

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

JEFFREY EPSTEIN and L.S.J., LLC,

Plaintiffs,

v.

FANCELLI PANELING, INC., and  
J.P. MOLYNEUX STUDIO, LTD.,

Defendants.

CIVIL NO. 2010/443

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**MOTION TO DISMISS CROSS-CLAIMS  
OF FANCELLI PANELING, INC.**

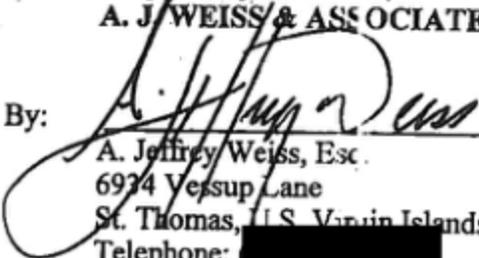
COMES NOW defendant J.P. MOLYNEUX STUDIO, LTD. ("JPMS"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in this Court by Superior Court Rule 7, hereby moves to dismiss the Cross-Claims of defendant Fancelli Paneling, Inc. ("Fancelli"), for failure to state claims on which relief can be granted, as there is no legal or factual basis on which Fancelli could be awarded indemnification or contribution from JPMS, and as Fancelli has failed to plead facts which, if proven, would entitle it to any of the relief sought against JPMS. In support of this motion, JPMS submits the accompanying Memorandum of Law.

WHEREFORE, defendant J.P. Molyneux Studio, Ltd. hereby requests that the Cross-Claims of Fancelli Paneling, Inc. be dismissed with prejudice.

DATED: August 10, 2012

Respectfully submitted,  
A. J. WEISS & ASSOCIATES

By:

  
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**CERTIFICATE OF SERVICE**

It is hereby certified that on the 10<sup>th</sup> day of August 2012, I caused a true and exact copy of the foregoing **MOTION TO DISMISS CROSS-CLAIMS OF FANCELLI PANELING, INC.** to be served via U.S. Mail, postage prepaid, upon the following:

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Kisha Callow

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS  
CROSS-CLAIMS OF FANCELLI PANELING, INC.**

COMES NOW defendant J.P. MOLYNEUX STUDIO, LTD. ("JPMS"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in this Court by Superior Court Rule 7, hereby submits this Memorandum of Law in Support of its Motion to Dismiss Fancelli's Cross-Claims for failure to state claims on which relief can be granted, as there is no legal or factual basis on which Fancelli could be awarded indemnification or contribution from JPMS, and as Fancelli has failed to plead facts which, if proven, would entitled it to any of the other relief sought against JPMS. In further support of its Motion to Dismiss, JPMS states as follows:

**I. Legal standards for 12(b)(6) Motion:**

The Supreme Court of the Virgin Islands in *Brady v. Cintron*, 55 V.I. 802, 822 (V.I. S. Ct. 2011), enunciated the standard to be applied to Motions to Dismiss for failure to state a claim on which relief can be granted in cases before the Superior Court. Therein the Court noted that :

In *Bell Atlantic Corp. v. Twombly* [550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)] and *Ashcroft v. Iqbal*, [556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed. 2d 868 (2009)], the United States Supreme Court interpreted [Federal Rule of Civil Procedure] Rule 8 to require a complaint to set forth a plausible claim for relief, and articulated the proper standard for evaluating motions to dismiss for failure to state a claim: "a claim requires a complaint with enough factual matter (taken as true) to suggest the required elements." *Robles v. HOVENSA, LLC*, 49 V.I. 491, 501 (V.I. 2008) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008)). Thus, under *Robles*, *Twombly*, and *Iqbal*, courts must undertake a three step analysis to determine whether a complaint states a plausible claim for relief.

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First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible. *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-50 (V.I. 2011) (quoting *Santiago v. Warminster Tp.*, 626 F.3d 121, 129-30 (3d Cir. 2010)).

*Brady v. Cintron*, 55 V.I. at 822-3.

In deciding a Motion to Dismiss under F.R. Civ. P. 12(b)(6), the Court is required to accept as true the well plead factual allegations in the Cross-Claim. *Phillip v. County of Allegheny*, 515 F. 3d, 224, 228 (3rd Cir. 2008). Conclusory allegations and legal conclusions, however, are to be disregarded. Moreover, a plaintiff is required to do more than simply use labels or conclusory allegations. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955. Instead, a plaintiff must plead facts to show it is entitled to relief. Thus, since *Twombly*, in deciding a Motion to Dismiss under Rule 12(b)(6), the Court must determine whether the pleading at issue "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570) (emphasis added).

The Court, therefore, must take note of the elements of each cause of action to determine what a plaintiff or cross-plaintiff must plead to state a claim on which relief can be granted. The court must also identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement. Finally, where there are factual allegations, a court should assume their veracity, and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient facts from which the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first

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step, then the claim is plausible. *Joseph v. Bureau of Correction*, 54 V.I. 644, 649-50 (V.I. 2011) (quoting *Santiago v. Warminster*, 626 F.3d 121, 129-30 (3d Cir. 2010)(internal quotation marks omitted). If there are not, the claim should be dismissed.

A complaint or Cross-Claim therefore satisfies the plausibility standard when the factual matters asserted in the pleading allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This requires showing more than a mere possibility that a defendant has acted unlawfully. A complaint which pleads facts which are merely consistent with a defendant's liability, however, stops short of the line between possibility and plausibility of entitlement of relief. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220-1 (3d Cir. 2011).

Here, defendant Fancelli's Cross-Claims do not come close to meeting this standard. Fancelli's Cross-claim seeks to assert claims for relief for indemnification and contribution, for damages, and for declaratory judgment. Those Cross-Claims allege and plead that JPMS should be held liable to Fancelli, in the event Fancelli is found to be liable to plaintiffs for its negligence or as a result of its breach of contract. Fancelli's cross-claim, however, does not contain any facts which could even arguably support the elements of a claim for contribution or indemnity, let alone facts sufficient to meet the standards set out in *Brady*, *Twombly*, and *Iqbal*, for its other claims for relief.

## 2. Fancelli's claims against JPMS:

In Count 1, at para 38., after attempting to incorporate the allegations from its Counterclaim against plaintiffs Epstein and LSJ, Fancelli alleges in mere conclusory fashion that "as a result of the foregoing, Defendant seeks a declaratory judgment from this Honorable court that: (1) Defendant satisfied its written contractual obligations, if any, to Molyneux, terminating any claim of further benefit to Plaintiffs and Molyneux as a matter of law and fact; (2) that Defendant has been released by Defendant Molyneux and Plaintiffs as a matter of law and fact; (3) that Molyneux and Plaintiffs have accepted the work of Defendant without protest as a matter of law and fact; and (4) that Defendant is entitled to a dismissal of this action upon release and/or accord and satisfaction and or

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the doctrine of "accounts stated" without protest. Defendant is further entitled to damages, attorneys fees and costs, in an amount to be determined at trial." There are no facts whatsoever alleged in this paragraph, and as such, it must be disregarded for purposes of determining JPMS' Motion to Dismiss.

In Count 2, which is labeled as a claim for "INDEMNIFICATION AND CONTRIBUTION", at para. 39, the single paragraph of that Count, Fancelli again asserts no separate facts for its Cross-Claims against JPMS, and instead seeks to incorporate its Counterclaim allegations against plaintiffs Epstein and LSJ as the factual support for that Cross-Claim against JPMS. It then requests relief as follows:

"A. To adjudge and declare that Defendant fully performed or substantially performed its duties as limited by the purchase orders(s) between it and Molyneux and to award Defendant damages against Molyneux in an amount equal to any amount realized by Plaintiffs against Defendant Fancelli;

B. To award Defendant its attorney's fees and costs, incurred in the defense of this action; and

C. To award such other and further relief as the Court deems just and proper."

Neither of these Cross-claims, however, contain any independent facts which could even arguably support a claim for relief against JPMS.

A review of the allegations in Fancelli's Counterclaim against plaintiffs, also discloses no such facts being alleged. For example, Fancelli alleges that the design drawings were done by Molyneux and that it did not have input into those drawings. Fancelli Counterclaim at para.23. Since there is no claim that those design drawings were defective and no claim that JPMS was negligent in preparing those drawings, these allegations are not relevant to FANCELLI's claims for indemnification or contribution from JPMS, or to its claim for damages from it. Nor is it germane to Fancelli's claim for a declaratory judgment.

Fancelli also alleges that Molyneux issued purchase orders to it for the fabrication of work to the specifications as outlined in those purchase orders, and it further asserts that it performed the

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work in accordance with those purchase orders. *Id.* at ¶24. There is nothing in these allegations which would support its Cross-Claims against JPMS. Fancelli then makes the conclusory assertion that it preformed the work to JPMS' satisfaction (*id.* at para. 25), and that it received an acknowledgment from JPMS that it had performed the work to JPMS' and plaintiffs satisfaction. *Id.* at para. 26, referencing Exhibit 4 to the Cross-Claims. Exhibit 4, however, is simply a punch list of work that has not been completed, and as such it does not support Fancelli's allegations. As such, the assertions must be disregarded.

Fancelli then goes on to assert that it was specifically instructed by Plaintiffs that its communication on this project was limited to three individuals including its/their representative, Gary Kearney ("Kearney"). *Id.* at para. 27. Even if true, that allegation is not relevant to its Cross-Claims against JPMS. Fancelli also alleges that Plaintiffs' representative, Kearney, accepted and signed off on the work, subject to a punch list, and three minor issues that Fancelli claims are de minimus. *Id.* at ¶ 28. Although this may be true, none of these facts are relevant to its Cross-Claims against JPMS.

In paragraph 29, Fancelli attempts to raise an issue based on verb tense between the Complaint and the Second Amended Complaint, which is not, for purposes of a Motion to Dismiss, a factual allegation. As such, it must be disregarded for the determination of this motion.

Fancelli then alleges that JPMS was the prime contractor, and that JPMS "effected and completed all outstanding contractual obligations". *Id.* at ¶30. Fancelli's concession that JPMS was the prime contractor, and that it was, in essence, the subcontractor is fatal to its claims for indemnification and contribution.

Fancelli also alleges defendant JPMS is the actual party in privity of contract with plaintiff, and that JPMS and plaintiffs each accepted Fancelli's work by fully acknowledging same in a writing. *Id.* at paras. 32 & 33. While this may limit or defeat plaintiffs' claims if proven to be true, these allegations do not support Fancelli's Cross-Claims against JPMS. Fancelli then goes on to allege that those writings constitute releases, and also an accord and satisfaction. *Id.* at paras. 34 &

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35. These, however, are conclusions and not facts, and as such must be disregarded.

Those are the sum total of the allegations in the Counterclaim which are incorporated by reference into Fancelli's Cross-Claims against JPMS.

**3. Elements of causes of action for Indemnification or Contribution:**

Contribution and indemnification are mutually exclusive remedies. "A person who has a right of indemnity against another person . . . does not have a right of contribution against that person and is not subject to liability for contribution to that person." Restatement (Third) of Torts: Apportionment of Liability § 23(c) (2000). The Restatement (Third) of Torts: Apportionment of Liability (2000), supplies the substantive law with regard to common law claims for contribution and indemnification. *In re Manbodh Asbestos Litigation*, 47 V.I. 375, 395 (Super. Ct. 2006).

**a. Contribution:**

In order for Fancelli to state a claim for contribution from JPMS, Fancelli must allege facts which, if proven, would show that: (i) Fancelli and JPMS "are or may be liable for the same harm"; and (ii) that Fancelli has discharged "the liability of [JPMS] by settlement or discharge of judgment". *Id.* at § 23(a). In the event Fancelli could allege facts to establish the first two elements, then it would also have to establish that the amount it paid to the plaintiffs was in excess of its (Fancelli's) comparative share of responsibility in relation to the fault of JPMS. *Id.* at § 23(b).

Here, however, Fancelli does not allege any facts to show that it can meet the first two elements of a cause of action for contribution, as there is no claim that it and JPMS are or may be liable for the same harm, and there is no allegation that Fancelli has discharged the liability of JPMS by settlement or payment of a judgment. Nor can there be, as plaintiffs are suing Fancelli not for anything JPMS did wrong, but rather for Fancelli's own negligent and defective workmanship, and its, not JPMS', breach of contract. As such, Fancelli is unable to establish the first element of a claim for contribution.

Fancelli has also failed to plead facts to establish the second and third elements of a cause of action for contribution, as there is no allegation that it has discharged the liability of JPMS or that

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it will pay any amount towards any liability of JPMS if plaintiffs prevail in their suit against Fancelli.

Additionally, Fancelli has not alleged facts to show that it has or will pay any amount to plaintiffs *in excess of its comparative share of the fault*. Nor can it, as it is being sued for its own negligence and breach of its contractual obligations, and it has not alleged any defect or negligence with regard to JPMS' designs. As such, Fancelli is unable to allege any facts which would, even if proven, set forth a plausible claim for contribution against JPMS. Accordingly, its Cross-Claims for contribution against JPMS must be dismissed.

**b. Indemnification:**

In order for Fancelli to assert a claim for indemnification against JPMS, Fancelli must allege facts to establish that: (i) it and JPMS "are or may be liable for the same harm"; (ii) that Fancelli has discharged the liability of JPMS in whole or in part, by settlement or discharge of judgment (*id.* at § 22(a)), and (iii) that Fancelli "was not liable *except* vicariously for the tort of JPMS (*id.* at § 22(a)(2)(i)). *In re Manbodh Asbestos Litigation*, 47 V.I. at 395.

Here, Fancelli has failed to plead any facts to establish these elements. There is no allegation in Fancelli's Cross-Claim (or Counterclaim, which is incorporated by reference into the Cross-Claim) which would create even an inference that Fancelli and JPMS are liable to plaintiffs for the same harm. *See*, Fancelli's Answer to Amended Complaint, Counterclaim and Cross-claim at ¶¶ 22 - 38. Moreover, Fancelli cannot make such an allegation, as plaintiffs are suing it as a result of its own negligence and defective workmanship, and not some negligence on the part of JPMS or of Fancelli and JPMS jointly<sup>1</sup>. Thus, Fancelli has failed to plead facts to establish the existence of the

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<sup>1</sup> To establish a claim for negligence, the Supreme Court of the Virgin Islands has held that a plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the defendant's negligence caused the plaintiff's injury. Causation includes cause in fact and legal causation, which is often referred to as proximate cause. In order for the negligent act to be regarded as the cause in fact of the injury, it must be shown that the injury would not have occurred but for the act. If there are multiple negligent acts that could have caused the injury, then the negligent conduct must be shown to have been a substantial factor in causing the harm. *Brady v. Cintron*, 55 V.I. at 823-24.

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first element of a cause of action for indemnification against JPMS.

In addition, Fancelli has not alleged that it has discharged the liability of JPMS in whole or part, by settlement or payment of a judgment. *Id.* Nor can it make such an allegation consistent with its Rule 11 obligations. Similarly, there are no facts alleged by Fancelli which would, if proven, establish that its liability to plaintiffs is solely vicarious and for the tort of JPMS. Again, Fancelli cannot make such allegations consistent with its Rule 11 obligations in the face of the Amended Complaint, since plaintiffs claims against Fancelli all arise out of Fancelli's own alleged negligence and defective workmanship. Thus, there can be no claim that Fancelli is vicariously liable for the tort of JPMS. As such, Fancelli's Cross-Claim fails to plead facts to establish the second and third elements required for a claim for indemnification.

Fancelli has not alleged a single fact which even arguably could be read to support of any of the elements of a claim for indemnification against JPMS. Its Answer to Plaintiff's Second Amended Complaint with Counterclaim and Cross-Claim is exclusively concerned with whether Fancelli owed any contractual duties to the plaintiffs, and whether Fancelli had fulfilled them. Nowhere in that pleading does Fancelli set forth a single duty allegedly owed by JPMS. In addition, Fancelli has not alleged the breach of any duty by JPMS, nor has Fancelli alleged that any alleged breach by JPMS created liability to plaintiffs on Fancelli's part, and these defects are fatal to Fancelli's Cross-Claims. As our Supreme Court has held, the Answer and Cross-Claim must contain "enough factual matter (taken as true) to suggest the required element" can be proven. *Brady v. Cintron*, 55 V.I at 822.

Fancelli's Cross-Claim allegations are nothing more than mere conclusions, and as such they are not entitled to the presumption of truth. *Id.* at 823. Without any facts to support an allegation that JPMS is jointly liable in negligence with Fancelli, and therefore "liable for the same harm", Fancelli cannot assert a legally sufficient claim for either contribution or for indemnity, and as such its Cross-Claims must be dismissed.

**c. Contract Indemnification/Contribution:**

To the extent that Fancelli's Cross-Claim might be attempting to assert a claim against JPMS for indemnification pursuant to a breach of contract theory, any such claim must also fail as a matter of law. Fancelli has not and cannot point to any contract provision which would create an express contractual right to indemnification or contribution. See, Fancelli's Answer to Plaintiff's Second Amended Complaint with Counterclaim and Cross-Claim at ¶¶ 23 - 39. Nor is a right of indemnity or contribution created for Fancelli in the Purchase Order (Exhibit 1 to Fancelli's Answer, Counterclaim & Cross-Claim), nor in any of the other exhibits Fancelli has submitted therewith.

There is no right under contract law to implied contribution or indemnification. In fact, the Restatement (Second) of Contracts (1981) contains no provision which could be read to create a right of indemnification or contribution in the absence of an express provision contained in a written contract. In order for Fancelli to assert a valid claim for contribution or indemnification pursuant to a breach of contract theory, Fancelli would have to plead facts to establish the existence of a contract with an indemnity or contribution provision contained therein, and also allege that it has or will be required to discharge *more than its proportionate share* of the liability. Fancelli would also have to allege facts to show that it would not be barred from obtaining contribution because of the wrongful nature of its own conduct. See, Restatement (Third) of Torts: Apportionment of Liability § 22(a) (2000).

The Restatement (Third) of Restitution and Unjust Enrichment (2010) provides for similar, if not identical elements. Section 23 thereof provides as follows:

§ 23. Performance of a Joint Obligation (Indemnity and Contribution)

(1) If the claimant renders to a third person a performance *for which claimant and defendant are jointly and severally liable*, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.

(2) There is unjust enrichment in such a case to the extent that

(a) the effect of the claimant's intervention *is to reduce an enforceable obligation*

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of the defendant to the third person, and

(b) as between the claimant and the defendant, *the obligation discharged* (or the part thereof for which the claimant seeks restitution) *was primarily the responsibility of the defendant.*

*Id.* (emphasis added).

Accordingly under Section 23 of the Restatement (3rd) of Restitution and Unjust Enrichment, Fancelli would have to plead facts to establish that: (i) it provided something (goods or services) to plaintiffs *for which both it and JPMS are jointly and severally liable*; (ii) that as a result, it has or is discharging an enforceable obligation *for which JPMS has primary responsibility*; and (iii) that as between JPMS and Fancelli, *JPMS was or is the party with primarily responsibility* for the discharge of that obligation. An examination of Fancelli's Cross-Claims show that Fancelli has not met this pleading burden, and cannot do so, as the claims by plaintiff are based on Fancelli's own singular wrongful conduct, and not on any obligation or wrongful conduct of JPMS.

Comment a to Section 23 provides the following explanation and example:

" A claim in restitution is potentially available in any situation not governed by express contract in which A discharges all or part of what is (i) *a common liability of A and B vis-à-vis a third-party obligee, but (ii) the obligation of B as between A and B.* The consequence is that A has to that extent performed B's obligation ... The claim is called indemnity *when the liability* in question, as between the parties, is *altogether* the responsibility of B; it is called contribution when A has paid more than A's share of a *common liability* that is allocated in some proportion between them. The logic and the rationale of the claim in restitution are precisely the same in either case.

*Id.* at §23, cmt. a. (emphasis added).

Regardless of which test for contribution or indemnity is applied here, however, Fancelli's Cross-Claims must be dismissed, as it has failed to allege any facts to establish the elements of a claim for contribution or indemnification under Virgin Islands law. Moreover, dismissal should be

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with prejudice as any attempt to amend would be futile because Fancelli cannot provide facts to establish the critical elements of common liability and JPMS' being primarily liable for the harm plaintiffs allege.

Indeed, there are absolutely no facts alleged in Fancelli's Cross-Claim or in his Counterclaim (incorporated by reference into the Cross-Claim), which would support a claim for relief against JPMS under any of the theories alleged by Fancelli, whether for damages, contribution, indemnification, or otherwise. To the contrary, Fancelli concedes that JPMS fully complied with its contractual obligations to plaintiffs (Epstein & LSJ). *See*, Fancelli Answer, Counterclaim & Cross-Claim at ¶ 30. This is fatal to the Cross-Claims. Fancelli has not and cannot point to any material breach by JPMS of a contract with Fancelli which would give rise to its claim against JPMS. Nor has Fancelli alleged a breach by JPMS of a contract with plaintiffs which caused Fancelli to incur liability for which JPMS would be primarily liable. Similarly, Fancelli has not and cannot allege facts to show that both it and JPMS were jointly and severally liable for the harm alleged by plaintiffs.

When boiled down to its essence, all that Fancelli is saying, is that in the event it is found liable to plaintiffs for breach of contract or for defective or negligent workmanship, then in such an event Fancelli wants JPMS to reimburse it for whatever it has to pay to plaintiffs notwithstanding the lack of any factual or legal basis for such reimbursement. Fancelli's Cross-Claim does not set forth any plausible legally sufficient claim upon which relief can be granted, and under the principles expressed in *Brady*, *Twombly* and *Iqbal*, and pursuant to the Restatements of Law Sections referenced above, Fancelli's Cross-Claims for indemnification and contribution must be dismissed for failure to state a claim on which relief may be granted.

**4. Fancelli's bare bones claim for damages against JPMS is also legally deficient and must be dismissed:**

In its Cross-Claims Fancelli also makes a throw away claim for some unspecified damages. *See*, Cross-Claim at ¶¶ 38 & 39. Fancelli, however, provides no facts to support any cause of action.

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sounding in tort or contract which would support a plausible claim for damages. See, ¶¶ 22 - 39, generally. Indeed, no allegation that JPMS was negligent is asserted by Fancelli, nor has Fancelli alleged that JPMS breached a contract with it. *Id.* As such, Fancelli has failed to set forth facts which, if proven, would establish a plausible right to damages from JPMS.

**5. Fancelli's Cross-Claim for Declaratory Relief must be dismissed:**

Count I of the Cross-Claim is entitled "(Declaratory Judgment)". The Court's Authority to provide declaratory relief is established in the Virgin Islands Declaratory Judgment Act, codified at 5 V.I.C. § 1261, *et. seq.* Section 1262 of that Act provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by statute, municipal ordinance, contract or franchise, may have determined any question of *construction or validity* arising under the instrument, statute, ordinance, contract, or franchise *and obtain a declaration of rights, status or other legal relations thereunder.*

5 V.I.C. § 1262 (emphasis added).

A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to its legal rights. *Top Constr. v. Dep't of Prop. & Procurement*, 41 V.I. 72, 78 (Terr. Ct. 1999) (citing *Davis v. Ronney*, 490 F.2d 1360, 1369 (3d Cir. 1973)). As such, to set forth a plausible claim for relief under the Act, a party must plead facts to show that it is in doubt as to its legal rights under a deed, will, written contract, or statute, to be entitled to declaratory relief under Virgin Islands law. *Hill v. De Jongh*, 2012 V.I. LEXIS 11 (V.I. Super. Ct. Apr. 19, 2012).

Here, however, without alleging that it is in doubt as to its legal rights under a deed, will, written contract, or statute, Fancelli requests a declaratory judgment against JPMS.

Fancelli's bare bones conclusory assertions in paragraph 38 of Count I of its Cross-Claim are insufficient to allege a plausible claim for declaratory relief under the Virgin Islands law, as it has not alleged that it is in doubt as to its rights under a contract with JPMS. Moreover, as discussed above with regard to its claims for indemnification and contribution, Fancelli's Cross-Claim does

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not assert any facts which would allow the court to draw the reasonable inference that the JPMS is liable for the misconduct alleged and thus declaratory relief cannot be granted. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (citing *Twombly*, 550 U.S. at 556).

As such, Count 1 of Fancelli's Cross-Claim for a declaratory judgment must be dismissed for failure to allege facts to establish the elements of a claim for a declaratory relief under 5 V.I.C. § 1262. See, *Hill v. De Jongh*, 2012 V.I. LEXIS 11.

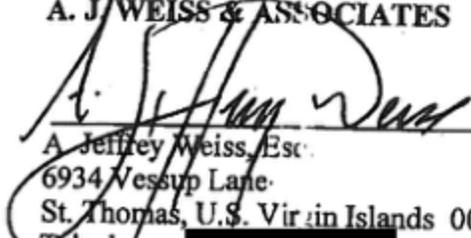
#### 6. Conclusion

There are absolutely no facts alleged in Fancelli's Cross-Claims, or in its Counterclaim (which is incorporated by reference into the Cross-Claims), which would support any plausible claim for relief against JPMS under any theory, whether for damages, contribution, indemnification, or otherwise. Because Fancelli has not alleged anything more than mere labels and conclusions, it has failed to meet the burden to allege facts sufficient to establish a plausible legally sufficient claim for indemnification, contribution, damages, and/or for a declaratory judgment against JPMS. As such, under the principles expressed in *Brady*, *Twombly* and *Iqbal*, Fancelli's Cross-Claims against JPMS must be dismissed for failure to state claims upon which relief may be granted.

DATED: August 10, 2012

Respectfully submitted,  
A. J. WEISS & ASSOCIATES

By:

  
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*Epstein v. Fancelli & J.P. Molyneux Studio, Ltd.*

*Super. Ct. Civ. No. 443/2010*

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**CERTIFICATE OF SERVICE**

It is hereby certified that on the 10<sup>th</sup> day of August 2012, I caused a true and exact copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMS OF FANCELLI PANELING, INC.** to be served upon the following via U.S. Mail, postage prepaid, and fax upon the following:

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Kisha Callwood

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

JEFFREY EPSTEIN and L.S.J., LLC,

Plaintiffs,

v.

FANCELLI PANELING, INC.,

Defendant,

v.

J.P. MOLYNEUX STUDIO, LTD.,

Nominal Defendant.

CIVIL NO. 2010/443

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**ORDER**

THIS MATTER is before the Court on defendant J.P. MOLYNEUX STUDIO, LTD.'s Motion to Dismiss defendant Fancelli Paneling, Inc.'s Cross-Claims; it appearing that all parties have been duly served, and the Court being fully advised as to the premises; it is now therefore hereby

**ORDERED** that defendant J.P. Molyneux, Ltd.'s Motion is **GRANTED**; and it is further

**ORDERED** that the Cross-Claims of Fancelli Paneling, Inc. are **DISMISSED WITH PREJUDICE**.

**SO ORDERED** this \_\_\_\_ day of August 2012.

HON. JAMES S. CARROLL, III  
Judge of the Superior  
Court of the Virgin Islands

**A T T E S T:**

VENETIA H. VELASQUEZ  
Clerk of the Superior Court

By: \_\_\_\_\_  
Deputy Clerk