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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

CASE NO. SCT-CIV-2022-0119

GEORGE FRANCIS,

Plaintiff/Appellant,

v.

EDWARD A. FRANCIS and JAMES L. FRANCIS

Defendants/Appellees

An Appeal from the Superior Court of the Virgin Islands

Division of St. Thomas & St. John, Case No. ST-2020-CV-00190

**OPENING BRIEF OF THE APPELLANT
GEORGE FRANCIS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

I. SUBJECT MATTER AND APPELLATE JURISDICTION.....5

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW.....6

 A. Issues on Appeal.....6

 B. No Previous Proceedings but Related Proceedings.....7

 C. Standard of Review.....8

III. STATEMENT OF THE CASE.....8

IV. ARGUMENT.....12

 A. No Basis to Order Execution of the PSA Without Material Performance of the Agreement.....12

 B. No Basis to Order Execution of PSA Where Agreement was Materially Breached.....18

V. CONCLUSION.....21

TABLE OF CASES AND AUTHORITIES

Statutes

4 V.I.C. § 76.....	5
28 V.I.C. § 451.....	5
4 V.I.C. § 32.....	5
4 V.I.C. § 32.....	5

Rules

V.I.R. Civ. P. 90(h)(3).....	19
------------------------------	----

Case Law

<i>Liat (1974), Ltd. v. Cherubin</i> , 2022 V.I. 21, 2022 WL 17414952.....	5
<i>Pub. Employees Relations Bd. v. United Indus. Workers-Seafarers Int'l Union</i> , 56 V.I. 429, 433 (V.I. 2012).....	5
<i>Howerton v. V.I. Office of Lieutenant Governor</i> , 2022 V.I. 19, 2022 WL 4093815, at *2 (V.I. 2022).....	8
<i>Rawlins v. People</i> , 58 V.I. 261, 268 (V.I. 2013).....	8
<i>St. Thomas-St. John Bd. of Election v. Daniel</i> , 49 V.I. 322, 329 (V.I. 2007).....	8
<i>Boynes v. Transportation Services of St. John, Inc.</i> , 60 V.I. 453, 459 (2014).....	12
<i>Alford v. Kuhlman Elec. Corp.</i> , 716 F.3d 909, 912 (5 th Cir. 2013).....	12
<i>Welch & Forbes, Inc. v. Cendant Corp.</i> , 233 F.3d 188, 192-93 (3d Cir. 2000).....	13
<i>Hendricks v. Clyne</i> , No. ST-16-CV-147, 2019 WL 624666, at *2 (V.I. Super. Ct. Feb. 8, 2019).....	13
<i>Phillip v. Marsh-Monsanto</i> , 66 V.I. 612, 625 (V.I. 2017).....	13
<i>Weary v. Long Reef Condominium Assoc.</i> , 57 V.I. 163, 167-70 (V.I. 2012).....	13
<i>Rivera v. Sharp, Slip Copy</i> , 2021 WL 2228492, at *14 (V.I. Super. Ct. 2021, June 1, 2021).....	16
<i>Beazer East, Inc. v. Mead Corp.</i> , 412 F.3d 429, 436 (3d Cir. 2005).....	16
<i>Stallworth Timber Co. v. Triad Bldg. Supply</i> , 968 F.Supp. 279, 282 (D.V.I. App. Div. 1997).....	18
<i>George v. V.I. Lottery Comm'n</i> , 54 V.I. 533, 539 (V.I. 2010).....	18

Thompson v. Florida Wood Treeters, Inc., 2010 WL 3119918, at *4 (D.V.I. August 4, 2010).....19
David v. Scotland, 2014 WL 11034925, at *2 (V.I. Super. Ct. Feb. 3, 2014).....19
Wilkinson v. Wilkinson, 70 V.I. 901, 914 (V.I. 2019).....20

Supplemental Authorities

11 WILLISON ON CONTRACTS § 33:1 (4TH ED. 2021).....16
RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).....18

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This matter commenced on April 28, 2020 in the Superior Court of the Virgin Islands (the “**Superior Court**”) by George Francis (“**George**”), who filed a single-count Complaint for partition of Parcel No. 65 Remainder Estate Smith Bay, Nos. 1, 2, and 3 East End Quarter, St. Thomas, United States Virgin Islands (the “**Property**”). JA022. The Superior Court had subject matter jurisdiction over this case pursuant to 4 V.I.C. § 76 and 28 V.I.C. § 451. On December 5, 2022, the Superior Court granted Defendants/Appellees Edward A. Francis and James L. Francis (“**Edward**” and “**James**” respectively, and together with George, the “**Parties**”) Motion to Enforce the Mediated Settlement Agreement thereby ordering George to execute a contract for the purchase and sale of the Property. JA011.

The Superior Court’s order is final because compliance with the order would summarily dispose of George’s claim for partition of the Property, “ending the litigation on the merits, leaving nothing else for the court to do except execute the judgement.” *Liat (1974), Ltd. v. Cherubin*, 2022 V.I. 21, 2022 WL 17414952, at *2 (V.I. 2022) (citing *Pub. Employees Relations Bd. v. United Indus. Workers-Seafarers Int’l Union*, 56 V.I. 429, 433 (V.I. 2012)). Sections 32 and 33 of Title 4 of the Virgin Islands Code Annotated confer appellate jurisdiction on the Supreme Court of the Virgin Islands to hear appeals from final orders and decisions of the

Superior Court. On February 3, 2023, Mr. Francis filed a Notice of Appeal, by and through undersigned counsel, and therefore this appeal is properly before this Court.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

A. Issues on Appeal

The issues raised on appeal are as follows:

1. Whether the Superior Court erred when it granted Edward and James' Motion to Enforce the Mediated Settlement Agreement and provided no discussion or analysis of the (counter) issues raised and brief in George's Motion to Rescind the Mediated Settlement Agreement.
2. Whether the provision of the Mediated Settlement Agreement that required the Parties to list the Property with a broker was a material term on the Mediated Settlement Agreement.
3. Whether Edward and James materially breached the Mediated Settlement Agreement when Edward and James entered into a contract for the purchase and sale of the Property without first adhering to the listing provision of the Mediated Settlement Agreement.
4. Whether George is entitled to rescission of the Mediated Settlement Agreement upon a determination that Edward and George materially breached the Mediated Settlement Agreement.

B. No Previous Proceedings but Related Proceedings

This matter has not previously been before the Supreme Court. There are, however, other matters that are related to the instant matter. In *George Alphonso Francis v. Priscilla Soto*, Case No. ST-2020-CV-00392, Superior Court of the Virgin Islands, the Superior Court found, amongst other things, that: (1) George is the owner of a superficiary house located on the Property; (2) Edward is not entitled to lease the superficiary house and has no ownership interest in and to the superficiary house; (3) George was (and is) entitled to immediate restitution of the superficiary house. JA014. That case has been adjudicated and is closed.

In *George Francis v. Edward Francis*, Case No. ST-2022-CV-00061, Superior Court of the Virgin Islands, George seeks to recover a money judgment against Edward for rental proceeds that Edward collected from Priscilla Soto, a tenant who leased the superficiary house owned by George. The claim is that Edward has no ownership interest (or agency) in and to the superficiary house, but entered into a lease with Priscilla Soto for use and possession of the superficiary house located on the Property, and collected rent for approximately one (1) year. JA021. Edward maintains that he is entitled to a portion of the funds collected. This case is currently in the discovery phase.

C. Standard of Review

The Virgin Islands Supreme Court standard of review for the “Superior Court’s application of law is plenary, while findings of fact are reviewed for clear error.” *Howerton v. V.I. Office of Lieutenant Governor*, 2022 V.I. 19, 2022 WL 4093815, at *2 (V.I. 2022) (citing *Rawlins v. People*, 58 V.I. 261, 268 (V.I. 2013)); *see also St. Thomas-St. John Bd. of Election v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

III. STATEMENT OF THE CASE

This action for partition of real property was commenced by George in the Superior Court following George’s desire to terminate his co-tenancy in the Property with Edward and James. George, Edward, and James are biological brothers who inherited the Parcel No. 65 Estate Smith Bay, Nos. 1, 2, & 3 East End Quarter, St. Thomas, U.S. Virgin Islands from their father Clarence Francis who died testate on August 21, 1967.¹ JA023, ¶4. Parcel No. 65 Estate Smith Bay, St. Thomas, U.S. Virgin Islands was subsequently subdivided into: (1) the Property; and (2) Parcel No. 65-A Estate Smith Bay, Nos. 1, 2, & 3 East End Quarter, St. Thomas, U.S. Virgin Islands (“**Parcel 65-A**”). JA023, ¶ 7. By Deed of Gift dated March 29, 2002, Angela A. Francis conveyed her interest in and to Parcel 65-A to Edward. JA023, ¶ 8. Then, by Quitclaim Deed dated October 21, 2008, George and James conveyed

¹ The Adjudication granted their mother, Angela A. Francis a/k/a Angela A. Martin, a life estate in 65 Estate Smith Bay with a remainder in George, Edward, and James. JA023, ¶ 8.

their interest in and to Parcel 65-A to Edward. JA023, ¶ 9. The Property consists 0.42 U.S. acres, more or less, and the lot contains: (1) a two (2) story masonry structure; and (2) a superficial structure located on the south western portion. JA023, ¶ 7.

Sometime after the death of Angela A. Francis, on or about August 29, 2009, the Parties began to experience pronounced differences in the possession and use of the Property, which has been further exacerbated by the dispute over ownership of the superfiary house and the right to collect rental proceeds flowing therefrom. On February 24, 2021, Edward filed a pro se motion to dismiss, which was denied on the basis that Edward was formerly represented by counsel, Attorney King. JA031-039. On October 13, 2021, the Superior Court referred this matter for mediation after various court hearings/proceedings primarily of a verbal nature. JA041.

George has maintained that his desired outcome in this matter is that he retains ownership the portion of the Property constituting the superfiary house and that the remaining portion of the plot be divided amongst Edward and James; provided, however, that if the Parties were not able to agree, the Property be sold, and the sale proceeds distributed equitably amongst the Parties. JA042. The mediation was conducted by Attorney Henry Smock, Esq. *Id.* However, given the Parties' inability to agree on the parameters of partitioning the Property, the Parties entered into a Mediated Settlement Agreement on Thursday, December 2, 2021 (the

“**Agreement**”) where, amongst other things, the Parties agreed to the terms and conditions on which the Property would be sold. JA047.

On Wednesday, December 8, 2021, six days later, Edward’s counsel, Darren John-Baptiste, Esq. (“**Attorney John-Baptiste**”)², informed George’s counsel, George M. Miller, Esq. (“**Attorney Miller**”), by email that Edward had made an offer to purchase the Property. JA053. Attorney John-Baptiste indicated in his email that Edward’s offer would, “among other things,” save the Parties commission fees paid to the broker, and that Edward had “already approached [a] bank” regarding financing. *Id.* On December 17, 2021, Attorney Miller forwarded correspondence indicating that the Parties had agreed to list the Property, but that George had authorized Attorney Miller to work towards a contract of sale prior to the holidays. JA054.

Sixty-three days later, on Wednesday, February 9, 2022, Attorney John-Baptiste contacted Attorney Miller by email referencing a recap of a conversation between both counsel regarding George’s willingness to consummate a purchase and sale of George and James’ interest in and to the Property on agreed upon terms; this email included versions of a proposed Contract for Sale of the Property (the “**PSA**”).

² Darren John Baptiste, Esq. was substituted as counsel for Edward on October 4, 2021.

JA055, 059-064. On Friday, February 11, 2022, Attorney Miller informed Attorney John-Baptiste by email that George did not intend to sign the PSA. JA057.

Attorney Miller then proceeded to inform George that he would be bowing out of the case and that he had informed the Superior Court that the Parties initially agreed to sell the Property and divide the money, but Edward had subsequently proposed a buyout of George and James. JA058. On February 16, 2022, Attorney Miller filed a motion to withdraw as counsel from the case. JA069. That same day, Edward filed a “Motion to Enforce Mediated Settlement Agreement” moving the Superior Court to enter an order “compelling [George’s] signature on the [PSA].” JA071. James joined in that motion. The alleged basis for Edward and James’ motion was that, among other things, Edward and James entered into a contract for the purchase and sale of the Property, and that George was therefore contractually obligated to sign the PSA because “two of the three parties” agreed to accept it. JA071, ¶ 2. Undersigned counsel entered an appearance on behalf of George on February 28, 2022, and the Stipulation for Substitution of Counsel was approved by the Superior Court on March 1, 2022.

On March 29, 2022, George filed a Motion to Rescind the Mediated Settlement Agreement, accompanied by a memorandum of law, which moved the Superior Court in opposition to Edward and James’ February 16, 2022 motion. JA074. On April 15, 2022, Edward filed his Opposition to Motion to Rescind the

Mediated Settlement Agreement, and James similarly filed Defendant James Francis' Opposition to Plaintiff's Motion to Rescind the Mediated Settlement Agreement on April 19, 2022, accompanied by a memorandum of law. JA076-081. On December 5, 2022, seven months later, Edward filed a Renewed Motion for An Order Enforcing the Mediated Settlement Agreement. JA082. That same day, with no analysis or discussion of issues raised in George's Motion to Rescind the Mediated Settlement Agreement, the Superior Court issued an order granting Edward and James' Motion to Enforce the Mediated Settlement Agreement, thereby ordering George to execute the PSA executed by James and Edward. Thus, by Order dated December 5, 2022, the Superior Court wholly disposed of George's action for partition, making the order final for purposes of appeal. JA084.

IV. ARGUMENT

A. NO BASIS TO ORDER EXECUTION OF THE PSA WITHOUT MATERIAL PERFORMANCE OF THE AGREEMENT

The Superior Court had no basis to order that George execute the PSA because the terms of the Agreement required the Parties were to list the Property for sale and jointly consider offers for the purchase and sale of the Property based on the agreed upon sales price. As a threshold matter, the Agreement is an enforceable "contract governed by basic contract principles." *Boynes v. Transportation Services of St. John, Inc.*, 60 V.I. 453, 459 (2014); *see also Alford v. Kuhlman Elec. Corp.*, 716 F.3d

909, 912 (5th Cir. 2013); *Welch & Forbes, Inc. v. Cendant Corp.*, 233 F.3d 188, 192-93 (3d Cir. 2000); *Hendricks v. Clyne*, No. ST-16-CV-147, 2019 WL 624666, at *2 (V.I. Super. Ct. Feb. 8, 2019). And, where the language of a contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of its terms. *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 625 (2017); *see also Weary v. Long Reef Condominium Assoc.*, 57 V.I. 163, 167-70 (V.I. 2012) (holding that the language was clear and unambiguous; therefore the Court would follow its plain meaning). While it is not this Court's task to reveal the parties' subjective intent, express language showing party intent must be given effect. *Hendricks* at *2.

It is unequivocally clear that the Agreement represents the Parties' mutual understanding under which George, Edward, and James would sell their interest in the Property. Meaning, albeit possible, the Agreement does not expressly contemplate the parameters of a sale *between* the Parties. This intent is most apparent from the clear and unambiguous language contained in the first paragraph of the Agreement, which states that:

“The parties *will* list the Property with the Realtor (broker) Delrease Roberts for an asking price of not less than \$650,000.”
(emphasis added) (the “Listing Provision”). JA047, ¶ 1.

The Parties' utilization of “will” is clear and unambiguous language that evidenced their mutual intent to treat the Listing Provision as a mandatory condition of the Agreement. Edward and James now contend that the Listing Provision was

not truly material to the Agreement. Edward, in his Opposition to Motion to Rescind the Mediated Settlement Agreement, asserted that it was instead the asking price of \$650,000.00 that was material to the Agreement, and that George waived any requirement to list the Property by failing to facilitate listing of the Property and agreeing to “buyout terms.” JA077. Similarly, James asserted in his Opposition to Plaintiff’s Motion to Rescind the Mediated Settlement Agreement that George was not entitled to performance of the Listing Provision because he had an equal obligation to list the Property and because the PSA provided that Edward would purchase the Property at \$650,000.00, sans a six percent (6%) broker fee that would otherwise be paid. These assertions, however, do not capture the mutual understandings of the Parties nor the express terms of the Agreement.

The express language of the Agreement—“will list...with Realtor (broker) Delrese Roberts”—removed any and all discretion surrounding the method by which the parties would offer the Property for purchase to potential buyers. JA047. Thus, to interpret the Agreement differently would constitute a material departure from the “binding nature of the [Agreement] on the parties.” *Boynes* at 460. To the extent Edward and James contemplated a sale that did not involve a broker, they knew to document said intentions accordingly as they forwarded a draft PSA consistent with these expectations six calendar days after executing the Agreement. However, George maintained a reasonable expectation that listing the Property with

a broker in the public real estate market would likely result in an increase in the potential purchase price by expanding the pool of eligible buyers. Meaning, the Listing Provision carried the effect of maximizing economic returns to George by ensuring the Property is listed and sold at the best offer. The sole private offer made by Edward instead created a *de facto* ceiling on the purchase price for the Property by foreclosing the potential for offers in excess of Edward's offer, which is inconsistent with the terms of the Agreement that required a listing with a broker for "an asking price of not less than \$650,000.00." JA047.

George did not contractually waive the listing requirement based on Attorney Miller's email communications surrounding execution of the PSA. On Friday, December 17, 2021, Attorney Miller forwarded email correspondence to Attorney John-Baptiste, indicating that George had authorized Attorney Miller to work towards a final PSA. JA054. Notably, in his email, Attorney Miller raised the issue that the Parties had in fact agreed to list the Property. Then, on February 9, 2022, Attorney John-Baptiste referenced communication from Attorney Miller indicating George was purportedly ready to move forward and clarify the contents of the PSA. JA055. Edward and James have attempted to use these communications by counsel as evidence that George waived the Listing Provision. However, the introduction of extrinsic evidence used to "interpret or change the meaning" of the Agreement is not only inconsistent with the written intent of the Parties, it also violates the parole

evidence rule. *Rivera v. Sharp, Slip Copy*, 2021 WL 2228492, at *14 (V.I. Super. Ct. 2021, June 1, 2021). The “purpose of the parole evidence rule is to give effect to the parties written expression of their agreement.” *Rivera* at *13; citing 11 Willison on Contracts § 33:1 (4th ed. 2021). And, as this Court noted, a “*written* settlement agreement” is “binding and conclusive.” *Id.* (emphasis added); *see also Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 436 (3d Cir. 2005) (a mediated settlement agreement “is not binding unless reduced to writing.”).

Thus, any modifications to the Agreement that allowed for the purchase and sale of the Property without adherence to the Listing Provision would have necessitated, at minimum, an addendum to the Agreement as opposed to email exchanges between counsel for the Parties. Attorney Miller, for his part, communicated as much to George when he informed him that the Superior Court was aware that George had not accepted the private offer from Edward.

Similarly, George did not contractually waive the performance of the Listing Provision simply because he failed to facilitate the collective obligation of the Parties to list the Property. It is not clear from the record why the Parties were not able to collectively achieve compliance with the Listing Provision and the Superior Court conducted no evidentiary hearing to determine the facts and circumstances surrounding this condition. The record is clear, however, that Edward communicated an offer to purchase the Property within six days of signing the Agreement. JA053.

Counsel for Edward informed counsel for George that Edward had “already approached the bank” regarding financing. *Id.* Indeed, Edward’s offer to purchase the Property formed the basis for his Motion to Enforce Mediated Settlement Agreement on the basis that, *inter alia*, “two of the three parties” could agree to accept an offer for less than \$560,104.00. JA072, ¶ 2. Incredible.

By that logic, Edward and James change the significance of Listing Provision, which was, on its face, contemplated to hedge against a single party hold-out, and allow two of three brothers to *sell* the Property in an event an offer was made below the threshold price. The key word here is “sell.” Meaning, Edward and James’s inconsistent interpretations of the Agreement and wrongful actions essentially paved the way for Edward’s exercise of undue influence on the transaction; here, Edward, a party to an agreement to *sell* the Property, was also able force the sale of the same to himself as a buyer by private offer with the assistance of James. This, however, could not be the intent of the Parties because it would clearly abrogate the need to include the Listing Provision, or require additional language that addressed circumstances where the Parties entertained offers among, and from, each other. George therefore submits to this Court that Edward and James’s actions are in contravention of his reasonable expectation that the Property would be listed publicly prior to acceptance of any offers, and the Superior Court had not basis in contract or in equity to order that he execute the PSA.

B. NO BASIS TO ORDER EXECUTION OF PSA WHERE AGREEMENT WAS MATERIALLY BREACHED

The Superior Court had no basis to order George to execute the contract where Edward and James materially breached the Agreement by entering to the PSA without first adhering to the terms of the Agreement. To determine whether breach of a contractual provision is material, this Court must consider: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F.Supp. 279, 282 (D.V.I. App. Div. 1997); citing Restatement (Second) of Contracts § 241 (1981); see also *George v. V.I. Lottery Comm'n*, 54 V.I. 533, 539 (V.I. 2010).

Edward and James materially breached the Agreement when they executed the PSA prior to listing the Property with Delrease Roberts, or any broker for that matter. As explained above, the Listing Provision of the Agreement constitutes a

material term that if not adhered to would result in a breach of the Agreement. George's injury cannot be adequately compensated without the performance of the Listing Provision because, as stated above, it ensures that the Property is listed and sold at the best offer. Thus, by signing the PSA, George will forfeit the benefit of the Agreement in having to part ways with real estate under terms and conditions he did not agree to. Indeed, the Property is a "unique asset, for which money damages are sometime inadequate." *Thompson v. Florida Wood Treeters, Inc.*, 2010 WL 3119918, at *4 (D.V.I. August 4, 2010).

George submits to this Court that a rescission of the Agreement best serves the interest of justice and equity. Under Virgin Islands Rules of Civil Procedure Rule 90(h)(3), a court may impose sanctions or other remedies as it deems fit where a party has breached the terms of a mediated settlement agreement. *Hendricks*, 2019 WL 624666, at *2. Where one party of a contract has determined that other party is in breach of the agreement, the non-breaching party may "stop performance and assume the contract is avoided." *Rivera* at *15. Thus, remedies for a material breach include damages, specific performance, and rescission. *David v. Scotland*, 2014 WL 11034925, at *2 (V.I. Super. Ct. Feb. 3, 2014). "Rescission is appropriate when the interests of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it." *David* at *3. To rescind a contract, a party must show that: (1) there was a misrepresentation; (2) the misrepresentation was material;

and (3) the misrepresentation induced the recipient to contract; and (4) the recipient reasonably relied on the misrepresentation. *Wilkinson v. Wilkinson*, 70 V.I. 901, 914 (V.I. 2019).

Here, Defendants made material misrepresentations in the Agreement inasmuch as their subsequent actions demonstrated a lack of intent to list the Property. This is evidenced by Edward's offer to purchase the Property that was communicated to George within less than a week of the Agreement, and no subsequent efforts or communications by Edward and James regarding compliance with the Listing Provision. *Wilkinson* at 919 (holding that claims for rescission based on fraud in the inducement are proved by clear and convincing evidence). Edward and James's misrepresentation was material because the Listing Provision ensured George received the benefit of the bargain, and served as the basis for George's willingness to enter the Agreement.

George reasonably relied on Edward and James' misrepresentation in that he had no indication, prior to the Agreement, that Edward and James would instead take steps to facilitate a private offer as opposed to listing the Property with Delrose Roberts. George's reasonable reliance on Edward and James' misrepresentation has resulted in additional and unnecessary time and costs associated with prosecuting this case. Given Edward and James' past behavior, George is justifiably reluctant to engage in any transaction(s) where the Parties must collectively contract to sell the

Property. Accordingly, the Agreement should be rescinded so that the above-captioned matter may proceed with a partition-in-kind, which would restore George to his relative position prior to entering the Agreement.

V. CONCLUSION

For the aforementioned reasons, George respectfully requests that this Court reverse the Superior Court's December 5, 2022 Order, and remand this matter to the Superior Court with instructions that the Parties adhere to the terms of the Agreement, or, in the alternative, enter a Judgement granting George's request for rescission of the Agreement.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the United States Virgin Islands bar.

/s/ Jechonias S. James
Jechonias S. James

CERTIFICATE OF LENGTH

I hereby certify that the length of this brief complies with V.I.R. App. P. 22(f).
The word count for this brief is approximately _____ words.

/s/ Jechonias S. James
Jechonias S. James

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I caused a true and exact copy of the foregoing *Brief of the Appellant, along with the Joint Appendix* to be filed electronic with he Clerk of the Court utilizing the VIJEFS system, which will send notification of such filing to the following:

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