DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

HAMMERHEAD CONSTRUCTION LLC, **Plaintiff/Counter-Defendant,** **v.** **HARVEY HOFFMAN, and JANICE HOFFMAN,** **Defendants/Counter-Plaintiffs.**	**3:23-cv-00014-RAM-EAH**

TO: Ryan C. Meade, Esq.
A. Jeffrey Weiss, Esq.

REPORT & RECOMMENDATION

THIS MATTER comes before the Court on "Defendants' Motion for Summary Judgment on Plaintiff's Complaint, and for Partial Summary Judgment on Counts I, II & V of their Counterclaim and to Pierce Hammerhead's Veil," filed in July 2024 by Defendants/Counter-Plaintiffs Harvey Hoffman and Janice Hoffman (the "Hoffmans"), individually and as Trustees of the Hoffman Revocable Trust. Dkt. No. 85. In their motion, the Hoffmans (1) seek summary judgment against Plaintiff Hammerhead Construction, LLC's Complaint for breach of contract and (2) they seek partial summary judgment on their Counterclaims for Breach of Contract (Count I) and Breach of the Implied Warranty of Proper Workmanship and Fitness for Purpose (together, "Breach of Warranties") (Count II), against Counterclaim Defendants Hammerhead and Stephen Rivera, the sole member of Hammerhead, and they also seek partial summary judgment on their Counterclaim for False and Overstated Construction Lien (Count V) against Counterclaim Defendants Hammerhead, Rivera, and Jennifer Firestone, Rivera's wife and Hammerhead's bookkeeper. *Id.* The Hoffmans also seek summary judgment on their Counterclaim remedy of piercing Hammerhead's corporate veil. *Id.* Hammerhead filed a

Response, Dkt. No. 130, and the Hoffmans filed a Reply, Dkt. No. 148. For the reasons that follow, the Court recommends denial of both the Motion for Summary Judgment and the Motion for Partial Summary Judgment.

BACKGROUND

I. Complaint; Answer/Affirmative Defenses/Third-Party Claims/Counterclaims

In March 2023, the Hoffmans removed to this Court a Complaint that Hammerhead had filed against them in September 2022 in the Superior Court of the Virgin Islands.[1] Dkt. No. 1-1. In its four-page Complaint, Hammerhead alleged that the Hoffmans engaged it to provide repair and restoration work on the Hoffmans' house on St. Thomas that had been damaged by Hurricane Irma. *Id*. ¶¶ 4, 9. Hammerhead provided a written repair and restoration estimate of $763,320.00. *Id*. ¶ 5. The Hoffmans negotiated a settlement with their insurance company and re-negotiated the scope of work to $521,378.00 and then to $507,078.00, and entered into a contract with Hammerhead to undertake that work. *Id*. ¶¶ 6-9. During the project, the Hoffmans amended the scope of work by adding an additional $60,511.70 in labor, materials, and profit, resulting in a total contract price of $567,589.70. *Id*. ¶¶ 10, 11. The Hoffmans paid $475,000.00 but breached the contract by failing to remit $92,589.70 due and owing. *Id*. ¶¶ 12-14.

In April 2023, the Hoffmans, individually and as Trustees, filed an "Answer, Affirmative Defenses, Counterclaim, and Third Party Claims" which, inter alia, raised Counterclaims against

[1] Removal to district court was improper, as it occurred more than 30 days after the Hoffmans were apparently served. *See* 28 U.S.C. § 1446(b). Hammerhead did not object to the late removal and did not file a motion to remand within 30 days as required by 28 U.S.C. § 1447(c). Since this is a procedural as opposed to a jurisdictional fault, the Court will not sua sponte enter a remand order. *Korea Exch. Bank, N.Y. Branch v. Trackwise Sales Corp*. 66 F.3d 46, 50-51 (3d Cir. 1995).

Hammerhead and Third-Party claims against Rivera and Firestone. Dkt. No. 9. Rivera and Firestone moved to dismiss the Third-Party Claims, Dkt. No. 19, and Hammerhead moved to dismiss the Counterclaims. Dkt. No. 20. In March 2024, the District Judge dismissed the Third-Party Claims, Dkt. No. 70, and granted in part and denied in part the motion to dismiss the Counterclaims, dismissing three of the ten Counterclaims. Dkt. No. 71.

II. The Amended Answer, Affirmative Defenses and Counterclaims

Eventually, the Hoffmans filed a Second Amended Answer, Affirmative Defenses and Counterclaims. Dkt. No. 82. The Counterclaims named Harvey and Janice Hoffman (individually) and the Hoffman Revocable Trust as Counterclaim Plaintiffs, and Hammerhead, Rivera, and Firestone as Counterclaim Defendants. The Hoffmans alleged that the Trust was "the successor-in-interest to the Hoffmans individual interests and rights." *Id.* at 7, ¶ 1.

The Counterclaim fact section alleged that, in 2017, prior to engaging Hammerhead to perform repairs and renovations to their St. Thomas home, Rivera falsely held himself to be a licensed general contractor; relying on that and other false representations, the Hoffmans engaged Rivera and, through him, Hammerhead. Rivera/Hammerhead proposed to complete hurricane repairs and renovations for $763,320.00. Rivera revised the cost to $521,378.00, as shown on Dkt. No. 82-2, a two-page "Revised Hurricane Rebuild Fee Spreadsheet" (the "Revised Rebuild Fee" spreadsheet) that Rivera attached to an October 23, 2018 email to Mrs. Hoffman. *Id.* ¶ 35. The Hoffmans paid $475,000 toward the repairs, indicated on the January 29, 2021 Notice of Construction Lien (the "Lien") that listed payments received from the Hoffmans.[2] *Id*.

[2] The Notice of Construction Lien, Dkt. No. 82-3, contained a cover page and three additional

¶ 36. The Lien showed charges to the Hoffmans and the Trust for materials and equipment never used or installed at the property and which Firestone and Rivera knew were not ordered or installed. Rivera and Hammerhead failed to complete all of the work contracted for and the work they did was of poor quality and did not comply with Code. *Id.* ¶¶ 40, 41. Firestone should have known she was fraudulently overbilling for services, labor and materials. *Id*. ¶ 42.

After the Hoffmans transferred the property to the Trust, Rivera, Firestone, and the Hoffmans caused the false and overstated Construction Lien in the amount of $92,589.00 to be recorded against the property based on false charges and overbilling. *Id.* ¶ 55. The Hoffmans issued a Stop Work Order on January 19, 2021. Thereafter, they had construction experts and a professional engineer examine the repairs done by Hammerhead/Rivera. The experts documented construction deficiencies, structural defects, incomplete work, improper installations, and non-Code work. *Id.* ¶¶ 56-59. The cost for reconstruction and restoration of the defective work, performed by Great Horizons, LLC, was $917,939.56. *Id.* ¶ 60.

The Counterclaim contained a lengthy section entitled "Evidence of Defendant Hammerhead as the Alter Ego of Rivera." Dkt. No. 82 ¶¶ 65-84. The Hoffmans alleged numerous instances where they believed Rivera had "siphoned off" money from Hammerhead (as shown on Hammerhead's 2017 and 2018 Gross Receipts and tax returns) to pay a variety of personal expenses. *Id.* They asserted that Rivera either used Hammerhead to fraudulently bill the

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pages. Two of those pages consisted of the Revised Hurricane Rebuild Fee spreadsheet, with lines running through a number of the entries to show that the work and pricing were not counted in the Construction Lien total, as well as a third page of "Additional Services" listing work totaling $60,511.70 that had not been included in the Revised Rebuild Fee.

Hoffmans for equipment that did not exist or that he concealed those assets on Hammerhead's tax returns and records. *Id.* Hammerhead provided no resolutions authorizing Rivera to act for it and no evidence showing the company paid dividends or had any officers. *Id.* ¶¶ 74, 77.

In their Breach of Contract Counterclaim, *id*. ¶¶ 85-113, the Hoffmans and the Trust reiterated many of the facts set out above. After the Hoffmans terminated the contract and issued a Stop Work Order, Rivera and Hammerhead claimed that $92,589.70 was owed for the additional services that were not included on the Revised Rebuild Fee spreadsheet *Id*. ¶¶ 101-03. Rivera and Hammerhead's failure to complete that work and their sub-standard work constituted a breach of contract. *Id.* ¶¶ 104-07. The Hoffmans and the Trust suffered losses in excess of $900,000.00. *Id*. ¶ 108. Due to the breach of contract and the fact that Hammerhead and Rivera disregarded company formalities, the Court should pierce the company veil so that Rivera personally and Hammerhead are jointly and severally liable for all damages. *Id.* ¶ 112.

The Hoffmans and the Trust alleged that implied warranties of proper workmanship and fitness for purpose existed with regard to the contract, Rivera and Hammerhead breached those warranties, and the Hoffmans suffered damages. *Id*. ¶¶ 114-19. As to the False & Overstated Construction Lien claim, the Hoffmans alleged that Rivera and Hammerhead, with the assistance of Firestone, caused a Construction Lien to be filed in bad faith containing overstated charges. *Id*. ¶¶ 149-57. The Hoffmans and the Trust suffered losses; Hammerhead, Rivera, and Firestone were liable for punitive damages. *Id.*

III. The Motion for Summary Judgment/Partial Summary Judgment

On July 3, 2024, the Hoffmans individually and as Trustees filed the instant Motion for Summary Judgment on Plaintiff's Complaint and for Partial Summary Judgment on Counts I, II, and V of their Counterclaim and to Pierce Hammerhead's Veil. Dkt. No. 85. They filed a memorandum of law, Dkt. No. 86, a 57-page Statement of Undisputed Material Facts, Dkt. No. 87, and 148 exhibits, Dkt. Nos. 88-105; Dkt. Nos. 116-19 (under seal). Hammerhead filed a Response, Dkt. No. 130, and a Response to the Hoffmans' Statement of Undisputed Facts and Counterstatement of Material Facts. Dkt. No. 129. The Hoffmans filed a Reply, Dkt. No. 148, essentially reiterating the arguments made in their moving brief, and a Response to Hammerhead's Counterstatement of Material Facts, Dkt. No. 145. Given the sprawling motion for Partial Summary Judgment, the Court will set out the parties' arguments and the facts in support once—in the discussion section related to each claim.

DISCUSSION

I. Legal Standards: Motions for Summary Judgment

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could find for the non-moving party. *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006). A factual dispute is "material" if it might affect the outcome under governing law, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 175 (3d Cir. 2011), and is determined by the substantive law defining the claims. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). When determining

whether a genuine issue of material fact remains for trial, the Court must draw all inferences "in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Pastore v. Bell Tel. Co. of Pa*., 24 F.3d 508, 512 (3d Cir. 1994).

Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 192 n.2 (3d Cir. 2001). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. A "party opposing summary judgment may not rest upon the mere allegations or denials of the pleadings." *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001) (citation modified). For "the non-moving party to prevail, that party must make a showing sufficient to establish the existence of every element essential to that party's case, and on which that party will bear the burden of proof at trial." *Cooper v. Sniezek*, 418 F. App'x 56, 58 (3d Cir. 2011) (citation modified). When the moving party also has the burden of proof at trial, that party "must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003) (citation modified); *Seldon v. Wetzel*, No. 1:19-cv-90, 2020 WL 1517061, at *1 (W.D. Pa. Mar. 11, 2020), *R&R adopted*, 2020 WL 1493547 (W.D. Pa. Mar. 27, 2020). A court's task on summary judgment is not to resolve disputes, but to determine whether factual disputes exist that must be tried. In that regard, "a

district court may not make credibility determinations or engage in any weighing of the evidence." *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004).

II. Preliminary Evidentiary Matter

A large part of the Hoffmans' Reply focuses on their position that Hammerhead's responses to the Hoffmans' Statement of Uncontested Material Fact did not comply with LRCi 56.1, given that Hammerhead failed to respond to each serially-numbered fact, failed to cite the precise portions of the record relied upon as evidence to show the Hoffmans' facts were disputed, and set out boilerplate objections to certain statements of material fact. Dkt. No. 148 at 1. The Hoffmans ask the Court to consider their Statement of Undisputed Material Facts admitted for summary judgment purposes and to strike Hammerhead's Statement of Uncontested Facts. *Id*. at 4-5. The Hoffmans also contend that Rivera submitted a "sham affidavit"[3] to create disputes of material fact where none existed. *Id*. at 5. For example, the Hoffmans posit that Hammerhead's sworn answers to interrogatories provided that the Hoffmans hired Rivera personally—not Hammerhead—as their property manager and for pool maintenance, and Hammerhead should be judicially estopped from now taking a contrary position (in the affidavit) that the Hoffmans hired Hammerhead for these jobs. *Id.* at 4-5.

The Hoffmans filed a separate Motion to Strike Hammerhead's Counter-Statement of Additional Facts and Exhibits 1, 2, and 3 thereof (the Affidavit of Rivera, the Affidavit of

[3] "The sham affidavit rule allows a court to disregard a later statement by a deponent on two conditions: the later statement contradicts the witness's deposition testimony, and the discrepancy between the two . . . is neither supported by record evidence nor otherwise satisfactorily explained." *SodexoMAGIC LLC v. Drexel Univ.,* 24 F.4th 183, 209 (3d Cir. 2022).

Firestone, and 34 pages of text messages between Rivera and Mrs. Hoffman from October 2019 through January 2021 discussing, inter alia, a variety of jobs to be completed around the house, Dkt. Nos. 129-1, 129-2, 129-3). Dkt. No. 143. The accompanying memorandum, Dkt. No. 144, reiterated that the Rivera and Firestone Affidavits were "sham affidavits" and pointed out that Hammerhead's Counter-Statement of Facts and accompanying exhibits were conclusory, belied by the evidence of record, and did not comply with Fed. R. Civ. P. 56(c) and LRCi 56.1(b). *Id.*

The Court agrees with the Hoffmans that Hammerhead's Responses to the Hoffmans' Statement of Uncontested Material Facts did not comply with LRCi 56.1. This is because Hammerhead disputed/objected to admissibility of "Undisputed Material Facts Nos. 1, and 3-150," Dkt. No. 129 at 2, without affixing copies of and citing to "the precise portions of the record relied upon as evidence of each disputed material fact." LRCi 56.1(b). The Local Rules provide that a "[f]ailure to respond to a movant's statement of material facts. . . as provided by these Rules *may* result in a finding that the asserted facts are not disputed for the purposes of summary judgment." LRCi 56.1(d) (emphasis added).

Nevertheless, the Court declines to consider the Hoffmans' Statement of Undisputed Material Facts admitted and undisputed based on Hammerhead's bulk response that did not comply with the Local Rules. This is because the District Judge denied the Hoffmans' Motion to Strike Hammerhead's Counter-Statement of Facts and Exhibits 1, 2, and 3. Dkt. No. 164 (denying Dkt. No. 143). From this denial, it is clear that the District Judge explicitly rejected the Hoffmans' effort to disallow Hammerhead's facts, despite their non-compliance with the Local Rules, and rejected their view that the Rivera and Firestone affidavits were "sham affidavits."

The District Judge's Order permits the Court to assess the Motions for Summary Judgment/Partial Summary Judgment based on the facts available, submitted by both parties, rather than to take a shortcut because of Hammerhead's procedural failing. Accordingly, based on the District Judge's decision, Dkt. No. 164, the Court rejects the Hoffmans' invitation to consider the Rivera and Firestone Affidavits as "sham affidavits," to consider the Hoffmans' facts undisputed, and to refuse to consider Hammerhead's facts.

III. Breach of Contract Claim: Motion for Summary Judgment on the Complaint; Motion for Partial Summary Judgment on the Counterclaim

The Hoffmans argue that the October 23, 2018 Revised Rebuild Fee spreadsheet that set out the $521,378 price and the scope of work is the contract between the parties. Dkt. No. 86 at 1-2. Responding to Hammerhead's allegation in its Complaint that the scope of work was re-negotiated to add $60,511.70 in charges, the Hoffmans argue that "no documents . . . support these allegations" and that there was no "meeting of the minds" regarding the alleged "Additional Services" that Hammerhead relies on to support its claim for $92,589.70 due. *Id.* at 2. The Hoffmans add that Hammerhead materially breached its contract through its substandard work, as described in their expert reports and depositions which are "for the most part" unrebutted. *Id*. at 4 (citing their Exhibits 66A, 66B, 67, and 79-84).[4] Because Hammerhead is the breaching party, that excuses the Hoffmans from any alleged non-performance on the

[4] They add that the report of Hammerhead's structural expert, Mr. Richard Taylor, must be excluded as he used the wrong legal standard and disregarded Virgin Islands law. The Court subsequently denied the Hoffmans' Motion to Exclude. Dkt. No. 171.

contract, since the corrective work to address the material breaches more than offsets any amounts Hammerhead may arguably recover. *Id*. at 4-5.

The Hoffmans view the 33-line items set out on the "Additional Services" list attached to the Notice of Lien (totaling $60,511.70, Dkt. No. 88-5), as individual claims, and disputed the validity of most of them. Dkt No. 86 at 5. The Hoffmans contend that some of the Additional Services were not done by Hammerhead but were done by Rivera individually, such as Rivera's work as the Hoffmans' property manager, and thus Hammerhead had no standing to assert claims for services it did not perform. *Id*. at 5-6 (citing Dkt. Nos. 89-6 and 92-2). Similarly, Hammerhead lacked standing to assert claims for payment related to a boat trip to Puerto Rico that Rivera and his family took with Mrs. Hoffman. *Id.* at 6-7. The Hoffmans incorporated by reference their Statement of Uncontested Material Facts, Dkt. No. 87, ¶¶ 46-49, setting out challenges to the line items in the Additional Services list and asserting that "Hammerhead cannot establish essential elements of its claim." *Id*. at 8.

In their Motion for Partial Summary Judgment on the Breach of Contract Counterclaim, the Hoffmans reiterated much of what they argued in their Motion for Summary Judgment on the Complaint. *Id* at 8-11. They assert that the Revised Rebuild Fee spreadsheet sent to the Hoffmans "describ[ed] the parties agreement." *Id*. at 8. The breach occurred when Hammerhead failed to complete the Revised Rebuild Fee scope of work and did substandard work, as indicated in their expert reports. *Id.* at 8-9. One of their experts estimated in 2022 that it would cost $827,109.00 to correct the defects; to date, the Hoffmans' reconstruction and

repair costs exceeded $700,000, with as much as $350,000 in additional repairs anticipated, bringing the damages to over $1,000,000 before other costs are added. *Id*. at 9-11.

In opposition to both motions, Hammerhead contends that genuine disputes of material fact regarding the scope of the contract between the Hoffmans and Hammerhead defeat summary judgment.[5] Dkt. No. 130. The Hoffmans admitted that they entered into a contract for a total of $521,378.00 and paid only $475,000, leaving $46,378 unpaid under the October 23, 2018 agreement. *Id.* at 4. The parties disagree on what the scope of the contract was. The original scope of work was determined by which items were covered by the Hoffmans' homeowner's insurance and those items were within the covered scope of work to be done for $521,378. According to Hammerhead, if the insurance company did not include a cost in the covered loss, the Hoffmans were adamant that it not be included in the original scope of the contract. *Id.* at 6. After they received money from the insurance company, the Hoffmans made changes to the original scope of work, which Mrs. Hoffman asked Hammerhead to complete, and agreed to be charged for time and materials for that additional

[5] In a footnote, Dkt. No. 130 at 1 n.1, Hammerhead adopted the arguments by "non-parties" Rivera and Firestone made in a "Motion for Rule 56(d) Relief," Dkt. No. 127, in which they opposed summary judgment on the "purported Counterclaims." In that motion, they argued the Counterclaims were not properly before the Court, as the Court never accepted the Hoffmans' revised complaint, they had not been properly joined, and therefore a ruling on summary judgment would be premature. *Id*. Rivera and Firestone filed a Motion to Strike the Amended Answer to the Complaint and Counterclaims, Dkt. No. 124, in which they raised the same arguments. The Court denied that motion in February 2026. Dkt. No. 172. The failure of Rivera and Firestone to oppose the summary judgment motion alone does not justify granting it; the Hoffmans still must demonstrate no genuine issue of material fact exists and they are entitled to judgment as a matter of law, and the record does not support that conclusion. *Vt. Teddy Bear Co. Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).

work, billed as Additional Services. *Id*. at 5-6. Mrs. Hoffman instructed Hammerhead regarding the changes to be added or removed from the Revised Rebuild Fee spreadsheet. *Id*. at 6. As an example of changes outside the original contract scope, the original fee for the pool was $10,000, as covered by insurance. The fee increased to $18,000 because the Hoffmans redesigned the pool, removed the staircase, changed the waterline tile, added a bench, new stairs, and new tile. The original fee also did not include conversion to a saltwater pool. *Id.*

As evidentiary support for these statements, Hammerhead relies on Rivera's Affidavit, Dkt. No. 129-1, as well as multiple text messages between Mrs. Hoffman and Hammerhead in which she asked for additional work to be done, Dkt. No. 129-3. According to Hammerhead, if any work was not completed, it was credited back to the Hoffmans or removed from the scope of work and the Revised Rebuild Fee spreadsheet was edited to reflect that change. Dkt. No. 130 at 7. Changes were discussed and agreed to by the parties; at the end of the relationship, the agreed-to contract price was $567,589.70 for the initial work plus additional work; the Hofffmans paid $475,000, leaving $92,589.70 in dispute. *Id*. at 6-7. The balance over the $46,378 not paid under the initial scope was for the additional work that Mrs. Hoffman asked Hammerhead to complete. *Id*. at 7.

As to the Hoffmans' argument that Hammerhead breached its contract by performing defective work, Hammerhead cites its expert who rebutted the Hoffmans' expert to show its work was not defective or substandard. *Id.* at 8. It contends that the competing expert opinions create a question of fact. *Id.* Further, given the disagreement about the scope of the project,

questions of fact exist as to whether the damages those experts opined about even involved work that Hammerhead was contracted to perform. *Id*. at 8-9.

A. Legal Standard

To state a breach of contract claim in the Virgin Islands:

> a plaintiff must "demonstrate: (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages." *Phillip v. Marsh-Monsanto,* 66 V.I. 612, 621 (V.I. 2017) (citations omitted). This Court first looks to the plain meaning of a contract when determining the duties that the contract created and whether those duties were breached. *Id.* at 625.

Roy v. Banco Popular de Puerto Rico, No. 21-cv-0034, 2025 VI 19, ¶ 26, 2025 WL 2550218, at *7 (V.I. Sept. 4, 2025). As to the first element, the existence of an agreement, the Supreme Court of the Virgin Islands has opined that:

> the terms "agreement" and "contract" are not synonyms, in that an agreement is a broader term than a contract. An agreement is "a coming together of parties in an opinion or determination, the union of two or more minds in a thing done or to be done." *See Gaskins*, 245 S.E.2d at 600. In contrast, a contract requires more than simply agreeing to do something: "a contract is created only when parties mutually assent to specific terms" in which there is "an offer and an acceptance" in which "the offer and acceptance must mirror each other in order for a contract to be legally formed." *Toussaint*, 67 V.I. at 951-52 (citing Restatement (Second) of Contracts §§ 17, 22, 24, 35, 36, 38, 39).

Mosler v. Gerace, No. 22-cv-0049, 78 V.I. 649, 667–68, 2024 WL 26761, at *5 (V.I. Jan. 3, 2024). Contracts may be modified by way of a manifestation of mutual assent.

> Contracting parties may evince a mutual intent to modify the terms of their contract through written words, acts, sustained course of conduct, and oral agreement. The circumstances evidencing the parties' conduct, acts, or oral agreements not reduced to a writing must be sufficient to support the court's finding of a mutual intention that the modification be effective and of consideration exchanged.

Arvidson v. Buchar, 72 V.I. 500, 520–21, 2020 WL 1321814, at *11 (V.I. Super. 2020) (citation modified); *see also Mustafa v. Muhammad*, No. 06-0041, 56 V.I. 841, 844; 2012 WL 687051, at *2 (D.V.I. App. Div. Feb. 29, 2012) ("It is settled law that any contract may be modified by subsequent oral agreement of the parties. Valid oral modification to written contracts may be shown by writings or by words or by conduct or by all three. An oral modification of a written contract must be proven by "clear, precise and convincing evidence.") (citation modified).

B. Application

The parties do not dispute that Hammerhead agreed to restore the Hoffmans' hurricane-damaged property; that was the basic "agreement." They also do not dispute that the scope of work and the price of $521,378 was set out in the Revised Hurricane Rebuild Fee spreadsheet that accompanied Rivera's October 23, 2018 email to Mrs. Hoffman. *See* Dkt. No. 86 at 1-2, citing Dkt. No. 87-6; Dkt. No. 130 at 4, 5, citing Rivera Aff. Dkt. No 129-1¶ 23. However, the breach of contract claim revolves around a major disagreement: whether the parties subsequently modified the agreement as to the scope and price that had been set out in the October 2018 Revised Rebuild Fee spreadsheet. Hammerhead's position is that the parties agreed to additional services and costs that were included in the "Additional Services" list attached to the January 2021 Notice of Lien. The Hoffmans' position is that the Revised Rebuild Fee spreadsheet was the contract, without any subsequent changes, and the alleged "Additional Services" were either already included in the Revised Rebuild Fee spreadsheet, were removed from it, or were improper charges that they never agreed to.

The Hoffmans bear the initial burden of demonstrating the absence of a genuine issue of material fact on this claim. *Celotex*, 477 U.S. at 323. In the Court's view, the Hoffmans have failed to bear their initial burden on the first element of the breach of contract claim: they have not shown the absence of a dispute of material fact as to what the agreement at issue actually was. In fact, their entire argument revolves around factual disagreements regarding the scope and price of the agreement at issue. They acknowledge this disagreement at the beginning of their summary judgment discussion: "*Contrary to plaintiff's claim* the contract between the parties is the October 23, 2018 'Revised Hurricane Rebuild Fee' . . . , which sets out the scope of work and sets the price at $521,378," Dkt. No. 86 at 1, 2 (emphasis added). In disputing many of the individual "Additional Services" charges, they implicitly recognize the genuine dispute surrounding the first element of the breach of contract claim—what the actual agreement was—sufficient to deny the motion for summary judgment on Hammerhead's Complaint.[6]

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[6] Sometimes the Hoffmans have offered combination legal-factual arguments in support of summary judgment. For example, they argue that they contracted with Rivera personally, not Hammerhead, for property management and pool maintenance services included in the Additional Services list, Hammerhead had no standing to seek payment for services rendered by Rivera as an individual, and there was no agreement as to the monthly amount charged for pool maintenance or any amount for acting as property manager. Dkt. No. 86 at 14 & n.57, 15. While the monthly amount charged is a factual question, the issue of standing is a legal one that the Hoffmans lose. They base their position on a strained reading of *Hammerhead's* response to certain interrogatories such as "Consistent with his property management responsibilities, Mr. Rivera would have the house cleaned in advance of [the Hoffmans]/their guests' arrival or every two months if they were not there." Dkt. No. 89-6 at 3. The Hoffmans interpret the word "his" to mean that Rivera apparently separately contracted with the Hoffmans to provide various services (property management, pool cleaning) when the sentence says no such thing and where no evidence exists in the record and the course of the parties' conduct that Rivera contracted outside of Hammerhead to perform work that Hammerhead would perform. *See* 13 V.I.C. § 1301(a)(1): "Each member is an agent of the limited liability company for the purpose of its business." This argument is particularly curious where Rivera is the sole member of

The Hoffmans' primary argument in support of summary judgment is that Hammerhead has not produced "a single document" reflecting the addition of $60,511.70 to the scope of work set out in the Revised Rebuild Fee spreadsheet. Dkt. No. 86 at 2. They contend that since no writings memorialized the alleged changes, those purported changes to the October 2018 agreement did not exist or, at the very least, had no legal significance. But this position does not reflect the law of contracts in the Virgin Islands. As indicated above, the Virgin Islands accepts agreements that manifest parties' assent, in contrast to the narrower constructs of a contract. *Mosler*, 78 V.I. at 667–68, 2024 WL 26761, at *5. Second, contracts and agreements may be modified orally or by subsequent writings. *Arvidson*, 72 V.I. 500, 520–21, 2020 WL 1321814, at *11. Therefore, the lack of writings setting out each change in the agreement is not sufficient for the Court to find an absence of a genuine issue of material fact; to hold that the October 2018 document was the complete agreement between the parties; and that Hammerhead's argument that that agreement was modified is factually and legally infirm. The Hoffmans have failed to carry their burden on the agreement and damages elements of the claim.

But even if the Hoffmans had satisfied their initial summary judgment burden, the Court would still recommend denial of the Motion for Summary Judgment because Hammerhead has set forth specific facts showing that there is a genuine issue for trial on the scope of the agreement (as well as damages, which is dependent on the scope; *see* 24 Williston on Contracts § 64:7 (4th ed.) ("[T]he amount of damages suffered is ordinarily for the jury[.]")). The parties'

Hammerhead and where the Hoffmans are vigorously pressing the position that he is the alter ego of Hammerhead so as to pierce the corporate veil.

course of conduct, shown in the record before the Court, reflects an informal, ad hoc, and evolving approach to agreeing to the work Hammerhead would do and the cost, supporting inclusion of added items on the list of Additional Services. Particularly significant evidence in this regard is found in Rivera's Affidavit. According to Rivera, the balance identified in the Lien and alleged to be due over the $46,378 not paid under the initial scope of the contract was for

> additional work Janice Hoffman asked Hammerhead to complete outside the scope of the original agreement. This work was requested and approved through text messages and conversations and was billed to the Hoffmans based on the costs of the time and materials necessary to complete the additional work. All work was completed or it was removed from the final invoice which was submitted with the construction lien filing.

Dkt. No. 129-1 ¶ 25. The Rivera Affidavit specifies some of the additional work and fees outside the October 2018 agreement that Hammerhead engaged in. *Id.* ¶¶ 28-30 (changes to the pool, charges related to the trip to Puerto Rico for Mrs. Hoffman to purchase items for the house, where Mrs. Hoffman said she would pay expenses prior to taking the trip, hiring Hammerhead to maintain the Hoffmans' pool and act as property manager at the property). Text and email messages to/from Mrs. Hoffman confirm or appear to confirm that the Hoffmans asked Hammerhead to do additional work that was not included in the October 2018 agreement. *See, e.g.,* Dkt. No. 129-3 at 24-25 (December 22, 2020 text providing list of items Mrs. Hoffman would like to have done; Rivera's response stating that he was "a little worried about all the other additional stuff that you have asked me to do. For example the glass for the showers. I ordered the same shower glass that I have at our house. It is very nice glass but not cheap. Is there going to be issues with additional items like the glass when I give you the final invoice?"); Dkt. No. 129-4 (email from Mrs. Hoffman to Rivera dated August 28, 2018 stating, inter alia,

"We are trying to figure out the best way to buy furniture in [Puerto Rico] and get it to our house. . . . Also, I am a bit overwhelmed with the idea of navigating, shopping, etc. in PR since I do not know my way around. Would it be possible for you to go with me? We would include your time and travel as part of rebuilding the house.")[7]; Dkt. No. 129-5 (email from Mrs. Hoffman to Rivera dated March 3, 2020 stating, inter alia, "Since rebuilding a house is always a work in progress and changes are made on the fly, I have made some notes where changes have been made that I believe will affect the cost.").

The Hoffmans dispute just about every item listed on the "Additional Services" list as either included in the original scope, not agreed to, or otherwise improper. Such factual disputes require resolution by a jury. Based on the evidence, and given that Court draws all inferences from the underlying facts in the light most favorable to the nonmoving party, *Pastore,* 24 F.3d at 512, the Court concludes that Hammerhead has identified specific facts showing that there is a genuine issue for trial as to what the actual agreement was that formed the basis for the breach of contract claim—i.e., what was the scope of work of the parties agreed to, and the cost, and recommends that the Hoffmans' Motion for Summary Judgment on Hammerhead's Complaint be denied.[8] *See Belnick, Inc. v. TBB Glob. Logistics, Inc.,* 106 F. Supp.

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[7] Highlighting the nature of the factual dispute underlying the charges related to the Puerto Rico trip to buy items for the house, Mrs. Hoffman stated at her deposition that Rivera invited her as his guest and she was not told he would charge her for the trip. Dkt. No. 90-4.

[8] The Court also notes that the Hoffmans did not bear their burden of demonstrating the absence of a genuine issue of material fact on the breach (and, derivatively, duty) elements of the breach of contract cause of action. They have admitted that $46,378 of the agreed upon $521,378 contract remained unpaid under the October 2018 agreement. Dkt. No. 87 at 4, ¶ 8. In other words, they breached that agreement, even before the disputes regarding additional costs and services are considered. In their brief, the Hoffmans do not directly address this issue.

3d 551, 566 (M.D. Pa. 2015) (given the parties' "dramatically different interpretations" regarding what exactly defendant was obligated to do in terms of providing certain services to plaintiff under a written agreement or under a possible oral modification to that agreement, or even under a separate oral contract that the parties negotiated over years of dealings, court held that rather than demonstrating an absence of material fact, "the parties have highlighted a record that shows fundamental differences of interpretation regarding an agreement that spanned years," where disputed issues of fact relevant to the issue of contract interpretation, the scope of the parties' agreement, and defendant's performance under that contract remained, resulting in a recommendation that cross-motions for summary judgment be denied on the breach of contract claims); *see also Legendary Art, LLC v. Godard*, 888 F. Supp. 2d 577, 583 (E.D. Pa. 2012) (fact issues concerning the scope of the contract and the existence of a breach must be resolved by the trier of fact, and denying summary judgment).

Rather, they assert that "[a]bsent evidence that Hammerhead completed the scope of work agreed to in a workmanlike manner, it is not entitled to the unpaid balance on the [Revised Rebuild Fee] even before any consideration of set-offs for the substantial defective, sub-standard and non-Code compliant work." Dkt. No. 86 at 3-4. They add that "Hammerhead committed major material breaches of its contract with the Hoffmans" and cannot recover on its claim for breach of contract "as the undisputed evidence is that plaintiff is the breaching party, not the Hoffmans[.]" *Id*. at 4. The problem is that they did not simultaneously seek summary judgment on their affirmative defenses of Hammerhead's breach of contract or failure of Hammerhead's work to comply with various building codes, Dkt. No. 82 at 3, 5, and they did not assert an affirmative defense of setoff. Thus, on the record before the Court, they did not put forth any evidence on the breach element at all. *See, e.g., Ocwen Loan Servicing, LLC v. Radian Guar., Inc.*, No. 16-cv-6586, 2018 WL 684838, at *10 (E.D. Pa. Jan. 31, 2018), *clarified* 2018 WL 11099083 (E.D. Pa. Mar. 5, 2018) (denying defendant's motion for summary judgment because the defendant did not "establish its affirmative defense of mutual rescission as a matter of law on Ocwen's breach of contract claim" and concluding that genuine disputes of material fact warranted denial of summary judgment).

With regard to the Motion for Partial Summary Judgment on the Hoffmans' Breach of Contract Counterclaim, the result is the same based on the evidence set forth above showing that a genuine dispute of material fact exists concerning the agreement at issue—its scope and cost—and damages based on the scope and cost. The Hoffmans cannot show that no reasonable jury could find for Hammerhead, and the Court recommends that the Motion for Partial Summary Judgment on the Breach of Contract Counterclaim also be denied.

IV. Breach of Implied Warranties of Proper Workmanship and Fitness for Purpose Counterclaim

A. Implied Warranty of Proper Workmanship

The Hoffmans argue that Hammerhead/Rivera provided construction and repair services to both the Hoffmans' and the Trust's property, satisfying the first factor of the claim (existence of the implied warranty). Dkt. No. 86 at 11-12. As to breach of the implied warranty, the unrebutted testimony, expert reports, and analysis of Mr. Walter Basnight and Mr. Mark Grimes (two of the Hoffmans' experts) establish that the work was not carried out in a reasonable manner and was not consistent with the services of a workman of average skill and experience. *Id.* at 12, generally citing Dkt. Nos. 97-3, 98-1 (Basnight report and deposition); Dkt. Nos. 95-6, 95-7, 96-1 (Grimes 2/25/21 Observation Report with Values; Grimes (updated) 6/13/22 Observation Report with Values; Grimes 3/12/21 Observation Report Summary); and Dkt. Nos. 98-2, 98-3, 99-1 (Grimes Additional Information Report dated 6/18/22; undated Hoffman Deck Estimate and Roof Estimate, with name of estimator not included; Grimes Deposition). Mr. Grimes estimated a cost of $827,109.00 to correct the defects that included replacing the roofs and decks, a figure that could increase depending on concealed defects and

increased cost of materials and labor. *Id*. at 12-13. As to the final element of the claim, the Hoffmans seek damages of at least $1,100,000. *Id.* at 13.

Hammerhead responds that disputed questions of fact surround whether its work was completed in a workmanlike manner. Dkt. No. 130 at 10. With regard to the main hipped roof of the residence, the point of contention between the experts (Mr. Basnight for the Hoffmans and Mr. Richard Taylor for Hammerhead) was whether certain supports were "members" or "beams." Hammerhead launches into a technical discussion of wind loads, the International Building Code, and other aspects of roof construction to support, apparently, its expert's conclusion that no remedial action was needed on that roof. *Id*. at 11-14.

1. Legal Standard

Only one case, *Bluewater Construction, Inc. v. Hill*, No. ST-2020-cv-00212, 76 V.I. 15, 2022 WL 721426 (V.I. Super. Feb. 11, 2022), has examined the cause of action for breach of the implied warranty of proper workmanship in the Virgin Islands after applying a *Banks*[9] analysis. The elements of this cause of action are:

> (1) the existence of the implied warranty (determined by showing the defendant sold repair or construction services to the plaintiff or for the benefit of the plaintiff); (2) breach of the implied warranty (shown by the services were not carried out in a manner reasonable given the circumstances of the project and consistent with a workman of average skill and experience in their field); and (3) damages[.]

[9] In *Banks v. Int'l Rental & Leasing Corp*., 55 V.I. 957 (V.I. 2011), the Supreme Court of the Virgin Islands explained that "Virgin Islands courts should not mechanically follow the Restatements of the American Law Institute or the common law of other jurisdictions and courts should instead apply a three-prong analysis to determine what common law rule should apply in the Virgin Islands." *Bluewater Constr., Inc.,* 76 V.I. at 27, 2022 WL 721426, at *5.

Id. at 34, 2022 WL 721426 at *8. The *Bluewater Construction* Court extended the protection of the implied warranty "to buyers not in privity with the contractor or workman" and to "both the construction of homes as well as other structures not intended for use primarily as a dwelling," as well as to "repairs of existing structures as well." *Id.* at 37, 2022 WL 721426, at *9. The court added that the damages for such a claim "should be the cost of repairing the defects, or replacement when repair is not possible. In some situations, damages may be whichever is lower as in the difference between the value of the structure had it been constructed properly compared to the actual value." *Id.* (citation modified).

2. Application

As to the first element, it is undisputed that Hammerhead provided construction and repair services to the Hoffmans. While Hammerhead contends that it had no contract with the Hoffmans as Trustees, Dkt. No. 129 ¶ 97, and that "[a]ll work was completed at the property prior to the creation of the Trust," Dkt. No. 129-1 ¶ 44, the text exchanges between Mrs. Hoffman and Rivera indicate that Hammerhead continued to work on the property after the November 2019 creation of the Trust and the December 2019 deeding of the property to the Trust. *See* Dkt. No. 129-3 at pp. 9, 12, 13, 23, 24. The Court concludes that the evidence shows the Hoffmans and the Trust have shown no dispute of fact on the first element of this claim.

As to whether the Hoffmans have shown a breach of the implied warranty—i.e., that Hammerhead's construction and repair services were not carried out in a reasonable manner—the Hoffmans have provided expert reports by Mr. Walter Basnight, a licensed engineer, whose 2021 report is found at Dkt. No. 97-3, and Mr. Mark Grimes, an Estimating Consultant with

Breckenridge Construction, whose 2021 and updated 2022 observations are found at Dkt. Nos. 95-6, 95-7, 96-1, and 98-2. Mr. Grimes was asked "to document known construction deficiencies and incomplete work, provide observations of work in place with regard to quality and if the work was performed to industry standards, identify any other apparent deficiencies, and provide an estimate to complete or correct the issues." Dkt. No. 96-1 at 1 (3/12/21 Observation Report Summary). In that report, Mr. Grimes noted that "[t]he owner [the Hoffmans] furnished Breckenridge with a list of known issues and a scope of work." Dkt. No. 96-1 at 1. This report summarized the 2/25/21 Itemized Observation Report, Dkt. No. 95-6, in which Mr. Grimes observed certain items at the house to be incomplete, not of acceptable quality, that had not been "performed in a workmanlike manner and could be described as shoddy," as well as some "egregious" items (safety issues) such as missing deck railings, railings that did not meet code and electrical switches that needed correction. Dkt. No. 96-1 at 3.

In his report, Mr. Basnight reported the results of visits to the house in May and June 2021 "to evaluate the structural conditions concerning the framing associated with the home's roofs and decks." Dkt. No. 97-3 at 2. The report pointed out certain deficiencies in the roofs and decks, such as that the main hip roof and shed roofs required replacement or retrofitting. *Id.* at 7. He concluded that the framing of the house was "inadequate, unsafe, non-Building Code compliant and requires significant upgrading" to meet the building code, and the lower deck "must remain condemned until the framing is upgraded," given serious safety issues. *Id*.

While these expert reports constitute significant evidence on the second Implied Warranty of Workmanship element, the issue on summary judgment is not whether the moving

party has provided significant evidence to prove their case, but whether the claim can be resolved as a matter of law. Fed. R. Civ. P. 56(a). In the Court's view, it cannot because Hammerhead has raised a salient factual question that requires resolution by a jury. The same disputes that surround the Breach of Contract claim, concerning what the actual agreement was between the parties—i.e., what work and services were or were not included in the scope of work—arise with this claim, but in a slightly different form. In the Breach of Contract claim, the question was whether the "Additional Services" set out in the Notice of Construction Lien were added to the parties' October 2018 agreement. Hammerhead provided evidence to defeat summary judgment by showing that the parties expanded the scope of the contract. As to this claim, the issue of scope relates to whether Hammerhead was actually responsible for the deficient work at issue. For example, the Grimes 6/13/22 Itemized Observation Report pointed out wood rot in the lower deck where "the owner states the contractor was responsible to replace any deficient timber." Dkt. No. 95-7 at 7, line 88. Another entry in the report provided:

> The owner states that the deck framing was to be rebuilt as part of the scope and that all deficiencies were to be corrected. There are several old through bolts and plates that are observed to be heavily rusted and are due for replacement. The owner should comment on if this was specifically excluded or included in the scope.

Id. at 9. But in his Affidavit, Rivera pointed out that a particular deficiency in the deck was not due to Hammerhead's workmanship:

> Hammerhead Construction did use correct size wood in all of Hammerhead's scope of work. Undersized wood . . . on first story deck wood structure preexisted Hammerhead's work. Replacing these pieces of wood was not included in Hammerheads scope of work so the existence of undersized lumber in the deck was not the result of Hammerhead's work.

Dkt. No. 129-1, ¶ 91; *see also* Dkt. No. 129 ¶ 65. The issue of *what* deficient work *Hammerhead* was actually responsible for is amplified in Mr. Grimes's deposition where he addressed a plumbing issue related to the cistern.

> Q: Do you know if any work was done on the cistern by Hammerhead Construction?
> A: I can't say for sure who did that work. Particularly, the part that says –there is about halfway down in the column with possible method of correction. It says, the pump was replaced after Irma and Maria. I suspect at some point in time the original suction line into cistern number 1 and number 2 were abandoned at the valved connections.
>
> So I do not know who performed that work. I can't say for sure. That's just identifying what the problem was. I can't say for sure if that was Hammerhead or someone else. You would have to ask the owner that question.
> Q: Okay. . . . But a lot of these items. . . item 111 on this same report [Dkt. No. 95-7]. It says that, "the owner states the deck framing was to be rebuilt as part of the scope and that all deficiencies were to be corrected."
>
> Do you have any knowledge of whether that was included in the scope of the construction contract with Hammerhead Construction other than based on what was told to you by the [Hoffmans]?
> A: That—that is why I clarified by opening that statement with, the owner states. I assumed that there would be another vehicle to determine whether that was in their contract or not in their contract. But that is not . . . something that I had.
> Q: But is it fair to say . . . that your understanding of what the scope of that construction contract is, all of that was relayed to you from the [Hoffmans]?
> A: That is—yes, that is correct.

Dkt. No. 129-18 at 2-3. In other words, when the Hoffmans pointed out all of the deficiencies in their house to Mr. Grimes that he included in his report, they explicitly or implicitly indicated that Hammerhead was responsible for all of them as arising from the scope of repair work Hammerhead agreed to perform. The basis for the damages the Hoffmans seek under this cause of action consists of the costs set out in the Grimes updated Itemized Observation Report, totaling $827,109.56, to fix all of those deficiencies. Dkt. No. 95-7 at 9.

The problem with this approach, as Hammerhead points out, Dkt. No. 129 at 2-3 n.1, is that the list of deficiencies the Hoffmans provided their experts with relies on the *Hoffmans*' view of what renovation and repair items were contained in the scope of work. And as the Court has already found, the scope of work as understood by the Hoffmans and Hammerhead was completely different—a conclusion that would also impact this cause of action on both the breach and damages elements. As acknowledged by Mr. Grimes in the deposition excerpt above, he did not know who performed the allegedly faulty work, and he was expecting another "vehicle"—i.e., some written document—from the Hoffmans that set out the scope of Hammerhead's work, but never received one. Drawing all inferences in the light most favorable to Hammerhead, *Pastore*, 24 F.3d at 512, factual questions are clearly raised concerning Hammerhead's alleged breach of the implied warranty and the amount of damages it may be responsible for. This conclusion gains additional traction because the October 2018 Revised Hurricane Rebuild Fee spreadsheet listed $763,320.00 in total expenses to fix everything listed.[10] Dkt. No. 87-6. However, the revised fee to which the Hoffmans agreed amounted to $521,378.00—over $240,000.00 in repairs *less* than what it would have apparently cost to fix everything. The Court infers that a number of items that needed attention at the Hoffman's residence after the hurricane were either not addressed or only partially addressed in the October 2018 agreement. Without a clear understanding of the scope of the agreement at issue, it is unclear whether all of the items listed in the Grimes Updated Itemized Observation Report

[10] In his Affidavit, Rivera stated that figure represented "[t]he original scope of the Hoffman project was determined by what the insurance company was willing to pay for each damaged item." Dkt. No. 129-1 ¶ 26.

were deficient as a result of Hammerhead's work, or whether they had been unaddressed from or preceded the hurricane damage. The Court therefore recommends denial of summary judgment on the Implied Warranty of Proper Workmanship Counterclaim.

B. Implied Warranty for Fitness of Purpose

The Hoffmans assert that they relied on Hammerhead to select certain equipment (air conditioning units, pool timer, water heater, hurricane shutters, plumbing and other equipment); Hammerhead and Rivera knew that the Hoffmans were relying on them to select appropriate goods; and the Hoffmans relied on Hammerhead and Rivera's judgment to their detriment. Dkt. No. 86 at 13-14. They add that the air conditioning units were not newly manufactured, the pool timer was not functioning, and Hammerhead/Rivera improperly installed the plumbing, the generator, and the hurricane shutters. *Id.* at 14. They rely on a snippet from Mr. Hoffman's affidavit, Dkt. No. 88-7, describing how the pool timer did not work and was used (not new), and unspecified portions of Mrs. Hoffman's deposition testimony apparently to show reliance on Hammerhead's choices of goods. They maintain that Hammerhead and Rivera breached the Implied Warranty of Fitness for Purpose by improperly installing defective items, entitling them to summary judgment. Dkt. No. 86 at 13-14.

Hammerhead counters that the Hoffmans provided no evidence that it qualified as a "seller" under Uniform Commercial Code Article 2. Hammerhead is not in the business of buying or selling goods and there was no evidence that the Hoffmans contracted with it to purchase the particular goods they now complain about. *Id.* at 14-15. Although the Hoffmans alleged that they relied on Hammerhead and Rivera to select air conditioning, a pool timer, a

water heater, hurricane shutters, plumbing and other equipment, they do not explain what the "particular purpose" was that they required the goods for: they just generally, not particularly, argue that they wanted this equipment, and provided no evidence what was unfit about the items, other than that they were allegedly inoperable. *Id.* at 14-15.

1. Legal Standard

The implied warranty for fitness of purpose is set out in the Virgin Islands Code:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

11A V.I.C. Art. 2 § 2-315. The Uniform Laws Comments to this section clarify that "[w]hether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting," and clarify that the "particular purpose" referred to

> differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods . . . go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

Id. "Seller" is defined 11A V.I.C. Art. 2 § 2-103(1)(d) as "a person who sells or contracts to sell goods." To state a claim, a plaintiff must allege: "(1) the seller had reason to know the particular purpose for which the buyer required the goods, (2) the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer in fact relied upon the seller's skill or judgment." *Matos v. Nextran, Inc.*, No. 08-cv-65, 2009 WL 2477516, at *4 (D.V.I. Aug. 10, 2009).

2. Application

The Court agrees with Hammerhead that the record contains no evidence that it is a "seller of goods" as defined in 11A V.I.C. Art. 2 § 2-103(1)(d). While it procured certain equipment or items to be installed at the house, and while the Hoffmans may well have relied on its choices, that procurement did not transform Hammerhead into a "seller." Nor is there any evidence that the Hoffmans sought the air conditioning units, the pool timer, or hurricane shutters for any purpose other than the ordinary purpose for which those goods are used so as to bring them under the implied warranty of fitness for a "particular purpose." The installation issues concern the implied warranty of proper workmanship, not fitness of purpose.

Accordingly, the Court recommends that the Hoffmans' motion for partial summary judgment on this Counterclaim be denied, as they have offered no evidence that Hammerhead was a seller and that the items mentioned were to be used for a "particular purpose" as contemplated by the statute. *In re Bressman*, 327 F.3d at 238.

V. False and Overstated Construction Lien

The Hoffmans assert that it "cannot be disputed" that Hammerhead recorded a false and overstated construction lien against their property, claiming that $92,589.00 remained unpaid. Dkt. No. 86 at 14. They refer to paragraphs 1-66 in their Statement of Undisputed Material Facts, Dkt. No. 87, as showing that Hammerhead's "claims" for the 33 "Additional Services" that form part of the Lien (Dkt. No. 88-5 at 4) should not have been included because the work was never done, was included in the Revised Rebuild Fee, was defective, was over-inflated, or was not done by Hammerhead but by Rivera individually—and that Hammerhead "admits" that the

work set out on thirteen lines of the "Additional Services" sheet fell into those categories. Dkt. No 86 at 14-15 (citing Dkt. No. 89-6). They contend, without further analysis, that Hammerhead and Rivera were not licensed general construction contractors or licensed master contractors in other trades (electrical, plumbing, mechanical), such that 28 V.I.C. § 254(d) precluded it from recording a construction lien to claim entitlement to payment for those services. *Id.* at 15.

The Hoffmans point to the Revised Rebuild Fee spreadsheet that left an unpaid balance of $46,378, not $92,589, as claimed in the Notice of Lien, and assert that no change orders had been approved by the parties setting forth an agreed upon price increase to the fixed price contract. *Id.* There was no agreement to pay $170.00/month for pool maintenance or any amount as property manager; no agreement to pay for the boat trip to Puerto Rico, for Rivera's time there, or other expenses as alleged in the Lien; or for Hammerhead to receive an "extra 25%" profit on amounts paid to the subcontractors. *Id.* at 15-16. They conclude that Hammerhead, Rivera, and Firestone prepared and recorded the Lien in bad faith "in retaliation for the Hoffmans terminating Hammerhead for cause," and seek punitive statutory damages in the amount found to be overstated, attorney's fees and costs, and actual damages. *Id.* at 16.

Hammerhead responds that disputes of material fact give rise to the amount due and whether additional work outside the original scope was authorized by the Hoffmans prior to the Stop Work Order being issued. Dkt. No. 130 at 18-19. It quotes an email from Mrs. Hoffman acknowledging that rebuilding a house "is always a work in progress and changes are made on the fly," supporting its position that questions exist as to whether changes were included in the original quote or resulted in additional costs or credits. *Id*. at 19 (citing Dkt. No. 129-5).

According to Hammerhead, the Hoffmans were presented with an invoice for the balance of work to be performed in March 2020, which was revised based on additional charges and credits agreed to by the parties, and was included in the Lien filing. *Id.*, citing Dkt. No 88-5, Dkt. No. 129-17. Thus, none of the information on the lien filing was inaccurate or fraudulent *Id*.

A. Legal Standard

The Hoffmans' Counterclaim generally refers to an alleged "false and fraudulent" Notice of Claim of Construction Lien; however, neither the Counterclaim nor the brief in support of the motion cite any provision of the Virgin Islands Code under which the Hoffmans brought this claim. Dkt. No. 82 ¶¶ 149-57; Dkt. No. 86 at 14-16. Nor did their brief cite any Code provision or case law describing the elements of such a claim to show that there was no genuine dispute of material fact to support summary judgment on this claim.

In *H.I. Const., LLC v. Bay Isles Assocs., LLLP,* No. ST-09-cv-427, 53 V.I. 206, 2010 WL 2035591 (V.I. Super. May 14, 2010), the court explained that the Virgin Islands Construction Lien Act, enacted at Title 28, Chapter 12 of the Virgin Islands Code, "provides protection to prime contractors, who are defined as contractors who enter into real estate improvement contracts directly with real property owners. 28 V.I.C. §§ 252(a)(1), (b)(1)." *Id*. at 213, 2010 WL 2035591, at *3. Title 28, Section 253, "Existence of a construction lien" sets out when a construction lien may be filed, and subsequent Code provisions set out what is excluded from a lien, limitations on a lien, procedural and other matters. Section 275, entitled "Wrongful conduct under this chapter; remedies," provides, in pertinent part: "If a claimant in bad faith overstates the amount for which he is entitled to a lien," the court may declare the lien void,

award the owner or other injured person actual damages, and "award the owner punitive damages in an amount not exceeding the difference between the amount claimed as a lien and the amount which the claimant was actually entitled to claim as a lien." 28 U.S.C. § 275(b)(1)-(3). In their Counterclaim, the Hoffmans seek punitive damages "in an amount claimed as a lien"—which may mean the entire $92,578 lien amount, Dkt. No. 82 ¶ 157, while in their brief, the Hoffmans seek punitive damages "in the amount found to be overstated." Dkt. No. 86 at 16.

B. Application

The discussion concerning the scope of the parties' contract related to the Breach of Contract issue has a direct bearing on the False and Overstated Notice of Construction Lien Counterclaim and requires denial of summary judgment for the same reasons. Because the Hoffmans have not shown that the scope of the contract was undisputed and that the October 2018 Revised Rebuild Fee was in fact the complete contract between the parties, they cannot show that the lien was "false" and "overstated." The Court refers to the evidence, *supra*, where Mrs. Hoffman assented to certain Additional Services as sufficient to deny summary judgment on the Breach of Contract claim, based on the genuine question of material fact as to the scope of the agreement, as also warranting denial of summary judgment on this claim.

Moreover, in order to be awarded punitive damages for an overstated construction lien there has to be a showing that Hammerhead acted in bad faith. *See Cannon v. Fulcrum Const., LLC*, No. ST-23-cv-146, 2023 WL 8683504, at *13 (V.I. Super. Dec. 12, 2023) ("While there is strong disagreement between the parties on the propriety of Fulcrum's recorded construction lien, there is insufficient evidence for the Court to conclude that Fulcrum acted in bad faith. In

fact, the existing record shows no evidence of bad faith"); *see id*. at *13 n.103 ("The requirement for the grant of relief under 28 V.I.C. § 275 . . . is a finding of bad faith actions taken by the claimant. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity, . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.") (citation modified).

The Hoffmans have not shown, for summary judgment purposes, entitlement to punitive damages. In their brief, they argued in passing that Hammerhead, Rivera, and Firestone "recorded the lien in bad faith, in retaliation for the Hoffmans terminating Hammerhead for cause," and that it was "undisputably false, untrue and fraudulently overstated" when filed. *Id*. at 16. These statements are conclusory: the Hoffmans do not define "bad faith," or explain how the lien was filed in "bad faith" and "in retaliation," much less show that these are undisputed material facts, and how Hammerhead, Rivera, and Firestone "knew" the lien was overstated. *See In re Fabrizio*, 369 B.R. 238, 246–47 (Bankr. W.D. Pa. 2007) ("[I]n deciding summary judgment motions, unsubstantiated arguments made in briefs. . . do not constitute evidence for purposes of consideration."). The Hoffmans' assumption appears to be that retaliation equates to bad faith (and retaliation must have been at play if Defendants filed the Construction Lien ten days after the Stop Work Order), but they provide no factual or legal support for these conclusions. Drawing inferences in favor of the non-moving party, the Court finds it at least equally probable that when the Hoffmans filed the Stop Work Order, Hammerhead was concerned that it would not be paid for the amount owing on the October 2018 agreement (which the Hoffmans acknowledge they had not paid) plus the Additional Services

Hammerhead later provided—and therefore it filed the Notice of Construction Lien. Because the Hoffmans have not shown the absence of a genuine issue of material fact, the Court recommends that the Motion for Partial Summary Judgment be denied on this Counterclaim.

VI. Piercing the Corporate Veil

The Hoffmans focus a significant part of their memorandum on their attempt to pierce Hammerhead's corporate veil in order to hold Rivera personally liable for Hammerhead's debts. Dkt. No. 86 at 16-25. They argue that Rivera siphoned off hundreds of thousands of dollars in undeclared income from Hammerhead into his and Firestone's joint personal checking account, purchased items for personal use and paid personal expenses with company funds, such as a new speedboat, homeowners association assessments, yacht club membership, and construction costs of his home, without reporting those amounts as member's draw, as income, or as a loan; and manipulated the company's financial records to under-report and evade thousands of dollars in gross receipts and income taxes. This behavior abused the LLC's form and failed to observe formalities, all justifying piercing the veil. *Id.* at 17-21.

The Hoffmans add that Rivera used Hammerhead to facilitate fraud and as part of a conspiracy to defraud them and their Trust, subjecting their property to an overstated lien and attempting to obtain money under fraudulent circumstances such as by misrepresenting amounts of sub-contractor invoices. *Id*. at 21. They contend that commingled assets and use of company funds for personal expenses, as seen on the General Ledger, constitute the improper siphoning of funds from the company to the dominant member and present a textbook case for piercing the company veil. *Id.* at 22-23. The Hoffmans argue that "Rivera concedes" the

information contained in the 2017-2019 annual reports was misleading. *Id*. at 23. They also charge that Rivera and Firestone kept multiple sets of books to avoid paying gross receipts and income taxes, violated multiple provisions of the Virgin Islands Code and treated the company checking accounts as their personal accounts. *Id*. at 23-25.

In response, Hammerhead asserts that no undisputed factual basis exists to pierce the corporate veil. Dkt. No. 130 at 15. When determining whether a shareholder has exercised sufficient domination and control over a corporation to justify treating it and the shareholder as a single entity, courts in the Virgin Islands consider a nonexclusive list of eight factors, keeping in mind that the corporate form should not be disregarded lightly. *Id*. at 16, citing *Donastorg v. Daily News Pub'g Co.,* 63 V.I. 196, 331-33, 2015 WL 5399263, at *66-68 (V.I. Super. 2015)). It points out the distinctions between LLCs and corporations, where LLCs do not have shareholders or stockholders, have limited company formalities, and do not need to keep corporate records. It applied the eight factors set out in *Donastorg* and argued that no undisputed factual evidence supports any of them. *Id*. at 17-18.

A. Legal Standard

The legal standard for piercing the corporate veil in the Virgin Islands was set out in *Cesar Castillo, Inc. v. Healthcare Enters., LLC,* No. 12-cv-108, 2016 WL 5660437 (D.V.I. Sept. 27, 2016):

> [A] plaintiff generally cannot sue the owners of a corporation based on the acts of the corporation unless "it can be shown that 'the shareholder or officer is doing business in his or her individual capacity without regard to corporate formality,' that is, whether it is appropriate to 'pierce the corporate veil.'" *Matheson v. Virgin Islands Community Bank, Corp.*, 297 F. Supp. 2d 819, 833 (D.V.I. 2003) (quoting *Strojmaterialintorg v. Russian Am. Commercial Corp.*, 815 F. Supp. 103, 105 (E.D.N.Y.

> 1993)). "Piercing the corporate veil is 'an equitable remedy whereby a court disregards the existence of the corporation to make the corporation's individual principals and their personal assets liable for the debts of the corporation.'" *Id.* (quoting *Trustees of Nat. Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 192 (3d Cir. 2003)).
>
> In the Virgin Islands, piercing the corporate veil is appropriate only "where the shareholder has exercised such domination and control over the corporation that the corporation has become an alter ego of the shareholder, *and* where the shareholder has utilized the corporate form to perpetuate the fraud or injustice at issue in the litigation." *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 333 (Super. Ct. 2015). When determining whether there has been "sufficient domination and control over the corporation to justify treating the corporation and the shareholder as a single entity," courts in the Virgin Islands examine the following nonexclusive list of factors: (1) whether the corporation suffers from gross undercapitalization; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of debtor corporation; (5) siphoning of funds from the debtor corporation to the dominant stockholder; (6) nonfunctioning of officers; (7) absence of corporate records; and (8) whether the corporation is merely a facade for the operation of the dominant stockholder. *Id.* at 331-33. However, "[t]he corporate form should not be disregarded lightly." *Id.* at 333. "The Virgin Islands, as in other jurisdictions, will respect corporate separateness unless presented with a compelling reason to disregard such a well-entrenched concept." *Id.* at 334.

Id. at *3 (citation modified); *see Donastorg*, 63 V.I. at 333-34, 2015 WL 5399263 at *68 ("The corporate form should not be disregarded lightly, especially because doing so threatens a company's ability to conduct business in this Territory.") (citation modified).

"Much like the issue of intent, the question of whether to pierce the corporate veil is typically inappropriate for resolution at summary judgment." *Balanced Bridge Funding, LLC v. Mitnick L. Off., LLC*, No. 21-cv-20512, 2024 WL 3949334, at *9 (D.N.J. Aug. 27, 2024), citing *The Mall at IV Grp. Props., LLC v. Roberts*, No. 02–04692, 2005 WL 3338369, at *10 (D.N.J. Dec. 8, 2005) ("[I]t is recognized that the determination of whether there are sufficient grounds for piercing the corporate veil ordinarily should not be disposed of by summary judgment, in view

of the complex economic questions often involved, especially if fraud is alleged.") (quoting 1 William Meade Fletcher *et al., Fletcher Cyclopedia of the Law of Corporations* § 41.95)).

B. Application

The Hoffmans' memorandum generally referred to two elements a party is required to establish to pierce a corporate veil: (1) that the LLC is "organized and operated as to make it a mere instrumentality of its individual member," and (2) that "adherence to the fiction of separate corporate existence would sanction a fraud or injustice." Dkt. No. 86 at 17. However, they addressed only one of the eight nonexclusive factors that Virgin Islands courts examine to assess that first element—Rivera allegedly siphoning off funds from the corporation---apparently to show that this factor, in and of itself, was sufficient to satisfy the first element of piercing the corporate veil.

In so arguing, the Hoffmans rely on the expert report of Roy Jackson, tasked with determining whether Rivera "siphoned off substantial sums of money from the company's accounts and treated the company checking accounts like his own paying personal expenses from the business account." Dkt. No. 100-8 at 1. Mr. Jackson reviewed "well over 1000 pages of financial records and tax documents" produced by Rivera. *Id.* He found, inter alia, approximately $121,000 in transfers from Hammerhead to a Rivera/Firestone joint checking account that had not been deposited back into Hammerhead's account despite Firestone asserting that they used the joint checking account as a conduit so that transfers out of Hammerhead's accounts were redeposited. *Id*. at 2. Mr. Jackson pointed to payments for a boat purchase that appeared to be "improperly accounted as business expenses and improperly

used to reduce income," and Hammerhead's work on Rivera's/Firestone's home, where it appeared that Rivera did not report amounts expended as income or owner's draw but improperly deducted those amounts from Hammerhead's taxable income. *Id*. Mr. Jackson concluded that Rivera "siphon[ed] off of significant amounts for his personal benefit without declaring those amounts as income." *Id.* at 3.

Hammerhead, on the other hand, addressed the eight factors and provided sufficient evidence to warrant denial of summary judgment on this remedy. Dkt. No. 86 at 17-18. In his Affidavit, Rivera averred that, per its Articles of Organization filed with the V.I. Lieutenant Governor's Office, Hammerhead is a member-managed LLC that may act directly through its members—himself. Dkt. No. 129-1 ¶¶ 3, 4. It has operated as a for-profit construction company (limited liability company) since 2009 and was formed with a $1,000 capital contribution; at no time has it suffered from "gross undercapitalization." *Id*. ¶ 6. It has maintained enough income to meet its expense obligations; it has filed annual reports every year; and when it changed its resident agent and principal place of business, it filed required forms with the Lt. Governor's Office. *Id.* ¶¶ 7-9. Further, it has annually applied for a business license with the Virgin Islands Government and maintains private general liability insurance and worker's compensation insurance. *Id.* ¶¶ 10, 11. It pays Rivera an annual salary as its sole member and pays a profit distribution at the end of the fiscal year when there are realized profits. *Id.* ¶ 12. It has never been insolvent and has maintained a business account that has always had sufficient cash on hand to pay debts as they become due. *Id.* ¶ 13. Although it is not required to maintain corporate records (such as by laws, share certificates, minutes of meetings), it

maintains its company records to include articles of organization, an operating agreement, tax returns, insurance, annual reports, and QuickBooks accounting records.[11] *Id*. ¶¶ 18, 19.

Rivera denied siphoning off funds. *Id.* ¶ 14. *See In re Autobacs Strauss, Inc.*, 473 B.R. 525, 557 (D. Del. 2012) (siphoning is "the improper taking of funds that the owner was not legally entitled to receive.") (citation modified). He explained that, as money was taken out of Hammerhead "the transaction would be recorded, as either a reimbursement, business expense, or an owner's draw," and the transactions would be provided to Hammerhead's Certified Public Accountant "who would review them and reconcile the company's balance sheets and transaction ledgers." *Id.* ¶ 15. If items had been mistakenly booked as "business expenses," the CPA would "recategorize them as 'owner's draws' and adjust her working balance sheet accordingly." *Id.* ¶ 16. The CPA made the ultimate determination of how items would be categorized prior to preparing the tax ledger and tax returns she submitted to the V.I. Bureau of Internal Revenue. *Id*. ¶¶ 48, 49, 63. Rivera added that he did not operate Hammerhead as a façade for his personal expenses but hired professionals (lawyers, engineers, accountants) to insure that the company was "operating correctly and independent from myself." *Id*. ¶ 20. He maintained a separate banking and financial existence from Hammerhead, with the only crossover being reimbursements and owner's draws that he was authorized to

[11] With regard to LLCs, "informality of organization and operation is both common and desired," *Mark IV Transp. & Logistics, Inc.*, 2014 WL 7073088, at *6, given that an LLC does not necessarily have a board, which must be taken into consideration in terms of an alleged failure to follow corporate formalities. *See* 13 V.I.C. § 1303 ("[t]he failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.").

take as the managing member. *Id*. ¶ 21. He asserted that there never were "multiple sets of general ledger reporting, given that Quickbooks allows reports to be printed based on whether it's a cash or accrual-based accounting." *Id*. ¶ 76. He also averred that the majority of work on his residence was completed prior to 2017 and a construction loan paid for that work. *Id*. ¶ 69.

The Court concludes that, even if addressing only one of the eight factors is sufficient for the Hoffmans to meet the first element for piercing the corporate veil, Hammerhead has provided evidence to raise a genuine question of material fact as to whether Hammerhead was organized and operated as to make it a mere instrumentality of Rivera, and whether he "siphoned off funds" from the LLC.[12] The fact that the financial transactions were reviewed by a certified public accountant who reconciled the company's balance sheets and transaction ledgers and exercised professional judgment in making the ultimate determination how transactions would be characterized supports Hammerhead's position that Rivera was not siphoning off funds. The factual dispute hinges in large part on the weight to be assigned to the testimony of Rivera, Hammerhead's CPA, and the Hoffmans' expert. These questions can be resolved by only a jury, and the Court need not reach the second element of the test. *Cesar Castillo,* 2016 WL 5660437 at *3; *Craig v. Lake Asbestos of Qc*., 843 F.2d 145, 151 n.3 (3d Cir.

[12] The Hoffmans have not alleged that Rivera siphoned off Hammerhead assets when the company was in financial distress, which some courts have found to be sufficient to pierce the corporate veil. *See United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981) (piercing corporate veil justified where sole stockholder "loaned large sums to the corporation and then repaid the loans to himself with corporate funds while the corporation was failing"). Even so, allegations demonstrating misuse of corporate funds that ultimately resulted in a company's inability to sustain its business operations frequently occur within the corporate realm, and, with nothing more, cannot constitute the specific, unusual circumstances required to pierce the veil. *Linus Holding Corp. v. Mark Line Indus., LLC*, 376 F. Supp. 3d 417, 429 (D.N.J. 2019) (citation modified).

1988). Accordingly, the Court recommends denial of the Hoffmans' motion for partial summary judgment on this remedy—a result that comports with case law holding that the question of whether to pierce the corporate veil is typically inappropriate for resolution at summary judgment**,** *N.J. Dep't of Env't Prot.,* 800 F. Supp. at 1220.

CONCLUSION

Accordingly, for the reasons set forth above, it is hereby **RECOMMENDED** that the Hoffmans' Motion for Summary Judgment, Dkt. No. 85, be **DENIED**. It is further **RECOMMENDED** that the Motion for Partial Summary Judgment on Counts I, II, and V of the Second Amended Counterclaim, and to Pierce the Corporate Veil, Dkt. No. 85, be **DENIED.**

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection." LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

ENTER:

Dated: February 23, 2026

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE