

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

Government of the United States
Virgin Islands,

Plaintiff,

v.

The ServiceMaster Company, LLC;
The Terminix International Company
Limited Partnership; and Terminix
International USVI, LLC,

Defendants.

Case No. SX-16-CV-700

Appearances:

CAROL THOMAS-JACOBS, ESQ.

Acting Deputy Attorney General
U.S. Virgin Islands Department of Justice
Charlotte Amalie, VI 00802

JOSEPH PONTEEN, ESQ.

Deputy Attorney General
U.S. Virgin Islands Department of Justice
Christiansted, VI 00820

MIMI Y. LIU, ESQ.*

Motley Rice, LLC
Washington, D.C. 20004
For Plaintiff

KEVIN A. RAMES, ESQ.

Law Offices of K.A. Rames, P.C.
Christiansted, VI 00820

JEFFREY T. GREEN, ESQ.*

TIMOTHY K. WEBSTER, ESQ.*

Sidley Austin, LLP
Washington, D.C. 20005
For Defendants

* Admitted *pro hac vice*.

MEMORANDUM OPINION

MEADE, Judge

BEFORE THE COURT are the following motions and other papers: (1) a motion for leave to file a brief in excess of twenty pages filed jointly by the Defendants, The ServiceMaster Company, LLC (hereinafter “ServiceMaster”), The Terminix International Company Limited Partnership (hereinafter “Terminix LP”), and Terminix International USVI, LLC (hereinafter “Terminix USVI”) (collectively “the Defendants”); (2) three stipulations between the parties to extending the briefing deadlines; (3) a motion filed by the Plaintiff, Government of the United States Virgin Islands (hereinafter “the Government”), for an extension of time *nunc pro tunc* to respond to a court order; and (4) a motion filed by the Government for leave to file a surresponse. The parties also filed multiple notices of supplemental authority and responses and replies thereto. For the reasons stated below, the Court will grant the Defendants’ page limit motion, approve the parties’ stipulations, and grant the Government’s surresponse motion. However, the Court must deny the Government’s motion for an extension of time and strike the parties’ supplemental filings, which were filed without leave of court long after briefing had ended.

REVELANT FACTUAL & PROCEDURAL HISTORY

This lawsuit arose after Terminix USVI provided fumigation services in March 2015 at the Sirenusa Resort on St. John, U.S. Virgin Islands. Methyl bromide was used and a family of four vacationing from Delaware was transported to a hospital “with catastrophic injuries.” (Compl. ¶ 5.) Symptoms “included neurologic impairment

consistent with acute methyl bromide toxicity.” *Id.* After the incident, the Virgin Islands Department of Planning and Natural Resources (“DPNR”) determined that “Terminix’s use of methyl bromide in residential structures was not approved and that Terminix did not apply or store methyl bromide properly, as required by its approved label.” *Id.* ¶ 7. DPNR issued a stop-use order to Terminix USVI regarding the use of methyl bromide in the Virgin Islands.

The Government commenced this civil action in the Superior Court of the Virgin Islands on December 16, 2016. The complaint, as later corrected,¹ asserts seven violations of Virgin Islands law.² Terminix LP, Terminix USVI, and ServiceMaster appeared (with ServiceMaster limiting its appearance) and waived service of the complaint. On February 17, 2017, the Defendants stipulated with the Government to extend their time to respond to the complaint to March 10, 2017. The court (Brady, J.)³ approved that stipulation by order dated February 24, 2017 and entered February

¹ Because a page was inadvertently omitted, the Government, on February 15, 2017, filed a corrected copy of its complaint, technically, without leave of court. Defendants did not object, however, and the parties have treated the corrected complaint as the current pleading. The Court declines to take issue with the Government’s *sua sponte* correction and, likewise, will treat the corrected complaint as the current pleading.

² Count one - violation of the Consumer Protection Law of 1973, 12A V.I.C. § 101; count two - violation of the Consumer Fraud and Deceptive Business Practices Act, 12A V.I.C. § 304; counts three through six - violations of the Criminally Influenced and Corrupt Organizations Act (“CICO”); and count seven - violation of the Pesticide Control Act, 12 V.I.C. § 825, *et seq.* All counts are asserted against all three Defendants except count five, which is asserted only against ServiceMaster and Terminix LP.

³ The Presiding Judge of the Superior Court of the Virgin Islands reassigned this case to the undersigned judge by Order dated May 17, 2017, entered May 22, 2017, and subsequently transferred this case to the Complex Litigation Division and reassigned it to the Honorable Robert A. Molloy by Order dated August 6, 2018, entered August 24, 2018. Because the undersigned judge heard oral argument and took the dismissal motions under advisement, and because the ancillary motions addressed in this Opinion must be resolved before the dismissal motions can be ruled on, the Court issues this Opinion, notwithstanding that this case has been reassigned.

28, 2017 (hereinafter "February 24, 2017 order"). On March 10, 2017, ServiceMaster moved to dismiss the complaint for lack of personal jurisdiction and all three Defendants jointly moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim for relief.

Along with their joint motion, Defendants filed a motion for leave to exceed the page limits. The Government did not file a response to this motion. On April 11, 2017, the parties stipulated to extend the deadlines for the Government's opposition and the Defendants' replies (hereinafter "Second Stipulation"). The Government agreed to file its oppositions by May 2, 2017, and the Defendants' agreed to file their replies by May 23, 2017. The Government met its deadline. The Defendants did in part. That is, Defendants filed a joint reply in support of their joint motion to dismiss on May 23, 2017, but also filed another stipulation with the Government (hereinafter "Third Stipulation"), agreeing to an extension until June 2, 2017. The Defendants did not meet that deadline, however, because, on June 9, 2017, they filed another stipulation with the Government (hereinafter "Fourth Stipulation"), agreeing to extend their reply deadline to June 12, 2017. ServiceMaster filed its reply in support of its motion to dismiss for lack of personal jurisdiction on June 12, 2017. The next day, June 13, 2017, the Defendants filed a duplicate copy of the joint reply they previously filed on May 23, 2017.

After both motions were fully briefed but before the Court heard oral argument on July 19, 2017, the Government filed a notice of supplemental authority in support of their oppositions to the Defendants' motions. Attached was a copy of a June 19,

2017 memorandum opinion issued by another Superior Court judge (Dunston, P.J.) in *Government of the United States Virgin Islands v. Takata Corporation, et al.* See generally 67 V.I. 316 (Super. Ct. 2017). A day later, on June 28, 2017, the Government filed a motion, titled as a “consent motion,” for leave to file a surresponse to ServiceMaster’s reply. The proposed surresponse was submitted as well. Also on June 28, 2017, the Defendants filed their own notice of supplemental authority, which the Government responded to on July 6, 2017. A day later, on July 7, 2017, the Defendants filed a joint response to the Government’s June 27, 2017 notice of supplemental authority.

In advance of oral argument, the Court issued an order, dated June 19, 2017 and entered June 20, 2017 (hereinafter “June 19, 2017 order”), directing the parties to submit within five days a list of witnesses and exhibits that would be admitted into evidence during the hearing on the motions to dismiss. Counsel filed a stipulation a month late and notified the Court that they would not be calling witnesses or introducing evidence. However, the next day, July 12, 2017, the Government filed a motion for extension of time *nunc pro tunc* to respond to the June 19, 2017 order and asked leave to submit into evidence a July 10, 2017 affidavit prepared by Dawn Henry, Commissioner of the Department of Planning and Natural Resources.

After the motions had been fully briefed, argued, taken under advisement, the Defendants, on March 12, 2018, filed a second notice of supplemental authority. Attached was a copy of a March 7, 2018 order issued by the District Court of the Virgin Islands (Gomez, J.) and a copy of the complaint filed in the same case. See generally

Catalus Capital USVI, LLC v. The ServiceMaster Company, LLC, Civ. No. 2017-17, 2018 U.S. Dist. LEXIS 37340 (D.V.I. Mar. 7, 2018). The Government filed a response to the Defendants' March 12, 2018 notice of supplemental authority on March 13, 2018. A week afterward, the Defendants' filed a joint reply to the Government's response. Then, on March 22, 2018, the Defendants filed an exhibit inadvertently omitted from their March 20, 2018 joint reply.

DISCUSSION

Because the motions, stipulations, and notices impact on what arguments are before the Court and, therefore, what the Court can consider in rendering a decision, the Court must resolve these ancillary motions first, before proceeding to the merits of the Defendants' motions to dismiss. *Accord People v. Rivera*, 68 V.I. 393, 397 (Super. Ct. 2018) ("First resolve the related, or ancillary, motions because granting or denying these motions could affect the arguments and issues that can be considered." (quotation marks, brackets, ellipsis, and citation omitted)); *Daniel v. Borinquen Insulation Co.*, No. SX-98-CV-192, et seq., 2017 V.I. LEXIS 117, *22 (V.I. Super. Ct. July 28, 2017) ("Courts must 'first resolve the related, or ancillary, motions' if 'granting or denying these motions would affect the arguments and issues that can be considered.'" (quoting *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 120 (Super. Ct. 2016)) (citing *Rivera-Mercado v. Gen. Motors Corp.*, 51 V.I. 307, 332 (2009) (Swan, J., concurring))). Thus, each motion will be considered below.

I. Motion to Exceed Page Limit

The Defendants seek permission, per Local Rule of Civil Procedure 7.1(d) to “exceed[] the page limit” of their joint motion to dismiss “by four (4) pages, for a total of twenty-six (24) [sic] pages.” (Defs.’ Mot. [to] File Br. in Excess of Twenty Pages 1, filed Mar. 10, 2017.) The Defendants conclude that the Court should grant leave “in the interest of justice,” *id.*, and cite in support *United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 336 F. Supp. 2d 430, 452 (E.D. Pa. 2004), and *Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1401 (D.N.J. 1985). The Defendants fail to explain, however, how either case is persuasive on the Superior Court of the Virgin Islands.

Local Rule of Civil Procedure 7.1(d), promulgated by the District Court of the Virgin Islands, provides that, “[w]ith the exception of exhibits and other supporting documentation, no document filed with the Court shall exceed twenty (20) pages without leave of Court.” D.V.I. Local R. Civ. P. 7.1(d) (hereinafter “LRCi.”) (applicable via Super. Ct. R. 7). In the past, the Superior Court of the Virgin Islands “routinely applied through Superior Court Rule 7 many of the rules the District Court of the Virgin Islands promulgated, including [Local] Rule[] 7.1,” *Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 501 (Super. Ct. 2017) (citing *Mitchell v. Gen. Eng’g Corp.*, 67 V.I. 271, 283 (Super. Ct. 2017)), because the Superior Court did not have its own rule concerning page limits. *Cf. id.* at 505 (noting that until recently “the Superior Court did not have its own rule governing page limits.”). However, the Supreme Court of the Virgin Islands has recently “emphasized” that “the Local Rules of the District Court should represent

rules of *last resort* rather than first resort.” *Vanterpool v. Gov’t of the V.I.*, 63 V.I. 563, 582 (2015) (quoting *Sweeney v. Ombres*, 60 V.I. 438, 442 (2014) (*per curiam*)). Additionally, not long after the Defendants filed their motion, the Virgin Islands Supreme Court promulgated the Virgin Islands Rules of Civil Procedure, including Rule 6-1, which directs that “all motions, responses and replies filed with the court shall not exceed the greater of 20 pages or 3,500 words in length unless leave of court has been obtained in advance for a longer submission.” V.I. R. Civ. P. 6-1(e)(2). So, the question now is which rule governs.

In this instance, however, determining which rule governs is not germane because the rules are substantially similar.⁴ *Cf. Edwards v. Hess Oil V.I. Corp.*, SX-15-CV-382, ___ V.I. ___, ___ n.3; 2017 V.I. LEXIS 94, *5 n.3 (V.I. Super. Ct. June 28, 2017) (“In some instances, the difference may be insignificant, e.g., applying Virgin Islands Rule of Civil Procedure 56, rather than Federal Rule of Civil Procedure 56 via Superior

⁴ Virgin Islands Rule of Civil Procedure 6-1 was not in effect when the Defendants filed their page limit motion. Nevertheless, Virgin Islands Rule of Civil Procedure 1-1 directs that the new rules govern “proceedings in any action pending on the effective date of the rules or amendments, unless” the Supreme Court directs otherwise or the Superior Court judge “makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.” V.I. R. Civ. P. 1-1(c)(2)(B). Because the Supreme Court has not directed otherwise, it would seem that Rule 1-1 would apply here. But Rule 1-1 also provides that the Virgin Islands Rules of Civil Procedure apply to “*action[s] pending . . . unless . . . applying them in a particular previously-pending action would be infeasible or would work an injustice.*” V.I. R. Civ. P. 1-1(c)(2)(B) (emphasis added). Additionally, the Reporter’s Note to Rule 1-1 explains that, “[i]f no ruling is made . . . the Rules of Civil Procedure will apply to *actions filed before* adoption of the Rules.” V.I. R. Civ. P. 1-1 (rprt note) (emphasis added). In other words, Rule 1-1 does not expressly apply to previously-pending *motions*. Rather, intent of the rule is clearly is to ensure that the same rules govern all civil cases going forward, whether the case was pending as of March 31, 2017 (when the rules went into effect) or after March 31, 2017, unless it would be unjust or infeasible to apply the new rules in a previously-pending action. *Accord Augustin*, 67 V.I. at 520 n.9; *see also Edwards v. Hess Oil V.I. Corp.*, SX-15-CV-382, 2017 V.I. LEXIS 94, *5 n.3 (V.I. Super. Ct. June 28, 2017) (“[I]t certainly is not feasible (or just) to pretend that Hess and HOVIC filed their December 15, 2015 motion for an extension of time pursuant to Virgin Islands Rule of Civil Procedure 6(b)(1), the corollary to Superior Rule 10(a), when the rule did not exist at that time.”).

Court Rule 7, and not make a difference"). Technically, Local Rule 7.1(d) may have governed the Defendants' motion, notwithstanding the promulgation of Virgin Islands Rule of Civil Procedure 6-1. *Cf. id.* ("[R]ather than reaching back in time, Rule 1-1 must require that the rules in effect prior to March 31, 2017 continue to govern motions pending as of that date, but for all motions filed after March 31, 2017, the new rules will apply unless application to the case (not a particular motion) would be unjust or infeasible."). But in this instance, both Rule 7.1(d) and Rule 6-1(e) limit motion papers to twenty pages and require leave of court to exceed that limit. There is one distinction, however, in that Rule 6-1(e) expressly directs that "leave of court" must be "obtained in advance for longer submissions." V.I. R. Civ. P. 6-1(e)(2). By contrast, Rule 7.1(d) does not expressly require obtaining leave in advance. *Cf. LRCi 7.1(d)* ("[N]o document filed . . . shall exceed twenty (20) pages."). Here, the Defendants did not wait for the Court to rule on their motion to exceed the page limits before filing their joint motion to dismiss. Instead, they filed both simultaneously.

Courts do "impose page limits for a reason," because it "force[s] parties to hone their arguments and to state those arguments succinctly." *Augustin*, 67 V.I. at 502 (citation omitted). However, an additional four pages is not excessive.⁵ Moreover, the Defendants also did not have to file a joint motion. The rules do not obligate co-defendants to file dispositive motions jointly. So, each Defendant could have filed a

⁵ Technically, the Defendants' joint motion totals thirty pages: the motion itself is one page and the memorandum in support is twenty-nine pages, but the cover page and a table of authorities takes up five pages of the memorandum, rendering the argument portion of the brief only four pages over the limit. *Cf. V.I. R. Civ. P. 6-1(e)(2)* ("The page or word limit does not include any cover page, caption, table of contents, table of authorities, appendices or exhibits, and certificates of service.").

separate motion. Since twenty-four pages is preferable to sixty-pages, the Court will grant the Defendants page limit motion and accept their joint motion to dismiss.

II. Stipulations to Extend Briefing Deadlines

Initially, the parties stipulated to extend the Defendants time to respond to the Government's complaint until March 10, 2017, and further, that the Government would have until April 17, 2017 to file a response, and the Defendants until April 28, 2017 to reply. By order dated February 24, 2017 (entered February 28, 2017), the court (Brady, J.) approved the stipulation (hereinafter "February 24, 2017 order"). The Defendants complied by filing their motions on March 10, 2017. On April 11, 2017, a week before the Government's response was due, the parties filed their Second Stipulation to extend the Government's and the Defendants' respective deadlines. The Government met its self-imposed response deadline when it filed its opposition on May 2, 2017. The Defendants met their self-imposed deadline when they filed their reply in support of their joint motion to dismiss on May 23, 2017. But for reasons unclear from the record, the parties filed a Third Stipulation on the same day, May 23, 2017, agreeing to extend the Defendants' reply time to June 2, 2017, notwithstanding the fact that the Defendants had also filed a reply the same day. Then, on June 9, 2017, the parties filed a Fourth Stipulation to further extend the Defendants' reply time to June 12, 2017. On June 12, 2017, ServiceMaster filed its reply, thereby complying with the final self-imposed deadline. But then, a day later, on June 13, 2017, the Defendants re-filed another copy of their May 23, 2017 reply—again, for reasons unclear from the record.

Stipulations are essentially motions filed jointly by two or more parties “to a lawsuit [that] are ineffective until and unless they receive the court’s approval.” *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (2012). “When court approval is required, a stipulation . . . remains pending until ruled on, withdrawn, or dismissed.” *Paul v. Raritan Supply Co.*, SX-97-CV-329, 2017 V.I. LEXIS 106, at *10 (Super. Ct. July 13, 2017); *see also Allstate Ins. Co. v. Administratia Asigurarilor de Stat*, 163 F.R.D. 196, 199 (S.D.N.Y. 1995) (“[I]t is an error to rely on a stipulation for an extension of time that has not been approved by a court.” (citing Fed. R. Civ. P. 6(b)(1))). However, once approved, a stipulation becomes an order of the court. *Cf. Phone Partners Ltd. P’ship v. C.F. Commc’ns Corp.*, 542 N.W.2d 159, 161 (Wis. Ct. App. 1995) (“A trial court may totally accept or reject a stipulation presented by the parties for its approval. Until approved, it is no more than a recommendation to the court.” (citations omitted)).

By approving the February 17, 2017 stipulation, the Court converted the parties’ agreement into an order. To extend the deadlines set by the February 24, 2017 order, the parties were required to show good cause. *See* V.I. R. Civ. P. 6(b) (“When an act is . . . allowed to be done . . . within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act.”); *see also People v. Hatcher*, 68 V.I. 378, 381 (Super. Ct. 2018) (“[G]ood cause must be shown, not concluded.” (citing *Fuller v. Browne*, 59 V.I. 948, 957 (2013); *In re: Red Dust Claims*, SX-15-CV-620, ___ V.I. ___, ___; 2017 V.I. LEXIS 98, *20 (V.I. Super. Ct. July 7, 2017))).

In determining whether good cause exist to extend a deadline, courts consider the following factors:

whether the request to extend time is made before or after the required date; the reason for the movant's delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party's failure to meet the originally prescribed deadline.

V.I. R. Civ. P. 6(b)(1). The party requesting more time must also "include . . . [a] statement" indicating "that the moving party has conferred with opposing parties and [that] there is agreement or objection," V.I. R. Civ. P. 6-2(a), and make a "representation" in the motion concerning "the number of [requests] . . . that have been filed . . . by the movant with respect to the same prescribed time period." V.I. R. Civ. P. 6-2(b). The Government and the Defendants failed to meet these requirements.

The Second Stipulation informed the Court that the parties wanted additional time "[d]ue to unforeseen circumstances." (Stip. For Extension of Time 1, filed Apr. 11, 2017.) What those "circumstances" were, was not explained. In the Third Stipulation the parties represented that their request was not "for the purposes of delay," and that the Defendants did "not anticipate that any further extension of time will be required." (Stip. for Extension of Time 2, filed May 23, 2017.) But the only reason given in support was that the Defendants needed to "secure Declarations from certain individuals attendant to the filing of its Reply." *Id.* Who they individuals were, how many declarations were needed, where the individuals were located, and why the Defendants could not to obtain the declarations sooner—none of that was explained. The Fourth Stipulation gave even less information than the prior two. The parties simply notified the Court that "Defendants will file their Replies to Opposition to Motion to Dismiss on

or before June 12, 2017.” (Stip. For Extension of Time 1, filed June 9, 2017.) ServiceMaster met this deadline. But for the earlier, May 23, 2017 reply, the Defendants would have been late again. None of this shows good cause.

Moreover, rather than wait for the Court to rule, the parties went ahead and filed their responses and replies, trusting that their stipulations would be approved. The concern now is that the motions are fully briefed, were argued, and submitted for a determination. To disallow the stipulations now because the parties failed to show good cause would only cause further delay because the Court would have to strike the responses and replies and force the parties to re-brief both motions. Rather than delay this matter further, *cf. Vanterpool*, 63 V.I. at 575 (courts should try to avoid outcomes that “serve absolutely no purpose other than to impose additional expense and delay” (quotation marks, brackets, and citation omitted), the Court will instead approve all three stipulations.

“[A]t bottom,” “[t]he determination of excusable neglect is . . . an equitable one, where the court should take into account all relevant circumstances.” *Fuller*, 59 V.I. at 954 (quotation marks and citations omitted). For good or for bad, it has “become a common practice in the Virgin Islands: filing a motion for leave to do some act and then doing that act simultaneously or shortly after the request is filed without awaiting the court’s ruling.” *Augustin*, 67 V.I. at 503 (citations omitted). This Court too “express[es] its] concern.” *Id.* But “the equitable decision for all involved is simply to wipe the slate clean.” *People v. Rivera*, 68 V.I. 393, 421 (Super. Ct. 2018) (quoting *Red Dust Claims*, 2017 V.I. LEXIS 98 at *28).

III. Consent Motion to File Surreponse

After briefing had ended, the Government filed a motion, consented to by ServiceMaster, for leave to file a surreponse to ServiceMaster's reply. In its reply, ServiceMaster had pointed the Government relied on the wrong document in making its arguments against dismissing the complaint. After the error was pointed out, the Government sought leave to correct the oversight, with no objection from ServiceMaster or the other Defendants.

"Generally the parties are expected to succinctly address their arguments in three filings—a motion, a response and a reply—or less, if possible. Courts do have the discretion, however, to allow further response or reply when necessary or warranted." *Der Weer*, 64 V.I. at 120 (quotation marks, brackets, and citations omitted); *accord* V.I. R. Civ. P. 6-1(c). But "a motion is not automatically granted simply because it is unopposed. In other words, even though a motion is unopposed, courts must still determine whether to grant it, especially when the decision is within the court's discretion." *Augustin*, 67 V.I. at 501 (quotation marks and citations omitted).

Here, the Court sees no reason to deny the Government's motion. The surreponse—which the Government submitted with its motion, *contra* V.I. R. Civ. P. 6-1(c)—is only three pages long. The Government's opposition (exclusive of introductory pages) was only thirteen pages long. An additional three pages is not excessive and would not exceed the twenty-page limit the Government could have used. The Court also applauds counsel for their professionalism and avoidance of "gotcha"

tactics. To deny the Government's motion would be to sanction such tactics. Instead, the Court will grant the Government's motion and deem the surresponse timely filed.

IV. Stipulation re: Hearing and *Nunc Pro Tunc* Motion

In advance of the July 19, 2017 hearing, the Court directed counsel to "submit . . . a list of witnesses, if any, who will give live testimony and any exhibits . . . that will be admitted into evidence during the hearing." (Order 1, entered June 20, 2017.) The Court gave the parties five days to respond, or until Tuesday, June 27, 2017. *Cf.* V.I. R. Civ. P. 6(b)(1) (exclude intervening weekends and holidays for deadlines less than fifteen days). Approximately two weeks after the deadline had passed, the parties filed a stipulation and notice, informing the Court that they would not "call witnesses at the July 19, 2017 hearing . . . and . . . will rely on the pleadings and documents of record."⁶ (Stip. & Notice re Hr'g 1, filed July 11, 2017.) The next day, the Government filed a motion for extension of time, *nunc pro tunc*, to respond to the June 19, 2017 Order. The Government admitted that, initially, it "planned to rely only on the evidence and exhibits already filed by the parties," but "now requests the addition of a single additional exhibit: the Affidavit of Dawn Henry, Commissioner of the Department of Planning and Natural Resources." (Pl.'s Mot. for Extension of Time 1, filed July 12, 2017.) The Government argued that, "Commissioner Henry's affidavit explains, in response to Defendants' argument on reply that the Commissioner "must first refer a

⁶ Although a stipulation requires court approval before becoming effective, the parties' July 11, 2017 stipulation is not a true stipulation in that, there is nothing for the Court to approve. *Cf. Joseph v. Publ. Emples. Rels. Bd.*, 68 V.I. 425, 429 (Super. Ct. 2018) ("The filing of a motion presupposes that the court has authority to rule on the motion and can either grant or deny the relief sought." (citations omitted)). Instead, the stipulation is just a notice.

matter to the Attorney General as a predicate to the Attorney General filing an enforcement action,” that the matter has been referred by the Commissioner to the Attorney General.” *Id.* (quoting Defs.’ Reply in Supp. of Jt. Mot. to Dismiss 17, filed May 23, 2017)). For this reason, the Court should grant the motion and admit the exhibit. The Court does not agree.

Even if the Court excused the parties’ failure to respond within the allotted time (five business days), and notwithstanding that the Government failed to show good cause for its delay or explain why it could not meet the initial deadline, the Court still could grant the Government’s motion because the effect of granting that motion would be to change the legal standard. *Cf.* V.I. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to *and not excluded by* the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given reasonable opportunity to present all the material that is pertinent to the motion.” (emphasis added)).

The June 19, 2017 Order had asked the parties to provide a list of exhibits and names of witnesses in advance of the July 19, 2017 hearing. Admittedly, the order did not specify that it concerned only the portion of the hearing on ServiceMaster’s motion to dismiss for lack of personal jurisdiction. *Cf. Molloy v. Indep. Blue Cross*, 56 V.I. 155, 172 (2012) (“If the trial court holds an evidentiary hearing on the issue of personal jurisdiction, then the plaintiff must come forward with evidence to prove the court’s jurisdiction by a preponderance of the evidence. At a 12(b)(2) factual hearing, the trial court may accept evidence, weigh the facts, and determine disputed factual issues,

including credibility determinations.” (citations omitted)). Nevertheless, the Government plainly states in its *nunc pro tunc* motion⁷ that the purpose for submitting Commissioner Henry’s affidavit is to rebut the “Defendants’ argument” and prove a fact not alleged in the complaint, namely that the Government failed to state a claim for relief because they failed to had complied with (what they contend is) a jurisdictional prerequisite to filing suit. (See Reply in Supp. of Jt. Mot. 17 (“The Attorney General’s claim of broad authority to file civil actions for violations of “any” provision of the Pesticide Control Act fails for two reasons: (1) the statute the Attorney General relies upon requires the Commission to first refer a matter to the Attorney General as a predicate to the Attorney General filing an enforcement action; and (2) the Attorney General’s theory for transforming grounds to revoke a license into enforceable “violations” is overbroad and would lead to clearly absurd results.”).) Clearly, granting the Government’s motion and accepting Commissioner Henry’s affidavit would have

⁷ The Government’s use of *nunc pro tunc* is incorrect here. “*Nunc pro tunc*’ means, literally, ‘now for then,’ and a valid *nunc pro tunc* order is one which, for some good reason, should have been made at an earlier date, and which, therefore, the court may cause to take effect as of the date when it should have been made.” *State v. Francis*, 194 P. 304, 305 (Mont. 1920); accord *John v. People*, 63 V.I. 629, 636 n.1 (2015) (“*Nunc pro tunc* emerged as a common law power to allow a court that has lost jurisdiction over a case to maintain jurisdiction over its records to correct clerical mistakes in the judgment arising from either scrivener’s errors or from omissions that are indicated in the record but are not recorded in the original judgment. . . . A typical illustration of a *nunc pro tunc* order exist in a situation where judgment is pronounced from the bench by the trial court in clear and definite terms and later it is determined that the memorial of judgment fails correctly to recite the judgment as rendered by the trial court from the bench.” (quotation marks and citations omitted)). Even assuming *nunc pro tunc* applies to parties, rather than courts, a party technically could only file a motion “now for then” if the oral motion were later reduced to writing. Here, the Government is not filing a written motion now for an oral motion made previously. Instead, the Government is just asking the Court to excuse the untimeliness of its motion. That is not a function of *nunc pro tunc*. But cf. *W. Pa. Water Co. v. Bd. of Prop. Assess. Apps. & Rev.*, 477, 439 A.2d 1259, 1261 (Pa. Commw. Ct. 1981) (“A petition for an appeal *nunc pro tunc* should be granted only where the party making the request has shown that the delay in filing their appeal was engendered by extraordinary conditions involving fraud or a breakdown in the court’s operations through a default of its officers, which has resulted in injury to that party.” (citation omitted)).

the effect of converting the Defendant's motion to dismiss for failure to state a claim into a motion for summary judgment because the Court would have included, not excluded, matters outside the pleadings. That converts motions to dismiss into motions for summary judgment. *See* V.I. R. Civ. P. 12(d). Accordingly, the motion must be denied.

V. Notices of Supplemental Authority

Lastly, the Court takes issue with the parties' continuing submission of briefing and argument after the motions were submitted. No provision of the Virgin Islands Rules of Civil Procedure authorizes the filing of notices of supplemental authority. The Local Rules of Civil Procedure may have sanctioned the practice of notifying the court, after a motion was fully briefed, of relevant authority subsequently issued. *Cf. Griffith v. Hess Oil V.I. Corp.*, 38 V.I. 460, 463-64 (D.V.I. 1998). But the Virgin Islands Rules of Civil Procedure were promulgated before the parties filed their various notices. *See In re: Adoption of the V.I. Rules of Civ. P.*, S. Ct. Prom. No. 2017-001, 2017 V.I. Supreme LEXIS 22, * 1-2 (V.I. Apr. 3, 2017) (effective date of March 31, 2017). The Virgin Islands Rules of Civil Procedure authorize "[o]nly a motion, a response in opposition, and a reply." V.I. R. Civ. P. 6-1(c). Supplementing fully-briefed motions under the guise of notifying the court of persuasive or binding authority rendered by another court is just not authorized under our rules. Equally important, "[a] notice is not a motion, and should not be so treated. A notice does not invite a response in opposition or a reply. Notices are neither granted nor denied (or dismissed)." *Goodwin v. Fawkes*, 67 V.I. 104, 131 (Super. Ct. 2016) (quotation marks and citation omitted). There was no basis for

either the Government or the Defendants to file notices of supplemental authority, to make arguments in such notices, or to treat such notices as motions and file responses and replies—all without leave of court.

Parties are on standing notice that they can be sanctioned for failing to follow the rules regarding the filing of motion papers. See V.I. R. Civ. P. 6-1(c) (“Only a motion, a response in opposition, and a reply may be served on other parties and filed with the court; further response or reply may be made only by leave of court obtained before filing. Parties may be sanctioned for violation of this limitation.”). Counsel violated this rule repeatedly. As a sanction, the Court will strike all of the following documents from the record: the Government’s June 27, 2017 notice of supplemental authority; the Defendants’ June 28, 2017 notice of supplemental authority; the Government’s July 6, 2017 response to the Defendant’s June 28, 2017 notice; the Defendants July 7, 2017 joint response to the Government’s June 27, 2017 notice; the Defendants’ March 12, 2018 notice of supplemental authority; the Government’s March 13, 2018 response to the Defendants’ March 12, 2018 notice; the Defendants’ March 20, 2018 joint reply to the Government’s March 13, 2018 response; and the Defendants’ submission of an omitted exhibit to their March 20, 2018 joint reply. “[A]t some point, briefing must end.” *Daniel*, 2017 V.I. LEXIS 117 at *16 (quotation marks and citation omitted). If the parties can continuously bombard the trial court with additional arguments, submitted without leave or request for leave, briefing will never come to an end.

CONCLUSION

Having considered all the ancillary motions, the Court will grant the Defendants' motion to exceed the page limits and deem the joint motion to dismiss timely. Notwithstanding that the parties failed to show good cause for stipulating to extend their briefing deadlines, the Court will approve the stipulations and deem the Government's response and the Defendants' replies timely. The Court will also grant the Government's motion to file a surresponse and deem that surresponse timely. The Court cannot grant the Government's motion for an extension of time to submit an affidavit in advance of oral argument because accepting the affidavit would convert the motions to dismiss into motions for summary judgment. Lastly, the Court will strike the parties notices, responses, and replies purportedly submitted under the guise of providing the Court with supplemental authority. An Order consistent with this Opinion follows.

Dated this 26 day of September, 2018.



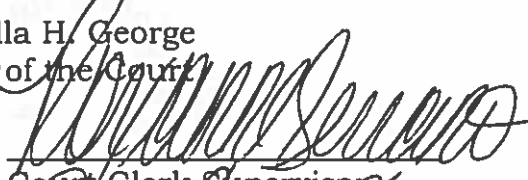
JOMO MEADE

Judge of the Superior Court

A T T E S T:

Estrella H. George
Clerk of the Court

By:



Court Clerk Supervisor

Dated: 9 / 26 / 18