DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LEOPOLD WILLIAMS as personal representation of the ESTATE OF ELTON WILLIAMS, **Plaintiff,** **v.** **COST-U-LESS, INC.,** **Defendant.**	**1:11-cv-00025-WAL-EAH**

TO: **Lee J. Rohn, Esq.**
For Plaintiff
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For Defendant

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on an Order referring the Motion to Dismiss Plaintiff's Third Amended Complaint, filed by Defendant Cost-U-Less, Inc., Dkt. No. 175, to the undersigned for a Report and Recommendation ("R&R"). Dkt. No. 186. In response to the Defendant's Motion to Dismiss, the Plaintiff, Leopold Williams, as personal representative of the Estate of Elton Williams, filed an Opposition, Dkt. No. 180, and the Defendant filed a Reply, Dkt. No. 182. For the reasons stated below, this Court recommends that the Motion to Dismiss be granted and the Third Amended Complaint be dismissed.

BACKGROUND

I. The Complaints

In March 2011, then-Plaintiff Elton Williams filed a Complaint against Cost-U-Less and its Store Manager, Scott Ramsey, alleging claims for false imprisonment; malicious

prosecution/abuse of process; defamation; violation of the Virgin Islands Minimum Wage Law; intentional infliction of emotional distress; fraud; and breach of the duty of good faith and fair dealing. Dkt. No. 1. In January 2012, Williams filed an Amended Complaint. Dkt. No. 31. The Defendants moved to dismiss for lack of subject matter jurisdiction, contending that diversity jurisdiction did not exist because Ramsey and Williams were both citizens of the Virgin Islands. Dkt. Nos. 43, 44. Following jurisdictional discovery, Williams moved to dismiss Ramsey, which the District Judge granted in February 2013. Dkt. Nos. 85, 86.

Also in February 2013, Cost-U-Less filed a Suggestion of Death of Plaintiff Elton Williams. Dkt. No. 91. In May 2013, Williams's counsel filed a Notice that Leopold Williams had been appointed as the personal representative for the Estate of Elton Williams, Dkt. No. 107. The Court granted counsel's motion for leave to amend the complaint to substitute Leopold Williams, as personal representative, as Plaintiff. Dkt. No. 118. The Second Amended Complaint was filed in June 2013. Dkt. No. 124. Cost-U-Less filed a Motion to Dismiss for Failure to State a Claim, Dkt. No. 130, which Plaintiff opposed, Dkt. No. 149.

After additional discovery and motion practice, Plaintiff filed a Motion to Amend the Second Amended Complaint, Dkt. No. 143, which the Magistrate Judge denied. Dkt. No. 159, and Plaintiff filed a Notice of Objection, Dkt. No. 161. In July 2014, the District Judge affirmed the Magistrate Judge's Order in part and reversed in part, Dkt. Nos. 168, 169, and eventually permitted Plaintiff to file a Third Amended Complaint ("TAC"), Dkt. No. 173, which was filed in September 2014—the operative complaint in the instant motion to dismiss. Dkt. No. 174.

The TAC alleged as follows. Elton Williams was a Cost-U-Less employee, and worked stocking shelves, unloading pallets, driving a forklift, and taking out trash. *Id*. ¶ 4. In November 2006, the store manager (Scott Ramsey), "acting in the scope of his employment," "had the store's surveillance videotapes edited and compiled by Cost-U-Less' Perishables Specialist, Mike Benson, to depict what Ramsey falsely claimed was Plaintiff stealing a 32-inch LCD Norent television and a Sony DVD home theater system from Defendant's premises on November 21, 2006." *Id*. ¶¶ 5, 6. Ramsey told Benson and Assistant Manager Mekus Samuels that Plaintiff was a thief and he had evidence to prove it. *Id*. ¶ 6. On January 8, 2007, Ramsey called Plaintiff into his office and "falsely" told him and Samuels that the FBI had viewed a videotape of Williams stealing a television, demanded that he return the electronics, and told him he would "drop the matter" if he brought the items back. *Id.* ¶ 8. Plaintiff, angry at being falsely accused, demanded to see the videotape, but Ramsey refused. *Id*. ¶¶ 10, 11. Williams laughed at the accusation, telling Ramsey and Samuels they were "f'-in funny" to accuse him of being a thief; "in retaliation," Ramsey told him that "since he was not cooperating about the television he was fired." *Id*. ¶¶ 12-14. Williams took off his badge and asked for his last paycheck; Ramsey refused, "falsely claiming that the FBI told him to hold it as collateral." Williams returned to the store three times but was denied his wages and never received them. *Id*. ¶ 15.

Because Ramsey was angry that Williams refused to cooperate with the false accusations, he falsely reported to the police on January 10, 2007 that Williams had been caught on surveillance cameras stealing the TV and home theatre system. *Id*. ¶ 16. The V.I.

Attorney General issued charges against Williams, including grand larceny and possession of stolen property, on November 14, 2008. *Id*. Williams was arrested on November 22, 2008, incarcerated for twelve days; his name appeared in the newspaper, and he was released on bail. *Id*. ¶¶ 17, 18. As a result of his wrongful discharge, he was out of work for a period of time, and as a result of his arrest, he lost his employment at Office Max. He also was evicted from his apartment. *Id*. ¶¶ 19-21. Cost-U-Less, through Ramsey, continually harassed Williams, including: stalking him, finding him at Pizza Hut on December 12, 2008, glaring at him, invading his personal space, approaching his vehicle and looking at him with a "screwed face." Ramsey also stated publicly in court on April 14, 2009 that Williams was a thief. When Ramsey saw Williams at the probation office, he blocked his entrance, glared at him, threatened him, and used menacing body language. *Id*. ¶ 22.

It was not until April 14, 2009 that Williams's public defender obtained the video discs and reviewed them. "[I]t was verified that Cost-U-Less Inc. had falsely claimed Plaintiff was seen stealing when. . . they showed no such thing." *Id*. ¶¶ 23, 24. Defendant through its current store manager, Samuels, "has admitted that there is no such evidence captured on videotape." Benson also agreed "there is nothing showing Plaintiff putting a TV into a box and taking it out of the store." *Id.* ¶ 25. The charges were dismissed without prejudice on January 4, 2010. *Id.* ¶ 26. Williams suffered physical and psychological injuries as a result of Defendant's actions, loss of income, loss of capacity to earn income, and pain and suffering, continuing into the foreseeable future. *Id.* ¶ 28. He alleged the following causes of action: malicious prosecution and/or abuse of process (Count I); defamation (Count II); violation of

the V.I. Fair Labor Standards Act ("VIFLSA") (Count III); intentional infliction of emotional distress ("IIED") (Count IV); fraud (Count V); and breach of the implied duty of good faith and fair dealing (Count VI). *Id*. at 7-8.

II. Motion to Dismiss; Opposition; Reply

Cost-U-Less filed a Motion to Dismiss Plaintiff's Third Amended Complaint in October 2014. Dkt. No. 175. It argued that the abuse of process, VIFLSA, intentional infliction of emotional distress, fraud, and breach of the duty of good faith and fair dealing claims were filed after the applicable statute of limitations had run and were time-barred on their face.[1] *Id*. at 3-4. In its reply, it argued that, once Williams identified in his opposition the defamatory statements, the defamation claim was time barred as well. Dkt. No. 182 at 11-12.

With regard to the malicious prosecution cause of action, Williams would have to allege that Cost-U-Less initiated or procured the proceedings without probable cause with a purpose other than bringing an offender to justice, and that the proceedings terminated in his favor. Defendant reporting the alleged theft to the police did not constitute procuring and

[1] Cost-U-Less argued that the statutes of limitations began running when the causes of action accrued and the limitations period had run before Williams filed his complaint: the abuse of process cause of action (two-year statute of limitations) accrued on the November 22, 2008 date of Williams's arrest; the VIFLSA claim (three-year statute of limitations) accrued on January 8, 2007, when Cost-U-Less failed to give him his final paycheck; the IIED claim (two-year statute of limitations) accrued on the date of his arrest, when he learned that Ramsey manufactured a false surveillance tape of him) or on December 12, 2008 (when Ramsey allegedly harassed him); the fraud cause of action (two-year statute of limitations) accrued on the date of his arrest; and the breach of the duty of good faith and fair dealing (two-year statute of limitations) accrued in November 2006 (when Ramsey allegedly compiled the false videotape). Since Williams initiated the suit in March 2011, after the respective statutes of limitations ran, these claims were time-barred. Dkt. No. 174 at 3-5.

Williams did not allege a purpose for initiating the proceedings other than bringing an offender to justice. *Id*. at 6. Given that he was charged with a crime, the Superior Court determined that probable cause existed. *Id*. at 6-7. As to the abuse of process claim, process must be used for a purpose other than that for which it was intended, as a form of extortion. *Id*. at 8. The TAC did not allege that Cost-U-Less initiated or used a civil or criminal process against Williams, or that any legal proceeding was used for a purpose other than for which it was designed. Consequently, he failed to state a claim. *Id.* at 8-9.

Williams also failed to state a defamation claim because an employer cannot be held liable for the tort of a person who intentionally injures an employee when that person is merely a supervisor or manager, and not the alter ego of the corporation and Williams did not allege such facts. *Id*. at 9-10. When Ramsey called him a thief in 2009 in court, the statement was made outside of the work premises more than two years after Williams had been employed at Cost-U-Less. *Id.* at 10-11. Moreover, the TAC failed to identify any defamatory statements made by Cost-U-Less, other than in paragraph 22 where Ramsey called him a thief and made other derogatory comments in April 2009, which did not identify the statements with particularity. *Id*. at 11, 14-15. In addition, statements made in court and statements made to the police were absolutely privileged. *Id.* at 11 & n.5, 15.

The VIFLSA statute, 24 V.I.C. § 17(a), sets a minimum wage rate and penalizes employers who pay less than that rate, and Williams did not allege that Cost-U-Less paid him less than the wage rate he was entitled. *Id*. at 17.

The IIED claim was insufficiently pleaded, as Williams did not allege which actions he considered "outrageous" to support this claim. *Id*. at 17-18. He could not attribute the actions of the Government in detaining him, more than two years after Cost-U-Less reported his criminal activity, to Cost-U-Less. *Id.* at 18-19. Williams also could not attribute Ramsey's actions to Cost-U-Less because he failed to allege any facts showing that Ramsey's purported scheme to manufacture a false surveillance tape to frame Williams for theft was authorized or directed by Cost-U-Less. *Id.* at 19. The assertions in TAC ¶ 22 that Ramsey "harassed, stalked and tormented" Williams in December 2008 were time-barred. Further, if the gravamen of an IIED claim sounded in defamation, an independent action for IIED would not lie. *Id*. at 20. The allegations that Ramsey blocked the probation office entrance, glared and smiled nastily at him, threatened him, and used menacing body language—are not outrageous actions going beyond all possible bounds of decency. *Id.* Finally, only two bases exist to assert an IIED clam against an employer in the Virgin Islands: (1) if the employee is the alter ego of the corporation, possessing sufficient authority to act as the employer itself; and (2) where the employer is made aware of the unlawful conduct of a supervisor and outrageously fails to address it. *Id.* at 20-21. The TAC contained no such allegations. *Id.* at 21.

Williams did not set out the elements of a fraud claim, much less state with particularity under Fed. R. Civ. P. 9(b) the circumstances constituting fraud. *Id*. at 21-22. Sifting through the general allegations, the only "false representation" alleged is the "false report" Ramsey made to the police. *Id.* at 22. But a false representation claim is actionable by *the recipient* of the representation who must show detrimental reliance thereon; Williams

did not allege Defendant made a false representation to him that he relied on to his detriment, or that Cost-U-Less had the intent to deceive him. *Id*. at 22-23.

In order to allege a breach of duty of good faith and fair dealing claim, Williams had to allege a contract between the parties and that the opposing party engaged in fraudulent or deceitful conduct inconsistent with the purpose of the agreement. *Id*. at 23. He failed to allege fraud or misrepresentation, or that a contract existed between the parties, and thus the claim must be dismissed. *Id.*

In his Opposition, Williams argued the TAC set forth sufficient factual allegations to support his claims. Dkt. No. 180. As to the malicious prosecution claim, the issue was whether the Defendant, not the police, prosecutor, or judge, reasonably believed that the person accused acted in a particular manner constituting an offense, that justified initiating a prosecution. *Id*. at 6. Ramsey falsely reported to the police that Williams had stolen the TV and home theatre system, without any proof, as the video did not show he stole anything. The V.I. Attorney General initiated charges in November 2008 based on Cost-U-Less's false statement, and the charges were dismissed in January 2010. Williams alleged that Defendant, through Ramsey, had a malicious intent initiating the proceedings because Ramsey was angry that Williams was not cooperating with his threats and laughed at Ramsey, satisfying all the elements of the claim. *Id.* at 6-7. The issue of whether Defendant initiated the proceeding by reporting the theft from the store was for the jury to decide. *Id*. at 7. The claim was not time barred because the cause of action did not accrue until after the charges were dismissed in January 2010. *Id*. at 8.

As to abuse of process, the TAC alleged that Cost-U-Less falsely reported Williams stole a TV and home theatre system but Ramsey had no basis to tell the police Williams stole those items. *Id.* at 9. The allegations showed that Ramsey, on behalf of Defendant, had an "ulterior motive" in pursuing legal process: he falsely accused Williams so he could terminate him, he was angry that Williams was not cooperating with his threats, and laughed at Ramsey's false accusations. He also used the false claims of theft not to pay Williams for his work. *Id*. at 10. This claim was timely because, although Williams was arrested in November 2008, it was not until April 2009[2] that the charges were dismissed. The discovery rule tolls the statute of limitations until the injured party discovers or should have discovered facts that form the basis of the action; since this involves a factual determination of whether the plaintiff exercised reasonable diligence in discovering the cause of the injury, a jury ordinarily must decide whether the discovery rule applies. *Id*. at 10-11.

Cost-U-Less was vicariously liable for Ramsey's torts: he acted in the scope of his employment as store manager when he told the police that Williams had stolen from the store, and defamed him by telling fellow employees that he had stolen the items. *Id.* at 11, 12. Agency principles also impose liability on employers when employees commit torts outside of the scope of employment. If a jury finds Cost-U-Less was negligent in allowing Ramsey to falsely report that he stole from the store, liability may lie. *Id*. at 12.

[2] This date is erroneous. The TAC indicates the charges were dismissed without prejudice in January 2010. Dkt. No. 174 ¶ 26.

The VIFLSA establishes labor standards, including minimum wages and maximum hours, and an employee's pay is calculated by multiplying the sum of the hours worked by the wage. *Id.* at 13. Williams sought compensation for hours worked which were denied him when he was wrongfully fired. That denial meant that Defendant refused to compensate Plaintiff at the minimum wage for his work done and is liable under the Act. *Id.* at 13-14.

As to the good faith/fair dealing claim, the breach of contractual duty to act in good faith is governed by a six-year statute of limitations for contract claims, not two years. *Id*. at 14. The claim is for breach of the duty to act in good faith that is part of at-will employment agreement, and thus the claim sounds in contract, not in tort. *Id.* at 14-15. The claim is based on Defendant acting deceitfully by editing the surveillance tape to falsely represent that Williams was a thief, falsely accusing him of theft in January 2007, and refusing to allow him to view the videotape. *Id.* at 15. He was also fired for refusing to return items he had never taken and was falsely reported to the police as taken the items, which initiated his false arrest. This claim is well within the six-year statute of limitations. *Id.*

Defendants' actions "amounted to fraud, deceit and misrepresentation" which supports a good faith/fair dealing claim. *Id.* at 15-16. To the extent Williams would have to show detrimental reliance to establish this claim, the matter should be certified to the Supreme Court of the Virgin Islands for such a determination, as the elements of this claim in a civil, employment context remain an unresolved issue of state law. *Id*. at 16-17. Moreover, pleading common law fraud under Rule 9(b) was not required for a good faith/fair dealing claim, as the pleading requirements were not the same. *Id*. at 18.

Nevertheless, Williams alleged fraud with particularity as a separate count, asserting that the Defendant knew that Williams had not stolen anything, knew that the videotape showed nothing, and knew that the FBI had not directed it to withhold Williams's pay. *Id.* at 19. He also alleged fraud in Defendant's knowingly wrongful report to the police that he was shown stealing the items from Cost-U-Less when it knew it was not true. *Id.* Although fraud has a two-year statute of limitations, the period was tolled until April 2009 when Williams was finally able to view the videotape and ascertain Defendant produced a fabricated tape that did not show Williams taking merchandise from the store. *Id.*

As to the defamation claim, publication of a statement that imputes a criminal offense to another constitutes defamation per se, and a Defendant bears the burden of proving truth as a defense. *Id*. at 20-21. The TAC alleged that Defendant falsely labeled Williams a thief, had no privilege to do so, told other employees he was a thief and falsely reported that he was a thief to the police. *Id.* at 21. Communications between supervisory employees of a corporation acting within the scope and course of their employment can constitute a publication. Thus, all of Ramsey's statements claiming that Defendant had a videotape of Plaintiff stealing a television, published to Samuels and Benson and other employes, constitute unlawful publications to third parties, and the claim should not be dismissed. *Id*.

With regard to the IIED claim, courts have found instances of the kind of outrageous conduct necessary to state a claim in cases involving harassment and retaliation. *Id*. at 21-22. The "Second and proposed Third Amended Complaint"[3] describe how Defendant

[3] This is incorrect. The Second Amended Complaint was superseded by the Third Amended

maliciously used the notion of false videotape footage to intimidate Plaintiff, "threaten him with termination into giving a false confession,"[4] wrongfully terminating him, publicly accusing him of being a thief, and initiating legal process against him causing his arrest, incarceration, loss of employment and loss of his apartment. *Id*. at 22. Defendant also denied him his paycheck with a deceitful statement that the FBI told them to hold it as collateral, refused to show him the videotape, and caused him to be arrested. Defendant's actions were outrageous, willful, wanton, and malicious. Williams suffered embarrassment, anxiety, humiliation, economic damages and chronic nightmares, and stated a claim. *Id*. at 22-23.

In its Reply, the Defendant reiterates and expands upon the arguments made in its opening brief. Dkt. No. 182. As to the malicious prosecution claim, there was no allegation that Cost-U-Less provided information that it knew was false to the police or initiated proceedings for a purpose other than bringing an offender to justice; the complaint cites Ramsey as being angry with Williams's behavior as prompting proceedings to be initiated. *Id*. at 3-4. The proceedings did not terminate in Plaintiff's favor. *Id*. at 5-6. The abuse of process claim was time-barred because Williams would have known at the time of his arrest that he was innocent of the crime and thus the discovery rule did not apply. *Id.* at 7-8. He did not state a claim because abuse of process concerns improper use of process after it is issued, not the initiation of process. *Id*. at 9-10.

Complaint and is no longer the operative pleading.

[4] It is unclear what Plaintiff is referring to. The TAC does not mention a false confession.

Williams identified the statements underlying his defamation claim for the first time in his opposition: Defendant falsely labeled him a thief, told employees he was a thief, and falsely reported he was a thief to the police. *Id*. at 11. These statements by Ramsey among supervisory employees were time-barred and were conditionally privileged. *Id.* at 12. The TAC did not allege that Defendant's liability was premised on vicarious liability or include allegations supporting such a theory, or that Ramsey was Defendant's alter ego, which is fatal to the claim. *Id*. at 12-13. Williams did not oppose Defendant's argument that the VIFLSA claim was untimely and it was time-barred under the statute of limitations. *Id.* at 14. He also did not counter Defendant's argument that the IIED claim was time-barred. In addition, the allegations did not rise to the level required for such a claim. *Id*. at 15.

As to the fraud claim, Williams did not address any false representation made to him, and asserted no detrimental reliance or intent to deceive by Cost-U-Less. The claim does not satisfy the particularity requirement and is time-barred. *Id.* at 16-17. The good faith/fair dealing claim was also time-barred because Williams conceded that the claim was based on a tort, rather than a contract theory, and cited no contract language from which any implied duty would arise or even that a contract existed between the parties. *Id*. at 17-19.

DISCUSSION

I. Standard of Review

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a plaintiff must plead

> sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is facially plausible when a plaintiff pleads factual content that

> allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A plaintiff's allegations must be enough to raise a right to relief above the speculative level; something more than a mere *possibility* of a claim must be alleged. The complaint must set forth direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.

Hartley v. Urban Outfitters, Inc., No. 23-cv-4891, 2024 WL 3445004, at *2 (E.D. Pa. July 17, 2024) (internal quotation marks and footnotes omitted).

II. Claims

A. Preliminary Issue

Ramsey and Cost-U-Less were initially Defendants in this action; however, because Ramsey destroyed diversity jurisdiction, Williams dismissed him from the case. Dkt. Nos. 85, 86. But Williams's allegations in the TAC still focused on Ramsey's behavior. In order to impute liability for Ramsey's behavior to Cost-U-Less, the TAC alleged that Ramsey was "acting in the course and scope of his employment" or "acting on behalf of Cost-U-Less." Dkt. No. 174 ¶¶ 6, 16, 22. Williams argued that under the doctrine of vicarious liability, Cost-U-Less was responsible for Ramsey's intentional torts, citing Rest. 2d Agency § 219(1) and (2) that describe employer liability for employees acting both within and outside the scope of their employment. Dkt. No. 180 at 11-12. He contended that Ramsey's acts, including compiling the false video and speaking to the police, were within the scope of his employment as manager. *Id*. Cost-U-Less responded that the claims were time-barred and did not support vicarious liability (or respondeat superior) because Williams was simply recasting the claims against Ramsey as against the store. Dkt. No. 182 at 12-13. Williams also

did not respond to its argument that he did not allege facts showing that Ramsey was the employer in person or alter ego of Cost-U-Less, which was fatal to that claim. *Id.* at 13-14.

In *Clendinen-Phipps v. Caribbean Leasing & Eco Transp. Inc*, No. ST-17-cv-281, 2019 WL 5099319 (V.I. Super. Ct. Aug. 21, 2019), the Superior Court opined that although the V.I. Supreme Court had not determined the rule for common law respondeat superior (the subset of vicarious liability that applies in employer-employee contexts), an earlier Superior Court case wholly adopted Rest.2d Agency § 219. *Id.* at *3 (citing *Nicholas v. Damian-Rojas*, 62 V.I. 123 (V.I. Super. Ct. 2015)). Section 219(2) sets forth circumstances where an employer is not liable for the torts of its servants acting outside the scope of their employment unless, inter alia, (a) the master [employer] intended the conduct or the consequences, or (b) the master was negligent or reckless, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. Rest. 2d Agency § 219(2)(a), (b), (d). The comment explains that (a) and (b) are categories where "the master is guilty of tortious conduct" and liability premised on (d) is based primarily on conduct within the apparent authority of a servant, as where one purports to speak for his employer in defaming another. Rest.2d Agency § 219 cmt.

Here, the TAC alleged no facts to support a conclusion that Cost-U-Less knew about, much less supported or encouraged Ramsey to doctor the videotape to falsely frame Williams for allegedly stealing items from the store. The circumstances surrounding the allegation that Ramsey doctored the videotape are sparse and provide no reason or motive

for Ramsey going to these lengths (such as, for example, a problematic employment relationship involving Williams, or personality clashes between Ramsey and Williams)—particularly where Williams was admittedly an at will employee. Dkt. No. 180 at 14. The only plausible explanation for this behavior is to draw an inference that Ramsey did not like Williams and independently—without Cost-U-Less's knowledge or approval—concocted an elaborate plot with the intention of getting him in trouble.

As the Superior Court explained in *Schrader-Cooke v. Moorhead*, No. No. SX-16-cv-00655, 2024 WL 2814639 (V.I. Super. Ct. May 30, 2024):

> In determining the scope of employment issue, the Supreme Court of the Virgin Islands has favorably cited the persuasive authority of the Restatement (Third) of Agency, noting that "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Brunn v. Dowdye*, 59 V.I. at 907 (quoting RESTATEMENT (THIRD) OF AGENCY § 7.07(2)).[5]
>
> The comments to Section 7.07 explain:
>
> If an employee's tortious conduct is unrelated either to work assigned by the employer or to a course of conduct that is subject to the employer's control, the conduct is outside the scope of employment. If an employee undertakes a course of work-related conduct for the sole purpose of furthering the employee's interests or those of a third party, the employee's conduct will often lie beyond the employer's effective control.
> * * *
> An independent course of conduct represents a departure from, not an escalation of, conduct involved in performing assigned work or other conduct that an employer permits or controls. When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer. The employee's intention severs the

[5] Rest.3d Agency § 7.07 (2006) concerns employees acting within the scope of employment. This section consolidated numerous topics from Rest. 2d Agency §§ 219, 220, 228-237, 267. § 7.07 Reporter's Notes (a).

> basis for treating the employee's act as that of the employer in the employee's interaction with the third party.

Id. at *5.

The Court concludes that the allegation that Ramsey caused the videotape to be doctored falls outside of the scope of his employment as a Cost-U-Less manager, and was based on personal animus to Williams. The fact that Williams pleaded that Ramsey was "acting in the course and scope of his employment when he ordered that the false videotape be compiled," Dkt. No. 174 ¶ 6, does not alter that conclusion because the phrase "acting in the course and scope of his employment" is a legal conclusion and is not entitled to be assumed true under *Iqbal*, 556 U.S. at 678. *See Miga v. Jamis*, No. 19-cv-00085, 2020 WL 13608037, at *3 (D.V.I. Mar. 11,2020). Thus, the Court will not impute liability to Cost-U-Less for the doctoring behavior, and does not assume that Cost-U-Less knew about it (given there was no such allegation).[6]

B. Malicious Prosecution

In *Palisoc v. Poblete*, No. 2013-cv-0041, 2014 WL 714254 (V.I. Feb. 25, 2014), the Supreme Court of the Virgin Islands adopted the following elements for a malicious prosecution cause of action: "(1) the initiating of or procuring of a criminal proceeding against the plaintiff by the defendant; (2) the absence of probable cause for the proceeding; (3) malicious intent on the part of the defendant; and (4) termination of the proceeding in

[6] For the purposes of this R&R only, the Court will assume that Ramsey was acting in the scope of his employment in reporting Williams's behavior to the police.

favor of the plaintiff. *Id.* at *4 (adopting Restatement (Second) of Torts ("Rest. 2d Torts") § 653 and its commentary analysis as part of the common law of the Virgin Islands).

Williams argues that Ramsey falsely reported to the police that he had stolen items from the store, as the videotapes did not show he stole anything, thereby initiating a criminal proceeding without probable cause. Dkt. No. 180 at 7. The Attorney General issued charges against him in November 2008 based on Cost-U-Less's "false statements," and the charges were dismissed without prejudice in January 2010. He alleged that the Defendant, through Ramsey, had a "malicious intent in initiating the proceedings" because Ramsey was angry Williams did not cooperate with his threats to return the items and was angered when Williams laughed at him. *Id*.

To show that Cost-U-Less initiated or procured the criminal proceeding, Williams must show that Cost-U-Less's "desire to have the criminal proceedings initiated was the determining factor in the government commencing prosecution or that [Cost-U-Less] provided false information to the police." *Palisoc*, 2014 WL 714254, at *5. "Criminal proceedings are initiated by making a charge before a public office or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused." Rest. 2d Torts § 653 cmt. c.

Ramsey reported the theft to the police in January 2007, but charges were issued one year and ten months later, in November 2008. Dkt. No. 174 ¶ 16.[7] The *Palisoc* Court ruled

[7] Because the Court concluded, above, that Cost-U-Less was not liable for Ramsey's actions in causing the videotape to be doctored, and there was no allegation that Cost-U-Less was aware that it was doctored, the Court does not find that Cost-U-Less (through Ramsey)

that "determining factor" meant "something more than active participation or consultation on part of the defendant, such as by urging or insisting that the prosecution be brought." 2014 WL 714254, at *5. In that case, after the defendant reported to the police his suspicion that plaintiff was embezzling, the government acted in its "discretion to investigate and initiate the criminal proceedings," and there was no evidence that the defendant encouraged the police to arrest the plaintiff. *Id*. at *6. The V.I. Supreme Court affirmed the Superior Court's holding that the plaintiff could not show the first element of malicious prosecution and that summary judgment in favor of the defendant was warranted. *Id.* Similarly, here, although Ramsey reported the theft to the police, the allegations indicate that it took the authorities one year and ten months to bring charges, evidencing an independent investigation of the matter, over and beyond Cost-U-Less bringing the situation their attention. *See Greene v. Virgin Islands Water & Power Auth.*, No. SX-13-cv-224, 2016 WL 4257529, at *6 (V.I. Super. Ct. Aug. 11, 2016), *aff'd,* 67 V.I. 727 (2017) (quoting Rest. 2d Torts § 653 cmt. g: "The exercise of the officer's discretion [to] make initiation of the prosecution his own and [sic] protects from liability the person whose information or accusation has led the officer to initiate the proceedings."). Thus, Williams did not satisfy the first malicious prosecution requirement.

The Restatement section associated with malicious prosecution entitled "Existence of Probable Cause" provides:

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provided "false information" to the police in relation to this element of the malicious prosecution claim.

> One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes
> (a) that the person whom he accuses has acted or failed to act in a particular manner, and
> (b) that those acts or omissions constitute the offense that he charges against the accused, and
> (c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution.

Rest. 2d Torts § 662. The TAC provides that Ramsey was angry that Williams refused to cooperate with Ramsey's "false accusations" and because Williams had laughed at him when Ramsey accused him of theft, "act[ed] on behalf of Cost-U-Less [and] falsely reported to the police on January 10, 2007 that Plaintiff had been caught on video surveillance cameras stealing a flat screen TV and DVD home theatre system from Cost-U-Less Inc." Dkt. No. 174 ¶ 16. But the "falsity" of the accusations was based on Ramsey having caused the video to be doctored. As concluded above, the fact the videotape was allegedly doctored cannot be attributed to Cost-U-Less as Ramsey was acting outside of the scope of employment when he did this and there was no allegation that Cost-U-Less was aware of that. As a result, when Cost-U-Less reported the theft to the police, it reasonably believed that Williams had stolen from the store. Thus, it had probable cause for the crime charged.

As to "malicious intent on the part of the Defendant," Virgin Islands courts have not defined what constitutes the requisite malice to state a malicious prosecution claim. However, in *Arellano v. Rich*, No. ST-07-cv-536, 2019 WL 3219689 (V.I. Super. Ct. May 29, 2019), the Superior Court discussed a claim similar to malicious prosecution, but involving civil litigation: wrongful use of civil proceedings, based on Rest. 2d Torts § 674. The elements of the two torts are similar: as to malice, the defendant must have initiated the proceeding

"with malice or for the primary purpose other than securing the adjudication of the claim." *Id.* at *5. The *Arellano* court defined actual malice, in the literal sense—the sense that Williams argues motivated Ramsey to initiate the proceeding (being angry at not cooperating with his threats and when Williams laughed at him)—as "personal animus, hatred, intent to injure, spite, revenge or ill will." *Id.* at *7.

Williams alleged that Ramsey was motivated to speak to the police because Williams "refused to cooperate with his false accusations, and because Plaintiff had laughed at him." Dkt. No. 174 ¶ 16. This encounter does not rise to the level of personal animus, hatred, intent to injure, spite, revenge or ill will to plausibly plead malice. Here, too, while doctoring a videotape could be evidence of malice, Williams does not argue that point in his opposition, and in any event, the Court does not attribute that behavior of Ramsey's to Cost-U-Less. Williams has not alleged the third element of a malicious prosecution claim.

Whether Williams pleaded the fourth element of the claim—that the proceedings terminated in his favor—is a closer question. The TAC alleged only that the charges "were finally dismissed without prejudice against the Plaintiff on January 4, 2010." Dkt. No. 174 ¶ 26. Williams does not discuss the circumstances surrounding the prosecutor's decision to dismiss the charges, which occurred nine months after the public defender reviewed the videotape that "showed nothing at all about a TV or home theatre system being stolen." *Id.* ¶¶ 23, 24, 26. Virgin Islands courts have not opined on what constitutes termination in favor of the defendant for purposes of a malicious prosecution claim. However, Rest. 2d Tort § 653's definition of malicious prosecution provides some guidance. *Palisoc*, 2014 WL 714254,

at *4. Commentary a. incorporates Restatement §§ 658-661 that discuss the termination in favor of the accused element.

Section 658, cmt. c, states that proof of the fact that a person "was innocent of the crime charged against him will not support an action under [Section 653] unless his innocence has been established by the termination of proceedings in his favor." Section 659 provides a list of resolutions of criminal proceedings that equate to being terminated in favor of the accused. They include "the formal abandonment of the proceedings by the public prosecutor," Rest. 2d Torts § 659(c), which is usually effected by entry of a nolle prosequi.[8] *Id*. cmt. c. That did not occur here. The Restatement goes on to discuss "Indecisive Termination of Proceedings," Rest. 2d Torts § 660, which provides: "[a] termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . (d) new proceedings for the same offense have been properly instituted and have not been terminated in favor of the accused." The Comment to clause (d) explains: "In a word, the abandonment of particular proceedings does not constitute a final termination of the case in favor of the accused. Only an abandonment of the charge brought against him will suffice."

Here, there is no allegation that Williams was found innocent of the charges, even given the alleged failure of the video to show that he stole the items. Nor were the charges dismissed with prejudice, meaning that he could not be re-prosecuted on the same charges.

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[8] A *nol pros* signifies termination of charges in favor of the accused "only when their final disposition is such as to indicate the innocence of the accused." *Donohue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002) (citing Rest. 2d Torts. § 660, cmt. a).

Rather, the charges were dismissed "without prejudice," meaning that they could be brought again, which implies that the charges were not dismissed in Williams's favor. *Cf. Arellano*, 2019 WL 3219689, at *7 (noting in case involving the tort of wrongful use of civil proceedings, which requires proceedings to be terminated in favor of the person against whom they have been brought, "courts have generally accepted that dismissals with prejudice are sufficient to meet the favorable termination requirement for purposes of wrongful use of civil proceedings while terminations due to statute of limitations, failure to prosecute, dismissals without prejudice, voluntary dismissals, and settlements in lieu of litigation are generally not considered favorable terminations."). Even if this approach is not taken here, the fact that Williams has not pleaded the first three elements of a malicious prosecution claim serve to undergird the Court's recommendation that Williams did not state a malicious prosecution claim and that it be dismissed.

C. Abuse of Process

Although the Supreme Court of the Virgin Islands has not opined on the topic, the Superior Court has issued opinions where it adopted the elements of this claim as set forth in the Rest. 2d Torts § 682. *See, e.g., Lee J. Rohn & Assocs., LLC v. Griffiths*, No. ST-2018-cv-00314, 2020 WL 8018812, at * 3-4 (V.I. Super. Ct. Dec. 29, 2020) (citing *Kiwi Constr., LLC v. Pono*, No. ST-2013-cv-011, 2016 WL 213037 (V.I. Super. Ct. Jan. 15, 2016).

Abuse of process is defined as follows: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Rest.

2d Torts § 682 (1977). The gravamen of the misconduct is not the wrongful initiation of criminal proceedings, but "the misuse of process, no matter how properly obtained, for any purpose other than what it was designed to accomplish." Rest. 2d Torts § 682 cmt. a. The word "primarily" means that

> there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant . . . The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

Id. cmt. b. To state an abuse of process claim, a plaintiff must show: "(1) that the defendant acted with an improper purpose or ulterior motive, and (2) used the process in a manner that would not be proper in the normal prosecution of a case." *Arellano*, 2019 WL 3219689, at *9. An improper purpose or ulterior motive is demonstrated as "coercion to obtain a collateral advantage that is not properly involved in the proceeding and is used to accomplish an end that is not within the regular purview of the process or compels the opposing party to do some collateral thing that he would not be legally and regularly be required to do." *Id.* Regarding the second element, a plaintiff must demonstrate the process was used "for a purpose other than that for which the process was designed[.]" *Id*. Because the tort may discourage citizens' willingness to bring a civil dispute and resolve their problems in court, it is generally disfavored and is construed narrowly. *Rohn*, 2020 WL 8018812, at *4. A two- year statute of limitations governs this claim. 5 V.I.C. § 31(5)(A).

In his opposition to the motion to dismiss, Williams asserted that Cost-U-Less "falsely reported" Williams as stealing a TV and home theatre from the store, and knew or should

have known the theft was not true. Dkt. No. 180 at 9, citing TAC ¶¶ 16, 25.[9] He argued that the ulterior motive in pursuing legal process was to falsely accuse him so they could terminate him, and Cost-U-Less also pursued legal process because Williams was not "cooperating" with Ramsey's threats and laughed at him for making false accusations. *Id*. at 10. Williams contended that the abuse of process claim was timely because, although he was arrested on November 22, 2008, it was not until April 19, 2009[10] that the charges were dismissed, and he filed suit on March 25, 2011, before the two-year statute of limitations had run. *Id*. He invoked the discovery rule that tolls a statute of limitations, where the injury is not immediately evident to the victim. *Id.* at 11.

Not only has Williams not stated an abuse of process claim, but even if he had, the cause of action would be untimely. His argument focuses on the *initiation* of the legal process, not any subsequent misuse of the process. As Rest. 2d Torts § 682 cmt. a provides, this tort is *not* directed to the "wrongful procurement of legal process or the wrongful initiation of criminal proceedings," but to the use of such proceedings to accomplish an end not within the regular purview of such process. The only "ulterior motive" Williams cited as prompting the abuse of process claim was to terminate him (as well as to punish him for laughing at Ramsey). But he was terminated *before* Ramsey even initiated process; if his termination was the goal, then Ramsey would not have had to initiate the process at all. And if the reason for

[9] Curiously, when citing the allegations in support of this claim, Williams did not cite TAC ¶ 5 which alleged that Ramsey had the store's videotapes edited to depict what Ramsey "falsely claimed" was Williams stealing the items.
[10] *See* n.2, *supra*.

initiating process was because Williams laughed at Ramsey (an implausible rationale) nowhere does Williams allege that that was the reason for *continuing* the process. In fact, almost two years separated the accusation and initiation the of process, and the TAC is devoid of any allegation that the process was continued for any reason other than for the reason it was designed. Consequently, Williams did not state a claim for abuse of process.

But even if he had stated a claim, the cause of action rests on his January 2007 termination and November 2008 arrest, which are outside the two-year statute of limitations. Williams attempts to salvage this time-barred claim by invoking the discovery rule, that the statute of limitations did not begin to run until the "dismissal" of the charges. But dismissal of charges applies to malicious prosecution claims, not abuse of process, which requires termination of the criminal proceeding for the claim to proceed. Rest. 2d § 653.[11] Nevertheless, the discovery rule tolls a statute of limitations when

> despite the exercise of due diligence, the injury or its cause is not immediately evident to the victim. The focus is not on the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff. Furthermore, the statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress[.]

Pegasus Holding Grp. Stables, LLC v. Share, No. ST-2014-cv-0069, 2020 WL 8020083, at *6 (V.I. Super. Aug. 21, 2020). Further, "[t]he plaintiff has the burden of justifying any delay beyond the date on which the limitation would have expired if computed from the date on

[11] Similarly, the TAC is silent as to whether Defendant *pursued* process for an improper purpose: it focuses on its initiation, which is not considered in an abuse of process claim. Rest. 2d Torts § 682 cmt. a.

which the acts giving rise to the cause of action allegedly occurred. He must allege and prove facts which show that he made reasonable efforts to protect his interests and which explain why he was unable to discover the operative facts for his cause of action sooner than he did." *MRL Dev. I, LLC v. Whitecap Inv. Corp*. No. 13-cv-48, 2014 WL 6461583, at *13-14 (D.V.I. Nov. 18, 2014), *aff'd on other grounds*, 823 F.3d 195 (3d Cir. 2016).

Here, however, the alleged falsity of the allegation that Williams stole items from Cost-U-Less, as well as the falsity of the allegations that Cost-U-Less made to the police, was immediately known to him on November 6, 2006 when Ramsey accused him of stealing the items and he became angry at the false accusation. Dkt. No. 174 ¶¶ 8, 10, 12. It was apparent to Williams when he protested the accusation in the encounter with Ramsey that a wrong had been committed, which caused him to be fired, and thus he had knowledge as early as November 2006 that he had been injured. He also knew, at the latest, when he was arrested in November 2008, that legal process had been initiated based on the alleged false accusations. Williams did not allege anything to show that these facts were insufficient for him to understand only when the charges were dropped that he was injured, and thus did not meet his burden for showing that the discovery rule applied. The fact that the charges were dismissed has nothing to do with his abuse of process claim. The Court concludes the discovery rule does not save this claim, and there is no need for a factual determination concerning whether Williams exercised reasonable diligence. The Court recommends that the abuse of process claim be dismissed for failure to state a claim and as time-barred.

D. IIED

Under Virgin Islands law, in order to state an IIED claim, a plaintiff must allege that the defendant "'(1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.'" *Ainger v. Great Am. Assurance Co.*, No. 20-cv-0005, 2022 WL 4379794, at *17 (D.V.I. Sept. 22, 2022) (quoting *Donastorg v. Daily News Publ'g Co.*, 63 V.I. 196, 295 (V.I. Super. Ct. 2015) (citing Restatement (Second) of Torts § 46)[12] (following *Banks*[13] analysis performed in *Joseph v. Sugar Bay Club & Resort Corp.*, No. ST-2013-CV-491, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2014)); *see also* *Williams v. Flat Cay Mgmt., LLC,* No. 3:22-

[12] Under Rest. 2d Torts § 46,

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress,
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm.

[13] In *Banks v. Int'l Rental & Leasing Corp.*, No. 2011-cv-0037, 2011 WL 6299025 (V.I. Dec. 15, 2011), the Supreme Court of the Virgin Islands held that when precedent is lacking on a common law rule, courts in the Virgin Islands must conduct what has become known as a "*Banks* analysis" to determine the applicable law in the Virgin Islands. A *Banks* analysis requires the balancing of three non-dispositive factors: (1) whether any U.S. Virgin Islands courts have previously adopted a particular rule, (2) the position taken by a majority of courts from other jurisdictions, and (3) which approach represents the soundest rule for the U.S. Virgin Islands. *See, e.g.*, *Halliday v. Great Lakes Ins. SE*, No. 3:18-CV-00072, 2019 WL 3500913, at *5-14 (D.V.I. Aug. 1, 2019).

cv-0002, 2023 WL 2563193, at *10 (D.V.I. Mar. 17, 2023). When there is no physical injury, "the conduct is expected to be sufficiently extreme and outrageous to guarantee that the claim is genuine," and whether the conduct is "so extreme as to permit recovery is initially a question of law for the Court." *Kirkland v. Feddersen*, No. ST-21-cv-051, ST-23-cv-050, 2023 WL 3727501, at * 6 (V.I. Super. Ct. May 18, 2023) (footnotes omitted). The statute of limitations for IIED claims is two years. *Pickering v. Arcos Dorados Puerto Rico, Inc.*, No. 14-cv-0092, 2016 WL 1271024, at *6 (D.V.I. Mar. 30, 2016) (citing 5 V.I.C. § 31(5)(A)).

Williams argues that he has stated an IIED claim because his "Second and proposed Third Amended Complaint" describe how the Defendant maliciously "used the notion of a false videotape footage to intimidate Plaintiff, threaten him with termination into giving a false confession, and wrongfully terminated him."[14] Dkt. No. 180 at 22. Further, the Defendant "falsely accused him publicly of being a thief, initiated legal process against him, which caused his arrest, incarceration, loss of employment and his apartment," denied him his paycheck, refused to show him the videotape and shouted at him to bring the television back. *Id.* Williams does not provide dates for these events; he merely cites to his Third Amended Complaint at paragraphs 8-21. *Id.* The creation of false videotape footage, being threatened with termination and being wrongfully terminated, having legal process initiated against him, and being denied his paycheck, even if they could suffice to state an IIED claim, (which they could not) are all time barred, as they occurred in 2007 and 2008 and the

[14] *See* nn. 3 and 4, *supra*.

complaint was filed in March 2011, well beyond the two-year IIED statute of limitations. Thus, these time-barred events cannot serve as predicates for his IIED claim.

The only non-time-barred action Williams cites as supporting this claim occurred in April 2009 when Ramsey went to court and publicly stated that Williams was a thief. Dkt. No. 174 ¶ 22(c). The circumstances here are vague: the court wis not identified, the proceeding was not identified, and the circumstances in which the statement was allegedly made were not explained. A reasonable and plausible assumption would be that Ramsey was not making such statements in the corridor of a court building to anyone who was listening but rather in the context of a legal proceeding involving the prosecution of Williams on the two charges. This assumption is supported by the fact that the TAC alleged that, on April 19, 2009—the same day that Ramsey made these statements—the public defender obtained and reviewed the videotape, which could indicate that a court proceeding took place. *Id.* ¶ 23. This public statement by Ramsey does not show Cost-U-Less's intent to cause Williams emotional distress; if it was made during a court proceeding, it was likely testimony to support Williams's prosecution. The substance of the statement is not so outrageous that it stretched beyond all possible bounds of decency. As a matter of law, the Court concludes that this statement does not constitute the kind of extreme and outrageous conduct that would support an IIED claim, and recommends that the IIED claim be dismissed as time barred and for failure to state a claim.[15]

[15] Moreover, in *Illaraza v. HOVENSA LLC*, 73 F. Supp. 3d 588, 614 (D.V.I. 2014), the District of the Virgin Islands reiterated that "an independent intentional infliction of emotional distress cause of action cannot lie where 'the gravamen of the complaint sounds in defamation.'"

E. Defamation

The Supreme Court of the Virgin Islands "has adopted the basic elements for a claim of defamation set forth in the Second Restatement of Torts." *Joseph v. Daily News Publishing Co.*, No. 09-cv-0015, 2012 WL 5419155 at *6 (V.I. Oct. 31, 2012) (citing *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011)). To prevail on a claim of defamation under Virgin Islands law, a plaintiff must show: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Chapman v. Cornwall*, No. 12-cv-0032, 2013 WL 2145092, at *6 (V.I. May 15, 2013) (quoting *Kendall*, 55 V.I. at 787). The plaintiff must also specifically identify "what alleged defamatory statements were made, including who made them, and to whom the statements were made." *Bethea v. Merchants Commercial Bank*, No. 11-cv-0051, 2014 WL 4413045, at *19 (D.V.I. Sept. 8, 2014) (citing *Smith v. V.I. Port Authority*, No. 02-cv-227, 2010 WL 1381222 at *16 (D.V.I. Mar. 31, 2010)).

A statement is defamatory only "if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Greene v. V.I. Water and Power Auth.*, 2011 WL 3032466, at *10 (D.V.I. July 22, 2011) (quoting Rest. 2d Torts § 559); *see also Joseph*, 57 V.I. at 586. "A disparaging remark that tends to harm someone in his business or profession is actionable irrespective of harm

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(quoting *Ali v. Intertek Testing Servs. Caleb Brett,* 332 F.Supp.2d 827, 831 (D.V.I. 2004), as the remaining part of the claim does here.

as such a remark falls within the definition of slander or defamation per se." *Illaraza v. Hovensa, LLC*, No. 07-cv-0125, 08-cv-0059, 2010 WL 3069482, at *4 (D.V.I. July 30, 2010) (citing *VECC, Inc. v. Bank of Nova Scotia*, 296 F. Supp. 2d 617, 623 (D.V.I. 2003)). Statements that are deemed to harm an individual's business or professional reputation either "impugn the integrity of the individual with respect to their job performance" or "attack the competence or skill of the employee in carrying out his or her duties." *Wilson v. V.I. Water & Power Auth.*, No. 07-cv-0024, 2010 WL 5088138 * 6 (D.V.I. Dec. 7, 2010) (citing *VECC, Inc.*, 296 F. Supp. 2d at 623).

Defamation claims are governed by a two-year statute of limitations. 5 V.I.C. § 31(5); *Fahie v. Ferguson*, No. ST-2016-CV-00638, ST-2016-CV-00682, 2021 WL 7279012, at * 6 (V.I. Super. Ct. Mar. 29, 2021). The Virgin Islands "has adopted the discovery rule, which tolls the statute of limitations until the injury is discovered by plaintiff unless the injury was known or, through regular due diligence, knowable to the plaintiff." *Id.*

The TAC did not identify which statement(s) Williams considered defamatory. *See* Dkt. No. 174 at ¶¶ 33, 34 (adopting by reference every allegation in paragraphs 1 through 32 and stating "[t]he actions of Defendant constitute defamation per se."). Without any guidance, the Defendant asserted that the only allegation made by Williams that related to this count was contained in ¶ 22(c) of the TAC. Dkt. No. 175 at 11. That paragraph referred to Ramsey harassing Williams on April 14, 2009 by "going to Court and stating publicly that the Plaintiff was a thief and voicing other derogatory statements to the public present." Dkt. No. 174 ¶ 22(c). But in his opposition to the motion to dismiss, Williams did not argue that

the statement referred to in paragraph 22(c) was defamatory, Dkt. No. 180 at 19-21. He thereby waived any such argument. *See Sportscare of Am. P.C. v. Multiplan, Inc.*, No. 10-cv-4414, 2011 WL 589955, at *1 (D.N.J. Feb. 10, 2011) ("failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue") (citing, inter alia, *Conroy v. Leone*, 316 F. App'x 10, 144 n.5 (3d Cir. 2009)). Rather, Williams identified the allegedly defamatory statements as "Defendant" telling other employees he was a thief, having no privilege to do so, and falsely reporting he was a thief to the police. Dkt. No. 180 at 21, citing Dkt. No. 174 ¶¶ 6, 16.[16]

Assessing the second alleged defamatory statement first—the January 10, 2007 false report to the police—Virgin Islands case law is unequivocal that such statements are absolutely privileged and cannot serve as the basis for a defamation claim.

> The Virgin Islands recognizes an absolute privilege for statements made to law enforcement personnel for the purpose of reporting a crime or initiating a criminal investigation and Courts of the Virgin Islands have consistently and repeatedly held that: A party cannot be subjected to defamation liability for reporting to the police his belief that a crime has been committed even if this belief is unfounded or later turns out to be erroneous. Similarly, the Court finds here that Hatchett's alleged communication to the police that Plaintiff Williams had committed a crime, even if the alleged statement could be determined to be defamatory, is subject to the absolute privilege provided by RESTATEMENT (SECOND) OF TORTS § 587. Thus, the Court concludes that Plaintiffs fail to state a plausible claim for defamation or defamation *per se* and will dismiss these claims altogether.

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[16] Paragraph 6 alleged that Ramsey, acting in the course and scope of his employment, ordered the false videotape be compiled, and told Mike Benson (Cost-U-Less Perishables Specialist) and Mekus Samuels "amongst others" that Williams was a thief and he had evidence to prove it. Dkt. No. 174 ¶ 6. This statement was made in November 2006. *Id.* ¶ 7. Paragraph 16 alleged that Ramsey falsely reported to the police on January 10, 2007 that Williams had been caught on video surveillance cameras stealing a flat screen TV and DVD home theatre from Cost-U-Less. *Id.* ¶ 16.

Flat Cay Mgmt., LLC, 2023 WL 2563193, at *14 (internal quotation marks and footnotes omitted); *see also Sprauve v. CBI Acquisitions, LLC*, No. 09-cv-0165, 2010 WL 3463308, at *11 (D.V.I. Aug. 31, 2010).

With regard to the November 2006 statement allegedly made by Ramsey to Benson and Samuels, although Cost-U-Less did not argue in its opening brief that such a statement was time-barred—because the TAC did not specify which statement(s) Williams considered defamatory—once Williams identified that statement in his opposition, Cost-U-Less argued in its reply that, on the face of the complaint, it was time-barred. Dkt. No. 182 at 12.

Case law allows the Court to raise a statute of limitations time bar sua sponte when dealing with a motion pursuant to Fed. R. Civ. P. 12(b)(6)—either dismissing an entire complaint, a claim or claims. *See Guzman v. City of Newark*, No. 20-cv-6276, 2023 WL 373025, at *3 (D.N.J. Jan. 23, 2023) (sua sponte dismissing false arrest and false imprisonment claims as time barred, and quoting *Bartley v. New Jersey*, 2022 U.S. App. LEXIS 13668, at *2 n.2 (3 Cir. May 20, 2022): "A district court may *sua sponte* dismiss a complaint on statute of limitations grounds where the time-bar is clear on the face of the complaint and no development of the factual record is required."); *see also Hatchigian v. Carrier Corp.*, No. 20-CV-4110, 2021 WL 765769, at *6 (E.D. Pa. Feb. 26, 2021) (dismissing claim sua sponte because it was clear on the face of the complaint that it was time barred); *N'Jai v. Floyd*, No. 07-cv-1506, 2009 WL 4823839, at *21 (W.D. Pa. Dec. 9, 2009), *aff'd,* 386 F. App'x 141 (3d Cir. 2010) (noting defendants had not moved for dismissal of a claim and quoting *Webb v. Warner Middle Sch.*, No. 09-3209, 340 F. App'x 677, 679 (3d Cir. Oct. 9, 2009) (per curiam) that when

a statute of limitations defense was obvious from the face of the claim, a district court could sua sponte dismiss the claim); *Nase v. Bucks Cnty. Hous. Auth.*, No. 16-cv-02417, 2016 WL 5390648, at *4 (E.D. Pa. Sept. 27, 2016) (same); *James v. Turnbull*, No. 2001-112, 2001 WL 1112157, at *1 (D.V.I. Sept. 18, 2001).

The statements Ramsey made in November 2006 to Samuels and Benson that Williams was a thief and he had evidence to show it are time barred by the two-year statute of limitations for defamation claims. This is clear from the face of the complaint. Williams filed his lawsuit in March 2011, long after the two-year statute of limitations for this statement had run. And even if the January 2007 statements to the police were not absolutely privileged, they would be time-barred as well. As a result, the Court recommends dismissal of the defamation claim for both failure to state a claim and as time-barred.

F. V.I. Fair Labor Standards Act

The VIFLSA provides, in pertinent part, that every employer shall pay to each of its employees a minimum wage determined by the statute. 24 V.I.C. § 4(a). Employers who fail to abide by the statute's terms may be fined. 24 V.I.C. § 16. Although the Court has found no authority setting forth the appropriate statute of limitations for an alleged VIFLSA violation, it is either three years, under 5 V.I.C. § 31(4)(B), governing actions "upon a statute for penalty or forfeiture, where the action is given to the party aggrieved" or two years, under 5 V.I.C. § 31(5)(B), governing actions "upon a statute for a forfeiture or penalty."

The Court need not determine which statute of limitations governs here because Williams's VIFLSA claim would be time-barred under either provision. He asserts that Cost-

U-Less did not give him his "last paycheck" which he requested on January 8, 2007 when Defendant told him he was fired. Dkt. No. 174 ¶ 15. Although the TAC ambiguously states that he "went back to the store for three pay periods but was denied his wages and has never received them," making it hard to pinpoint when he returned to the store to ask for his final check, he explained in his opposition to the motion to dismiss that he defined "three pay periods" as "three times every two weeks or for six weeks, to see if they would release his check." Dkt. No. 180 at 13. Thus, assuming he even states a claim, his final attempt to retrieve his check would have occurred at some point in February 2007, far outside either the two or three-year statute of limitations for VIFLSA claims, making it time-barred. In addition, Williams did not contest the motion to dismiss this claim, thereby waiving any opposition to its dismissal. *Sportscare of Am. P.C.*, 2011 WL 589955, at *1. The Court therefore recommends dismissal of this claim for failure to state a claim and as time-barred.

G. Fraud

In the Virgin Islands, a claim for fraud is known as fraudulent misrepresentation. *Merchants Com. Bank v. Oceanside Village, Inc.*, No. ST-2011-cv-653, 2015 WL 9855658, at *4 & n.33 (V.I. Super. Ct. Dec. 18, 2015) (performing *Banks* analysis; citing *Isaac v. Crichlow*, No. SX-12-cv-065, 2015 WL 10568556, at *7. n. 8 (V.I. Super. Ct. Feb. 10, 2015)). The Supreme Court of the Virgin Islands has recognized the elements of a fraudulent misrepresentation tort as: "(1) [the defendant] misrepresented a material fact, opinion, intention, or law; (2) that it knew or had reason to believe was false; (3) and was made for the purpose of inducing [the plaintiff] to act or refrain from acting; (4) which [the plaintiff] justifiably relied on; and

(5) which caused [the plaintiff] a pecuniary loss." *Jahleejah Love Peace v. Banco Popular de Puerto Rico*, No. 2019-cv-0057, 2021 WL 4228698, at * 2 (V.I. Sept. 16, 2021).

In addition, a plaintiff litigating in federal court must comply with Fed. R. Civ. P. 9, which requires that "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *Coulter v. Paul Laurence Dunbar Cmty. Ctr.,* 765 F. App'x 848, 851 (3d Cir. 2019). To satisfy Rule 9(b), a plaintiff "must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Pricaspian Dev. Corp. v. Martucci*, 759 F. App'x 131, 135 (3d Cir. 2019) (internal quotation marks omitted). However, a plaintiff is not required to allege every material detail as long as it "pleads the circumstances of the fraud with sufficient particularity to place defendants on notice of the precise misconduct with which they are charged." *Discover Growth Fund, LLC v. Fiorino*, No. 20-cv-00351, 2021 WL 236595, at *4 (D.N.J. Jan. 25, 2021) (internal quotation marks omitted). "In the Virgin Islands, a claim for fraud is a tort claim subject to a two-year statute of limitations, as is a claim for fraudulent misrepresentation." *Nguyen v. Nguyen*, No. ST-18-cv-468, 2022 WL 251932, at *4 (V.I. Super. Jan. 4, 2022) (citing 5 V.I.C. § 31(a)(5)(A)). Pursuant to 5 V.I.C. § 32, "these claims shall be deemed to commence only upon the discovery of the fraud or mistake." *Id.*

Williams alleged that he stated a claim for fraud by alleging that Defendant knew: (1) he had not stolen anything from the store, (2) the videotape showed no such thing, and (3) the FBI had not directed it to withhold Williams's pay. Dkt. No. 180 at 19. He also alleged fraud based on Defendant's knowingly wrongful report to the police that he was shown on

videotape stealing items when it knew that was not true. *Id.* citing Dkt. No. 174 ¶¶ 16, 43. Acknowledging that a two-year statute of limitations governs fraud claims, Williams again relies on the discovery rule, asserting that the statute of limitations was tolled until April 14, 2009 when he finally viewed the videotape and ascertained that the Defendant had produced a fabricated videotape that did not show "anything about Plaintiff taking a television or any merchandise from the store." *Id.*, citing Dkt. No. 174 ¶¶ 23-24. Since he filed the complaint in March 2011, the fraud claim was not time-barred. *Id.*

Here, too, Williams has both failed to state a fraud claim, and the claim is time-barred. His first argument is based on his contention that Cost-U-Less *knew* he had not stolen from the store, *knew* the FBI did not tell it to withhold his pay, and *knew* what the videotape showed. But *Ramsey* was the one who allegedly doctored the videotape and knew Williams had not stolen from the store. The Court has concluded that this behavior by Ramsey did not fall within the scope of his employment, and the TAC contains no allegation that Cost-U-Less had any knowledge of Ramsey's "doctoring" behavior. Thus, Cost-U-Less had no reason to believe Ramsey's statements that Williams was a thief was false. And even if the Court considered Ramsey's statements about the FBI directing Defendant to withhold Williams's paycheck, and the statements made to the police as sufficiently particular to support a fraud claim, Williams does not explain how he relied on these statements to his detriment. As a result, the TAC does not state a claim for fraud.

In addition, the discovery rule does not apply to save Williams's fraud claim for the same reason it did not apply to save his abuse of process claim. Williams knew on November

6, 2006 that Ramsey's assertions that he stole from the store were false. Dkt. No. 174 ¶¶ 8, 10, 12. Williams did not need to see the videotape in April 2009 to "discover the operative facts of his cause of action" *MRL Dev. I, LLC,* 2014 WL 6461583, at *13-14, regarding the falsity of the allegations of thievery.[17] The videotape was merely evidence of the alleged fraud that supported what Williams already knew were false statements. Williams did not meet his burden for showing that the discovery rule applied. The Court recommends dismissal of the fraud claim for failure to state a claim and as time barred.

H. Breach of the Covenant of Good Faith and Fair Dealing

"To state a claim for breach of the covenant of good faith and fair dealing, a plaintiff must show that (1) a valid contract exists between the parties, (2) acts committed by the [defendant] amount to fraud or deceit or an unreasonable contravention of the parties' reasonable expectations under the contract; and (3) that damages suffered as a result." *Mamouzette v. Jerome*, No. 13-cv-0117, 2024 WL 3013643, at *5 (D.V.I. June 13, 2024). The Supreme Court of the Virgin Islands has held that every contract implies a duty of good faith and fair dealing. *Chapman v. Cornwall*, 58 V.I. 431, 441 (V.I. 2019). However, in an employment context, while the covenant applies to at-will contracts,

> this duty only protects an employee's reasonable expectations stemming from the employment contract, such as payment earned from labor provided. Continued employment and just cause termination are not reasonable expectations of at-will employment contracts. To successfully state a claim for breach of the duty of good faith and fair dealing, the moving party must establish at least an implied contract. Additionally, in an at-will employment context, a

[17] Similarly, Ramsey's statement that the FBI told him to withhold Williams's pay, made on January 8, 2007, was not proved false by his viewing the videotape two years later, so as to overcome the statute of limitations time bar.

> successful claim requires proof of acts amounting to fraud or deceit on the part of the employer.

Clark v. Virgin Islands Hous. Auth., No. ST-17-cv-00423, 2021 WL 8566762 , at * 3 (V.I. Super. Ct. Dec. 23, 2021) (internal quotation marks, footnotes, and ellipses omitted); *see Moore v. U.S. Virgin Islands Dep't of Tourism*, No. 14-cv-0081, 2020 WL 5219533, at *18 (D.V.I. Aug. 31, 2020) (in the employment context, "courts have recognized that a tension exists between [the implied covenant of good faith and fair dealing and at-will employment] doctrines insofar as the implied covenant imposes a duty of good faith and fair dealing on an employer who intended to retain total discretion over his or her employment relationships. Accordingly, the covenant of good faith and fair dealing should not be viewed too broadly, for the risk is that it may be misapplied.") (internal quotation marks omitted); *see also Fraser v. Kmart Corp.*, No. 05-cv-0129, 2009 WL 1124953, at *15-16 (D.V.I. Apr. 24, 2009) ("Courts sitting in the Virgin Islands have recognized a cause of action for breach of the duty of good faith and fair dealing when an at-will employment contract between the parties is found to exist.") (but not reaching plaintiff's contention that the Safety Handbook and Associate Handbook constituted implied contracts). Breach of contract claims are governed by a six-year statute of limitations, 5 V.I.C. § 31(3)(A), including implied contracts, *Pegasus Holding Group Stables*, 2020 WL 8020083, at * 5, while tort claims, as noted above, are governed by a two-year statute of limitations. 5 V.I.C. § 31(5)(A).

Williams asserted, in a conclusory and summary manner, that his good faith claim is "part of an at-will employment agreement, thus his claim rests on a contractual duty and not in tort" in an attempt to avoid the two-year tort statute of limitations on this claim. Dkt. No.

180 at 14. Immediately after making this pronouncement, he argued that this claim was based on the Defendant

> editing and compiling surveillance videotapes to try and falsely represent that Plaintiff was a thief, and then falsely accusing him of theft on January 8, 2007, but refusing to allow Plaintiff to view the videotape. Defendant also fired him because he refused to bring back the television he had never taken then falsely reported him to the police as having stolen the TV and home entertainment center and initiated his false arrest.

Id. at 15, citing Dkt. No. 174 at ¶¶ 5-16. He also contended that the Defendant acted deceitfully by falsely accusing him of theft, terminating him based on those false accusations, and denying his paycheck based on the misrepresentation that the FBI told Defendant to hold the check as collateral, *id.* ¶ 16.

Case law addressing the statute of limitations for a good faith/fair dealing claim has been scarce and generally arises in the context of insurance coverage actions. The parties point to *Charleswell v. Chase Manhattan Bank, N.A.*, 223 F.R.D. 371, 383 (D.V.I. 2004), arguing that it does or does not apply. *Charleswell* was an insurance coverage action in which the District Court held that the limitations period was governed by whether the plaintiff's good faith cause of action was based on a tort or a breach of contract claim. Concluding that the plaintiff's excessive premium claims were asserted in the tort counts (negligence, fraud, breach of good faith) and "not based on a breach of contract theory," the court held that the two-year statute of limitations applied rather than the six-year contract statute of limitations. *Id.*

To the extent that *Charleswell* and subsequent local cases have applied a two-year tort statute of limitations when allegations tied to the good faith/fair dealing claim sound in

tort,[18] that claim is time-barred here because Williams's allegations tied to the breach of good faith and fair dealing implicate defamation and fraud, and clearly sound in tort, not contract. As a result, the good faith/fair dealing claim is subject to a two-year tort statute of limitations. Since his termination occurred in January 2007 and his arrest occurred in November 2008, the statute of limitations ran in January 2009 and November 2010, respectively, and is time-barred.

But even if the good faith/fair dealing claim did not meet its demise on statute of limitations grounds, it does not state a claim and must be dismissed for that reason. *Nowhere* in the four corners of the Third Amended Complaint has Williams even alleged the presence of an at-will or implied contract; he raised that point—*in passing*—and *only* in his opposition to the motion to dismiss, not in the TAC. *See Clark*, 2021 WL 8566762 at * 3 ("To successfully state a claim for breach of the duty of good faith and fair dealing, the moving party must

[18] In *Codrington v. Steadfast Insurance Company*, No. 19-cv-00026, 2023 WL 6627210, at *6-7 & n.12 (D.V.I. June 23, 2023), *report and recommendation adopted*, 2023 WL 6356674 (D.V.I. Sept. 29, 2023), *aff'd,* No. 23-2949, 2024 WL 3493449 (3d Cir. July 22, 2024), this Court addressed, but did not decide, a similar limitations issue. The Defendant had cited *Guardian Ins. Co. v. Khalil,* 863 V.I. 3, 22 (V.I. Super. Ct. 2012), *declined to follow on other grounds by Certain Underwriters at Lloyd's of London v. Garcia* (V.I. Super. Ct. Nov. 25, 2015), ruling that the breach of good faith and fair dealing claim, which focused on the alleged bad faith of the insurance company, was governed by the tort two-year statute of limitations for bad faith. In *Davies v. Certain Underwriters at Lloyds of London*, ST-2014-cv-00637, 2017 WL 3759810 at * 9 n.58 (V.I. Super. Aug. 25, 2017), an opinion issued by Judge Denise Francois, the court followed *Khalil* and applied a two-year statute of limitations for a good faith/fair dealing claim alleging bad faith by an insurance company. The *Codrington* Court noted that, in a 2020 opinion by Judge Francois in *Pegasus Holding Grp. Stables, LLC*, 2020 WL 8020083, at * 5, the court rejected a two-year statute of limitations for good faith/fair dealing and held that the six-year statute of limitations applied. However, critically, *Pegasus* did not allege bad faith; the good faith/fair dealing cause of action was based on a straight breach of contract claim.

establish at least an implied contract"); *Edwards v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc.*, No. ST-14-CV-222, 2015 WL 476216, at *4 (V.I. Super. Jan. 29, 2015) (same). Moreover, he expressly stated that he "is not asserting a breach of contract claim" in the TAC. Dkt. No. 180 at 1 n.1. Without any allegation that any kind of contract is at issue, and also having failed to plead fraud,[19] Williams failed to state a claim. *See Jahleejah Love Peace*, 2021 WL 4228698, at *2. In addition, to the extent this claim is based on his allegedly unjust termination, such a claim is precluded by law.[20] *Clark ,* 2021 WL 8566762 at * 3 (just cause termination is not a reasonable expectation of an at-will employment contract). The Court therefore recommends that this claim be dismissed as time-barred and for failure to state a claim.

CONCLUSION

Accordingly, the Court **RECOMMENDS** that the Defendant's Motion to Dismiss, Dkt. No. 175, be **GRANTED**, and the Third Amended Complaint be **DISMISSED**.

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

[19] Deceit involves "[t]he act of intentionally giving a false impression." *Edwards*, 2015 WL 476216, at *4. The same analysis the Court applied to the fraud claim would apply here.

[20] Even if the Court were to conclude that Williams's at-will employment created a contractual relationship and were to hold that he stated a claim for payment due for work provided, *Clark,* 2021 WL 8566762 at * 3, this claim would be dismissed for lack of subject matter jurisdiction, as his last paycheck could not have exceeded the $75,000 minimum required to plead diversity jurisdiction. 28 U.S.C. § 1332(a).

Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

ENTER:

Dated: August 14, 2024

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