FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS,	)	**CASE NO. SX-16-CV-700**
	)	**COMPLEX LITIGATION DIVISION**
Plaintiff,	)	
v.	)	
THE SERVICEMASTER COMPANY, LLC; THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP; and TERMINIX INTERNATIONAL USVI, LLC,	)	
Defendants.	)	

Cite as: 2019 VI Super 164

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MEMORANDUM OPINION

MOLLOY, *Judge.*

¶1 **BEFORE THE COURT** is a motion filed by the ServiceMaster Company, LLC ("ServiceMaster"), the Terminix International Company Limited Partnership ("Terminix LP"), and Terminix International USVI, LLC ("Terminix USVI") (collectively "Defendants") to dismiss for lack of subject matter jurisdiction and for failure to state a claim for relief. The Plaintiff, Government of the Virgin Islands ("Government" or "Plaintiff"), opposes dismissal. For the reasons stated below, the Court will grant the motion in part as to the portion of the Unfair Trade Practices claim (Count I) that seeks damages because the Superior Court has appellate jurisdiction over monetary fines imposed by the Commissioner of the Department of Licensing and Consumer Affairs. Otherwise, the motion to dismiss the remaining claims for lack of subject matter jurisdiction and for failure to state a claim for relief will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 According to the complaint, which the Court takes as true at this stage, the Defendants, whom the Government refers to collectively as Terminix in its complaint, "regularly provided fumigation services using methyl bromide—a highly toxic pesticide that is banned for indoor use precisely because it is so toxic—in residences and for other unauthorized uses all across the Virgin Islands." (Compl. ¶ 1, filed Feb. 15, 2017.[1]) "Not only was Terminix using methyl bromide where it should not have been—in homes and indoors—but Terminix personnel had no idea how to use it," *id.* ¶ 2, the Government claims. Furthermore, "[s]enior safety managers and directors at Terminix LP knew for years that Terminix personnel on the Virgin Islands lacked proper training and basic equipment to fumigate using methyl bromide." *Id.* The Government further alleges that

> Terminix flouted Virgin Islands pesticide laws and marketed, sold, and provided fumigation services using methyl bromide by concealing and misrepresenting critical information—including, in many cases, that it was using methyl bromide at all. Terminix also failed to disclose that it was using the pesticide illegally in residences and otherwise contrary to the manufacturer's label; that the chemical is highly toxic and can cause paralysis and death; and that Terminix lacked training and equipment to fumigate safely. Terminix also deceptively advertised its products, including

[1] The compliant the Government initially filed, on December 16, 2016, inadvertently omitted a page. Accordingly, the Government, gave notice of the missing page on February 15, 2017, and filed a corrected complaint. The Defendants have not objected and filed their motions to dismiss the corrected complaint. Thus, it is the operative pleading.

> methyl bromide, as environmentally friendly and promised that they would "protect our beautiful island."

Id. ¶ 3. The Defendants further "collude[ed] with its distributor, Superior Angran, a Puerto Rico company, to import pesticides containing methyl bromide illegally into the Virgin Islands," which allowed Terminix to "keep purchasing and, therefore, keep selling fumigation services using methyl bromide for unlawful uses in the Virgin Islands." *Id.* ¶ 4.

¶3 The Court (Meade, J.) gave additional details, and the procedural background of this case, in a September 26, 2018 Opinion:

> This lawsuit arose after Terminix USVI provided fumigation services in March 2015 at the Sirenusa Resort on St. John, U.S. Virgin Islands. Methyl bromide was used and a family of four vacationing from Delaware was transported to a hospital "with catastrophic injuries." Symptoms "included neurologic impairment consistent with acute methyl bromide toxicity." After the incident, the Virgin Islands Department of Planning and Natural Resources ("DPNR") determined that "Terminix's use of methyl bromide in residential structures was not approved and that Terminix did not apply or store methyl bromide properly, as required by its approved label." DPNR issued a stop-use order to Terminix USVI regarding the use of methyl bromide in the Virgin Islands.
>
> The Government commenced this civil action in the Superior Court of the Virgin Islands on December 16, 2016. The complaint, as later corrected, asserts seven violations of Virgin Islands law. Terminix LP, Terminix USVI, and ServiceMaster appeared (with ServiceMaster limiting its appearance) and waived service of the complaint. On February 17, 2017, the Defendants stipulated with the Government to extend their time to respond to the complaint to March 10, 2017. The court (Brady, J.) approved that stipulation by order dated February 24, 2017 and entered February 28, 2017. On March 10, 2017, ServiceMaster moved to dismiss the complaint for lack of personal jurisdiction and all three Defendants jointly moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim for relief.
>
> Along with their joint motion, Defendants filed a motion for leave to exceed the page limits. The Government did not file a response . . . . On April 11, 2017, the parties stipulated to extend the deadlines for the Government's opposition and the Defendants' replies. The Government agreed to file its oppositions by May 2, 2017, and the Defendants' agreed to file their replies by May 23, 2017. The Government met its deadline. The Defendants did in part. That is, Defendants filed a joint reply in support of their joint motion to dismiss on May 23, 2017, but also filed another stipulation with the Government, agreeing to an extension until June 2, 2017. The Defendants did not meet that deadline, however, because, on June 9, 2017, they filed [yet] another stipulation with the Government, agreeing to extend their reply

deadline to June 12, 2017. ServiceMaster filed its reply in support of its motion to dismiss for lack of personal jurisdiction on June 12, 2017. The next day, June 13, 2017, the Defendants filed a duplicate copy of the joint reply they previously filed on May 23, 2017

After both motions were fully briefed but before the Court heard oral argument on July 19, 2017, the Government filed a notice of supplemental authority in support of their oppositions to the Defendants' motions. Attached was a copy of a June 19, 2017 memorandum opinion issued by another Superior Court judge (Dunston, P.J.) in *Government of the United States Virgin Islands v. Takata Corporation, et al. See generally* 67 V.I. 316 (Super. Ct. 2017). A day later, on June 28, 2017, the Government filed a motion, titled as a "consent motion," for leave to file a surresponse to ServiceMaster's reply. The proposed surresponse was submitted as well. Also on June 28, 2017, the Defendants filed their own notice of supplemental authority, which the Government responded to on July 6, 2017. A day later, on July 7, 2017, the Defendants filed a joint response to the Government's June 27, 2017 notice of supplemental authority.

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

After the motions had been fully briefed, argued, taken under advisement, the Defendants, on March 12, 2018, filed a second notice of supplemental authority. Attached was a copy of a March 7, 2018 order issued by the District Court of the Virgin Islands (Gomez, J.) and a copy of the complaint filed in the same case. *See generally Catalus Capital USVI, LLC v. The ServiceMaster Company, LLC*, Civ. No. 2017-17, 2018 U.S. Dist. LEXIS 37340 (D.V.I. Mar. 7, 2018). The Government filed a response to the Defendants' March 12, 2018 notice of supplemental authority on March 13, 2018. A week afterward, the Defendants' filed a joint reply to the Government's response. Then, on March 22, 2018, the Defendants filed an exhibit inadvertently omitted from their March 20, 2018 joint reply.

Gov't of the U.S.V.I. v. ServiceMaster Co., LLC, Case No. SX-16-CV-700, 2018 V.I. LEXIS 100, *2-6 (V.I. Super. Ct. Sep. 26, 2018) (abbreviations and citations to the record omitted). Because these ancillary motions had to be resolved before either of the dispositive motions could be ruled on, the Court (Meade. J.) granted the Defendants motion to exceed the page limits, *see id.* at *10, approved the stipulations extending the briefing deadlines, *see id.* at *15-16, and accepted the Government's surresponse to ServiceMaster's' personal jurisdiction motion. *See id.* at *17. But the Court struck "the parties notices, responses, and replies purportedly submitted under the guise of providing the Court with supplemental authority." *Id.* at *24. Thus, only the motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim, the opposition, and the reply are before this Court.[2]

II. DISCUSSION

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

¶4 Pursuant to Virgin Islands Rule of Civil Procedure 12(b)(1), a court can dismiss a complaint, or individual claims within a complaint, for lack of subject-matter jurisdiction.[3] "The applicable standard of review under Rule 12(b)(1) differs depending on whether the moving party has made a facial attack or a factual attack on the court's power to hear the case." *James-St. Jules v. Thompson*, Case No. SX-09-CV-136, 2015 V.I. LEXIS 74, *6 (V.I. Super. Ct. June 25, 2015); *accord Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("The facial attack does offer similar safeguards to the plaintiff: the court must consider the allegations of the complaint as true. The factual attack, however, differs greatly for here the trial court may proceed as it never could under 12(b)(6) or . . . 56.").

¶5 "When an attack on subject matter jurisdiction is factual, the Superior Court is free to evaluate the merits of jurisdictional claims and may look beyond the face of the complaint to make

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[2] The Presiding Judge of the Superior Court of the Virgin Islands designated this case as complex on May 17, 2017, and reassigned it to the undersigned judge by order entered May 22, 2017. Since the case had been reassigned to the undersigned judicial officer when the Court (Meade, J.) issued the September 26, 2018 opinion, the Court will adopt the September 26, 2018 opinion and order by separate order to avoid causing unnecessary appealable issues. *Cf. Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 575 (2015) ("When a trial judge takes actions that exceed the scope of his authority because authority was vested in another judge, 'the decision to deny those proceedings legal effect is grounded not in metaphysical notions regarding transfer of power, but on practical considerations concerning efficient judicial administration.'" (citation omitted)). *Cf. ServiceMaster Co.*, 2018 V.I. LEXIS 100 at *3 n.3.

[3] Although Federal Rule of Civil Procedure 12(b)(1), as applied through Superior Court Rule 7, governed motions to dismiss for lack of subject-matter jurisdiction at the time when the Defendants' filed their motion, the federal rule and the Virgin Islands rule are identical. Therefore, the Court will apply the Virgin Islands rule. More importantly, the rule is a means to an end: subject-matter jurisdiction is determined by statute. *Accord DeGroot v. DeGroot*, 939 A.2d 664, 668 (D.C. 2008) ("The Superior Court is 'a court of general jurisdiction,' but its subject matter jurisdiction has from time to time been expanded or contracted by statute." (citation omitted)); *Pieren-Abbott v. Kan. Dep't of Revenue*, 106 P.3d 492, 499 (Kan. 2005) ("Subject matter jurisdiction is vested by statute and establishes the court's authority to hear and decide a particular type of action."); *Earley v. Landsidle*, 514 S.E.2d 153, 156 (Va. 1999) ("Subject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies.").

this determination." *Daley-Jeffers v. Graham*, 69 V.I. 931, 939 n.8 (2018). "Factual" does not concern the facts alleged in the complaint, however. Rather, the "fact" at issue in a factual subject-matter attack is whether the court does, in fact, have jurisdiction, meaning the power to hear the dispute, notwithstanding what might be revealed for that specific case through discovery. *Cf. Berardi v. Swanson Mem'l Lodge No. 48 of Fraternal Order of Police*, 920 F.2d 198, 200 (3d Cir. 1990) ("[M]otion required the trial judge to 'inquire as to its jurisdiction before considering the merits . . . .'" (quoting *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)). Under a facial attack, "'the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff,'" and "'apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6).'" *Thompson*, 2015 V.I. LEXIS 74 at *7 (citation omitted). An answer does not have to be filed first. *Cf. Berardi*, 920 F.2d at 200 ("The requirement . . . that a motion to dismiss for lack of subject matter jurisdiction must be made 'before pleading if a further pleading is required' would make little sense if the factual basis for subject matter jurisdiction could not be contested until after an answer is filed.").

¶6 Unfortunately, neither the Defendants nor the Government addressed whether the attack on this Court's jurisdiction was facial or factual. And the Defendants' motion could proceed under either. The Supreme Court of the Virgin Islands has acknowledged, but not adopted the facial/factual approach. *See Daley-Jeffers*, 69 V.I. at 939 n.8. Since "'there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.'" *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (citation omitted); *see also id.* ("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, the court may inquire, by affidavits or otherwise, into the facts as they exist." (citations omitted)). But here, what the Defendants contend is that the Court lacks subject-matter jurisdiction over Counts I, II, and VII because the Government failed to comply with the administrative process under the relevant statutes.

Count I: Unfair Trade Practices Act

¶7 In Count I, the Government alleges that the Defendants engaged in unfair trade practices in violation of the Virgin Islands Code, title 12A, sections 101 and 104, by, among other things, "failing to disclose to consumers that it was fumigating using methyl bromide." (Compl. ¶ 73a.) The Virgin Islands Unfair Trade Practices Act provides that "[n]o person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts." 12A V.I.C. § 101. The Government seeks injunctive relief under section 104(d), and the maximum civil penalty for "each and every violation" under section 104(a). According to the complaint, the Defendants allegedly applied methyl bromide no less than thirty-five times at various locations throughout the Virgin Islands.[4] Section 104(a) authorizes a maximum fine of $5,000 for each violation. Thus, the Defendants, jointly and severally, face a possible fine of $185,000, the Government contends. But the problem, and the heart of the Defendants' argument, is that the fines can be imposed only "[u]pon previous notice and an opportunity for a fair hearing," before "the Commissioner [of the Department of Licensing and Consumer Affairs]." 12A V.I.C. § 104(a). The Commissioner "may bring an action in the name of the Government of the United States Virgin Islands . . . to restrain, by temporary or permanent injunction," *id.* § 104(d), the unfair trade practice. And the Superior "Court may impose an additional fine, not to exceed $5,000," *id.* § 104(b), but only "for noncompliance with the Commissioner's order or nonpayment of a fine." *Id.* Moreover, and more importantly, the Superior Court's authority to impose additional fines is triggered only "upon the filing with the Superior Court of a notice of *appeal*." *Id.* § 104(a) (emphasis added).

¶8 The Defendants argue, first, that the Court lacks subject-matter jurisdiction because the Attorney General instituted this action on behalf of the Government, not the Commissioner of the Department of Licensing and Consumer Affairs. This argument lacks merit, however. *See generally Brooks v. Gov't of the V.I.*, 58 V.I. 417 (2013). The Court could simply direct the Government to file an amended complaint to specify that the portion of Count I seeking injunctive relief was brought

[4] The Complaint alleges that the Defendants "applied pesticides containing methyl bromide in residences and/or for noncommodity/non-quarantine uses in the Virgin Islands," (Compl. ¶ 35), between and 2015, at the following locations: on St. Croix: 91 Estate Whim, Frederiksted; 56-58 Hill St., Christiansted; 3F Estate Bethlehem St., Christiansted; 74 Green Cay, Christiansted; 336 Herman Hill, Christiansted; 39C La Grande Princess, Christiansted; Louise E. Brown Community Center, Frederiksted; 42 Villa Madeline, Christiansted; 180 Sion Hill, Christiansted; 165 Judith's Fancy, Christiansted; P.O. Box 4303, Kingshill; 52 Cotton Valley, Christiansted; 423 Carden Beach, Christiansted; 97 Judith's Fancy, Christiansted;2-J-3 Estate Paradise, Frederiksted; 56A Recovery Hill, Christiansted;125 Mt Pleasant EA, Christiansted;6 Beeston Hill, Christiansted; Arawak Building, Suite 1, Christiansted; 24 Eliza's Retreat, Christiansted; 10D Colony Cove Condo, Christiansted; 52 Seven Flags Rd., Christiansted; 42 Estate Cotton Valley, Christiansted; Estate Glynn, Christiansted; 143 Shoys, Christiansted; 88 Hanna's Rest WE, Frederiksted; 3016 Estate Richmond, Christiansted; on St. John: Estate Enighed; and on St. Thomas: Crowley Yard and 16 Estate Solberg. The Complaint also alleges the Defendants proposed to fumigate the following locations with methyl bromide: 29P North Slob, Christiansted, and 10 Estate LaGrange, Frederiksted.

by the Commissioner in the name of the Government. *Accord id.* at 430 ("There is nothing in section 380 of title 24 to suggest that a mistake in naming the petitioner in the caption . . . should constitute a jurisdictional defect, and there are certainly no 'clear' indications that the Legislature intended such a result. Consequently, the trial court erred when it dismissed . . . without considering whether Rule 17 . . . would permit the *nunc pro tunc* substitution of the Union as the petitioner . . . ."). The Department of Licensing and Consumer Affairs is "an executive department in the Government," 3 V.I.C. § 270(a), and the Attorney General "appear[s] for and represent[s] the executive branch of the Government . . . before the courts in all civil proceedings in which the said Government, or any executive department, board, commission, agency, instrumentality or officer thereof is interested." 3 V.I.C. § 114(a)(1). So, the Defendants' first argument is frivolous. *Accord Mathes v. Century Alumina Co.*, No. 2005/0062, 2008 U.S. Dist. LEXIS 90087, *26 (D.V.I. Oct. 31, 2008) (permitting, in the reverse scenario, the Government to substitute in place of a commissioner) (citing Fed. R. Civ. P. 17(a)).

¶9 But the Defendants also argue that the Government's failure to comply with the administrative hearing procedures deprives the Superior Court of jurisdiction over its unfair trade practices claim. The Court agrees. Generally, "because 'the consequences that attach to the jurisdictional label may be so drastic,' and because 'jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants,'" *Brooks*, 58 V.I. at 424 (brackets and citation omitted), courts must find "that the Legislature [clearly] intended to make a particular statutory requirement jurisdictional . . . ." *Id.* This clarity is apparent here because the statute specifies several ways in which the Superior Court's jurisdiction may be invoked.

¶10 First, a consumer, who is defined as "a purchaser or lessee or prospective purchaser or lessee of consumer goods or services or consumer credit, including a co-obligor or surety," 12A V.I.C. § 102(d), may commence an individual action for damages, declaratory, and injunctive relief, or a class action for the same relief. *See generally id.* § 108. Likewise, the Commissioner of the Department of Licensing and Consumer Affairs "may . . . bring a class action on behalf of consumers where appropriate for the actual damages caused by an act or practice declared by law or rule as violating this chapter." *Id.* § 106(a). The Commissioner may also commence an action for injunctive relief if he or she "has reason to believe that any person is using any method, act, or practice that *would be* in violation of" the unfair trade practice act. *Id.* § 104(d) (emphasis added). And the

Commissioner may "bring an action in Superior Court to revoke an individual's, partnership's, or corporation's business license." *Id.* § 104(g). But if the focus is punitive, meaning fines are sought for engaging in unfair trade practices, then the Commissioner serves as the trial court, "issu[ing] a subpoena requiring the appearance of an individual and the production of documentation of every kind and description reasonably necessary for his *deliberations*." *Id.* § 104(a) (emphasis added).

¶11 Although the Unfair Trade Practices Act does not explicitly use language like "no action may be instituted unless," legislatures also do not have to "'incant magic words.'" *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1850 (2019) (citation omitted). Here, the overall structure of the law compels the conclusion that the Government's request for this Court to "order Defendants to pay the maximum civil penalty . . . for each and every violation," (Compl. ¶ 96c), is not within this Court's power. When a statute specifies several different ways to invoke a court's jurisdiction, the failure to comply with one of those ways deprives the court of jurisdiction. The Government did not bring this action as a class action to recover damages for the persons who allegedly were exposed to methyl bromide. The Government also did not bring this action as "a purchaser . . . or prospective purchaser," 12A V.I.C. § 102(d), of Terminix USVI's services. Instead, the Government seeks damages, in the form of civil fines, perhaps in its capacity as *parens patriae*.[5] *Cf. Mathes*, 2008 U.S. Dist. LEXIS 90087 at *25 ("[T]he Territory of the Virgin Islands may bring suits as *parens patriae* in appropriate circumstances."). But the Superior Court is not authorized to assess fines because the primary responsibility is vested in the Commissioner to "investigat[e]," 12A V.I.C. § 104(c), to "subpoena," *id.* § 104(a), and to "deliberat[e]," *id.*, as to whether an unfair trade practice occurred. In fact, the Unfair Trade Practices Act allows the Commissioner to "accept written assurance of discontinuance of any act or practice in violation of this chapter from the person or persons who have engaged in such acts or practices," *id.* § 105(a), provided "[s]uch assurance . . . include[s] a stipulation for voluntary payment by the violator of the costs *of investigation by the* [*Commissioner*]. . . ." *Id.* (emphasis added). The duty to investigate rests with the Commissioner in the first instance.

¶12 Perhaps the final point that bears mention here is that the Unfair Trade Practices Act vests the Superior Court with appellate jurisdiction, reinforcing that the Commissioner functions as the

[5] See generally *Hawaii v. Standard Oil Company*, 405 U.S. 251, 257-59 (1972), for background on the common law *parens patriae* doctrine.

trial court, given that "an appeal is an extension of an existing case . . . ." *Baumann v. Pub. Emples. Relations Bd.*, 68 V.I. 304, 332 (Super. Ct. 2018).

¶13 "'Appeal' is a legal term of art." *Valerino v. Manning*, 68 V.I. 276, 300 (Super. Ct. App. Div. 2018) (brackets and citation omitted). "Final decision" and "notice of appeal" are also terms of art. *Cf.* 1 V.I.C. § 42. Courts must presume legislatures know the law when they legislate. *Cf. Brooks*, 58 V.I. at 428. Here, the Legislature used appellate terms of art to describe the Superior Court's jurisdiction. *See* 12A V.I.C. § 104(a) ("After a *final decision* to impose an administrative fine has been rendered by the Commissioner, it shall be subject to judicial review upon the filing with the Superior Court of a *notice of appeal* within 30 days after the receipt of the notice of the imposition of the fine which shall have been mailed by the Commissioner by Certified Mail, Return Receipt Requested." (emphasis added)). Thus, the Superior Court's jurisdiction under the Unfair Trade Practices Act is appellate when administrative fines have been assessed.

¶14 The Government tries to avoid this conclusion, contending that "[t]he Attorney General has broad statutory authority to bring actions to protect the interests of the Virgin Islands and its residents." (Pl.'s Opp'n to Mot. to Dismiss 2, filed May 2, 2017 (hereinafter "Opp'n").) But that is not in dispute. *Accord Mathes*, 2008 U.S. Dist. LEXIS 90087, *26. Instead, the dispute is whether the particular claim the Government asserted here is proper. The general grant of authority the Government relies on, namely title 3, section 114 of the Virgin Islands Code, specifies general powers and duties of the Attorney General, and dates back to 1962, when a Department of Law was first established, and predates the Unfair Trade Practices Act, which was enacted in 1973. *See generally* Act No. 3431, § 4, 1973 V.I. Sess. L. 85, 87-97 (May 13, 1973). Thus, the more recent and more specific statute controls over the later and more general statute. *Cf. Haynes v. Ottley*, 61 V.I. 547, 561 (2014) ("[A]s a general rule, 'specific statutes establishing comprehensive schemes for attaining judicial review in particular types of cases supplant statutes that broadly confer general jurisdiction.' . . . [A]nother well-established rule of statutory construction is that the more specific statute takes precedence over the more general one . . . .'" (citations omitted)). But more importantly, the Legislature knows how to vest commissioners and executive departments and agencies with authority to proceed independently of the Judiciary, vesting the courts with appellate jurisdiction, or to give the courts concurrent jurisdiction. Compare, for example, the Uniform Securities Act, which empowers the Lieutenant Governor, acting as "Administrator," *see* 9 V.I.C. §

602(1), to conduct an administrative hearing *or* to maintain a civil action in the Superior Court. *See id.* §§ 664, 663. And even when the Administrator issues an order within her or his enforcement authority under section 664 of title 9 of the Virgin Islands Code, the Administrator can still file an action for injunctive relief in addition to or in lieu of filing a certified copy of her or his order with the court, and then petitioning the courts to enforce the order.

¶15 The Court agrees with the Defendants: the Legislature "did create a role for this Court, that role [i]s to hear appeals from . . . administrative decisions. The Attorney General [cannot] circumvent this statutory scheme by sheer fiat." (Defs.' Reply in Supp. of their Jt. Mot. to Dismiss 2-3, filed May 23, 2017 (hereinafter "Reply").) Accordingly, the request for "the maximum civil penalty," (Compl. ¶96c), in Count I must be dismissed for lack of jurisdiction.[6] But the remainder of Count I does not have to be dismissed because the Attorney General is authorized to bring suits for injunctive relief on behalf of the Commissioner of Licensing and Consumer Affairs. *See* 12A V.I.C. § 104(d). Although the Commissioner did not bring this action on the Government's behalf, the Court will order the Plaintiffs to substitute the Commissioner. *Accord* V.I. R. Civ. P. 15-2 ("The court may amend any . . . pleading for any omission or defect therein . . . .").

<u>Count II: Consumer Fraud and Deceptive Business Practices Act</u>

¶16 The Defendants raise a similar argument regarding Count II, violation of the Consumer Fraud and Deceptive Business Practices Act. The act declares that "[i]t is unlawful for any person to engage in unfair methods of competition or unfair or deceptive trade acts or practices in the conduct of any trade or commerce." 12A V.I.C. § 304. But the act also states that "[t]he Department of Licensing and Consumer Affairs shall be responsible for the administration and enforcement of this chapter." *Id.* § 305. "[B]ecause . . . the Consumer Fraud and Deceptive Business Practices Act specifically identifies the Department of Licensing and Consumer Affairs—which is not a party to this case—as having

[6] The Court acknowledges that this conclusion appears at odds with a decision of another Superior Court judge. *See Gov't of the V.I. v. Takata Corp.*, 67 V.I. 316, 379-95 (Super. Ct. 2017). Bolstered by the *Takata* decision, the Government attempted to supplement its arguments "under the guise of notifying the court of persuasive . . . authority rendered by another court . . . ." *ServiceMaster Co.*, 2018 V.I. LEXIS 100 at *22. But the Court rejected the supplemental arguments on both sides because "[t]here was no basis for either the Government or the Defendants to file notices of supplemental authority, to make arguments in such notices, or to treat such notices as motions and file responses and replies—all without leave of court." *Id.* Nevertheless, this Court notes that the issue in *Takata* was personal jurisdiction and the sufficiency of the complaint, not subject-matter jurisdiction. *See Takata*, 67 V.I. at 334. Therefore, the decisions are distinguishable. "Moreover, decisions of trial level courts are not binding on any other court, including that same trial court." *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 101 (Super. Ct. 2014) ("The same judge need not decide the same issue the same way as in an earlier case . . . .").

exclusive enforcement authority, that specific statutory language should control," (Defs.' Jt. Mot. to Dismiss Pl.'s Corrected Compl. for Lack of Subj. Matter Juris. Under R. 12(b)(2) & for Failure to State a Claim for Relief Under R. 12(b)(6) at 7, filed Mar. 10, 2017 (hereinafter "Mot.")), and because the Plaintiff in this case is the Government, not the Department of Licensing and Consumer Affairs, the Defendants contend that the Superior Court lacks jurisdiction. *Brooks* forecloses this argument too, however. Therefore, the Defendants motion to dismiss Count II for lack of subject-matter jurisdiction must be denied.

B. Motion to Dismiss for Failure to State a Claim for Relief

¶17 At the time when the Defendants filed their motion, the Virgin Islands assessed the sufficiency of a complaint "under the heightened 'plausibility' standard adopted by the Supreme Court of the United States." *Arno v. Hess Corp.*, 2019 VI Super 140, ¶ 35. Consequently, because the Government filed its complaint on December 16, 2016, it had to allege sufficient facts in support of each element of every claim to show that its claims were plausible. *Cf. Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471 (2013)). The Supreme Court of the Virgin Islands promulgated the Virgin Islands Rule of Civil Procedure in 2017, however, and "'restored the notice pleading regime that had previously been in effect.'" *Arno*, 2019 VI Super 140 at ¶ 36 (brackets omitted) (quoting *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (2017)). Although "'the Supreme Court of the Virgin Islands has yet to determine what exactly is required to survive a Rule 12(b)(6) motion to dismiss,'" *id.* (brackets, ellipsis, and citation omitted), Virgin Islands courts have returned to the prior "no set of facts" standard in the interim. *See id.* (citing *Morton v. Mapp*, ST-16-MC-056, 2018 V.I. LEXIS 148, *3 n.11 (V.I. Super. Ct. Apr. 4, 2018)); *see also Morton*, 2018 V.I. LEXIS 148 at *3 n.11 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

¶18 Accordingly, even though the Government filed its complaint when the prior pleading standard was in effect, the Defendants' motion to dismiss must be decided under the current pleading standard. *Accord Arno*, 2019 VI Super 140 at ¶36. And this Court recently summarized the current standard for a Rule 12(b)(6) motions:

> In ruling on a motion to dismiss for failure to state a claim for relief, courts assume all reasonable factual allegations in the complaint as true and draw all fair inferences from such allegations. But courts cannot infer truth if the allegations contradict facts in the public record or judicially noticed by the court. Moreover, when the facts alleged—despite the arguably thorough manner in which they were pleaded—simply

> do not give rise to relief, then question is not whether the claims could have survived a Rule 12(b)(6) challenge but for the plaintiff's failure to plead sufficient facts to satisfy the requirements of Rule 8(a)(2) or Rule 9(b). Instead, the purpose of a motion to dismiss is to assess the legal feasibility of the complaint.

Arno, 2019 VI Super 140 at ¶ 37 (quotation marks, citations, ellipses, and brackets omitted).

Count I: Unfair Trade Practices Act / Count II: Consumer Fraud and Deceptive Business Practices Act

¶19 ServiceMaster and Terminix LP move to dismiss Counts I and II because "[t]he Complaint fails to allege that any statement by Terminix LP or ServiceMaster was made 'in connection with the sale' of a fumigation." (Mot. 9.) Section 101 of title 12A "defines a 'deceptive trade practice' as 'any false or misleading oral or written statement, visual description or other representation of any kind made in *connection with the sale* of consumer goods or service.'" *Id.* at 8-9 (ellipses omitted) (quoting 12A V.I.C. § 102(a)). Additionally, relying on *White v. S & E Bakery, Inc.*, 26 V.I. 87 (Terr. Ct. 1991), the Terminix LP and ServiceMaster argue that contracts between the customers and Terminix LP or ServiceMaster are needed because 'an action for deceptive trade practices arises from a contract for sale of consumer goods or services." *Id.* (citing *White*, 26 V.I. at 90-91). They further assert that Virgin Islands customers needed to have read, heard, or relied upon misrepresentations of Terminix LP or ServiceMaster. *See id.* at 10 (citing *Gawara v. U.S. Brass Corp.*, 74 Cal. Rptr. 2d 663, 673 (Cal. Ct. App. 1998)). The Court disagrees.

¶20 First, *White* did not hold that claims for unfair or deceptive trade practices must be based on a contract. The court did conclude, however, that "an action for deceptive trade practice arises from a contract of sale of consumer goods or services." 26 V.I. at 90-91. But the court arrived at that conclusion because the issue before the court was whether claims for unfair or deceptive trade practices sound in tort or contract, *see id.* at 88, and thus, which statute of limitations applies. In fact, *White* favors the Government here because Ms. White sued the bakery after she purchased a can of pear nectar and got ill. *See id.* at 88-89. Ms. White did not enter into a formal contract with the bakery to buy a drink. But the court concluded that "the purchase of the pear nectar . . . constituted a 'contract for the sale of goods' within the meaning of the UCC section 2-106 . . . . [because a] 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.* at 90 (citing 11A V.I.C. § 2-401). *White* does not aid Terminix LP or ServiceMaster here.

¶21 Second, deceptive trade practice claims are not restricted only to communications, contrary to the arguments of ServiceMaster and Terminix LP. The phrase "deceptive trade practice" is defined broadly to included "any false . . . representation of any kind made in connection with the sale . . . of consumer goods or services . . . ." 12A V.I.C. § 102(a). And deceptive trade practices also include "representations that . . . services have . . . approval . . . [or] characteristics, [or] ingredients . . . that they do not have . . . or [that] services are of particular standard, [or] quality . . . if they are of another." *Id.* § 102(a)(1). The Government alleges that,

> [n]ot only did Terminix fail to disclose its illegal and non-compliant use of methyl bromide, Terminix provided to some customers in the Virgin Islands proposals for fumigation services using methyl bromide that falsely stated: "Only materials that are registered with the Environmental Protection Agency will be used in performing these services. All materials will be used in strict accordance with label directions."

(Compl. ¶ 58.) The Government further alleges that,

> Terminix failed to disclose on a continuing basis in its local or national advertising and in its service agreements or other documents provided to customers, that its fumigation process using methyl bromide for residential or non-commodity / non-quarantine applications was illegal and not in accordance with the approved label for pesticides containing methyl bromide.

Id. ¶ 55. "Service agreements" constitute contracts, notwithstanding that a formal contract is not required. And the complaint defines "Terminix" to include both ServiceMaster and Terminix LP. Moreover, when the Commissioner of the Department of Licensing and Consumer Affairs brings a suit for injunctive relief behalf of the Government, "it need not be shown that consumers are being or were actually injured." 12A V.I.C. § 104(e). Thus, ServiceMaster and Terminix LP's arguments to the contrary are rejected. The Government stated an unfair or deceptive trade practices act claim against both defendants. Their motion to dismiss Counts I and II must be denied.

Count II: Consumer Fraud and Deceptive Business Practices Act

¶22 For similar reasons, the Defendants' additional argument for dismissing Count II also must be rejected. As they note, "[t]he Consumer Fraud and Deceptive Business Practices Act likewise prohibits 'deceptive trade acts,' 12A V.I.C. § 304, which it defines as 'any false or misleading oral or written statement made *in connection with the sale* of consumer goods or services.'" (Mot. 9 (ellipses omitted) (quoting 12A V.I.C. § 303(e)). But the Defendants contend that the Complaint fails to connect any statement they made with sales or proposed sales of fumigation services. They further argue that the Complaint fails to allege they acted with intent to defraud, and that the Consumer Fraud and Deceptive Business Practices Act does not authorize suits for failure to disclose. *See id.* at 13 ("By its own terms, the Act does not impose liability for merely failing to disclose facts, and no case has extended it so far.")

¶23 Here, the Government is correct: "A 'deceptive business practice' prohibited by the CFDBPA is defined the same as a 'deceptive trade practice' in the CPL." (Opp'n 14.) *Compare* 12A V.I.C. § 102(a) ("'Deceptive business practice' means any false, falsely disparaging, or misleading oral or written statement, visual description or other representation of any kind made in connection with the sale, lease, rental, or loan of consumer goods or services, or in the extension of consumer credit or in the collection of consumer debts which has the capacity, tendency or effect of deceiving or misleading consumers."), *with id.* § 303(e) ("'Deceptive trade practice' means any false, falsely disparaging, or misleading oral or written statement, visual description or other representation of any kind made in connection with the sale, lease, rental, or loan of consumer goods or services, or in the extension of consumer credit or in the collection of consumer debts, which has the capacity, tendency or effect of deceiving or misleading consumers."). Although the CPL, or Consumer Protection Law, gives additional examples of unfair or deceptive trade practices, *see id.* § 102(a)(1)-(10), the definitions are the same. Thus, the same reasons for denying the motion to dismiss Count I apply to Count II.

¶24 Additionally, the Defendants' "intent to defraud" argument is a red herring. The Consumer Fraud and Deceptive Business Practices Act does require proof of intent to defraud. *See id.* § 328(b) ("The Department may petition the Superior Court to impose a civil penalty in a sum not to exceed $50,000 against any person found by the court to have engaged in any method, act or practice declared unlawful under this chapter. If the court finds the method, act or practice to have been entered into with the intent to defraud, the court may impose a civil penalty in a sum not to exceed $50,000 per violation."). But "intent to defraud" is not necessarily an element of the claim because the Department of Licensing and Consumer Affairs can not only seek declaratory or injunctive relief, *see id.* § 328(a)(1)-(2), but also "[a]n action on behalf of one or more consumers for the actual damages caused by an act or practice in violation of this chapter." *Id.* § 328(a)(3).

¶25 Admittedly, the language of the statute is unclear because it could be read as permitting the Superior Court to impose a maximum $50,000 civil penalty if a violation is shown, and an *additional*

$50,000 maximum civil penalty if intent to default is found. Both are defined as "civil penalties" and all civil penalties "must be paid to the Department of Finance who shall deposit the money in the Treasury of the Government of the Virgin Islands in a special fund designated the Consumer Protection Fund . . . ." *Id.* § 382(c). But civil penalties, and the potential for intent to defraud to be found, are not at issue when the Department of Licensing and Consumer Affairs brings a case on behalf of Virgin Islands "consumers for . . . actual damages." *Id.* § 328(a)(3). The Department can, of course, bring multiple claims or seek alternate relief. But here the Government is seeking "the maximum civil penalty under . . . [§] 328(b) for each and every violation of . . . [§] 304 . . . ." (Compl. ¶ 96c.) In other words, the Government is not seeking damages for Virgin Islanders. Its seeking moneys for the Treasury. However, regardless of whether the $50,000 maximum civil penalty can be doubled, so to speak, the Government did allege that the Defendants acted with intent to defraud. (*See* Compl. ¶ 76 ("Since at least as early as 2008 until on or about April 2012, Defendants ServiceMaster and Terminix LP with the intent to defraud engaged in unfair or deceptive trade acts or practices in connection with the sale or offering for sale of fumigation services in the Virgin Islands . . . ."); *id.* ¶ 78 ("Since on or about April 2012 until on or about March 2015, all Defendants with the intent to defraud engaged in unfair or deceptive trade acts or practices in connection with the sale or offering for sale of fumigation services in the Virgin Islands . . . .").). Thus, the Defendants are mistaken.

¶26 Lastly, as the Government points out, the Consumer Fraud and Deceptive Business Practices Act "is intended to be interpreted similarly to section 5 of the FTC [or Federal Trade Commission]." (Opp'n 14 (citing 12A V.I.C. § 304).). *But see* 12A V.I.C. § 304 ("In construing this chapter, consideration must be given to the interpretations of the Federal Trade Commission and the federal courts relating to 15 U.S.C. § 45 *at the time of enactment of this chapter*." (emphasis added)). The Consumer Fraud and Deceptive Business Practices Act was enacted in 2006. *See generally* Act No. 6833, § 7, 2006 V.I. Sess. L. 35, 35 (May 17, 2006). And at least since 1984, the Federal Trade Commission has interpreted deception to include omissions. *See In re: Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164 (1984) ("Consistent with its Policy Statement on Deception, issued on October 14, 1983, the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." (footnote omitted)).

See also, e.g., FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006) ("To prove a deceptive act or practice under § 5(a)(1), the FTC must show three elements: '[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material.' The deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably." (citations omitted)). The Defendants' arguments to the contrary—that the Legislature could have included omissions and failures to disclose information but chose not to and, thus, the courts cannot "simply add it in," (Reply 12)—are rejected.

¶27 The Consumer Fraud and Deceptive Business Practices Act should "be liberally construed to protect the consuming public from deceptive and unfair acts or practices in the conduct of any trade or commerce." 12A V.I.C. § 302. And the common law has abhorred silence and deception in business dealings for centuries. *Cf. Williamson v. Jones*, 27 S.E. 411, 416 (W. Va. 1897) ("Unless there is a duty to speak out, one need not. 'To create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told.'" (quoting *Viele v. Judson*, 82 N.Y. 32, 40 (1880)); *see also id.* at 415 ("'Having now considered the subject of deception by act on all sides, we are next brought to the subject of deception by omission; in the case of silence, where there was a duty to speak. Now, silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby. A man's unpublished thought is surely his own. But it must be understood at the outset that by silence we mean entire silence, as distinguished from that sort which merely keeps back part of the truth told or suggested.'" quoting 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 590 (1888)). This same treatise further explains that "[t]his latter case"—meaning partial silence—"is nothing else than misrepresentation . . . ." 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 590 (1888). As stated earlier, courts presume legislatures know the law when they legislate. *Cf. Brooks*, 58 V.I. at 428. Deception by omission has been considered fraud for many, many years. Therefore, the Court must deny the Defendants' motion to dismiss.

Counts III - VI: Civil Violations of the Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 605(a)

¶28 The Criminally Influenced and Corrupt Organizations Act ("CICO") declares it to be "unlawful for any person employed by, or associated with, any enterprise . . . to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity." 14 V.I.C. § 605(a). It is also "unlawful for any person to conspire or attempt to violate, either directly or through another or others, the provisions of section 605, subsections (a), (b), and (c)." *Id.* § 605(d). To successfully plead a CICO claim, the plaintiff must allege the defendants are an enterprise, or are associated with an enterprise, that engaged, either directly or indirectly, in a pattern of criminal activity. "'Enterprise' includes any individual, sole proprietorship, partnership, corporation, trust, or other legal entity, or any union, association or group of persons, associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental as well as other entities." *Id.* § 604 (h). A pattern of criminal activity requires "two or more" criminal acts, related to the enterprise, but not isolated acts, and at least one act must have been a felony. *See id.* § 604(j).

¶29 "CICO is cast in the mold of the federal RICO statute." *In re: Najawicz*, 52 V.I. 311, 330 (2009) As with RICO claims, "an 'association-in-fact' enterprise constitutes an 'enterprise' under CICO." *People v. McKenzie*, 66 V.I. 3, 12 (Super. Ct. 2017). And an association-in-fact enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* (quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009)).

¶30 The Defendants argue that the "vague and equivocal statements" and "conclusory boilerplate" language of the Complaint do not sufficiently plead causes of action under CICO. (Mot 14-15.) They contend that the Complaint must include the "dates or substance of any alleged communications or agreements between the alleged members of the 'enterprise in fact,' . . . the personnel involved, and . . . any actions taken to import, sell, or distribute illegal pesticides." *Id.* at 11. But the Complaint alleges that "ServiceMaster, Terminix LP, and Bugbusters, and then ServiceMaster, Terminix LP, and Terminix USVI, together with Superior Angran constituted an enterprise associated in fact," (Compl. ¶¶ 81, 84, 87), that "Terminix and Bugbusters colluded with Superior Angran illegally to import pesticides containing methyl bromide into the Virgin Islands," *id.* ¶¶ 82, 85, 88, all with the "common purpose of illegally importing, selling and distributing pesticides containing methyl bromide, and selling fumigation services using those pesticides in the Virgin Islands for economic gain." *Id.* ¶¶ 81, 84, 87, & 90. Bugbusters is alleged to have done business in the Virgin Islands as Terminix USVI, Inc., and was later acquired by Terminix USVI, Inc. *See id.* ¶ 16 ("On or about April 2012, Terminix USVI purchased the assets of Bugbusters. In practice, Terminix USVI was a continuation of Bugbusters, with many of the same employees, including the employee and manager responsible for performing and supervising fumigations using methyl bromide, and operating under the same name (Terminix) . . . ."). These allegations are sufficient to defeat the Defendants' broad challenge to all CICO claims.

Counts III & IV: Civil Violations of the Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 605(a) • Crime of Obtaining Money by False Pretense, 14 V.I.C. § 834 and Conspiracy Related to Crime of Obtaining Money by False Pretense, 14 V.I.C. § 834

¶31 Regarding Counts III and IV specifically, the Defendants contend they "suffer from at least three additional, specific, and fatal deficiencies." (Mot. 16.) First, obtaining money by false pretenses requires fraud, not failure to disclose. The Defendants concede that section 834 of title 14 "does not define fraud, [so] courts have relied on the common law . . . ." *Id.* (citing *Todmann v. People*, 59 V.I. 926, 941-42 (2013)). But they argue that "'[m]erely neglecting to convey information does not amount to fraud.'" *Id.* at 16-17 (quoting *Gov't of the V.I. ex rel. C.C. v. A.P.*, 36 V.I. 14, 201 (Terr. Ct. 1995)). Second, the Complaint fails to allege customer reliance and "[t]he 'mere utterance of a false statement or misrepresentation must necessarily be found insufficient to constitute a crime under section 834. There must be proof that the misrepresentation induced another to confer something of value to the person making the misrepresentation.'" *Id.* at 17 (*quoting Gov't of the V.I. v. Adams-Tutein*, 47 V.I. 514, 523 (D.V.I. App. Div. 2005) (*per curiam*)). And third, two of predicate acts cited in the complaint, offers to provide extermination services, cannot support a CICO claim "[b]ecause the Complaint never alleges that the two proposals . . . were accepted or that any particular Defendant ever received 'something of value' in response to those proposals . . . ." *Id.* at 18.

¶32 For similar reasons as stated previously concerning deception by omission, the Court also rejects the Defendants' first and second arguments. The Defendants are correct, that the two offers to exterminate, standing alone, would not state a claim for relief because no money was obtained falsely. The offers were not accepted. But the Government is also alleging a conspiracy. And what the Defendants either fail to appreciate or intentionally ignore is that the Government is not alleging that the Defendants just happened to forget to tell their customers that the pesticide being applied in their homes and residences contained methyl bromide. The Court takes judicial notice that methyl bromide is a controlled substance, that "[i]n 1992, the Environmental Protection Agency announced plans to promulgate a rule to phase out the use of methyl bromide in the United States." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 402 (1999); *see also Nat'l Resources Def. Council v. EPA*, 513 F.3d 257, 258 (D.C. Cir. 2008) ("Methyl bromide is used in the United States and throughout the world as a broad-spectrum pesticide and, since 1992, has been a controlled substance under the Montreal Protocol on Substances that Deplete the Ozone Layer. In 1997 the parties to the Montreal Protocol established a 2005 deadline for phasing out its use and production, but at the same time provided that the phaseout would not apply 'to the extent the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.'"). The Court also takes judicial notice that the Virgin Islands and Puerto Rico are territories of the United States. And the Government avers that "[i]n 1984, the EPA banned the indoor use of methyl bromide products." (Compl. ¶ 27.)

¶33 The Virgin Islands Code criminalizes obtaining money by false pretenses, specifically providing that "[w]hoever knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property . . . ." 14 V.I.C. § 834. The Complaint alleges that the Defendants "colluded" with a Puerto Rican company to "import pesticides containing methyl bromide illegally into the Virgin Islands," (Compl. 4), and did not tell their customers that their homes and residences were being fumigated and treated with a banned pesticide. This was done knowingly, and by design, according to the Government's allegations, because the substance is controlled, and its use indoors is illegal. From these actions, the Defendants obtained money: payments from their customers for extermination services. Taking all this to be true, as the Court must on a motion to dismiss, the Defendants were on notice that applying methyl bromide indoors within the United States is a violation of the law. And violating the law thirty-five times for profit can support a CICO claim.

¶34 The Court does appreciate the Defendants' concerns: that "[t]he Attorney General . . . claim[s] that the Defendants—a Virgin Islands pest control company, the national company, and an indirect corporate parent—operate like organized crime . . . . [and] seeks . . . civil penalties for alleged regulatory violations that could (if true) be adequately remedied under other Virgin Islands laws." (Mot. 2.) But these concerns must fall on deaf ears because the Court has no authority to dismiss this complaint because the Defendants claim "CICO is being used to bludgeon lawful companies for conventional torts, contract disputes, and regulatory violations already subject to venerable remedies, albeit those reaping lower monetary rewards." *Id.* at 2 n.2 (citing *Gov't of the U.S.V.I. v. Hess Corp.*, SX-15-CV-358; *Gov't of the U.S.V.I. v. Takata Corp., et al.*, ST-16-CV-286; *Charleswell v. Chase Manhattan Bank, N.A.*, 45 V.I. 495 (D.V.I. 2004)). These concerns are for the other branches of government.

Count V: Civil Violations of the Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 605(a) • Federal Felony of Wire Fraud, 18 U.S.C. § 1343

¶35 Count V is asserted only against ServiceMaster and Terminix LP and alleges that both defendants violated the United States Code, specifically mail and wire fraud in violation of 18 U.S.C. § 1343, which provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be hall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343. And a "scheme or artifice to defraud" includes any "scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346.

¶36 ServiceMaster and Terminix LP claim Count V fails to state a claim because wire fraud does not impose a duty to disclose, citing several cases in support. (*See* Mot. 15 ("A claim for wire fraud based on 'the concealment of material facts and a failure to disclose information' may only lie where 'the defendant is under a known legal duty to disclose' those purported facts." (quoting *United States v. Ciavarella*, 716 F.3d 705, 728-29 (3d Cir. 2013); citing *Bonilla v. Volvo Car Corp.*, 150 F.3d 62, 70 (1st Cir. 1998)); *see also* Reply 16-17 (citing *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015); *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1226 (11th Cir. 2002); *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000); *Chiarella v. United States*, 445 U.S. 222, 235 (1980). The Government counters that the cases ServiceMaster and Terminix LP do not support their argument.

¶37 *Bonilla v. Volvo Car Corporation* does give a detailed analysis of the duty to disclose. *Bonilla*, decided in 1998, involved a class action under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), and addressed the evidence necessary to "support a finding that [a defendant] committed predicate acts of mail or wire fraud." *Id.* at 66. The *Bonilla* court explained that

> [t]o prove mail or wire fraud, plaintiff[] must show three elements: a "scheme to defraud," [defendant's] "knowing and willful participation in the scheme with the intent to defraud," and the use of the mails or interstate wire or radio communication in furtherance of the scheme. The conduct must "be intended to deceive another, by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct."

Id. at 65 (citations omitted). In defining fraud, the court explained that

> the *locus classicus* of fraud is the seller's affirmative false statement or a half truth, i.e., a statement that is literally true but is made misleading by a significant omission. At common law, fraud doctrine did not impose any broader, general duty to disclose, but it is settled that the mail and wire fraud statutes go somewhat beyond the common law. . . . The failure to disclose information may also constitute a fraudulent representation [under the mail and wire fraud statutes] if the defendant was under a legal, professional or contractual duty to make such a disclosure.

Id. at 69-70 (citations and paragraph break omitted).

¶38 ServiceMaster and Terminix LP are correct: "'there is no general obligation of the seller to tell the buyer everything negative that the buyer might be interested in learning about the transaction or item to be purchased.'" (Mot. 15 (quoting *Bonilla*, 150 F.3d at 70).) "[C]aveat emptor remains the general rule . . . ." *Bonilla*, 150 F.3d at 70. But only "absent false statements or half truths." *Id.* (parentheses omitted). And therein lies the distinction because pesticides, fumigation, and extermination necessarily involve chemicals that are toxic; the goal is to kill those pests and vermin that may be present and leave sufficient residue to kill any newcomers. There is an inherent, implicit representation that chemicals used in the process are not illegal or highly toxic to the inhabitants.

¶39 The Government claims ServiceMaster and Terminix LP committed wire fraud, in violation of 18 U.S.C. § 1343, through the Terminix website, www.terminix.com, specifically by making misrepresentations and failing to disclose facts. The Government alleges that "[a]t all relevant times, Terminix LP operated the website www.terminix.com, which provides marketing and information for Terminix customers throughout the United States [and] the Virgin Islands." (Compl. ¶ 15.) The Government also alleges that "ServiceMaster and Terminix LP failed to disclose in its national website advertising that" it used methyl bromide, that use of methyl bromide for residences was illegal, or that methyl bromide was illegal "due to acute toxicity." *Id.* ¶ 88. This is sufficient to state a CICO claim for violation of the federal wire fraud statute.

Count VI: Civil Violations of the Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 605(d) • Conspiracy and/or Attempt to Violate CICO

¶40 The Defendants further move to dismiss Count VI, a civil CICO claim alleging conspiracy to violate, and attempted violations of, Virgin Islands law. Section 605(d), title 14 of the Virgin Islands Code provides that "[i]t is unlawful for any person to conspire or attempt to violate, either directly or through another or others, the provisions of section 605, subsections (a), (b), and (c)." Viewing the complaint in the light most favorable to the Government, Count VI does not fail to state a claim. The Defendants' challenge here was premised on a successful attack on the other CICO claims. (*See* Mot. 19 ("Therefore, with the necessary dismissal of Counts Three, Four, and Five, no other allegations within Count Six can serve as predicate acts necessary to support the [] separate claim for conspiring to violate CICO.").) Because Counts III, IV, and V state claims for relief, Count VI does not fail. Furthermore, civil claims can be plead in the alternative and a civil CICO conspiracy claim is a viable claim and can be alleged on its own. Thus, the motion to dismiss Count VI must be denied.[7]

Count VII: Virgin Islands Pesticide Control Act

¶41 In Count VII, the Government claims that the Defendants "violated and/or aided and abetted the violation of the Pesticide Control Act, 12 V.I.C. §§ 825, 827, and 843, in its use and storage of pesticides containing methyl bromide." (Compl. ¶ 94.) Specifically, the Government alleges the Defendants violated the Pesticide Control Act by:

a. Applying or using any pesticide contrary to the registered label usage;
b. Engaging in fraudulent business practices in the application of pesticides;
c. Failing to demonstrate sufficient knowledge and experience concerning the proper use and application of pesticides;
d. Failing to supply the occupants of a dwelling with a written copy of the information including any warning, contain[ed] on the label of the pesticide to be applied prior to the application of a pesticide within or on the premises of a dwelling;
e. Storing of any pesticide contrary to the registered label; and/or

[7] The Defendants actually argue that the Court would lack subject-matter jurisdiction over the civil CICO conspiracy claim if the "predicate" claims were dismissed under Rule 12(b)(6). That is incorrect. The Superior Court has subject-matter jurisdiction over all civil actions. *See* 4 V.I.C. § 76(a). Thus, the Court construes the Defendants' challenge to Count VI as proceeding under Rule 12(b)(6), not 12(b)(1).

f. Aiding and abetting the conduct described at paragraph 94(a) through (d).

Id. ¶¶ 94a-f. In its prayer for relief, the Government requests that the Defendants "pay the maximum civil penalties allowed by law." *Id.* ¶ 98b.

¶42 The Defendants argue that Count VII fails to state a claim because the violation provision of the Pesticide Control Act is found in section 836 of title 12, whereas the Government's complaint relies on section 825, 827, and 843 of title 12.[8] The Government, in response, points to section 842, which provides: "'In lieu of seeking administrative sanctions, the Commissioner may refer any violation described in subsection (a) of this section to the attorney general who shall be empowered to bring a civil suit to seek any of the sanctions described in subsection (a) of this section.'" (Opp'n 19-20 (quoting 12 V.I.C. § 842(b)).) And "'[s]ubsection (a) of this section' states that the Commissioner may seek administrative sanctions against any person who violates '*any provision* of this chapter or any rule, regulation or order issued thereunder or commits any offense described in section 836 of this chapter.'" *Id.* at 20 (quoting 12 V.I.C. § 842(a)). The Defendants' reply is that Count VII still fails—not only because the cited sections cannot be violated—because the Commissioner of the Department of Planning and Natural Resources ("DPRN") did not make a referral, which they argue is "a condition precedent to filing suit. . . ." (Reply 17-18.)

¶43 The Government is not incorrect here. Section 842(b) does empower the Attorney General to file suit. But section 803 also states that "[j]urisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides, is by this chapter, vested exclusively in the Commissioner." 12 V.I.C. § 803(a). This language is plain and unambiguous. And use of words like "jurisdiction," "vested," and "exclusive" is clear legislative intent to deprive the Superior Court of jurisdiction, but only as to "matters pertaining to the distribution, sale, use, and transportation of pesticides . . . ." *Id.* And it is this point the Defendants' overlook.

¶44 To be clear, someone can violate section 842(a) by: (1) violating any provision of the Virgin Islands Pesticide Control Act; or (2) violating a rule, regulation, or order promulgated by the Commissioner; or (3) by committing any offense enumerated in section 836. Certain minor infractions are carved out, however, to be redressed by a written warning, a small fine, and issuance

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[8] Technically, due to a scrivener's error, the Complaint references title 14. However, the Virgin Islands Pesticide Control Act is contained in title 12. *See generally* 12 V.I.C. § 801, *et seq.*

of educational materials. *See id.* § 842(a) (citing 12 V.I.C. §§ 831(b)-(c), 832(c)). In general, the Commissioner of DPNR has primary authority to investigate and assess fines, which are reviewable by writ in the Superior Court. *See id.* But the Commissioner can also "refer any violation described in subsection (a) . . . to the attorney general . . . to bring a civil suit to seek any of the sanctions described in subsection (a) . . . ." *Id.* § 842(b). Each sale of or offer to sell a prohibited substance "constitute[s] a separate violation." *Id.* § 842(d). The question the Defendants raise here is whether "any provision" really means "any."

¶45 "'Courts are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it.'" *People v. Noel*, 68 V.I. 196, 210 (Super. Ct. 2017) (brackets and citation omitted). And clearly the words "any provision" are clear and unambiguous. But the argument the Defendants raise is more nuanced because what they are really saying is that Count VII fails to state a claim for relief because sections 825, 827, and 843 of title 12 cannot be violated. Section 825 requires any person, defined broadly to include individuals as well as businesses, *see* 12 V.I.C. § 801(43), "who engages in the commercial or private application of pesticides or the sale of restricted use pesticides . . . [to] be certified . . . ." *Id.* § 825(a). The remaining portions of the statute address certification broadly, with further requirements to be adopted by the Commissioner of DPNR. *See id.* § 803(c)(5). The statute also requires applicators to keep records and provide the owners, or managers of multiple dwelling buildings, "with a written copy of the information, including all warnings, contained on the label of the pesticide to be applied." *Id.* §§ 825(h), 825(i). And this last requirement is what the Government claims was violated.[9]

¶46 The Government is not claiming the Defendants were not certified under the Virgin Islands Pesticide Control Act. Instead, the Government claims the Defendants failed to supply residents and owners with written information about the pesticides applied. Failure to supply written warnings and information about the pesticides applied is a violation of the Virgin Islands Pesticide Control

[9] The Government also cites to section 827 of title 12 in its complaint, which addresses the denial of an application for certification to apply pesticides or the revocation of such certification. This portion of the complaint must be dismissed. The Superior Court does not have the authority to certify someone to apply pesticides. *See generally* 12 V.I.C. §§ 825-26. Instead, "all matters pertaining to the distribution . . .[and] use . . . of pesticides, is . . . vested exclusively in the Commissioner." 12 V.I.C. § 803(a). The Superior Court likewise lacks the authority to deny certification or to revoke certification, even as a form of penalty of punishment. Instead, the Commissioner makes that decision, which is "final unless the aggrieved party institutes a proceeding under chapter 97, title 5 of this Code . . . ." *Id.* § 827. The Superior Court's jurisdiction over a revocation or a denial of an applicator's certifications is appellate in nature.

Act. So, Count VII cannot be dismissed, certainly not as to Terminix USVI. As for Terminix LP, the national company, and ServiceMaster, the direct or indirect parent company (the parties dispute the extent of ServiceMaster's control), the Court must also deny the motion to dismiss Count VII at this time as to them because the Government relies on an "[a]iding and abetting" theory. (Compl. ¶ 94f.) And the Virgin Islands Pesticide Control Act extends civil and criminal liability to aiders and abettors. *See* 12 V.I.C. § 843 ("Any person knowingly aiding or abetting any other person in the violation of any provision of this chapter or any rule, regulation, or order of the department made pursuant thereto is subject to the same punishment and penalty as that prescribed by this chapter for the violation by such other person."). Thus, the motion to dismiss Count VII must also be denied.

Counts I - VII: Failure to Satisfy the Requirements of Rule 9(b)

¶47 The remaining argument the Defendants make concerns the Complaint as a whole: that none of the claims as plead satisfy the requirements of Federal Rule of Civil Procedure 9(b). Prior to the promulgation of the Virgin Islands Rules of Civil Procedure, the Superior Court of the Virgin Islands routinely applied through Superior Court Rule 7, the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence as well as the local rules promulgated by the District Court of the Virgin Islands. *Accord ServiceMaster Co.*, 2018 V.I. LEXIS 100 at *8-9. "But the Supreme Court of the Virgin Islands later 'criticized this uncritical application by the Superior Court of the Virgin Islands of rules promulgated by other courts.'" *Albert v. Hess Oil V.I. Corp.*, 70 V.I. 316, 325 (Super. Ct. 2019) (quoting *Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 501-02 (Super. Ct. 2017)). *See generally Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (2015) ("Such uncritical application of the rules of another court to a proceeding in the Superior Court is wholly inconsistent with our admonition that 'the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort, and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other applicable procedure." (brackets omitted) (quoting *Sweeney v. Ombres*, 60 V.I. 438, 442 (2014) (*per curiam*)).

¶48 In response, the Superior Court judges began to consider whether a particular federal or District Court rule applied.[10] The Supreme Court of the Virgin Islands never had occasion to address

[10] *E.g.*, Albert, 70 V.I. at 325-26 (D.V.I. Local R. Civ. P. 7.1); *Hunt v. Downs*, SX-15-CV-585, 2017 V.I. LEXIS 25, *3 n.4 (V.I. Super. Ct. Feb. 14, 2017) (D.V.I. Local R. Civ. P. 7.3); *Guardian Ins. Co. v. Gumbs*, ST-15-CV-195, 2016 V.I. LEXIS 226, *4

whether Federal Rule of Civil Procedure 9(b) applied through Superior Court Rule 7, other than a passing reference in a dissenting opinion. *See Ross v. Hodge*, 58 V.I. 292, 314 n.2 (2013) (Hodge, C.J., dissenting) ("However, claims for fraud—unlike actions for restitution based on 'undue influence'—must be pleaded with particularity." (citing Fed. R. Civ. P. 9(b); Super. Ct. R. 7)). And the reason why it matters here is because this could be an instance where applying the newly-promulgated rules of procedure might work an injustice. *Cf.* V.I. R. Civ. P. 1-1(c)(2)(B) ("These rules, and subsequent amendments, govern . . . proceedings in any action pending on the effective date of the rules or amendments, unless . . . the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.").

¶49 Virgin Islands Rule of Civil Procedure 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The federal rule is identical. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Federal courts are divided over whether Rule 9(b) applies when claims "sounding in fraud" are statutory rather than common law.[11] The Government,

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n.14 (V.I. Super. Ct. Aug. 22, 2016) (Fed. R. Civ. P. 56); *Tutein v. Ford Motor Co.*, 67 V.I. 144, 147 n.4 (Super. Ct. 2016) (Fed. R. Civ. P. 9(g)); *Goodwin v. Fawkes*, 67 V.I. 104, 121 (Super. Ct. 2016) (Fed. R. Civ. P. 23); *Prosser v. Nissman*, 67 V.I. 96, 99 n.8 (Super. Ct. 2016) (Fed. R. Civ. P. 12(b)(1)); *Libien v. MIFR, Inc.*, ST-15-CV-107, 2016 V.I. LEXIS 193, *21-22 (V.I. Super. Ct. Nov. 28, 2016) (Fed. R. Civ. P. 12(f)); *People v. Roberts*, SX-14-CR-136, *et seq.*, 2016 V.I. LEXIS 232, *1 n.2 (V.I. Super. Ct. Oct. 25, 2016) (Fed. R. Crim. P. 14); *Williams v. Leerdam*, ST-13-CV-449, 2015 V.I. LEXIS 148, *4 n.5 (V.I. Super. Ct. Dec. 16, 2015) (Fed. R. Civ. P. 12(b)(6)). *But cf. Banco Popular De P.R. v. Lorenzo*, SX-13-CV-268, 2017 V.I. LEXIS 92, *5 n.2 (V.I. Super. Ct. June 27, 2017) ("Since there are precedents from the Supreme Court of the Virgin Islands regarding motions for summary judgment, the Court will use the standard of review set forth in said precedents.").

[11] *See Nesco, Inc. v. Fairley Cisco*, No. CV205-142, 2005 U.S. Dist. LEXIS 36189, *5-6 (S.D. Ga. Oct. 7, 2005) ("Sister circuits, which have addressed this issue, are split on whether to apply Rule 9(b) to claims under UFTA."); *see also, e.g., Carbone v. Zen 333 Inc.*, No. 2:16-cv-0108-DCN, 2016 U.S. Dist. LEXIS 176355, at *20 (D.S.C. Dec. 21, 2016) ("[T]he Fourth Circuit has 'routinely applied Rule 9(b) to statutory claims sounding in fraud.'" (brackets omitted) (quoting *Bolling v. PP&G, Inc.*, No. WDQ-15-911, 2015 U.S. Dist. LEXIS 169423, *16 (D. Md. Dec. 17, 2015)). *Cf. also Flowers v. Cont'l Grain Co., Wayne Poultry Div.*, 775 F.2d 1051, 1054 (8th Cir. 1985) (civil RICO claim) ("Section 1341 is the federal statute prohibiting mail fraud. As the District Court's opinion makes clear, this complaint falls far short of the specificity required by Fed. R. Civ. P. 9(b) when fraud is alleged."); *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 524 (D.N.J. 2008) ("All Plaintiffs bring common law fraud claims, and statutory fraud claims under New Jersey's Consumer Fraud Act. Plaintiffs' common law fraud claims are, of course, subject to the pleading requirements of Federal Rule of Civil Procedure 9(b). Plaintiffs' statutory fraud claims are also subject to Rule 9(b)'s heightened pleading standards." (citations omitted)); *Kranz v. Koenig*, 240 F.R.D. 453, 455 (D. Minn. 2007) (holding that Fed. R. Civ. P. applies to Minn. Uniform Fraudulent Transfer Act). *But cf., e.g., In re: Arby's Rest. Grp. Litig.*, No. 1:17-cv-0514-AT, 2018 U.S. Dist. LEXIS 131140,*67 (N.D. Ga. Mar. 5, 2018) (concluding that Rule 9(b) did not apply to the Ga. Fair Businesses Prac. Act claims);

relying on a decision of another Superior Court judge, argues "that Rule 9(b) does not apply to statutory claims, like the CPL and CFDBPA." (Opp'n 8-9 (citing *Williams v. Leerdam*, Case No. ST-13-CV-449, 2015 V.I. LEXIS 148, *8 (V.I. Super. Ct. Dec. 16, 2015)).)

¶50 Having acknowledged *Vanterpool*'s concerns, *cf.* 2015 V.I. LEXIS 148 at *4 n.5, the *Williams* court noted the "split of judicial authority regarding whether the particularity pleading requirements of Rule 9(b) apply to claims brought under the Uniform Fraudulent Transfer Act." *Id.* at *7. Because the Virgin Islands statute was silent, and "in light of the conflicting views," *id.* at *8, *Williams* "look[ed] to the purpose of the heightened pleading requirement of Rule 9(b)." *Id.*

> The requirement to plead claims of fraud with particularity in Rule 9(b) is derived from the English common law and codified procedures which were followed when the Federal Rules of Civil Procedure were first adopted. The rationale for imposing a more stringent pleading standard for fraud claims is rooted in concerns about the nature, breadth, and consequences of fraud allegations. The reasons identified by many courts included: 1) erecting a safeguard to protect putative defendants from unsupported claims of acts of moral turpitude; 2) the advancement of nuisance claims made primarily, or solely, for the purpose of forcing settlements; 3) to protect the finality of private economic transactions; 4) the use of fraud suits to enable a "fishing expedition" for information of the defendants; and 5) the wide swath of types of conduct which could potentially be the basis for a claim of fraud.

Id. (footnotes omitted). The *Williams* court acknowledged that "these judicially-based concerns have validity, particularly in the realm of the common law," but concluded that they "must give way to legislatively-established policies under our three-branch system of governance." *Id.* at *8-9. The court reasoned that "[t]he fears of abusive common law fraud lawsuits which underlie the pleading requirements of Rule 9(b), are greatly abated under a statutory scheme such as VIUFTA." *Id.* And the court held that "the purposes of Rule 9(b) are *not furthered* by requiring plaintiffs to meet the particularity pleading requirement . . . . [and] may force a plaintiff to allege facts which need not be proved to succeed on the claim." *Id.*

¶51 Persuaded in part by the historical basis for the rule, another Superior Court judge concluded "that Rule 9(b) serves the valid purpose of curtailing unnecessary reputational harm

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FTC v. Student Aid Ctr., Inc., 281 F. Supp. 3d 1324, 1332 (S.D. Fla. 2016) ("[C]courts in the Eleventh Circuit have held that Rule 9(b) does not apply to claims under Florida's Deceptive and Unfair Trade Practices Act." (citing *Hetrick v. Ideal Image Dev. Corp.*, 372 F. App'x 985, 992 (11th Cir. 2010) (*per curiam*)); *Special Purpose Accounts Receivable Coop. Corp. v. Prime One Capital Co., L.L.C.*, No. 00-06410-CIV, 2007 U.S. Dist. LEXIS 93127, *13 (S.D. Fla. Dec. 19, 2007) ("The Court concludes that the heightened pleading standard does not apply to claims brought under the UFTA.").

which could result if fraud allegations are not cabined by heightened pleading requirements." *Tutu Park, Ltd. v. Harthman Leasing I, LLLP*, ST-14-CV-456, 2016 V.I. LEXIS 159, *11 (V.I. Super. Ct. Sep. 27, 2016). The specific issue in *Harthman Leasing* concerned Rule 9(b) and its application by way of Superior Court Rule 7 to affirmative defenses sounding in fraud. *See generally id.* ("Therefore, the Court will apply Rule 9(b) to all averments of fraud, including affirmative defenses."). The court reasoned that "'Rule 9(b) does not require omniscience; rather, the Rule requires that the circumstances of fraud be pled with enough specificity to put [the other side] on notice as to the nature of the claim [or defense].'" *Id.* (citation omitted).

¶52 This Court agrees with *Williams* and *Harthman Leasing* and holds that Federal Rule of Civil Procedure 9(b) would have applied through Superior Court Rule prior to the promulgation of Virgin Islands Rule of Civil Procedure 9(b). *Cf. Feuerzeig v. Innovative Commc'ns Corp.*, No. 531/1998, 2000 V.I. LEXIS 31, *8 (V.I. Terr. Ct. Oct. 5, 2000) ("Each element must be specifically pleaded." (citing Fed. R. Civ. P. 9(b)); *Francis v. Graham Miller (Caribbean) Ltd.*, 26 V.I. 184, 187 (1991) (mistake) ("[C]ount XII falls within the Rule 9(b) particularity requirement and is insufficiently pled. The appropriate relief, however, is not dismissal but amendment of count XII to comply with Rule 9(b)."); *see also Battiste v. Citibank, N.A.*, No. 505/1980, 1983 V.I. LEXIS 70, *2 (V.I. Terr. Ct. Feb. 8, 1983) (noting that "Rule 9(b) [does] not . . . abrogate Rule 8(a) in fraud claims." (citation omitted)). But Rule 9(b) could only apply if no Virgin Islands statute, rule, or procedure said otherwise. *Cf. Vanterpool*, 63 V.I. at 576. And therein lies the issue because *Williams* essentially concluded that applying Rule 9(b) would contravene *Vanterpool* "when a statutory cause of action, like that created by the VIUFTA, is at issue . . . ." *Williams*, 2015 V.I. LEXIS 148 at *9. *Accord Sweeney*, 60 V.I. at 443 (applying Federal Rule of Civil Procedure 25 rather than 5 V.I.C. § 78 was error).

¶53 *Williams* concluded that Rule 9(b) does not apply to statutory claims because "when a statutory cause of action . . . is at issue, the key consideration when defining what must be alleged is not what a court pleading rule requires." *Williams*, 2015 V.I. LEXIS 148 at *9. Rather, the focus is on "the statutory elements created by the Legislature; and . . . whether the . . . facts averred . . . [in the pleading] meet those essentials." *Id.* The *Williams* court further made two persuasive points: (1) that "[t]his view is consistent with venerable principle that a statute is construed in accordance with the plain and unambiguous language of the law," *id.*, and (2) that "when reviewing whether a complaint sufficiently pleads a statutory cause of action, the trial court must presume that 'the Legislature intended that the governing law be construed to simply mean what it says.'" *Id.* at *9-10 (brackets and citation omitted). This Court adds a third point: that by subjecting a statutory claim to a higher pleading standard, courts may, in effect, be rewriting the statute and effectively precluding relief, contrary to the Legislature's public policy determination.

¶54 Here, for example, the Defendants contend that Counts I through VI fail because the Government had not met Rule 9(b)'s heightened pleading standard. They assert that "'[n]aked assertions of false and misleading acts—however egregious their impact is said to be—do not comport with the requirements of Rule 9(b).'" (Mot. 4 (quoting *Tradewinds, Inc. v. Citibank, N.A.*, 20 V.I. 152, 160 (D.V.I. 1983)).) This Court does not disagree. But *Tradewinds* also involved a wrongful eviction claim, not statutory claim. *See id.* And while the Defendants may be correct, that "[c]ourts routinely apply Rule 9(b)'s heightened pleading standard to statutory causes of action sounding in fraud, including Section 5 of the Federal Trade Commission Act and state consumer protection laws," (Reply 6 (citing *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 851-53 (C.D. Cal. 2010); *Green v. Green Mtn Coffee Roasters, Inc.*, 279 F.R.D. 275, 279 (D.N.J. 2011); *Cinalli v. Kane*, 191 F. Supp. 2d 601, 608 (E.D. Pa. 2002); *Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 86 (11th Cir. 2008))), other courts have reached the opposite conclusion. *See, e.g., FTC v. Student Aid Ctr., Inc.*, 281 F. Supp. 3d 1324, 1332 (S.D. Fla. 2016) ("Although a split of authority exists, federal courts in the Eleventh Circuit have held that Rule 9(b) does not apply to claims under Section 5 of the FTC."), *adopted by* 281 F. Supp. 2d 1324, 1328 (S.D. Fla. 2016); *N.M. ex rel. King v. Capital One Bank (USA) N.A.*, 980 F. Supp. 2d 1314, 1320 (D.N.M. 2013) ("The Tenth Circuit does not impose the Fed. R. Civ. P. 9(b) heightened pleading requirement upon unfair trade practices claims, and New Mexico courts do not require plaintiffs to plead such claims with particularity." (citation omitted)); *Zuleski v. Hartford Accident & Indem. Co.*, No. 2:05-0490, 2005 U.S. Dist. LEXIS 27760, *9-10 (S.D. W. Va. Oct. 24, 2005) ("They do not cite, and this Court has not found, any case indicating that the requirements of Rule 9(b) apply to the Unfair Trade Practices Act.").

¶55 But regardless whether Rule 9(b) should also apply to statutory claims, courts have long recognized that, in general, "Rule 9(b) exists to eliminate 'general, unsubstantiated charges of fraud that can do damage to a defendant's reputation.'" *Scott v. Pfizer, Inc.*, 249 F.R.D. 248, 259 (S.D. Tex. 2008) (quoting *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993)). And "Rule 9(b)'s clear intent is to eliminate fraud actions in which all the facts are learned through discovery *after* the complaint is filed." *Id.* (emphasis added) (citing *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir.1985)). Furthermore, courts "considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of rule 9(b) with the broader policy of notice pleading." *Friedlander*, 755 F.2d at 813 n.3 "Rule 9(b) must not be read to abrogate Rule 8(a) requiring notice pleading." *United States ex rel. Clausen v. Lab. Corp. of Am.*, 198 F.R.D. 560, 562 (N.D. Ga. 2000); *accord Battiste*, 1983 V.I. LEXIS 70 *2. "A complaint that presents in detail the 'who, what, when, where, and how' of the alleged fraud has generally been held to comply with Rule 9(b)." *Clausen*, 198 F.R.D. at 561 (N.D. Ga. 2000); *accord United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) ("A plaintiff alleging fraud must therefore support its allegations 'with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.'" (quoting *In re: Rockefeller Ctr. Props., Inc. Securities Litig.*, 311 F.3d 198, 217 (3d Cir. 2002)). "This normally includes the time, place, and content of the false misrepresentations, the facts misrepresented, and the nature of the detrimental reliance . . . ." *Elster*, 75 F.R.D. 458, 461 (N.D. Ga. 1977). But courts do allow "some leniency allowed for complex issues or transactions covering a long period of time." *Id.*

¶56 Reading Rule 8(a) and Rule 9(b) together, the Court finds that the Complaint gives enough detail to put each Defendant on notice of the claims. Who? Terminix USVI and Bugbusters in conjunction with Terminix LP and ServiceMaster, all colluding with Superior Angran. To do what? Import methyl bromide into the U.S. Virgin Islands illegally, not inform customers that methyl bromide was used, make money, and promote Terminix. Where? On St. Croix, St. Thomas, and St. John. When? From July 2008 through April 2012 via Bugbusters and then, from April 2012 through March 2015 via Terminix USVI. How? Here, the Defendants stand on firmer ground. The Complaint does not have much in the way of "how" the collusion, deception, and misrepresentations occurred. But the Court will grant some the Plaintiff some leeway here.

¶57 First, this case is complex. It concerns multiple transactions and communications by and between several companies, including Bugbusters, who is either defunct or was acquired by or renamed as Terminix USVI, as well as Superior Angran, who the Government did not name as a party. The transactions spanned several years and allegedly circumvented federal and territorial laws pertaining to the use of banned substances inside homes and residences in the Territory.

Clearly, the Defendants know what this case is about. And they, collectively, know how methyl bromide ended up being used indoors within the Territory. Perhaps, as the Government alleges, methyl bromide was used with complete disregard for Virgin Islanders and persons visiting the Territory, all in pursuit of profit. Or perhaps, as the Defendants imply, it was simply a lack of training and oversight. But the question at this stage is not whether the Government will prevail. Rather, the question is whether the Government has a stated its claims, including any that are subject to Rule 9(b), sufficiently, giving the Defendants enough notice to know what defenses to assert.

¶58 Second, ServiceMaster has also filed a motion to dismiss for lack of personal jurisdiction. If ServiceMaster lacks minimum contacts with the Territory, some or all claims may have to be dismissed, which would moot or reduce the concerns it has about the sufficiency of the Government's allegations of fraud and misrepresentation. The Court will consider granting ServiceMaster leave to renew its more definite statement motion should its motion to dismiss for lack of personal jurisdiction be denied.[12]

¶59 Finally, the concerns animating Rule 9(b), regarding harm to a defendant's reputation from general and unsubstantiated allegations of fraud, are simply not relevant here. "Terminix USVI (the Virgin Islands LLC that conducted the fumigation) and Terminix LP (the national company) have taken responsibility for th[e] incident [on St. John] – they agreed to plead guilty to four misdemeanor counts of violating federal pesticide law, to pay a substantial fine and costs, and to provide a fund for training on pesticide applications in the Virgin Islands." (Mot. 1). The Defendants' reputations have already been impacted. *Cf. United States v. Terminix Int'l Co., Ltd.*, Crim. No. 2016-10, 2016 U.S. Dist. LEXIS 135641, *1-2 (D.V.I. Sep. 30, 2016). Again, ServiceMaster's involvement is not as clear. But it has preserved its personal jurisdiction defense, notwithstanding that it joined in this motion as well. *But see Catalus Capital USVI, LLC v. ServiceMaster Co., LLC*, No. 2017-17, 2018 U.S. Dist. LEXIS 36021, *2 (D.V.I. Mar. 6, 2018) (concluding that 12(b)(2) motion was waived because joint 12(b)(1) and 12(b)(6) motion was filed "48 minutes" earlier).

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[12] All defendants move in the alternative for a more definite statement. That motion is made in passing, is not briefed, nor is any authority or even a rule cited in support, which constitutes wavier. The alternate request will be denied, except for ServiceMaster, and only to avoid further delay.

III. CONCLUSION

¶60 For the reasons explained above, the Court will grant in part the Defendants' motion to dismiss. The Court lacks subject-matter jurisdiction over the portion of Count I for damages. Otherwise, the motion will be denied.

Date: November 27, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: ______________________
Court Clerk
Dated: 11/25/2019