SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

DR. TYLUR ARVIDSON and DR. TYGUE ARVIDSON,	**CASE NO. ST-16-CV-410**
	CITE AS 2019 V.I. SUPER 122
Plaintiffs,	
v.	
DR. WILLIAM BUCHAR and V.I. CHIROPRACTIC, LLC,	
Defendants.	

MEMORANDUM OPINION

¶1. Before the Court is Plaintiffs' March 1, 2019, Motion for Summary Judgment, asking the Court to dismiss Defendant's counterclaims for breach of contract, breach of the duty of good faith and fair dealing, tortious interference with prospective business relations, unjust enrichment, fraudulent misrepresentation, and contribution.

¶2. Buchar's breach of contract claim is based on the V.I. Chiropractic Operating Agreement, while the Arvidsons' motion for summary judgment, in substance, seeks to invalidate the covenant to not compete contained within that document. The Court finds as a matter of law that the covenant to not compete contained in the Agreement fails to balance Buchar's legitimate business interests with any hardship borne by the Arvidsons or the public's interest and lacks any durational, territorial, and manner restrictions. Because these inadequacies render this overly broad and restrictive covenant unenforceable, the Arvidsons' motion is granted with regard to the covenant to not compete.

¶3. The Arvidsons contend that, because the covenant to not compete is unenforceable, no contract exists alongside which Buchar's duty of good faith and fair dealing claim may stand. However, though the covenant to not compete is invalid, the Agreement still stands as a valid contract, and the Arvidsons' motion is denied as to this claim. And, because the Arvidsons failed to establish that no genuine issue of material fact exists with regard to Buchar's intentional interference with prospective business relations claim, that portion of the motion is also denied.

¶5. It is unclear whether Buchar intends to claim the Arvidsons were unjustly enriched with regard to the same contractual interests and obligations upon which he bases his contractual breach claim. But, an unjust enrichment claim may be pled in the alternative, and the Arvidsons failed to meet their summary judgment burden. Accordingly, their motion is denied as to Buchar's unjust enrichment claim.

impose a restraint on the way they practice their own trade or occupation.[46] Most, if not all jurisdictions, use a three-pronged test, which assesses:

> (1) the restraint or promise a promisor takes upon himself, inquiring as to whether the self-imposed restriction or promise is broader than necessary to protect a legitimate business interest of the promise;
> (2) the impact of the restraint or promise on the promisee and his need for the restraint, taking care to ensure the restraint or promise does not result in any undue burden or hardship to the promisor; and
> (3) the restraint or promise in no way adversely impacts the public welfare or common good.[47]

Some jurisdictions have gone so far as to require the party enforcing the covenant to not compete to identify the protectable interest at the outset, before engaging in any assessment as to whether the covenant actually results in the protection of that interest.[48]

¶25. Fourth, the reasonableness of the restraint and its ability to protect the promisee and its legitimate business interest is measured in a more concrete fashion, in nearly all jurisdictions, by assessing the time or duration of the restraint, the geographic area covered by the restraint, and the scope or manner of the activity restricted by the covenant.

B. Restatement (Second) of Contracts § 188

¶26. A minority of jurisdictions have expressly adopted the Restatement's rule addressing covenants to not compete. Labeled as "Ancillary Restraints on Competition," Section 188 of the Restatement of Contracts provides:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
> (2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:
> (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
> (b) a promise by an employee or other agent not to compete with his employer or other principal;

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[46] *See U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-84 (Cir. Ct. App. 6th 1898).
[47] 6 Richard A. Lord, *Williston on Contracts* § 13:4.
[48] *See e.g. Reliable Fire Equipment Co. v. Arredondo*, 965 N.E.2d 393, 395-403 (Ill. 2003) ("Based on this court's extensive precedent, we continue to recognize the legitimate business interest of the promisee as a long-established component in the three-prong rule" of reasonableness.); and *Renal Treatment Centers—Missouri v. Braxton*, 945 S.W.2d 557, 564 (Mo. Ct. App. 1997) ("In employment situations, Missouri requires that a party seeking to enforce a non compete clause prove that it has a protectable interest.").

(c) a promise by a partner not to compete with the partnership.[49]

¶27. Although Section 188 does not mention the fourth portion of the test of reasonableness noted above, Comment d to Section 188 explains that the extent of the covenant to not compete's restraint is measured "by type of activity, by geographical area, and by time." It continues:

> If the promise proscribes types of activity more extensive than necessary to protect those engaged in by the promisee, it goes beyond what is necessary to protect his legitimate interests and is unreasonable. If it covers a geographical area more extensive than necessary to protect his interests, it is also unreasonable. And if the restraint is to last longer than is required in light of those interests, taking account of such factors as the permanent or transitory nature of technology and information, it is unreasonable. Since, in any of these cases, the restraint is too broad to be justified by the promisee's need, a court may hold it to be unreasonable without the necessity of weighing the countervailing interests of the promisor and the public. What limits as to activity, geographical area, and time are appropriate in a particular case depends on all the circumstances.[50]

¶28. At least twenty-two jurisdictions have relied upon rule statements or principles provided by the Restatement (Second) of Contracts § 188 when addressing various iterations of noncompetition agreements presented to their courts.[51] However, only two—Alaska and the District of Columbia—have expressly adopted the Restatement (Second) of Contracts Section 188, verbatim, as their own rule addressing covenants to not compete.[52]

C. Jurisdictions relying on state statutes

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[49] *Restatement (Second) of Contracts* § 188 (1981).
[50] *Id.* Cmt. d.
[51] The following states have relied upon concepts embodied in Section 188 or its comments to supplement its own case law's application: Arizona in *Bryceland v. Northey*, 160 Ariz. 213, 216 (Ariz. Ct. App. 1989); Iowa in *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 436-49 (Iowa 1984); Idaho in *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 419 (Idaho 2005); Illinois in *Reliable Fire Equipment Co. v. Arreedondo*, 965 N.E.2d 393, 395-403 (Ill. 2011); Kansas in *Corporate Lodging Consultants, Inc. v. Railsback*, 1997 Kan. App. Unpub. LEXIS 753, at * 12-*14 (Kan. Ct. App. Apr. 11, 1997); Massachusetts in *Kroeger v. Stop & Shop Cos.*, 13 Mass. App. 310, 315-23 (Mass. App. Ct. 1982); Missouri in *Renal Treatment Centers-Missouri v. Braxton*, 945 S.W.2d 557, 563-65 (Mo. Ct. App. 1997); Montana in *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 498-507 (Mont. 2011); Nebraska in *Boisen v. Petersen Flying Service, Inc.*, 222 Neb. 239, 240-49 (Neb. 1986); New Hampshire in *Technical Aid Corp. v. Allen*, 134 N.H. 1, 8 (N.H. 1991); New York in *BDO Seidman v. Hirsberg*, 93 N.Y.2d 382, 388-95 (N.Y. 1999); Ohio in *Ohio Urology, Inc. v. Poll*, 72 Ohio App. 3d 446, 451-55 (Ohio Ct. App. 1991); Pennsylvania in *Volunteer Fireman's Insurance Services, Inc. v. CIGNA*, 693 A.2d 1330, 1335-43 (Pa. Super. Ct. 1997); Rhode Island in *Cranston Print Works Co. v. Pothier*, 848 A.2d 213, 217-21 (R.I. 2004); and Tennessee in *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 471-74 (Tenn. 1984).
[52] *See Wenzell v. Ingrim*, 228 P.3d 103, 110-11 (Alaska 2010) (quoting Restatement (Second) of Contracts §§ 186 and 188); and *Deutsch v. Barsky*, 795 A.2d 669, 675-76 (D. D.C. 2002) (quoting Restatement (Second) of Contracts §§ 186-188).

¶29. A few states' legislatures have taken some discretion out of the judiciary's hands by passing legislation outlining the contours of restrictive covenants. Under these statutes, public policy dictates how the jurisdiction's courts treat covenants to not compete. Some statutes embody the same common law test for covenants to not compete discussed in Section A above.[53] For example, Section 8-1-190 of the Alabama Code largely echoes the common law rules applicable to covenants to not compete in employer-employee relationships, business entity formation, sale of a business, and business entity dissolution.[54]

III. The soundest rule for the Virgin Islands is to choose the option indicated under *Banks*, the common law's iteration of the rule addressing covenants to not compete.

¶31. In *Banks v. International Rental and Leasing Corporation*,[55] the Virgin Islands Supreme Court held that 1 V.I.C. § 4 was implicitly overruled when the Virgin Islands Legislature adopted 4 V.I.C. §

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[53] *E.g.*, Ala. Code §§ 8-1-190, 8-1-191, 8-1-192, 8-1-193, 8-1-194, 8-1-195, 8-1-196, 8-1-197; Cal. Bus. & Prof. Code §§ 16600-16607; Tex. Bus. & Com. Code §§ 15.01-15.09; and 15 Okla. Stat. §§ 217-219B.

[54] Alabama Code § 8-1-190 provides:

> Contracts in restraint of trade; preservation of protectable interests.
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> (a) Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void.
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> (b) Excepts as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:
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> (1) A contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or employees of a party to the contract where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.
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> (2) An agreement between two or more persons or businesses or a person and a business to limit commercial dealings to each other.
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> (3) One who sells the good will of a business may agree with the buyer to refrain from carrying on or engaging in a similar business and from soliciting customers of such business within a specified geographic area so long as the buyer, or any entity deriving title to the good will from that business, carries on a like business therein, subject to reasonable time and place restraints. Restraints of one year or less are presumed to be reasonable.
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> (4) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from carrying on or engaging in a similar business within a specified geographic area so long as the commercial entity carries on a like business therein, subject to reasonable restraints of time and place. Restraints of two years or less are presumed to be reasonable.
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> (5) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from soliciting current customers, so long as the commercial entity carries on a like business, subject to reasonable time restraints. Restraints of 18 months or for as long as post-separation consideration is paid for such agreement, whichever is greater, are presumed to be reasonable.
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> (6) Upon or in anticipation of a dissolution of a commercial entity, partners, owners, or members, or any combination thereof, may agree that none of them will carry on a similar commercial activity in the geographic area where the commercial activity has been transacted.
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> Ala. Code § 8-1-190.

[55] 55 V.I. 967 (V.I. 2011).

21.[56] First, the Supreme Court noted that the Virgin Islands Legislature adopted 4 V.I.C. § 21 to "more accurately . . . express the concept of the Common Law as constituting a body of rules established by *precedent*, as distinguished from a body of statutory law."[57] Second, the *Banks* court held that, in adopting 4 V.I.C. § 21, the Legislature intended to "develop the common law [of the Virgin Islands] through judicial precedent."[58] Third, *Banks* also established that the Virgin Islands Supreme Court and the Superior Court are to "determine the common law without automatically and mechanistically following the Restatements.[59]

¶32. In light of this guidance and direction, the Court must choose between adopting the Restatement's treatment of covenants to not compete and the common law's treatment of covenants to not compete, the latter of which (1) balances the promisee's legitimate business interests against the promisor's hardship incurred as well as the public interest and (2) assesses this balance through the lens of time, place, and manner restrictions. The two approaches are substantially similar, but they are not mirror images. As has been noted by other courts:

> The Restatement analysis . . . provide[s] information that is relevant to determining the 'reasonableness' of a restrictive covenant, but that approach can also be incomplete or introduce considerations irrelevant to the competitive analysis required . . . particularly with respect to the effect of the covenant on competition in the relevant market. Restatement 'injury to the public' is 'measured against the urgency of the [promisee's] claim for protection; rather than an extrinsic standard, and the hardship to the [promisor] factor permits 'consideration of personal circumstances of the restrained [promisor]—his financial circumstances or other factors unrelated to the [promisor-promisee] relationship.' A [reasonability] analysis focuses on the effect of the restraint on the public. . . . [mindful that] . . . antitrust laws were passed for the protection of competition, not competitors.[60]

¶33. The approach espoused by the common law's treatment of covenants to not compete is sonorous with the approach developed through hundreds of years of judicial precedent and its "focus[] on the effect of the restraint on the public."[61] Because *Banks* seeks to develop Virgin Islands common law via judicial precedent, choosing the approach which encompasses this history aligns with the *Banks* mandate.

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[56] *Government of the Virgin Islands v. Connor*, 60 V.I. 597, 600 (V.I. 2014).
[57] *Banks v. International Leasing and Rental Corp.* 55 V.I. at 976 (quoting Historical Note to 1 V.I.C. § 4) (emphasis original).
[58] *Id.* at 977.
[59] *Id.* at 979.
[60] *Inergy Propane, LLC v. Lundy*, 219 P.3d 547, 558-59 (Okla. Civ. App. 2008) (quoting Harlan Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 649-51 (1960)).
[61] *Id.*

Accordingly, the Court finds that the soundest rule for the Virgin Islands is the common law's treatment of covenants to not compete as expressed herein.

A rule for the Virgin Islands regarding treatment of covenants to not compete

¶ 34. "Non-competition agreements [have been] disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood."[62] "From the *Dyers' Case* in 1414 to *Mitchel v. Reynolds*[63] in 1711, judicial policy ran strongly against a bond or covenant not to compete."[64] *Mitchel*, a business transfer case, proved to be a watershed for the common law approach labeled as the "rule of reasonableness" now generally applied in U.S. courts.[65] Therefore, it has long been held that an "agreement by a person to refrain from exercising his trade or calling, standing alone, is viewed as being illegal and contrary to public policy because it is against the interests of society in a free competitive market and to the interests of the person refrained in earning a livelihood."[66]

¶35. More recently, U.S. courts have allowed covenants to not compete to stand if they are ancillary to legitimate transactions, if they are supported by consideration, and if they meet the jurisdiction's reasonableness test, all of which "seek to accommodate (1) the right to work, (2) the right to contract, and (3) the public's right to competition."[67] Under the rule of reasonableness, U.S. courts often uphold and enforce ancillary covenants to not compete as long as they function to safeguard a protectable business interest and are reasonable in the time, geography, and scope they cover.

¶36. In accordance, this Court similarly adopts the same rule of reasonableness, which establishes "not that a limited restraint is good, but that it *may* be good."[68] While "there is no inflexible formula for deciding the ubiquitous question of reasonableness . . . there are certain elements which should always be considered in ascertaining the reasonableness" of covenants to not compete."[69] Accordingly, in the Virgin Islands, a contract which is only in partial restraint of trade may be valid and enforceable when it (1) is ancillary to the main purpose of a valid contract or transaction, (2) is supported by valid consideration, (3) passes a three-pronged test assessing whether the covenant safeguards a protectable

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[62] *Wenzell v. Ingrim*, 228 P.3d 103, 110 (Alaska 2010).
[63] *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711) (establishing a unifying principle to guide judicial decisions in covenant to not compete cases in which Lord Maclesfield noted that a presumption exists with regard to covenants to not compete but that the presumption could be overcome with a showing of reasonableness).
[64] *Amex Distribution Co. v. Mascari*, 150 Ariz. 510, 514 (Ariz. Ct. App. 1986).
[65] *Id.*
[66] *Renal Treatment Centers—Missouri v. Braxton*, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997) (quoting John D. Calamari & Joseph Perillo, *Contracts*, Specific Performance §§ 16-19 (1977)).
[67] *Amex Distribution Co.*, 150 Ariz. at 514.
[68] *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 367 (Ariz. 1999) (quoting *Mandeville v. Harman*, 42 N.J. Eq. 185, 189 (N.J. Ch. 1886)) (emphasis added).
[69] *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 472 (Tenn. 1984). *See also Central Monitoring Services, Inc. v. Zakinski*, 553 N.W.2d 513, 521 (S.D. 1996) ("Each case must be determined on its own particular facts, and it is impossible to lay down any general rule.").

business interest of the promisee, and (4) is reasonable with regard to its duration, geographic area covered, and manner or scope of activities restricted when protecting the legitimate interests of the promisee. The Court's ultimate determination of reasonableness is a question of law. "But reasonableness is a fact-intensive inquiry that depends on weighing the totality of the circumstances."[70] "Each case hinges on its own particular facts."[71] "[T]here can be no mathematical formula."[72]

The type of contract or transaction to which the covenant to not compete is ancillary determines the level of scrutiny the Court applies to the covenant to not compete.

¶37. When addressing and assessing whether a covenant to not compete is ancillary to a valid contract or transaction, common law sources and the Restatement show that these covenants may be included in different contexts: the sale of a business, an employer-employee relationship or employment contract defining that relationship,[73] a professional partnership agreement,[74] an independent contractor relationship,[75] and a professional LLC operating agreement.[76]

¶38. It is important to identify at the outset to which context the covenant to not compete is primarily related.[77] Courts examine covenants to not compete under varying levels of scrutiny, and the level of scrutiny hinges upon the contract or transaction to which the covenant is attached. On "one end of the spectrum, a covenant ancillary to the sale of a business is subject to a low level of scrutiny;"[78] therefore courts tend to "enforce[] [their terms] more liberally."[79] Further, when the sale of a business includes a

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[70] *Valley Medical Specialists*, 194 Ariz. at 367.
[71] *Bryceland v. Northey,* 160 Ariz. 213, 217 (Ariz. Ct. App. 1989).
[72] *Central Monitoring Services, Inc.*, 553 N.W.2d at 521.
[73] Some jurisdictions allow covenants to not compete to be enforced in at-will employment relationships. This issue is not presented by the facts of this case, therefore the court refrains from opining on this point of law.
[74] *Renal Treatment Center—Missouri*, 945 S.W.2d at 563; and *Restatement (Second) of Contracts* § 188 (establishing that covenants to not compete have been deemed reasonable when appended to employee-employer relationships, contracts memorializing the sale of a business, and partnership agreements).
[75] *Renal Treatment Centers—Missouri*, 945 S.W.2d at 563-65 (holding that covenants to not compete and their test of reasonableness apply to independent contractor relationships and citing to other jurisdictions who have held the same, namely, Georgia in *Amstell, Inc. v. Bunge Corp.*, 213 Ga. App. 115 (Ga. Ct. App. 1994) and North Carolina in *Starkings Court Reporting Services v. Collins*, 67 N.C. App. 540 (N.C. Ct. App. 1984)).
[76] *See Celtic Maintenance Services, Inc. v. Garrett Aviation Services, LLC*, Case No. CV 106-177, 2007 U.S. Dist. LEXIS 93715, at *7-*20 (S.D. Ga. Dec. 21, 2007) (listing types of relationships and contexts Georgia law recognizes as ancillary to covenants to not compete); *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, Case No. Civil Action 8602-VCG, 2014 Del. Ch. LEXIS 2, at *11-*16 (Del. Ch. Jan. 13, 2014) (finding that an LLC agreement did not contain the purported covenant to not compete on which the plaintiff based his claim, therein granting the defendants' motion to dismiss); and *Hill Medical Corp. v. Wycoff*, 86 Cal. App. 4th 895, 900-08 (Cal. Ct. App. 2001) (reiterating California's rejection of the rule of reasonableness test for its own statutory regime and holding that in the sale of a business—including an LLC—there must be a clear indication that goodwill was included in the sale price for a covenant to not compete to be rendered enforceable).
[77] *Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 496 (Mass. App. Ct. 1986).
[78] *Celtic Maintenance Services, Inc.*, 2007 U.S. Dist. LEXIS at *8 (citations and quotation marks omitted).
[79] *Alexander & Alexander, Inc.*, 21 Mass. App. Ct. at 496.

transfer of the business' goodwill, "courts have generally been more willing to uphold promises to refrain from competition made in connection with [these transactions] than those made in connection with contracts of employment."[80] When explaining this more liberal approach, courts have commented: "it is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits."[81] Further, transactions conveying businesses are "more likely to be [marked by] equal bargaining power between the parties; [generate] proceeds . . . [which] . . . generally enable the seller to support himself temporarily without the immediate practical need to enter into competition with his former business; and [compensate] a seller [with a] . . . premium for agreeing not to compete with the buyer."[82] Sales which expressly include a transfer of goodwill may benefit from "a broad noncompetition agreement . . . [because they] assure that the buyer receives that which he purchased."[83] Even in sales which lack an express covenant to not compete, "an agreement by the seller not to depreciate the value of good will may be implied so as to prevent the seller from taking back that which he purported to sell."[84] It is for this reason that "[c]ourts have been more inclined to enforce a long or limitless time period barring competition after a sale of a business"[85] but less inclined in other contexts. However, limits exist. Despite the fact that the Court will look less critically and weigh different elements in these instances, the fact that a covenant to not compete is ancillary to a sale of a business does not automatically lead the Court to conclude that it is fully enforceable as written.[86]

¶39. At the other end of the spectrum, covenants to not compete ancillary to an employee-employer relationship or an employment contract are subject to strict scrutiny. Some courts refuse to modify restrictive covenants in this context upon finding that the covenant imposes an unreasonable restraint on trade.[87] In these instances, "an ordinary employee typically only has his own labor or skills to sell and often is not in a positon to bargain with his employer."[88] As a result, covenants to not compete in employee-employer contexts "must be scrutinized carefully to see that they go no further than necessary to protect an employer's legitimate interests."[89] In addition, whether the employee or employer initiates

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[80] *ADT Security Services, Inc. v. A/C Security Systems*, 15 Neb. App. 666, 703 (Neb. Ct. App. 2007).
[81] *Id* (citations, brackets, and quotation marks omitted).
[82] *Alexander & Alexander, Inc.*, 21 Mass. App. Ct. at 496.
[83] *Id.*
[84] *Id.*
[85] *Heritage Operating, L.P. v. Rhine Bros., LLC*, Case No. 02-10-00474-CV, 2012 Tex. App. LEXIS 4939, at *15 (Tex. Ct. App. June 21, 2012).
[86] *Alexander & Alexander, Inc.*, 21 Mass. App. Ct. at 498.
[87] *Id* at 496; and *Celtic Maintenance Services, Inc*, 2007 U.S. Dist. LEXIS at *9 (opining that in employment contexts, "if any portion of the restrictive covenant is found unreasonable, the entire covenant must fall") (citations and quotation marks omitted).
[88] *Alexander & Alexander, Inc.*, 21 Mass App. Ct. at 498.
[89] *Id.*

the employee's termination influences how a court treats a covenant. The "circumstances surrounding the employee's departure should be considered before enforcing the covenant."[90] Whether an "employer terminat[es] an employee without cause clearly has a bearing on whether . . . [to] enforce a non-competition covenant."[91] A "stricter standard to enforce covenants applie[s] when the employee [has] been terminated without cause."[92] "It is the function of the law to maintain a reasonable balance, and this requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an employer. The circumstances of each case must be carefully scrutinized."[93]

¶40. Between the two extremes described above, covenants to not compete ancillary to partnership agreements receive intermediate scrutiny. In contrast to most employee-employer relationships, "signatory partners hold relatively equal bargaining power, enjoy mutual advantage from the restrictive covenants, and share equally in the consideration" exchanged.[94] Because these aspects indicate the actual bargaining parity between the parties comprising a partnership, they guide the Court's decision whether to apply a strict or loose scrutiny when examining the covenant to not compete and whether to enforce or not enforce its provisions. Further, some jurisdictions give a "wider latitude to covenants between members of a learned profession because their services are unique or extraordinary."[95] Because LLCs are business associations, just as partnerships are business associations, the Court applies the same level of intermediate scrutiny.

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[90] *Wrigg v. Junkermeir, Clark, Campenella, Stevens, P.C.*, 362 Mont. 496, 504 (Mont. 2011).

[91] *Id* (citations and quotation marks omitted).

[92] *Id.* When explaining its rationale for this holding, the Montana Supreme Court expounded:

> an employee who contemplates terminating his employment faces a choice. The employee may choose to preserve his livelihood under an employment contract by remaining with the employer and not competing. On the other hand, the employee may elect to risk losing his livelihood by leaving his employment voluntarily to engage in competition with his former employer. The employee makes an informed decision under these circumstances about the risks associated with a covenant's enforcement and voluntarily chooses to encounter those risks.
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> No informed decision exists, however, when an employee departs involuntarily. Enforcement of the covenant could impoverish an employee who has done nothing to warrant his termination. Courts have noted that termination creates inequitable circumstances for an employee. . . . Enforcement [in these circumstances] would allow an employer to economically cripple a former employee and simultaneously deny other potential employers his services when the employer, without reason, creates the employee's need to compete."
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> *Id.* at 503-04.

[93] *Hall v. Willard & Woolsey, P.S.C.*, 471 S.W.2d 316, 318 (Ky. Ct. App. 1971) (quoting 6 Arthur Linton Corbin, *Corbin on Contracts* § 1394 (1960)).

[94] *Celtic Maintenance Service, Inc.*, 2007 U.S. Dist. LEXIS at *8.

[95] *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 390 (N.Y. 1999). *See also Reed, Roberts Associates, Inc. v. Strauman*, 40 N.Y.2d 303, 307 (N.Y. 1976) ("no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment includ[ing] those techniques which are but skillful variations of general processes known to the particular trade").

¶41. Importantly though, the Court notes that not every contract falls smoothly into one of these three contexts. When determining the ultimate level of scrutiny, "the Court . . . consider[s] the relative bargaining power of the parties and whether there is independent consideration for the restrictive covenant itself."[96]

¶42. For example, in *Physicians Specialists in Anesthesia, P.C. v. MacNeill*,[97] the Georgia Court of Appeals analyzed the aspects characterizing a partnership just before and during negotiations creating the entity's partnership agreement and covenant to not compete. Ultimately, the *Physicians Specialists* court determined that a middle level of scrutiny was appropriate. When explaining what influenced the determination, the Georgia Court of Appeals highlighted the following facts in support of the plaintiff-partner's bargaining strength: (1) the partnership agreement "treat[ed] Drs. Mogelnicki and Chambers preferentially to all other shareholders. . . . exempt[ed] . . . Mogelnicki from the restrictive covenant, permanently designat[ed] him as chair and medical director of the anesthesiology department, assign[ed] him a permanent position on the board of directors, limit[ed] the circumstances under which his employment [could] be terminated, and prohibit[ed] the reduction of his compensation below a certain level;" and (2) Rizor's inability to prevent his own termination or removal by Mogelnicki.[98] As a counterbalance, the court also noted the following facts in support of one of the defendant-partners' bargaining strength: (1) Rizor's stature as one of "the most actively involved shareholder[s] in the process of revising the 1990 Agreement;"[99] (2) Rizor serving as "president of [the partnership] until a month or two prior to the execution of the 1993 Agreement,"[100] a position which gave him "significant input into the drafting of the restrictive covenant;"[101] and (3) all physician-shareholders in the partnership serving as "specialists whose services were capable of generating considerable monetary benefit for [the partnership], for the other shareholders, and for themselves."[102] In similar fashion, when analyzing the dynamics characterizing a partnership in executing its partnership agreement and covenant to not compete, the Nebraska Supreme Court noted that, while a defendant-employee was a partner, he was "a partner with such a minor interest [in the entity] . . . [that he was] in a real sense no different than an employee."[103]

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[96] *Celtic Maintenance Service, Inc.*, 2007 U.S. Dist. LEXIS at *9 (citations and quotation marks omitted). *Accord Physician Specialists in Anesthesia, P.C. v. MacNeill*, 246 Ga. App. 398, 402-03 (Ga. Ct. App. 2000).
[97] 246 Ga. App. 398 (Ga. Ct. App. 2000).
[98] *Id.* at 402-03.
[99] *Id.* at 403.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 128 (Neb. 1982).

A three-pronged protectable interest test must be met and assessed in light of the reasonableness of the restriction's duration, territorial coverage, and manner or scope of activities covered.

¶43. A covenant to not compete is reasonable only when it affords fair protection to the interests of the party in whose favor it is imposed—namely the promisee. "If the restraint goes beyond such fair protection, it is oppressive to the other party, [the promisor,] . . . injurious to the interests of the public, and, consequently, void upon the ground of public policy."[104] Accordingly, the modern common law rule of reasonableness this Court uses when determining whether to enforce covenants to not compete is: "A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the [promisee], (2) does not impose undue hardship on the [promisor], and (3) is not injurious to the public. A violation of any prong renders the covenant invalid."[105]

¶ 44. "Reasonable restraints—those no broader than the [promisee's] legitimately protectable interests—will be enforced."[106] An interest is a protectable interest when it must necessarily be safeguarded so that the basis of the promisee's bargain may be protected or when a buyer of a business or employer or partner possesses "a substantial right in its business sufficiently unique to warrant the type of protection contemplated by a noncompetition agreement."[107] The second prong of the protectable interest test is not satisfied when the restriction "is greater than necessary to protect the promisee's legitimate interests."[108] Thus, any adverse effects that result from the greater than necessary restriction "constitute[] an undue hardship upon" the promisor.[109] The Court must ask: does the covenant to not compete prohibit the promisor's employment opportunities without providing any legitimate benefit to the other party? The third prong of the protectable interest test ensures that the covenant to not compete does not injure the public interest. While the restriction may limit the choice of businesses, the mere existence of some limitation does not suffice "to constitute injury to the public interest."[110] If it were sufficient, no restrictive covenant could be found to be reasonable, as any restriction [would] curtail to some degree the public's ability to choose."[111]

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[104] *Reliable Fire Equipment Co. v. Arredonda*, 965 N.E.2d 393, 397 (Ill. 2011).
[105] *BDO Seidman*, 93 N.Y.2d at 388-89 (emphasis original).
[106] *Amex Distribution Co.*, 150 Ariz. at 515.
[107] *Clark v. Liberty National Life Co.*, 592 S.2d 564, 566 (Ala. 1992) (citations and quotation marks omitted).
[108] *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386 (Tex. 1991).
[109] *Hayes v. Altman*, 424 Pa. 23, 29 (Pa. 1967).
[110] *Technical Aid Corp. v. Allen*, 134 N.H. 1, 11 (N.H. 1991).
[111] For the Court to find a covenant to not compete "injurious to the public interest," it "must *unreasonably* limit the public's right to choose." *Technical Aid Corp.*, 134 N.H. at 11 (N.H. 1991) (emphasis original). *See also Williamson*, 16 V.I at 292-95 (finding that a covenant to not compete did not hurt the public interest because, among other reasons, the defendant was able to practice for government veterinarians on St. Thomas and St. John and for all veterinarians on St. Croix, therein not severely limiting the Territory's access to veterinarians in total).

¶6. Since the Arvidsons have shown that Buchar cannot fulfill the causation element linking the misrepresentation element to the pecuniary injury element, summary judgment is granted on Buchar's fraudulent misrepresentation claim.

¶7. Finally, Buchar's counterclaim for contribution conflates contractual indemnification, contribution in the realm of corporate governance, and common law contribution and indemnification in tort, but he pursues a contractual breach claim grounded only in corporate governance. In addition, the clauses in the Agreement upon which Buchar relies for his contribution claim obligate only V.I. Chiropractic—and not the Arvidsons—to indemnify Buchar for costs associated with litigation arising out of his execution of managerial duties on behalf of V.I. Chiropractic. As a result, Buchar's contribution claim is dismissed.

Factual and Procedural History

¶8. A more detailed rendering of the facts giving rise to this lawsuit was provided in this Court's June 6, 2018, Memorandum Opinion deciding various discovery motions.[1] Ultimately, this dispute arises between business associates who entered into discussions to dissolve their business venture, V.I. Chiropractic, upon discovering they were unable to reconcile their differences regarding its management and operation. In the midst of these discussions and the ensuing incomplete dissolution process, relations further deteriorated such that on July 12, 2016, Tylur and Tygue Arvidson initiated this lawsuit against William Buchar.[2] In a First Amended Complaint, the Arvidsons submit that Buchar breached his fiduciary duties to them by failing to execute the dissolution of V.I. Chiropractic in an effort to lower the market value of the Arvidsons' shares during buy-out negotiations and ask this Court to dissolve the LLC.[3] In response, Buchar filed counterclaims asserting that the Arvidsons breached their contractual duties under the Agreement, breached the covenant of good faith and fair dealing appurtenant to his contract claim; intentionally interfered with prospective business relations, made fraudulent misrepresentations, owe him contribution, and were unjustly enriched.[4] [5]

Summary Judgment Standard

¶10. Motions for summary judgment are governed by V.I. R. Civ. P. 56, which provides that the Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material

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[1] *Arvidson v. Buchar*, Memorandum Opinion, June 6, 2018.
[2] Pls.' Compl.
[3] Pls.' First Am. Verified Compl.
[4] Def.'s Second Am. Counterclaim.
[5] On March 19, 2019, the Arvidsons filed this Motion for Summary Judgment, Buchar filed an Opposition Response and a Statement of Additional Facts on April 8, 2019, to both of which the Arvidsons replied on April 25, 2019.

¶45. In the context of the sale of a business, the purpose of selling a business's goodwill as a business asset is to transform goodwill into a transferable asset. It necessarily follows that the business's "[g]oodwill is a protectable, valuable interest, and parties may determine its value and contract for its sale."[112] Therefore, "[i]t is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the goodwill for which he pays."[113]

¶46. In the context of an employee-employer relationship, cases from multiple jurisdictions illustrate that courts assess covenants to not compete on a case-by-case basis. Yet, these same cases show that certain interests have repeatedly emerged as being entitled to protection: trade secrets; business secrets; confidential information regarding product development; internally-generated customer lists which are not readily ascertainable from public sources (i.e., phone books or the internet); clients and customers in situations in which "the employee closely associates or has repeated contact with the employer's customers so that the customer tends to associate the employer's business with the employee;"[114] and competition from an employee who has developed an ability to offer services that are unique or extraordinary in nature.[115] The purpose of an employer's imposing a covenant to not compete on an employee in protection of these interests "is to prevent competitive use, for a time, of *information* or *relationships* which pertain peculiarly to the employer and which the *employee acquired* in the course of the employment."[116]

¶47. Safeguarding customer relationships an employee developed during the course of employment has been deemed a legitimate employer interest.[117] "The risk to the employer reaches a maximum in situations in which the employee must work closely with the client or customer over a long period of time, especially when his services are a significant part of the total transaction."[118] Because an employee has been able to share in generating a client's or customer's goodwill, which the employer's overall efforts and expenditures created, the employer has a legitimate interest in preventing the former employee from exploiting or appropriating that goodwill.[119] Further, though the goodwill was created at the

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[112] *Heritage Operating, L.P. v. Rhine Bros., LLC*, Case No. 02-10-00474-CV, 2012 Tex. App. LEXIS 4939, at *13 (Tex. Ct. App. June 21, 2012). "Good will is the custom or patronage of any established trade or business including the value that results from the probability that old customers will continue to trade with an established concern. Good will carries more with it than simply the advantage of keeping the premises which were occupied by a former firm and included common celebrity, or reputation for skill, or affluence or punctuality. The goodwill of a business is the expectation of continued public patronage." *Inergy Propane, LLC v. Lundy*, 219 P.3d 547, 554 (Okla. Civ. App. 2009) (citations, brackets, and quotation marks omitted).
[113] *ADT Security Services, Inc.*, 15 Neb. App. at 671.
[114] *Hasty v. Rent-A-Drive, Inc.*, 671 S.W.2d 471, 473 (Tenn. 1984).
[115] *BDO Seidman*, 93 N.Y.2d at 389.
[116] *BDO Seidman*, 93 N.Y.2d at 391 (N.Y. 1999) (emphasis original to *BDO Seidman*) (citing Harlan Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 653 (1960)).
[117] *Bryceland,* 160 Ariz. at 217.
[118] *BDO Seidman*, 93 N.Y.2d at 391-92.
[119] *Bryceland*, 160 Ariz. at 217.

employer's expense, it is also "maintained at the employer's expense, to the employer's competitive detriment."[120] As a result, "[t]he law will guard this interest by means of a covenant not to compete for as long as may be necessary to replace the employee and give the replacement a chance to show that he can do the job."[121] But, to the extent that a covenant to not compete extends over customer or client relationships an employee developed but which the employer did not enable him to acquire through the performance of services through the course of employment, the covenant is overreaching and therefore invalid and unenforceable.[122]

¶48. Simultaneously, our present economic structures are "premised on the competition engendered by the uninhibited flow of services, talent[,] and ideas."[123] Accordingly, this Court acknowledges that restrictive covenants "should [not] fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment, . . . includ[ing] those techniques which are but skillful variations of general processes known to the particular trade."[124] On the other hand, this Court "also recognize[s] the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy."[125] Therefore, a covenant to not compete will be enforced "to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information."[126] Indeed, these interests must be safeguarded or "the employer may not get the full value of the employment contract [because he] . . . cannot confidently give the employee access to confidential information and client relationships needed for the most efficient performance of his job."[127]

¶49. Even in the context of a partnership agreement or joint venture agreement, business strategies, trade secrets, and confidential information have been held to constitute legitimate, protectable business interests. For instance, in *Volunteer Fireman's Ins. Services v. CIGNA Property & Casualty Agency*,[128] a Pennsylvania trial court found that the non-compete restrictions ancillary to a joint venture and partnership agreement were not outweighed by any hardship imposed on the promisor, CIGNA. There, the parties had entered into a relationship akin to a joint venture, and upon the relationship's end, a three-

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[120] *Id*; *BDO Seidman*, 93 N.Y.2d at 391-92.
[121] *Bryceland*, 160 Ariz.at 217.
[122] *See Freiburger v. J-U-B Engineering, Inc.*, 141 Idaho 415, 421 (Idaho 2005) ("a prohibition against doing business with an employer's clients, without regard to whether a relationship existed between the client and the employee, is an overbroad means of protecting the employer's interest in the goodwill developed by the employee"). *Accord BDO Seidman*, 93 N.Y.2d at 393.
[123] *Reed Roberts Associates, Inc.*, 40 N.Y.2d at 307.
[124] *Id.*
[125] *Id.* at 308.
[126] *Id.*
[127] *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 502 (Mont. 2011).
[128] 693 A.2d 1330 (Pa. Super. Ct. 1997).

year covenant to not compete became active.[129] The court found that at the same time that Volunteer Fireman's was entering the market on its own, following the end of its joint venture with CIGNA, it did so with CIGNA "possess[ing] intimate knowledge of VFIS's business strategies, trade secrets, and confidential information."[130] The court continued "[d]uring the initial period of its new business arrangement, VFIS would be particularly vulnerable to competition,"[131] that it was entering a highly competitive market, and that the knowledge CIGNA possessed, owing to its joint venture with VFIS, "place[d] it in a unique position to compete with VFIS and undermine it in the early stages of its new venture."[132] In light of the protectable interests to which CIGNA gained access, the court upheld the covenant to not compete as reasonable.

The covenant to not compete must not impose unreasonable durational, territorial, and manner and scope restrictions.

¶50. The reasonableness of a restrictive covenant and this Court's determination as to whether it protects a legitimate business interest hinges on the restriction's duration, territorial coverage, and manner and scope of activities covered. Simply, is the restraint as to time, territory, and scope of activities covered by the covenant necessary to safeguard the promisee's interest while not oppressive to the promisor or injurious of the interests of the general public?[133] "In reconciling concerns that the test provide clear guidelines to drafters, with concerns that a rigid application of the test may not give adequate weight to the factual settings in which a particular covenant may operate . . . [the Court] determine[s] that both of these ends can be best served by retaining the three-element test . . . and utilizing it, not as an arbitrary rule but as a helpful tool in examining the reasonableness of the [covenant in a] particular factual setting."[134]

¶ 51. "While the rare case of a covenant providing for unlimited restriction of both time and space would be void because of the undue hardship on the promisor, in general, a restrictive covenant is not invalid *per se* because it is unlimited in terms of time *as long as* it is limited as to space."[135] In a similar manner, "when a restraint provides for a limited period of time, it *may* be enforceable . . . so long as" it is limited as to space,[136] therein rendering it otherwise reasonable.

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[129] *Id.* at 1334-37.
[130] *Id.* at 1341.
[131] *Id.*
[132] *Id.*
[133] *See* 6 Richard A. Lord, *Williston on Contracts* § 13:5.
[134] *ALW Marketing Corp. v. McKinney*, 205 Ga. App. 184, 185 (Ga. Ct. App. 1992) (citations and quotation marks omitted).
[135] 6 Richard A. Lord, *Williston on Contracts* § 13.5 (emphasis added).
[136] *Id.*

¶52. In most situations, either a durational or a territorial limitation is provided, or both. "Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other."[137]

¶53. With regard to time, when "determining whether a restraint extends for a longer period of time than necessary to protect the [promise], the court must determine how much time is needed for the risk of injury to be reasonably moderated."[138] "The frequency of contact between [the promise and the promisor] affects the permissible length of the restraint."[139] The overarching thrust is to give an "employer a reasonable amount of time to overcome the former employee's loss, usually by hiring a replacement and giving that replacement time to establish a working relationship."[140] "Most employee covenants that are upheld have a duration of no more than a few years, which is considerably shorter than the typical covenant ancillary to the sale of a business."[141] For instance, a five-year employee non-compete period has been found reasonable in certain circumstances while a one-year restriction has been found too long in others.[142]

¶54. With regard to territorial coverage, the geographic scope of a covenant to not compete must be no larger than is fairly required for the promisee's protection, a determination that "depend[s] on the nature and extent of the [promisee's] business and the degree of the promisor's involvement in that business."[143] In some instances, a one hundred mile radius has been found reasonable,[144] whereas in others twenty-five miles from the promisee's office [145] and ten and fifteen miles of any of an employer's locations were

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[137] *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 665 (N.C. 1968).
[138] *Bryceland*, 160 Ariz. at 217.
[139] *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 370 (Ariz. 1999).
[140] *Id.*
[141] 3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks, and Monopolies* § 16:29 (4th ed. 2019).
[142] *See e.g., EarthWeb, Inc. v. Schlack*, 71 F.Supp. 2d 299, 312-17 (S.D. N.Y. 1999) (finding "that the one-year duration of [the] restrictive covenant [was] too long given the dynamic nature of [the internet] industry, its lack of geographic borders," and its quickly changing nature making it likely an employee's knowledge gained during employment would lose any value rapidly); *Unisource Worldwide, Inc. v. Carrara*, 244 F.Supp. 2d 977, 982-83 (C.D. Ill. 2003) (finding two years too long in an industry where information regarding pricing, costs, and customer information becomes stale in a period of six to twelve months); *Williamson*, 16 V.I. at 292 (finding that a two-year restriction was appropriate because the covenant only applied to private veterinary practices on St. Thomas and St. John with no limit placed on St. Croix).
[143] *Availability, Inc. v. Riley*, 336 So.2d 668 (Fla. Dist. Ct. App. 1976).
[144] *See id.*
[145] *See Northside Hospital, Inc. v. McCord*, 245 Ga. App. 245, 247-48 (Ga. Ct. App. 2000) (finding a covenant unreasonable because the territory restricted was larger and broader than the actual territory from which the promisee procured his clients).

found to be unreasonable.[146] In other instances, covenants were deemed unreasonable because they included the entirety of a territory when a promisee's interests were located in certain pockets of the prohibited area.

¶55. The Court recognizes that an LLC's operating agreement defines when and how members of the LLC are liable for a breach of the provisions included within that agreement. Accordingly, the Court looks to the language of the agreement between the parties to determine the reasonableness of its covenant to not compete. When interpreting a contract, the Court's "task is not to reveal the subjective intentions of the parties, but what their words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[147] In these instances, the "goal is to ascertain the intent of the parties and give it effect [because] [t]he cardinal principle of contract interpretation is that the intention of the parties must prevail unless it is inconsistent with some established rule of law."[148] The Court "will not rewrite the contract or give it a construction that conflicts with the plain, ordinary[,] and accepted meaning of the words used."[149]

The LLC Operating Agreement is more akin to an employment contract than a partnership agreement.

¶56. Here, the Arvidsons and Buchar entered into an Agreement for the purpose of establishing a business offering chiropractic services on St. Thomas. Under the Agreement, Buchar is the only Manager of V.I. Chiropractic LLP,[150] and the Arvidsons are listed as "Members," along with Buchar.[151] In the business's early stages, Buchar contributed $98,000.00, representing ninety-eight percent of V.I. Chiropractic's initial capital investments.[152] The Arvidsons initially contributed $1,000.00 each, an amount that, when combined, represented only two percent of V.I. Chiropractic's capital investments. During the later stages of V.I. Chiropractic's development, the Arvidsons increased their contributions to amounts representing twenty percent of the LLC's capital investments, respectively, and forty percent when combined.[153] Under the rules set out in Provision 14.5 of the Agreement, this amount of capital

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[146] *See RKR Dance Studios, Inc. v. Makowski*, Case No. CV084035468, 2008 Conn. Super. LEXIS 2295, at *15-*21 (Conn. Super. Ct. Sept. 12, 2008) (finding a covenant unreasonable because a promisor-dance instructor had to commute one and one-half hours to the closest dance studio not prohibited by the covenant).
[147] *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 625 (V.I. 2017).
[148] *Id.*
[149] *Volunteer Fireman's Insurance Services, Inc.*, 693 A.2d at 1339.
[150] Article 6, V.I. Chiropractic LLC Operating Agreement.
[151] *Id.*
[152] V.I. Chiropractic Operating Agreement, Exhibit A.
[153] Mot. Exclude Expert Witness Testimony of J. DiRuzzo, Exh. A; Letter from Joseph A. DiRuzzo to Christopher Kroblin (Feb. 28, 2019); Buchar Dep. 53:10-56:11 and 63:15-64:17, Dec. 7, 2018.

investment equated to the Arvidsons wielding less of the LLC's voting power.[154] In addition, only Buchar was empowered to determine if and when the Arvidsons were to make additional capital contributions.[155]

¶57. The Agreement states that the Arvidsons are responsible for performing "Consulting Services," and that these duties "may be adjusted from time to time by" Buchar, and also provides that only Buchar "participate[s] in the management or control of the Company's business, transact[s] any business for the Company, or [has] the power to act or bind the Company.[156] Only Buchar may remove himself from his position as LLC Manager.[157] And only Buchar may establish his compensation.[158] Under the Court's reading of this document, the Arvidsons were empowered to perform only consulting services, which were defined in the Agreement as "(1) Chiropractic Consulting Services, (2) Nutritional Consultant Services, and (3) Supplemental Sales Consulting Services."[159] Their compensation was established as "a performance based monthly fee totaling 35% of the net profits collected each month for the satisfactory completion of the services as determined by the Manager."[160] In addition to the Agreement providing Buchar with "exclusive authority to manage the operations and affairs of the Company and to make all decisions regarding the business of the Company[,] . . . . [it also gives Buchar] exclusive authority to establish strategies, accounting procedures[,] and other practices and to make any business decisions the Manager, in his sole discretion, determines . . . .;"[161] provides him the "right, power, and authority to do on behalf of the Company all things that, in his sole judgment are necessary, proper, or desirable. . . .;"[162] bestows sole discretion to have distributions made;[163] gives Buchar the power to decide to treat the LLC as an S corporation for tax purposes;[164] and provides him with sole authority to make all bank withdrawals.[165] But most pointedly, Buchar has his own covenant to not compete which provides:

> The Manager is permitted to engage in any other business, without offering rights or participation to the Company or any Member, provided however, that the Manager is not allowed to engage in any business, whether as an employee, manager, independent contractor, owner or otherwise, with a business deemed to be competitive with the business of the Company absent Dr. William Buchar's consent.[166]

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[154] V.I. Chiropractic Operating Agreement, Subsection 14.5.
[155] V.I. Chiropractic Operating Agreement, Subsection 9.2.
[156] V.I. Chiropractic Operating Agreement, Subsection 14.1.
[157] V.I. Chiropractic Operating Agreement, Subsection 14.3.
[158] V.I. Chiropractic Operating Agreement, Subsection 14.4.
[159] V.I. Chiropractic Operating Agreement, Exhibit B, Subsection 1.
[160] V.I. Chiropractic Operating Agreement, Exhibit B, Subsection 2.
[161] V.I. Chiropractic Operating Agreement, Subsection 15.1.
[162] V.I. Chiropractic Operating Agreement, Subsection 15.2.
[163] V.I. Chiropractic Operating Agreement, Article 10.
[164] V.I. Chiropractic Operating Agreement, Subsection 12.4.
[165] V.I. Chiropractic Operating Agreement, Subsection 12.6.
[166] V.I. Chiropractic Operating Agreement, Subsection 15.9.

¶58. On the other hand, Buchar, as Manager, is not allowed to sell or transfer his interest in the LLC, and he must notify the Arvidsons so that they may invoke their right to enter into thirty days of negotiations to buy Buchar's percentage interest before all others.[167]

¶59. The control that the Agreement gave to Buchar persuades the Court to view the Agreement as more akin to that found in an employee-employer context and less as an agreement made between equal partners who have exchanged equitable amounts of consideration. Thus, the Court applies strict scrutiny to its terms.

The Covenant to not compete does not pass the three-pronged business interest test and, by failing to provide time, place, and manner restrictions, is overly broad and invalid.

¶60. The Arvidsons assert that the covenant to not compete is facially invalid and quote portions of the three-pronged test that requires a restrictive covenant to protect a legitimate business interest of Buchar's without imposing an undue hardship on the Arvidsons and without injuring the public interest.[168] However, the Arvidsons fail to point to any facts illustrating how Buchar's asserted interests are not legitimate business interests worthy of protection and how the restrictive covenant imposes an undue hardship on the Arvidsons when balanced against Buchar's interests. The Arvidsons contend that the covenant is "not merely directed against unfair competition but against competition of any kind on the part of its employees."[169] The Arvidsons also claim that the covenant injures the public interest because the Arvidsons are doctors and certain characteristics of the Virgin Islands (i.e., population size, number of medical professionals, and distance from the mainland) make it such that the Arvidsons' need to practice outweighs the need to protect Buchar's business interest.[170]

¶61. In rebuttal, Buchar contends the Arvidsons violated the covenant, but he fails to specify the legitimate business interests the covenant was created to protect. Buchar does argue that the Agreement imposed duties on the Arvidsons; the Arvidsons agreed the document created these duties; and their opening another chiropractic office, soliciting patients, and soliciting employees from V.I. Chiropractic was a violation of the Agreement on the whole and the covenant to not compete in particular.[171] It would appear that these patient relationships and employee relationships are the legitimate business interests Buchar now wants to protect.[172] However, the Court may not so assume; it is Buchar's burden to show

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[167] V.I. Chiropractic Operating Agreement, Subsection 16.1.
[168] Pls.' Mot. Summ. J. 5.
[169] *Id.* 6.
[170] *Id.* 8-10.
[171] Def.'s Opp. to Pls.' Mot. Summ. J. 1-14.
[172] *See id.* 2, 6, 11.

the covenant was created to protect these particular interests. In addition, Buchar also fails to point to facts illustrating how the covenant does not adversely affect the public interest and only asserts that the Arvidsons have failed to produce factual evidence regarding this third prong of the protectable interest test.[173]

¶62. Ultimately, both parties point to the three-pronged legitimate business interest test, yet fail to present facts that illustrate how the balancing of hardship with business interests tilts too much to one side or the other. Left with only the covenant's language to analyze, the Court notes the clause's lack of verbiage indicating that it was created to protect any legitimate business interest. However, since the clause flatly states that the Arvidsons may not compete with V.I. Chiropractic, with no further express guidance, the Court finds the restrictive covenant causes undue hardship on the Arvidsons.

¶63. The Arvidsons' main contention is that the covenant's lack of any time, place, or manner provisions render the covenant invalid and unenforceable,[174] failing to establish limits which are no wider as to area and no longer as to duration than are reasonably necessary to protect the business of the employer. Indeed, the pertinent language of Clause 14.6 states that the Arvidsons are not allowed "to engage in any business . . . deemed to be competitive with the business of the Company absent Dr. William Buchar's consent"[175] With regard to engaging in "any business," this statement is too broad. Had the covenant specified any "chiropractic practice on St. Thomas and St. John" or "any medical service provider on St. Thomas and St. John," then perhaps the Court could have been persuaded to enforce the clause or part of the clause.[176] In these hypothetical instances, the Court would have been able to determine what durational limits, when added to the suggested territorial limits, would be considered reasonable when all three aspects were considered in totum. In the alternative, if a durational limit had been given without a geographic restriction, then the Court would still have been able to decide what sort of geographical limits would reasonably accompany the named durational limit when considered together.

¶64. In addition, the phrase "absent Dr. William Buchar's consent" also renders the restriction potentially overly broad because there is no geographical nor durational limit with the addition of this phrase. In fact, this phrase introduces a more subjective element, the approval of a former business partner-turned competitor. At worst, the phrase could amount to an illusory promise because Buchar has no obligation under the covenant to even consider giving consent to any competitive arrangement.

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[173] *Id.* 12.
[174] Pls.' Mot. Summ. J. 5-6.
[175] V.I. Chiropractic Operating Agreement, Subsection 14.
[176] *Cf. e.g., Williamson*, 16 V.I. at 292-94 (allowing a covenant to not compete to stand because the geographical restrictions it placed on the employee's ability to work for other veterinary practices were limited to private veterinary practices located only on St. Thomas and St. John).

¶65. In conclusion, nearly every jurisdiction in the United States measures the reasonableness of covenants to not compete with the three-pronged legitimate business interest test and time, place, and manner restrictions laid out in the covenant itself. Not only does the covenant to not compete in Clause 14.6 fail to make clear what legitimate business interests it was created to protect, it does so without giving a durational restriction, a territorial restriction, and a manner, or scope of work, restriction. Accordingly, the Arvidsons have met their summary judgment burden, and the Court finds the covenant to not compete invalid and unenforceable as a matter of law.

Effect of invalidity – the soundest rule for the Virgin Islands is the equitable reformation approach

¶66. After determining the effectiveness of a covenant to not compete, courts adopt one of three approaches when responding to the parties' request to enforce or not enforce such a provision. The first approach voids an unreasonable restraint in its entirety or enforces the covenant in its entirety. The "all or nothing rule," in past, constituted the majority approach. Over time, courts came to disfavor its rigidity and began to wield more flexible approaches to unreasonable covenants to not compete: the "blue-pencil rule" and the equitable reformation doctrine.

¶67. When employing the blue-pencil doctrine, a court "has discretion to cross out overbroad, unreasonable provisions in a noncompete clause while keeping in place the enforceable [i.e., reasonable] language."[177] The rule "does not allow the court to redraft terms or add language to the clause, even where the revision would narrow the scope of the covenant,"[178] thereby rendering it reasonable. Rather, a court's ability to alter the clause's language is restricted to those actions which "delet[e] unreasonable terms or provisions to narrow the scope and enforce[e] the remaining language, so long as the language remains grammatically correct."[179] Courts decline to use the blue-pencil rule when "the covenant is so lacking in essential terms that the trial court is no longer modifying, but is in effect rewriting, the covenant."[180] In some jurisdictions, courts implementing this approach exercise their discretion when deciding whether to alter a covenant's terms.[181] When explaining why they invoke the blue-pencil rule,

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[177] *Steiner v. American Friends of Lubavich (Chabad)*, 177 A.3d 1246, 1256 (D. D.C. 2018) (adopting the equitable reformation doctrine for the district).
[178] *Id.* at 1256-57.
[179] *Id.* at 1257.
[180] 3 Louis Altman and Malla Pollack, *Callmann on Unfair Competition, Trade, and Monopoly* § 16:18 (*see* note 14 for a list of cases illustrating this principle).
[181] *E.g., Cintas Corp. v. Perry*, 517 F.3d 459, 466-68 (7th Cir. 2008) (discussing Ohio precedent that changed Ohio's approach from the blue-pencil rule to the equitable reformation rule and explaining that under both rules the courts had the discretion to choose whether to apply either rule given the circumstances); *Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 718 (N.D. Ill. 2014) (declining to use the blue-pencil rule to change a restrictive covenant's language and deciding to not enforce the covenant as a result); and *Gavaras v. Greenspring Media, LLC*, 994 F. Supp. 2d 1006, 1012 (D. Minn. 2014) (opting to not use the blue-pencil rule to alter restrictive covenant language because doing so would require altering more than duration and scope to render it reasonable). In at least

courts typically indicate that when they "are dealing with an express contract between parties, which by its terms defines what conduct is to be deemed fair or unfair . . . courts . . . were not authorized to erect boundaries never agreed upon by the parties."[182]

¶68. Those jurisdictions deciding to not implement the blue-pencil rule often note its "overly formalistic approach,"[183] calling it a "purely mechanical device, emphasizing form [and the wording of a contract] over [its] substance, which should not stand in the way of equity"[184] ensuring a reasonable version of the parties' agreement is enforced. An additional concern is that "employers [and promisees would be] allowed to blue-pencil their agreements, [therein allowing them] . . . to load up . . . [on] oppressively overreaching terms and intimidate all but the litigation-hardy employees, then post-hoc excise offending provisions to avoid requested judicial invalidation."[185]

¶69. In response to these concerns, other jurisdictions have adopted the equitable reformation doctrine, sometimes labeled as the rule of reasonableness or partial performance. In short, this approach "allows courts to enforce a covenant to the extent that its terms are reasonable, regardless of grammatical severability."[186] "[U]nless the circumstances indicate bad faith on the part of the employer [or promisee], a court will enforce covenants not to compete to the extent that they are reasonably necessary to protect the employer's [or promisee's] interest without imposing undue hardship on the employee [or promisor] when the public interest is not adversely affected."[187] When applying this approach, courts ignore a covenant's "divisibility aspect and exercise their inherent equity powers to modify and enforce covenants whether their phraseology lends itself to severability or not."[188] "[U]nless circumstances indicate bad faith or deliberate overreaching on the part of the promisee, a court will attempt to modify an unreasonable covenant and enforce it to an extent that is reasonably necessary to protect the promisee's legitimate interests . . . without . . . undue hardship on the promisor."[189]

¶70. Equitable "modification . . . [is] more consistent with the inherent concerns of a court of equity—fairness and reasonableness. . . . [and] allows a court to escape the rule of arbitrary refusal to enforce a covenant which, while unreasonable or indefinite in some of its terms, nevertheless serves to protect a

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two jurisdictions, Florida and Texas, state statutes mandate that courts use the blue-pencil rule to reform an unreasonable covenant to not compete. *See* Fla. Stat. § 542.335 (1)(c) and Tex. Bus. & Com. Code § 15.51 (c).

[182] *Delancey Kosher Restaurant & Caterers Corp. v. Gluckstern*, 305 N.Y. 250, 256 (N.Y. 1950).

[183] *Steiner*,177 A.3d at 1257.

[184] *Durapin, Inc. v. American Products*, 559 A.2d 1051, 1059 (R.I. 1989) (adopting the rule of partial enforcement).

[185] *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1307 (7th Cir. 2005).

[186] *Steiner*, 177 A.3d at 1256.

[187] *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984) (adopting the equitable reformation rule, though entitling it in that jurisdiction as the rule of reason).

[188] *Durapin, Inc.*, 599 A.2d at 1058.

[189] *Id.*

fact and the movant is entitled to judgment as a matter of law."[6] "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]'"[7] and a fact is material only where it "might affect the outcome of the suit under the governing law[.]"[8] "[T]he party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact."[9] "If the moving party does so, the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in [its] favor."[10] But, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial."[11] "A party asserting that a fact cannot be or is genuinely disputed must . . . support the assertion by (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (ii) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[12]

¶11. "The [C]ourt must credit all reasonable inferences from the evidence on record in favor of the nonmoving party in considering whether there are any disputed issues of material fact"[13] and "must take the non-moving party's conflicting allegations as true if supported by proper proofs."[14] Further, the Court "should not weigh the evidence, make credibility determinations, or draw 'legitimate inferences' from the facts when ruling upon summary judgment motions because these are the functions of the jury."[15] "The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits."[16] The Court must deny summary

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[6] V.I. R. Civ. P. 56(a).
[7] *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[8] *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (quoting *Anderson*, 477 U.S. at 248).
[9] *United Corp.*, 64 V.I. at 309 (V.I. 2016) (quoting *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (citations omitted).
[10] *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017) (citation and quotation marks omitted).
[11] *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (quotation marks omitted).
[12] V.I. R. Civ. P. 56 (c)(1).
[13] *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citing *Burd v. Antilles Yachting Servs., Inc.*, 57 V.I. 354, 358 (V.I. 2012) and *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011)).
[14] *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and quotation marks omitted).
[15] *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).
[16] *Hawkins*, 66 V.I. at 117 (citing *Williams*, 50 V.I. at 195).

legitimate interest of the parties or the public."[190] "[E]quity should not permit the injustice that might result from the total rejection of a covenant merely because the court disagrees with the promisee's judgment about what restriction is necessary to protect the promisee's proprietary interests and that covenant's language does not lend itself to the mechanical blue-pencil modification."[191] These rationales supporting the application of equitable modification are tempered by concerns for employee and promisor hardships because "an intentionally overbroad covenant could end up tying an employee's hands for years although a majority of courts would find it unreasonable on its face."[192]

¶71. The Court notes that the Virgin Islands Legislature has made protection of employment a matter of public policy.[193] Therefore, choosing an approach that would seemingly encourage employers to write overly broad restrictive covenants in the hope that uninformed employees would not fight the covenant in court, or that would have the court fashion a reasonable version of terms to which the parties did not originally agree, does not seem like the soundest rule for this jurisdiction. While *Banks* does express a penchant for having this Court determine the majority rule addressing legal issues, it does not mandate adoption of the majority rule.

¶72. First, the "all or nothing rule" is a draconian approach providing little to no protection for employers or promisees asking for protection of their legitimate business interests. Second, the blue-pencil rule, while preventing courts from writing contracts to which they were never a party and simultaneously allowing adherence to the parties' original contractual intent, is overly formalistic.

¶73. Therefore, the Virgin Islands joins the majority of jurisdictions and finds the equitable reformation doctrine to be the soundest rule for covenants to not compete. When opting for this rule, the Court emphasizes its "reluctance to rewrite contracts between parties . . . and . . . the argument which suggests that partial enforcement rewards employers who have everything to gain from writing overbroad covenants."[194] Accordingly, the Court implements this rule with a "greater willingness to refuse to reform agreements that are not reasonable on their face."[195] As the D.C. Circuit noted in its recent opinion adopting the same majority approach: "We are persuaded to adopt equitable reformation more by the argument that the blue-pencil doctrine can be too rigid and technical an approach than by any suggestion that courts should be at liberty to wholesale rewrite overbroad clauses."[196]

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[190] *Insurance Center Inc. v. Taylor*, 94 Idaho 896, 899 (Idaho 1972).
[191] *Durapin*, 599 A.2d at 1058-59.
[192] *Cambridge Engineering Inc. v. Mercury Partners*, 378 Ill. App. 3d 437, 456 (Ill. App. Ct. 2007).
[193] 24 V.I.C. § 76 (the Virgin Islands Wrongful Discharge Act enumerating only nine reasons for which an employer may lawfully discharge an employee after qualifying for protection under the statute).
[194] *Steiner*, 177 A.3d at 1257 (citations and quotation marks omitted).
[195] *Id.* at 1258 (citations and quotation marks omitted).
[196] *Id.*

¶74. Overall, when weighing whether, when, and how to modify or rewrite a facially overbroad restrictive covenant, the guiding consideration remains "whether modified enforcement is possible without injury to the public and without injustice to the parties themselves."[197] Following this mandate, if the Court finds itself facing a clause in which less than all of the covenant is unenforceable on grounds of public policy because it is too broad, then the Court has the discretion to enforce part of the term not offensive to public policy. "The [C]ourt's power in such a case is not a power of reformation . . . and it will not, in the course of determining what part of the term to enforce, add to the scope of the term in any way."[198] Further, the Court may exercise its discretion for a party seeking reformation as long as that party "made the agreement in good faith and in accordance with reasonable standards of fair dealing."[199] The Court will not exercise this discretion to "aid a party who has taken advantage of his dominant bargaining power"[200] and then rewrite an overbroad covenant, making it enforceable. In addition, the Court will "review with stricter scrutiny a decision to reform an agreement to make it reasonable where doing so would require a substantial rewrite of the contract or where the court would be called upon to supply essential terms."[201]

¶75. Here, not one portion of the covenant to not compete is reasonable. The clause lacks specificity as to the legitimate business interests of Buchar's it seeks to protect. While it is possible to infer that patient relationships are the interests sought to be protected, the Court would still be forced to guess whether present or future patient relationships were at issue. Although the Arvidsons are prohibited from engaging in "any business," with no mention whether a certain type of business is intended or if all businesses are intended, this portion of the covenant may appear to be susceptible to reformation by adding the term "chiropractic" to make the clause read "any chiropractic business." However, because no durational limits exist; no territorial limits exist; and no manner or scope limits exist; all of these terms would have to be supplied by the Court as well. The addition of this many terms would result in a "substantial rewrite of the clause." Supplying all of these time, place, and manner terms to render the covenant not to compete enforceable would equate to the Court "supply[ing] the essential terms" of this covenant. Under the equitable reformation doctrine, the Court is charged with enforcing a covenant "to the extent that its terms are reasonable." There existing no extent to which the terms in this covenant are reasonable, the Court must invoke a "greater willingness to refuse to reform [an] agreement that [is] not reasonable on [its] face." The Court does possess the discretionary power to reform partially reasonable

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[197] *Id* (quoting 15 Grace McLane Geisel, *Corbin on Contracts* § 89.26 (Joseph M. Perillo ed., rev. ed. 2003)).
[198] Restatement (Second) of Contracts § 184 Cmt.b.
[199] *Id.*
[200] *Id.*
[201] *Steiner*, 177 A.3d at 1258.

covenants. However, that power should not "reward[] employers who have everything to gain from writing overbroad covenants."

¶76. Accordingly, the Arvidsons have met their summary judgment burden, and the covenant to not compete contained within the V.I. Chiropractic Operating Agreement is deemed unenforceable.[202]

Covenant of good faith and fair dealing

¶77. The Arvidsons next argue that because the covenant to not compete included in the Agreement is not valid, then Buchar's covenant of good faith and fair dealing claim is also extinguished. In addition, the Arvidsons contend that, because Buchar told them he was dissolving V.I. Chiropractic, their actions in starting another chiropractic practice did not breach a duty of good faith and fair dealing.[203] In his Opposition, Buchar posits that this portion of the Arvidsons' motion for summary judgment "is not credible . . . [because] . . . facts that are in the record and [that] will be presented at trial will establish the Arvidsons' breach."[204] Specifically, Buchar's Opposition asserts: "The Plaintiffs' motion for summary judgment does not . . . make any argument refuting that a valid agreement was entered into between the parties nor that a duty was created by that agreement, nor that a breach of that duty occurred causing the Defendant damages. . . . because it is undisputed that the Plaintiffs entered into a valid written Operating Agreement, which gave rise to duties with which the Plaintiffs were charged with as members of V.I. Chiropractic."[205] In addition, in a Statement of Additional Facts submitted to supplement the parties' motions, Buchar also posits "Plaintiff[s] testified under oath at their respective depositions that it was

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[202] Two additional sub-issues must be addressed regarding the Arvidsons' covenant to not compete. First, Buchar also argues that two sentences written in the Notice of Dissolution he sent to the Arvidsons constitute a second covenant to not compete between the parties. First, to the extent that Buchar claims these sentences form a valid covenant to not compete, he is reminded that the first two elements of the test of reasonableness are: (1) the covenant must be ancilliary to a valid transaction; and (2) the covenant must be supported by consideration. Here, unlike the V.I. Chiropractic Operating Agreement, a document notifying an LLC member that its Manager is dissolving the LLC does not constitute a valid transaction or exchange (i.e., the sale of a business or an employment contract) nor the creation of a business entity (i.e., the creation of an LLC or partnership). Thus, the portion of the Notice of Dissolution which Buchar contends is a covenant to not compete is not ancillary to a valid transaction and fails to fulfill the first element of the test of reasonableness. Importantly, when assessing the purported covenant's validity, the Court also notes that no consideration changed hands between Buchar and the Arvidsons when Buchar sent the Notice of Dissolution to the Arvidsons (i.e., neither party purchased the other's shares). Thus, the covenant fails to fulfill the second element of the test of reasonableness. As a result, the sentences do not constitute a legally enforceable covenant to not compete.

Second, the Arvidsons contend that if the covenant to not compete contained in the V.I. Chiropractic Operating Agreement is valid and enforceable, then Buchar's actions, in (1) notifying the Arvidsons of his initiation of the dissolution process and (2) never filing for dissolution, amounted to actions which would give rise to the covenant's not being enforced under the judicial theories of estoppel or waiver. These arguments are rendered moot by the above analysis. Accordingly, the Court will not write case law nor conduct legal analysis that amounts to an advisory opinion.

[203] Pls.' Mot. Summ. J. 12-13.

[204] Def.'s Opp. to Pls.' Mot. Summ. J. 14-15.

[205] *Id.* 6.

their duty to abide by the terms of the Operating Agreement and that opening up another chiropractic office and soliciting patients would stand in violation of their duties of good faith and fair dealing to Dr. Buchar and the company."[206]

¶78. From these submissions, it appears that the parties refer to the covenant of good faith that arises when parties perform their contractual duties. However, Buchar's counterclaim asserts his covenant of good faith and fair dealing claim by alleging the Arvidsons "violated their duty of good faith and fair dealing with Dr. Buchar and the Company"[207] with no further detail.

¶79. Reading Buchar's counterclaim alongside the written arguments of both parties, it is unclear to the Court whether the Arvidsons' motion for summary judgment refers to the covenant of good faith and fair dealing under common law contract principles or under the Virgin Islands LLC statute. Because the Arvidsons do not refer to the specific statute that addresses the fiduciary duty of good faith and fair dealing in Virgin Islands LLC contexts, i.e., 13 V.I.C. § 1409, because Buchar lists the elements of a common law breach of the covenant of good faith and fair dealing claim in his Opposition, and because LLC statutes establish their own fiduciary duty of good faith and fair dealing, the Court looks to the Virgin Islands' LLC statutes outlining the fiduciary duty of good faith and fair dealing," first, and then to case law addressing the duty of good faith and fair dealing in contractual contexts.

¶80. 13 V.I.C. § 1104 establishes the effect of LLC operating agreements in the Virgin Islands. Under its mandate, when read with 13 V.I.C. § 1409, an operating agreement "may not . . . eliminate the obligation of good faith and fair dealing" for members of member-managed Virgin Islands LLCs.[208] In Virgin Islands LLCs, members in manager-managed LLCs "who [are] not also . . . manager[s] owe[] no duties to the [LLC] or to the other members solely by reason of being a member."[209]

¶81. Here, Buchar is the Manager of V.I. Chiropractic, and the Arvidsons are members with no managerial duties. Under these facts and the Virgin Islands LLC statutory regime, the Arvidsons owe no fiduciary duty of good faith and fair dealing to V.I. Chiropractic nor Buchar. While operating agreements may serve as vehicles through which parties may impose their own contractually-agreed-to fiduciary

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[206] *Id.* 2. In his Statement of Additional Facts, Buchar asserts that the Arvidsons "had a duty to operate in good faith and fair dealing" when "dealing with [Buchar] in the running of V.I. Chiropractic," (Def.'s Statement of Additional Facts ¶ 38), by "be[ing] honest . . . and act[ing] truthfully [*id.* ¶ 39], by be[ing] transparent with their actions" [*id.* ¶ 40], by "adher[ing] to the terms of the operating agreement" (*id.* ¶ 41), by not "compet[ing] with V.I. Chiropractic" (*id.* ¶ 42), and by not "soliciting V.I. Chiropractic patients" (*id.* ¶ 43) nor its employees (*id.* ¶ 44). However, the Court has read the portions of the Arvidsons' depositions to which Buchar cites when making these assertions. Only in Tylur Arvidson's deposition did Buchar's counsel question him regarding a "duty to operate in good faith and fair dealing with Buchar. Tylur Arvidson Dep. 291:12-293:17, Dec. 5, 2018.

[207] Def.'s Second Am. Countercl. ¶ 60.

[208] 13 V.I.C. § 1104 (b)(4); 13 V.I.C. § 1409 (d).

[209] 13 V.I.C. 1409 (h)(1).

duties, the Agreement contains no such provisions. Accordingly, the Court finds the Arvidsons owe no fiduciary duty of good faith and fair dealing to Buchar or to V.I. Chiropractic under the Agreement.

¶82. Second, the Court turns its attention to the duty of good faith and fair dealing that "arises by implication through the existence of a contract."[210] In the Virgin Islands, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[211] "The duty of [contractual] good faith limits the parties' ability to act unreasonably in contravention of the parties' reasonable expectations" when performing under the contract.[212] "The implied covenant recognizes that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."[213] "[A] party breaches the implied covenant of good faith and fair dealing by taking actions that deprive another party of the benefits for which it had bargained."[214]

¶83. To prevail under the Virgin Islands' iteration of this claim, Buchar must show that (1) a valid contract exists between the parties and (2) acts committed by the Arvidsons amount to fraud or deceit or an unreasonable contravention of the parties' reasonable expectations under the contract. Conduct illustrating fraud shows "an intention to deceive."[215] Actions illustrating deceit " involve[] the act of intentionally giving a false impression.'"[216]

¶84. Typically, the first element of the duty of good faith and fair dealing, the contract element, is easily identifiable. Here, however, the Arvidsons premise their motion for summary judgment on the invalidity of the Agreement's covenant to not. Instead, Buchar's Counterclaim described the breach of contract claim by pointing to the entire Agreement, contemplating the Agreement as an enforceable contract. In particular, Buchar's Counterclaim states:

> 56. The Operating Agreement constitutes a bargained-for-exchange between the Plaintiffs and Defendant and the Company, and was a valid contract.[217]
> 57. The Plaintiffs have broken their promises to Buchar and the Company under the Operating Agreement as described herein.
> 58. The Plaintiffs' actions constitute a breach of the material terms of the Operating Agreement and has [sic] resulted and will continue to result in monetary damages. . . .[218]

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[210] *Chapman v.* Cornwall, 58 V.I. 431, 441 (V.I. 2013).
[211] *Basic Services, Inc. v. Government of the Virgin Islands*, Case No. 2017-0084, 2019 WL 2488037, at *4 (V.I. June 13, 2019).
[212] *Chapman*, 58 V.I. at 441.
[213] *Merchants Commercial Bank v. VI F.F.O. LLC*, Case No. ST-18-CV-183, 2018 WL 4586346, at *3 (V.I. Super. Ct. Sept. 17, 2018).
[214] *Id.* at *3.
[215] *Hiss v. Commercial Security, LLC, Inc.*, Case No. SX-15-CV-104, 2016 WL 3092511, at *3 (V.I. Super. Ct. Apr. 8, 2016).
[216] *Id.*
[217] Def.'s Second Am. Countercompl. ¶ 56.
[218] *Id.* ¶ 57-58.

¶85. To determine whether the first element is fulfilled, the Court addresses a conceptually prior issue. Generally, LLC operating agreements are contracts that should be interpreted using traditional contract principles, unless an express provision in the relevant LLC statute or in the operating agreement establishes the contrary. Virgin Islands LLC statutes permit—but do not require—LLC members to "enter into an operating agreement."[219] Operating agreements establish the procedures through which LLC members "regulate the affairs of the company and the conduct of its business, and . . . govern relations among members, managers, and company."[220] Though Virgin Islands LLC statutes do not expressly define operating agreements as contracts, the Court notes two points. First, the legal definition of "agreement" is "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons."[221] Second, subsection (b) of 13 V.I.C. § 1104 sets out restrictions the Virgin Islands Legislature has placed on LLC operating agreements in the Virgin Islands.[222] Importantly, no restriction imposed by 13 V.I.C. § 1104 (b) provides that operating agreements in the Virgin Islands are not contracts or are not to be interpreted using traditional contract law principles.[223] LLC members would likely not memorialize "a mutual understanding . . . [of] their relative rights and duties" in a document which "regulat[es] the affairs of [their LLC] and the conduct of its business and govern[s] relations among [the LLC's] members, managers, and the company" unless the members did not intend their rights and duties to be legally enforceable. Accordingly, the Court finds that LLC operating agreements are contracts, unless the operating agreement states on its face that it is not a contract and not to be interpreted under contract law principles.

¶86. Here, the opening line of the Agreement reads, "This OPERATING AGREEMENT is executed . . . [and] entered into . . . by each of the Members listed in Exhibit A of this Agreement."[224] Verbiage follows which establishes that the "Members enter into this Agreement to provide for the governance of the Company and the conduct of its business and to specify their relative rights and obligations."[225] It also sets out the performance obligations that Members, the Arvidsons, are to perform, namely consulting services.[226] In return for the Arvidsons' performance of the consulting services, V.I. Chiropractic "shall

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[219] 13 V.I.C. § 1104 (a).
[220] 13 V.I.C. § 1104 (a).
[221] BLACK'S LAW DICTIONARY 67 (7th ed. 1999).
[222] For example, 13 V.I.C. § 1104 provides that operating agreements may not "eliminate the [presumably fiduciary] obligation of good faith and fair dealing [for members in member-managed LLCs] . . . [though they] may determine the standards by which the performance of the obligation is to be measured." 13 V.I.C. § 1104 (b)(4).
[223] *See generally*, 13 V.I.C. § 1104 (b).
[224] V.I. Chiropractic Operating Agreement, Introduction.
[225] *Id.*
[226] V.I. Chiropractic Operating Agreement, Exhibit B.

pay the members Dr. Tylur Arvidson and Dr. Tygue Arvidson, . . . each a performance based monthly fee totaling 35% of the net profits collected each month."[227] By agreeing to perform consulting services and by agreeing to have the LLC compensate the Arvidsons, the Arvidsons and Buchar, respectively, have exchanged mutually binding obligations. In addition, the Agreement establishes more rights, duties, and obligations owed by both parties regarding capital contributions, LLC distributions, allocation of profits and losses, the maintenance of accountings and records, the "rights and duties of members," and "the powers, rights, and duties of the manager," among other duties.[228] Accordingly, although the Agreement's covenant to not compete is now invalid and unenforceable, the document still stands as a valid, enforceable contract, and the first element for a breach of the covenant of good faith and fair dealing is fulfilled.

¶87. To prevail on the second element of this claim, the Arvidsons must to show that no issue of genuine material fact remains which could allow the Court to find that they commited acts that amounted to fraud or deceit or that unreasonably contravened Buchar's reasonable expectations or benefits derived from the V.I. Chiropractic Operating Agreement. Recently, the Virgin Islands Supreme Court provided further guidance regarding the acts necessary to fulfill the second element of this claim when it stated: "the implied duty of good faith and fair dealing is limited by the original bargain; it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value . . . [and it] operates as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract."[229] Illustrative examples from Virgin Islands case law show that in instances where a breach of the covenant of good faith and fair dealing was premised on fraud, acts deemed sufficient to overcome a motion to dismiss of a breach of this covenant include (1) an employer's misleading an employee regarding the employee's status and the same employer's subsequent failure to relay the reason for the employee's termination,[230] as well as (2) an employer's misleading an employee regarding whether

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[227] V.I. Chiropractic Operating Agreement, Exhibit B.

[228] V.I. Chiropractic Operating Agreement, Articles 9, 10, 11, 12, 14, and 15.

[229] *Basic Services, Inc. v. Government of the Virgin Islands*, Case No. 2017-0084, at ¶ 21, 2019 WL 2488037, at *6 (V.I. June 13, 2019).

[230] *See Hiss v. Commercial Security, LLC, Inc.*, Case No. SX-15-CV-104, 2016 WL 092511, at *3-*4 (V.I. Super. Ct. Apr. 8, 2016) (finding that an employer's acts (1) of telling the employee to wait before returning to work until after an internal investigation regarding the employee had been completed, (2) of failing to advise the employee to return to work though the employer told the employee he would advise him about "the next step" after any internal investigation, and (3) of never informing the employee why he was terminated all indicated that the plaintiff-employee had forecast sufficient evidence to overcome a motion to dismiss by showing the employer had possibly acted in a fraudulent manner therein breaching the covenant of good faith and fair dealing).

managerial positions were available within the entire company by telling the employee none were open.[231] In instances where a breach of the covenant of good faith and fair dealing was premised on a contravention of another contractual party's reasonable expectations under a contract, acts deemed sufficient to indicate a breach of the covenant included (1) termination of an employee who led his co-workers in objecting to an unreasonable pay raise given to another employee,[232] (2) a bank-defendant's improper disclosure of a customer-plaintiff's private financial information to a third party,[233] and (3) a lender's misleading a borrower regarding the progression of steps involved in a multi-step loan that ultimately resulted in the defunding of the borrower's construction project.[234]

¶88. Here, the Arvidsons contend that no contract exists without the covenant to not compete, but this argument fails to meet their summary judgment burden. Buchar argues that the Agreement still stands as a valid contract, thus fulfilling element one. The Court concurs. The question of whether a dispute of genuine material fact remains for Buchar's breach of the covenant of good faith and fair dealing claim hinges on the second element. In his Opposition, Buchar asserts that the Arvidsons' argument that no factual dispute exists regarding his breach of the covenant of good faith and fair dealing claim is "not credible."[235] Buchar continues, "Clearly, the facts that are in the record and [that] will be presented at trial will establish the Plaintiffs' breach of good faith and fair dealing." After that assertion, Buchar goes onto state that "Conclusory arguments made at summary judgment do not meet the high review standards established for dispositive motions."[236]

¶89. Indeed, both the Arvidsons and Buchar have failed to present evidence regarding this particular claim. While Buchar did submit an Additional Statement of Facts in which he points to a deposition of Tylur Arvidson, the questions posed to Tylur Arvidson ask generally about a duty of good faith and fair

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[231] *See Service v. Almod Diamonds, Ltd.*, Case No. ST-16-CV-280, 2016 WL 7106368, at *2-*3 (V.I. Super. Ct. Dec. 5, 2016) (finding that an employer's acts of telling an employee that there were no managerial level positions open over a certain period of time and of simultaneously hiring other individuals with less experience than the employee to fill those managerial positions both indicated that the plaintiff-employee had forecast sufficient evidence to overcome a motion for summary judgment by showing the employer had possibly acted in a fraudulent manner therein breaching the covenant of good faith and fair dealing).

[232] *See Webster v. CBI Acquisitions, LLC*, Case No. ST-11-CV-558, 2012 WL 832044, at * 4 (V.I. Super. Ct. Mar. 5, 2012) (finding that a plaintiff-employee's allegation that he was terminated "in retaliation for leading his co-workers in objecting to a pay-raise that they found to be unreasonable" was inconsistent with the purpose of his employment agreement and was sufficient to overcome the defendant-employer's motion to dismiss a breach of the covenant of good faith and fair dealing claim).

[233] *Firstbank Puerto Rico v. Webster*, Case No. ST-12-CV-239, 2013 WL 436702, at *3 (V.I. Super. Ct. Jan. 17, 2013).

[234] *See Merchants Commercial Bank v. Oceanside Village, Inc.*, 64 V.I. 3, 34 (V.I. Super. Ct. 2015) (finding that allegations that a plaintiff-bank "repeatedly failed to perform its obligations under [a] loan agreement," "misrepresent[ed] its lending limits to Defendants," "fail[ed] to make timely payments under [the same] loan agreement," and ultimately "fail[ed] to fund the loan" were sufficient to amend the defendant-lendee's complaint).

[235] Def.'s Opp. to Pls.' Mot. Summ. J. 15.

[236] *Id.*

dealing, with the most specific questions focusing on a breach of the covenant to not compete, which this Court has ruled overbroad, invalid, and unenforceable. Moreover, the questions fail to demonstrate concrete actions Tylur Arvidson took which go to illustrate fraud, deceit, or contravened reasonable contractual expectations comprising the second element of this claim.[237]

¶90. Virgin Islands Rule of Civil Procedure 6-1 (a)(2) states that motions, inclusive of the responses and replies thereto, "must . . . state with particularity the grounds for seeking the order, including a concise statement of reasons and citation of authorities."[238] Although case law provides ample examples of how the covenant of good faith and fair dealing may be breached, neither side has pointed to any of that legal authority. Both sides rely on overbroad generalizations which do not attempt to tether concrete facts to standing legal precedent developed in the course of other controversies. As a result, the court is compelled to find that genuine issues of material fact exist and remain to be settled at trial with regard to this claim. This portion of the Plaintiffs' motion for summary judgment is denied.

Intentional interference with prospective business relations[239]

¶91. The Virgin Islands Supreme Court has yet to articulate the elements required to prevail on a claim of intentional interference with prospective business relations. Therefore, the Court looks to an opinion written by another judge on this Court in which it conducted a *Banks* analysis of the claim. Under *Donastorg v. Daily News Publishing Co., Inc.*,[240] "to prevail on a claim for interference with prospective business relations, a plaintiff . . . must demonstrate: (1) the existence of a professional or business relation that is reasonably certain to produce an economic benefit for the plaintiff; (2) intentional interference with that relationship by the defendant; (3) that was accomplished through improper means or for an improper purpose; and (4) that the defendant's interference damaged the plaintiff."[241]

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[237] Tylur Arvidson Dep., 291:12-293:17, Dec. 5, 2018.
[238] V.I. R. Civ. P. 6-1 (a)(2).
[239] On November 30, 2017, Buchar filed a Motion to Add a Third Party and a Second Amended Counterclaim with the Court. In the last Memorandum Opinion, dated May 29, 2018, addressing this dispute, the Court denied Buchar's Motion to Add a Third Party, Rock City Wellness, LLC (the Arvidsons' new chiropractic practice). Simultaneously, the Court failed to explicitly grant the amendments to his Complaint noted in his Second Amended Counterclaim. Virgin Islands Rule of Civil Procedure 15 (a)(2) establishes that "a party may amend its pleading only with the opposing party's written consent or the Court's leave. The Court should freely give leave when justice so requires." Buchar's Second Amended Complaint whittles down his initial nine claims against the Arvidsons to seven claims. In addition, Buchar has complied with V.I. R. Civ. P. 15-1 by submitting a red-lined amended complaint. Accordingly, the Court gives leave to Buchar to amend as reflected in his Second Amended Counterclaim. Thus, his intentional interference with current business relations claim is dismissed, but his intentional interference with prospective business relations claim remains.
[240] 63 V.I. 196 (V.I. Super. Ct. 2015)
[241] 63 V.I. at 293.

¶92. To fulfill the third element, the "plaintiff must also demonstrate that the defendant's conduct was wrongful for reasons beyond the interference itself."[242] In short, the plaintiff's evidence must show that the "defendant's interference was the result of either improper means or an improper motive,"[243] meaning "liability should only flow when the defendant has committed an independently-wrongful act."[244] The *Donastorg* court went to pains to elucidate what sort of actions are captured by the terms "improper means" and "improper motive."[245] "Improper means include acts that would be independently actionable, in violation of existing laws, statutes, or regulations. . . . [and] may also include an extreme departure from an established industry standard."[246] An improper motive is evidenced when the defendant commits acts which lack any "legitimate business objective, [and] instead . . . only . . . harm . . . the plaintiff."[247]

¶93. The Arvidsons assert that Buchar cannot show that they engaged in wrongful or improper conduct because the covenant to not compete is unenforceable and no non-solicitation agreement exists between the parties.[248] Buchar responds with conclusory statements, which lack both factual and legal support, that "facts that are in the record clearly establish the plaintiff's tortious interference."[249] In reply, the Arvidsons posit that Buchar alleges that the wrongful conduct arose from a violation of the covenant to not compete, which the Arvidsons reiterate is unenforceable.[250] For his intentional interference with prospective business relations claim, Buchar's Second Amended Counterclaim alleges:

> 63. Dr. Buchar and [V.I. Chiropractic] had an ongoing professional relationship with the patients of the Company.
> 64. This professional relationship was reasonably certain to produce an economic benefit because the patients routinely returned for follow-up services.
> 65. The Arvidson brothers intended to induce Dr. Buchar's and the Company's patients to breach their contractual or beneficial business relationships.
> 66. To do so, the Arvidson brothers entered an agreement with each other designed to achieve an improper purpose of disadvantaging Dr. Buchar and the Company, and through this agreement induced patients to leave Dr. Buchar and the Company and see them personally at Rock City Wellness.
> 67. Dozens of Dr. Buchar and the Company's patients did, in fact, leave for this reason.

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[242] *Id.* at 292.
[243] *Id.*
[244] *Id.* at 293.
[245] *See id.* at 292 n.329 (citing *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014); *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 582 P.2d 1365, 1371 (Or. 1978); and *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 176 (Tenn. Ct. App. 2007).
[246] *Donastorg*, 63 V.I. at 292.
[247] *Id.*
[248] Pls.' Mot. Summ. J. 14.
[249] Def.'s Opp. to Pls.' Mot. Summ. J. 15-16.
[250] Pls.' Reply to Def.'s Opp. to Pls.' Mot. Summ. J. 8.

judgment where a factual dispute exists[17] and must grant summary judgment if the non-moving party cannot establish an essential element of its claim.[18]

Analysis

Breach of Contract -- Breach of Covenant to Not Compete

¶12. The Arvidsons' first seek summary judgment on Buchar's breach of contract claim, under the covenant to not compete in Clause 14.6 of the V.I. Chiropractic LLC Operating Agreement. Clause 14.6 in the Agreement provides:

> 14.6 Non-Compete. The Members are permitted to engage in any other business, without offering rights or participation to the Company or any other Member, provided however, that the Member is not allowed to engage in any business, whether as an employee, manager, independent contractor, owner or otherwise, with a business deemed to be competitive with the business of the Company absent Dr. William Buchar's consent.

¶13. The Arvidsons contend that the (1) the covenant to not compete is void and unenforceable, as it fails to meet the test of reasonableness; (2) the covenant is contrary to public policy;[19] and, in the alternative (3) even if the covenant to not compete is valid and not contrary to public policy, it still cannot be enforced due to estoppel and waiver.[20] In response, Buchar asserts the Arvidsons (1) agreed to abide by the Agreement, (2) had previous experience with covenants to not compete, (3) consulted their own lawyers regarding the Agreement, and (4) were sophisticated doctors who bound themselves in an arm's length transaction which, if found void, should be remedied with either the "blue-pencil" approach or the equitable reformation approach, both of which Buchar assumes this Court has at its disposal.[21] In addition, Buchar submits that the Arvidsons violated the portion of the Dissolution Notice he supplied them, which reads:

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[17] *See id.* (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009)).
[18] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (explaining that summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial").
[19] When making their public policy argument, the Arvidsons ground their assertions in (1) the general legal principle that holds general restrictive covenants are invalid; (2) the claim that because the Arvidsons are chiropractors the covenant to not compete is void because it purports to apply to physicians; and (3) because the Virgin Islands has such a small number of professionals and is water-locked, public policy counsels the Court to not enforce the covenant (an argument better suited for the third prong of the test used to assess the enforceability of covenants to not compete). Pls.' Mot. Summ. J. 4-12. These arguments conflate the historical treatment of restrictive covenants and a decision that various jurisdictions have made to prohibit restrictive covenants between and among physicians. Each will be addressed accordingly.
[20] *Id.*
[21] Def.'s Opp. to Pls.' Mot. Summ. J. 14.

> 68. The Arvidson brothers were not entitled to do this.
> 69. Dr. Buchar personally and the Company have been damaged by the Arvidson brothers' tortious interference with their business relations.[251]

¶94. Of the Virgin Islands cases applying the rule articulated in *Donastorg*, only one, *Gerard v. Dempsey*,[252] turned on the improper purpose element. In *Gerard*, the plaintiff initially claimed the defendant tortuously interfered with his employment contract with the Government of the Virgin Islands by authoring a report to the then-newly-elected Governor that recommended the plaintiff be terminated.[253] Because the defendant generated the report as a member of a team responsible for making personnel recommendations to the Governor, "improper means" (in the form of a personnel report) was not the route through which the plaintiff sought to fulfill the impropriety element in issue.[254] Instead, *Gerard*'s analysis focused on the defendant's improper motives fueling the recommendation, which were: (1) to replace the plaintiff and others with the defendant's own friends and colleagues; and (2) to build a new driveway without having to file and pay for the necessary environmental permits that were to be approved by the plaintiff's office.[255] However, the *Gerard* court addressed factual scenarios inherent in government and was presented with concrete and factually specific evidence eliminating any issue of material fact with regard to the defendant's alleged improper motives.[256] Here, Buchar's intentional interference with prospective business relations claim is set in a different context.

¶95. *Donastorg*'s impropriety analysis relied upon *Watson's Carpet and Floor Coverings, Inc. v. McCormick*,[257] *Top Service Body Shop, Inc. v. Allstate Insurance Co.*,[258] and *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*[259] Specifically, in *Watson's*, the Tennessee Court of Appeals provided more detail for the impropriety element of this cause of action, making three main points. First, because impropriety is the legal interest the tort of intentional interference with prospective business relations seeks to safeguard, the *Watson's* court established the outer limits of impropriety to be prohibited by this claim, observing:[260]

> Given the protection and dignity afforded contractual relationships . . . it would be contrary to sound public policy to inadvertently extend a *greater* protection to relationships where the parties themselves are not bound (non-contractual) or where the existence of the relationship itself

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[251] Def.'s Second Am. Compl. ¶¶ 63-69.
[252] Case No. SX-09-CV-076, 2019 WL 1559922, 2019 VI SUPER 47 (V.I. Super. Ct. Apr. 5, 2019).
[253] *Id.* at ¶¶ 11-17.
[254] *Id.* at ¶¶ 18-24.
[255] *Id.* at ¶¶ 18-32.
[256] *Id.*
[257] 247 S.W.3d 169 (Tenn. Ct. App. 2007).
[258] 283 Ore. 201 (Or. 1978).
[259] 844 N.W.2d 210 (Minn. 2014).
[260] *Watson's Carpet and Floor Coverings, Inc.*, 247 S.W.3d at 177-78.

> is uncertain (prospective relationships). . . . Economic relationships short of contractual . . . should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal responsibility in a way that maximizes areas of competition free of legal penalties. . . . [Therefore,] the tort['s] . . . application should still be governed by concerns about interference with legitimate competition. . . . [and] should not be interpreted in such a way as to prohibit or undermine the ability to contract freely and engage in competition. . . . A person is not free to compete if a refusal to do business incurs civil liability. . . . [P]roof of improper conduct extending beyond the bounds of doing business . . . [fulfills the impropriety element, while] simply refusing to do business with an entity does not extend beyond the bounds of doing business.[261]

¶96. Second, *Watson's* clarified that, because "a precise or all-encompassing definition of [the term of art] improper [is] neither possible nor helpful[,] [i]mpropriety will depend on the facts and circumstances" of a case.[262] When showing a defendant had an "improper motive," a "plaintiff must prove that the defendant's 'predominant purpose' was to injure the plaintiff."[263] If the "alleged interfering party is a competitor, the determination of 'predominant purpose' may be difficult."[264] When a determination turns on "two competitors [who] are competing over the same business, separating the interest in improving one's own business and taking business away from the competitor would seem problematic."[265] In contrast, when determining that a defendant used "improper means," a plaintiff must show that the means employed were "illegal, independently tortious, or that [they] violate[d] an established standard of a trade or profession."[266] Examples of this sort of liability-incurring conduct "include violations of statutes, rules, or recognized common law rules, violence, threats, bribery, unfounded litigation, fraud, misrepresentation, defamation, duress, undue influence, misuse of confidential information, . . . breach of a fiduciary duty . . . [and less clearly defined] . . . 'unethical conduct' described as sharp dealing, overreaching, or unfair competition."[267]

¶97. Third, *Watson's* highlighted that no matter "whether [the] improper motive was shown, [a defendant] may still be liable for tortious conduct if it used improper or wrongful means" to interfere with a plaintiff's third party relationship.[268] Because the third impropriety element of intentional interference

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[261] *Id* (emphasis added).
[262] *Id.* at 176.
[263] *Id.*
[264] *Id.* at 183.
[265] *Id.*
[266] *Id.*
[267] *Id.* at 176-77.
[268] *Id.* at 184.

with prospective business relations is expressed in the disjunctive form, evidence presented by the plaintiff may work to show either improper means or improper motive for liability to attach.[269]

¶98. Though the Arvidsons still point to the invalidity of the covenant to not compete as the foundation of their motion for summary judgment,[270] Buchar relies on a Statement of Additional Facts he filed along with his Opposition. In the Statement of Additional Facts, Buchar claims:

> 10. On or about August 15, 2015, V.I. Chiropractic opened its doors to the public and began providing chiropractic care and treatment to patients. V.I. Chiropractic became successful very quickly and soon was treating hundreds of patients.[271]

¶99. In their Response to Paragraph Ten of Buchar's Statement of Additional Facts, the Arvidsons indicated "Not disputed for the purpose of ruling on the Motion for Summary Judgment."[272] As a result, a factfinder may conclude that V.I. Chiropractic had transactions with patients treated by the Company and, based upon these transactions, had prospective business relationships with these patients concerning the patients' future chiropractic treatment.

¶100. But, the fact that a court may find that the Arvidsons interfered with Buchar's prospective business relationships with these patients after the parties' dispute began does not end the inquiry. To defeat the Arvidsons' Motion for Summary Judgment, Buchar, as non-movant, must also present evidence that the Arvidsons' "interference [with the prospective business relationships] was the product of either an improper means or an improper motive."[273]

¶101. The Arvidsons direct the Court's attention to the Agreement's covenant to not compete as the route through which an improper means or motive could be illustrated. Buchar does not specify the precise improper means utilized by the Arvidsons, nor does Buchar allege that a precise, improper motive fueled them when violating the covenant to not compete. Nonetheless, Buchar may still prevail on his counterclaim for intentional interference with prospective business relations at trial as long as he is able to prove that the Arvidsons interfered with these prospective business relations and did so with an improper means or an improper motive outside of violating the unenforceable covenant to not compete.

¶102. In fact, Buchar contends in his Second Amended Counterclaim that the "Arvidson brothers intended to induce Buchar's and the Company's patients to breach their contractual or beneficial business relationships."[274] "To do so , the Arvidson brothers entered an agreement with each other designed to

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[269] *Id* (Though the *Watson's* court went to lengths to discuss impropriety, it ultimately held that the jury was correct to find that the evidence supported one of the defendant's using an improper means, defamation, to interfere with the plaintiff's relationship with a client.).
[270] Pls.' Mot. Summ. J. 5-13.
[271] Def.'s Statement of Additional Facts ¶ 10.
[272] Pls.' Response to Def.'s Statement of Additional Facts ¶ 10 Response.
[273] *Donastorg*, 63 V.I. at 288.
[274] Def.'s Second Am. Countercompl. ¶ 65.

achieve an improper purpose of disadvantaging Dr. Buchar and the Company, and through this agreement, induced patients to leave Dr. Buchar and the Company and see them personally at Rock City Wellness instead."[275] In addition, Buchar's Statement of Additional Facts posits that:

> 22. From May through June of 2016, the Plaintiffs turned patients away from V.I. Chiropractic LLC.
> 23. From May through July 2016, the Plaintiffs told patients to place their accounts on hold with V.I. Chiropractic.
> 24. In and around May and June 2016, the plaintiffs stole Company property including patient lists, patient records, patient contact information, policies and procedures.
> . . . .
> 26. Beginning in 2016 and continuing thereafter, the Plaintiffs slandered Dr. Bill Buchar and his brother Dr. Patrick Buchar on a regular basis to patients and business associates and staff. The Plaintiffs claimed that Dr. Patrick Buchar and Dr. Bill Buchar did not have licenses, that V.I. Chiropractic did not have a license, that Dr. Patrick Buchar did not know what he was doing, and that Dr. Buchar would commit fraud, amongst other comments.
> 27. The Arvidsons also told Company patients that they had been fired by Dr. Buchar and that they should request that their accounts be placed on hold with the Company. All of these false statements resulted in dozens of patients leaving the Company.[276]

In neither document does Buchar allege that the Arvidsons' impropriety stemmed from violating the covenant to not compete. Instead, Buchar claims that the Arvidsons' impropriety arises from a variety of acts. "[I]t would be contrary to sound public policy to extend a greater protection to relationships where the parties themselves are not bound . . . or . . . [are] prospective relationships."[277] However, "proof of improper conduct extending beyond the bounds of doing business"[278] will fulfill the impropriety element. Turning patients away from V.I. Chiropractic, telling patients to place their accounts on hold, stealing V.I. Chiropractic property, slandering an individual, and misrepresenting that they had been fired are acts a court could find to "extend[] beyond the bounds of doing business"[279] because "[i]mpropriety . . . depend[s] on the facts and circumstances"[280] of each case. While it can be difficult to ascertain an improper motive when parties are competing for the same business,[281] improper means can cover acts which are "illegal," "independently tortious," "violat[ive of] an established standard of a trade or profession," "violat[ive of] statutes, rules, or recognized common law rules," a "misrepresentation,"

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[275] *Id.* ¶ 66.
[276] Def.'s Statement of Additional Facts ¶¶ 22-24, 26-27.
[277] *Watson's Carpet and Floor Coverings, Inc.*, 247 S.W.3d at 177.
[278] *Id.* at 178.
[279] *Id.*
[280] *Id.* at 176.
[281] *Id.* at 183.

"defamatory," "sharp dealing," or overreaching."[282] Accordingly, a trier of fact may find that the acts Buchar complained of in his Additional Statements of Fact constitute improper means.

¶103. For the purposes of summary judgment, it is important to note that Buchar relies nearly exclusively on his own deposition and affidavit, his brother's deposition and affidavit, and the deposition and affidavit submitted by a Buchar witness, Mike Ciganek, when claiming that the Arvidsons turned away patients from V.I. Chiropractic, told patients to place their accounts on hold with V.I. Chiropractic, stole V.I. Chiropractic property, and slandered Buchar and his brother, another practicing chiropractor. The Arvidsons disputed each of these assertions by claiming that, under *Abney v. University of the Virgin Islands*,[283] each allegation was "an improper characterization . . . and [did] not comply with the purpose and spirit of the Local Rules."[284] Because Buchar has based these claims on evidence submitted to this Court, and because the Arvidsons have disputed them, the Court finds that a genuine issue a material fact remains as to whether they fulfill the impropriety element within Buchar's intentional interference with prospective business relations claim.

¶104. However, when addressing one allegation Buchar does not rest exclusively on self-serving depositions and affidavits submitted by Buchar, his brother, and Ciganek, citing depositions given by Tylur and Tygue Arvidson in support of his claim that "the Arvidsons . . . told Company patients that they had been fired by Dr. Buchar and that they [the patients] should request that their accounts be placed on hold with the Company."[285] In his deposition, Tylur Arvidson was asked about an email in which he and his brother notified V.I. Chiropractic patients that they were no longer practicing at V.I. Chiropractic, "were replaced as treating doctors and ordered to leave the facility by the office's majority shareholder, Dr. William Buchar, without prior notice, effective June 6, 2016," and announced the opening of their own chiropractic practice, Rock City Wellness.[286] In his deposition, Tygue Arvidson was asked, in various permutations, whether he had conveyed information to or had communications with V.I. Chiropractic patients and former V.I. Chiropractic patients which informed them that they could request or should request a "hold" or a "stop care order" be placed on their account with V.I. Chiropractic.[287] To each version of the question, Tygue Arvidson replied that he could not recall advising or asking or telling patients they could or should place their accounts with V.I. Chiropractic "on hold" except for when V.I. Chiropractic patients were first being on-boarded as new patients with V.I. Chiropractic.[288] In rebuttal,

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[282] *Id.* at 176-77.
[283] Pls.' Response to Def.'s Statement of Additional Facts, ¶¶ 4, 5, 8, 9, 11-2-, 22-36.
[284] *Id.*
[285] Def.'s Statement of Additional Facts ¶ 27.
[286] Tylur Arvidson Dep. 277:4-282:8, Dec. 5, 2018.
[287] Tygue Arvidson Dep. 234:5-243:25, Dec. 6, 2018.
[288] *Id.* 241:20-23.

Buchar, Patrick Buchar, and Mike Ciganek averred that the Arvidsons told patients that they should place their accounts with V.I. Chiropractic on hold.[289] In his deposition, Pat Buchar stated that the Arvidsons positioned themselves outside the V.I. Chiropractic office (after being asked to leave) and "coached" V.I. Chiropractic patients who entered to "put [their] account[s] on hold."[290] When faced with these dueling sources of evidence, the Court finds that a genuine issue of material fact exists as to whether the Arvidsons told V.I. Chiropractic patients to place their accounts with V.I. Chiropractic "on hold" as a means of interfering with Buchar's prospective business relations with these patients.

¶105. Based on the quantum of evidence provided by both parties, genuine issues of material fact still exist as to whether the Arvidsons intentionally interfered with Buchar's prospective business relationships with V.I. Chiropractic patients. Specifically, genuine issues of material fact remain to be resolved as to whether the Arvidsons employed improper means or were fueled by improper motives when executing acts that could constitute intentional interference with Buchar's prospective business relations with V.I. Chiropractic patients.

Unjust enrichment

¶ 106. "Unjust enrichment[] will ordinarily lie in a case where the defendant receives something of value to which he is not entitled and which he should restore to the plaintiff."[291] Conversely, "[o]ne is not unjustly enriched by receipt of that to which he is legally entitled."[292] It is usually found to have occurred in situations in which one party retains a "benefit conferred by another, without offering compensation in circumstances where compensation is reasonably expected."[293] Because the claim "is an equitable remedy, it—like all equitable remedies—is inappropriate where a legal remedy is available."[294]

¶107. To successfully prosecute an unjust enrichment claim, Buchar must "prove (1) that the [Arvidsons were] enriched, (2) that such enrichment was at [Buchar's] expense, (3) that the [Arvidsons] had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the [Arvidsons] should return the money or property to" Buchar.[295] "The purpose of the knowledge element should be clear—the unjust enrichment [claim], as its name implies, is concerned with preventing an *unjust* conferral of a benefit onto the defendant at the expense of the plaintiff. Not all

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[289] Buchar Aff. ¶ 11; Patrick Buchar Aff. ¶ 4; Ciganek Aff. ¶ 4.
[290] Patrick Buchar Dep. 32:13-15, Feb. 14, 2019.
[291] *Cacciamani & Rover Corp. v. Banco Popular de Puerto Rico*, 61 V.I. 247, 251 (V.I. 2014) (citations and quotation marks omitted).
[292] *Fuller v. Roswell Properties LLC, Ltd.*, Case No. ST-16-CV-438, 2018 V.I. LEXIS 27, at *19 (V.I. Super. Ct. Mar. 5, 2018).
[293] *Maso v. Morales*, 57 V.I. 627, 634 n.9 (V.I. 2012) (citations and quotation marks omitted).
[294] *Cacciamani & Rover Corp.*, 61 V.I. at 252.
[295] *Walters v. Walters*, 60 V.I. 768, 779-80 (V.I. 2014).

enrichment is necessarily unjust in nature."[296] Absent a knowledge element, "an individual could simply provide services for another, without their knowledge or consent, and then seek compensation for the value of the benefit conferred."[297]

¶108. The Arvidsons argue that because both parties concede they entered into a contract, the Agreement, Buchar's unjust enrichment claim cannot stand.[298] Indeed, "it is well-settled that the existence of an express contract excludes a claim for" restitution in the form of a "contract implied-in-law concerning the *identical* subject matter."[299] "A quasi-contract, also referred to as a contract implied-at-law, imposes a contractual duty on a party that is unjustly enriched at the expense of another."[300]

¶109. Buchar contends, in turn, that an unjust enrichment claim "may . . . be pled in the alternative."[301] For example, in *Creative Minds, LLC v. Reef Broadcasting, Inc.*,[302] this Court allowed an unjust enrichment claim to proceed in a case where the parties entered into a fully-executed agreement. But, the precise subject matter in dispute and for which the claimant alleged an unjust enrichment claim was with regard to the storage of certain equipment, and the storage contract at issue did not address the storage of the particular equipment at the center of the dispute, but other chattels.[303] Accordingly, "the existence of the Agreement [did] not exclude [the p]laintiff's unjust enrichment claim."[304]

¶110. Here, the Agreement still stands as an enforceable contract. Under its terms, Buchar and the Arvidsons owe each other a collection of rights, duties, and obligations, as is customary under LLC operating agreements that set out how the parties intend to regulate the LLC's affairs, conduct its business, and govern their relations among themselves on issues ranging from capital contributions to LLC distributions to the allocation of profits and losses to the rights and duties owed by the Arvidsons, as members, to Buchar, as manager.[305] Buchar broadly alleges that the Arvidsons broke their promises to Buchar and V.I. Chiropractic without specifying the promises, duties, obligations, or interests created by the Agreement.[306] Because unjust enrichment may be pled in the alternative, and because it is not entirely clear that this unjust enrichment claim addresses "*identical* subjects" that Buchar will address in his breach of contract claim (which arises from an operating agreement creating multiple obligations), the

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[296] *Id.* at 779 (emphasis original).
[297] *Id.*
[298] Pls.' Mot. Summ. J. 14.
[299] *Creative Minds, LLC v. Reef Broadcasting, Inc.*, Case No. ST-11-CV-131, 2012 WL 4029764, at *3 (V.I. Super. Ct. Sept. 6, 2012) (emphasis added).
[300] *Id.* at *3-*4.
[301] Def.'s Opp. to Pls.' Mot. Summ. J., 16.
[302] Case No. ST-11-CV-131, 2012 WL 4029764 (V.I. Super. Ct. Sept. 6, 2012).
[303] *Id.* at *2.
[304] *Id.*
[305] *See* V.I. Chiropractic Operating Agreement.
[306] Def.'s Second Am. Countercompl. ¶¶ 56-58.

existence of the Agreement does not necessarily exclude Buchar's unjust enrichment claim. Accordingly, the Arvidsons' motion is denied as to Buchar's breach of the covenant of good faith and fair dealing claim.

Fraudulent misrepresentation

¶111. The Arvidsons also move for summary judgment with regard to Buchar's fraudulent misrepresentation cause of action, claiming: (1) the gist of the action doctrine precludes the assertion of a tortious fraudulent misrepresentation claim because this claim encompasses duties which were created in a contract which Buchar alleges the Arvidsons breached; and (2) alternatively, the Arvidsons are entitled to summary judgment because all elements of fraudulent misrepresentation cannot be fulfilled. In opposition, Buchar contends that the Arvidsons committed certain allegedly fraudulent acts *before* forming an LLC with Buchar,[307] *during* their time with V.I. Chiropractic,[308] and *toward the end* of the parties' business relationship.[309] But, Buchar's Counterclaim grounds his fraudulent misrepresentation only on actions which allegedly occurred near the end of the parties' business relationship.[310] Specifically, Buchar claims:

> 87. On or about May 27, 2016, the Arvidson brothers induced Dr. Buchar into initiating preliminary steps to dissolve the Company after the parties were unable to agree upon sale of shares from one party to another.
> 88. The Arvidson brothers intended for Dr. Buchar to act upon their false representations that dissolution was appropriate given the situation.
> 89. Despite this reliance, the Arvidson brothers then turned around and demanded large and unreasonable amounts of compensation for their shares in addition to dissolution, and damaged the Company in such a manner that it could not continue to operate.[311]

¶112. The gist of the action doctrine is founded on "the concern that tort recovery should not be permitted for contractual breaches."[312] Contractual parties "are not automatically prevented from bringing a tort action."[313] However, the "gist of the action doctrine precludes tort suits for the . . . breach

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[307] Buchar argues that the Arvidsons hid details about questionable past dealings with other chiropractic practitioners which allegedly occurred before entering into negotiations to start V.I. Chiropractic with Buchar. Def.'s Opp. to Pls.' Mot. Summ. J. 17.
[308] Buchar argues that the Arvidsons hid fraudulent billing practices from Buchar during their time operating V.I. Chiropractic and falsely represented themselves as V.I. Chiropractic's Office Manager, Mike Ciganek, in order to "hijack" the latter's email account. *Id.* 17-18.
[309] Buchar contends the Arvidsons fraudulently induced him to begin the dissolution process as set out in the V.I. Operating Agreement during a timeframe that the brothers only intended to file the present lawsuit. *Id.* 18.
[310] Second Am. Countercompl. ¶¶ 87-89.
[311] *Id.*
[312] *Pollara v. Chateau St. Croix, LLC*, 2016 V.I. LEXIS 49, at *10-*11 (V.I. Super. Ct. May 3, 2016).
[313] *Id.*

of contractual duties unless the plaintiff can point to separate or independent events giving rise to the tort."[314] If a plaintiff's harm sued upon "arose from the breach of a duty established within the four corners of a contract, then the aggrieved party's remedies are governed by contract law."[315] On the other hand, "[i]f the harm is separate and distinct from the contract, creating a viable claim, stand-alone claim, then the gist of the action doctrine will not prevent the tort claim from being litigated."[316]

¶113. A "tort action for damages, commonly referred to as the action for deceit, is of very ancient origin. . . . known as early as 1201."[317] Over the past eight hundred years, routes of remedy sought for deceit have differentiated themselves into breach of contract actions seeking rescission, breach of warranty actions, and tort actions seeking damages. Each cause of action springs from its own nature of grievance.[318] Each cause of action protects its own legal interest and offers its own legal remedy.

¶114. More recently, the Virgin Islands Supreme Court has differentiated between fraud actions sounding in tort and fraud actions sounding in contract:

> At the outset, we must distinguish between actions for fraud or deceit—sounding in tort and seeking damages—and claims to void or rescind a contract where the claimant's assent was obtained through fraud—commonly called "fraud in the inducement."
>
> . . . .
>
> Fraud may become important either for the purpose of giving the defrauded person a right to sue the fraudulent person for damages in an action of deceit, or its equivalent, or to enable the defrauded person to rescind the transaction. The requirements of the law for these two purposes are not always identical.
>
> It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or rescission of the bargain. The converse is not, however, true. There are cases where the belief of the deceived person is not due to such a consciously fraudulent misrepresentation as would justify an action of deceit; and yet there may be every reason why rescission should be allowed.[319]

¶115. Buchar's breach of contract claim is founded on the Agreement, which still stands. As a result, the cluster of obligations and duties the Agreement establishes still remain as well. In comparison, Buchar's tortious fraudulent misrepresentation claim is rooted in actions that, he alleges, were intended to induce him into enacting one of the sources of authority created by the Agreement—the dissolution of

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[314] *Id.*
[315] *Id.* at *16.
[316] *Id.*
[317] W. Page Keeton & William L. Prosser, *Prosser and Keeton on the Law of Torts* 727 (15th ed. 2004).
[318] *Id.* pp. 725-35.
[319] *Wilkinson v. Wilkinson*, 2019 V.I. 9, ¶ 9, 2019 WL 1421187, at *3-*4 (V.I. Mar. 26, 2019) (citing Richard A. Lord, *Williston on Contracts* § 69:4 (4th ed. 2003)).

V.I. Chiropractic LLC. The nature of the grievances in both of these claims differ, as do the legal interests Buchar seeks to protect, and the legal remedies Buchar seeks. Therefore, the gist of the action doctrine does not preclude Buchar's tortious fraudulent misrepresentation claim. The gist of his fraudulent misrepresentation claim seeks to protect Buchar from being tricked or fraudulently induced into exercising an authority granted to him by the V.I. Chiropractic Operating Agreement. It does not involve his actual exercise of the authority to dissolve his V.I. Chiropractic as created by and granted to him by the Agreement. Consequently, the tort claim does not overlap with the breach of contract claim founded on the Agreement.

¶116. Second, the Arvidsons contend that the facts of this case fail to fulfill the claim's elements.[320]

¶117. Since assuming its jurisdiction, the Virgin Islands Supreme Court has addressed a fraudulent misrepresentation claim. Yet, when doing so, it chose to adopt the Restatement (Second) of Torts § 525 and rely on its articulation of the cause of action. In a more recent opinion, the Virgin Islands Supreme Court recognized that its earlier treatment of this tort ran contrary to the mandate provided in *Banks v. International Rental and Leasing Corporation*.[321] As a result, the Virgin Islands Supreme Court held that this Court must engage in a *Banks* analysis before making a determination in a fraudulent misrepresentation lawsuit. Fortuitously, another judge on this Court conducted a thorough and thoughtful *Banks* analysis of this cause of action in *Merchants Commercial Bank v. Oceanside Village, Inc.*[322] This Court agrees with its methodology, reasoning, and conclusions and adopts the *Merchants Commercial Bank* court's imprimatur of the following rule defining tortious fraudulent misrepresentation:

> One who makes a misrepresentation of fact, opinion, intention, or law that he or she either knew or had reason to know was false, and that was made for the purpose of inducing another to act or refrain from acting on it, is subject to liability to the other for pecuniary loss caused by the other's justifiable reliance on the misrepresentation.[323]

¶118. It is important to note that this test derives from the Restatement (Second) of Torts § 525, and the *Merchants Commercial Bank* court gave sound reasons for relying on this source. Thus, it is appropriate to look to the Restatement (Second) of Torts for guidance when conducting an analysis of this claim because it is consistent with this jurisdiction's past treatment of the fraudulent misrepresentation tort and because the concepts embodied in the Restatement are synonymous with those found in the common law treatment of the same claim.[324]

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[320] Pls.' Mot. Summ. J. 16.
[321] 55 V.I. 967 (V.I. 2011).
[322] 64 V.I. 3 (V.I. Super. Ct. Dec. 18, 2015).
[323] *Id.*, 64 V.I. at 21-22.
[324] W. Page Keeton & William L. Prosser, *Prosser and Keeton on the Law of Torts* 728 (5th ed. 2004).

> The Members shall not compete with the Company during the dissolution of the Company pursuant to the Operating Agreement. This provision will be strictly enforced. The Members shall not take from the Company any asset including but not limited to patients list[s], billing accounts and setups, and other information crucial to the operation of the Company business.[22]

¶14. Buchar argues the Arvidsons violated this notice as well as a footnote at the bottom of the Notice, which states, "During the dissolution and negotiations, if any, the Members shall refrain from any marketing, networking, or soliciting chiropractic business on behalf of any person other than the Company."[23]

¶15. These motions present two threshold issues. First, does the Virgin Islands follow the common law or the Restatement (Second) of Contracts' treatment of covenants to not compete when assessing their validity and enforceability? Second, does that treatment, readily applied in employee-employer, sale of a business, and partnership contexts, apply to LLC Operating Agreements? Applying *Banks v. International Rental and Leasing Corp.*,[24] the Court finds that the Virgin Islands should adopt the common law treatment of covenants to not compete, including those in LLC operating agreements. Accordingly, the covenant to not compete in V.I. Chiropractic's Operating Agreement is overly broad because it lacks durational, territorial, and scope of work limitations.

Banks Analysis—Validity and Enforceability of Covenants to not Compete

I. Virgin Island precedent addressing the validity and enforceability of covenants to not compete predates the Virgin Islands Supreme Court's assumption of jurisdiction and assesses covenants to not compete largely in the context of employment agreements.

¶16. Three Virgin Islands judicial opinions addressed the validity and enforceability of covenants to not compete: *Walter v. Netherlands Mead, N.V.*,[25] *Williamson v. Hess*[26], and *V.I. Diving Schools/Supplies v. Dixon.*[27] The earliest case, *Walter*, centered on a covenant to not compete included in an employment

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[22] Notice of Dissolution, William L. Buchar, June 1, 2016.
[23] *Id.*
[24] 55 V.I. 967 (V.I. 2011).
[25] 513 F.2d 1130 (3d Cir. 1975) (assessing a covenant to not compete included in an employment contract and holding that the covenant altered the defendant-employee's duty of loyalty such that the defendant's actions in beginning to construct a new grocery store did not constitute a breach of the duty of loyalty to his employer's shipping division, which the employee-defendant oversaw).
[26] 16 V.I. 284 (V.I. Terr. Ct. 1979) (finding that a veterinarian hired by a veterinarian practice on St. Thomas violated his valid and enforceable covenant to not compete after finishing his contract with the practice because the veterinarian was directly involved in generating goodwill for the practice as one of its treating veterinarians, a position which allowed him to develop direct relationships with local customers and develop an intimate knowledge of the practice's internal business procedures).
[27] 20 V.I. 54 (V.I. Terr. Ct. 1983) (finding that the employee-defendants' employment contracts contained invalid and unenforceable covenants to not compete because the covenants were not tailored to protect a legitimate business

¶119. To facilitate application of this rule for the purposes of summary judgment, the Court condenses the *Merchants Commercial Bank* rule to six elements: (1) a misrepresentation; (2) the defendant's knowledge or reason to know the misrepresentation was false; (3) the defendant's making the misrepresentation for the purpose of inducing another to act or to refrain from acting; (4) the plaintiff's justifiable reliance upon the misrepresentation; and (5) the pecuniary loss or injury (6) caused by justifiably relying upon the misrepresentation.[325]

¶120. The Arvidsons' arguments can be summarized in three main points. First, the Arvidsons assert that Buchar is the sole member of V.I. Chiropractic who is vested with the authority and right to initiate the dissolution of and, then, dissolve V.I. Chiropractic. Second, the Arvidsons argue that Buchar is the sole member of V.I. Chiropractic who has been vested with any power to manage V.I. Chiropractic. Third, the Arvidsons claim that V.I. Chiropractic was never dissolved, thereby making it impossible for Buchar to sustain injury and damages caused by his reliance on the Arvidsons' statement inducing him to dissolve V.I. Chiropractic.

¶121. Even if the Court assumes that the Arvidsons made a fraudulent misrepresentation regarding whether they believed dissolution was the only appropriate next step, their statement did not negate or in any way weaken Buchar's right or authority to manage V.I. Chiropractic nor to dissolve V.I. Chiropractic. Because the Agreement bestowed those powers on Buchar alone, only he could take the steps to begin and complete the process of dissolution. Any misrepresentation made by the Arvidsons still would not lessen Buchar's authority to dissolve nor deprive Buchar of the power to dissolve V.I. Chiropractic because the misrepresentation would not change the terms of the Agreement. Since Buchar is the only person who can initiate dissolution, any statement by the Arvidsons may or may not actually induce him to do so. At best, such a statement only makes it more likely that Buchar would use his power to dissolve the LLC. However, on summary judgment, the Arvidsons' burden is to show that no genuine issue of material fact exists. The fact that the power to dissolve and manage V.I. Chiropractic rested in Buchar alone does not mean that he was impervious to inducement, as the Arvidsons' argument appears to suggest. On this point, the Arvidsons have failed to meet their burden.

¶122. The Restatement (Second) of Torts indicates that the alleged tortfeasor's fraudulent misrepresentation must be both (1) a cause-in-fact of the pecuniary loss sustained by the plaintiff's action or inaction, the latter of which was induced by the plaintiff's justifiable reliance on the misrepresentation and (2) a proximate cause of the pecuniary loss sustained by the plaintiff's action or inaction, the latter of which was induced by the plaintiff's justifiable reliance on the misrepresentation. Thus, the Restatement distinguishes between cause-in-fact, or actual cause, and legal cause, or proximate case.

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[325] *See Merchants Commercial Bank*, 64 V.I. at 21-22.

¶123. Regarding cause-in-fact, the Restatement (Second) of Torts § 546 states:

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.[326]

¶124. Regarding proximate cause, the Restatement (Second) of Torts § 548A provides:

> A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance.[327]

Comments a and b of § 584A provide further light:

> Not all losses that in fact result from the reliance are, however, legally caused by the representation. In general, the representation is a legal cause only of those pecuniary losses that are within the foreseeable risk of harm that it creates it.[328]
>
> . . . .
>
> Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, in general, not legally caused by it and are beyond the scope of the maker's liability. This means that the matter misrepresented must be considered in the light of its tendency to cause those losses and the likelihood that they will follow.[329]

¶125. The Arvidsons argue that, since dissolution was never completed, it never resulted in damages or injury, demonstrating that facts fulfilling the causation and injury elements are lacking. In his Counterclaim, Buchar states that the Arvidsons made a misrepresentation regarding their intent to dissolve V.I. Chiropractic; the Arvidsons knew this misrepresentation was false because they intended to file the present lawsuit instead of dissolving V.I. Chiropractic; the Arvidsons made this misrepresentation to induce Buchar to file for dissolution; Buchar justifiably relied on this misrepresentation; because he relied on this misrepresentation, Buchar initiated the dissolution process; and the initiation of the dissolution process was the actual and proximate cause of Buchar's pecuniary injury, i.e, the Arvidsons' demand of substantial amounts of money as part of the dissolution process.

¶126. In following this causal chain, the Arvidsons are correct; their demand for money (during the course of dissolution negotiations) did not amount to a pecuniary injury which the tort of fraudulent misrepresentation was created to prevent. Accordingly, while causation may exist, injury does not.

¶127. Buchar also claims that he sustained damages that no longer allow V.I. Chiropractic to operate. In this iteration of his claim, Buchar alleges that the Arvidsons made a misrepresentation regarding their

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[326] Restatement (Second) of Torts § 546.
[327] *Id.* § 548A.
[328] *Id.* § 548A, cmt.*a.*
[329] *Id.* § 548A, cmt.*b.*

intent to dissolve V.I. Chiropractic; the Arvidsons knew this misrepresentation was false because they intended to file the present lawsuit instead of dissolving V.I. Chiropractic; the Arvidsons made this misrepresentation to induce Buchar to file for dissolution; Buchar justifiably relied on this misrepresentation; because he relied on this misrepresentation, Buchar initiated the dissolution process; and the initiation of the dissolution process was the actual and proximate cause of Buchar's pecuniary injury, i.e., V.I. Chiropractic sustaining damages to such an extent that it could no longer operate. When attempting to show a nexus between his justifiable reliance upon the Arvidsons' misrepresentation and his initiation of the dissolution process to the injury he sustained from V.I. Chiropractic's inability to operate, Buchar cannot show that his reliance and initiation of the dissolution process were substantial factors in V.I. Chiropractic no longer operating, as the definition of cause-in-fact requires in Section 546. More importantly, V.I. Chiropractic's sustaining damages that no longer allowed it to operate is not the type of loss that "might reasonably be expected to result from the reliance," as Section 548A requires. V.I. Chiropractic's inability to continue operating is not "within the foreseeable risk of harm" created by the Arvidsons' alleged misrepresentation regarding the initiation of dissolution procedures.

¶128. By pointing to the lack of injury and damages that flow from Buchar's initiation of the dissolution process, the Arvidsons have met their summary judgment burden. Given the chance to respond, Buchar did not shore up gaps in the causation chain linking reliance (on the misrepresentation regarding dissolution initiation) to injuries (an excessive demand by the Arvidsons for their shares during dissolution talks and the cessation of V.I. Chiropractic's operations). Instead, Buchar pointed to other alleged fraudulent misrepresentations that Arvidsons made to Buchar before the LLC was formed and during its operation before requesting dissolution. Accordingly, no genuine issue of material fact exists with regard to the injury element and its lack of a causal link to the misrepresentation element, and Buchar's fraudulent misrepresentation claim is dismissed.

Contribution

¶129. The Arvidsons contend that Buchar's claim for contribution "is essentially a claim for attorney's fees."[330] In his Opposition, Buchar fails to address his own contribution claim, but in their Reply, the Arvidsons tangentially state that "there is no basis for his contribution claim" and reiterate that the claim "is essentially . . . for attorneys' fees."[331] Ultimately, neither party mentions any applicable legal authority, neither references the portion of the Agreement addressing indemnity, contribution, or capital contributions, and neither draws light to facts that clearly illustrate how or why Buchar may or may not be

[330] Pls.' Mot. Summ. J. 18.
[331] Pls.' Reply to Def.'s Opp. to Pls.' Mot. Summ. J. 9.

entitled to demand contribution from the Arvidsons. As a result, the Court will review Buchar's Counterclaim, which states, in pertinent part:

> 93. Dr. Buchar attempted to keep the Company operating profitably while the agreed-upon dissolution process was initiated, but the Arvidson brothers were hell-bent on preventing that and diverting as many patients as possible to Rock City Wellness, LLC.
> 94. Accordingly, the Company is no longer generating any profits.
> 95. Yet, the Operating Agreement requires that in actions where the Manager, Dr. Buchar, faces a claim arising out of his managerial actions that the Company pays for his defense.
> 96. The only claim of the Arvidson brothers is that Dr. Buchar initiated a dissolution, which he is authorized to do as a Manager of the Company under the terms of the Operating Agreement.
> 97. The Company has not been dissolved.
> 98. Since the Company has not been dissolved, it must defend Dr. Buchar in this suit premised upon his managerial election. As Members, under the Operating Agreement, the Arvidson brothers are required to contribute when profits do not cover the costs of the Company. They have not contributed to the Company accordingly to assist in covering Dr. Buchar's costs.[332]

¶130. Looking to Paragraphs 95, 96, 97 and the first sentence of Paragraph 98, Buchar alleges that (1) the V.I. Chiropractic Operating Agreement requires that V.I. Chiropractic reimburse Buchar for legal fees arising from his performing managerial actions in service of V.I. Chiropractic as its Manager; (2) V.I. Chiropractic still exists as a registered LLC in the Virgin Islands; and (3) because V.I. Chiropractic still exists, it must defend Buchar in this lawsuit. Buchar then adds a fourth contention: "As Members, under the Operating Agreement, the Arvidson brothers are required to contribute when profits do not cover the costs of the Company."[333]

¶131. Based on these assertions, it appears that Buchar envisions that the Agreement establishes two potential methods of recovery when Buchar is sued in his capacity as Manager. First, under the Agreement, V.I. Chiropractic is contractually obligated to indemnify Buchar when he must defend himself in a legal action arising from his acts as Manager for V.I. Chiropractic. Second, the Agreement contractually obligates the Arvidsons to contribute to V.I. Chiropractic "when profits do not cover the costs of the Company."

¶132. Section B of the Introduction of the Agreement states that "The Members enter into the Agreement to provide for the governance of the Company and the conduct of its business, and to specify

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[332] Def.'s Counterclaim ¶¶ 93-98.
[333] *Id.* ¶ 98.

their relevant rights and obligations."[334] Only Clauses 15.3 and 15.4 come close to supporting Buchar's claim for contribution. A portion of Clause 15.3 provides:

> 15.3 No Liability. Neither **the Manager**, nor any employee, or any agent of the Manger [sic], (including any shareholder, officer, director or manager of a successor manger [sic] that is not an individual), **will be liable**, responsible, or accountable in damages or otherwise **to the Company** or any Member **for any action taken or failure to** act on behalf of the Company within the scope of the authority conferred on the Manager by this Agreement or by law unless the action or omission was performed or omitted fraudulently, in bad faith, or constituted gross negligence.[335]

Clause 15.4 indicates, in part:

> 15.4 Indemnification and Hold Harmless. **The Company will indemnify and hold harmless the Manager** (and its shareholders, officers, directors, employees, and agents, if any) **and Dr. William Buchar, from and against any loss, expense**, damage, or injury suffered or sustained by them by reason of any acts, omissions, or alleged acts or omissions **arising out of the Manager's or Dr. William L. Buchar's activities on behalf of the Company**. This **includes**, but is not limited to, any judgment award, settlement, **reasonable attorneys' fees**, and other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding, or claim, if the acts, omissions or alleged acts or omissions on which the actual or threatened action, proceeding[,] or claim is based were for a purpose reasonably believed to be in the best interests of the Company and were not performed or omitted fraudulently, in bad faith, or as a result of gross negligence by the party and were not in violation of the Manager's fiduciary obligation to the Company. Any indemnification will only be for the assets of the Company.[336]

¶133. Based on this language, Paragraph 95 (i.e, ". . . the Operating Agreement requires that in actions where the Manager, Dr. Buchar, faces a claim arising out of his managerial actions that the Company pays for his defense") and Paragraph 96 (i.e., the Arvidsons claim "that Dr. Buchar initiated a dissolution, which he is authorized to do as a Manager of the Company under the terms of the Operating Agreement") of the Counterclaim advance his contention that V.I. Chiropractic is to reimburse him for costs he incurs while involved in legal proceedings arising from his actions as Manager, including actions he may or may not have taken concerning the dissolution of V.I. Chiropractic. More precisely, when the indemnification

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[334] V.I. Chiropractic Operating Agreement, Introduction, Section B.
[335] V.I. Chiropractic Operating Agreement, Clause 15.3 (emphasis added).
[336] V.I. Chiropractic Operating Agreement, Clause 15.4 (emphasis added).

clauses are read together, it appears Buchar may have a claim for indemnification against V.I. Chiropractic, as a separate legal entity.

¶134. Importantly though, Clauses 15.3 and 15.4 do not specify the source of the funds with which V.I. Chiropractic is to indemnify Buchar nor how that process takes shape. More pointedly, the Arvidsons, as non-managing Members, are not required to contribute to V.I. Chiropractic in the instances addressed by Clauses 15.3 and 15.4, and Buchar's assertion that he has a contribution claim against the Arvidsons is not borne out by those provisions.

¶135. The Court has a responsibility to read past the labels affixed to counts within complaints and respond to the document's substance. In Paragraph 93, Buchar claims that he "attempted to keep the Company operating profitably while the agreed-upon dissolution process was initiated, but the Arvidson brothers were hell-bent on preventing that and diverting as many patients as possible to Rock City Wellness, LLC."[337] Reviewing the substance of this sentence, the facts he alleges in the remainder of this contribution claim, and the language of the V.I. Operating Agreement, Buchar seeks to tap the Arvidsons as a source of financial remedy in a lawsuit that sounds in breach of contract, without having a contractual clause that expressly links the Arvidsons to Buchar's right to indemnification. Meanwhile, he has a claim for contractual indemnification against V.I. Chiropractic. It appears that Buchar has conflated three legal concepts: (1) contractual indemnification, (2) contribution in the realm of corporate governance, and (3) common law contribution and indemnification in tort. All the while, he pursues a counterclaim which claims contractual breach while simultaneously asserting facts sounding in corporate and LLC governance.

¶136. First, Buchar's factual allegations against the Arvidsons do not sound in contractual indemnification because he seeks compensation by relying on an indemnity clause which fails to obligate the Arvidsons to play a role in V.I. Chiropractic's indemnification process.

¶137. Second, the Court will not address capital contribution in the LLC context, since the appropriate Virgin Islands statute addressing capital contributions has not been mentioned and the Agreement provision addressing members' capital contributions has not been invoked by either party.

¶138. Third, in Paragraph 93 Buchar contends that the Arvidsons (1) were "hellbent" on ensuring that V.I. Chiropractic did not succeed as a profitable going concern and (2) diverted patients from V.I. Chiropractic to achieve that goal. These allegations indicate that Buchar believes the Arvidsons have inflicted an injury on Buchar and V.I. Chiropractic by diverting patients. Recompense for this type of injury and invasion of this type of legal interest falls within the realm of tort law.

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[337] Def.'s Countercompl. ¶ 93.

¶ 139. "Contribution and indemnity are variant remedies used when required by judicial ideas of fairness to secure restitution."[338] Both claims are "similar in nature and origin and [have] a common basis in equitable principles."[339] Despite these shared roots, the claims "differ in the kind and measure of relief provided. . . . [The former] requires the parties to *share the liability* or burden, whereas [the latter] requires one party to *reimburse the other* entirely."[340] As a result, "[c]ontribution is appropriate where there is a common liability among the parties, whereas indemnity is appropriate where one party has a primary or greater liability or duty which justly requires him to bear the whole of the burden as between the parties."[341]

¶140. Despite this dichotomy, case law through the years has treated these common law claims in such a way that "distinction between common law indemnification and common law contribution has become blurred."[342] Accordingly, the Court turns to a *Banks* analysis completed by another judge on this Court, in *Willie v. Amerada Hess Corporation*,[343] to provide some clarity. While opinions completed by other Superior Court Judges are not binding on this Court, this particular *Banks* analysis details the development of common law contribution and common law indemnity claims in the Virgin Islands. Further, this case history was taken into consideration when the *Willie* court crafted the soundest rule for the Virgin Islands for common law contribution and common law indemnity claims. The *Willie* court's research of the history of these claims in the Virgin Islands and its influence on the definitions and rules adopted by the *Willie* Court is sound, and the Court adopts it.

¶141. At common law, contribution is "the right to claim or demand contribution from persons or companies who may have played a role in causing someone else's injury."[344] It seeks to "secur[e] the right of one who has discharged more than his fair share of a common liability or burden to recover from another who is also liable [for] the proportionate share which the other should pay or bear."[345]

¶ 142. "Common law contribution may be asserted (1) by a party in a tort or personal injury action, (2) against a co-party or a nonparty, (3) if the co-party or nonparty is or may be liable (4) for the same injury or damages as the plaintiff has sued for."[346] Since liability is joint and several in the Virgin Islands, as prescribed by 5 V.I.C. 1451(d), the allotment of fault between and among parties is completed by the trier of fact.[347]

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[338] *Willie v. Amerada Hess Corporation*, 66 V.I. 23, 47 (V.I. Super. Ct. 2017).
[339] *Id.*
[340] *Id* at 48 (emphasis original).
[341] *Id.*
[342] *Id.*
[343] 66 V.I. 23 (V.I. Super. Ct. 2017).
[344] *Id.* at 68.
[345] *Id.* at 47.
[346] *Id.* at 106.
[347] *Id.* at 49.

¶143. In contrast, indemnification is "the *shifting of* responsibility from the shoulders of one person to another . . . where an *innocent party* is held vicariously liable for the actions of the *true tortfeasor*."[348] Virgin Islands courts hold that common law indemnification "should only arise in very limited circumstances"[349] and have so far only recognized it in relationships between manufacturers and suppliers. "[T]he relationship between the parties should control"[350] when determining if an indemnification claim may be brought.

¶144. When bringing a claim for common law indemnification in the Virgin Islands, "[e]quity and fairness demand that . . . [the claim] be limited to [those having] a legal or special relationship between the person seeking indemnification (indemnitee) and the person who would be required to indemnify the other (indemnitor). To state a claim for common law indemnification, the indemnitee must allege that (1) it has been or may be sued (2) for damages, (3) proximately caused by the indemnitor's actions or inactions, and (4) but for the relationship between the indemnitee and the indemnitor, the indemnitee would not have been sued or found liable."[351]

¶145. Applying the elements of common law contribution to Buchar's factual assertions shows that his claim for common law contribution must fail. Although Buchar's lawsuit sounds in both tort and contract, when describing the routes through which he is owed contribution, his allegations are rooted directly in Paragraphs 94-98. These paragraphs sound in contractual indemnification, not common law contribution. Second, the Arvidsons are neither "non-parties" nor "co-parties" with Buchar. Therefore, the second element cannot be fulfilled. Third, the damages and finding of liability which Buchar seeks in his contribution claim differ from those that the Arvidsons, as plaintiffs, seek in their breach of fiduciary duty claim against Buchar. Thus, the third and fourth elements cannot be fulfilled.

¶146. Further, not only do Buchar's allegations fail to fulfill the elements of contribution, they also fail to be encapsulated by the theory of contribution. Common law contribution claims are appropriately asserted by parties when they have "discharged more than [their] fair share of a common liability or burden [and then seek] to recover from another . . . [their] proportionate share."[352] However, the thrust of Buchar's actual lawsuit, and his contribution claim in particular, is not that he has been forced to discharge "more than his fair share of a common liability or burden." Buchar's allegations do not indicate that the Arvidsons are "liable [for] a proportionate share" of an amount for which he is also liable.

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[348] *Id.* at 92.
[349] *Id. See id.* note 22 for a list of special relationships which have been deemed in other jurisdictions to give rise to the types of relationships from which common law indemnity claims may arise.
[350] *Id.* at 92.
[351] *Id.* at 108.
[352] *Id.* at 47.

Instead, Buchar seeks to "shift liability" from his shoulders to the Arvidsons. Accordingly, Buchar's claim for contribution fails and is dismissed.

Conclusion

¶147. For the foregoing reasons, the Arvidsons' Motion for Summary Judgment is granted in part and denied in part. Insofar as Buchar's breach of contract claim relates to the V.I. Chiropractic Operating Agreement's covenant to not compete, Buchar's breach of contract claim is dismissed. As it relates to other contractual obligations created by the V.I. Chiropractic Operating Agreement, Buchar's breach of contract claim remains. As a result, the Arvidsons' Motion for Summary Judgment addressing the breach of the implied covenant of good faith and fair dealing is denied. Regarding Buchar's intentional interference with prospective business relations and unjust enrichment claims, the motion is denied, and Buchar's intentional interference with prospective business relations and unjust enrichment claims still stand. Finally, with reference to Buchar's fraudulent misrepresentation and contribution claims, the motion is granted, and those claims are dismissed. An Order consistent with this Opinion shall issue.

Dated: September 10, 2019.

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

ATTEST: Estrella H. George
Clerk of the Court ___/___/____

by: _____
Lori Boynes-Tyson
Court Clerk Supervisor 9/12/2019

contract executed between an employer, Mead, and its employee, Walter, a close friend and business partner of Mead's owner. The employment contract represented only one part of a multi-step business arrangement[28] and contained the covenant to not compete, which consisted of two promises. First, Walter promised to not work with other entities besides Mead (while still retaining the ability to work in his own interest). Second, Walter promised to not compete with Mead's Shipping Division.[29] Over time, Mead's ownership changed, and the new owners slowly defunded the Shipping Division Walter oversaw. Ultimately, Mead's new executives ordered Walter to transfer funds to a Florida Mead account, which would have made it substantially difficult for Walter to continue managing and running Mead's Shipping Division on St. Thomas. Walter refused, and simultaneously and surreptitiously, Walter, through his own business, began construction of a new grocery store. When Mead executives learned of Walter's construction project, they fired him. Litigation arose when Walter attempted to redeem debentures he purchased when initially signing his employment agreement. In the proceedings, Mead attempted to enforce the covenant to not compete included in Walter's contract due to his beginning construction of the grocery store. When interpreting the contractual clauses forming Walter's noncompetition covenant, the Third Circuit did not quote the Restatement's rule nor any common law rule addressing covenants to not compete. Instead, the Walter court held that the language of the two clauses restricted the duty of loyalty Walter owed to Mead. As a result, when reading the plain language of the covenant, the court found Walter's actions in beginning to build the new grocery store did not amount to a breach of the duty of loyalty.[30]

¶17. In *Williamson v. Hess*[31] and *V.I. Diving Schools/Supplies v. Dixon*,[32] the Virgin Islands Territorial Court invoked different versions of the Restatement of Contracts when addressing covenants to not compete appurtenant to employment contracts. In *Williamson*, the court analyzed a veterinarian's covenant to not compete contained within his employment contract with an established St. Thomas veterinarian's practice. The covenant prohibited the veterinarian from practicing veterinary medicine with a private entity for three years on St. Thomas and St. John. Applying the five-factor "test of

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interest seeing as the defendants were not privy to trade secret or confidential information regarding the internal procedures of the diving business nor any secret procedure used by the business to locate clients who were overwhelmingly sourced from cruise ships docking at St. Thomas and not recurring local residents).

[28] In this arrangement, Walter negotiated the purchase of a cargo ship; Mead purchased the ship; Walter signed a ten-year agreement making Walter's privately held business Mead's "preferred customer" for Mead's Shipping Division; Walter and Mead executed a ten-year employment agreement wherein Walter became Mead's Managing Director of Shipping; and Walter purchased eight profit-sharing debentures from Mead. *Walter*, 513 F.2d at 1132-34.

[29] *Walter*, 513 F.2d at 1132-34.

[30] *Id.* at 136-37.

[31] 16 V.I. 284 (V.I. Terr. Ct. 1979).

[32] 20 V.I. 54 (V.I. Terr. Ct. 1983).

reasonableness" extracted from the Restatement (Second) Contracts § 515[33] to Williamson's restrictive covenant, the court found that (1) three years was a reasonable time period to not practice because the employee-veterinarian worked for two years in his employer's veterinarian practice, which allowed the employee to become knowledgeable of the practice's clientele; (2) St. Thomas and St. John constituted a reasonable area in which to not work for a privately owned veterinary practice because the employee could still practice as a veterinarian for a government entity on St. Thomas and St. John and had no limitation regarding the public sector if practicing on St. Croix or the mainland; (3) the covenant was not overbroad in its protection of the employer's legitimate business interests, namely its goodwill, the employee's exposure to the employer's clients and business techniques, and the employer's thirteen-year development of practice, procedures, and goodwill; (4) the employee's youth, lack of roots in the Virgin Islands, ability to relocate, and ability to practice as a government-employed veterinarian on St. Thomas and St. John offset the employee's hardship; and (5) the public interest was still served when enforcing the covenant because the existence of three other veterinarians on St. Thomas and St. John ensured that no veterinarian shortage would ensue.[34]

¶18. In *V.I. Diving School*, the court invoked the Restatement (Second) of Contracts § 188 and its commentary, holding that to enforce a covenant to not compete, the employer must have a protectable, legitimate business interest.[35] The court took care to highlight examples of protectable interests, such as trade secrets, unique services that an employee was involved in providing, or confidential information relating to running the employer's business. Ultimately, the *V.I. Diving School* court found that the covenant to not compete was unreasonable, noting facts that contrasted with those found in *Williamson* and which indicated that the employer lacked protectable business interests. Specifically, the employees in *V.I. Diving* provided no unique services to their employer; had no access to confidential information or any trade secret; and had no way to cull customer relationships developed by their employer on St. Thomas because clients overwhelmingly came from cruise ships as opposed to the local community.[36] In discussing the characteristics of this employment relationship and its lack of a protectable business

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[33] *Williamson*, 16 V.I. at 292 ("In determining whether a restrictive provision is valid and enforceable, the courts are guided by the general rule that such a covenant is valid and enforceable only where it is reasonable. This test of reasonableness must be applied to the following five factors:

1. Is the duration of the restriction reasonable?
2. Is the area of restriction reasonable?
3. Is the interest of the employer reasonably protected?
4. Is undue hardship imposed on the employee?
5. Is the public interest reasonably protected?

(citing Restatement (Second) of Contracts § 515 et. seq. (1981)).

[34] *Williamson*, 16 V.I. at 292-95.

[35] *V.I. Diving School*, 20 V.I. at 60.

[36] *Id.* at 60-61.

interest, the court found that (1) employees are allowed to develop and use skilled variations of general practices upon which workers in a particular industry rely and (2) the covenant at issue was overbroad because it worked to prevent any kind of competition by any former employee as opposed to preventing unfair competition.[37]

II. Other Jurisdictions

¶19. The majority of jurisdictions use a test of reasonableness, similar to that enunciated in the Restatement (Second) of Contracts Section 188, but they do so by relying upon their own state-specific common law that has developed through the years. If jurisdictions constituting the majority invoked or relied upon rules or comments from the Restatement, in all instances, the courts did so to address specific issues or factual scenarios that had not yet been covered by their particular state's case law. In short, the majority of jurisdictions invoke their own state-specific common law, supplemented by the Restatement only when needed to address discrete factual scenarios their own jurisprudence has not yet had opportunity to discuss.

A. Jurisdiction-specific common law

¶20. A majority of jurisdictions have developed their own jurisdiction-specific bodies of common law addressing the validity and enforceability of covenants to not compete. The great weight of authority from nearly all jurisdictions holds that four major principles guide the analysis and enforceability of these self-imposed restraints.

¶21. First, the covenant must be ancillary to a valid and enforceable contract or transaction.

¶22. Second, in accord with the ancillary requirement, consideration must be given in exchange for one's promise to restrict his ability to practice his own trade or occupation. These requirements are vestiges of earlier economic and political eras and embodiments of a "public policy originating at a time when human enterprise [was] limited . . . [with] . . . each individual's activity [being] necessary to the well-being of society."[38] As the Pennsylvania Supreme Court noted:

> [G]eneral covenants not to compete present centuries old legal problems. The earliest cases were decided against the economic background of a chronic shortage of skilled workers in England, the result of the virulent epidemics of the Black Death during the fourteenth century. It was not surprising, then, that all covenants to refrain from practicing a trade were held to be void as against public policy. This policy carried over into the early seventeenth century when the grants of exclusive trading privileges by the Sovereign caused widespread public indignation which broadened

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[37] *Id.* at 61.
[38] 6 William A. Lord, *Williston on Contracts* § 13:4 (4th ed. 2009).

> into a dislike for all restraints upon the free exercise of trade. However, by the eighteenth century England found itself in the midst of a new commercial era, and adjusting to changed economic conditions, the courts upheld at common law contracts in partial restraint of trade provided they were ancillary to a principal transaction, and were reasonably limited both in geographical extent and duration of time.[39]

¶23. Other jurisdictions' most senior tribunals have also noted that courts' resistance to covenants to not compete originated at a time when "each man's industrial activity was, more or less, necessary to the material well-being and welfare of his community and of the state."[40] But "the conditions that made so rigid a doctrine reasonable no longer exist."[41] In today's "practically unlimited field of human enterprise, there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business."[42] This ages-old reluctance to allow promises to restrain oneself from engaging in a trade or occupation was typically given life in the form of a cursory rule statement attesting to the jurisdiction's reluctance to enforce covenants to not compete.

¶24. Third, to be enforced by a court, the covenant to not compete must be a reasonable and valid restraint on the promisor's ability to conduct his own trade or occupation. Common law and secondary sources such as *Williston on Contracts* indicate that a reasonable restraint on trade will generally be deemed "a valid exercise of the parties' freedom to contract."[43] The most frequently iterated version of this general rule comes from early English legal authority, *Horner v. Graves*,[44] which establishes that the enforceability of a covenant to not compete hinges on whether the restraint

> only . . . afford[s] a fair protection to the interests of the party in favor of whom it is given, and [is] not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.[45]

Late nineteenth century jurisprudence reinforced this principle when affirming that courts may enforce covenants to not compete as long as they are reasonable in the extent to which they allow the promisor to

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[39] *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 627 (Pa. 1957).
[40] *Wood v. Whitehead Bros. Co.*, 165 N.Y. 545, 550-51 (N.Y. 1901).
[41] *Id.*
[42] *Id.*
[43] 6 Richard A. Lord, *Williston on Contracts* § 13:4.
[44] 7 Bing. 735, 743 (Eng. Ct. C.P. 1831).
[45] 6 Richard A. Lord, *Williston on Contracts* § 13:4.