APPEAL NO. 2022-0049

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

WARREN MOSLER, CHRIS HANLEY AND CHRISMOS CANE BAY, LLC,
Appellants/Cross Appellees

v.

JOSEPH GERACE AND VICTORIA VOOYS d/b/a CANE BAY BEACH BAR,
Appellees/Cross Appellants

On Appeal from the Superior Court of the Virgin Islands,
Division of St. Croix, No. 2005 -CV-00368

APPELLANTS' REPLY BRIEF/CROSS APPELLEES' OPPOSITION BRIEF

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While Appellees elected to address their cross-appeal first, the Appellants will reply to Appellee's opposition to their three issues first and then address the cross-appeal. The parties will be referred to herein as "Plaintiffs" and "Defendants," as was done in the Appellant's opening brief.

REPLY RE APPELLANTS' ISSUES RAISED ON APPEAL

I. Count VIII (Intentional Misrepresentation)

The Defendants argued that there was insufficient evidence to support the jury's findings on the elements needed to support for a claim for intentional misrepresentation for several reasons, which Plaintiffs disputed.

A. The Alleged Misrepresentation

Plaintiffs assert that a promise to give a seven-year lease is sufficient to support a claim for misrepresentation, even if no other terms of the lease are included in the promise. While it is disputed whether there was ever such a promise to give a seven-year lease, it is undisputed that this alleged promise was never accompanied by any other terms that make up a binding lease—the amount of rent (for the next seven years), who is responsible for repairs, the permitted uses, when rent is due, where notices are to be sent, etc.[1]

[1] Indeed, at trial, Vooys and Gerace stated that they rejected the written lease that was given to them because key lease provisions were unacceptable or were missing-the name for tenant was wrong (as it should have been their corporation, Barabus, Inc.), the amount of rent was wrong, there was no option to renew, it failed to require

In response to this point, the Plaintiffs did not point to any evidence where these other critical items were ever part of the alleged promise to give them a seven-year lease. In short, despite all of the rhetoric about unrelated matters in Plaintiffs' brief on this point (pages 44-46), they did not respond to this issue.

If a promise to lease property is missing all of the key items needed to have a lease, other than the term, there is not an enforceable promise. Thus, there is no representation that the Plaintiffs could have reasonably relied upon to support a claim for intentional misrepresentation, warranting reversal.

B. Pecuniary Losses

The Defendants argued next that there was no evidence that the Plaintiffs "suffered a pecuniary loss," a needed element to support a claim for intentional misrepresentation, as the only evidence at trial showed that all of the funds spent to maintain and/or repair the premises were the corporate funds of Barabus, Inc. In response, Plaintiffs first argue that that this issue was not preserved in Defendants' Rule 50(a) motion, but it was---quite extensively. JA1374-1378

Plaintiffs then argue in two sentences on p. 47 of their brief that they owned Barabus so that they were free to borrow funds from Barabus and not pay it back.

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the landlord to do certain repairs, it had a waiver of a jury trial that was unacceptable and it was not assignable. JA1008-1010, 1289-1291 In short, the term of the lease is just one item to negotiate with a landlord in any lease negotiation.

Of course, Barabus' tax returns show no loans being made to the shareholder (found on line 7 of Schedule L). JA765, 768, 772, 774, 777, 780. Thus, this "argument of counsel" has no factual support, as there is no evidence of this phantom loan.

Finally, Plaintiffs then fail to point to any evidence in the record where they spent any of their own funds on the leasehold premises, instead arguing at pages 47-48 that they were not required by the Defendants to spend their own funds. That may be true, but if Plaintiffs did not spend any of their own funds, they have no personal loss to support a finding that they suffered any pecuniary losses, an element of intentional misrepresentation.

To the contrary, the trial evidence confirmed that all payments for repairs, maintenance and equipment to the leasehold premises were made by Barabus, who sold food and drinks to pay for its operational expenses, as noted by its tax returns. JA765-783 In short, Barabus' ordinary business expenses cannot be claimed by the Plaintiffs as pecuniary losses they personally suffered.

Finally, Plaintiffs did not respond to the last point raised by Defendants that they voluntarily sold their business to Jordan, so that they were not "deprived of the use of these improvements" by Defendants. Thus, this point is conceded.

In short, the element of "pecuniary losses" is also not supported by the record, which is another reason to vacate the jury verdict as to intentional misrepresentation.

C. There is no evidence any statement was knowingly false when made.

Finally, there was no evidence to support a finding that the alleged promises of a seven-year lease, made in 2003 and 2004, **were knowingly false when made**, a critical element of intentional misrepresentation. Indeed, it is undisputed that there was no acrimony between Plaintiffs and Defendants until March of 2005.

Plaintiffs dispose of this issue in one paragraph on p. 48 of their brief, simply quoting cases that say "state of mind" issues involve credibility determinations by a jury, not a judge. However, while those cases were correctly cited, they do not hold that *no* evidence is needed to support a jury finding that a statement was knowingly false when made. Despite being challenged to point to any such evidence in this record that would support such a finding, Defendants failed to even try to do so. And they could not do so, as there is no evidence to support a finding that Defendants had no intention of ever giving Plaintiffs a seven-year lease when these discussions took place in 2003 and 2004.

D. Summary as to Count VIII

In summary, reversal is required if even one element of a claim for intentional misrepresentation is lacking factual support. Here, it is respectfully submitted that three of the required elements are not supported by the trial evidence, warranting reversal of the award for Count VIII.

II. The "Racial Statements"

Plaintiffs first respond to this issue by arguing that the in limine Order still required the Defendants to make contemporaneous objections at trial each time the specific racial statement in question was made, thus waiving this objection on appeal. However, the in limine Order contained no such language, as it held that the statement was "relevant and material" to Defendants' motives (JA124), but added they were free to argue otherwise during the trial, stating (JA124):

> Defendants are free to argue against the relevance that race played in their actions with all arguments developed in their motion and reply during trial.

Thus, no such further objections were expected or required, as the Court unequivocally denied the motion in limine. As stated in V.I. Evid. R. 103(b):

> **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Thus, the case cited by Plaintiffs, *Atl. Hum. Res. Advisors, LLC v. Espersen*, 76 V.I. 583, 618 (2022), is easily distinguishable, as no motion in limine had been filed in *Espersen* before trial. Moreover, the mandate of V.I.R. App. P. 4(h) is also satisfied.

As for the merits of this issue, Plaintiffs argue that the specific statement allegedly made by Mosler in March of 2005 to Vooys (that no one else heard)--that he wanted to turn CBBB into a "white, middle class restaurant"---goes to his "motive" in trying to get Plaintiffs to leave the premises in the March/April time

period of 2005. This is the same argument Plaintiffs made in opposition to the motion in limine, claiming it showed the "motive" of the Chrismos parties in wanting Plaintiffs out of CBBB. JA211-281[2]

However, as Defendants pointed out in their motion in limine reply, Vooys had already testified that this offensive statement was allegedly made in March of 2005 (JA201), which was her trial testimony as well. JA1025-1026 As such, this statement was made long after the alleged statements about a seven-year lease were made (and relied upon) in September of 2003 or August of 2004.[3] Thus, this statement made after the landlord/tenant relationship deteriorated in 2005 does not show "motive" for statements made in 2003 or 2004.

Thus, these alleged "racial" statements made in March of 2005 should have been excluded, as they were irrelevant to the Defendants' "motives" in making the alleged misrepresentations in 2003 and 2004. Of course, Plaintiffs did not even try to address, much less refute this point in their brief.

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[2] The court agreed, finding this evidence admissible to show motive, citing V.I. Evid. R. 404(b). JA119

[3] Plaintiffs assert on pages 21-22 of their brief that they were promised a seven-year lease three times, including once in 2005. However, the record contains no evidence of any such alleged promise being made in 2005, nor do the Plaintiffs support that assertion with a cite to the trial record.

As evidence that is not relevant is inadmissible under V.I. Evid. R. 402, that should end this issue. Recognizing the weakness of its factual position as to the relevance of a statement made in March of 2005 to show the "motive" for alleged misrepresentations in September of 2003 and August of 2004, Plaintiffs next argue that evidence was still properly admitted as it was not unfairly prejudicial.

Defendants need not show evidence is unduly prejudicial under V.I. Evid. R. 403 if the evidence is not admissible in the first place, as Rule 403 only comes into play once the trial court deems the evidence admissible—a ruling made here because the court found the evidence was relevant to motive. However, it is respectfully submitted that the statement "white, middle class restaurant" clearly meets the unduly prejudicial standard set forth in *Alexander v. People of the Virgin Islands,* 60 V.I. 486, 496 (V.I. 2014) ("evidence which tends to lure the trier of fact to arrive at a conclusion on an . . . emotional . . . basis is unfairly prejudicial"). Nothing could be more emotional for a jury, especially a Virgin Islands jury, than a racial statement.

Finally, on page 52 of its brief, Plaintiffs argue that Defendants failed to show how this evidence was detrimental to their case. However, the Plaintiffs' closing argument demonstrates the power of such a message, as the phrase was repeatedly used in closing, including an assertion that Molser did not like 95% of CBBB's patrons being black. JA1838, 1842, 1843, 1845, 1854 Clearly the Plaintiffs felt it was detrimental to the Defendants' case. And it certainly was.

III. Defendants' Rule 59(a) Motion re Closing Arguments

This Court need not address this issue if it vacates the Judgment and denies the cross-appeal. However, if this Court finds that any portion of the jury's verdict was supported by the evidence, a new trial is warranted under Rule 59 (a)(1)(A)(vi) because of Plaintiffs' closing argument.

In their brief, Plaintiffs did not disagree with this admonition in *Frett v. People*, 66 V.I. 399, 424 (V.I. 2017);

> "[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence." (Citations Omitted).

Likewise, the Plaintiffs did not even try to address the very detailed analysis of all of the statements in the closing argument that violated this "cardinal" rule, conceding they were improper, so no further reply is needed to these unrefuted points.

Instead, Plaintiffs argue (1) that the objections to these improper statements were not preserved and (2) that the closing arguments were "not unduly prejudicial" because of this high burden on appeal, particularly once the court instructs the jury that counsel's arguments are not evidence.

As for the first point, Plaintiffs did not raise this objection when Defendants objected to counsel's initial closing arguments. JA1865-1867 Thus, Plaintiffs did not preserve this issue. While Plaintiffs' counsel did raise the timeliness of the objection after her reply closing, saying the objections should have been made each

time an improper statement was made (JA1959), the trial judge made it clear that most courts do not permit closing argument to be interrupted. JA1960 Plaintiffs cited no case law to support their assertion that objections must be made each time an improper statement was made during opening or closing argument.

While this Court did address the need for a contemporaneous objection to a closing argument in *Atl. Hum. Res. Advisors, LLC v. Espersen*, 76 V.I. 583, 618, (2022) and in *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 682, (2022), it did not address whether this objection should be made after each offending statement, interrupting the closing argument, or at the end of the argument. Thus, it is respectfully submitted that the trial judge did not abuse his discretion in considering Defendants' objections as being timely in deciding how to manage the cases being tried in his courtroom. JA1960

As for Plaintiffs' second point, the rule that closing arguments are rarely the subject of a reversal order, especially after a curative instruction is given, is generally true. However, it is respectfully submitted that the closing arguments made in this case crossed this line, warranting a new trial if the Judgment is not vacated.[4] Of

[4] The trial judge found each statement listed in Defendant's brief to be contrary to the evidence (JA109-111), but held that they were not unduly prejudicial since the jury was instructed that counsel's argument is not evidence. However, if this instruction is all that is needed to justify an argument that violated the "cardinal rule" that "counsel must confine comments to evidence in the record and to reasonable inferences from that evidence," then Rule 59(a)(1)(A)(vi) would not be needed.

course, that is why the Plaintiffs chose not to address the specific misstatements in the "Reply" closing argument carefully documented in the Defendants' brief, as those misstatements of the evidence could not be justified. These misstatements in the Reply closing were particularly egregious because (1) counsel had already been warned by the Court not to make any further improper statements[5] and (2) Defendants had no opportunity to respond to them.

As for the improper statement made in the opening argument, Plaintiffs do not argue that the use of rebuttal evidence as substantive evidence was proper, conceding that it was improper, as the court also found. JA1866 Instead, they argue that the jury's award of $100,000 moots the argument of prejudice since it was less than the $125,000 figure counsel improperly referred to! To the contrary, that award confirms the jury was swayed by this argument, as it was the only information the jury had to justify any award at all for Plaintiffs' alleged loss of "value" when they sold their lease for "only" $30,000.[6]

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[5] The court's specific admonition after the objection was made to counsel's initial closing argument was "If there is another instance like that, I will review the record and if I find it is cumulative, the Court will find it's egregious and I will declare a mistrial." JA 1932

[6] Counsel told the jury that they could use the impeachment testimony allowed from Alexandra Meyers to calculate Plaintiff's damages--stating that if Plaintiffs had had a lease, they could have sold it to Jordan for $125,000, just like Jordan sold his lease to Meyers for $125,000. JA1856

In summary, Plaintiffs counsel's closing arguments were not based on any reasonable inferences that could be drawn from the evidence, but on clear fabrications of the evidence. Indeed, as noted, the court found each of these multiple arguments to be improper. Thus, it is respectfully submitted that the trial court erred in holding they were not unduly prejudicial, or that this prejudice could be cured by simply giving standard instructions to the jury.

Indeed, they were made after Plaintiffs counsel's multiple inflammatory references to the "white, middle class" statement. As such, on this unique record, the court's denial of mistrial was an abuse of discretion, warranting a new trial if any portion of the jury's verdict is permitted to stand.

THE CROSS APPEAL

STANDARD OF REVIEW

The Defendants agree with the Plaintiffs' standard of review as to the first three issues. Counsel could not find where Plaintiffs addressed the standard of review for issues 4 and 5, which are questions of law over which this Court exercises plenary review. *Vlaun v. Briscoe*, 2022 VI 18, ¶ 9 (2022)

COUNTERSTATEMENT OF FACTS

While Plaintiffs accused the Defendants of "strategically" picking facts in Defendants' Statement of Facts in their brief, counsel knows that this Court will scrutinize the record, so each fact included by Defendants had a specific citation to the record. With that comment in mind, Defendants will address the trial evidence relevant to the cross-appeal issues.

The first issue raised by Plaintiffs concerns Counts V and XI (the "contract" claims), which the court dismissed. The factual evidence regarding these claims is the same as the evidence regarding Count VIII (Intentional Misrepresentation), so those facts are already stated in Defendants' opening brief and need not be repeated here. However, these two assertions of fact in Plaintiffs' brief require a response:

- Plaintiffs claim on pages 21-22 of their brief that they were promised a seven-year lease three times, once in 2003, once in 2004 and once in 2005. However, the record contains no evidence of any such alleged promise being made in 2005, nor do the Plaintiffs' appendix cites support that assertion.
- Plaintiffs claim on page 24 their brief that certain of their efforts to improve the premises warrant an award of damages for sweat equity, an issue not raised before or during the trial.

The second issue raised by Plaintiffs involves the defamations claims, also dismissed by the court below. Victoria Vooys was the only Plaintiff who testified

about any defamatory statements, as Joe Gerace was not asked about his defamation claim or how it affected him. JA 1261-1318 Vooys claimed she saw Mosler on a taped television show where he said (1) "we didn't know what we were doing, we were always late in rent, we were behind in rent, and we didn't know how to run a restaurant" and that (2) "we borrowed $150,000 from our family." JA1032-1035 Vooys testified that Mosler's defamatory statements were all made in April of 2005, resulting in the clientele at the restaurant dropping. JA1032, 1035-1036, 1051

Vooys also claimed that Mosler said the restaurant was dirty, with dogs allowed inside, but she never claimed that those statements were made to anyone other than herself and Gerace. JA1028-1029

Neither Vooys nor Gerace testified that Hanley made any defamatory statements about them. JA1032-1051; 1261-1318

John Woodson, a regular patron of the Plaintiffs' business, testified that he called into the Roger Morgan show to support Reggae, but he never heard either Mosler or Hanley on the radio. JA1210-1214, 1216, 1219

Mike Belcheff, who did some work at CBBB, testified that he heard Mosler (but not Hanley) on the radio stating that rent was late, but that was all he could recall. JA1224-1228, 1230-1231

John Reid, the bartender at the CBBB, testified that he heard Molser (not Hanley) on the radio saying the Plaintiffs did not pay rent and had loud parties, along

with other negative things "about drugs or something", that was devastating to the Plaintiffs, but he could not tell if it affected the clientele. JA1329, 1344-1345, 1359

Chris Hanley testified that he called the radio on April 14, 2005 to defend himself, stating that the Plaintiffs' rent was often in arrears. JA1447-1448 Indeed, Hanley pointed out that the rent for April had still not been paid, *id.,* which he confirmed at trial by showing that the April rent check was dated April 14th, with a notation made by his office showing the check was delivered at 12:45 pm, just after he got off the radio (JA1459, 752), which testimony the Plaintiffs never refuted.

The trial evidence showed as to each alleged defamatory statement as follows:

- The rent was constantly paid late from the outset of their tenancy, as the rent checks confirmed (JA 752), which Vooys conceded. JA1019-1025

- The Plaintiffs admitted they borrowed money from their family, although they did not know exactly when or how much. JA1074-1075

- The Plaintiffs admitted at trial that they did not know how to run their business, specifically acknowledging at various times that:

  (1) They had never run a restaurant before, as they had just graduated from a six-month culinary program. JA992, 1001,1263

  (2) They bought the business without a lease or an assignable tradename, which they only discovered after they had arrived on St. Croix. JA996, 1085, 1133; 1192, 1281 1283, 1285

  (3) They constantly paid rent late, going five months at one point without paying rent, which Vooys admitted. See JA752, JA 1019-1025

(4) They paid $4500 in back rent in February by check, which bounced, as Vooys admitted. JA1019-1025

(5) Their business in fact lost money every year according to their own tax returns. JA765, 772 , 777

(6) Vooys thought a seven-year lease was better than a five-year lease with a five-year option (totaling 10 years). JA1059

(7) Vooys claimed that she did not keep all of the receipts for the business. JA1117-1118, 1177, 1182-1183, 1187 1193-1194, 1197

(8) They did not pay any withholding taxes or Social Security taxes because "no one told us to" and they "didn't know how to do business taxes" (JA 1158, 1160-1161), nor did they pay any gross receipt taxes while they ran the business because they "never had the money" to pay them. JA1052-1053, 1111

(9) They admitted that they never got a business license. JA1128-1129

In short, the trial evidence showed that the Plaintiffs were constantly late in paying rent, did not know how to run a business and borrowed money from their family.

Based on this record, the jury awarded **each** Plaintiff $30,000 against Mosler ($60,000 total) and **each** Plaintiff $30,000 against Hanley ($60,000 total).

ARGUMENT RE CROSS APPEAL

Plaintiffs raised five issues in their cross appeal, which Defendants dispute.

1. The court properly vacated the jury verdict on the contract claims.

The jury returned a verdict finding Defendants breached a contract with the Plaintiffs (Count V) as well as violated the duty of good faith and fair dealing in

performing this contract (Count XI). The court vacated these findings and dismissed these two counts, which Plaintiffs now assert was error.

As noted in Plaintiffs' brief, the "contract" at issue was based on the promise the Defendants had allegedly given to Plaintiffs that they would get a seven-year lease if they performed certain work to the leasehold premises, which they claimed they then did. For the purposes of the issue on appeal, it is conceded the jury could have found that a promise to give a seven-year lease was made by Defendants, although that finding is not enough to create a contract. Moreover, Defendants dispute that the evidence shows Plaintiffs made the alleged improvements.

A. There never was a contract

The court vacated the jury findings as to the existence of a contract, as there was no evidence that an agreement had ever been reached on the basic items needed to have a lease, other than the seven-year term, such as the amount of rent, who was going to do repairs, etc. As the court found, while Plaintiffs testified that the parties exchanged two leases, the evidence showed that multiple terms, not just the length of the lease, were never resolved (such as whose name it was in, the amount of rent, waiver of a jury trial, indemnification of costs, etc.). JA091

Because none of the other key terms of a lease were included in the alleged promise of a seven-year lease, the court found there could not be a contract, much

less a bad faith breach of any such contractual obligations. In reaching this decision, the court cited *Engle v. Heier,* 173 N.W. 2d 454, 456 (S.D. 1970), which stated:

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

Plaintiffs did not even address this issue, much less cite any law that holds a contrary view. Instead, Plaintiffs focused on the mantra that jury findings should simply not be disturbed for any reason.

However, there is nothing in the record to support a finding that all of the essential lease terms were agreed to, so there cannot be a seven-year lease to enforce. Similarly, there cannot be a bad faith breach of any such agreement that does not exist. Thus, because there never was an agreement on the critical terms needed to have a lease, Counts V and IX fail.

B. There is no evidence that Plaintiffs made any improvements

Even if this Court finds a contract existed, these "contract" counts still fail. In this regard, as this Court held in *Atlantic Human Resource Advisors, LLC et al v. Espersen,* 71 V.I. 583, 621 (V.I. 2022):

> As a threshold matter, a claim that a plaintiff failed to introduce sufficient evidence to sustain a compensatory damage award is necessarily different from other challenges to the amount of damages. **Since compensatory damages are often an element of a cause of action, the failure of the plaintiff to introduce sufficient evidence to prove damages will result in**

> **dismissal of the cause of action and judgment entered in favor of the defendant,** just as would be the case with respect to the failure to prove any other element. (Citation omitted) (Emphasis added).

In this case, Plaintiffs failed to prove any such damages based upon a breach of contract, which is also fatal to their breach of the duty of good faith and fair dealing based on any contractual obligations.

In this regard, these two counts required proof ***of specific economic and/or pecuniary losses,*** as per the Court's instructions:

- Count V-The Court instructed the jury that it had to find that the Plaintiffs "**suffered specific economic losses**" for the contract claim. (JA2087);

- Count XI-The Court instructed the jury that it had to find the Plaintiffs "**suffered economic damages**" for the "Good Faith/Fair Dealing" claim (JA2109).

As will be seen, Plaintiffs failed to prove such losses.

In Plaintiff's brief, the Plaintiffs asserted on page 24 that their expenditures totalled $155,000 as follows:

- Plaintiffs spent over **$40,000** in repairs;
- Plaintiffs spent over **$20,000** in new restaurant equipment;
- Plaintiffs spent over **$50,000** in advertising, promotions and building good will; and
- Plaintiffs had to take out a family loan from Vooys' father for **$45,000** for living expenses while getting CBBB operational and running.

However, these alleged sums cannot support the jury's award of $100,000 in damages to Plaintiffs for the alleged breach of contract for several reasons.

First, the Plaintiffs admit they did not spend the "$40,000 in repairs; $20,000 in new equipment; and over $50,000 in advertising," as Vooys conceded at trial that Barabus, Inc. made **all** of these alleged expenditures.[7] JA 1120. Moreover, Barabus sold food and drinks, which it then used to pay all of these expenses, as noted by its tax returns (JA765, 772, and 777), so these funds did not come from the Plaintiffs. In short, Barabus' ordinary business expenses cannot also be claimed by the Plaintiffs as separate "pecuniary losses" incurred by them even if a contract existed, as they did not incur them---Barabus did from its own revenues.[8]

Second, the **$45,000 in** "borrowed funds" cannot constitute economic losses for the Plaintiffs since (once again) they never paid the loans back, so there is no monetary loss suffered by them. Indeed, there is no evidence when they received this loan, which they testified was used for personal living expenses, not business expenses for CBBB. JA1075 – 1076

[7] Plaintiffs assert that Defendants did not preserve this objection, the Rule 50 motion extensively covered this point, discussing at length that "'these aren't expenditures that they took out of their own pocket," as Barabus Inc. paid them. JA 1374-1378.

[8] Plaintiffs' claim on page 24 that "Whether Plaintiffs must pay the money back to Barabus, Inc. [for these expenses] is of no concern to Defendants." However, as already noted, Barabus' tax returns lists no loans made to the shareholders. JA765, 768, 772, 774, 777, 780. Moreover, if the Plaintiffs borrowed money, they cannot claim these funds as part of their personal losses if they never paid the loan back.

In short, what evidence did the jury use to "calculate" the $100,000 in specific economic losses suffered by Vooys and Gerace? There is no such evidence, so this award of $100,000 for Count V and Count XI is without any factual support.

One final comment is in order. Plaintiffs assert on page 24 of their brief that they also suffered a loss of "sweat equity." This claim apparently includes doing some work themselves, particularly when they first took over CBBB, as described on page 23 of the brief. Not only was the jury not instructed on the concept of, "sweat equity," this was never mentioned as a damage claim in the Complaint (JA 161-172) and the Joint Final Pretrial Order. JA129, 141-143 Indeed, to recognize such a claim would require a full *Banks* analysis, which Plaintiffs did not do. Likewise, Plaintiffs offered no evidence of any specific "pecuniary loss" related to such work. As such, it would be pure speculation to suggest that the jury made such a calculation in this case, particularly since "sweat equity" was not in the court's instructions. Thus, this Court should reject this belated attempt to justify the $100,000 jury verdict for the "contract" counts based upon an alleged calculation of "sweat equity."

C. Promissory Estoppel

Plaintiffs assert for the first time on appeal that this Court grant them relief under the doctrine of promissory estoppel if their appeal of the contract claims is rejected. However, this issue was not raised below, nor did Plaintiffs explain where

it was preserved for appeal, as required by V.I.R. App. P. 22(a)(3).[9] That theory is probably what Plaintiffs should have pled, but even if had it been raised, it would not warrant appellate relief for the same reasons the contract claims must fail. As there was no promise for a lease that included all of the terms needed to find a valid contract, it would have been unreasonable to rely on such an incomplete promise. Likewise, as noted in §90 of the Restatement (Second) of Contracts, promissory estoppel, even if proven, has limited remedies. Here, Plaintiffs proved no damages that they suffered, as only Barabus, Inc. expended any funds.

2. The defamation counts were properly dismissed.

The jury found that both Defendants were liable to both Plaintiffs for defamation, awarding **each** Plaintiff $30,000 against Mosler ($60,000 total) and **each** Plaintiff $30,000 against Hanley ($60,000 total). Both awards were vacated by the court below.

On pages 31-33 of their brief, Plaintiffs argue that both Defendants defamed them based on statements they made on TV and on the radio about (1) CBBB's rent always being in arrears, (2) Plaintiffs getting loans from family members, (3)

[9] Plaintiffs claim this Court has taken such sua sponte action before, citing *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 696–97 (2015), but in that case the issue was raised below at the intermediate appellate court, but not addressed by it. *Id.* Thus, that case does not support ignoring V.I.R. App. P. 4(h).

Plaintiffs not knowing how to run their business and an "eviction" letter being read on the radio.

In addressing the defamation issue, the court first noted in part (JA095):

> Vooys was the primary witness who testified as to any defamatory statements. No audio or video recording from the Roger Morgan show was presented at trial. Further, Christensen testified only that she had heard about Mosler going on the radio and talking about the Beach Bar. She did not testify as to what Mosler said and did not mention Hanley having been on the radio. Gerace was not asked whether he heard Mosler or Hanley on the radio.

The trial court then vacated the award against Hanley, stating (JA097):

> Furthermore, no one testified to any defamatory statements allegedly made by Hanley. . . . to be sure, Hanley did admit to going on the radio to defend his reputation and character. But only Hanley testified to any particular statement he, himself, made on the radio and those statements were made to counter Vooys' statements that they were current on the rent. Based on Hanley's testimony only, it was not possible for the jury to find that he defamed Gerace or Vooys.

Plaintiffs argue that this finding is not supported by the evidence since Hanley told them they could pay the rent whenever they wanted. However, that does not mean their rent was not late, which Vooys conceded it was. JA1019-1025 Thus, the court did not err in vacating the defamation award against Hanley.

As for the alleged defamatory remarks attributed to Mosler, the trial evidence confirmed all of these statements were true, as:

(1) Plaintiffs admitted they bought the business without a lease or an assignable tradename, which they only discovered after they had arrived on St. Croix. JA996, 1085, 1133; 1192, 1281 1283, 1285

(2) Vooys admitted that the rent was constantly late, as confirmed by the rent checks introduced into evidence, with the rent being over five months behind at one point, which was paid with a $4500 check that bounced. JA752, JA1019-1025

(3) Their business in fact lost money every year according to their own tax returns. JA765, 772 , 777

(4) Vooys claimed that she did not even keep all of the receipts for the business. JA1117-1118, 1177, 1182-1183, 1187 1193-1194, 1197

(5) They did not pay any employee withholding taxes or Social Security taxes because "no one told us to" and they "didn't know how to do business taxes." JA1158, 1160-1161

(6) They did not pay any gross receipt taxes while they ran the business because they "never had the money" to pay them. JA 1052-1053, 1111

(7) They admitted that they never got a business license. JA1128-1129

(8) Even though Plaintiffs admitted they borrowed money from their family, they did not know exactly when or how much.[10] JA1074-1075

In short, all of the alleged defamatory statements were true.

Additionally, even if that had not been true, the court decided to vacate the defamation award against Mosler because he found the statements about the Plaintiffs' ability to operate a business were his opinions, stating (JA099-100):

> Similarly, saying that someone does not know how to run a business is an opinion that could never be defamatory because "'only statements that are provable as false are actionable."

[10] Saying the Plaintiffs borrowed money from their family is not even defamatory. Likewise, saying they borrowed more money than they actually did is not defamatory either.

In this regard, this Court held that statements which are opinions are not actionable in *Simpson v. Andrew L. Capdeville, P.C.*, 64 V.I. 477, 488 (V.I. 2016):

> Capdeville further cited approximately 12 statements he claims were published on one or more websites owned and controlled by Simpson. These statements ranged from accusing Capdeville of being a "liar" who has "proven himself to be dishonest," to statements referring to Capdeville as a "disgrace," a "danger," and insisting that his conduct "was so terrible" that it "should be used ... as an example of what Lawyers should not do." But "hyperbole and expressions of opinion" are typically "not provable as false," and are therefore not actionable.

See also, *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 788 (Sup. Ct. Sept. 21, 2011), aff'd, 716 F.3d 82 (3d Cir. 2013)("only statements that are 'provable as false' are actionable; hyperbole and expressions of opinion not provable as false are constitutionally protected").[11] Thus, the statements attributable to Mosler about Plaintiffs' inability to run a business were just opinions, which are not actionable.

It should be noted that Plaintiffs argue that this issue was not preserved below, even though Plaintiffs are appealing this issue, not Defendants. However, this argument is incorrect for two reasons. First, as opinions are not actionable, proof that Mosler made a statement which expresses an opinion fails to prove defamation, which is Plaintiffs' burden. Second, the issue was preserved before the case was

[11] If this Court finds the statements were not opinions, it can still affirm the judgment below, as the statements that Plaintiffs "did not know how to operate a business" were true, as discussed above.

submitted to the jury, as counsel stated in Defendants' Rule 50(a) motion that there was "insufficient evidence to show that . . . defendants defamed the plaintiffs." JA1599-1600[12]

In a final effort to save this claim, Plaintiffs argue on Pages 32-34 of their brief that three additional statements were defamatory as well:

- Mosler said he had reduced their rent, when he had not done so;
- Someone read the "eviction" letter on the radio;
- James Jordan reduced his offer to purchase the business because Defendants told him Plaintiffs had vacated the premises, even though they were still open in June.

Plaintiffs fail to explain why the first statement would be defamatory, as it is not.

As for the second statement, Defendants never sent an "eviction" letter to Plaintiffs. Indeed, the referenced letter had no defamatory statements in it and ended with a request to let Defendants know if anything in it was not correct. JA482

Finally, James Jordan sent an email confirming that he saw that Plaintiffs had removed their restaurant equipment before reducing his offer. JA791 Indeed, Vooys finally conceded CBBB was closed by June 1 (JA1364), which Reed had said as

[12] If this Court finds this portion of the defamation claim should be reversed for any reason, then a new trial would be needed since the jury's damage award did not distinguish between the defamation claims regarding the back rent and the inability to operate a restaurant.

well (JA1364-1365), so the assertion that Defendants defamed them by saying otherwise has no merit either.

3. Defendants were entitled to the punitive damages being stricken.

The jury found that Plaintiffs were entitled to punitive damages against Molser and Hanley, but not Chrismos. The jury then awarded $100,000 in punitive damages to Vooys, but it did not award any such damages to Gerace, as the verdict form failed to include a line for the punitive damages due him. JA54-59 The court vacated the award for two reasons.

First, it determined that since punitive damages were not awarded against Chrismos, the jury must have based the award on the defamation count. Since the defamation awards were vacated, the punitive damage award had to also be vacated.

Alternatively, the court found that even though it did not make sense to find Chrismos, Mosler and Hanley liable for intentional misrepresentation, and then only make a punitive damage award against two of these three defendants for the same conduct, the punitive damage award must still be set aside.

In this regard, the court noted that the award did not distinguish between the conduct of Mosler and Hanley, a requirement under *Epperson,* supra, 76 V.I. at 684 (it is error to assess the reprehensibility of all defendants collectively). Thus, this fact alone supported vacating the jury's verdict.

Additionally, the court found as follows (JA105):

> But even when viewing all the evidence in the light most favorable to Plaintiffs, the Court cannot conclude that it shows, clearly and convincingly, that either Mosler or Hanley acted with "reckless indifference" or engaged in "conduct that is outrageous and warrants special deterrence."

In making this finding, the court analyzed the trial record and then summarized the conduct between the parties as follows (JA105):

> As the Court noted earlier, Plaintiffs and the Chrismos Defendants were in a contractual relationship as tenants and landlord but were also negotiating a new relationship, a long-term landlord-tenant relationship. There was no duty to bargain or negotiate in good faith at that point. Vooys and Gerace took Mosler and Hanley at their word, ultimately to their detriment, because Mosler eventually began to look for a new tenant to replace them. He succeeded. That does not rise to the level of outrageous conduct that warrants special deterrence, however.

The court then discussed the background of how Plaintiffs met Defendants and how that relationship evolved before concluding as follows (JA107):

> Thus, the evidence, even viewed in the light most favorable to Plaintiffs, shows only that Mosler and Hanley mislead Vooys and Gerace into thinking they would get a long-term lease. This is not conduct so outrageous that it must be punished by punitive damages. Accordingly, the Court will also set aside the jury's award of punitive damages against Mosler and Hanley.

The court reached this determination applying the “clear and convincing” standard of proof (JA105) that the parties had agreed governed the punitive damage award.

Plaintiffs cited Defendants’ repeated breaches of their promises to give the Defendants a seven-year lease—promises that by themselves were unenforceable as noted by Defendants in this appeal. Plaintiffs also again repeated their totally erroneous assertion that Defendants served them with an improper eviction notice,

which is not true. Indeed, that argument also made in Plaintiffs' closing arguments is one basis for which a new trial is being sought. Plaintiffs then repeated their defamation arguments, which have already been addressed.

Notwithstanding the fact that none of these arguments support an award of punitive damages against Mosler and Hanley, Plaintiffs assert they are still entitled to such relief because the jury said so. However, it is respectfully submitted that the reasoned opinion of the trial court should be affirmed.[13]

4. No interest is due Plaintiffs after the jury's verdict was rendered.

Plaintiffs assert since the court did not promptly enter judgment, they are entitled to interest from the day the verdict was entered. In making this argument, Plaintiffs argue that Defendants prematurely filed their Rule 50(b) motion because judgment had not been entered. However, Rule 50(b) states in part:

> No later than 28 days after the entry of judgment — **or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged** — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. (Emphasis added)

In this case, Defendants did raise multiple other issues in their Rule 50(b) motion other than just the jury issues decided by the verdict, such as the denial of their motion in limine, the impropriety of counsel's closing argument, the gist of the

[13] Of course, if the tort counts (defamation and intentional misrepresentation) fail, so does any claim for punitive damages.

transaction doctrine and the liability of LLC members (among others). Thus, the very premise of Plaintiffs' motion is skewered.

Moreover, Plaintiffs cite no law that requires the court to enter judgment while it is considering such motions. Indeed, Defendants did everything possible to get the post-trial motions promptly addressed, filing early and not seeking or causing any delays, unlike Plaintiffs. *See, e.g., Gerace v. Mosler*, 76 V.I. 195, 202, 2022 VI SUPER 46, ¶ 11 (Super. 2022)(discussing Plaintiffs' repeated conduct delaying disposition of this motion). As such, this issue has no merit.

5. Plaintiffs are not entitled to pre-judgment interest.

Finally, Plaintiffs assert they are entitled to pre-judgment interest on the breach of contract verdict of $100,000, citing 11 V.I.C. §951. At the outset, Plaintiffs did not raise this claim in their statement of damages in the JFPTO as to Defendants, *although they did so as to the now dismissed co-defendant.* JA129, 141-143. The JFPTO ends with counsel's affirmation that amendments to it are not permitted. Thus, this issue was not properly preserved below. [14] See, e.g. *Vlaun v. Briscoe*, 2022 VI 18, ¶ 19 (2022) (holding that parties may be found to have waived this claim).

[14] In fact, if pre-judgment interest is deemed to be part of a damage claim, this calculation should be made by a jury after being instructed on pre-judgment interest, particularly where the amount is not readily ascertainable, as in this case.

Even if this damage claim had been properly preserved, there are several problems with this claim. First, unless the contract claim is reinstated, this issue is moot. Second, as Plaintiffs' rambling description of their damages in the JFPTO confirms (JA129, 141-143), Plaintiffs' damages were not ascertainable prior to trial.

As this Court held in *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 736 (2022):

> In addition, the language of section 951(a) indicates that prejudgment interest is authorized "only where the amount due is in money and therefore is easily ascertainable."

Here, the amount was never "easily ascertainable" even if the contract claim is reinstated in the amount of $100,000. Indeed, as noted in the statement of damages in the JFPTO, it was impossible for Defendants to analyze this amount before trial, or even at trial, as Plaintiffs argued in their closing that this amount should have been $275,000 (JA1861), making the final award unascertainable until then.

Thus, for all of the foregoing reasons, this issue should be rejected as well.

CONCLUSION

Defendants request this Court to dismiss Count VIII. Additionally, Defendants ask this Court to deny the cross appeal. Alternatively, if this Court finds that Count VIII should be affirmed, or that any issue raised in the cross appeal is meritorious, it should order a new trial based upon (1) the improper admission of the racial remarks and/or (2) Plaintiffs' counsel's improper closing arguments.

Dated: February 6, 2023

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that Joel H. Holt is a member in good standing of the Supreme Court of the Virgin Islands and the Virgin Islands Bar.

Dated: February 6, 2023 */s/ Joel H. Holt*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-face, type-volume, type-style requirements set forth in the Supreme Court Rules including 7800 word limit in Rule 22(f), as this brief has 7634 words, excluding the table of contents, table of authorities, signature block and certifications.

Dated: February 6, 2023 */s/ Joel H. Holt*

CERTIFICATION OF VIRUS CHECK

I HEREBY CERTIFY that a virus check was performed by Joel Holt and no viruses were detected.

Dated: February 6, 2023 */s/ Joel H. Holt*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2023, I caused a true copy of the foregoing Brief to be served by this Court's electronic filing system (as well as seven paper copies conventionally filed with the Supreme Court) along with two paper copies on counsel:

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