**FOR PUBLICATION**

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

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| Cruzan Tires,<br><br>Plaintiff,<br><br>v.<br><br>Government of the Virgin Islands,<br><br>Defendant. | Case No. SX-18-CV-042<br><br>Action for Breach of Contract and Collection of Debt |

**Appearances:**

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**MEADE, JOMO, Judge**

## MEMORANDUM OPINION

**BEFORE THE COURT** are an Application for Temporary Restraining Order and a Petition for a Preliminary Injunction, both filed by the Plaintiff, Cruzan Tires. After reviewing the application for a temporary restraining order, the Court issued an order, dated and entered February 23, 2018, denying it and scheduling a hearing on the request for a preliminary injunction. This opinion provides the basis for the Court's February 23, 2018 Order.

* Specific counsel has not appeared yet.

## Background[1]

Cruzan Tires, a retailer and supplier of tires and other auto parts, bid on and was awarded a contract to supply tires, tubes, and batteries to various departments of the Government of the Virgin Islands. The contract began on October 1, 2015 and initially ran through September 30, 2016, and was extended into the summer of 2017. Thereafter, the Government contracted with Cruzan Tires on a month-to-month basis until Hurricanes Irma and Maria impacted the Territory in September 2017. Raymond Sharmouj, owner of Cruzan Tires, periodically checked local newspapers (both in print and online) to "stay up to date" about "the potential for a new bid." (Sharmouj Affid. ¶ 8 (Feb. 14, 2018), Ex. 1, Pl.'s Application for Temp. Restraining Order, filed Feb. 16, 2018 (hereinafter "Pl.'s Mot.").) He "never saw a notice," however. *Id.* In November 2017, the Commissioner of the Department of Property and Procurement (hereinafter "Property & Procurement" told him "that there would be no bids this year due to the impacts of hurricanes Irma and Maria." *Id.* ¶ 9. But a month earlier, in October 2017, Property & Procurement had issued a bid. Cruzan Tires was not notified. (*See* Verified Compl. ¶ 7, filed Feb. 16, 2018 ("After 2017, Defendant did not renew Plaintiff's contract. In fact it issued another bid, contrary to law, by failing to properly notice it and by intentionally not placing Plaintiff on notice of bid and misleading Plaintiff as to any new bids.").

On Friday, February 16, 2018, at 4:46 p.m., Cruzan Tires, as plaintiff, filed a complaint, verified by Sharmouj, against the Government of the Virgin Islands ("the Government"), as defendant, seeking, *inter alia*, judgment in the amount of

[1] Taken from the papers filed to date in this case.

$44,790.66 for unpaid invoices. Cruzan Tires also filed an application for a temporary restraining order and a petition for injunctive relief the same day that it filed suit. Both documents were captioned differently than the complaint, however. Cruzan Tires referred to itself as the petitioner and the Government as the respondent and described its case as an "action for breach of contract and in violation of 31 VIC 236, et seq." (Pl.'s Mot. 1 (all caps in original).)

The following Tuesday, February 20th, 2018,[2] the Clerk's Office opened a new case with the complaint and docketed the application and the petition as subsequent papers filed in that case. Two days later, on Thursday, February 22, 2018, the Clerk's Office assigned the case at random to the undersigned judge. The next day, February 23, 2018, the Court denied the application for a temporary restraining order and scheduled a hearing for Friday, March 1, 2018. To date, the Government has not appeared or filed its answer. However, Cruzan Tires also has not filed proof of service yet.

## Discussion

Pursuant to Virgin Islands Rule of Civil Procedure 65,

> [t]he court . . . may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

V.I. R. Civ. P. 65(b)(1).

> In deciding whether to grant a preliminary injunction, the Superior Court must consider four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant

[2] Monday, February 19, 2018 was President's Day. The Superior Court was closed for the holiday.

> will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

*Tip Top Constr. v. Gov't of the V.I.*, 60 V.I. 724, 731 (2014) (quoting *Yusuf v. Hamed*, 59 V.I. 841, 847 (2013)).[3] "The party seeking an injunction bears the burden of proof as to all four factors." *3RC & Co. v. Boynes Trucking Sys., Inc.*, 63 V.I. 544, 550 (2015) (quotation marks, brackets, and citation omitted). And when

> considering whether to grant or deny the preliminary injunction, the Superior Court must evaluate the moving party's showing on all four factors under a sliding-scale standard. In conducting this sliding-scale analysis, the Superior Court must make findings on each of the four factors and determine whether—when the factors are considered together and weighed against one another—the moving party has made a clear showing that it is entitled to injunctive relief.

*Id.* at 557 (quotation marks, brackets, and citation omitted). Each factor is addressed below.

<u>Success on the Merits</u>

Turning to the first factor, the Court discerns two claims: a debt claim asserted in the Complaint and a statutory claim asserted in the Petition. Cruzan Tires has shown a likelihood of succeeding on its debt claim. "To state a common

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[3] The Supreme Court of the Virgin Islands has not addressed whether, in deciding whether to issue a temporary restraining order, courts should consider the same factors as when deciding whether to grant a preliminary injunction. Several Superior Court judges have concluded that "the factors to be considered when evaluating a temporary restraining order are the same factors courts consider when evaluating whether to issue a preliminary injunction." *Fenster v. DeChabert*, SX-16-CV-343, 2016 V.I. LEXIS 90, *11 (V.I. Super. Ct. July 13, 2016); *see also id.* at *11 n.39 (collecting cases). Federal courts agree. *See, e.g., Singh v. Carter*, 186 F. Supp. 3d 216, 223 (D.D.C. 2016) ("The standard for a temporary restraining order is the same as that for preliminary injunction." (citations omitted)); *Newlife Homecare, Inc. v. Express Scripts, Inc.*, No. 3:07cv761, 2007 U.S. Dist. LEXIS 33031, *8 (M.D. Pa. May 4, 2007) ("These same factors are used to determine a motion for a temporary restraining order." (citing *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D.Pa.1994)); *Tootsie Roll Indus. v. Sathers, Inc.*, 666 F. Supp. 655, 658 (D. Del. 1987) ("Generally speaking, courts apply the standards for granting a preliminary injunction in determining the propriety of issuing a temporary restraining order."). Absent indication from the Virgin Islands Supreme Court to the contrary, this Court applies the same factors.

law claim for debt under Virgin Islands law, the plaintiff must allege that the defendant owes a certain amount and that the defendant is or should be obligated to pay that amount. Damages are ordinarily not available." *Carlos Warehouse v. Thomas*, 64 V.I. 173, 192 (Super. Ct. App. Div. 2016) (citations omitted). Cruzan Tires alleges in its Complaint that it was awarded a contract by the Government to supply tires, tubes, and batteries. The contract was extended for another eight months or so, from October 2016 into the summer of 2017. After the contract ended, the Government continued to purchase automobile parts from Cruzan Tires on a month-to-month basis. In an affidavit attached to the Application, Sharmouj alleges the Government still owes "$7,652.98" for an "invoice[] for services from September 29, 2017" and "$37,137,68 . . . for services rendered in 2015, 2016, and 2017." (Sharmouj Affid. ¶ 20.) Clearly, Cruzan Tires has stated a debt claim against the Government. Cf. Carlos Warehouse, 64 V.I. at 293 ("allege that the defendant owes a certain amount and that the defendant is or should be obligated to pay that amount."). Thus, Cruzan Tires has shown success on the merits of this claim. The Government may be able to defeat it. *Cf. id.* at 196 (payment is a defense to a debt claim). But at this stage, the question is not will the movant prevail, but only whether he has shown "a reasonable probability of success" that he could prevail. *Tip Top Constr.*, 60 V.I. at 731 (citation omitted).

The second claim is not straight-forward. *Tip Top Construction v. Government of the Virgin Islands* is instructive here. *Tip Top* was also a bid protest case. Tip Top sued "the Government on December 16, 2013, alleging that the Department of Property and Procurement had improperly rejected its bid because it was the lowest responsive bidder. That same day, Tip Top filed a motion for a temporary restraining order ("TRO") and preliminary injunction." *Id.* at 728. The trial court granted the motion and issued a TRO "enjoin[ing] the Government from entering into a contract with Island Roads," *id.*, the company Property & Procurement had selected. While the TRO was in place, the court scheduled a preliminary injunction hearing and, after hearing testimony and reviewing the evidence, denied Tip Top's preliminary injunction motion. *See id.* at 729-30. On appeal, the Supreme Court reversed. *See id.* at 727. Tip Top's sought "two different forms of non-equitable relief," *id.* at 732, judgment awarding the contract to Tip Top and not Island Roads, and judgment declaring that the Government had violated the Virgin Islands' procurement laws. *See id.* at 732-33. The Supreme Court explained that being awarded the contract by judicial decree would carry "a very high burden." *Id.* at 733. But

> the judicial remedy for a statutory or regulatory violation is considerably narrower than outright awarding the contract to the disappointed bidder; rather, the disappointed bidder is only entitled to restoration of the status quo prior to the illegal act, which . . . would entail re-opening the procurement process so that the procuring agency may issue a new decision pursuant to procedures that are consistent with the law.

*Id.*

Unlike in *Tip Top*, Cruzan Tires has not included a demand in its complaint to have the bidding process reopened. The complaint demands that the Court "order the Defendant to pay Cruzan Tires . . . $44,790.56, together with any and all costs, applicable interests and attorney's fees" and also that the Court award "any other remedy equitable or otherwise to which Plaintiff may be entitled." (Comp. 3.) Cruzan Tires also "request[s] that the Court grant [its] complaint; as well as the injunctive relief sought herein *pursuant to the application for a Temporary Restraining Order and Petition for Preliminary Injunction.*" *Id.* (emphasis added). It is in the Petition that

Cruzan Tires demanded "a preliminary injunction . . . enjoin[ing] the defendant from carrying out any further business pursuant to [the contract] until such time as a new and properly issued bid and in compliance with the law is undertaken." (Pl.'s Pet. for Preliminary Inj. 13, filed Feb. 16, 2018 (hereinafter "Pl.'s Pet.").) But this demand—that Property & Procurement be ordered to reopen the bidding process—was made in the Petition, not the Complaint, and "there can only be one complaint in an action." *Cohen v. Super Ct. of City & Cty of San Francisco*, 53 Cal. Rprt. 378, 383 (Ct. App. 1966) (citations omitted). Knowing what claims are at issue here is crucial because "'the division between law and equity remains meaningful to defining the remedies available in a particular action.'" *3RC & Co.*, 63 V.I. at 553 (quoting *Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 252 n.3 (2014)).

A complaint is not the same as a petition. *See, e.g., In re: Mariacopa Cty, Juv. Action No. J-81405-S*, 594 P.2d 506, 508 (Ariz. 1979) ("There is a distinction between 'complaints' and 'petitions' in juvenile law."); *Div. of Child Supp. Enforcement ex rel. Abediyi v. Ferguson*, 77 Va. Cir. 341, 342 (2008) ("Rules . . . require that a civil action be commenced by filing a complaint in the clerk's office, but when a statute requires, a proceeding may be commenced by a pleading styled Petition." (quotation marks, brackets, ellipsis, and footnote omitted)). Cruzan Tires filed a complaint, verified by Sharmouj, and captioned it as "an action for breach of contract and collection of debt." (Compl. 1 (all caps in original).) But Cruzan Tires also filed a petition and captioned it as "an action for breach of contract *and in violation of 31 VIC 236, et seq.*" (Pl.'s Pet. 1 (emphasis added) (all caps in original).) Further, the Complaint refers to Cruzan Tires as the *Plaintiff* and the Government of the Virgin

Islands as the *Defendant* whereas the Petition refers to Cruzan Tires as the *Petitioner* and the Government of the Virgin Islands as the *Respondent.* The parties to civil or criminal actions are the plaintiff and the defendant whereas the parties to civil proceedings are the petitioner and the respondent. The terms are not interchangeable. How this case was commenced may be a problem.

"A civil action is commenced by filing a complaint with the clerk of court." V.I. R. Civ. P. 3; *accord* Fed. R. Civ. P. 3. Except in certain instances not present here, permission is not required. Courts do grant petitions, however. *Cf. Xavier v. Treasure Bay V.I. Corp.*, SX-09-CV-450, ____ V.I. ____, _____ n.7, 2017 V.I. LEXIS 31, *18 n.7 (Super. Ct. App. Div. Feb. 23, 2017) ("[P]etitions proceed by permission and thus must be granted." (citations omitted)). Cruzan Tires asked that the Court grant its complaint. (*See* Compl. 3 ("**WHEREFORE**, it is respectfully requested that the Court grants this complaint.").) This conflates a complaint with a petition. Some civil actions are commenced by petition and not by complaint. *E.g.*, Rivera-Moreno v. Gov't of the V.I., 61 V.I. 279, 311 (2014) ("'When presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief—and also whether the stated claims are for any reason procedurally barred.'" (quoting People v. Romero, 883 P.2d 388, 391 (Cal. 1994)); *see also Dennie v. People*, 66 V.I. 143, 151 (Super. Ct. App. Div. 2017) ("Generally speaking, civil actions are commenced by filing a complaint or a petition." (citing V.I. R. Civ. P. 3; *Moseley v. French*, 961 F. Supp. 889, 893 (M.D.N.C. 1997)); V.I. Hab. Corp. R. 1(d)(1) ("A 'petition for writ of habeas corpus' is the petitioner's initial filing that commences *a proceeding*." (emphasis added)); *accord In re Robert H. Draves Trust & Agnes L.*

*Draves Trust*, 828 N.W.2d 83, 91 n.1 (Mich. Ct. App. 2012) (*per curiam*) (civil proceedings are commenced by application or petition whereas civil actions are commenced by complaint); *State ex rel. Bealler v. Ohio Adult Parole Auth.*, 740 N.E.2d 1100, 1102 (Ohio 2001) ("[O]riginal actions for extraordinary relief like a writ of mandamus must be commenced by filing a complaint or petition, not by filing a motion or an application." (citations omitted)); *see also* 11 U.S.C. § 301(a) ("A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter."). Cruzan Tires may have intended to commence two civil actions—an action at law by filing a complaint for debt and breach of contract and an action in equity by filing a petition for injunctive relief.

If the intent was to commence two actions, that intent was either not made clear to Clerk's Office or was not followed because the Clerk's Office opened one case and processed the Complaint as the initiating document and the Petition and the Application as subsequent filings in the case. More importantly, however, even if Cruzan Tires did intend to commence two actions, it was not necessary since "the Superior Court of the Virgin Islands—like almost all modern American courts—exercises both equitable and legal authority." *3RC & Co.*, 63 V.I. at 553. Legal and equitable claims can be asserted in the same pleading, but there cannot be multiple pleadings in the same case. "[I]it is elementary that there can only be one complaint in an action." *Cohen*, 53 Cal. Rprt. at 383 (citations omitted). But if the Petition and the Application are really just motions, then they were incorrectly titled. *See Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 128-29 (Super. Ct. 2016) ("Any application—whether orally or in writing—made to a court or judge for the purpose of obtaining a ruling or order directing some act to be done in favor of the applicant in a pending case is a motion." (quotation marks, brackets, and citations omitted)). The Court can disregard the title of the motion and consider the substance. *Cf. Moorhead v. Mapp*, 62 V.I. 595, 601 n.6 (2015) ("[I]t is the substance, and not the caption, of a document that controls the legal standard that the Court should apply." (citations omitted)

But if Cruzan Tires did intend to bring a statutory claim under the procurement laws, and if Cruzan Tires is requesting that the Court decree that Property & Procurement must reopen the bidding process, this claim was not stated in the Complaint, which means that Cruzan Tires has only stated a debt claim. The statutory claim regarding the bidding process, if at issue here, was presented in the Petition. "Pleadings must be construed so as to do justice." V.I. R. Civ. P. 8(e). But courts cannot "assume the role of advocate or rewrite pleadings to include claims that were never presented." *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 622-23 (2017) (quotation marks, brackets, and citations omitted).

Cruzan Tires does identify the law that it claims the Government violated. The Government "failed to comply with the requirements under 31 V.I.C. 236 et, seq., when issuing a new bid." (Compl. ¶ 10.) Section 236 is situated within Chapter 23 of Title 31 of the Virgin Islands Code, which comprises the laws governing the procurement of public property by the Government of the Virgin Islands. But Cruzan Tires did not identify in its Complaint what statute the Government violated, which is crucial to determining whether a remedy is available. If a statute provides a right to sue, then "the plaintiff has been granted a 'private right of action.'" *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (citing *Devereaux v. Abbey*, 263 F.3d

1070, 1074 (9th Cir. 2001) (*en banc*)). One court in the Virgin Islands (Donohue, P.J.) has explained that

> [a] private right of action is the right of an individual to bring suit to remedy or prevent an injury resulting from an actual or threatened violation of a legal requirement. . . . Many statutes provide an express private right of action in the language of the statute itself, but . . . [entrust] enforcement . . . [with] the Attorney General of the Virgin Islands. Some statutes, however, contain an implied private right of action where there is no express language conferring that right.

*Olive v. de Jongh*, 57 V.I. 24, 43-44 (Super. Ct. 2012).

*Olive*'s recognition that a private right of action may be implied in a statute comports with the Virgin Islands Supreme Court's holding that courts must "presume[] that the Virgin Islands Legislature will not create a right without a remedy, and thus 'statutes which are silent as to who has standing should be broadly interpreted to confer standing.'" *Mapp v. Fawkes*, 61 V.I. 521, 534 n.11 (2014) (quoting *Bryan v. Fawkes*, 61 V.I. 201, 223 n.12 (2014)). The concern here is that Cruzan Tires has not identified in its Complaint what injury the Government caused that it seeks to redress. The only reference in the Complaint is a cross-reference. In paragraph 7, Cruzan Tires alleges that,

> [a]fter 2017, Defendant did not renew Plaintiff's contract, In fact it issued another bid, contrary to law, by failing to properly notice it and by intentionally not placing Plaintiff on notice of bid and misleading Plaintiff as to any new bids [*this is the subject of the petition for temporary restraining order and injunction*].

(Compl. ¶ 7 (emphasis added).) If the Petition was intended to be a pleading, then Virgin Islands Rule of Civil Procedure 10 would permit adoption by reference. "A statement in a pleading . . . may be adopted by reference . . . in any other pleading or motion." V.I. R. Civ. P. 10(c). But can only be one complaint per case and statements cannot be adopted by reference from pleadings in another case. If the

Petition is intended to be a motion, then incorporating into the Complaint statements from the motion was not proper. Rule 10 is a one-way street. A later pleading or a motion can adopt statements from in an earlier pleading. Hence, an answer can adopt a statement from the complaint. But a complaint cannot adopt statements from a motion, even if the motion were filed simultaneously with the complaint. More importantly, a claim for relief must be stated, shortly and plainly, in a party's pleading not incorporated by reference from another document. Plaintiffs, like legislatures, cannot "hide elephants in mouse holes." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) (quotation marks and citation omitted).

Assuming for purposes of this opinion only that Cruzan Tires intended to state a bid protest claim like in *Tip Top Construction*, the failure to plead that claim plainly in the Complaint and the failure to identify in the Complain the relief that is sought compels the Court to conclude that Cruzan Tires is not likely to succeed on this claim at this time. That is not to say that Cruzan Tires cannot succeed.[4] "The opportunity to compete for a contract and secure any resulting profits . . . has itself been recognized to constitute significant harm. In addition to potential lost profits with respect to the contract in dispute, the firm that performs the . . . work covered in the contract also could have some advantage in follow up contracts." *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 505 (Ct. Cl. 1997) (internal citation

[4] Cruzan Tires can amend its pleading "once as a matter of course," V.I. R. Civ. P. 15(a)(1), to merge the petition and the complaint if appropriate since the time to amend without court leave has not passed. *See* V.I. R. Civ. P. 15(a)(1)(A) ("A party may amend its pleading once as a matter of course within . . . 21 days after serving it."). Cruzan Tires can also amend its complaint to "set forth in separate numbered paragraphs . . . with separate designation of counts . . . each claim." V.I. R. Civ. P. 8(a)(2). Because "doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count." V.I. R. Civ. P. 10(b).

omitted). But at this stage, the Court must consider the pleadings as plead, not as they might have been pleaded.[5] Hence, this factor did not weigh in favor of issuing a temporary restraining order.

Irreparable Harm to the Moving Party

The second factor to be shown is irreparable harm. "[A] party seeking injunctive relief must demonstrate that the injunction is necessary to avoid 'certain and imminent harm for which a monetary award does not adequately compensate'— in other words, harm without an adequate legal remedy." *3RC & Co.*, 63 V.I. at 554 (quoting *Yusuf*, 59 V.I. at 854)). Injunctive relief is not available for debt claims, however. *Cf. Yusuf v. Hamed*, 59 V.I. 841, 854 (2013) ("[W]hen the record indicates that a plaintiff's loss is a matter of simple mathematic calculation, a plaintiff fails to establish irreparable injury for preliminary injunction purposes." (quotation marks, brackets, and citations omitted)). Cruzan Tires conceded as much in its Application. (*See* Pl.'s Mot. 3 ("[A] plaintiff seeking a money judgment cannot obtain an injunction freezing the defendant's assets to protect plaintiff's right to recovery." (citing *3RC & Co.*, 63 V.I. 544 at 599 (remaining citations omitted)).) But Cruzan Tires counters that "there is an exception when the judgment is sought against a financially

[5] In its Application, Cruzan Tires argues that "[i]njunctive relief is a proper remedy where, *as here*, the Plaintiff asserts an equitable claim such as conversion." (Pl.'s Mot. 3 (emphasis added) (citing *Newlife Homecare, Inc.*, 2007 WL 1314861 at *3).) First, the word conversion does not appear anywhere in the Complaint. If Cruzan Tires intended to assert a conversion claim, and not a statutory bid protest claim under the procurement laws, then it clearly failed to state that claim and thus, has not shown a likelihood of success in support of its application for a temporary restraining order. Second, conversion is not an equitable claim, but a legal claim. *See, e.g.*, *Moore v. Benson*, 700 S.E.2d 273, 278 (S.C. Ct. App. 2010) ("An action for conversion is an action at law." (citation omitted)); *accord Douglas v. Joseph*, 656 F. App'x 602, 605 (3d Cir. 2016) ("'Conversion is an action at law and is, therefore, subject to the two-year statute of limitations.'" (quoting *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa. Super. Ct. 1987), parenthetically)). Money damages is the relief in an action for conversion. Finally, the authority Cruzan Tires cited, *Newlife Homecare*, actually undermines its position. *See* 2007 U.S. Dist. LEXIS 33031 at *22 ("'[F]ailure to pay a debt is not conversion.'" (quoting *Francis Bernhardt, III, P.C. v. Needleman*, 705 A.2d 875, 878 (Pa. Super. Ct.1997)).

unstable of insolvent defendant." *Id.* (citations omitted). "[T]he current financial pressures on the Government as a result of hurricane[s] Irma and Maria increase the probability," Cruzan Tires argues, that it "may not be able to collect on the outstanding debt." *Id.* at 5. The Court rejects this argument.

First, governments are not the same as businesses and corporations. Corporations may be dissolved, may declare bankruptcy, and may go out of business. Governments do not go out of business. *Cf. Flournoy v. State*, 41 Cal. Rptr. 190, 200 (Ct. App. 1964) ("[G]overnment cannot go out of business. Unlike a private entity, it cannot quit building and maintaining highways and other public properties because of its exposure to liability for payment of damages for injuries suffered by individuals. Nor are its tax-raised funds inexhaustible." (quotation marks and ellipsis omitted)); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 Vand. L. Rev. 407, 470 (2006) ("Governments do not go out of business, no matter how inefficient they are." (quotation marks and footnoted citation omitted)); *see also, e.g.*, Brian S. Gowdy, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 Fla. L. Rev. 695, 721-22 (1999) ("The federal government should not be permitted to conceal evidence by invoking an attorney-client privilege, because the privilege's rationale fails when the client is the government. Applying the privilege to an entity is difficult, but possible, when the entity is a corporate client. However, the government is not a corporation").

Second, the Legislature of the Virgin Islands must appropriate funds to satisfy any judgment entered against the Government and, once appropriated, the funds may not be used for any other purpose. *See* 33 V.I.C. § 3054(a) ("The Fund shall consist of such sums of money as may be appropriated thereto from time to time by the Legislature, which sums shall remain available until expended."). Hence, even if Cruzan Tires did prevail here, it could not immediately execute the judgment when entered.

Third, assuming that Cruzan Tires is asserting a bid protest claim under Chapter 23 of Title 31, Cruzan Tires affirmed in its complaint that the Government has already "issued another bid." (Comp. ¶ 7.) Consequently, Cruzan Tires is not trying to enjoin the Government from issuing a bid or awarding a contract. Rather, Cruzan Tires is complaining, i.e., seeking redress, because it was excluded from the bidding process that already occurred. Yet, it still wants the Government enjoined "from having any of its vehicles from its fleet . . . serviced . . . with either Ec[h]o Valley or H H Tire & Battery." (Pl.'s Mot. 1.) Cruzan Tires has not shown how enjoining the Government from doing business with Echo Valley or H H Tire & Battery will avoid certain and imminent harm to it. In its Petition, Cruzan Tires argues that "[t]he Respondent has the ability to continue to obtain service by issuing [p]urchase orders, until a proper bid is undertaken." (Pl.'s Pet. 11.) But Cruzan Tires fails to explain how forcing the Government to revert to obtaining automotive parts by purchase order will prevent immanent harm to it. Cruzan Tires has not asked the Court to order the Government to share the tire and battery business evenly among Echo Valley, H H Tire & Battery, and Cruzan Tires until the merits of this case are decided Instead, Cruzan Tires wants the Government enjoined from doing business with either company under the bid process is reopened. But, as Cruzan Tires points out, the Government could still do business with H H Tire & Battery and Echo Valley by purchase order, which also implies it can choose not to do business with Cruzan Tires by purchase order. This argument is unconvincing.

Finally, and most importantly, Sharmouj swore in his Affidavit that he "first found out about Bid IFB031DPPC17 (S) in October 2017," (Sharmouj Affid. ¶ 11), and that the Commissioner of Property & Procurement told him in November 2017 "that there would be no bids this year due to the impacts of hurricanes Irma and Maria." Sharmouj's sworn statement shows that he knew in October 2017 that Cruzan Tires was excluded from the bidding process and also knew in November 2017 that the Commission had either lied to him or was unaware that a bid was, in fact, issued the month before. Yet, rather than come to court in October, November, or December of 2017 or January of 2018, Cruzan Tires waited until February 2018 to seek redress and, what's more, until minutes before 5:00 p.m. on a Friday before a holiday weekend. Irreparable harm is not shown here. Consequently, the second factor also did not weigh in favor of issuing a temporary restraining order.

<u>Greater Harm to the Nonmoving Party</u>

The third factor to be shown is that issuing a temporary restraining order will not result in even greater harm to the nonmoving party. Cruzan Tires did not satisfy this factor either. First, Cruzan Tires did not address this factor in its Application. It did address it in its Petition, however, claiming the Government can revert to "[p]urchase orders, until a proper bid is undertaken." (Pl.'s Pet. 11.) But arguments of counsel of counsel are not evidence, however, and evidence must be offered in support of granting injunctive relief. *See Henry v. Dennery*, 55 V.I. 986, 994 (2011) ("[U]nsworn representations of an attorney are not evidence."); *see also Tip Top Constr.*, 60 V.I. at 732 n.4 (noting that evidence must be presented but declining to decide whether a "motion for a preliminary injunction is subject to the preponderance of the evidence standard or the clear and convincing evidence standard."). Hence, this factor weighs against granting a temporary restraining order.

Public Interest

The final factor to be considered is the public interest. "[T]his factor will typically favor the moving party 'if it demonstrates both a likelihood of success on the merits and irreparable injury.'" *3RC & Co.*, 63 V.I. at 557 (brackets omitted) (quoting *Yusuf*, 59 V.I. at 858 n.11). Cruzan Tires has demonstrated a likelihood of succeeding on its debt claim, but "'it is axiomatic that equitable relief is only available where there is no adequate remedy at law.'" *Id.* at 554 (brackets omitted) (quoting *Cacciamani & Rover Corp.*, 61 V.I. at 252). Because a monetary award is the remedy when a debt claim is proven, the likelihood that Cruzan Tires will succeed on its debt claim is of no moment here. Additionally, since the Court finds that Cruzan Tires has not adequately plead a statutory bid protect claim under the procurement laws, the Court cannot conclude at this time that it is likely to succeed on the merits.

"[C]ourts should seek to prevent the parties from halting specific acts presumptively benefiting the public until the merits can be reached and a determination made as to what justice requires." *Yusuf*, 59 V.I. at 858 (quotation marks, ellipsis, brackets, and citation omitted). Here, the public interest would not be served by enjoining the Government from reverting to purchase orders to obtain batteries, tires, and other automobile supplies from Echo Valley and H H Tire & Battery for its fleet of vehicles on St. Croix. The need for car batteries and tires would not diminish if an injunction were issued. Public safety needs do not *per se* outweigh granting injunctive relief. *Cf. ATA Def. Indus.*, 38 Fed. Ct. at 506 ("While the court certainly must give serious consideration to national defense concerns and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public." (citing *Magnavox Elec. Sys. Co. v. United States*, 26 Ct. Cl. 1373, 1384 (Ct. Cl. 1997)). As with the other factors, Cruzan Tires has failed provide any evidence that would allow the Court to find that the public interest weighs in favor of an injunction. Thus, this factor too weighs against granting a temporary restraining order.

**Conclusion**

Because none of the four factors weighed in favor of granting injunctive relief, the Court issued its February 23, 2018 Order denying Cruzan Tires' Application for a temporary restraining order. The Court did, however, grant Cruzan Tires' request for "an expedited hearing," (Pl.'s Mot. 7), and advanced and consolidated the hearing on the preliminary injunction with trial on the merits per Virgin Islands Rule of Civil Procedure 65(a)(2).

**Dated** this 26 day of February, 2018.

**JOMO MEADE**
Judge of the Superior Court

**ATTEST:**

Estrella H. George
Clerk of the Court

By: ______________
Court Clerk Supervisor

Dated: 2 / 26 / 18

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

| | |
|---|---|
| Cruzan Tires,<br><br>Plaintiff,<br><br>v.<br><br>Government of the Virgin Islands,<br><br>Defendant. | Case No. SX-18-CV-042<br><br>Action for Breach of Contract and Collection of Debt |

***ERRATA ORDER***

***COMES NOW*** the Court ***sua sponte*** to issue this Order to correct the following scrivener's errors in the Memorandum Opinion dated February 26, 2018:

> On page 2, ten lines from the bottom of the page, insert a closing parenthesis before the word "told" and after the quoted phrase "Property & Procurement"; on page 5, near the end of the first full paragraph, italicize the citation signal and case name "***Cf. Carlos Warehouse***"; on page 8, in the middle of the page, italicize the case names "Rivera-Moreno v. Gov't of the V.I." and "People v. Romero"; on page 9, in the second line of the first full paragraph, insert the word "the" between the words "to" and "Clerk's"; on page 11, two lines from the end of the page, insert the word "there" between the words "But" and "can"; on page 12, replace "Complain" with "Complaint" in the third line of the first full paragraph; and on page 16, six lines from the end of the page, delete the duplicated words "of counsel".

It is further ***ORDERED*** that a copy of this Order be directed to counsel of record and forwarded to the Law Library for distribution to Lexis and Westlaw.

***Dated*** this 30 day of July, 2018.

**JOMO MEADE**
Judge of the Superior Court

***ATTEST:***
Estrella H. George,
Clerk of the Court
By: ________________
Court Clerk Supervisor
Dated: 7 / 30 / 18

CERTIFIED A TRUE COPY
DATE: 7-31-18
ESTRELLA H. GEORGE
~~ACTING~~ CLERK OF THE COURT
BY: ________________
COURT CLERK II