SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

DALE ANTONIO NIBBS, SR.	)
Plaintiff	)
vs.	) **CASE NO. ST-13-CV-520**
GOVERNMENT OF THE VIRGIN ISLANDS, THE DEPARTMENT OF PUBLIC WORKS, and VIRGIN ISLANDS WASTE MANAGEMENT AUTHORITY	)
Defendants.	)

MEMORANDUM OPINION

Pending before the Court is Defendant's June 18, 2015, Motion to Dismiss. For the following reasons, Defendant's Motion to Dismiss is denied.

FACTUAL & PROCEDURAL HISTORY

On October 4, 2013, Plaintiff Dale Antonio Nibbs, Sr., filed a Complaint against Defendants Government of the Virgin Islands ("Government") and the Department of Public Works ("DPW"), seeking damages for the injuries he sustained in an accident on November 26, 2012, when he fell through a negligently maintained, deteriorating manhole on the Sugar Estate Road. Defendants filed an Answer to Complaint on January 27, 2014.

On April 1, 2015, Defendants filed Motion for Leave to File First Amended Answer and Affirmative Defenses Based on New Information, stating that "that Government does not own nor is it responsible for the manhole which is the subject of this lawsuit" and that Plaintiff failed to join the proper party in accordance with Fed. R. Civ. P. 19 because the manhole is the responsibility of the Virgin Islands Waste Management Authority ("VIWMA").[1] Defendants explain in their Motion for Leave that "[a] visual inspection of the manhole by [DPW] in late February 2015 revealed that the manhole was not a water service line, which would be in the purview of the [DPW] but instead, a sewage manhole which is within the province of the [VIWMA]," which was confirmed by VIWMA through an inspection on March 19, 2015.[2] Defense counsel contends that she "immediately advised Plaintiff's counsel of the ownership of the manhole and agreed that none of the defenses raised by [defense counsel] advised Plaintiff that [DPW] might not be the owner of the sewage manhole."[3] In their First Amended Answer, Defendants add the defenses that the "Government does not own nor is it responsible for the maintenance of the sewer which is the subject of this litigation" and "[t]he Complaint against the Government should be dismissed since it is not the proper party to this lawsuit."[4]

Consequently, on May 29, 2015, Plaintiff filed a Motion for Leave to File First Amended Complaint, seeking to add VIWMA as a defendant. Neither party opposed the respective motions for leave to amend. On June 12, 2015, the Court granted both motions, deeming the First Amended Answer filed as of April 1, 2015 and the First Amended Complaint filed as of May 29, 2015.[5]

On June 18, 2015, Defendant, VIWMA filed this Motion and Memorandum of Law for Dismissal of Plaintiff's Complaint, arguing the First Amended Complaint is time-barred because it was filed after the two (2) year statute of limitations for personal injury actions. Plaintiff filed an Opposition on July 10, 2015, arguing the First Amended Complaint is timely because it relates

[1] Gov't and DPW's Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶ 11.
[2] Gov't and DPW's Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶¶ 10-11.
[3] Gov't and DPW's Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶ 12.
[4] Gov't and DPW's First Amend. Answer, Defenses, ¶¶ 16-17.
[5] *See* June 12, 2015, Order granting the motions and indicating that neither party submitted a proposed order granting the relief requested or addressed their failure to comply with the May 29, 2015 deadline for filing a mediation report.

back to the original, timely filed Complaint since, *inter alia*, VIWMA is an instrumentality of the Government, a defendant named in the original Complaint. VIWMA filed a Reply on July 24, 2015, arguing that VIWMA is an entity separate from the Government and the First Amended Complaint does not relate back because VIWMA did not receive the notice required under Fed. R. Civ. P. 15(c).

STANDARDS

I. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."[6] In considering a motion to dismiss, the issue is not whether the plaintiff ultimately will prevail but whether he is entitled to offer evidence to support his claims. Generally, when considering such a motion, the Court must first identify the elements of a claim and identify the items the plaintiff must sufficiently plead.[7] Thereafter, the Court can liberally construe the pleadings to the extent permitted by the pleading requirements of Fed. R. Civ. P. 8[8] and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.[9] While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation."[10] "Once the legal and factual

---

[6] FED. R. CIV. P. 12(b)(6).
[7] *Pollara v. Chateau St. Croix*, LLC, 58 V.I. 455, 458 (V.I. 2013).
[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
[9] *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) ("[I]n considering a motion to dismiss under Rule 12(b) (6), the Court must accept as true the well-pleaded allegations in the complaint . . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . .") (internal citations omitted).
[10] *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. Ct. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

allegations have been distinguished, the Court must decide whether under any reasonable reading of the complaint the plaintiff may be entitled to relief"[11] because "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"[12] such that the claim is plausible on its face. In other words, "[a] motion to dismiss a complaint should be denied if the factual allegations are 'enough to raise a right to relief above the speculative level'"[13] and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[14] Only after satisfying this multi-step analysis can a party survive a motion to dismiss.

Here, Defendant inaccurately identifies the applicable procedural rule as Fed R. Civ. P. 12(b)(1), lack of subject matter jurisdiction.[15] The statute of limitations is an affirmative defense that is "presumptively non-jurisdictional, and therefore may be waived if not timely asserted by a defendant or equitably modified by a court."[16] Thus, dismissal for the lapse of the statute of limitations should be entered pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, rather than Rule 12(b)(1) for lack of subject matter jurisdiction.[17] Therefore, the Court will construe Defendant's Motion to Dismiss as if it were brought under Rule 12(b)(6).[18]

---

[11] *Benjamin v. Esso V.I., Inc.*, 2010 V.I. LEXIS 12, 1 (V.I. Super. Ct. Mar. 16, 2010).
[12] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446).
[13] *Williams v. Seabourne V.I., Inc.*, 2010 WL 7371480, at *1 (V.I. Super. Ct. 2010) (citing *Phillips v. County of Allegheny*, 2008 WL 305025, at *6 (3d Cir. 2008)).
[14] *Twombly*, 550 U.S. at 555.
[15] Def.'s Motion and Memorandum of Law for Dismissal of Plaintiff's Complaint, p. 2.
[16] *Brady v. Cintron*, 55 V.I. 802, 817 n. 15 (V.I. 2011) (citing *Jensen v. V.I. Water & Power Auth.*, 52 V.I. 435, 442 (V.I. 2009); FED. R. CIV. P.8(c)).
[17] *Id.* (citing *See Martinez v. Colombian Emeralds*, 51 V.I. 174, 189 (V.I. 2009) (explaining that affirmative defenses arise under Rule 12(b)(6), not Rule 12(b)(1) and thus may not be raised by Superior Court *sua sponte* when time for filing motion to dismiss has lapsed)).
[18] Had Rule 12(b)(1) been the proper procedural vehicle for seeking dismissal of the First Amended Complaint, the Court would have reviewed VIWMA's motion under the standard applicable to motions to dismiss filed pursuant to Rule 12(b)(6) because VIWMA filed this Motion to Dismiss prior to answering the First Amended Complaint and

ANALYSIS

A. "RELATION BACK" UNDER FED. R. CIV. P. 15(C)(1).

This Court refers to Fed. R. Civ. P. 15(c)(1) for guidance when determining whether an amendment relates back to the original pleading because Super. Ct. R. 8, the local rule governing the amendment of pleadings, does not address the standard for the relation back of amendments.[19] The provisions set forth in Fed. R. Civ. P. 15(c)(1) "can ameliorate the running of the statute of limitations on a claim by making the amended claim relate back to the original, timely, filed complaint."[20] Fed. R. Civ. P. 15(c)(1) provides, in pertinent part, that "[a]n amendment shall relate back only when:

> . . .
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if [the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading] and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and

---

thus makes a "facial attack" on this Court's subject matter jurisdiction. A facial attack on the court's jurisdiction filed pursuant to Rule 12(b)(1) is reviewed under the same standard applicable to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *7-8 (V.I. Super. Ct. 2015) (citing *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 892 n. 17 (3d Cir. 1977) ("A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted.") (other citations omitted); *see also Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413, 417 (3d Cir. 2012) ("As the defendants had not answered and the parties had not engaged in discovery, the first motion to dismiss [for lack of subject matter jurisdiction] was facial.")).

[19] *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 275, n.11 (V.I. 2012) ("Superior Court Rule 7 provides that '[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by ... the Federal Rules of Civil Procedure.' SUPER. CT. R. 7. This Court has held, however, that, when a Superior Court rule governs the same subject matter as a federal rule, the federal rule cannot apply to Superior Court proceedings pursuant to Superior Court Rule 7 when application of the federal rule would render the Superior Court rule 'wholly superfluous.' *See Corraspe v. People*, 53 V.I. 470, 482-83 (V.I. 2010). Accordingly, pursuant to this Court's decision in *Corraspe*, Superior Court Rule 8, and not Federal Rule of Civil Procedure 15, should govern amendments to complaints, even if Superior Court Rule 8 provides a less comprehensive framework than Federal Rule of Civil Procedure 15. However, since Superior Court Rule 8 does not address the standard for the relation back of amendments, we may consider the doctrines developed under the federal rule in determining this issue.").

[20] *Id.* at 276 (citing *Singletary v. Pennsylvania Dept. of Corr.*, 266 F.3d 186, 193 (3d Cir. 2001).

> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.[21]

"Thus, Rule 15(c)(1)(C) delineates three distinct prerequisites for an amendment to relate back to the original complaint: (1) the claims in the amended complaint must arise out of the same occurrences set forth in the original complaint, (2) the party to be brought in by amendment must have received notice of the action within 120 days of its institution, and (3) the party to be brought in by amendment must have known, or should have known, that the action would have been brought against the party but for a mistake concerning its identity. Once these requirements are satisfied, Rule 15(c) instructs that the 'amendment … relates back to the date of the original pleading.'"[22] In reviewing relevant case law, it appears the relation back rule is remedial and should be liberally construed and applied.[23]

B. THE CLAIMS IN THE FIRST AMENDED COMPLAINT ARISE OUT OF THE SAME OCCURRENCES SET FORTH IN THE ORIGINAL COMPLAINT.

The first requirement of Rule 15(c)(1)(C) is clearly met here, as the First Amended Complaint arises out of the same facts set forth in the original Complaint, specifically, that Plaintiff stepped on a manhole cover that was cracked in two, which caused him to fall into the manhole and sustain injuries.[24] The pleadings differ in that the First Amended Complaint adds VIWMA as a named defendant and articulates the role of each named defendant in the accident, alleging VIWMA had "the duty to maintain the man hole [sic] because the manhole is part of its waste

---

[21] *Santiago*, 57 V.I. at 276 (citing FED. R. CIV. P. 15(c)(1)).
[22] *Id.* (citing *Arthur v. Maersk, Inc.*, 434 F.3d 196, 203 (3d Cir. 2006)).
[23] *Waterman v. Morningside Manor*, 2013 SD 78, P18 (S.D. 2013) (citing *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1300 (5th Cir. 1971); *Murthy v. Abbott Labs.*, 847 F. Supp. 2d 958, 980 (S.D. Tex. 2012); *Love v. Rancocas Hosp.*, 270 F. Supp. 2d 576, 580 (D.N.J. 2003); *Fabbiano v. Demings*, 91 So. 3d 893, 895 (Fla. Dist. Ct. App. 2012); *Dever v. Simmons*, 292 Ill. App. 3d 70, 684 N.E.2d 997, 1003, 226 Ill. Dec. 1 (Ill. App. Ct. 1997); 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1497 (3d ed. 2013)).
[24] First Amend. Compl. ¶¶ 7-9; *C.f.* Original Compl. ¶¶ 6-8.

disposal system," the DPW had the duty "to maintain the roads and sidewalks of the territory [sic]," and as "agencies and instrumentalities of Defendant [Government,] their actions or in actions [sic] are part and parcel the actions of the [Government]."[25] Since the claims in the First Amended Complaint arise out of the same occurrences set forth in the original Complaint, the controversy here rests on whether the second and third requirements of Rule 15(c)(1)(C) are satisfied.

C. FEDERAL RULE OF CIVIL PROCEDURE 15(C)(2) DOES NOT APPLY.

Plaintiff argues that it is advisable, but not necessary, to name VIWMA as a defendant when the Government is named as a defendant because, as an instrumentality of the Government, VIWMA is "part of the Government" and "[t]he amendment to the complaint only specifies the arm of Government that has added responsibility to the Plaintiff."[26] Plaintiff further contends that VIWMA is "part of the Government" because it "receives its funding from the central Government" and "appears at the Virgin Islands Legislature annually at Budget hearing [sic] to get its funding for operations."[27] While Plaintiff fails to cite any supporting authority whatsoever regarding how this proposition satisfies the requirements of the relation back rule, Plaintiff's argument is contemplated by Fed. R. Civ. P. 15(c)(2) regarding notice to the United States.

For amendments adding a United States officer or agency, Rule 15(c)(2) provides that the notice and "mistake" requirements of Rule 15(c)(1)(C) are satisfied through service of process, within the stated period, on the United States Attorney, Attorney General of the United States, or the officer or agency.[28] In adding this provision to the relation back rule, the central concern was

---

[25] First Amend. Compl. ¶¶ 13-15.
[26] *See* Pl.'s Opposition to Def.'s Motion to Dismiss, p. 4.
[27] *See* Pl.'s Opposition to Def.'s Motion to Dismiss, p. 4.
[28] Fed. R. Civ. P. 15(c)(2) ("When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General

the misnaming of government instrumentalities by private parties and the harsh consequences imposed for doing so.[29] Relation back is allowed in these situations because "the government as a whole, which is effectively the real party in interest, receives notice when the original complaint is filed, notwithstanding formal naming defects."[30] Rule 15(c)(2) is made applicable to the notice received by the Virgin Islands Government for relation back purposes through Super. Ct. R. 27, which provides that "all references to 'United States or any officer or agency of the United States' shall be read instead 'Virgin Islands or any officer or agency of the Virgin Islands.'"[31] Thus, when read together, Super. Ct. R. 27 and Rule 15(c)(2) provide that "when the Virgin Islands or a Virgin Islands officer or agency is added as a defendant by amendment, the notice [and "mistake" requirements of the relation back rule] are satisfied if, during the stated period, process was delivered or mailed to the Virgin Islands attorney or . . . to the Attorney General of the Virgin Islands, or to the officer or agency." The question here, then, is whether VIWMA is an agency of the Government so as to warrant the application of the relaxed notice standard under Rule 15(c)(2).

Under Virgin Islands law,[32] VIWMA is a non-profit government corporation functioning as an independent autonomous authority that performs solid waste and wastewater management

---

of the United States, or to the officer or agency."); *See also Goodman v. PraxAir, Inc.*, 494 F.3d 458, 474-475 (4th Cir. Md. 2007).

[29] *Goodman*, 494 F.3d at 474-475 ("The central concern when . . . [Rule 15(c)(2)] was added was the misnaming of government instrumentalities.") (citing Fed. R. Civ. P. 15 advisory committee's note (1966 amendment) ("The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States.").

[30] Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants under Federal Rule of Civil Procedure 15(c)*, 89 CAL. L. REV. 1549, 1562 (2001) (citing FED. R. CIV. P. 15 advisory committee's note (1966)).

[31] *See* SUPER. CT. R. 27(b) ("The summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure, provided, however, that reference in the said Rule to 'United Sates Marshal or Deputy United Sates Marshal' shall be read instead 'Marshal or Deputy Marshal of the Superior Court of the Virgin Islands,' and that all references to 'United States or any officer or agency of the United States' shall be read instead 'Virgin Islands or any officer or agency of the Virgin Islands.'"); *See also* SUPER. CT. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by ... the Federal Rules of Civil Procedure.").

[32] VIWMA was created on January 23, 2004 after the Virgin Island Legislature adopted Act No. 6638 and amended Title 29 of the Virgin Islands Code by adding Chapter 8, which sets forth the statutory framework for VIWMA.

services.[33] By adopting Act. No. 6638, which created VIWMA, the Legislature transferred the responsibilities related to waste water management[34] previously vested in the Government and Commissioner of Public Works to VIWMA.[35] VIWMA has the right and power to "perpetual existence as a corporation"[36] and is governed by a Board of Directors comprised of seven (7) members.[37] Significantly, 29 V.I.C. § 497(d) specifically provides that:

> [VIWMA] shall be a non-profit, independent public body politic and corporate and a governmental instrumentality subject . . . to the control of the aforementioned members [of the Board of Directors] . . . but *[VIWMA] is a corporation having legal existence and personality separate and apart from the Government and the officers controlling it.*[38]

In addition, VIWMA possesses significant autonomous powers, including the power to make, modify, and repeal bylaws, guidelines, rules, and regulations,[39] to sue and be sued in its corporate

---

[33] 29 V.I.C. § 496 (VIWMA was established to "function[ ] as a non-profit, public body corporate and politic of the Government of the Virgin Islands . . . [and] constitute[s] an autonomous instrumentality of the Government of the Virgin Islands."); *See Public Emples. Rel. Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 431, (V.I. 2012) (The Legislature created VIWMA to function as "an independent autonomous authority that would perform solid waste and wastewater management services."); *See also Chapman v. Cornwall*, 58 V.I. 431, 437-438 (V.I. 2013); 29 V.I.C. § 494(h)(2) (providing that one of the purposes chapter 8 is to "create an autonomous Virgin Islands Waste Management Authority to establish a program of regulation over the management, storage, transportation, collection, treatment and disposal of wastewater and solid waste"); *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 360, n 5 (VI. 2014) (citing 29 V.I.C. § 494).

[34] 29 V.I.C. § 496 (The stated purposes of VIWMA are "to provide environmentally sound management for the collection and disposal of solid waste, including operation and closure of landfills, and wastewater collection, transport, treatment and disposal in the Territory."); *See also United States v. Gov't of the Virgin Islands*, 2011 U.S. Dist. LEXIS 34792, *12 (D.V.I. Mar. 31, 2011) (discussing the creation of VIWMA and the associated statutory framework).

[35] 29 V.I.C. § 496(r) (VIWMA is authorized to "perform all of the functions consistent with [chapter 8] heretofore vested in the Government of the Virgin Islands and the Commissioner of Public Works."); *See United States v. Gov't of the Virgin Islands*, 2011 U.S. Dist. LEXIS 34792, at *13 ("VIWMA thus seems to have been legislatively transferred the responsibilities of the predecessor entity responsible for those functions — [the Department of] Public Works . . . [and] Act 6638 clearly contemplates that VIWMA will perform the functions related to waste water management previously carried out by the Government.").

[36] 29 V.I.C. § 496(a).

[37] 29 V.I.C. § 497(a).

[38] (*emphasis added*).

[39] 29 V.I.C. § 496(b).

name,[40] to make and execute contracts,[41] to acquire and sell property,[42] to borrow money and issue bonds,[43] to invest money,[44] and to determine rates for the use of its facilities.[45] Importantly, the Government has immunized itself from VIWMA's debts.[46]

Because the Government has immunized itself from VIWMA's debts, VIWMA is responsible for paying judgments rendered against it, and therefore, the Government is not the "real party in interest," as contemplated by Rule 15(c)(2).[47] Therefore, the relaxed standard for notice under Fed. R. Civ. P. 15(c)(2) does not apply in this case and the second and third requirements of Rule 15(c)(1)(C) must be satisfied in order for the First Amended Complaint to relate back to the timely filing of the original Complaint.

D. VIWMA RECEIVED THE REQUISITE NOTICE OF INSTITUTION OF THE ACTION AND WILL NOT BE PREJUDICED IN DEFENDING ON THE MERITS.

The second requirement of Rule 15(c)(1)(C), that the party to be brought in by amendment must have received notice of the action within 120 days of its institution [so] that it will not be prejudiced in defending on the merits,[48] has two conditions, "notice and the absence of prejudice, each of which must be satisfied."[49]

---

[40] 29 V.I.C. § 496(d).
[41] 29 V.I.C. § 496(e).
[42] 29 V.I.C. § 496(g)-(h).
[43] 29 V.I.C. § 496(i).
[44] 29 V.I.C. § 496(k).
[45] 29 V.I.C. § 496(l).
[46] 29 V.I.C. § 497(d) ("[T]he debts, obligations, assets, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, facilities and property of the [VIWMA] shall be deemed to be those of the [VIWMA] and not to be those of the Government of the Virgin Islands, or any office, bureau, department, agency, commission, municipality, branch, agent, offices or employee thereof.").
[47] *See Virgin Islands Port Auth. v. Balfour Beatty, Inc.*, 1994 U.S. Dist. LEXIS 10021, *5 (D.V.I. 1994) (When interpreting the statute applicable to the Virgin Islands Port Authority, the court found that "under 29 V.I.C. § 541(e), 'obligations' of VIPA and 'debts' incurred by VIPA are expressly deemed those of VIPA and *not* of the [Government.] Clearly, such language reflects the intent of the Virgin Islands legislature to separate and thus immunize itself from the agency's debts.").
[48] FED. R. CIV. P. 15(c)(1)(C)(ii).
[49] *Santiago*, 57 V.I. at 277 (citing *Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 458 (3d Cir. 1996)).

As to notice, Rule 15(c)(1)(C) requires that VIWMA receive notice of the action "within the period provided by Rule 4(m) for serving the summons and complaint," *e.g.* within 120 days of the filing of the original Complaint. Here, the Complaint was filed on October 4, 2013 and therefore the record must reflect that VIWMA had notice of the filing of the original Complaint on or before February 2, 2014. "For purposes of the relation back doctrine, notice can be 'actual, constructive, or imputed,'"[50] although courts vary on whether imputed notice is considered a form of constructive notice or a separate, third type of notice.[51] Notice under the relation back rule "must be more than notice of the event that gave rise to the cause of action; it must be notice that the plaintiff has instituted the action."[52]

For relation back purposes, actual notice does not require formal service of process and "may be deemed to have occurred when a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means."[53] Actual notice can also occur "where an agent receives notice, [and] that notice is imputed to the principal."[54] Constructive or imputed notice for relation back purposes may be established by two methods, the 'shared attorney' method or the 'identity of interest' method."[55] Under the shared attorney method, the plaintiff must demonstrate that there was "'some

---

[50] *Id.* (citing *Singletary*, 266 F.3d at 195).
[51] *Cavalli*, 2013 U.S. Dist. LEXIS 55405, at *7-8 (collecting cases).
[52] *Lockhart v. Treasure Bay V.I. Corp.*, 2015 V.I. LEXIS 101, *10 (V.I. Super. Ct. 2015) (citing *Singletary*, 266 F.3d at 194).
[53] *Id.* (quoting *Singletary*, 266 F.3d at 195); *See also Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175 (3d Cir. V.I. 1977) (holding that the person plaintiff sought to add as a defendant had actual notice because he saw a copy of the complaint naming as defendants both the place where he worked and "an unknown employee," which he knew referred to him).
[54] *Buchanan v. Reliance Ins. Co.* (In re Color Tile, Inc.), 475 F.3d 508, 513 (3d Cir. Del. 2007) (collecting cases) ("Imputing knowledge from an agent to a principal must be analyzed according to principles of actual notice rather than constructive/imputed notice.")..
[55] *Id.* at *8 (citing *Miller v. Hassinger*, 173 Fed. Appx. 948, 956 (3d Cir. Pa. 2006) (per curiam) (other citations omitted)).

communication or relationship' between the attorney for the named defendants and the parties sought to be added as defendants prior to the expiration of the 120-day period for service of the summons and complaint."[56] "The identity of interest method requires the plaintiff to demonstrate that the circumstances surrounding the filing of the lawsuit permit the inference the notice was actually received by the parties sought to be added as defendants during the relevant time period."[57]

Of particular relevance to this case is the "identity of interest" method for imputing notice between entities. "Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other."[58] In applying the "identity of interest" method, courts have found corporate entities to be sufficiently related to impute notice for relation back purposes when an already named defendant and the "new" defendant share organizers, officers, directors, and office space.[59] In the employment context, courts have found a sufficient nexus of interests to impute notice from an employee to an organization when the employee is "highly . . . placed in the [organization's] hierarchy"[60] because he or she "is responsible in many ways for the well-being of the organization . . .[and t]hus, a court may presume that the higher-up is knowledgeable about business affecting the entire organization."[61] When the case involves a non-management

[56] *Miller*, 173 Fed. Appx. at 956 (citing *Singletary*, 266 F.3d at 196-197) (other citation omitted)).
[57] *Id.* (citing *Singletary*, 266 F.3d at 197-200) (other citation omitted)).
[58] *Singletary*, 266 F.3d at 193 (quoting 6A Charles Alan Wright et al., Federal Practice & Procedure § 1499, at 146 (2d ed. 1990)).
[59] *Allbrand Appliance & Television Co., Inc. v. Caloric Corp.*, 875 F.2d 1021, 1025 (2d Cir. 1989)).
[60] *Garvin, supra*, 354 F.3d at 227 (citing *Singletary, supra*, 266 F.3d at 200).
[61] *Id.* (citing *Singletary, supra*, 266 F.3d at 199); *Lindley v. Taylor*, 2015 U.S. Dist. LEXIS 35475, *22-23 (N.D. Ala. Mar. 23, 2015) ("When a sheriff's office is sued, the sheriff himself shares an "identity of interest" with his office such that notice of the suit passes interchangeably between them . . . That is not so easily said of non-management employees, who, while certainly having some general stake in the well-being of the organization, are not necessarily looking out for any interest other than their own. So while the sheriff must share an identity of interest with the sheriff's

employee, courts have declined to impute notice to the organization "absent other circumstances that permit the inference that notice was actually received." With respect to government entities, courts have declined to find an identity of interest for relation back purposes when the entities have distinct and separate legal identities.[62]

A review of VIWMA's statutory framework reveals that imputation of notice under the "identity of interest" method should be allowed in this case because VIWMA and the Government share a sufficient nexus of interests in the litigation. First, the Legislature specifically made the provisions of the Virgin Islands Tort Claims Act[63] ("VITCA") applicable to VIWMA.[64] "The Revised Organic Act grants sovereign immunity to the Government of the Virgin Islands for tort claims, providing "that no tort action shall be brought against the Government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature."[65] "The Virgin Islands has waived the immunity for certain torts as provided in the VITCA."[66] "Specifically, the Government's immunity is waived under the VITCA 'with respect to injury or loss of property or personal injury or death caused by the negligent or wrongful act or

office, a brand new deputy, one of fifty, say, does not share that same identity with the office of the sheriff, *or an identity with any other fellow deputy*.") (citing *Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980)).

[62] *See Otchy v. City of Elizabeth Bd. of Educ.*, 325 N.J. Super. 98, 108-109 (App. Div. 1999) ("[T]he City and the [School] Board are two distinct legal entities . . . Thus, plaintiffs have failed to demonstrate a sufficient identity of interest in this litigation between the two entities to infer knowledge of the action by the [School] Board, and therefore lack of prejudice cannot be assumed.").

[63] The statutory scheme for the VITCA is set forth in 33 V.I.C. 3401, *et seq.*

[64] 29 V.I.C. § 496(d) (VIWMA has the power and right "to sue and be sued in its corporate name; and its directors, officers, and employees shall be immune from tort liability for acts and omissions constituting the exercise of their official functions to the extent provided by Title 33, Chapter 118, of the Virgin Islands Code."); 29 V.I.C. § 497(d) ("The Board and its individual members, and the officers, agents or employees of the [VIWMA] shall not incur civil liability for any action taken in good faith in the performance of their duties and responsibilities pursuant to [chapter 8]").

[65] *Cyprian v. Butcher*, 2010 V.I. LEXIS 30, *13 (V.I. Super. Ct. 2010) (citing *Commissioner of Dept. of Planning and Natural Resources v Century Alumina Co., LLC*, 2010 U.S. Dist. LEXIS 866, *7, [WL] (D.V.I. Jan. 5, 2010) (citing 48 U.S.C. § 1541(b)).

[66] *Id.* (citing 33 V.I.C. § 3401 *et seq.*).

omission of an employee[67] of . . . [the Government] while acting within the scope of his office or employment."[68] The waiver of the Government's immunity for tort claims is not without limitation, however, as Virgin Islands courts do not have subject matter jurisdiction to adjudicate tort claims against the Government unless the prospective plaintiff complies with the procedural requirements of the VITCA.[69] Thus, the Government does not waive its sovereign immunity unless the plaintiff complies with the procedural requirements of the VITCA.

Importantly, this Court has found that the protections afforded by the VITCA do not extend to independent instrumentalities of the Government, such as VIWMA, because they are excluded from the VITCA's definition of "Government"[70] to which the VITCA applies.[71][72] As such, this

---

[67] 33 V.I.C. § 3401 (VITCA defines "Employee of the Government" as "elected or appointed officials, employees, members of Governing Boards and Commissions and other persons acting on behalf of the Government of the United States Virgin Islands.").

[68] *Id.* (citing *Century Alumina Co., LLC*, 2010 U.S. Dist. LEXIS 866, at *7 (citing 33 V.I.C. § 3408(a)) (internal quotation marks omitted).

[69] *James-St. Jules, supra,* 2015 V.I. LEXIS 74, at *15-16, 19 (citing *Richardson v. Knud Hansen Mem'l Hosp.*, 744 F.2d 1007, 1010 (3d Cir. 1984) ("The Third Circuit Court of Appeals and other Virgin Islands courts, however, have expressly held that a plaintiff's failure to comply with the procedural requirements of the VITCA precludes a court from exercising subject matter jurisdiction over such claims . . . Because a decision of the Third Circuit rendered in its capacity as the "de facto court of last resort in the Virgin Islands" is binding on the Superior Court, *see In re People of the Virgin Islands*, 51 V.I. 374, 389 n.9 (V.I. 2009), this Court is bound by the Third Circuit's decision in *Richardson* ruling that the provisions of the VITCA are jurisdictional").

[70] 33 V.I.C. § 3401 (*emphasis added*) (VITCA defines the "Government of the Virgin Islands" as "the executive, legislative, and judicial branches of the Government of the Virgin Islands, *agencies and instrumentalities of the Government of the Virgin Islands*, and Governing Boards and Commissions of the Government of the Virgin Islands, including but not limited to the Virgin Islands Government Hospitals and Health Facilities Corporation, but does not include any contractor with the Government of the Virgin Islands.").

[71] *Cyprian v. Butcher*, 2010 V.I. LEXIS 30, at *17-18 ("[T]he Legislature . . . when referring in title 33, section 3401 to "agencies and instrumentalities of the Government of the Virgin Islands" does not construe such as automatically extending VITCA's protections to *independent instrumentalities in general* . . . [T]he Legislature after exercising very cautious efforts in 1980 to narrowly restrict WAPA's as well as other independent instrumentalities' broad exemption from the applicability of other inconsistent laws to strictly those instances where the law is made "*generally applicable to independent instrumentalities of the Government of the Virgin Islands*" obviously cannot be found now to logically or reasonably construe the much broader term of *agencies and instrumentalities of the Government of the Virgin Islands* " as including *independent instrumentalities*.") (citing 1980 V.I. Sess. 12 (Act 4407)); *See also Petersen v. V.I. Water & Power Auth.*, 2009 V.I. LEXIS 20, *10 (V.I. Super. Ct. Oct. 16, 2009).

[72] This conclusion is partly based on the provision in many independent instrumentalities' charters, which provide that only laws that explicitly state they apply to the independent instrumentality are deemed applicable to it. *Petersen, supra,* 2009 V.I. LEXIS 20, *6-7 (interpreting the applicable laws provision for WAPA, 30 V.I.C. § 122, which provides WAPA is not exempt "from any law made specifically applicable thereto or generally applicable to independent instrumentalities of the Government of the Virgin Islands," as meaning "only laws that explicitly state

Court has found that, unless the Legislature specifies otherwise, independent instrumentalities of the government are not entitled to sovereign immunity.[73] Unlike similarly structured government corporations such as the Virgin Islands Water and Power Authority and the Virgin Islands Port Authority,[74] the Legislature expressly made the provisions of the VITCA applicable to VIWMA.[75] In doing so, the Legislature granted VIWMA the same protections as government agencies that are considered the "arms" or "alter-egos" of the Government for Eleventh Amendment purposes.[76] In addition, 29 V.I.C. § 496(d) does not state that VIWMA has the *exclusive* power to sue and be sued. Rather, it states VIWMA has the power "to sue and be sued in its corporate name" with the limitation that its directors, officers, and employees are immune from tort liability in the same manner in which the Government has sovereign immunity pursuant to the VITCA.[77] Although VIWMA, rather than the Government, is responsible for indemnifying its employees for costs incurred with claims, lawsuits, and legal actions for which they are immune or which result from

---

they apply to WAPA are deemed applicable to it") (citations omitted); 29 V.I.C. § 578 (VIPA's applicability of laws provision); 29 V.I.C. § 500n (VIWMA's applicability of laws provision).

[73] *Peterson*, 2009 V.I. LEXIS 20, at *10 ("As a distinct and separate corporate entity, WAPA does not enjoy the privilege of sovereign immunity and Plaintiff's failure to comply with the notice provisions of the [VITCA] does not deprive this Court of subject matter jurisdiction.").

[74] *See Bovoni Investments, LLC, supra*, 61 V.I. at 360 ("[VIWMA] is a government corporation, independent of the Government of the Virgin Islands and similar in structure to the Virgin Islands Water and Power Authority and the Virgin Islands Port Authority.") (citing 29 V.I.C. § 494).

[75] 29 V.I.C. §§ 496(d), 497(d).

[76] *See Peterson*, 2009 V.I. LEXIS 20, at *4-5 (referring to the Third Circuit's test for determining whether an entity is an arm or "alter ego" of the Government for Eleventh Amendment purposes set forth in *Febres v. The Camden Board of Education*, 445 F.3d 227, 229 (3d Cir. 2005), and *Urbano v. Bd of Managers*, 415 F.2d 247, 250-251 (3d Cir. 1969)).

[77] 29 V.I.C. § 496(d) (VIWMA has the power and right "to sue and be sued in its corporate name; and its directors, officers, and employees shall be immune from tort liability for acts and omissions constituting the exercise of their official functions to the extent provided by Title 33, Chapter 118, of the Virgin Islands Code."); *See Titan Med. Group v. Governor Juan F. Luis Hosp. & Med. Ctr.*, 2015 V.I. LEXIS 79, *9 (V.I. Super. Ct. 2015) (Finding 19 V.I.C. § 244(a), which states the public entity, Virgin Islands Hospitals and Health Facilities Corporation ("VIHHFC"), may "sue and be sued subject to the limitations and requirements of existing law applicable to the Government of the Virgin Islands . . . " e.g. the VITCA, "does not state that VIHHFC has the *exclusive* power to sue and be sued on behalf of the Hospital" and ultimately concluding that VIHHFC was not an indispensable party in addition to or in the place of the Government.).

their official actions, this does not negate the fact that VIWMA is afforded protection under VITCA, like the Government and its agencies.[78]

Second, all seven (7) members of VIWMA's Board of Directors are appointed by the Governor.[79] The Governor appoints the three (3) governmental members from departments and/or agencies of the Government, *with one being the Commissioner of the Department of Works*, and appoints the remaining four (4) non-governmental members with the advice and consent of the Legislature and who may be removed only for cause by the Governor.[80] Third, the Virgin Islands Legislature explicitly grants VIWMA the power of eminent domain as a mechanism of acquiring property.[81] Fourth, VIWMA is exempt from judicial process and taxes.[82] Fifth, VIWMA is a considered a "public employer" for purposes of labor relations.[83] In light of the foregoing factors,[84]

---

[78] 29 V.I.C. § 497(d) ("The [VIWMA] shall indemnify all Board members and the officers, agents and employees of the Authority for any costs incurred in connection with any claim for which they enjoy immunity hereunder and in connection with any lawsuits or other legal actions brought against such Board members, officers, agents, and employees as a result of their official actions; except, that no indemnification shall be provided to any person who is found to have acted contrary to federal or local law."). Nor does the fact that 29 V.I.C. § 496(x) authorizes VIWMA to purchase insurance against loss, including civil liability insurance for its Board members, officers, agents, and employees negate such a conclusion.

[79] 29 V.I.C. § 497(a).

[80] 29 V.I.C. § 497(a)-(b) (*emphasis added*).

[81] 29 V.I.C. § 496(g) (VIWMA has the power and right to "acquire property . . . deemed by it to be necessary or desirable for carrying out the purposes of this Authority . . . by any lawful means, including but not limited to the exercise of the power of eminent domain."). *C.f. Balfour Beatty, Inc., supra*, 1994 U.S. Dist. LEXIS 10021, at *6 (The court found the Legislature's denial of VIPA's power of eminent domain as a mechanism of acquiring property supported a finding that VIPA was not the alter-ego of the Government of the Virgin Islands).

[82] 29 V.I.C. § 500(e).

[83] *Chapman, supra*, 58 V.I. at 443 ("Pursuant to [29 V.I.C. § 496(a)], the section creating VIWMA, '[t]he Authority shall constitute an autonomous instrumentality of the Government of the Virgin Islands.' . . . Thus, as VIWMA is a public employer under [24 V.I.C. § 362], it is expressly exempt from application of the Virgin Islands Wrongful Discharge Act.") (citations omitted).

[84] Courts have found these factors weigh in favor of a finding that a government corporation is the "arm" or "alter-ego" of the Government so as to enjoy sovereign immunity for Eleventh Amendment purposes, which, while inapplicable to the analysis at hand, is helpful in analyzing the relationship of VIWMA and the Government in the relation back context. *See Balfour Beatty, Inc.*, 1994 U.S. Dist. LEXIS 10021, at *3-9 (Analysis as to whether VIPA is an arm or "alter-ego" of the Government so as to enjoy sovereign immunity for Eleventh Amendment purposes); *See also Peterson*, 2009 V.I. LEXIS 20 (Analysis as to whether WAPA is an arm or "alter-ego" of the Government so as to enjoy sovereign immunity for Eleventh Amendment purposes).

the Court finds the legal identity of VIWMA is not so separate and distinct from the Government to preclude an application of the "identity of interest" method in this case.

Further, circumstances in this case indicate that VIWMA actually received notice of the institution of the action.[85] Like all corporations, VIWMA "is not a sentient being and, therefore, cannot know, be aware of, or discover anything except through the agency of its employees," such as its officers and directors.[86] The Commissioner of Public Works serves as a member of VIWMA's Board of Directors[87] and was served with a copy of the original Complaint on October 9, 2013, five (5) days after it was filed. Thus, the Commissioner of Public Works, a member of VIWMA's Board of Directors, received actual notice of the action well within 120 days of the filing of the original Complaint and, moreover, well before the expiration of the statute of limitations for the personal injury action on November 26, 2014.[88] In addition, the management role of the Commissioner of Public Works in the VIWMA further indicates the Government and VIWMA have a sufficient nexus of interests in the litigation to permit the imputation of notice to VIWMA. In light of the underlying policy that the relation back rule is remedial in nature, the Court finds that the facts of this case support the conclusion the notification to the Government and the Commissioner of Public Works constituted notification to the VIWMA.

The Court further finds that VIWMA will not be prejudiced in defending on the merits. "Since the effect of Rule 15(c) is to avoid the impact of the statute of limitations, the sufficiency of the notice must be evaluated in light of the policy objectives of the statute of limitations, i.e., to

---

[85] Neither party addresses this point in their pleadings.
[86] 18B AM. JUR. 2d Corporations § 1413 (2015).
[87] 29 V.I.C. § 497(a).
[88] *Der Weer v. Hess Oil Virgin Island Corp.*, 61 V.I. 87, 116 (V.I. Super. Ct. 2014) (citing 5 V.I.C. § 31(5)(A)) (Stating that in personal injury cases filed in the Virgin Islands the injured person has two (2) years from the date of injury to file a lawsuit).

avoid undue surprise, to permit investigation and collection of evidence while it is fresh and other similar considerations . . . [which] are intimately related to the requirement that the notice be such that the party to be brought in will not be prejudiced in defending on the merits."[89] Thus, "the 'prejudice' to which [Rule 15(c)(1)(C)] refers is that suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale."[90] Here, lack of prejudice is assumed because the notice of the institution of the action against the Government is imputed to VIWMA. Moreover, even assuming, *arguendo*, that the Government's notice is not imputed to VIWMA, VIWMA had upwards of one (1) year from the date its Board member, the Commissioner of Public Works, received actual notice of the action to contact its attorney and "take steps to investigate the claim, including collecting and preserving evidence against any foreseeable eventuality."[91] Accordingly, the second requirement of Fed. R. Civ. P. 15(c)(1)(C) is satisfied.

E. VIWMA SHOULD HAVE KNOWN THAT THE ORIGINAL COMPLAINT WOULD HAVE BEEN BROUGHT AGAINST IT BUT FOR A MISTAKE CONCERNING ITS IDENTITY.

The third and final requirement of Rule 15(c)(1)(C) is that "the party to be brought in by amendment must have known, or should have known, that the action would have been brought against the party but for a mistake concerning its identity."[92] The proper inquiry under this prong

---

[89] *Kirk, supra,* 629 F.2d at 408 (citing Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83 (1972)).
[90] *Cavalli v. Port of $ale, Inc.*, 2013 U.S. Dist. LEXIS 55405, *7 (D.V.I. Apr. 18, 2013) (citing *Garvin v. City of Philadelphia*, 354 F.3d 215, 222 n. 6 (3d Cir. Pa. 2003)).
[91] *See Kirk*, 629 F.2d at 408; *See also Waterman v. Morningside Manor*, 2013 SD 78, P18 (S.D. 2013) ("Underlying the rule is the view that 'a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.' . . . Thus, when the opposing party, standing in the place of a reasonably prudent person, should have been able to anticipate or should have expected the original claim to be altered or expected that aspects of the occurrence set forth in the original pleading would be called into question, that party should not have the protection of the statute of limitations.") (citations omitted) (internal quotation marks omitted).
[92] FED. R. CIV. P. 15(c)(1)(C)(ii).

is "whether [the defendant named in the amended complaint] knew or should have known that it would have been named as a defendant but for an error."[93] Notably, the "mistake" requirement of Rule 15(c)(1)(C) "asks what the prospective defendant knew or should have known during the Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing her original complaint."[94] Thus, a plaintiff's knowledge of a party's existence does not automatically equate to absence of mistake.[95] However, "[w]hen the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity," the "mistake" requirement of Rule 15(c)(1)(C) is not met.[96]

In *Krupski v. Costa Crociere S. p. A.*,[97] the United States Supreme Court considered a variety of factors when determining whether the prospective defendant knew or should of known that it would have been named as a defendant but for an error, including:

> (1) that the defendant in the original complaint and the defendant named in the amended complaint were represented by the same attorney; (2) the trial court's uncontested finding that the defendant named in the amended complaint had constructive notice of the complaint within the period specified by Rule 4(m); (3) the clarity of the complaint, which indicated that the plaintiff intended to sue . . . [a defendant] that bore certain specified responsibilities; (4) the misunderstanding, concerning the identity of the proper defendant, that was apparent on the face of the complaint; (5) the information . . . communicated to the plaintiff which would be relevant in determining the identity of the proper party to name as a defendant in a lawsuit; (6) the strategy that plaintiff may have been pursuing by suing the defendant named in the original complaint; (7) that the entities were related and had similar names; (8) the contribution to . . . confusion concerning the identity of the proper party to be named as a defendant; and (9) the awareness of the defendant named in the amended complaint concerning the confusion between its name and that of the defendant named in the original complaint.[98]

---

[93] *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2493, 117 L. Ed. 2d 48 (U.S. 2010).
[94] *Id.*
[95] *Id.* at 2494.
[96] *Id.* at 2496.
[97] 560 U.S. 538, 130 S. Ct. 2485, 117 L. Ed. 2d 48 (U.S. 2010).
[98] *Santiago*, 57 at 303-304 (Swan, J., concurring) (citing *Krupski,* 130 S. Ct. at 2491, 2497-98).

In applying the *Krupski* factors here, the Court concludes that the First Amended Complaint relates back to the date the original Complaint was filed. The first factor weighs against this conclusion, in that the originally named defendants and VIWMA are not represented by the same attorney. However, the second factor weighs in favor of relation back because, as discussed, the Government's notice is imputed to VIWMA. As to the third and fourth factors, the original Complaint clearly indicates that Plaintiff intended to sue the entity that was responsible for maintaining the manhole, which Plaintiff misunderstood to be DPW and/or the Government.[99] The record indicates a potential source of confusion in the government entity responsible for maintaining the manhole, in that "water service line manhole[s]" remain in the purview of DPW, while "sewage manhole[s]" are within "the province of the [VIWMA]."[100] Fifth, this information was not communicated to Plaintiff's counsel until after the statute of limitations had run and defense counsel for the Government and DPW has conceded that "none of the defenses raised . . . advised Plaintiff that [DPW] might not be the owner of the sewage manhole."[101]

The sixth factor involves the strategy that plaintiff may have been pursuing by suing the defendant named in the original complaint. "Where there is a basis for the plaintiff to assert liability against the party or parties named in a complaint and there is no reason for another party to believe that the plaintiff did anything other than make a deliberate choice between potential defendants, courts have consistently held that the . . . ['mistake' requirement of Rule 15(c)(1)(C)] is not met."[102] Here, the original Complaint alleges DPW is liable for breaching its duties to maintain the public sidewalk and roads, including the manhole cover,[103] while the First Amended Complaint

---

[99] *See* Original Compl., ¶¶ 9-13.
[100] *See* Gov't and DPW's Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶ 10.
[101] *See* Def.'s Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶ 12.
[102] *Slater v. Skyhawk Transp., Inc.*, 187 F.R.D. 185, 196 (D.N.J. 1999) (citations omitted).
[103] Original Compl. ¶¶ 12-13.

continues to allege DPW is liable for failing to maintain the public sidewalk and roads, but asserts VIWMA also owed the duty to maintain the manhole cover.[104] While it is a close call, in construing the well-pleaded allegations in favor of Plaintiff, the Court finds that VIWMA had reason to believe Plaintiff's failure to name it as an original defendant was not deliberate, given that Plaintiff alleges to have fallen in the cracked manhole[105] and VIWMA is responsible for maintaining sewage manholes.[106]

Seventh, while DPW and VIWMA do not have similar names, they perform related governmental functions in that the subject services performed by VIWMA originally fell within the responsibility of DPW. DPW is a department of the Government of the Virgin Islands headed by the Commissioner of the DPW, whose functions include, *inter alia*, "participat[ing] in the planning of, supervise the construction of, and repair and maintain, all government buildings and grounds, public roads, highways, seawalls, wharves, seaways, public recreation areas, airports, and properties of like character" and "repair[ing] and maintain[ing] *other government-owned public utilities*, and recommend methods for their maintenance."[107] VIWMA, whose Board of Directors includes the Commissioner of Public Works, provides "environmentally sound management for the collection and disposal of solid waste, including operation and closure of landfills, and wastewater collection, transport, treatment and disposal in the Territory,"[108]

---

[104] First Amend. Compl. ¶¶ 13-15.
[105] Original Compl. ¶¶ 6-7.
[106] *See* 29 V.I.C. § 496(r) (VIWMA is authorized to "perform all of the functions consistent with [chapter 8] heretofore vested in the Government of the Virgin Islands and the Commissioner of Public Works.");
[107] 31 V.I.C. § 1(a)(1)-(2). (*emphasis added*).
[108] 29 V.I.C. § 496; *See United States v. Gov't of the Virgin Islands*, 2011 U.S. Dist. LEXIS 34792, *12 (D.V.I. Mar. 31, 2011) (discussing the creation of VIWMA and the associated statutory framework).

functions that were previously performed by DPW.[109] Eighth, the record indicates the confusion regarding the identity of the entity responsible for maintaining the manhole may have been caused by original defense counsel's failure to communicate that DPW may not be the owner of the manhole.[110] Ninth, it is conceivable that VIWMA knew or should have known, through the knowledge of the Commissioner of Public Works, a member of its Board of Directors, that VIWMA should have been named in the original Complaint as the instrumentality of the Government responsible for sewage manholes.

In light of the foregoing, the Court finds the *Krupski* factors weigh in favor of a finding that VIWMA knew, or should have known, that it would have been named as a defendant in the original Complaint, had Plaintiff properly identified the government entity responsible for maintaining the subject manhole. Thus, Plaintiff's "mistake" was misidentifying DPW as the governmental entity responsible for the manhole. Even if the mistake is construed as Plaintiff's lack of knowledge, rather than misidentification, the procedural history of this case supports a finding of mistake. Although the statute of limitations for Plaintiff's personal injury action did not expire until November 26, 2014, Plaintiff filed the Complaint on October 4, 2013, and served copies of it on the Government and DPW on October 9, 2013. The original Defendants had over one (1) year to properly raise the defense and communicate to Plaintiff that DPW might not be the owner of the subject manhole before the statute of limitations would expire, yet failed, or purposely chose not, to do so.[111] The Court finds the only reasonable explanation in failing to name VIWMA

[109] *United States v. Gov't of the Virgin Islands*, 2011 U.S. Dist. LEXIS 34792, at *12-13 (citing 29 V.I.C. § 496(r)) (VIWMA is authorized to "perform all of the functions consistent with [chapter 8] heretofore vested in the Government of the Virgin Islands and the Commissioner of Public Works.").
[110] *See* Gov't and DPW's Motion for Leave to File First Amended Answer and Affirmative Defenses, ¶¶ 10, 12.
[111] *See Brink v. First Credit Resources*, 57 F. Supp. 2d 848, 857 (D. Ariz. 1999) ("'[T]he mistake concerning ... identity' requirement may be satisfied when the plaintiff was unaware of the new defendant's identity at the time the

in the original Complaint is that Plaintiff made a mistake as to the proper party, which was not corrected until after the expiration of the statute of limitations.[112]

Accordingly, the third requirement of Fed. R. Civ. P. 15(c)(1)(C) is also satisfied, and the Court finds the First Amended Complaint relates back to the timely filed original Complaint.

CONCLUSION

For the foregoing reasons, Defendant's June 18, 2015, Motion to Dismiss is denied. An Order consistent with this Opinion shall follow.

Dated: September 30, 2015

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

ATTEST: Estrella George
Acting Clerk of Court __/__/__
by: ________
Lori Boynes-Tyson
Court Clerk Supervisor 10/1/15

complaint was filed and learns the identity of the new defendant only after the statute of limitations has expired because the named defendant failed to provide the information sooner.").

[112] *See Arthur, supra,* 434 F.3d at 208 (citations omitted) (Finding "mistake" for relation back purposes when "[t]he original complaint did not name the United States as a party, even though it would have been in Arthur's interest to do so. The answers to the complaint did not indicate that the United States owned the ships, and the companies did not allege that the United States was the proper defendant until October 2002. Documentary support for this assertion was not forthcoming for another two months, at which time Arthur sought additional discovery to support his claim against the United States. The only reasonable conclusion that can be gleaned from the record is that Arthur made a mistake as to the proper party when he filed the original complaint and that this mistake was not finally corrected until December 2002, after expiration of the statute of limitations.").