

actual malice, Daily News' republication of those same statements does not expose Redfield to additional liability.

II. INTERFERENCE WITH BUSINESS RELATIONSHIPS

In paragraph 28 of their Complaint, Plaintiffs allege that "[t]he [Defendants'] actions constitute a concerted effort to harass and discredit Plaintiffs and to interfere with their business relationships."²⁶⁹ The Court has identified several cases in the Territory where the tort of interference with "business relationships" has been alleged,²⁷⁰ but none of those cases define the elements of that cause of action in detail. Plaintiffs' Opposition does not assist the Court in determining exactly what claim Plaintiffs are attempting to allege, as Plaintiffs' Opposition claims that "courts interpreting Virgin Islands law have consistently relied on Restatement [(Second) of Contracts] § 766 *et seq.* to supply the rule of decision in the past in tortious interferences cases."²⁷¹ Yet "§ 766 *et seq.*" sets forth several theories of liability.²⁷² Regardless of the theory applied, Plaintiffs have not demonstrated genuine issues of material fact to justify submitting their second cause of action to a jury.

a. Applicable law

It is helpful to adopt consistent terminology at the outset of this analysis. A cause of action that protects business relationships or contracts that are reasonably certain to occur, but that may not have been reduced to writing, enjoys no less than twenty-four similar, yet distinct titles across fifty-four jurisdictions.²⁷³ The most common title given to such a tort is "intentional interference with prospective business relations," which is the term that the Court will adopt for the purpose of its analysis.

It is also necessary to detail the interrelationship between three closely-related, but distinct theories of liability. While the law of contracts prescribes the rights, obligations, and remedies for parties to a contract, a cause of action that protects parties to an existing contract from interference by a third party is generally referred to as a claim for intentional interference with existing contractual relations. Since parties to a contract expect to derive some benefit from their contract, courts generally consider a claim for intentional interference with existing contractual relations to

²⁶⁹ Fourth Am. Compl. ¶ 28.

²⁷⁰ *Pemberton Sales & Service, Inc. v. Banco Popular de Puerto Rico*, 877 F. Supp. 961 (D.V.I. 1994); *Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I. 1983); *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983); *Storage on Site, LLC v. Slodden*, 57 V.I. 94 (V.I. Super. Ct. 2012).

²⁷¹ Pls.' Resp. to Defs'. Mot. for Summ. J. and Br. in Supp. 60.

²⁷² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 766A (describing the principles for a cause of action based on the intentional interference with existing contractual relations); *id.* § 766B (describing same for a cause of action based on the intentional interference with prospective business relations).

²⁷³ See, e.g., *Dube v. Likens*, 167 P.3d 93, 98 (Ariz. Ct. App. 2007) (identifying such a tort as a claim for "tortious interference"); *Soderland Bros, Inc. v. Carrier Corp.*, 663 N.E.2d 1, 7-8 (Ill. App. Ct. 1995) (titling the tort "interference with prospective business advantage"); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 215 (Minn. 2015) (acknowledging the tort as "interference with a prospective economic advantage"); *M & M Rental Tools, Inc. v. Milchem, Inc.*, 1980-NMCA-072, ¶ 20, 94 N.M. 449, 453, 612 P.2d 241, 245 (acknowledging the tort as "prospective contract interference").

be an example of a broader cause of action for intentional interference with prospective business relations.²⁷⁴ This second cause of action protects an anticipated economic advantage in one's business dealings from the interference of others. However, both of these torts are examples of an even broader cause of action for intentional interference with prospective economic advantage.²⁷⁵ This third cause of action protects economic expectations that arise outside the scope of business—one's ability to receive an inheritance, for example.²⁷⁶

Because Plaintiffs' Complaint alleges an interference with "business relationships,"²⁷⁷ this Court need not consider the broadest of the three torts discussed in the preceding paragraph. But while some jurisdictions distinguish between a cause of action for intentional interference with existing contractual relations and a cause of action for intentional interference with prospective business relations, other jurisdictions treat them as the same cause of action.²⁷⁸ Before the Court can define the parameters of the tort at issue, the Court must first determine how it will treat causes of action that protect the expectancies of one's business dealings.

- i. This jurisdiction recognizes a distinction between claims for intentional interference with existing contractual relations and intentional interference with prospective business relations.

Although similar, each cause of action shelters a different legally-protected interest and is justified by a different policy. Causes of action for intentional interference with existing contractual relations protect the right of contracting parties to receive the benefit of their bargain without improper interference from a third party,²⁷⁹ and support the policy that parties should be encouraged to contract freely without fear of improper interference from third parties.²⁸⁰ In contrast, a cause of action for intentional interference with prospective business relations protects an individual's right to develop networks and relationships and generally conduct business without

²⁷⁴ *E.g., Oaksmith v. Bruisch*, 774 P.2d 191, 198 (Alaska 1989); *Gifford v. Sun Data, Inc.*, 686 A.2d 472, 474 (Vt. 1996).

²⁷⁵ *Oaksmith*, 774 P.2d at 198. *See also Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 953 (Cal. 2003) (observing that the tort of interference with a prospective economic advantage is "considerably more inclusive" than actions in contract or interference with contract).

²⁷⁶ *See, e.g., Allen v. Hall*, 974 P.2d 199, 202–03 (Or. 1999) (en banc) (concluding that inheritance is an interest that "fits by logical extension within the concept underlying the tort of intentional interference with prospective economic advantage," despite the fact that such a tort has generally been used to protect commercial interests).

²⁷⁷ Fourth Am. Compl. ¶ 28.

²⁷⁸ *See, e.g., Dube*, 167 P.3d at 98 (explaining that a plaintiff who wishes to assert a claim for tortious interference must allege the existence of a valid contractual or business relationship); *Calbom v. Knudtson*, 396 P.2d 148, 162–63 (Wash. 1964) (clarifying that "[t]he basic elements going into a prima facie establishment of the tort are (1) the existence of a valid contractual relationship or business expectancy . . .").

²⁷⁹ *See generally* RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (summarizing the historical development of the tort of intentional interference with contractual relations, and observing that the tort is "but one instance . . . of protection against improper interference in business relations"). Some courts have characterized interference with an existing contractual relationship as an interference with property rights. *E.g., Lien v. Northwestern Engineering Co.*, 39 N.W.2d 483, 486 (S.D. 1949).

²⁸⁰ *See Watson's Carpet and Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 174 (Tenn. Ct. App. 2007) (explaining that an action for interference with existing contractual relations "is based on society's need for stability in contractual relations").

fear that their efforts will be unlawfully undermined by competitors.²⁸¹ The latter tort promotes the policy that, while competition should be open and robust, some activities cross the line that divides lawful competition from unlawful activity. The law should incentivize the former, and penalize the latter.

One might argue that the distinction between these two theories is unnecessary because all circumstances under which a plaintiff could state a cause of action for intentional interference with existing contractual relations could also justify a claim for intentional interference with prospective business relations. Some courts recognize this overlap. However, this criticism ignores the fact that each tort protects a unique interest. Consequently, this Court recognizes two separate torts: the tort of intentional interference with existing contractual relations, and the tort of intentional interference with prospective business relations.

ii. This jurisdiction recognizes a cause of action for intentional interference with existing contractual relations.

Since at least 1621, courts have recognized that certain forms of interference with another's business constitute tortious conduct,²⁸² and courts in every jurisdiction in the United States recognize that certain interference with the contractual relations of others constitutes actionable conduct. Because the Supreme Court of the Virgin Islands has not yet defined this cause of action, this Court must determine the soundest rule of law for the Virgin Islands.²⁸³

1. Approaches taken by other courts in this jurisdiction

Courts in the Virgin Islands have acknowledged two situations where a cause of action will lie for intentional interference with existing contractual relations. For claims that a defendant caused a third party to breach an existing contractual relation with the plaintiff, both the Superior Court of the Virgin Islands and the District Court of the Virgin Islands have relied on the principles of law summarized in the Restatement (Second) of Torts, Section 766 to determine when the

²⁸¹ See, e.g., *Hawaii Medical Association v. Hawaii Medical Service Association, Inc.*, 148 P.3d 1179, 1217 (Hawaii 2006) (explaining that the purpose of this tort “is the protection of legitimate and identifiable business expectancies” by “[w]eighing against social and individual interests in protection of business expectancies and efforts to acquire property . . . the interests in legitimate business competition”) (emphasis in original).

²⁸² See generally *Tortious Interference with Conduct of a Business*, 56 YALE L.J. 885, 885 (1947) (citing *Garret v. Taylor*, Cro. Jack 567, 79 Eng. Rep. 485 (K.B. 1621); *Gregory v. Duke of Brunswick*, 6 Man. & G. 205, 134 Eng. Rep. 866 (C.P. 1843); *Tarleton v. McGawley*, Peake N.P. 270, 170 Eng. Rep. 153 (K.B. 1793); and *Keeble v. Hickeringill*, 11 Mod. 130, 88 Eng. Rep. 945 (K.B. 1707)) (discussing the origins of tortious interference claims).

²⁸³ See *Malloy v. Reyes*, S. Ct. Civ. No. 2012-0081, 2014 WL 3697332, at *5 (V.I. July 22, 2014) (observing that, “when the Superior Court confronts an issue of common law that this Court has yet to address . . . it must conduct a three-factor *Banks* analysis”); *Government of the Virgin Islands v. Connor*, S. Ct. Civ. No. 2014 WL 702639, at *3 (V.I. Feb. 24, 2014) (holding that, pursuant to *Banks v. International Rental and Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Superior Court must consider the approaches taken by other courts in the Virgin Islands, the approaches taken by a majority of other jurisdictions—along with any competing approaches—and most importantly, the soundest rule for the Virgin Islands, when the Superior Court considers a question of common law not foreclosed by binding authority).

interfering party may be held liable.²⁸⁴ Courts in the Virgin Islands have not developed any competing approaches to Section 766's standard, under which a plaintiff must prove that: "[1] there was an existing contract, [2] that the alleged tortfeasor knew of the existing contract, [3] that the alleged tortfeasor's actions were the proximate cause of the third person's failure to perform, and [4] that the tortfeasor's actions were intentional, improper, and caused damages."²⁸⁵ To determine if the alleged interference was improper under this standard, courts have considered the factors listed in the Restatement (Second) of Torts Section 767.²⁸⁶

When a defendant has allegedly interfered with the plaintiff's performance of the plaintiff's contractual obligations to a third party, the United States Court of Appeals for the Third Circuit has opined that the principles of law summarized in Section 766A represent the law of Virgin Islands.²⁸⁷ Under this standard, a plaintiff must prove that there was an existing contract, that the alleged tortfeasor knew of that contract, that the defendant's actions proximately caused the plaintiff to either breach the contract or perform the contract under substantially more expensive or burdensome conditions than the plaintiff had originally bargained for, and that the plaintiff suffered damages as a result.²⁸⁸

2. Approaches taken by other jurisdictions

Every jurisdiction in the United States recognizes a cause of action for intentional interference with existing contractual relations. To prevail on such a claim, thirty-four jurisdictions explicitly require that a plaintiff prove the existence of a contract.²⁸⁹ The remaining jurisdictions either imply that a plaintiff must prove the existence of a contract,²⁹⁰ or, similar to

²⁸⁴ E.g., *Board of Directors of Sapphire Bay Condominiums West v. Simpson*, Civil No. 04-62, 2014 WL 4067175, at *12 (D.V.I. Aug. 13, 2014); *Sorber v. Glacial Energy VI, LLC*, ST-2010-CV-588, 2013 WL 6184064, at *5 (V.I. Super. Ct. Nov. 22, 2013).

²⁸⁵ *Government Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 452 (D.V.I. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 766).

²⁸⁶ See *id.* (listing factors such as "the nature of the actor's conduct . . . the actor's motive . . . the interests of the other with which the actor's conduct interferes . . . the interests sought to be advanced by the actor . . . the societal interests in protecting the freedom of action of the actor . . . the contractual interests of the other, and . . . the relations between the parties").

²⁸⁷ *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 833–34 (3rd Cir. 2011).

²⁸⁸ See *id.* (explaining that action rendering a third-party's performance more burdensome, expensive, or impossible is not actionable, but that action rendering a plaintiff's performance more burdensome, expensive, or impossible is actionable pursuant to Section 766A).

²⁸⁹ E.g., *Paul v. Howard University*, 754 A.2d 297, 308–09 (D.C. 2009); *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000); *Brass Metal Products, Inc. v. E-J Enterprises, Inc.*, 984 A.2d 361, 383 (Md. Ct. Spec. App. 2009); *Community Title Co. v. Roosevelt Federal Savings and Loan Association*, 796 S.W.2d 369, 372 (Mo. 1990) (en banc); *Snyder v. Sony Music Entertainment, Inc.*, 684 N.Y.S.2d 235, 238 (N.Y. App. Div. 1999); *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 123 (Tex. Ct. App. 1997).

²⁹⁰ See, e.g., *Nelser v. Fisher and Co., Inc.*, 752 N.W.2d 191, 194 (Iowa, 1990) (requiring a plaintiff to plead that the defendant had improperly interfered with the performance of a contract); *Bolz v. Myers*, 651 P.2d 606, 611 (Mont. 1982) (citing *Bermil Corp. v. Sawyer*, 353 So.2d 579, 585 (Fla. Dist. Ct. App. 1977)) (stating that, "[i]n order to establish a prima facie case of interference with contractual or business relations, it must be shown that the acts were intentional and willful, (2) were calculated to cause damage to the plaintiff in his or her business, (3) were done with the unlawful purpose of causing damage or loss, without any right or justifiable cause on the part of the actor, and (4) that actual damages and loss resulted").

courts in Nebraska, require that a plaintiff prove “the existence of a valid business relationship or expectancy”—a requirement that encapsulates an existing contractual agreement.²⁹¹ At least thirty-one jurisdictions require the plaintiff prove that the defendant had knowledge of the contract at issue.²⁹² Jurisdictions that do not explicitly state that the defendant’s knowledge of the contract is an element of the plaintiff’s case require the plaintiff to prove that the defendant’s conduct was intentional.²⁹³ Twenty-nine jurisdictions explicitly require a plaintiff to plead that the contract at issue was breached or terminated,²⁹⁴ while other jurisdictions only require a showing that the defendant interfered with the contract.²⁹⁵ Across all jurisdictions, a plaintiff must prove that the defendant’s interference damaged the plaintiff.

In order to be actionable, over forty jurisdictions require that a defendant’s interference be something more than intentional. In defining the behavior that constitutes actionable interference, jurisdictions have variously required that interference be “improper,”²⁹⁶ “unprivileged,”²⁹⁷ or “unjustified.”²⁹⁸ There is no clear majority position as to how improper, unprivileged, or unjustified interference is defined. Some jurisdictions look to the factors listed in Section 767 of the Restatement (Second) of Torts,²⁹⁹ while others evaluate the facts of each case.³⁰⁰ Although only arising in the context of a claim for intentional interference with prospective business relations, a minority of courts have observed that the touchstone of impropriety is that the

²⁹¹ See *Midwest, Inc. v. Lund Co.*, 826 N.W.2d 225, 229 (Neb. 2012) (analyzing an alleged inducement to breach an existing lease agreement as a claim for “interference with a business relationship”).

²⁹² E.g., *White Sands Group, L.L.C., v. PRS II, LLC*, 32 So.3d 5, 14 (Ala. 2009); *Beard Research, Inc. v. Kates*, 8 A.3d 573, 605 (Del. Ch. 2010); *Cohen v. Battaglia*, 293 P.3d 752, 755 (Kan. 2013); *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671 (Minn. 1955); *Sunridge Builders, Inc. v. Olde Blue, LLC*, Nos. 56338, 57316, 2013 WL 485831, at *1 (Nev. Feb. 6, 2013); *Belliveau Building Corp. v. O’Coin*, 763 A.2d 622, 627 (R.I. 2000).

²⁹³ See, e.g., *Allen v. Hall*, 974 P.2d 199, 202 (Or. 1999) (en banc) (requiring a plaintiff to plead both the existence of a professional or business relationship, “which could include . . . a contract,” and an “intentional interference with that relationship”).

²⁹⁴ E.g., *Stewart Title Guarantee Co. v. American Abstract & Title Co.*, 215 S.W.3d 596, 601 (Ark. 2005); *Smith v. Ocean State Bank*, 335 So.2d 641, 643 (Fla. Dist. Ct. App. 1976); *Galinski v. Kessler*, 480 N.E.2d 1176, 1182 (Ill. Ct. App. 1985); *Duggin v. Adams*, 360 S.E.2d 832, 835 (Va. 1987).

²⁹⁵ E.g., *Downes-Patterson Corp. v. First National Supermarkets, Inc.*, 780 A.2d 967, 976 (Conn. 2001); *Shaw v. Southern Aroostook Community School District*, 683 A.2d 502, 503 (Me. 1996) (citing *Barnes v. Zappia*, 685 A.2d 1086, 1090 (Me. 1995)); *Bolz v. Myers*, 651 P.2d 606, 611 (Mt. 1982) (citing *Bermil Corp. v. Sawyer*, 353 So.2d 579, 585 (Fla. Dist. Ct. App. 1977)).

²⁹⁶ E.g., *ASC Construction Equipment, USA, Inc. v. City Commercial Real Estate, Inc.*, 693 S.E.2d 559, 563 (Ga. Ct. App. 2010) (requiring the plaintiff to show that the defendant “acted improperly” in a claim for “tortious interference with contracts and business relationships”); *Nelser v. Fisher and Co., Inc.*, 752 N.W.2d 191, 194 (Iowa 1990) (requiring interference to be intentional and improper); *Allen*, 974 P.2d at 202 (requiring that the defendant interfere by improper means or for an improper purpose).

²⁹⁷ E.g., *Cohen*, 293 P.3d at 755; *Snyder v. Sony Music Entertainment, Inc.*, 684 N.Y.S.2d 235, 238 (N.Y. App. Div. 1999); *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979).

²⁹⁸ E.g., *Galinski*, 480 N.E.2d at 1182; *Recio v. Evers*, 771 N.W.2d 121, 131 (Neb. 2009).

²⁹⁹ E.g., *Amoco Oil v. Ervin*, 908 P.2d 493, 500 (Colo. 1995) (en banc); *Calborn v. Knudtson*, 396 P.2d 148, 151–52 (Wash. 1964) (en banc).

³⁰⁰ E.g., *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 582 P.2d 1365, 1371 (Or. 1978) (en banc).

defendant acted with either an improper motive, or interfered using improper means—means which, by themselves, would be actionable.³⁰¹

Finally, a small minority of jurisdictions only require that a plaintiff prove that a defendant's intentional interference with the contractual relation of another was the proximate cause of harm to the plaintiff.³⁰² In these jurisdictions, interference alone is wrongful, regardless of the method of, or justification for the interference.

3. *The soundest rule of law for the Virgin Islands*

In determining the soundest rule to apply, the weight of authority supports the conclusion that a plaintiff must demonstrate the existence of a specific contract, that the defendant knew of that contract, and that the defendant intentionally interfered with that contract. The Supreme Court of New Mexico provides the clearest justification for the knowledge requirement: “[o]ne cannot be held liable . . . unless he has knowledge of the contract; without such knowledge, the requisite intention is absent.”³⁰³ Additionally, requiring a plaintiff to plead both the existence of a contract and the defendant's knowledge of that contract comports with past approaches utilized by courts in the Virgin Islands.

The weight of authority also supports the conclusion that a plaintiff must prove that the defendant's conduct damaged the plaintiff. Every jurisdiction requires a plaintiff to plead causation and damages, including the Virgin Islands. There is no compelling reason to abandon these requirements here.

A plaintiff in the Virgin Islands must also demonstrate that the defendant's interference was improper. The Supreme Court of Connecticut has explained that “not every act that disturbs a contract . . . is actionable,”³⁰⁴ and as discussed above, a clear majority of jurisdictions require that a defendant's interference be more than intentional before it will be actionable. This shifting attitude can also be seen in the change in language from the Restatement (First) of Torts, which required only that interference be purposeful, to the language in the Restatement (Second) of Torts, which now states that interference must be both intentional and improper.³⁰⁵ Again, such a requirement is consistent with previous opinions from courts in the Virgin Islands.

Requiring a plaintiff to prove impropriety also serves the important objective of distinguishing legitimate competition from unlawful activity. Although this concern bears more

³⁰¹ *E.g.*, *id.* at 1371; *Crandall Corp. v. Navistar International Transportation Corp.*, 396 S.E.2d 179, 266 (S.C. 1990); *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 300 (Utah 1982); *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987).

³⁰² *E.g.*, *Korean Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 953 (Cal. 2003); *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 123 (Tex. Ct. App. 1997).

³⁰³ *Wolf v. Perry*, 339 P.2d 679, 682 (N.M. 1959).

³⁰⁴ *Larsen Chelsey Realty Co. v. Larsen*, 656 A.2d 1009, 1022 n.24 (Conn. 1995). *Accord Dolton v. Capitol Federal Savings and Loan Association*, 642 P.2d 21, 22–23 (Colo. Ct. App. 1981) (explaining that, while interference with voidable contracts is actionable, interference with contracts that are void as a matter of law is not actionable).

³⁰⁵ RESTATEMENT (SECOND) OF TORTS § 766, reporters note.

weight in the context of an alleged interference with prospective business relations, an example illustrates how the same concerns apply where parties have reduced their agreements to a contract. A defendant, aware of an existing contract between the plaintiff and a third party, could intentionally adjust its prices to create a situation where it would be economically efficient for the third party to breach its contract with the plaintiff and contract with the defendant instead. In this situation, the principles of contracts law entitle the plaintiff to be made whole by the third party, and the defendant and the third party benefit by way of their newly-formed relationship. Liability in tort should not attach to economic activity that leave all parties involved in no worse a position than where they began.

It is axiomatic the law should not incentivize unlawful behavior. When a defendant interferes with an existing contract using means that are proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard,³⁰⁶ however, a cause of action for intentional interference with existing contractual relations exists. Similarly, when a defendant is not motivated by a genuine business purpose, but rather interferes with a plaintiff's contract solely for the purpose of injuring the plaintiff, a cause of action for intentional interference also exists.³⁰⁷ Thus, in order to prevail on a claim for intentional interference with existing contractual relations, a plaintiff must prove that the defendant's interference was the product of either an improper means or an improper motive. This approach to impropriety comports with a growing minority of jurisdictions,³⁰⁸ and strikes the appropriate balance between promoting competition and disincentivizing illegal behavior.

This Court rejects the approach of jurisdictions where plaintiffs are required to establish impropriety with reference to Section 767 of the Restatement (Second) of Torts. Section 767's approach effectively requires a plaintiff to disprove any legitimate reason that a defendant might have for its actions. This greatly increase a plaintiff's burden of persuasion, and the fact-intensive nature of such an inquiry almost guarantees that such a claim cannot be resolved on the pleadings alone. Thus, a disgruntled plaintiff could use a lawsuit to force a competitor into discovery. At best, the suit would disrupt operations and cash flow. At worst, it could compromise trade secrets or other proprietary information, and may even culminate in the termination of a business.

³⁰⁶ *Accord Korean Supply Co.*, 63 P.3d at 954 (discussing impropriety in the context of claims for intentional interference with prospective business relations, and concluding that an improper act is one that is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014) (requiring interference to be independently tortious or in violation of a state or federal statute or regulation).

³⁰⁷ *Accord Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 582 P.2d 1365, 1368 (Or. 1978) (en banc) (permitting a cause of action for intentional interference with prospective business relationships where a defendant's motive is to harm the plaintiff).

³⁰⁸ *See, e.g., Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 36, 628 N.W.2d 707, 717 (requiring "an independently tortious or unlawful act of interference"); *Top Service Body Shop, Inc.*, 582 P.2d at 1371 (requiring interference to be "unlawful by some measure beyond the fact of the interference itself," as derived, for example, from "a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade profession"); *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691, 701 (Tenn. 2002) (citing *Top Service Body Shop, Inc.*, 582 P.2d at 1371) (requiring "improper motive or improper means"); *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) (citing *Top Service Body Shop, Inc.*, 582 P.2d at 1371) (same).

To prevail on a claim for intentional interference with existing contractual relations, a plaintiff in this jurisdiction must prove: (1) the existence of a contract between the plaintiff and a third party; (2) that the defendant knew of that contract; (3) that the defendant interfered with the contract using improper means or with an improper motive; and (4) that the plaintiff was damaged as a result.

iii. This jurisdiction recognizes a cause of action for intentional interference with prospective business relations.

Like the tort of intentional interference with existing contractual relations, a cause of action for the intentional interference with prospective business relations is widely recognized across the United States. Because no binding authority directs this Court on the nature of a claim for intentional interference with prospective business relations, this Court is again obligated to determine the soundest rule of law for the Virgin Islands.³⁰⁹

1. Approaches taken by other courts in this jurisdiction

In the Virgin Islands, courts have looked to the principles summarized in the Restatement (Second) of Torts, Section 766B, to determine when a plaintiff may prevail on a claim for interference with prospective business relations.³¹⁰ In doing so, Virgin Islands courts have drawn no distinction between claims titled “tortious interference,” “tortious interference with prospective advantage,” “tortious interference with prospective economic advantage,” “interference with prospective contractual relations,” or “intentional interference with prospective contractual relations.”³¹¹ Courts here have stated that the expected benefit must be “sufficiently concrete” before a cause of action will lie.³¹² Courts in the Virgin Islands have not utilized other standards to analyze claims of this nature. In determining whether a defendant’s conduct is improper, some courts in the Virgin Islands have looked to the factors listed in the Restatement (Second) of Torts Section 767.³¹³ Others have rendered their opinion after considering the facts of each case.³¹⁴ No court in the Virgin Islands has addressed the question of whether a defendant’s conduct must be independently actionable.

³⁰⁹ *Government of the Virgin Islands v. Connor*, S. Ct. Civ. No. 2014 WL 702639, at *3 (V.I. Feb. 24, 2014).

³¹⁰ *Board of Directors of Sapphire Bay Condominiums West v. Simpson*, Civ. No. 04-62, 2014 WL 4067175, at *12 (D.V.I. Aug. 13, 2014); *First American Development Group/Carib, LLC v. WestLB AG*, 55 V.I. 316, 333–34 (V.I. Super. Ct. 2011).

³¹¹ Compare *Simpson*, 2014 WL 4067175, at *12 (analyzing a claim for “intentional interference” under the standard set forth in Section 766B), with *Pourzal v. Marriot International, Inc.*, 45 V.I. 488, 491–92 (D.V.I. 2004) (analyzing a claim for “tortious interference with prospective advantage” under the same standard), *Government Guarantee Fund of the Republic of Finland v. Hyatt Corp.*, 35 V.I. 356, 375–76 (D.V.I. 1997) (analyzing a claim for “tortious interference with prospective economic advantage” under the same standard), and *First American Development Group/Carib, LLC*, 55 V.I. 316 at 333–34 (analyzing a claim for “interference with prospective contractual relations” under the same standard).

³¹² See, e.g., *Government Guarantee Fund of the Republic of Finland*, 35 V.I. at 376–77 (determining that a plaintiff, a contractor, did not state a claim for intentional interference with prospective economic advantages because he did not demonstrate that he had any concrete plans for future contracting work).

³¹³ E.g., *Pourzal*, 45 V.I. at 492; *Government Guarantee Fund of Republic of Finland*, 35 V.I. at 369–70.

³¹⁴ E.g., *Board of Directors of Sapphire Bay Condominiums West*, 2014 WL 4067175, at *12; *First American Development Group/Carib, LLC*, 55 V.I. at 333–34.

2. Approaches taken by other jurisdictions

In every jurisdiction, the existence of a prospective business relation is a prerequisite for prevailing on this cause of action. The interest has been variously described as “a valid contractual relationship or business expectancy,”³¹⁵ a “prospective contract,”³¹⁶ a “business relationship[] not formally reduced to contract,”³¹⁷ a “reasonable probability that a contractual relationship would have been entered,”³¹⁸ “a prospective relationship with an identifiable class of third persons,”³¹⁹ and a “reasonable expectation of an economic advantage,”³²⁰ among other descriptions. However termed, the interest must be “something more than a mere hope or the innate optimism of the salesman,”³²¹ and must be “sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff.”³²²

At least twenty-five jurisdictions explicitly require a plaintiff to prove that the defendant knew of the relation.³²³ All remaining jurisdictions imply that such knowledge is a prerequisite to maintaining a cause of action for intentional interference with prospective business relations by requiring the plaintiff to prove that the defendant acted intentionally. One cannot intentionally interfere with a relationship about which one knows nothing.

At least forty-three jurisdictions require that a defendant’s interference be wrongful by some measure beyond the interference itself.³²⁴ Some of these jurisdictions require the plaintiff to establish that interference was improper with reference to the factors listed in Section 767 of the Restatement (Second) of Torts.³²⁵ Other jurisdictions require the plaintiff to prove that the defendant acted without justification or without privilege.³²⁶ A minority of jurisdictions require a plaintiff to prove that the defendant’s interference was the product of either improper motive or

³¹⁵ *Calbom v. Knudtson*, 396 P.2d 148, 162 (Wash. 1964).

³¹⁶ *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 597 (Va. 1984).

³¹⁷ *Gifford v. Sun Data*, 686, A.2d 472, 474 (Vt. 1996).

³¹⁸ *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 124 (Tex. Ct. App. 1997).

³¹⁹ *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

³²⁰ *Printing Mart-Morristown v. Sharp Electronics Corp.*, 563 A.2d 31, 37 (N.J. 1989).

³²¹ *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979).

³²² *Hawaii Medical Association v. Hawaii Medical Service Association, Inc.*, 148 P.3d 1179, 1218 (Hawaii 2006).

³²³ *E.g., White Sands Group, L.L.C. v. PRS II, LLC*, 32 So.3d 5, 14 (Ala. 2009); *Dube v. Likens*, 167 P.3d 93, 98 (Ariz. Ct. App. 2007); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 761 A.2d 1268, 1273 (Conn. 2000); *Cedroni Associates, Inc. v. Tomblinson, Harburn Associates, Architects & Planners, Inc.*, 821 N.W.2d 1, 4 (Mich. 2012); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014); *Calbom v. Knudtson*, 396 P.2d 148, 162 (Wash. 1964); *Gore v. Sherard*, 50 P.3d 705, 710 (Wyo. 2002).

³²⁴ *E.g., Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 814 (Fla. 1994) (requiring interference to be “intentional and unjustified”); *United Truck Leasing Corp., v. Geltman*, 551 N.E.2d 20, 23 (Mass. 1990) (requiring proof of “malicious” conduct); *Nichols v. Tri-State Brick and Tile Co., Inc.*, 608 So.2d 324, 328 (Miss. 1992) (requiring proof that interference was “done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant”); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 597 (Va. 1984) (requiring both intentional and improper interference).

³²⁵ *E.g., Crandall Corp. v. Navistar International Transportation Corp.*, 396 S.E.2d 179, 226 (S.C. 1990).

³²⁶ *E.g., Leavitt v. Leisure Sports Incorporation*, 734 P.2d 1221, 1225 (Nev. 1987).

improper means.³²⁷ Remaining jurisdictions only require that the defendant's intentional interference with the relation caused the plaintiff to suffer damages.³²⁸

As with the previous tort of intentional interference with existing contractual relations, all jurisdictions require a plaintiff must prove damages in order to prevail on a claim for intentional interference with prospective business relations.

3. *The soundest rule of law for the Virgin Islands*

In order to prevail a claim for intentional interference with prospective business relations, a plaintiff in the Virgin Islands must prove the existence of a business relation that was reasonably certain to produce an economic benefit for the plaintiff. A plaintiff must also prove that the defendant knew of that relationship. Adopting these requirements harmonizes Virgin Islands law with the majority of other jurisdictions and conforms to the decisions of prior Virgin Islands courts. For these reasons, a plaintiff must also prove damages as a result of the defendant's interference.

A plaintiff must also demonstrate that the defendant's conduct was wrongful for reasons beyond the interference itself. A plaintiff must satisfy this requirement by proving that the defendant's interference was the result of either improper means or an improper motive. Improper means include acts that would be independently actionable, in violation of existing laws, statutes, or regulations.³²⁹ Improper means may also include an extreme departure from an established industry standard.³³⁰ An improper motive exists when the defendant acts with no legitimate business objective, but instead acts only to harm the plaintiff.

A brief discussion of the evolution of this particular tort illustrates the propriety of such an approach. Early formulations of this tort allowed a plaintiff to prevail over a defendant by proving that the defendant intentionally interfered with a prospective business relation, thereby damaging the plaintiff.³³¹ Courts have criticized this approach for requiring too little of a plaintiff and for exposing a wide range of otherwise-legal conduct to liability.³³² In response, courts began placing the burden on the plaintiff to demonstrate that the defendant acted without privilege or

³²⁷ *E.g., Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).

³²⁸ *E.g., Soderlund Bros., Inc. v. Carrier Corp.*, 663 N.E.2d 1, 7 (Ill. Ct. App. 1995).

³²⁹ *See, e.g., Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014) (citing *Hayes v. N. Hills General Hospital*, 590 N.W.2d 243, 248 (S.D. 1999)) (requiring that interference be "independently tortious or in violation of a state or federal statute or regulation"); *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 582 P.2d 1365, 1371 (Or. 1978) (en banc) (explaining that means may be improper "by reason of statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession") *Watson's Carpet and Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 176 (Tenn. Ct. App. 2007) (providing examples of improper conduct, such as "means that are illegal, independently tortious, or that violate an established standard of a trade or profession" and "violations of statutes, rules, or recognized common law rules, violence, threats, bribery, unfounded litigation, fraud, misrepresentation, defamation, duress, undue influence, misuse of confidential information, or breach of a fiduciary duty").

³³⁰ *Top Service Body Shop, Inc.*, 582 P.2d at 1371.

³³¹ *See Leigh Furniture and Carpet Co.*, 657 P.2d at 302 (discussing early formulations of the tort).

³³² *E.g., id.* at 303.

justification.³³³ Again, this shift can be seen when one reviews the change in language from the Restatement (First) which required only that interference be purposeful, to the language in the Restatement (Second) which now states that interference must be both intentional and improper.³³⁴ But if the early approaches to this tort required too little of the plaintiff, the revised approach requires too much because it required a plaintiff to effectively disprove that a defendant's conduct was lawful.

Acknowledging these two extremes, a few courts utilize the approach adopted above. By requiring a plaintiff to establish that a defendant's interference resulted from either improper means or an improper motive, these courts implicitly determined that liability should only flow when the defendant has committed an independently-wrongful act. Since a cause of action for intentional interference with prospective business should not impinge upon lawful competition, it makes sense to identify actionable conduct based on the illegality of that conduct.

Thus, to prevail on a claim for interference with prospective business relations, a plaintiff in this jurisdiction 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.

b. To the extent that Plaintiffs have stated a claim for intentional interference with existing contractual relations against Daily News and Redfield on behalf of any of the Plaintiffs, Daily News and Redfield are entitled to summary judgment their favor on those portions of Plaintiffs' Complaint.

In order to prevail on a claim for intentional interference with existing contractual relations, Plaintiffs must identify a specific contract about which Daily News or Redfield knew, and with which Daily News or Redfield intentionally interfered. Despite having provided hundreds of pages of evidence to support their Opposition, Defendants have failed to identify such a contract. Consequently, no reasonable jury could find Daily News or Redfield liable for intentionally interfering with a contract to which any of the Plaintiffs were a party.

c. To the extent that Plaintiffs have stated a claim for intentional interference with prospective business relations against Daily News and Redfield on behalf of any of the Plaintiffs, Daily News and Redfield are entitled to summary judgment in their favor on those portions of Plaintiffs' Complaint.

Although Plaintiffs allege that the allegedly-defamatory material published by Daily News and Redfield discouraged companies from doing business with Senator Donastorg, Plaintiffs do not identify a single business relationship between any of the Plaintiffs and a third party about which Daily News or Redfield knew and with which Daily News or Redfield improperly

³³³ See generally RESTATEMENT (SECOND) OF TORTS § 766, cmt. a (tracing the evolution of interference torts from the 1600s to present).

³³⁴ See *id.* reporters note (observing the change in language).

interfered. Consequently, no reasonable jury could find Daily News and Redfield liable to any of the Plaintiffs for intentionally interfering with a prospective business relationship.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

a. Applicable law

There is no binding authority that compels this Court to adopt a specific formulation of the tort of intentional infliction of emotional distress. However, in the case of *Joseph v. Sugar Bay Club & Resort Corp.*,³³⁵ the Superior Court of the Virgin Islands, Francois, J., conducted a *Banks* analysis and concluded that the principles of law summarized in Section 46 of the Restatement (Second) of Torts represented the soundest rule of law for the Virgin Islands. Having reviewed the reasoning set forth in *Joseph*, there is no need to revisit this Court's conclusion, and *Joseph's* reasoning is incorporated by reference in this Memorandum Opinion.

In order for a plaintiff's intentional infliction of emotional distress claim to survive a motion for summary judgment, a plaintiff must demonstrate genuine issues of material fact concerning whether a defendant: (1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.³³⁶

For a public official, the burden is higher. According to the Supreme Court of the United States, when a claim for intentional infliction of emotional distress is brought by a public official and the official alleges that the actionable conduct constitutes defamation:

public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the [allegedly-defamatory] publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true."³³⁷

b. To the extent that Plaintiffs have stated a claim for intentional infliction of emotional distress on behalf of Senator Donastorg against Daily News, Daily News is entitled to summary judgment in its favor on those portions of Plaintiffs' Complaint.

As evidence of genuine disputes of material fact, Plaintiffs offer all citations contained in paragraph 4 of Plaintiffs' Amended Response to Defendants' Statement of Facts.³³⁸ Paragraph 4

³³⁵ Case No. ST-2013-CV-491, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2014), *rev'd on other grounds*, S. Ct. Civ. No. 2014-0048, 2015 V.I. Supreme LEXIS 4 (V.I. Feb. 10, 2015).

³³⁶ See RESTATEMENT (SECOND) OF TORTS § 46 (outlining the tort of intentional infliction of emotional distress).

³³⁷ *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

³³⁸ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. 59.

of Plaintiffs' Amended Response to Defendants' Statement of Facts contains two categories of facts. First, paragraph 4.B.1 discusses the Sheraw Investigation and the alleged relationship of all Defendants thereto. Second, paragraphs 4.B.2–9 discuss a series of allegedly-defamatory statements, some made by Daily News, others made by Redfield. As discussed under the section pertaining to Senator Donastorg's defamation claim, Plaintiffs have not adduced clear and convincing evidence from which a reasonable jury could conclude that the allegedly-defamatory statements implicating matters of public concern made by Daily News were made with actual malice.³³⁹ Consequently, no reasonable jury could conclude that the allegedly-defamatory statements referenced in paragraphs 4.B.2–9 constitute the extreme and outrageous conduct necessary to support Senator Donastorg's intentional infliction of emotional distress claim against Daily News.

The only remaining evidence that could support Senator Donastorg's claim must be found in paragraph 4.B.1. In paragraph 4.B.1, Plaintiffs identify the actions that allegedly constitute an invasion of Senator Donastorg's privacy, and Daily News is only mentioned once in that paragraph. Citing to the affidavit of Attorney Dean Barnes, Plaintiffs claim that "[a] The [sic] Daily News reporter . . . also improperly tried to get confidential information from a government agency about alleged claims that Donastorg was not paying child support which was just false."³⁴⁰ Although Attorney Barnes states in his affidavit that a reporter from the Daily News visited the Division of Paternity and Child Support because the reporter "had received a tip that a senator was not paying his child support,"³⁴¹ nowhere in his affidavit does Attorney Barnes state that the reporter inquired specifically about Senator Donastorg. To the contrary, Attorney Barnes stated that the reporter "did not mention . . . the name of any specific senator."³⁴² Consequently, Attorney Barnes' affidavit does not constitute evidence from which a reasonable jury could conclude that Daily News engaged in "extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society" with respect to Senator Donastorg.

The evidence discussed in the preceding two paragraphs is the only evidence offered by Plaintiffs to substantiate the existence of genuine disputes of material fact on Senator Donastorg's intentional infliction of emotional distress claim against Daily News. Since no reasonable jury could find for Senator Donastorg on this evidence, Daily News is entitled to summary judgment on Senator Donastorg's intentional infliction of emotional distress claim.

³³⁹ Although the February 6, 2002 article titled "Sen. Donastorg and wife face foreclosure on their Wintberg home" was not analyzed to determine whether it was published with actual malice, the article cannot form the basis for Senator Donastorg's defamation claim because the parties agree that the contents of the article were factually accurate. Since the truth of this article precludes it from supporting a defamation action, this article cannot constitute one of the allegedly-defamatory statements upon which Senator Donastorg's intentional infliction of emotional distress claim could be founded.

³⁴⁰ Pls.' Am. Resp. to Defs.' Stmt. of Facts 18–19.

³⁴¹ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. V, Aff. of Atty. Dean L. Barnes ¶ 4.

³⁴² *Id.* ¶ 9.

- c. To the extent that Plaintiffs have stated a claim for intentional infliction of emotional distress on behalf of Senator Donastorg against Redfield, Redfield is entitled to summary judgment in his favor on those portions of Plaintiffs' Complaint.**

Plaintiffs allege that the same evidence supporting Senator Donastorg's intentional infliction of emotional distress claim against Daily News also supports Senator Donastorg's intentional infliction of emotional distress claim against Redfield. As with Daily News, Plaintiffs have not set forth clear and convincing evidence that any of the allegedly-defamatory publications attributed to Redfield in paragraphs 4.B.2–9 were made with actual malice. Consequently, no reasonable jury could conclude that Redfield's statements constitute the extreme and outrageous conduct necessary to support Senator Donastorg's intentional infliction of emotional distress claim against Redfield.

In paragraph 4.B.1, Plaintiffs allege that Redfield committed two specific acts that each represent evidence that Redfield intentionally inflicted emotional distress upon Senator Donastorg. First, citing to pages 16, 17, and 83 of Sheraw's deposition transcript, Plaintiffs claim that "Holland Redfield [was an] ICC contact person [] for Sheraw or [was a] person [] with which Sheraw discussed the report."³⁴³ Second, citing to pages 94 and 95 of Senator Donastorg's deposition transcript, Plaintiffs claim that "Prosser, Redfield, ICC, and the cabal had Senator Donastorg followed in 2000, 2001, and 2002."³⁴⁴

Neither of these two propositions is supported by the citations provided by Plaintiffs. First, Redfield is not mentioned anywhere in pages 16, 17, or 83 of Sheraw's deposition transcript. Consequently, these pages do not constitute evidence that Redfield engaged in the sort of conduct for which a claim for intentional infliction of emotional distress may lie. Even when read as a whole, no reasonable jury could find that Sheraw's deposition transcript constitutes evidence that Redfield engaged in extreme and outrageous conduct. Sheraw testified that he communicated once with Redfield, and that Redfield "told [Sheraw] that Donastorg had called him and told him that he had this investigative file."³⁴⁵ Sheraw was later asked whether he had "ever been hired by Holland Redfield to do an investigation of Donastorg or any member of his family," to which Sheraw replied: "no."³⁴⁶ Based upon this evidence, the Court is not persuaded that a reasonable jury could find that Redfield engaged in extreme and outrageous conduct toward Senator Donastorg that is utterly intolerable in a civilized society.

Second, Redfield is not mentioned anywhere in pages 94 or 95 of Senator Donastorg's deposition transcript. Like the pages of Sheraw's deposition transcript cited by Plaintiffs, these pages do not constitute evidence that Redfield engaged in the sort of conduct for which a claim for intentional infliction of emotional distress exists. Page 94 of Senator Donastorg's deposition transcript memorializes Senator Donastorg's testimony that he observed "[t]wo gentlemen in a

³⁴³ Pls.' Am. Resp. to Defs.' Stmt. of Facts 16 (citing Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. IV, Sheraw Dep. Tr. 16–17, 83).

³⁴⁴ *Id.* at 18 (citing Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. III, Donastorg Dep. Tr. 94–95).

³⁴⁵ Sheraw Dep. Tr. 84:13–17.

³⁴⁶ *Id.* at 99:14–16.

white car; just certain individuals, other individuals that I don't ever recall or could identify" that were allegedly following him.³⁴⁷ Senator Donastorg's failure to identify Redfield as one of the men who allegedly followed him precludes a reasonable jury from concluding that Redfield engaged in the conduct upon which a claim for intentional infliction of emotional distress can be founded.

Even when viewed in a light most favorable to Senator Donastorg, the evidence cited by Plaintiffs in paragraph 4.B.1 does not establish genuine disputes of material fact over whether Redfield's alleged malfeasance exceeds all possible bounds of decency in a civilized society. Consequently, Redfield is entitled to summary judgment in his favor on Senator Donastorg's intentional infliction of emotional distress claim.

d. To the extent that Plaintiffs have stated a claim for intentional infliction of emotional distress on behalf of Senator Donastorg's family against Daily News and Redfield, Daily News and Redfield are entitled to summary judgment in their favor on those portions of Plaintiffs' Complaint.

The tort of intentional infliction of emotional distress is meant to impose liability for only extreme and outrageous conduct. Other opinions from courts in this Territory demonstrate that termination of an employee does not meet this standard,³⁴⁸ that the failure to warn firefighters that they are operating in a building containing asbestos does not meet this standard,³⁴⁹ and a financial institution's alleged breach "of its contractual duty of confidentiality and good faith during bankruptcy proceedings and negotiations, concerning . . . [a] mortgage account" with that institution does not state a claim for intentional infliction of emotional distress.³⁵⁰ When compared against such examples and in light of the evidence proffered by Plaintiffs, no reasonable jury could conclude that either Daily News or Redfield engaged in the extreme and outrageous conduct for which a claim for intentional infliction of emotional distress will lie simply because Senator Donastorg's family was mentioned in an investigative report authorized under the Virgin Islands Code.

Plaintiffs claim that Senator Donastorg's family suffered an intentional infliction of emotional distress due to the events described in paragraph 4.B.1 of Plaintiffs' Amended Response to Defendants' Statement of Facts.³⁵¹ In paragraph 4.B.1, Plaintiffs only address the impact of the Sheraw Investigation on Senator Donastorg's family in broad terms by stating that:

[w]ith respect to Senator Donastorg and all of his family members, the evidence shows that Sheraw gathered 'confidential source information' from 'law enforcement' sources and campaign contributors; gathered private bank-account information that is 'difficult to obtain and highly confidential in nature and should

³⁴⁷ Donastorg Dep. Tr. 94:5-7.

³⁴⁸ *Hodge v. Daily News Publishing Co., Inc.*, 52 V.I. 186, 198 (V.I. Super. Ct. 2009).

³⁴⁹ *Louis v. Caneel Bay, Inc.*, 50 V.I. 7, 20-21 (V.I. Super. Ct. 2008).

³⁵⁰ *FirstBank of Puerto Rico v. Prosser*, Case No. SX-09-CV-520, 2015 V.I. LEXIS 72, at *3, 9-12 (V.I. Super. Ct. June 22, 2015).

³⁵¹ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. 60.

be handled accordingly,'; and made 'pretext calls to gain confidential information from medical providers including the St. Thomas Hospital, in an effort to find 'indiscretions'; and made pretext calls to lawyers and colleges like California State University, Fullerton.³⁵²

Nothing in paragraph 4.B.1 alleges that either Daily News or Redfield commissioned or facilitated the research into Senator Donastorg's family, and Plaintiffs have provided no evidence of same. Further, the Virgin Islands Code authorizes the investigation of a person with reference to "[t]he identity, habits, conduct, movement, whereabouts, affiliation, associations, transactions, reputation or character of any person, group or [sic] persons, association, organization, society, other group of persons or partnership or corporation."³⁵³

Additionally, the portions of the Sheraw Investigation submitted by Plaintiffs to the Court demonstrate that Senator Donastorg's family receives little exposure in the report. An April 16, 1998 report begins by indicating that several court cases involving Adlah Donastorg, Sr. had been identified.³⁵⁴ The report does not discuss these cases. The report later indicates that Ella Moran, Norma Duran, and Josefina Donastorg are the directors of Senator Donastorg's corporation, "Carrier Multi-Service, Inc."³⁵⁵ The report concludes that further investigation will occur pertaining to "Josephine Donastorg's experience in the business."³⁵⁶ No other information about Senator Donastorg's family is contained in this report.

A May 20, 1998 report indicates that "Josephine Donastorg is the subject's mother and Benedicta Donastorg is the subject's wife."³⁵⁷ The report also indicates that "Ella Moran and Norma Duran . . . are listed as Directors of Carrier Multi Service, Inc. – the corporate name of Donastorg's Company. No entries were found for Moran, however, a criminal case was found for Duran."³⁵⁸ The report clarifies that "Ms. Duran was arrested on August 10, 1993 for defrauding the Department of Agriculture by falsifying her income in order to obtain low income housing[,]" but also indicates that "the case was dismissed on March 22, 1996, and the case file contained no information regarding why the case was dismissed"³⁵⁹ In a section titled "Business Licensing," the report states that the business license file for Senator Donastorg's company lists Josefina Donastorg, Ella Moron, and Glenda Hamm, but not Norma Duran, as the directors.³⁶⁰ The report concludes by noting that there would be further investigation "regarding the dismissal of the criminal case against Norma Duran" and "into Josephine Donastorg's qualifications and involvement in Carrier Medical Supply."³⁶¹ No further mention is made of Senator Donastorg's family in this report.

³⁵² Pls.' Am. Resp. to Defs.' Stmt. of Facts 14–15.

³⁵³ 23 V.I.C. § 1301(f)(2).

³⁵⁴ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. VI, Ex. 3, at Bates No. D 1300.

³⁵⁵ *Id.* at Bates No. D 1303–04.

³⁵⁶ *Id.* at Bates No. D 1306.

³⁵⁷ *Id.* at Bates No. D 1288.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at Bates No. D 1289.

³⁶⁰ *Id.* at Bates No. D 1290.

³⁶¹ *Id.* at Bates No. D 1294.

A June 24, 1998 report indicates that Duran's criminal case was likely dismissed because Duran immediately vacated the premises that she was inhabiting and paid some restitution, and because the US Attorney's Office was overworked and may have missed a filing deadline.³⁶² This report also indicates that Josephine Donastorg "was the Head Office Clerk in St. Thomas" for a local supermarket, that she held that position from approximately 1960 through 1980, and that she has been retired since that time.³⁶³ The report observes that a source "had heard nothing about Josephine working for (or running) her son's company . . ."³⁶⁴ The report concludes by offering to further research "how active (if at all) Josephine Donastorg is in the company."³⁶⁵ No further mention of Senator Donastorg's family is made in this report.

Plaintiffs have provided no other excerpts from the Sheraw Investigation that reference Senator Donastorg's family. Due to the fact that Senator Donastorg's family receives little mention in the Sheraw Investigation, coupled with the fact that Plaintiffs have not demonstrated that either Daily News or Redfield commissioned or participated in the Sheraw Investigation, no reasonable jury could find either Daily News or Redfield liable for intentional infliction of emotional distress to Senator Donastorg's family.

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs' claim for negligent infliction of emotional distress is alleged as an alternative cause of action to Plaintiffs' claim for intentional infliction of emotional distress.³⁶⁶

a. Applicable law

Unlike the version of this tort predicated upon intent, there is no authority to inform this Court on the parameters of the tort of negligent infliction of emotional distress that comports with the framework established by *Banks v. International Rental & Leasing Corp.* Consequently, this Court must determine the soundest rule of law for the Virgin Islands.³⁶⁷

i. Approaches taken by other courts in this jurisdiction

Courts in the Virgin Islands have approached causes of action for negligent infliction of emotional distress in different ways. In the case of *Berry v. Jacobs, IMC, LLC*,³⁶⁸ the United States Court of Appeals for the Third Circuit affirmed an entry of summary judgment against an employee in a suit brought by the employee against his employer.³⁶⁹ The employee premised his claim for negligent infliction of emotional distress on his employer's alleged discrimination,

³⁶² *Id.* at Bates No. D 1295.

³⁶³ *Id.* at Bates No. D 1297.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at Bates No. D 1299.

³⁶⁶ Fourth Am. Compl. ¶ 32.

³⁶⁷ *King v. Appleton*, 61 V.I. 339, 349 (VI. 2014) (citations omitted).

³⁶⁸ 99 Fed. Appx. 405 (3d Cir. 2004).

³⁶⁹ *Id.* at 410.

breaches of contract, and violations of federal laws.³⁷⁰ Citing to the summary of law set forth in Section 313 of the Restatement (Second) of Torts,³⁷¹ the Third Circuit observed that the employee did not produce evidence that he suffered any sort of physical injury as a result of his employer's conduct, or evidence that it was reasonably foreseeable that his employer's conduct would result in physical injury.³⁷²

In the case of *Mingolla v. Minnesota Mining and Manufacturing Co.*,³⁷³ the wife and children of a deceased patient brought a wrongful death suit on the patient's behalf for injuries arising out of the use of a surgical pin that had been implanted in the decedent. The plaintiffs in *Mingolla* alleged that they suffered emotional distress as a result of witnessing their father suffer.³⁷⁴ They premised their right to recovery on Sections 402A,³⁷⁵ 436,³⁷⁶ and 436A³⁷⁷ of the Restatement (Second) of Torts. The Appellate Division of the District Court of the Virgin Islands observed that, although the plaintiffs alleged emotional distress, the plaintiffs' complaint failed to state a claim because the plaintiffs did not allege that the emotional distress resulted in physical harm. The Appellate Division also cited Section 436A to explain that the plaintiffs could not recover for negligent infliction of emotional distress absent some showing of bodily harm.

³⁷⁰ *Id.* at 407.

³⁷¹ Section 313 reads:

- (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor:
 - (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
 - (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
- (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

³⁷² 99 Fed. Appx. at 410.

³⁷³ 893 F. Supp. 499 (D.V.I. App. Div. 1995).

³⁷⁴ *Id.* at 505.

³⁷⁵ Section 402A concerns the right of an end user to recover in strict liability for a defective or unreasonably dangerous product. The court dismissed the plaintiffs' claim because they were not the end-users of the surgical pin that had been implanted in the decedent.

³⁷⁶ Section 436 reads:

- (1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.
- (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.
- (3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

³⁷⁷ Section 463A reads: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

Since *Mingolla*, the District Court for the Virgin Islands has clarified when a plaintiff who witnesses injury to a third person may recover for negligent infliction of emotional distress. In the case of *Cohler v. United States ex rel. National Park Services*,³⁷⁸ the District Court drew from Sections 436(2)-(3) and 436A of the Restatement (Second) of Torts, and stated that a claim for negligent infliction of emotional distress premised on “witnessing injury to a third person” requires a plaintiff to allege: (1) that the defendant’s negligence placed the plaintiff in danger for his own safety—in other words, the plaintiff was in the “zone of danger” when the accident occurred; (2) that the emotional disturbance manifested physical symptoms; and (3) that the plaintiff is a member of the injured third party’s immediate family.³⁷⁹

In the case of *Hill v. De Jongh*,³⁸⁰ the Superior Court of the Virgin Islands relied on Section 313 of the Restatement (Second) of Torts when analyzing an employee’s claim for negligent infliction of emotional distress. The employee based his claim on allegations that his union failed to represent him in his effort to seek back pay under the terms of a collective bargaining agreement between the union and the government.³⁸¹ The Superior Court dismissed the employee’s claim for negligent infliction of emotional distress because the employee failed to allege that he suffered physical harm as a result of the defendants’ conduct.³⁸²

Two observations can be drawn from these cases. First, a plaintiff may state a direct cause of action against a defendant for negligent infliction of emotional distress. Both the *Berry* and *Hill* cases illustrate this, and demonstrate that a plaintiff who alleges emotional distress resulting from a defendant’s alleged negligence may not recover without demonstrating that the emotional distress caused physical harm. In *Berry* and *Hill*, the absence of an intrusion upon the plaintiff’s physical wellbeing justified dismissing the plaintiff’s claims.

The second observation to be drawn from the Virgin Islands courts’ past treatment of negligent infliction of emotional distress claims is that a cause of action for negligent infliction of emotional distress may lie for those who witness injury to a third person. The plaintiffs in both *Mingolla* and *Cohler* premised their right to recovery on the suffering they witnessed others endure. The *Cohler* opinion drew a clear boundary for such claims when it stated a conjunctive, three-part test to determine which plaintiffs could recover for being a bystander to the injury of another.

ii. Approaches taken by other jurisdictions

Although recognized in nearly every jurisdiction,³⁸³ approaches to the tort of negligent infliction of emotional distress vary from jurisdiction to jurisdiction. The extent to which other

³⁷⁸ 48 V.I. 575 (D.V.I. 2006).

³⁷⁹ *Id.* at 578–79 (citing RESTATEMENT (SECOND) OF TORTS §§ 463(2)–(3), 463A).

³⁸⁰ ST-2010-CV-585, 2012 WL 1439591 (V.I. Super. Ct. Apr. 19, 2012).

³⁸¹ *Id.* at *1.

³⁸² *Id.* at *5.

³⁸³ *But see, e.g., FMC Corp., Inc. v. Helton*, 202 S.W.3d 490, 502 (Ark. 2005) (explaining that Arkansas does not recognize the tort of negligent infliction of emotional distress); *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065–66 (Md. Ct. Spec. App. 1986) (explaining that Maryland does not recognize an independent tort of negligent

jurisdictions recognize the tort of negligent infliction of emotional distress depends upon the extent to which each jurisdiction characterizes a defendant's duty toward the emotional wellbeing of others.³⁸⁴ Noting that traditional negligence principles define a defendant's liability by the foreseeability of harm caused, most jurisdictions have determined that foreseeability alone is both too speculative for an award of damages and does not guarantee the veracity of a plaintiff's mental suffering.³⁸⁵ Consequently, nearly every jurisdiction has determined that a defendant owes no general duty of care to refrain from negligently inflicting emotional distress on others.³⁸⁶

However, under certain circumstances, a clear majority of jurisdictions have determined that a defendant owes a duty of care toward the emotional wellbeing of others. The scope of this duty is defined by the context in which a plaintiff alleges injury: whether the plaintiff was the direct victim of the defendant's negligence, or whether the plaintiff was a bystander who witnessed the defendant's conduct injured a third party.³⁸⁷

In the context of direct victim cases, there is little uniformity as to how a defendant's duty is defined. Some jurisdictions state that a claim for negligent infliction of emotional distress will only lie when a defendant has breached a duty that was imposed upon him or her by the operation of law or contract.³⁸⁸ In these cases, the plaintiff and defendant enjoy a special relationship, beyond the general relationship that strangers share with each other. Due to the nature of this relationship, the defendant has undertaken a duty to avoid negligently inflicting emotional distress upon the plaintiff.

Other jurisdictions have defined a defendant's duty by the zone of danger the defendant creates as the result of the defendant's negligent conduct.³⁸⁹ Courts that employ this standard

infliction of emotional distress, but that mental anguish may be an element of damages under other recognized theories of recovery).

³⁸⁴ See *Lee v. State Farm Mutual Insurance Co.*, 533 S.E.2d 82, 86 (Ga. 2000) (citations omitted) (explaining that rules for recovery for negligent infliction of emotional distress "run the gamut from variations of the impact approach, to analysis under a so-called 'zone of danger,' to a broader rule based on foreseeability of injury assessed by application of factors relating to proximity, direct observation, and relationship to the victim, to the most expansive view of reasonable foreseeability of injury under general tort theory").

³⁸⁵ See, e.g., *Curtis v. Porter*, 2001 ME 158, ¶18, 784 A.2d 18, 25 (reasoning that "the determination of duty in [claims of negligent infliction of emotional distress] is not generated by traditional concepts of foreseeability"). But see *O'Donnell v. HCA Health Services of New Hampshire, Inc.*, 883 A.2d 319, 324 (N.H. 2005) (clarifying that New Hampshire has "relied upon the traditional tort concepts of foreseeability and causation" when evaluating claims for negligent infliction of emotional distress).

³⁸⁶ See *Boyles v. Kerr*, 855 S.W.2d 593, 598 n.2 (Tex. 1993) (collecting cases).

³⁸⁷ See, e.g., *Burgess v. Superior Court*, 831 P.2d 1197, 1200-01 (Cal. 1992) (en banc) (discussing the differences between direct victim and bystander causes of action for negligent infliction of emotional distress); *Corgan v. Muehling*, 574 N.E.2d 602, 605 (Ill. 1991) (same); *Clark v. Estate of Rice ex rel. Rice*, 653 N.W.2d 166, 170-71 (Iowa 2002) (same); *Jarrett v. Jones*, 258 S.W.3d 442, 446 (Mo. 2008) (en banc) (same); *Montoya v. Pearson*, 2006-NMCA-097, ¶ 19 142 P.3d 11, 16 (acknowledging the distinction between direct victim and bystander claims).

³⁸⁸ E.g., *Burgess*, 831 P.2d at 1201; *Spangler v. Betchel*, 958 N.E.2d 458, 466 (Ind. 2011); *Boyles v. Kerr*, 855 S.W.2d 593, 596 (Tex. 1993).

³⁸⁹ E.g., *Armstrong v. A.I. Dupont Hospital for Children*, 60 A.3d 414, 426 (Del. Super. Ct. 2012) (citations omitted); *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 798 (D.C. 2011) (citing *Washington v. John T. Rhines Co.*, 646 A.2d 345, 347-48 (D.C.1994)); *Bohdan v. Altoool Manufacturing Co.*, 411 N.W.2d 902, 907 (Minn. Ct. App. 1987); *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 425 A.2d 92, 95 (Vt. 1980).

permit a plaintiff to recover for mental anguish when the defendant's negligent action places the plaintiff within a zone of physical danger. Some jurisdictions that rely on the zone-of-danger test require that a plaintiff's mental anguish manifest itself in the form of physical symptoms,³⁹⁰ but some do not.³⁹¹ At least one jurisdiction examines whether serious emotional harm was reasonably foreseeable.³⁹²

In contrast to direct victim cases, jurisdictional approaches to bystander cases have been more uniform. Most jurisdictions employ some variation of the test first articulated by the Supreme Court of California in the case of *Dillon v. Legg*.³⁹³ Under that standard, courts must determine the existence of a duty of care on a case-by-case basis by weighing three factors: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock to the plaintiff resulted from "the sensory and contemporaneous observation of the event;" and (3) whether the plaintiff and the victim were closely related.³⁹⁴ The *Dillon* test was later refined by the same court in *Thing v. La Chusa*.³⁹⁵ Thus, in California, bystander recovery is limited to circumstances where: "(1) the plaintiff is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness."³⁹⁶ Most notably, *Thing* clarified the quantum of psychological injury one must suffer in order to prevail in a claim for negligent infliction of emotional distress.³⁹⁷

The evolution of bystander liability in California mirrors the evolution of bystander liability around the country. Although a clear majority of jurisdictions still require that a plaintiff be closely related to the victim and that the plaintiff contemporaneously perceive the injury-causing event, other requirements have emerged. Some jurisdictions explicitly require that the victim suffer severe injury or death,³⁹⁸ while other jurisdictions require the plaintiff to be within the zone of danger created by the event that injured the victim. Some jurisdictions require that the plaintiff be at the scene as the injury occurs,³⁹⁹ while other jurisdictions allow a plaintiff to maintain an action if he or she arrives at the scene of the accident shortly after its occurrence.⁴⁰⁰ Some jurisdictions require that the bystander substantiate his or her claim for mental anguish by

³⁹⁰ *E.g., Bohdan*, 711 N.W.2d at 907.

³⁹¹ *AALAR, Ltd. Inc., v. Francis*, 716 So.2d 1141, 1147 (Ala. 1998).

³⁹² *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 395 S.E.2d 85, 97 (N.C. 1990) (citations omitted).

³⁹³ 441 P.2d 912 (Cal. 1968) (en banc). *But see AALAR, Ltd. Inc.*, 716 So.2d at 1147 (citing *Gideon v. Norfolk Southern Corp.*, 633 So.2d 453, 454 (Ala. 1994)) (explaining that the Alabama Supreme Court has "refused to extend liability so far as to recognize a right of recovery in bystanders").

³⁹⁴ 441 P.2d at 920.

³⁹⁵ 771 P.2d 814 (Cal. 1989).

³⁹⁶ *Id.* at 866.

³⁹⁷ *See id.* (requiring that a bystander must suffer "emotional distress beyond that which would be anticipated in a disinterested witness").

³⁹⁸ *Browne v. Kommel*, No. FSTCV085006167S, 2009 WL 2506328, at * 3 (Conn. Super. Ct. July 14, 2009) (citing *Clohessy v. Bachelor*, 675 A.2d 852, 865 (Conn. 1996)).

³⁹⁹ *E.g., Heldreth v. Marrs*, 425 S.E.2d 157, 169 (W.Va. 1992).

⁴⁰⁰ *E.g., Eskin v. Bartee*, 262 S.W.3d 727, 739–40 (Tenn. 2008).

demonstrating that the anguish manifested itself with physical symptoms,⁴⁰¹ while some jurisdictions do not.⁴⁰² And not all jurisdictions permit bystanders recovery.⁴⁰³

Finally, some jurisdictions reject a cause of action for negligent infliction of emotional distress entirely. Both Arkansas⁴⁰⁴ and Maryland⁴⁰⁵ explicitly reject the tort.

iii. The soundest rule of law for the Virgin Islands

The soundest rule of law for the Virgin Islands is to treat a claim for negligent infliction of emotional distress similar to the manner in which this Court would treat an ordinary claim for negligence: a plaintiff must demonstrate the existence of a duty, a breach of that duty, direct and proximate causation, and damages. By recognizing a claim for negligent infliction of emotional distress, the Court recognizes that individuals have a legally protected interest in some degree of emotional tranquility. The corollary of this proposition is that individuals owe some duty of care to refrain from impinging upon that degree of emotional tranquility. However, “[c]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people.”⁴⁰⁶ The soundest rule of law for this jurisdiction must thus address two concerns: First, mindful that “emotional disturbance can be too easily feigned or imagined,”⁴⁰⁷ the Court must define the nature of the interest protected by this tort.⁴⁰⁸ Second, the law must ensure that a defendant’s liability is proportional to his or her culpability.⁴⁰⁹

The first of these concerns is addressed by requiring that a plaintiff suffer serious or severe emotional distress. Although the description of compensable emotional distress within the context of a claim for negligent infliction of emotional distress varies by jurisdiction,⁴¹⁰ a clear majority

⁴⁰¹ *E.g., Wargelin v. Sisters of Mercy Health Corp.*, 385 N.W.2d 732, 735 (Mich. Ct. App. 1986).

⁴⁰² *E.g., Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992) (en banc) (citing *Thing*, 771 P.2d at 866).

⁴⁰³ *See AALAR, Ltd. Inc., v. Francis*, 716 So.2d 1141, 1147 (Ala. 1998) (observing that the Supreme Court of Alabama “has, however, refused to extend liability so far as to recognize a right of recovery in bystanders”).

⁴⁰⁴ *FMC Corp. v. Helton*, 202 S.W.3d 490, 502 (Ark. 2005).

⁴⁰⁵ *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065–66 (Md. Ct. Spec. App. 1986).

⁴⁰⁶ *Thing v. La Chusa*, 771 P.2d 814, 839 (Cal. 1989). *Accord Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012) (explaining that “emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society”).

⁴⁰⁷ *Chizmar v. Mackie*, 896 P.2d 196, 201 (Alaska 1995).

⁴⁰⁸ *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 545 (1994) (explaining that “[n]o jurisdiction, however, allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another”). *Accord Bowen v. Lumbermens Mutual Casualty Co.*, 517 N.W.2d 432, 443 (Wis. 1994) (explaining the policy considerations underlying the tort of negligent infliction of emotional distress).

⁴⁰⁹ *Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992) (en banc). *Accord Bowen*, 517 N.W.2d at 443–44 (explaining that courts ensure the “fairness of the financial burden placed upon a defendant” by considering, among other things, “whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor,” “whether allowance of recovery would be too likely to open the way to fraudulent claims,” and “whether allowance of recovery would enter a field that has no sensible or just stopping point”).

⁴¹⁰ *Compare, e.g., Carrol v. Allstate Ins. Co.*, 815 A.2d 119, 127 (Conn. 2003) (requiring that emotional injury be “severe enough that it might result in illness or bodily harm”), *with Osborne*, 399 S.W.3d at 17 (requiring that the emotional injury be one where “a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case”).

jurisdictions that recognize claims for negligent infliction of emotional distress explicitly require that the alleged emotional distress be serious or severe.⁴¹¹ The Supreme Court of Kentucky provides a framework that requires a plaintiff's suffering to be sufficiently serious but still allows a jury to consider the facts of the case in light of their life experiences and common sense. According to the Supreme Court of Kentucky, "[a] serious or severe emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case."⁴¹² Accordingly, in order to prove that a defendant has encroached upon the legally-protected interest for which a claim of negligent infliction of emotional distress will provide a remedy, a plaintiff in this jurisdiction must prove that he or she has suffered a serious or severe mental injury by demonstrating that a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the plaintiff's case.

In light of the historical approaches to this tort, further clarification on what constitutes a serious or severe emotional injury is necessary. In the past, jurisdictions had satisfied themselves that a plaintiff's alleged distress was the type of distress for which the law should provide a remedy if the plaintiff proved that his or her mental suffering was precipitated by a physical injury. However, recognizing that a near miss could be as frightening as a direct hit,⁴¹³ almost every jurisdiction has abandoned the requirement that emotional distress stem from a physical impact.⁴¹⁴ Now, some jurisdictions find that a plaintiff has suffered serious emotional injuries only if he or she was in the zone of danger created by the trauma-inducing event.⁴¹⁵ Other jurisdictions state that mental suffering is only serious when accompanied by physical symptoms.⁴¹⁶ However, a growing minority of jurisdictions has abandoned these legal fictions entirely.⁴¹⁷

This Court joins that growing minority. The jurisdictions that have abandoned the legal fictions surrounding the tort of negligent infliction of emotional distress reason that medicine and science have advanced to the point where the testing and diagnosis by medical professionals

⁴¹¹ E.g., *Chizmar*, 896 P.2d at 201; *Burgess*, 831 P.2d at 1201; *Clohesy v. Bachelor*, 675 A.2d 852, 865 (Conn. 1996); *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 796–97 (D.C. 2011); *Lee v. State Farm Mutual Insurance Co.*, 533 S.E.2d 82, 86–87 (Ga. 2000); *Doe Parents No. 1 v. State Department of Education*, 58 P.3d 545, 581 (Haw. 2002); *Clark v. Estate of Rice ex rel. Rice*, 653 N.W.2d 166, 170 (Iowa 2002); *Osborne*, 399 S.W.3d at 17; *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282, 1284 (Me. 1987); *Sacco v. High Country Independent Press, Inc.*, 896 P.2d 411, 425 (Mont. 1995); *O'Donnell v. HCA Health Services of New Hampshire, Inc.*, 883 A.2d 319, 324 (N.H. 2005); *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983); *Reilly v. United States*, 547 A.2d 894, 895 (R.I. 1988); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Heldreth v. Marrs*, 425 S.E.2d 157, 161 (W.Va. 1992). The words 'severe' and 'serious' function as synonyms, and although the adjective varies by jurisdiction, the principle that an emotional injury must surpass a certain threshold before the law will provide a remedy does not.

⁴¹² *Osborne*, 399 S.W.3d at 17.

⁴¹³ *Consolidated Rail Corp.*, 512 U.S. at 547 (citations omitted).

⁴¹⁴ *But see Lee*, 533 S.E.2d at 86 (retaining the rule that a plaintiff must suffer physical impact before he or she can recover for negligent infliction of emotional distress).

⁴¹⁵ E.g., *Armstrong v. A.I. Dupont Hospital for Children*, 60 A.3d 414, 423 (Del. Super. Ct. 2012).

⁴¹⁶ E.g., *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982).

⁴¹⁷ *Osborne* 399 S.W.3d at 6. *See also id.* (explaining that "societal advancements in mental health treatment and education . . . assures [that] individuals suffering from legitimate emotional injuries will be able to seek recovery"); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (concluding that "the claimed injury or impairment must be supported by expert medical or scientific proof").

provide a more accurate method for determining whether a plaintiff has suffered severe emotional distress.⁴¹⁸ Although there may never be an exact method for determining whether a plaintiff has suffered the kind of mental distress for which the law should provide a remedy, there is no longer a need to define the severity of a plaintiff's emotional injury based upon arbitrary standards such as his or her presence on the 'zone of danger' or the presence of physical symptoms when medicine can provide a more individualized diagnosis.

The Court will not rely on zone of danger test as the sole means of determining whether a plaintiff may recover for the negligent infliction of emotional distress because this fiction does not allow a plaintiff to be assessed as an individual, and individuals respond differently to the same stimulus. For example, a defendant may negligently crash his car into a diner in which two patrons are enjoying their coffee. One patron may be startled by this occurrence, but may nonetheless finish her coffee, pay her tab, exit the diner, and continue her day unfazed. The other patron may be so shaken by this occurrence that he spills his coffee, collapses into a corner, and relives the incident every evening in vivid nightmares for the following month. Under the zone of danger test, each patron's claim to mental anguish would be equally viable. However, medical diagnosis would likely confirm that the first patron suffered little mental anguish, while the second patron's suffering was severe.

The Court also rejects the requirement that emotional distress must produce physical symptoms before the emotional injury will be considered severe. Although courts in the Virgin Islands have imposed such a requirement in the past, this requirement ignores the facts that individuals respond differently to the same event, and that some mental injuries persist despite an absence of physical symptoms. Courts from other jurisdictions have criticized such a requirement for being both over and under inclusive,⁴¹⁹ and medicine has advanced to the point where medical professionals can accurately determine the nature and extent of an individual's mental injury. Given the advances in medicine that make such diagnoses possible, courts no longer need to impose an arbitrary bar that prohibits recovery for mental distress absent physical symptoms.

It should be noted that a plaintiff's presence in the zone of danger and the manifestation of physical symptoms may still constitute evidence that a plaintiff has suffered a severe or serious emotional injury. Indeed, such facts are relied upon by physicians in assessing the extent of a plaintiff's mental injury.⁴²⁰ However, neither fact is a prerequisite for recover under a theory of negligent infliction of emotional distress in this jurisdiction.

⁴¹⁸ See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1247–54 (1970) (explaining the medical aspects of mental distress). See also *Leong v. Takasaki*, 520 P.2d 758, 766–67 (Haw. 1974) (explaining how a calculation of damages can be accomplished with reference to the medical aspects of mental distress).

⁴¹⁹ *Chizmar v. Mackie*, 896 P.2d 196, 202 (Alaska 1995) (citing *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 838 (Cal. 1980) (en banc)).

⁴²⁰ Comment, *Negligently Inflicted Emotional Distress: The Case for an Independent Tort*, *supra* note 418, at 1248–52 (explaining that traumatic stimuli cause both primary and secondary reactions, and observing that, “[d]ue to the subjective nature of [primary reactions], precise levels of suffering and disability cannot be objectively determined, and the psychiatrist must rely on the plaintiff's testimony the context in which the trauma occurred, and on his general knowledge of the amount of pain and disability likely to result from such a trauma”).

By determining that a claim for negligent infliction of emotional distress only provides redress to a plaintiff that has suffered a serious or severe emotional injury, it follows that, in some instances, individuals have a duty to refrain from negligently inflicting serious or severe emotional injury upon others. Having identified the duty implicated by the tort of negligent infliction of emotional distress, the Court must next define the class of individuals to whom this duty is owed.

The concern that a defendant's liability must be proportionate to his or her negligence is fundamentally a question of fairness. In the context of negligence, a plaintiff's duty, and hence a plaintiff's liability, is premised on foreseeability of harm.⁴²¹ The soundest rule for the Virgin Islands will clearly define the class of people to whom the defendant owes a duty of care, thereby ensuring that any award of liability is proportionate to the defendant's misconduct.

In direct victim cases, the rule that most closely guarantees that a defendant's liability will be foreseeable, and hence proportionate to his or her negligence, is a rule that requires a showing of some preexisting duty between the plaintiff and the defendant, imposed either by law or contract, such that the defendant has undertaken a special relationship to ensure the emotional wellbeing of the plaintiff. Although many jurisdictions rely on the zone-of-danger concept to determine to whom a defendant owed a duty of care, the zone of danger rule is arbitrary because it is incapable of a precise definition. Effectively, the zone of danger test requires a determination that anyone within a fifteen-foot radius of a defendant's negligent act is owed a duty of care, but that anyone standing sixteen feet away has no right to recovery. Under the zone of danger rule, a potential defendant cannot foresee the extent to which his or her actions may result in liability. When compared to the zone of danger test, the requirement of a preexisting duty more accurately defines the category of people to whom a duty of care is owed; the zone-of-danger rule is inferior at protecting against fraudulent claims because it may expose the tortfeasor to greater liability than justice requires. Consequently, in the absence of a preexisting duty imposed by law or contract, a plaintiff may not recover damages for mental anguish premised solely on the negligence of the defendant.

In bystander cases, jurisdictions are nearly unanimous that a defendant's duty only extends to those who satisfy the factors first set forth by the Supreme Court of California in *Dillon v. Legg*. Thus, in a claim for negligent infliction of emotional distress premised on witnessing the injury of another, a defendant's duty of care only extends to those in a familial or a close personal relationship with the victim who were present at the scene of the injury or arrived immediately thereafter, before the scene had been altered. Case law from other jurisdictions has provided no reason to expand the scope of a defendant's duty in bystander cases, and the Court perceives no reason to do so here.

Thus, to prevail on a claim of negligent infliction of emotional distress under a theory that the plaintiff was the direct victim of a defendant's negligent conduct, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious

⁴²¹ *Accord Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 386, (V.I. 2014) (quoting *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013)) (holding that "the foreseeability of harm 'is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care'").

or severe emotional injury, which duty either arose by contract or was imposed as an independent legal obligation; (2) that the defendant breached its contractual or legal obligation, i.e. its duty; and (3) that, as a direct and proximate result of defendant's breach, the plaintiff suffered a serious or severe emotional injury. To prevail on a claim of negligent infliction of emotional distress under a theory that the plaintiff witnessed the defendant cause injury to a third party, the plaintiff must prove: (1) that the plaintiff was in a familial or a close personal relationship with the victim and that the plaintiff was present at the scene of the injury or arrived immediately thereafter, before the scene had been altered; (2) that the defendant's conduct caused the victim to suffer severe injuries or death; and that (3) as a direct and proximate result of either witnessing the victim's injury or arriving at the scene of the victim's injury shortly after the injury occurred—but before the scene has been altered—the plaintiff suffered a serious or severe emotional injury.

b. To the extent that Plaintiffs have stated a claim for negligent infliction of emotional distress against Daily News and Redfield on behalf of any Plaintiff, Daily News and Redfield are entitled to summary judgment in their favor on those portions of Plaintiffs' Complaint.

In their Opposition, Plaintiffs do not address their claim for negligent infliction of emotional distress. Consequently, to the extent that they have stated a claim for such a tort, they have not demonstrated genuine issues of material fact on any of its elements.

Nor is it clear that they could, based on the standards adopted above. Plaintiffs have not introduced evidence that either Daily News or Redfield owed any of the Plaintiffs a duty of care that arose from a contract or existed due to a previously-imposed legal obligation. Nor have Plaintiffs introduced evidence that any of the Plaintiffs were bystanders to a physical injury sustained by a family member or a close personal relation, that any of the Plaintiffs were present when that injury was sustained, and that any of the Plaintiffs believed that the injured party suffered severe injuries or death.

Due to Plaintiffs' failure to introduce evidence pertaining to any element of a claim for negligent infliction of emotional distress, no reasonable jury could find either Daily News or Redfield liable to any of the Plaintiffs for the negligent infliction of emotional distress.

V. INVASION OF PRIVACY

Plaintiffs have alleged that Defendants' conduct constitutes an "invasion of privacy,"⁴²² and cite to the evidence referenced in paragraph 4.B.1 of Plaintiffs' Amended Response to Defendants' Statement of Facts to substantiate their claim. Whether by statute or evolution of common law, all fifty states and the District of Columbia recognize that certain invasions of one's privacy are actionable in tort. The concept of a common law right to privacy was first advanced in a law review article written by Samuel Warren and Louis Brandeis in 1890,⁴²³ but the modern understanding of an actionable invasion of privacy can be traced back to a law review article

⁴²² Fourth Am. Compl. ¶¶ 34–36.

⁴²³ Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

written by Professor William Prosser in 1960.⁴²⁴ Based upon a review of over three hundred opinions issued since Warren and Brandeis' article, Professor Prosser concluded that the right to privacy "[i]s not one tort," but is rather "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common"⁴²⁵ Following Professor Prosser's guidance—first due to his law review article and then later due to his position as a reporter for the American Law Institute—every jurisdiction in the United States to address the issue has acknowledges Prosser's four-part distinction. Yet the extent to which each of Prosser's four torts is recognized varies by jurisdiction.

a. Applicable law

There is no binding authority in this jurisdiction addressing the extent to which these four torts are actionable in the Virgin Islands. Plaintiffs' Opposition narrows the scope of the Court's inquiry because it only argues that Defendants are liable for the torts of intrusion upon seclusion and for publically portraying Plaintiffs in a false light. Yet the Court must still determine whether to recognize each of these causes of action, and if so, how to define them.

i. This jurisdiction recognizes a cause of action for intrusion upon seclusion.

A cause of action for intrusion upon seclusion protects an individual from "intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man."⁴²⁶ It protects "the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying."⁴²⁷ Given that past practices by courts in the Virgin Islands mirror the approach taken by a majority of other jurisdictions, the Virgin Islands should continue to recognize a cause of action for intrusion upon seclusion.

1. Approaches taken by other courts in this jurisdiction

The tort of intrusion upon seclusion has been analyzed several times by courts in the Virgin Islands.⁴²⁸ In each instance, the court has applied the principals of law summarized in Section 652B of the Restatement (Second) of Torts to analyze the plaintiff's claims.⁴²⁹ Section 652B requires a plaintiff to prove (1) an intrusion upon the solitude, seclusion, or private affairs or concerns of another; (2) that is intentional; and (3) that would be highly offensive to a reasonable person.⁴³⁰

⁴²⁴ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

⁴²⁵ *Id.* at 389.

⁴²⁶ RESTATEMENT (SECOND) OF TORTS § 652B cmt. a.

⁴²⁷ *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469, 489 (Cal. 1998).

⁴²⁸ *Anderson v. Government of the Virgin Islands*, 199 F. Supp. 2d 269 (D.V.I. 2002); *Venzen v. Abraham*, 18 V.I. 385 (D.V.I. 1981); *FirstBank Puerto Rico v. Webster*, ST-2012-CV-239, 2013 WL 436702 (V.I. Super. Ct. Jan. 17, 2013).

⁴²⁹ *Anderson*, 199 F. Supp. at 278; *Venzen*, 18 V.I. at 388–89; *Webster*, 2013 WL 436702 at *3.

⁴³⁰ RESTATEMENT (SECOND) OF TORTS § 652B.

2. Approaches taken by other jurisdictions

At least forty-three jurisdictions recognize a common law cause of action for intrusion upon seclusion, and another four jurisdictions have created a statutory right to bring such a claim. Only two jurisdictions explicitly reject the cause of action.

There is a great deal of similarity across the jurisdictions that recognize a common law cause of action for intrusion upon seclusion, but each jurisdiction enumerates the elements of the tort with slight differences. For example, all jurisdictions recognizing a common law cause of action for intrusion upon seclusion require the alleged intrusion to be offensive to some degree. At least thirty-one jurisdictions require the intrusion to be “highly offensive to a reasonable person,”⁴³¹ while at least seven jurisdictions require the intrusion be offensive or objectionable to a reasonable person.⁴³² The remaining jurisdictions require that the intrusion would cause mental suffering to an ordinary person.⁴³³ As another example, all jurisdictions require some form of intrusion into the plaintiff’s solitude or seclusion, but at least two jurisdictions have held that the intrusion must be physical,⁴³⁴ while others permit a cause of action for intrusion “by use of a defendant’s sense of sight or hearing, or by use of some other form of investigation or examination,”⁴³⁵ and at least one has required that the defendant’s actions be “intrusive into a matter that the plaintiff has a right to expect privacy.”⁴³⁶ However, despite these variations, there is no deviation from the general principle, first articulated by Professor Prosser, that a cause of

⁴³¹ E.g., *Phillips v. Smalley Maintenance Services, Inc.*, 435 So.2d 705, 708–09 (Ala. 1983); *Shulman v. Group W. Productions, Inc.*, 955 P.2d at 490 (citing *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986)); *Danai v. Canal Square Associates*, 862 A.2d 395, 400 (D.C. 2004); *Froelich v. Adair*, 516 P.2d 993, 997 (Kan. 1973); *Furman v. Sheppard*, 744 A.2d 583, 585 (Md. Ct. Spec. App. 2000); *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995); *Burgess v. Busby*, 544 S.E.2d 4, 10–11 (N.C. Ct. App. 2001); *Mauri v. Smith*, 929 P.2d 307, 310 (Or. 1975); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Hillman v. Columbia County*, 474 N.W.2d 913, 918–19 (Wis. Ct. App. 1991).

⁴³² E.g., *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060, 1076 (Colo. Ct. App. 1998) (requiring that the intrusion be “offensive or objectionable to a reasonable person”); *Yarbray v. Southern Bell Telephone & Telecommunications Co.*, 409 S.E.2d 835, 837 (Ga. 1991) (requiring intrusion “which would be offensive or objectionable to a reasonable person”); *Burns v. Masterbrand Cabinets, Inc.*, 874 N.E.2d 72, 77 (Ill. Ct. App. 2007) (same); *Dalley v. Dykema Gossett*, 788 N.W.2d 679, 687 (Mich. Ct. App. 2010) (requiring that the intrusion be “objectionable to a reasonable man”); *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1008 (N.H. 2003) (requiring that the intrusion be “offensive to persons of ordinary sensibilities”); *Hougum v. Valley Memorial Homes*, 1998 ND 24, ¶ 14, 574 N.W.2d 812, 817 (requiring that the intrusion be “objectionable to a reasonable person”); *Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 19, 667 N.W.2d 651, 660–61 (requiring that the intrusion be “unreasonable, unwarranted, serious, and offensive”).

⁴³³ See *Rucinsky v. Hentchel*, 881 P.2d 616, 618 (Mont. 1994) (citing *Sistok v. Northwestern Telephone Systems, Inc.*, 615 P.2d 176, 182 (Mont. 1980)) (requiring that the invasion be conducted “in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities”); *Snakenberg v. Hartford Casualty Insurance Co., Inc.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989)) (citing *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956) (requiring conduct that “would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances”).

⁴³⁴ *Newman v. Jewish Community Center Association of Indianapolis*, 875 N.E.2d 729, 737 (Ill. Ct. App. 2007); *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977) (citing *Estate of Berthiaume v. Pratt, M.D.*, 365 A.2d 792, 795 (Me. 1976)).

⁴³⁵ *Danai*, 862 A.2d at 400.

⁴³⁶ *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011).

action will lie when a defendant intentionally intrudes upon a place where the plaintiff has secluded him or herself, and the defendant's intrusion was offensive to some degree.

3. The soundest rule of law for the Virgin Islands

Given the nearly uniform approach to this tort across other jurisdictions in the United States, the soundest rule for the Virgin Islands is to recognize a cause of action for intrusion upon seclusion under the same parameters as courts in the Virgin Islands have previously done. Thus, in order to prevail on a claim for intrusion upon seclusion in the Virgin Islands, a plaintiff must prove: (1) an intrusion upon the solitude, seclusion, or private affairs or concerns of another; (2) that is intentional; and (3) that would be highly offensive to a reasonable person. This approach mirrors the common law in a majority of other jurisdictions, and facilitates consistency amongst trial court opinions here in the Virgin Islands. As the common law of this Territory develops, it will fall to the courts to determine exactly where an individual enjoys the solitude or seclusion upon which a defendant may not intrude, or what conduct will be deemed highly offensive.

ii. This jurisdiction does not recognize a cause of action for false light invasion of privacy.

There is no binding precedent in this jurisdiction that addresses a cause of action for false light invasion of privacy. Because the Supreme Court of the Virgin Islands has not yet addressed this cause of action, this Court must determine the soundest rule of law for the Virgin Islands.⁴³⁷ Although there is a growing trend to recognize the existence of this tort, the Virgin Islands lacks sufficient safeguards to ensure that a cause of action for false light invasion of privacy does not chill the freedoms protected by the First Amendment.

1. Approaches taken by other courts in this jurisdiction

No court in the Virgin Islands has addressed a cause of action for false light invasion of privacy. Although a few courts have acknowledged that false light invasion of privacy constitutes one of four torts that comprise a broader common-law right to privacy,⁴³⁸ no court in this jurisdiction has set forth the elements for such a claim.

2. Approaches taken by other jurisdictions

A majority of jurisdictions recognize a cause of action for false light invasion of privacy. Of those jurisdictions, at least twenty eight draw their statement of the law directly from Section 652E of the Restatement (Second) of Torts.⁴³⁹ At least nineteen of these jurisdictions cite to the

⁴³⁷ *Malloy v. Reyes*, S. Ct. Civ. No. 2012-0081, 2014 WL 3697332, at *5 (V.I. July 22, 2014).

⁴³⁸ See, e.g., *Venzen v. Abraham*, 18 V.I. 385 (D.V.I. 1981) (discussing how the concept of a common-law right to privacy, as first articulated in 1890 and later refined by Professor Prosser in the 1960s, generally comprises four interrelated, but distinct torts).

⁴³⁹ E.g., *Regions Bank v. Plott*, 897 So.2d 239, 344 (Ala. 2004) (citing to the Restatement (Second) of Torts § 652E); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1330-31 (Conn. 1982) (adopting the Restatement (Second) of Torts § 652E); *Chung v. McCabe Hamilton & Renny Co., Ltd.*, 128 P.3d 833, 847 (Haw. 2006) (citing to

Restatement—and often to Professor Prosser’s article as well—without conducting any additional analysis of whether their jurisdiction should adopt a cause of action for false light invasion of privacy. However, a few jurisdictions that draw their definition of this tort directly from the Restatement have done so after analyzing whether it was appropriate to recognize such a cause of action. A few other jurisdictions recognize the tort as an evolution of their common law without reference to the Restatement.⁴⁴⁰

Two minority positions exist relative to this cause of action. The larger of these positions rejects the concept of false light invasion of privacy by operation of statute.⁴⁴¹ The smaller of these position is held by a group of states that do not recognize the existence of this cause of action at common law.⁴⁴² The jurisdictions that do not recognize this tort reason that the tort of false light invasion of privacy is so similar to the tort of defamation that there is very little conduct that could not be properly addressed by a claim for defamation, or by other causes of action. These jurisdictions also point out that many of the protections that have evolved to prohibit the abuse of defamation lawsuits have not evolved to address the potential chilling effects that allegations of false light invasions of privacy could have. These jurisdictions have questioned whether non-defamatory speech should be actionable on any grounds at all.

3. *The soundest rule of law for the Virgin Islands*

Despite the widespread recognition of a cause of action for false light invasion of privacy, the Virgin Islands is best served by rejecting this tort at this time. The third prong of the *Banks* analysis mandates that this Court “determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands.”⁴⁴³ When the criticisms of false light claims are

the Restatement (Second) of Torts § 652E); *Wingard v. Larson*, 260 N.W.2d 816, 823 (Iowa 1977) (same); *Cole v. Chandler*, 2000 ME 104, ¶ 17, 752 A.2d 1189, 1197 (same); *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 325 (Mo. Ct. App. 2008) (same); *Romaine v. Kallinger*, 537 A.2d 284, 289–90 (N.J. 1988) (collecting cases from New Jersey that cite the Restatement (Second) of Torts § 652E); *Marleau v. Truck Insurance Exchange*, 37 P.3d 148, 153–54 (Or. 2001) (recognizing by implication a cause of action for false light invasion of privacy and citing to the Restatement (Second) of Torts § 652E); *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) (citing to the Restatement (Second) of Torts § 652E); *Crumpp v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 (W. Va. 1983) (same); *Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176, ¶¶ 19–23 (same).

⁴⁴⁰ *E.g.*, *Association Services, Inc. v. Smith*, 549 S.E.2d 454, 459 (Ga. Ct. App. 2001); *Hoskins v. Howard*, 971 P.2d 1135, 1140 (Idaho 1998); *Stern v. Doe*, 806 So.2d 98, 101 (La. Ct. App. 2001); *Tobin v. Michigan Civil Service Commission*, 331 N.W.2d 184, 189 (Mich. 1982); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235–36 (Minn. 1998).

⁴⁴¹ *See, e.g.*, *Ayash v. Dana Farber Cancer Institute*, 822 N.E.2d 667, 681 n.16 (Mass. 2005) (citing MASS. GEN. LAWS ch. 214 § 1B) (observing that Massachusetts has not interpreted its privacy statute to permit claims for false light invasion of privacy); *Johnson v. Staten Island Advance Newspaper, Inc.*, 38480/03, 2004 WL 4986754, at *7–8 (N.Y. City Civ. Ct. July 23, 2004) (citing *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1323 (N.Y. 1982)) (explaining that New York’s statutory right to privacy only applies to situations where a person’s photograph is used for advertising or trade without that person’s consent); *Ladd v. Uecker*, 2010 WI App. 28, ¶ 5, 780 N.W.2d 216, 218–19 (citing WIS. STAT. § 995.50) (acknowledging that Wisconsin does not recognize false light privacy claims under its privacy statute).

⁴⁴² *E.g.*, *Denver Publishing Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (en banc); *Cain v. Hearst Corporation*, 878 S.W.2d 577, 577 (Tex. 1994).

⁴⁴³ *Government of the Virgin Islands v. Connor*, S. Ct. Civ. No. 2013 0095, 2014 WL 702639, at *3 (V.I. Feb. 24, 2014).

compared to the present development of the Virgin Islands Judiciary, the desirability of rejecting this tort becomes apparent.

Critics of false light invasion of privacy point out that the tort lacks many of the procedural safeguards that protect free speech in the context of defamation claims.⁴⁴⁴ This criticism is most easily illustrated with reference to printed media, where even the smallest factual inaccuracy could form the basis for a cause of action against the author or the publisher.⁴⁴⁵ Proponents of the tort argue that the criteria that a false statement be highly offensive to a reasonable person guarantees that free speech will not be chilled. But the definition of “highly offensive” is also highly subjective. Consequently, journalists and publishers are left to speculate whether the subject of a story will consider their portrayal to be highly offensive. Critics of the false light tort argue that this ambiguity disincentivizes the open and robust debate encouraged by the First Amendment by encouraging journalists and newspapers to tread softly.⁴⁴⁶ This Court agrees with the critics.

As the tort of defamation has evolved, absolute and qualified privileges have developed to ensure that defamation remained the exception to the general rule of free speech. For example, absolute privileges protect statements made during judicial proceedings, by legislators during legislative debates, and between spouses. Qualified privileges protect statements made in government reports of official proceedings, fair criticism of published media, and statements made in self-defense. Given the novelty of false light claims, it is unclear to what extent the privileges pertaining to defamation apply to claims of false light invasion of privacy.

This concern is magnified by the infancy of the common law in the Virgin Islands. Although the Supreme Court of the Virgin Islands has acknowledged the existence of both absolute and qualified privileges in the context of defamation claims,⁴⁴⁷ it has not issued an opinion establishing whether or to what extent these privileges are recognized in the Virgin Islands. Only as recently as October of 2014 has the Supreme Court issued an opinion that conclusively establishes the elements of negligence without relying on the Restatements of Law.⁴⁴⁸ Thus, it is difficult to believe that the Supreme Court will issue an opinion that comprehensively defines the privileges that will defeat a defamation action in the near future. Given the novelty of false light claims, the likelihood of receiving such an opinion concerning the privileges that will defeat false light claims anytime soon decreases even further. Finally, the Virgin Islands Code does not codify privileges for the journalist, reporter, or publisher. Consequently, the burden falls upon the Superior Court to adjudicate, on a case-by-case basis, whether these privileges exist in the Virgin Islands. With this in mind, it is not hard to see how a well-pled complaint and the threat of voluminous discovery could be used as a weapon to pacify media here in the Territory.

⁴⁴⁴ *E.g.*, *Lake*, 582 N.W.2d at 235–36; *Arrington*, 434 N.E.2d at 1323.

⁴⁴⁵ *See Cain*, 878 S.W.2d at 577 (observing that “any fact in the story, no matter how seemingly innocuous, may prove to be a basis for liability”).

⁴⁴⁶ *E.g.*, *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1113–14 (Fla. 2003); *Lake v.*, 582 N.W.2d at 235–36; *Moats v. Republican Party of Nebraska*, 796 N.W.2d 584, 588–89 (Neb. 2011).

⁴⁴⁷ *See Joseph v. Daily News Publishing Co.*, 57 V.I. 566, 586 (V.I. 2012) (discussing the second element of a claim for defamation in the Virgin Islands).

⁴⁴⁸ *Machado v. Yacht Haven U.S.V.I., LLC*, S. Ct. Civ. No. 2012-0137, 2014 WL 5282116, at *2 (V.I. Oct. 16, 2014).

It is also worth noting that the majority position concerning the recognition of this tort is somewhat misleading. Although a clear majority of jurisdictions permit a cause of action for false light invasion of privacy, at least half of those jurisdictions do not appear to have analyzed the development of their jurisdiction's common law or the unique characteristics of their jurisdiction to determine whether it would be appropriate to adopt such a cause of action.⁴⁴⁹ Rather, these jurisdictions simply acknowledge the four-part distinction articulated in Professor Prosser's article and copy their legal standard straight from the Restatement. Thus, at least half of the jurisdictions to recognize a cause of action for false light invasion of privacy have done so in a manner that resembles the mechanistic application of the Restatement that the Supreme Court of the Virgin Islands has deemed to be unconstitutional.

Of the jurisdictions that have adopted the tort of false light invasion of privacy after analyzing the propriety of doing so, some have satisfied themselves that First Amendment guarantees will not be chilled due to the Supreme Court of the United States' holding in the case of *Time, Inc. v. Hill*.⁴⁵⁰ In that case, the Supreme Court held that a plaintiff alleging false light invasion of privacy pursuant to a state's privacy statute must establish 'actual malice' when that plaintiff is a public figure, like in a claim for defamation.⁴⁵¹ However, the requirement that a public figure establish that false light publications were either made with knowledge of their falsity or reckless disregard thereto does not address the concern that false light claims require a journalist or publisher to gamble on whether a reasonable person would find an article's content highly offensive. Although the Supreme Court of the United States has expanded First Amendment protections in the context of false light claims in one instance, members of the media in a jurisdiction lacking robust protections for journalists, reporters, and publishers—jurisdictions like the Virgin Islands—are still only safe from legal action so long as the subject of a story does not take offense to that story.

Courts have correctly pointed out that false light claims protect a different interest than defamation claims: defamation claims protect one's reputation in the community, while false light claims protect one's right to the integrity of one's image.⁴⁵² However, this Court has not discovered a single example of a case that succeeded as a claim for false light invasion of privacy, but failed as a claim for defamation.⁴⁵³ Furthermore, the success of such a claim assumes that non-defamatory speech should be actionable. In the context of a claim for false light invasion of privacy, the Supreme Court of the United States has cautioned that it would "create a grave risk of serious impairment of the indispensable service of a free press in a free society if [the Court were to] saddle the press with the impossible burden of verifying to a certainty the facts associated in

⁴⁴⁹ E.g., *Cole v. Chandler*, 2000 ME 104, ¶ 17, 752 A.2d 1189, 1197.

⁴⁵⁰ 385 U.S. 374 (1967).

⁴⁵¹ *Id.* at 387–88.

⁴⁵² E.g., *Easter Seal Society for Crippled Children & Adults, Inc. v. Playboy Enterprises, Inc.*, 530 So.2d 643, 646 (La. Ct. App. 1988).

⁴⁵³ But see *Jensen v. Sawyers*, 2005 UT 81, ¶ 57, 130 P.3d 325, 337 (observing that the Supreme Court of Utah "remain[s] sufficiently persuaded that there is certain unacceptable conduct that could be within the reach of false light invasion of privacy, but not defamation"). The *Jensen* Court vacated an award of damages on claims for defamation and false light invasion of privacy that were each premised on the same set of facts. Consequently, *Jensen* does not provide guidance as to the type of conduct that would be actionable under the theory of false light invasion of privacy but not as a claim for defamation.

news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter."⁴⁵⁴ Such a concern militates against lawsuits for nondefamatory speech.

Assuming that some forms of non-defamatory speech should be actionable, there may come a day when a claim for false light invasion of privacy is necessary to remedy a wrong that cannot be addressed by any other cause of action, and can proceed in a manner that does not chill First Amendment freedoms. But it is not this day. At present, this Court will not embrace the questionable protection afforded by false light claims where the attendant potential for their abuse is so great.

b. To the extent that Plaintiffs have stated a claim for intrusion upon seclusion on behalf of any Plaintiff against Daily News, Daily News is entitled to summary judgment in its favor on those portions of Plaintiffs' Complaint.

Plaintiffs state that the facts supporting their intrusion upon seclusion claim against Daily News are contained in paragraph 4.B.1 of Plaintiffs' Amended Response to Defendant's Statement of Facts.⁴⁵⁵ Daily News is only mentioned once in paragraph 4.B.1. Citing to the affidavit of Attorney Dean Barnes for support, Plaintiffs allege that "[a] The [sic] Daily News reporter . . . also improperly tried to get confidential information from a government agency about alleged claims that Donastorg was not paying child support which was just false."⁴⁵⁶

As the only piece of evidence offered to support Plaintiffs' intrusion upon seclusion claim against Daily News, the Barnes Affidavit does not constitute evidence of any of the three elements of the tort of intrusion upon seclusion. In his affidavit, Barnes testifies that, on or about March 7, 2006, he met with a reporter from The Virgin Islands Daily News.⁴⁵⁷ Barnes testified that the reporter "said that he had received a tip that a senator was not paying his child support,"⁴⁵⁸ but that he "did not mention . . . the name of any specific senator."⁴⁵⁹ Barnes further testified that he did not "refer to or otherwise identify any party to a child support case."⁴⁶⁰ Because Barnes' affidavit establishes that Senator Donastorg was never identified during Barnes' encounter with the reporter, the Barnes Affidavit does not constitute evidence that Daily News intentionally intruded upon solitude, seclusion, or private affairs or concerns of any of the Plaintiffs. Consequently, no reasonable jury could find Daily News liable for the tort of intrusion upon seclusion in favor of any of the Plaintiffs.

⁴⁵⁴ *Time, Inc.*, 385 U.S. at 389.

⁴⁵⁵ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. 58–59.

⁴⁵⁶ Pls.' Am. Resp. to Defs.' Stmt. of Facts 18–19.

⁴⁵⁷ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. V, Aff. of Atty. Dean L. Barnes ¶¶ 2–3.

⁴⁵⁸ *Id.* ¶ 4.

⁴⁵⁹ *Id.* ¶ 9.

⁴⁶⁰ *Id.* ¶ 12.

- c. To the extent that Plaintiffs have stated a claim for intrusion upon seclusion on behalf of any Plaintiff against Redfield, Redfield is entitled to summary judgment in his favor on those portions of Plaintiffs' Complaint.**

The facts supporting Plaintiffs' intrusion upon seclusion claim against Redfield are also contained in paragraph 4.B.1 of Plaintiffs' Amended Response to Defendants' Statement of Facts. The Sheraw Investigation forms the basis of Plaintiffs' intrusion upon seclusion claim against Redfield. Citing to Pages 16, 17, and 83 of Sheraw's deposition transcript, Plaintiffs allege that Redfield was "[an] ICC contact person[] for Sheraw or [was a] person[] with which [sic] Sheraw discussed the report."⁴⁶¹ Plaintiffs also claim that Redfield's alleged intrusion upon Plaintiffs' seclusion extended beyond Redfield's discussion of the report with Sheraw. Citing to pages 94–95 of Senator Donastorg's deposition transcript, Plaintiffs allege that Redfield, along with Prosser, ICC, "and the cabal" all "had Senator Donastorg followed in 2000, 2001, and 2002."⁴⁶²

The evidence provided by Plaintiffs concerning Sheraw's investigation of Senator Donastorg does not show that Redfield had any role in the commission or execution of the investigation. As discussed in the section pertaining to Plaintiffs' intentional infliction of emotional distress claim, Redfield is not mentioned in the pages of the deposition transcripts cited by Plaintiffs. The surrounding pages of Sheraw's deposition transcript demonstrate Redfield did not hire Sheraw to conduct an investigation of Senator Donastorg or Senator Donastorg's family. Sheraw's deposition transcript reveals that Redfield spoke to Sheraw only once: after Senator Donastorg had received a copy of the Sheraw Investigation from his attorney.

Additionally, the portions of the Sheraw Investigation attached to Plaintiffs' Opposition contain no reference to Redfield. Instead, those documents indicate that Benta was Sheraw's contact person. By letter dated April 16, 1998, directed to Benta, Sheraw confirmed that he had undertaken a "background search on Adlah Donastorg" "pursuant to [Benta's] request."⁴⁶³ By letter dated June 24, 1998, directed to Benta, Sheraw confirmed that his investigation of Senator Donastorg was complete.⁴⁶⁴ Sheraw's June 24, 1998 letter to Benta identifies that Sheraw provided Benta with one additional progress report on his investigation of Senator Donastorg, which was dated May 20, 1998.⁴⁶⁵ These documents were all addressed to "Mr. Oakland Benta, Security Director, Emerging Communications, P.O. Box 1730 St. Croix, V.I. 00821."⁴⁶⁶ Additionally, the invoice for Sheraw's services was directed to Benta under the same title and at the same address,⁴⁶⁷ and was paid in full by Atlantic Tele-Network Co., P.O. Box 1730, Christiansted, St. Croix, USVI 00821.⁴⁶⁸ Redfield's name does not appear in any of these documents.

⁴⁶¹ Pls.' Am. Resp. to Defs.' Stmt. of Facts 16.

⁴⁶² *Id.* at 18.

⁴⁶³ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. App. Vol. VI, Ex. 3, at Bates No. D 1300.

⁴⁶⁴ *Id.* at Bates No. D 1295.

⁴⁶⁵ *Id.* at Bates No. D 1287.

⁴⁶⁶ *See id.* at Bates No. D 1300 (directing the initial report to Benta); *id.* at Bates No. D 1287 (directing the second progress report to Benta); *id.* at Bates No. D 1295 (directing the final report to Benta).

⁴⁶⁷ *Id.* at App. Vol. VI, Ex. 4, at 1–2

⁴⁶⁸ *Id.* at 2.

The pages of Senator Donastorg's deposition testimony are similarly unavailing to Plaintiffs, as these pages do not demonstrate that Redfield had Senator Donastorg followed. Senator Donastorg testified that he saw "two gentlemen in a white car" that were "just certain individuals, other individuals that I don't ever recall or could identify."⁴⁶⁹ Based upon Senator Donastorg's failure to identify Redfield as one of the men allegedly following him, no reasonable jury could find that Redfield intruded upon Senator Donastorg's seclusion.

From the evidence submitted by Plaintiffs, no reasonable jury could find that Redfield intruded upon the seclusion of any of the Plaintiffs, whether through his alleged involvement with the Sheraw Investigation or due to Plaintiffs' allegation that Redfield was part of an alleged cabal that had Senator Donastorg followed.

VI. PLAINTIFFS' CONCERTED ACTION THEORIES

In addition to allegations that each Defendant has engaged in one or more of the torts described in analysis sections I through V above, Plaintiffs have also proffered multiple theories under which the conduct of one Defendant may be imputed upon another Defendant for purposes of establishing the liability of the second Defendant. Plaintiffs allege that "[t]he V.I. Supreme Court . . . expressly, and broadly, recognizes 'alter-ego,' 'joint-enterprise,' and 'concerted-action' theories as viable under the law."⁴⁷⁰ As authority for this proposition, Plaintiffs cite to a number of cases from courts in the Third Circuit—none of which constitute binding precedent on this Court⁴⁷¹—and to an opinion from the Supreme Court of the Virgin Islands concerning a conviction for the crime of aiding and abetting.⁴⁷²

The three terms used by Plaintiffs—alter-ego, joint-enterprise, and concerted-action—refer to three distinct categories of liability. Generally, alter-ego liability pertains to circumstances where a court will disregard the legal fiction that business entities and those entities' owners are separate. Joint-enterprise liability refers to circumstances where courts will disregard the legal fiction that business entities owned by a parent corporate retain a distinct existence from one another. Concerted-action is more appropriately termed civil conspiracy, and refers to situations where courts can impute the tortious conduct one person to other members of a group.

a. Applicable law

Despite Plaintiffs' assertion that the Supreme Court of the Virgin Islands "expressly[] and broadly" recognizes the theories of liability set forth by Plaintiffs, there is no binding authority in this jurisdiction addressing civil conspiracy, corporate veil piercing, or the joint enterprise theory of liability. Plaintiffs have also cited to case law in which federal courts have employed 'single employer' and 'joint employer' tests. Although the discussions in analysis sections I through V

⁴⁶⁹ *Id.* at App. Vol. III, Donastorg Dep. Tr. 94:5–7.

⁴⁷⁰ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. In Supp. 27–29. *See also id.* at 27 n.16 (collecting cases).

⁴⁷¹ *See id.* at 27 n.16 (citing opinions issued by the United States Court of Appeals for the Third Circuit that originated outside of the Virgin Islands, opinions from the District Court of the Virgin Islands, opinions from various courts in Pennsylvania, and an opinion from Texas).

⁴⁷² *Id.* at 27 (citing *Nanton v. People of the Virgin Islands*, 52 V.I. 466, 484–85 (V.I. 2009)).

above explain why Daily News and Redfield are entitled to summary judgment on each claim asserted by Plaintiffs against them directly, the Court must also determine whether the plethora of joint liability theories advanced by Plaintiffs could justify holding Daily News or Redfield liable for the conduct of the remaining Defendants.

i. Civil conspiracy

Amongst the theories propounded by Plaintiffs, Plaintiffs argue first that the Supreme Court of the Virgin Islands has “expressly[] and broadly”⁴⁷³ recognized the principles of law summarized in the Restatement (Second) of Torts Section 876.⁴⁷⁴ However, the Supreme Court of the Virgin Islands has never issued an opinion adopting the principles set forth in Section 876. Plaintiffs have thus asserted a proposition of common law for which there is no binding precedent in this jurisdiction, and this Court must determine whether, and if so, the extent to which the common law of this jurisdiction embraces the principles of law summarized in Section 876.

In the case of *Isaac v. Crichlow*,⁴⁷⁵ the Superior Court of the Virgin Islands, Molloy, J., conducted the three-prong analysis mandated by *Banks v. International Rental & Leasing Corp.*⁴⁷⁶ and determined that the provisions of law summarized in Section 876 represented the soundest rule for the Virgin Islands. Being satisfied that the principles of law contained in Section 876 have not only been relied upon by courts in this jurisdiction,⁴⁷⁷ but are also relied upon by a majority of other jurisdictions,⁴⁷⁸ this Court agrees with the Honorable Judge Molloy’s conclusion that the principles of law summarized in Section 876 represent the soundest rule for the Virgin Islands pertaining to liability for civil conspiracy. All portions of the *Banks* analysis in *Crichlow* not previously cited are incorporated herein by reference.

As reasoned in *Crichlow* and reaffirmed in this Memorandum Opinion, the soundest rule for the Virgin Islands is that a person is subject to liability for harm resulting to a plaintiff from the tortious conduct of co-defendant when that person (1) does a tortious act in concert with the co-defendant pursuant to a common design with him; (2) knows that the co-defendant’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the co-defendant to so conduct him or herself; or (3) gives substantial assistance to the co-defendant in accomplishing a tortious result and his or her own conduct, separately considered, constitutes a breach of duty to the plaintiff. The existence of tortious conduct is a prerequisite for liability under this standard. Absent tortious conduct, there cannot be a generalized claim for civil conspiracy.⁴⁷⁹

⁴⁷³ Pls.’ Resp. to Defs.’ Mot. for Summ. J. and Br. In Supp. 27.

⁴⁷⁴ *Id.* at 27–28 (quoting RESTATEMENT (SECOND) OF TORTS § 876). Plaintiffs do not identify a case where the Supreme Court of the Virgin Islands has addressed the legal foundations for a civil conspiracy claim.

⁴⁷⁵ Civil No. SX-2012-CV-065, 2015 V.I. LEXIS 15 (V.I. Super. Ct. Feb. 10, 2015).

⁴⁷⁶ 55 V.I. 967 (V.I. 2011).

⁴⁷⁷ See 2015 V.I. LEXIS 15, at *32 n.11 (collecting cases from the Virgin Islands).

⁴⁷⁸ See *id.* n.12 (collecting cases).

⁴⁷⁹ See *Mieczkowski v. York City School Dist.*, 414 Fed. Appx. 441, 450 (3d Cir. 2011) (citing *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000)) (explaining that “[t]here is no liability for civil conspiracy where there is no liability for the act or acts underlying the conspiracy”). Accord 16 AM. JUR. 2D *Conspiracy* § 64 (2009) (same).

ii. Plaintiffs' corporate law theories

Plaintiffs have advance three distinct corporate law theories under which a corporate entity may be disregarded: traditional piercing of the corporate veil, reverse piercing of the corporate veil, and the single enterprise theory of liability.⁴⁸⁰

1. *Traditional veil piercing*

"Piercing the corporate veil 'is an equitable remedy whereby a court disregards the existence of the corporation to make the corporation's individual principals and their personal assets liable for the debts of the corporation.'"⁴⁸¹ This Court must determine whether, and if so the extent to which this jurisdiction embraces such a remedy because the Supreme Court of the Virgin Islands has never issued an opinion discussing the extent to which the concept of piercing the corporate veil applies in this jurisdiction.

a. Approaches taken by courts in this jurisdiction

In the case of *Matheson v. Virgin Islands Community Bank Corp.*,⁴⁸² the Appellate Division of the District Court of the Virgin Islands explained that this remedy should be applied "when the court must 'prevent fraud, injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability.'"⁴⁸³

Matheson concerned a motion for summary judgment filed by a defendant corporation and its sole shareholder on, among other things, whether it was appropriate to disregard the corporation's separate existence.⁴⁸⁴ In granting summary judgment for the corporation on the veil-piercing issue, the Appellate Division considered eight factors upon which the United States Court of Appeals for the Third Circuit had previously relied:

- (1) whether the corporation suffers from gross undercapitalization;
- (2) a failure to observe corporate formalities;
- (3) the non-payment of dividends;
- (4) the insolvency of the debtor corporation;
- (5) the siphoning of funds from the debtor corporation from the dominant stockholder;
- (6) the presence of nonfunctioning officers;
- (7) the absence of corporate records; and

⁴⁸⁰ See Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. in Supp. 27 n.16 (citing to *Schwab v. McDonald*, 405 B.R. 555, 563 (Bankr. M.D. Pa. 2009) to illustrate the concept of reverse veil piercing, to *Gateco, Inc. v. Safeco Ins. Co. of Am.*, Civ. No. 05-2869, 2006 U.S. Dist. LEXIS 50313 (E.D. Pa. July 24, 2006) to illustrate the concept of traditional veil piercing in the context of parent and subsidiary corporations, and to *Hoffmann v. Dandurand*, 180 S.W.3d 340, 348 (Tex. Ct. App. 2005) to illustrate the single enterprise theory of liability).

⁴⁸¹ *Matheson v. V.I. Community Bank, Corp.*, 297 F. Supp. 2d 819, 833 (D.V.I. App. Div. 2003) (quoting *Trustees of the Nat'l Elevator Industry Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 192 (3d Cir. 2003)).

⁴⁸² 297 F. Supp. 2d 819 (D.V.I. App. Div. 2003).

⁴⁸³ *Id.* (quoting *Pearson v. Component Technology Corp.*, 247 F.3d 471, 484 (3d Cir. 2001)).

⁴⁸⁴ *Id.* at 822-23.

- (8) whether the corporation is merely a facade for the operation of the dominant stockholder.⁴⁸⁵

The Appellate Division concluded that “Plaintiff’s claims amount to nothing more than conclusory allegations that [the sole shareholder] was involved in the [corporation]’s operations,”⁴⁸⁶ and consequently, that veil piercing was not justified.

Quoting *Matheson* and the Third Circuit case law cited therein, the Superior Court has continued to follow this standard.⁴⁸⁷

b. Approaches taken by other jurisdictions

A clear majority of jurisdictions recognize that corporate separateness may be disregarded when necessary to prevent fraud or injustice.⁴⁸⁸ Although approaches vary by jurisdiction, most jurisdictions analyze a nonexclusive list of factors like those enumerated in *Matheson* in order to determine whether a defendant shareholder exercised sufficient domination and control over the corporation and used the corporate form to perpetrate fraud or injustice.⁴⁸⁹ Any attempt to quantify the specific factors utilized by every jurisdiction would transform an already-lengthy opinion into a bona fide treatise on corporate law. However, several factors consistently present themselves in circumstances where courts find that the disregard of the corporate entity is appropriate: whether corporate formalities have been observed; whether the corporation was adequately capitalized; whether, and if so, the extent to which personal and corporate assets have been comingled; whether the corporate form has been used to promote fraud or injustice; and whether there is a causal connection between the shareholder’s control and the malfeasance at issue.⁴⁹⁰ There is no uniformity concerning the quantum of proof necessary to disregard the corporate existence; courts examine the facts of each case in order to determine whether to disregard the concept of limited liability that is a “‘bedrock’ principle of corporate law.”⁴⁹¹

c. The soundest rule of law for the Virgin Islands

The soundest rule of law is to disregard corporate separateness and utilize the assets of a shareholder to satisfy a corporation’s liability, but only in those circumstances where the

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *E.g., Balbo Corp. v. Enighed Condominiums, LLC*, Civil No. ST-09-CV-399, 2011 V.I. LEXIS 11, at *5 (V.I. Super. Ct. Feb. 7, 2011) (citations omitted); *People of the Virgin Islands v. Alkhatib*, 53 V.I. 131, 136 (V.I. Super. Ct. 2010) (citations omitted).

⁴⁸⁸ *See generally Henn & Alexander*, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 344–56 (3d ed. 1988) (collecting authorities).

⁴⁸⁹ *See, e.g., Mesler v. Bragg Management Co.*, 702 P.2d 601, 606–07 (Cal. 1985) (identifying factors that indicate when a shareholder or group of shareholders has exercised sufficient domination and control over a corporation that the disregard of corporate separateness may be justified); *Morris v. State Dep’t of Taxation & Fin.*, 623 N.E.2d 1157, 1160–61 (N.Y. 1993) (same).

⁴⁹⁰ *See generally Douglas G. Smith, Piercing the Corporate Veil in Regulated Industries*, 2008 BYU L. REV. 1165, 1169–82 (2008) (collecting and summarizing authorities).

⁴⁹¹ *Id.* at 1169 (quoting *Escobedo v. BHM Health Assoc., Inc.*, 818 N.E.2d 930, 933 (Ind. 2004)).

shareholder has exercised such domination and control over the corporation that the corporation has become an alter ego of the shareholder, and where the shareholder has utilized the corporate form to perpetuate the fraud or injustice at issue in the litigation. Adopting this standard harmonizes the law of the Virgin Islands with well-established principles of corporate law while still providing equitable relief in appropriate circumstances. In determining whether a shareholder has exercised sufficient domination and control over the corporation to justify treating the corporation and the shareholder as a single entity, courts in this jurisdiction should consult the nonexclusive list of factors identified in *Matheson*, and any other factors that may be appropriate. By incorporating these factors into the Court's opinion, the Court ensures that the common law of this jurisdiction evolves in a manner that is mindful of the case law that existed before the creation of the Supreme Court of the Virgin Islands while also allowing courts the flexibility to consider the facts of each case.

By adopting this approach to piercing the corporate veil, the Court also recognizes that "the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require."⁴⁹² The corporate form should not be disregarded lightly, especially because doing so threatens a company's ability to conduct business in this Territory.⁴⁹³ The Virgin Islands, as in other jurisdictions, will respect corporate separateness unless presented with a compelling reason to disregard such a well-entrenched concept.

2. Reverse veil piercing

In the last several decades, some jurisdictions have developed a variation to the traditional corporate veil piercing doctrine known as reverse piercing.⁴⁹⁴ Jurisdictions that apply this doctrine do so in two situations.⁴⁹⁵ In the first, a dominant shareholder or other controlling insider attempts to have the corporate entity disregarded in order to avail him or herself of corporate claims against third parties, or to shield assets from claims asserted against the insider in his or her personal capacity.⁴⁹⁶ Because the party seeking to disregard corporate separateness operates from within the corporation, commentators refer to this situation as 'inside reverse piercing.' The second situation under which a reverse pierce might occur arises when a third party seeks to disregard the corporate entity in order to hold the corporation liable for the debts of a corporate insider.⁴⁹⁷ This is known as 'outside reverse piercing,' and more closely resembles the traditional concept of veil piercing. Because Plaintiffs argue that Redfield's actions are attributable to Daily News and VITELCO,⁴⁹⁸ this case may represent an example of a situation where an outside reverse pierce of the corporate veil is appropriate.

⁴⁹² *Mesler*, 702 P.2d at 607.

⁴⁹³ See Smith, *supra* note 490, at 1182–88 (discussing the costs, externalities, and other implications of veil piercing).

⁴⁹⁴ E.g., *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006) (en banc) (recognizing the concept of outside reverse piercing in the state of Colorado); *State v. Easton*, 647 N.Y.S.2d 904, 909 (N.Y. Sup. Ct. 1995) (recognizing the same concept in the state of New York). See generally, Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 CORP. L. J. 33, 34–37 (1990) (discussing the evolution of both traditional and reverse pierce claims).

⁴⁹⁵ See Crespi, *supra* note 494, at 37 (classifying reverse pierce claims as either 'inside' or 'outside' reverse piercing).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 55–56.

⁴⁹⁸ Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. In Supp. 27–29.

Despite Plaintiffs' representations, there is no binding authority in this jurisdiction that recognizes an outside reverse veil pierce as a remedy.⁴⁹⁹ Consequently, this Court must determine whether the law of this jurisdiction embraces such a remedy.⁵⁰⁰

a. Approaches taken by courts in this jurisdiction

Although there have been several cases in this Territory concerning traditional veil piercing,⁵⁰¹ no court in this Territory has addressed the concept of either inside or outside reverse veil piercing. As mentioned above, there is case law from other courts in the Third Circuit that addresses the concept of reverse piercing. However, because none of these cases concern the interpretation of Virgin Islands law, they are not relevant to this prong of the analysis.

b. Approaches taken by other jurisdictions

A growing minority of other jurisdictions have allowed the creditors of a debtor to disregard the corporate entity owned or controlled by the debtor in certain circumstances.⁵⁰² Many commonalities exist between the approaches applied by these jurisdictions. First, they all rely on

⁴⁹⁹ In a related filing, Plaintiffs have argued that three cases demonstrate the applicability of the outside reverse veil pierce to this jurisdiction: *In re DiLoreto*, 266 Fed. Appx. 140 (3d Cir. 2008); *In re Blatstein*, 192 F.3d 88 (3d Cir. 1999); and *In re Mass*, 178 B.R. 626 (M.D. Pa. 1995). None of these three cases bind this Court. Ultimately appealed to the United States Court of Appeals for the Third Circuit, *DiLoreto* was filed in the United States Bankruptcy Court for the Eastern District of Pennsylvania, and the concept of reverse piercing was approached under both Pennsylvania common law and federal law. 266 Fed. Appx. at 143. Although *DiLoreto* constitutes persuasive authority as to when a court might decide to permit a reverse pierce, neither Pennsylvania common law nor federal law represents the law of this Territory. See *Malloy v. Reyes*, S. Ct. Civ. No. 2012-0081, 2014 WL 3697332, at *5 (V.I. July 22, 2014) (stating that the Superior Court must conduct an independent analysis to determine the appropriate rule of law where the question has not been foreclosed by the Supreme Court of the Virgin Islands); *Najawicz v. People*, 58 V.I. 315, 327–28 (V.I. 2013) (observing that the Superior Court is only bound by decisions from the Third Circuit issued when the Third Circuit was sitting as the de facto court of last resort for the Virgin Islands). Importantly, in *Najawicz*, the Supreme Court of the Virgin Islands rejected the proposition that a Third Circuit case originating out of the Western District of Pennsylvania had any binding authority on the Superior Court. 58 V.I. at 327. Plaintiffs' reliance on *Blatstein* and *Mass* is similarly flawed. Like *DiLoreto*, both *Blatstein* and *Mass* originated in the bankruptcy courts of Pennsylvania. Although *Blatstein* was appealed to the Third Circuit and *Mass* to the district court, both cases approached the concept of reverse piercing under either Pennsylvania common law or federal law. Neither source of law binds this Court.

⁵⁰⁰ *Malloy*, 2014 WL 3697332, at *5.

⁵⁰¹ E.g., *Matheson v. Virgin Islands Community Bank Corp.*, 297 F. Supp. 2d 819, 833–34 (D.V.I. App. Div. 2003).

⁵⁰² E.g., *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006) (en banc); *Litchfield Asset Management Corp. v. Howell*, 799 A.2d 298, 311 (Conn. App. Ct. 2002); *Estudios, Proyectos, e Inversiones de Centro America, S.A. v. Swiss Bank Corporation (Overseas) S.A.*, 507 So.2d 1119, 1120–21 (Fla. Dist. Ct. App. 1987); *Minich v. Gem State Developers, Inc.*, 591 P.2d 1078, 1083 (Idaho 1979); *Lambert v. Farmers Bank, Frankfort, Indiana*, 519 N.E.2d 745, 747 (Ind. Ct. App. 1988); *Central Nat. Bank & Trust Co. of Des Moines v. Wagener*, 183 N.W.2d 678, 681–82 (Iowa 1971); *Dictoguard, Inc. v. Lopeo*, 948 So.2d 305, 308–09 (La. Ct. App. 2006); *Clark v. United Technologies Automotive, Inc.*, 594 N.W.2d 447, 451–53 (Mich. 1999); *Medlock v. Medlock*, 642 N.W.2d 113, 124 (Neb. 2002); *LFC Marketing Group, Inc. v. Loomis*, 8 P.3d 841, 846 (Nev. 2000); *State v. Easton*, 647 N.Y.S.2d 904, 909 (N.Y. Sup. Ct. 1995); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 516–17 (Tex. App. 2001); *C.F. Trust, Inc. v. First Flight Limited Partnership*, 580 S.E.2d 806, 810 (Va. 2003); *Olen v. Phelps*, 546 N.W.2d 176, 181 (Wis. Ct. App. 1996); *United Enterprises, Inc. v. King*, Nos. Civ. 93-1174, 94-046, 1995 WL 1943000, at *2 (N. Mar. I. 1995).

the same “alter ego” metaphor that courts apply in traditional veil piercing cases,⁵⁰³ explaining that the corporate existence will only be disregarded when the separation of the corporation and its shareholders ceases to exist. To determine whether the debtor and corporation are alter egos of each other, courts consult a nonexclusive list of factors similar to the one in *Matheson*, discussed above.⁵⁰⁴ Courts that have adopted the concept of outside reverse piercing also acknowledge that its application is only appropriate “to prevent fraud or achieve equity,”⁵⁰⁵ and that it is only appropriately applied to one who owns or controls the corporation.⁵⁰⁶

A smaller number of jurisdictions have rejected the concept of outside reverse piercing.⁵⁰⁷ These jurisdictions do not permit reverse outside piercing because the doctrine’s application can harm innocent corporate shareholders and other corporate creditors.⁵⁰⁸ Additionally, these courts recognize that there are other theories that protect judgment creditors without disturbing the corporate identity, such as agency law or vicarious liability.⁵⁰⁹ Still other jurisdictions have not considered whether it would be appropriate to apply the principle of outside reverse piercing.

⁵⁰³ E.g., *In re Phillips*, 139 P.3d at 644; *Dictoguard, Inc.*, 948 So.2d at 308, *LFC Marketing Group, Inc.*, 8 P.3d at 846.

⁵⁰⁴ See, e.g., *In re Phillips*, 139 P.3d at 644 (considering “a variety of factors, including whether (1) the corporation is operated as a distinct business entity, (2) funds and assets are commingled, (3) adequate corporate records are maintained, (4) the nature and form of the entity’s ownership and control facilitate misuse by an insider, (5) the business is thinly capitalized, (6) the corporation is used as a ‘mere shell,’ (7) shareholders disregard legal formalities, and (8) corporate funds or assets are used for noncorporate purposes”); *United Enterprises, Inc.*, 1995 WL 1943000, at *2 (considering a nonexclusive list of factors, including “undercapitalization, failure to observe corporate formalities, nonpayment of dividends, siphoning of corporate funds by dominant stockholders, nonfunctioning of other officers or directors, absence of corporate records, use of the corporation as a facade for the operations of the dominant stockholders, and use of the corporate entity in promoting injustice or fraud,” along with additional factors, such as “[w]hether the individual is in a position of control or authority over the entity; [w]hether the individual controls the entity’s actions without need to consult others; [w]hether the individual uses the entity to shield himself from personal liability; [w]hether the individual uses the business entity for his or her own financial benefit; [w]hether the individual mingles his own affairs in the affairs of the business entity; [w]hether the individual uses the business entity to assume his own debts, or the debts of another, or whether the individual uses his own funds to pay the business entity’s debts”).

⁵⁰⁵ *Easton*, 647 N.Y.S.2d at 909. See also *Estudios Proyectos*, 507 So.2d at 1120 (observing that an outside reverse pierce is warranted when a controlling shareholder attempts to “deceive or defraud his personal creditors”); *Lambert*, 519 N.E.2d at 747 (finding an outside reverse pierce appropriate when an individual attempts to use the corporate form to fraudulently shield himself); *Clark*, 594 N.W.2d at 451 (observing that equity is the touchstone of the reverse pierce analysis).

⁵⁰⁶ See, e.g., *In re Phillips*, 139 P.3d at 645 (holding that the doctrine applies to a “dominant shareholder or other corporate insider”); *Estudios Proyectos*, 507 So.2d at 1120 (applying the doctrine to “a controlling shareholder”); *Lambert*, 519 N.E.2d at 747 (applying the doctrine to one who “own[s] and control[s] the corporation”); *Dictoguard, Inc.*, 948 So.2d at 308 (applying the doctrine to “a corporate shareholder or officer”); *United Enterprises, Inc.*, 1995 WL 1943000, at *2 (stating that the doctrine applies to “a dominant stockholder”).

⁵⁰⁷ E.g., *Postal Instant Press, Inc. v. Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 102–03 (Cal. Ct. App. 2008) (California); *Acree v. McMahon*, 585 S.E.2d 873, 874 (Ga. 2003) (Georgia); *Mathias v. Rosser*, 2002 Ohio 2772, at ¶ 35 (Ohio).

⁵⁰⁸ *Postal Instant Press, Inc.*, 77 Cal. Rptr. 3d at 98.

⁵⁰⁹ *Id.* See also Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L. J. 1, 2–4 (1978) (observing that other causes of action, such as agency, fraud, estoppel, unjust enrichment, and breach of fiduciary duty, might afford a plaintiff the same relief without the necessity of disregarding the corporate existence).

c. The soundest rule of law for the Virgin Islands

The soundest rule of law for the Virgin Islands is to permit outside reverse piercing in the extremely limited circumstances where a debtor's conduct is so indistinguishable from the debtor's corporation that the debtor and the corporation are essentially the same entity, where the debtor exercised sufficient ownership or control over the corporation to perpetrate the malfeasance at issue, where the corporation was used by the debtor to perpetrate the malfeasance at issue, and where exposing the corporation to liability would not injure innocent shareholders or creditors.

Following the example set by a majority of the courts that have accepted outside reverse piercing as a method of disregarding the corporate entity, courts in the Virgin Islands should first consider the following non-exclusive list of factors to determine whether the legal separateness of the debtor and the corporation is an illusion:

1. The degree to which the corporate entity is undercapitalized;
2. The degree to which the corporation has failed to observe corporate formalities;
3. Whether and to what extent the corporation has paid dividends, if required;
4. Whether and to what extent dominant stockholders have siphoned corporate funds for personal use;
5. The presence of nonfunctioning officers or directors;
6. Whether and to what extent the corporation has kept records of its business;
7. Whether and to what extent the corporation has been used as a facade for the operations of the dominant stockholders;
8. Whether the debtor mingles his own affairs in the affairs of the corporation;
9. Whether the debtor uses the corporation to assume his or her personal debts, or the personal debts of another; and
10. Whether the debtor uses his or her own funds to pay the corporation's debts.

Once a court has made the determination that the conduct of the debtor and the corporation justifies treating them as the same entity, the court must be satisfied that the individual exercised sufficient ownership or control over the corporation such that the actions complained of by the plaintiff could actually have been orchestrated by the debtor. By adopting this approach, the Court recognizes that stock ownership is not a prerequisite for outside reverse piercing. To illustrate, a board of directors may own 100% of a corporation's stock and elect a chief executive officer to run the corporation. The board may—through lack of diligence, willful neglect, or otherwise—turn a blind eye to how the CEO chooses to run the corporation. The CEO might then proceed to operate the company in such a manner to justify treating the CEO and the company as a single entity. Under such a scenario, it may be proper to hold the corporation liable for malfeasance committed by the CEO in his personal capacity, despite the fact that the CEO did not own any stock in the corporation. However, when the debtor through whom the creditor seeks to reach does not have sufficient control or ownership to utilize the corporation as his or her instrument, it is inappropriate to impose the debtor's liability on the corporation.

Once a court has determined that the corporation and the individual can be treated as the same entity and that the debtor has sufficient control over the corporation to have perpetrated the malfeasance at issue, the court must then determine whether the particular facts of the case merit imposing liability on the corporation. Courts that adopt outside reverse piercing inquire whether the debtor attempted to use the corporation to shield themselves from liability,⁵¹⁰ to avoid a personal obligation, to perpetuate a fraud or crime, to commit an injustice, or to gain an unfair advantage.⁵¹¹ Conversely, even if the debtor and corporation can be treated as the same entity, a court should decline to disregard the corporate existence where the debtor's relationship to the corporation bears no relation to the causes of action raised in the case.

Finally, and most importantly, a Court must determine that imposing liability on the corporation will not unjustly injure innocent shareholders or other creditors. The concerns raised by the courts that have rejected outside reverse piercing are well-placed, and a court's role as an institution of equity would be seriously compromised if innocent investors and creditors were injured in order to satiate a creditor of an individual that also owns and operates a corporation.

This test imposes a very heavy burden on the party seeking to hold a corporation liable for the debts of an individual. But because a rule to the contrary may jeopardize the ability of businesses to form and operate in this Territory, an individual who seeks to disregard the corporate existence should bear such a burden.

3. *The single enterprise theory of liability*

This theory is also referenced by the Plaintiffs as one of the several avenues by which one defendant may be held liable for the tortious conduct of another.⁵¹² The "single entity theory,"⁵¹³ also termed by courts as the "entity enterprise liability theory"⁵¹⁴ and the "single business enterprise theory,"⁵¹⁵ refers to a situation where "two or more corporations share common ownership and are, in reality, operating as a corporate combine."⁵¹⁶ Under this theory—referred to herein as the single enterprise theory for the sake of consistency—"when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purpose."⁵¹⁷ No binding authority in this jurisdiction has opined on the applicability of the single enterprise theory in the Virgin Islands, and the concept of the single enterprise theory

⁵¹⁰ *Lambert*, 519 N.E.2d at 747.

⁵¹¹ *C.F. Trust, Inc. v. First Flight Limited Partnership*, 580 S.E.2d 806, 810 (Va. 2003).

⁵¹² Pls.' Resp. to Defs.' Mot. for Summ. J. and Br. In Supp. 27 n.16 (citing *Hoffmann v. Dandurand*, 180 S.W.3d 347, 348 (Tex. App. 2005)).

⁵¹³ *Miners, Inc. v. Alpine Equipment Corp.*, 722 A.2d 691, 695 (Pa. Super. Ct. 1998).

⁵¹⁴ *Id.*

⁵¹⁵ *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 452 (Tex. 2009).

⁵¹⁶ *Miners, Inc.*, 722 A.2d at 695.

⁵¹⁷ *Paramount Petroleum Corp. v. Taylor Rental Center*, 712 S.W.2d 534, 536 (Tex. App. 1986) (abrogated by *SSP Partners*, 275 S.W.3d at 453). See also *SSP Partners*, 275 S.W.3d at 453 (explaining that the Supreme Court of Texas does not suggest "that unity of enterprise alone would justify disregarding corporate structures").

has not been addressed by courts in this jurisdiction. This Court must thus determine the soundest rule of law for the Virgin Islands.⁵¹⁸

a. Approaches taken by other jurisdictions

Only a small minority of jurisdictions have adopted the single enterprise theory. In the case of *Las Palmas Associates v. Las Palmas Center Associates*,⁵¹⁹ the California Court of Appeals observed that, while alter-ego liability is reserved for a parent-subsidary relationship, the single enterprise theory allows liability to be found between sister companies.⁵²⁰ The theory looks at two or more distinct corporate personalities and determines that “there is but one enterprise,” and that the enterprise has been handled in such a way that it should respond as a whole for the debts of its component parts.⁵²¹ However, the California Court of Appeals later clarified that courts should use the same tests for determining whether to pierce the corporate veil as they would for determining whether to impose alter ego liability between affiliated corporations.⁵²²

Another jurisdiction to recognize the single enterprise theory is Louisiana. In the case of *Green v. Champion Insurance Co.*,⁵²³ the Louisiana Court of Appeals explained that, like in veil-piercing cases, courts look to a nonexclusive list of factors to determine whether a group of corporations constitute a “single business enterprise.”⁵²⁴ Once a court makes such a finding, the court “may disregard the concept of corporate separateness to extend liability to each of the affiliated corporations to prevent fraud or achieve equity.”⁵²⁵

⁵¹⁸ *Malloy v. Reyes*, S. Ct. Civ. No. 2012-0081, 2014 WL 3697332, at *5 (V.I. July 22, 2014).

⁵¹⁹ 1 Cal. Rptr. 2d 301 (Cal. Ct. App. 1991).

⁵²⁰ *Id.* at 318.

⁵²¹ *Id.*

⁵²² See *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*, 159 Cal. Rptr. 3d 469, 480 (Cal. Ct. App. 2013) (explaining that, “[i]n California, common principles apply regardless of whether the alleged alter ego is based on piercing the corporate veil to attach liability to a shareholder or to hold a corporate liable as part of a single enterprise”). See also *id.* at 480–81 (explaining that courts should consider factors such as “the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other,” but that no one factor governs and courts must consider the circumstances of each case).

⁵²³ 577 So.2d 249 (La. Ct. App. 1991).

⁵²⁴ *Id.* at 259. See also *id.* at 257–58 (listing the factors that guide a court’s inquiry into whether multiple corporations are functioning as a single business entity).

⁵²⁵ *Id.* at 259.

At least four jurisdictions explicitly reject the theory,⁵²⁶ and another four have issued opinions mentioning the of single enterprise theory without adopting it.⁵²⁷

b. The soundest rule of law for the Virgin Islands

The soundest rule of law for the Virgin Islands is to reject the adoption of the single enterprise theory. The single enterprise theory is accepted in very few jurisdictions, and has been rejected in more jurisdictions than it has been accepted. As the Supreme Court of Texas observed, “[t]here is nothing abusive or unjust” about the “sharing of names, offices, accounting, employees, services, and finances.”⁵²⁸

Criticisms of a related theory advanced by Plaintiffs in a separate filing—the theory of triangular veil piercing—are illustrative of the problems created by adopting the single entity theory. In the case of *Minno v. Pro-Fab, Inc.*,⁵²⁹ the Supreme Court of Ohio held that a corporation could not be held liable for the debts of its sister corporation due to their common ownership by a parent company. The *Minno* Court reasoned that control is a fundamental element in determining whether to disregard separate corporate personalities.⁵³⁰ The *Minno* Court then observed that a debtor corporation had no ownership interest in its sister corporation, and thus had no way of controlling the sister corporation’s actions.⁵³¹ Federal courts to address the concept of triangular piercing have similarly focused on the lack of control that one sister corporation exercises over another.⁵³² One court has observed that the concept of triangular piercing “is plainly out of

⁵²⁶ See *Hart Holding Co., Inc. v. Drexel Burnham Lamber, Inc.*, 18 DEL. J. CORP. L. 700, 718 (Del. Ch. 1992) (observing that, in the context of personal jurisdiction, the enterprise theory “certainly does not represent the law of Delaware”); *Restaurant of Hattiesburg, LLC v. Hotel & Restaurant Supply Co.*, 84 So.3d 32, 42 (Miss. Ct. App. 2012) (observing that Mississippi “has never adopted the ‘single business enterprise’ theory to justify holding affiliated LLCs jointly liable for each other’s debts”); *SSP Partners v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444, 456 (finding that the single business enterprise theory is “fundamentally inconsistent” with Texas’ approach to corporations law, and holding that the theory “will not support the imposition of one corporation’s obligations on another”); *Assisted Living Concepts, Inc. v. Siegel Gallagher, Inc.*, 2012 WI App 52, ¶ 24 n.6, 813 N.W.2d 247 (declining to adopt the single business enterprise theory without further discussion).

⁵²⁷ See *Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co.*, 627 P.2d 260, 274 (Haw. 1981) (rejecting plaintiff’s attempts to circumvent the proposition that corporations and their subsidiaries generally cannot conspire for purposes of violating the Sherman Antitrust Act because they constitute a single entity); *Wood v. McDonald’s Corporation*, 603 S.E.2d 539, 547–48 (N.C. Ct. App. 2004) (rejecting plaintiff’s attempt to disregard the corporate form based on the theory that the corporation and the owner were engaged in a joint venture); *Walkovsky v. Carlton*, 223 N.E.2d 6, 10 (N.Y. 1966) (finding that plaintiff’s complaint failed to plead facts that, if true, would permit the court to disregard the separate existence of multiple corporations all owned by the same individual); *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, 846 A.2d 1264, 1296 n.9 (Pa. Super. Ct. 2004) (observing that the single entity theory still has yet to be adopted in Pennsylvania).

⁵²⁸ *SSP Partners*, 275 S.W.3d at 454.

⁵²⁹ 2009-Ohio-1247, 905 N.E.2d 613.

⁵³⁰ *Id.* ¶ 11, at 617.

⁵³¹ *Id.* ¶ 12, at 617.

⁵³² See *S.E.C. v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003) (observing that ownership is a prerequisite to alter ego liability, and consequently rejecting the argument that that an individual need not own any part of a corporation for an alter ego relationship to exist); *Johnson v. Medisys Health Network*, No. 10-CV-1596 (ERK)(WP), 2011 WL 5222917, at *22 (E.D.N.Y. June 1, 2011) (dismissing a complaint that requested direct, reverse, and triangular piercing—without discussing these theories—because the plaintiff failed to allege how the defendants controlled the entities,

harmony with both the traditional piercing doctrine and the more novel ‘reverse piercing’ doctrine” because it disregards the corporate existence without regard to ownership or control.⁵³³

To the extent that the theories are distinct, the single enterprise theory works the same harms as the concept of triangular veil piercing by threatening to impose liability on sister corporations by virtue of ownership by a common parent corporation without a showing that one sister corporation controlled the other. At its most fundamental level, the purpose of any corporate structure is to pursue the common purpose of its owners.⁵³⁴ There are many legitimate reasons why a holding company would choose to operate through a number of subsidiaries, not the least of which is to hedge against the possibility that the business of one subsidiary might fail. The ability of entrepreneurs to manage multiple ventures through a single holding company encourages investment because it allows the entrepreneur to minimize costs while diversifying investments. But common ownership does not imply that subsidiaries exercise any degree of control over one another. A rule that permits the debtor of one entity to reach to other entities solely by virtue of common ownership and a shared business purpose discourages the use of a fundamental business strategy and, in turn, signals to potential investors that the Virgin Islands has little respect for the risks undertaken by investors. Such a result does not serve the Virgin Islands in the slightest, and mandates the rejection of the single enterprise theory of liability.

iii. Plaintiffs’ employment law theories: ‘single employer’ and ‘joint employer’ liability

Citing to the case of *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc.*,⁵³⁵ Plaintiffs refer to the theory of joint’ or ‘co-employer’ liability in employment cases.”⁵³⁶ The single employer and joint employer concepts are separate theories utilized by the National Labor Relations Board (“NLRB”) to determine for whom an individual works.⁵³⁷ Plaintiffs have provided no argument as to why this Court should apply principles utilized by the NLRB in this case, and this case does not involve disputes between any of the corporate defendants and the individually-named defendants in this case. Because these theories have no application to this case, the Court has no need to determine the extent to which the common law of the Virgin Islands embraces similar concepts.

undercapitalized the entities, or ignore the corporate formalities of the entities); *Nursing Home Consultants, Inc. v. Quantum Health Services, Inc.*, 926 F. Supp. 835, 840 n.12 (1996) (rejecting the concept of triangular piercing because it allows for the imposition of liability absent control) *aff’d*, 112 F.3d 513 (8th Cir. 1997).

⁵³³ *Nursing Home Consultants, Inc.*, 926 F. Supp. at 840 n.12.

⁵³⁴ *Accord Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771–72 (2014) (explaining that the proper use of the corporate form depends on the law of the state of incorporation, and observing that states generally permit corporations to be formed for “any lawful purpose or act”).

⁵³⁵ 691 F.3d 1117 (3d Cir. 2001).

⁵³⁶ Pls.’ Resp. to Defs.’ Mot. for Summ. J. and Br. in Supp. 27 n.16.

⁵³⁷ See 691 F.2d at 1122–23 (discussing the distinction between the theories). *Compare Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965) (providing the conceptual justifications for the single employer theory), with *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (providing the conceptual justifications for the joint employer theory).

b. Plaintiffs' allegations of conspiracy do not save their putative causes of action against Daily News and Redfield from summary judgment.

In order for the jury to consider whether either Daily News or Redfield is liable as part a civil conspiracy with the other Defendants, Plaintiffs must demonstrate the existence of genuine disputes of material fact concerning any of the following scenarios: (1) whether any of the allegedly-tortious acts committed by Daily News or Redfield were done in concert with the other Defendants pursuant to a common design; (2) whether either Daily News or Redfield knew that their co-defendant's action constituted a breach of duty and gave substantial assistance or encouragement to the co-defendant so to perform that action; or (3) whether either Daily News or Redfield gave substantial assistance to a co-defendant in accomplishing a tortious result, and the conduct of Daily News or Redfield, separately considered, constitutes a breach of duty to the Plaintiffs. The second and third scenarios each require Plaintiffs to introduce evidence of a duty and a breach of that duty. No such allegations appear anywhere in Plaintiffs' Complaint or Plaintiffs' Opposition to Daily News' Motion. Consequently, the Court confines its inquiry to the first scenario only.

Tortious conduct is a prerequisite for civil conspiracy. As discussed in analysis sections I through V above, Plaintiffs have not introduced evidence from which a reasonable jury could find either Daily News or Redfield liable for any of the tortious conduct attributed to them in Plaintiffs' Complaint or Plaintiffs' Opposition. Because no reasonable jury could reach such a conclusion, it follows that no reasonable jury could conclude that either Daily News or Redfield committed their allegedly-tortious conduct in concert with the other Defendants. Consequently, Plaintiffs' civil conspiracy allegations cannot justify holding Daily News or Redfield liable for the conduct of the remaining Defendants.

c. Plaintiffs' veil-piercing theories do not save their putative causes of action against Daily News and Redfield from summary judgment.

The traditional concept of piercing the corporate veil is utilized to impose liability on a shareholder for acts undertaken by a corporation. Here, Plaintiffs have introduced no evidence that either Daily News or Redfield owned any portion of VITELCO. To the contrary, Plaintiffs pled that VITELCO was wholly owned by ICC during the operative periods of this lawsuit. Consequently no reasonable jury could find that either Daily News or Redfield exercised sufficient control over VITELCO to justify holding either Daily News or Redfield accountable for any liability that VITELCO may incur.

Benta is being sued as an individual and not as a corporate defendant. Consequently, the theory of traditional corporate veil piercing has no bearing on the question of whether Daily News and Redfield can be held liable for Benta's alleged misconduct.

An outside reverse veil pierce is used to hold a corporation liable for the debts of one of its shareholders or controlling officers. Plaintiffs have not introduced any evidence that either VITELCO or Benta owned any portion of Daily News, or occupied a position from which they could exercise control over Daily News' operations. Rather, Plaintiffs have pled that Daily News

was owned by ICC for all relevant periods to this suit. Consequently, no reasonable jury could determine that either Daily News or Redfield exercised the necessary level of control over VITELCO to justify holding Daily News or Redfield accountable for any liability that VITELCO may incur.

Redfield is being sued as an individual, not as a corporate defendant. Consequently, the theory outside reverse corporate veil piercing has no bearing on the question of whether Redfield may be held liable for the alleged misconduct of VITELCO and Benta.

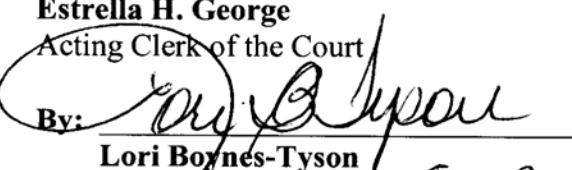
CONCLUSION

Plaintiffs have advanced a number of theories under which they contend Daily News and Redfield may be held liable. Plaintiffs have attempted to support their arguments with hundreds of pages of documents, including affidavits, entire deposition transcripts, newspaper articles, and copies of investigation reports. Despite the voluminous evidence offered in support of their positions, Plaintiffs have not demonstrated that genuine issues of material fact exist concerning any of the claims brought by Plaintiffs against either Daily News or Redfield that would justify submitting those claims to a jury. Consequently, both Daily News Publishing Co. Inc. and Lowe Davis are entitled to summary judgment in their favor on all counts of Plaintiffs' Complaint. Likewise, Redfield is entitled to summary judgment in his favor on all counts of Plaintiffs' Complaint. An appropriate order shall follow.

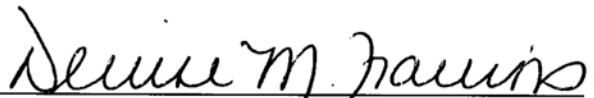
Dated: August 19, 2015

ATTEST:

Estrella H. George
Acting Clerk of the Court

By: 

Lori Boynes-Tyson
Court Clerk Supervisor 8/19/15



DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands