a court grants a Rule 12(b)(6) or Rule 12(c) motion based on an affirmative defense, the facts establishing that defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude.”)(internal quotations omitted)(citing *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir.2006)).

<sup>10</sup> *Burton v. First Bank of Puerto Rico*, 49 V.I. 16, 20 (V.I. Super. 2007)(applying the pre-*Twombly* standard to a Fed. R. Civ. P. 12(b)(6) motion); see *Charleswell v. Chase Manhattan Bank*, 45 V.I., 495, 506 (D.V.I, 2004).

<sup>11</sup> *Burton*, 49 V.I. at 20 (internal citations and quotations omitted) (citing *Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005)).

<sup>12</sup> *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001)); see generally *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). If other extrinsic evidence is considered, a court may convert the motion into Fed. R. Civ. P. 56 motion at its discretion. See generally STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK, at 470 (2012).

billing statements because they were “indisputably authentic documents” that were explicitly referred to in the complaint.<sup>13</sup>

### ANALYSIS

Defendant argues that Plaintiff’s Complaint should be dismissed because the statute of limitations period for Plaintiff’s claims for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) have expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is “based on a breach of a legal duty imposed by law that arises out of the performance of the contract” or otherwise carries a six (6) year statute of limitations if it is “based upon a breach of specific provisions in the contract.”<sup>14</sup> Pursuant to 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations.<sup>15</sup> Pursuant to 5 V.I.C. § 31(3)(A), a breach of contract claim carries a six (6) year statute of limitations.<sup>16</sup> While Plaintiff lists “accounting”<sup>17</sup> and “constructive trust or recoupment” as separate counts, they are equitable remedies, and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.<sup>18</sup>

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<sup>13</sup> 49 V.I. at 20.

<sup>14</sup> *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 79 (Terr. V.I. Apr. 21, 1997)

<sup>15</sup> *Id.* at 84 (“[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.”)

<sup>16</sup> *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).

<sup>17</sup> *Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I. 1997) (“equitable accounting is a remedy of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiff’s property or entitlements. The plaintiff makes a prima facie case by showing a breach of fiduciary duty plus gross receipts resulting to the fiduciary, and the defendant must prove what deductions are appropriate to figure the net profit.”) (internal quotations and citations omitted) (quoting 1 Dan B. Dobbs, *Law Of Remedies* § 4.3(5), at 610 (2d ed.1993)).

<sup>18</sup> *See generally* 1A C.J.S. Accounting § 6 (“An accounting is essentially an equitable remedy, which arises from an obligation to account for the plaintiff’s money or property.”); 90 C.J.S. Trusts § 176

Plaintiff argues that, while the alleged acts of misconduct occurred as early as 1992 and in 1995, the statutory period was tolled because Plaintiff had no way of knowing of the misconduct until Plaintiff received certain documents in October 2011 that had been gathered pursuant to a 2003 federal criminal investigation in *U.S. v. United Corporation, et al.*

Ordinarily, “a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action” unless the statute of limitations has been tolled.<sup>19</sup> While Plaintiff’s reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant argues that Plaintiff’s argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable ‘discovery rule’ tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party’s conduct. The discovery rule is to be applied using an objective reasonable person standard.<sup>20</sup> (emphasis added)

On the other hand, equitable tolling may apply “where the defendant has actively misled the plaintiff,” as Plaintiff here alleges in the Complaint.<sup>21</sup> However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

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(“[Constructive trusts] are remedial in character and are classified as belonging to remedial rather than substantive law, and it is not itself a substantive right.”)(internal citations omitted).

<sup>19</sup> *Whitaker*, 36 V.I. at 81.

<sup>20</sup> *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at \*5 (Bankr. D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at \*3 (D.V.I 2002)) (internal citations and quotations omitted).

<sup>21</sup> *Id.* at \*6.

“that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim.”<sup>22</sup> (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an “objective reasonable person standard.”<sup>23</sup>

Applying the “reasonable diligence” standard of the discovery rule and doctrine of equitable tolling, the Court will discuss in turn the 1992 and 1995 allegations of wrongful conduct to determine whether recovery on the Complaint on its face, construed liberally in a light most favorable to Plaintiff, is barred on statute of limitations grounds.

**I. Claims relying on facts alleging Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995.**

Plaintiff’s Complaint alleges that

In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United’s knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7<sup>th</sup>, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff’s business operations.<sup>24</sup>

Further, in his response to Defendant’s Motion, Plaintiff argues that the “statute of limitations could not accrue and was tolled because Plaintiff could not have possibly known of Defendant’s misconduct until a federal investigation revealed this

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<sup>22</sup> *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

<sup>23</sup> *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) (“[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.”)(internal citations and quotations omitted).

<sup>24</sup> Complaint, ¶ 14.

misconduct.”<sup>25</sup> Defendant argues that the statute of limitations period was not tolled because under either the discovery rule or doctrine of equitable tolling Plaintiff failed to exercise “reasonable diligence” in reviewing the basic accounting records of the company before the records were seized by the government in *U.S. v. United Corporation, et al.*

The Court agrees with Defendant, albeit on different grounds. Specifically, the Complaint states that in 2003 Plaintiff United, along with Defendant and others, were indicted in “*U.S. v. United Corp., ST-15-CR-2005.*”<sup>26</sup> Upon a review of public records, it appears that Plaintiff is referring to *U.S. v. United Corporation, et al.,* Crim. No. 2003-147 in the District Court. The original indictment, issued and unsealed on September 18, 2003, in *U.S. v. United Corporation, et al.,* Crim. No. 2003-147, and any subsequent superseding indictments may be considered by the Court in its analysis to determine whether Plaintiff exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling because Plaintiff explicitly refers to that case on the face of the Complaint, and further, these indictments are indisputable public records.<sup>27</sup> The third superseding indictment, issued on September 9, 2004, charged Defendant Waheed Hamed, among others, with

purchas[ing] and direct[ing] and caus[ing] Plaza Extra employees and others to purchase cashier’s checks, traveler’s checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the case as legitimate-appearing financial instruments.<sup>28</sup>

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<sup>25</sup> Plaintiff’s Response in Opposition to Defendant’s Motion for Judgment on the Pleadings, May 1, 2013, at ¶ 7.

<sup>26</sup> Complaint, ¶ 14.

<sup>27</sup> *Barany-Snyder*, 539 F.3d at 332; See Fed. R. Evid 902.

<sup>28</sup> *U.S. v. Yusuf, et al.,* 2003-147, Third Superseding Indictment, Sept. 9, 2004, at ¶ 15.

While the third superseding indictment largely alleges that Defendant Waheed Hamed, among others, used cashier's checks and other methods to conceal illegal money transfers abroad, the third superseding indictment, although only containing allegations, would have *at least* put a reasonable person in Plaintiff's position,<sup>29</sup> as Defendant's employer, on notice<sup>30</sup> that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties, as alleged in Plaintiff's Complaint at Paragraph 15. Plaintiff does not contend any efforts were made after this point to review United's business and accounting records to investigate the government's allegations against Defendant.<sup>31</sup> Instead, the Complaint clearly states on its face that the discovery was only made in October 2011 upon a review of the government's records and documents. Thus, here, "the facts are so clear that reasonable minds cannot differ," on the face of the Complaint that the commencement period for the statute of limitations began *at least* by September 9, 2004.<sup>32</sup> As such, all claims relying on facts alleging

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<sup>29</sup> *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at \*6 (noting that while reasonable diligence is an objective test based on a reasonable person standard, the test is flexible to take into account certain situations and circumstances).

<sup>30</sup> See *Whitaker*, 36 V.I. at 81 ("the . . . crucial question in determining the accrual date for statute of limitations purposes is whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him.") (quoting *Zelevnik v. U.S.*, 770 F.2d 20, 23 (3d Cir. 1985)).

<sup>31</sup> See, e.g., *Zafarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 553 (E.D. Pa. 2010) ("Once a plaintiff becomes aware of an injury and who caused it, he is under a duty to investigate and promptly file his suit.") Plaintiff primary argument is that Plaintiff did not have access until October 2011 to many of the records, particularly Defendant's 1992 tax return, which lead to the discovery of Defendant's alleged misconduct. Here, Plaintiff, a corporation, has access to its own accounting and other record-keeping files, a review of which may have revealed Defendant's alleged misconduct. Even if the government had confiscated Plaintiff's business records, an objectively reasonable individual would have retained copies, particularly if an indictment was pending, and have inquired into the wrongdoing suggested by the September 9, 2004, third superseding indictment. Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendant's misconduct is without merit.

<sup>32</sup> As the Court relied on the third superseding indictment, the Court does not hold or address whether the original indictment may have also placed Plaintiff on notice of Defendant's alleged misconduct.



Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995, are barred on statute of limitations grounds. All of Plaintiff's claims carry a six (6) year statute of limitation or less, meaning the statutory period expired by *at least* September 9, 2010.

**II. Claims relying on facts alleging Defendant operated a wholesale grocery business called "5 Corner's Mini Mart" and converted Plaintiff's inventory and personal property without Plaintiff's knowledge in 1992 for an unknown period of time.**

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory . . . belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."<sup>33</sup> Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in *U.S. v. United Corporation, et al.*, were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.<sup>34</sup>

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<sup>33</sup> Complaint, ¶¶ 16-20.

<sup>34</sup> Plaintiff's Response in Opposition to Defendant's Motion for Judgment on the Pleadings, May 1, 2013, at ¶¶ 4, 7. Defendant argues that because Plaintiff fails to specifically reference the alleged 1992 misconduct in their response to Defendant's Motion that "[P]laintiff concedes the limitation issue as to the 1992 act." Defendant Hamed's Reply to Plaintiff's Opposition to the Motion for Judgment on the Pleadings, June 4, 2013, at 3. The Court agrees that Plaintiff's counsel failed to cite to any relevant authority in violation of Local Rule of Civil Procedure 11.1 which provides that, "[b]y signing a motion or supporting memorandum or brief, an attorney certifies to the Court that: (a) the applicable law in this jurisdiction has been cited, including authority for and against the position being advocated by counsel . . . ." The Court strongly cautions Plaintiff's counsel to cite to relevant authority and applicable legal standards in any future representations before this Court. However, the Court in its discretion, and in viewing the Complaint in a light most favorable to Plaintiff, has considered Plaintiff's general argument that Plaintiff had no way of discovering Defendant's alleged misconduct until October 2011 to both the alleged misconduct that occurred in 1992 and 1995.

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determine as a matter of law and is rather a question of material fact.<sup>35</sup> Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in *U.S. v. United*, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, here, Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which Plaintiff previously did not have access. As such, Defendant's motion is premature with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011.


For the foregoing reasons, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings. An Order consistent with this Opinion shall follow.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.  
Clerk of Court

by:

  
Lori Boynes-Tyson  
Court Clerk Supervisor

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

<sup>35</sup> See, e.g. *In re Mushroom*, 383 F.3d at 338.

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

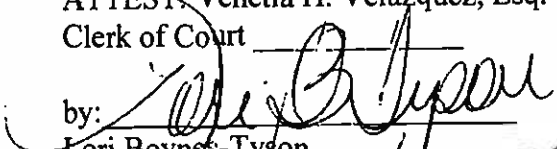
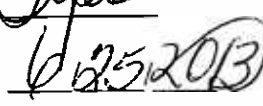
<b>UNITED CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
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<b>vs.</b>	)	
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<b>WAHEED HAMED, a/k/a WILLY OR WILLIE</b>	)	
<b>HAMED</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	


**ORDER**

The Court having issued a Memorandum Opinion on this date, it is  
ORDERED that Defendant's April 15, 2013, Motion for Judgment on the  
Pleadings is GRANTED in part and DENIED in part without prejudice; and it is  
ORDERED that the portion of Plaintiff's Complaint related to an alleged certified  
check for seventy-thousand dollars (\$70,000.00) is DISMISSED with prejudice; and it is  
ORDERED that Plaintiff submit an amended complaint by July 15, 2013,  
consistent with holding of the Memorandum Opinion; and it is  
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.  
Clerk of Court

by:   
Lori Boynes-Tyson  
Court Clerk Supervisor 

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