IN THE SUPREME COURT OF THE VIRGIN ISLAN

Appeal No. 2021-0001

SENATOR ADLAH DONASTORG, JR., BENEDICTA DONASTORG, ADLAH DONASTORG, SR., JOSEPINA DONASTORG, ELLA MORON AND NORMA DURAN,
Appellants.

DAILY NEWS PUBLISHING CO. INC., LOWE DAVIS, HOLLAND "DYKE" REDFIELD, VITELCO AND OAKLAND BENTA.
Appellees.

On Appeal from
The Superior Court of the Virgin Islands
Division of St. Thomas

Re: Super. Ct. Civ. No. 2002-117 (STT)

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

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I. STATEMENTS

A. Jurisdictional Statement

1. Subject-Matter Jurisdiction

The Superior Court had subject-matter jurisdiction over this civil action because it is a court of general jurisdiction without regard to the amount in controversy.[1]

2. Appellate Jurisdiction

This Court has appellate jurisdiction over "all appeals arising from final judgments, final decrees, or final orders of the Superior Court"[2] and all appeals certified as final by the Superior Court pursuant to V.I. R. Civ. P. 54(b). On January 7, 2021, the Superior Court certified its August 19, 2015, Order as a final judgment as to Appellees Daily News Publishing Company, Inc. ("Daily News"), J. Lowe Davis ("Davis") based on a motion filed by those parties. (**JA226**). Appellants Adlah Donastorg, Jr., Benedicta Donastorg, Adlah Donastorg, Sr., Josefina Donastorg, Ella Moron and Norma Duran (collectively Appellants) timely filed a Notice of Appeal on February 8, 2021, amended February 22, 2021. (**JA111**).

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[1] *See* 4 V.I.C. § 76(a).
[2] *See* 4 V.I.C. § 32.

B. Statement of the Issues Presented for Review

Whether the Superior Court Committed Reversible Error When It Entered Summary Judgment in Favor of The Daily News and Davis

Appellants contend that the Superior Court committed reversible error when it granted summary judgment in favor of The Daily News and Davis on all claims despite the existence of genuine issues of material fact which precluded the entry of summary judgment. Appellants preserved error in their Response to Appellees' Motion for Summary Judgment, Amended Response to Alleged Statement of Facts and Response to Supplemental Motion for Summary Judgment. (**JA641, 705, 3178**). The Superior Court ruled on the issues in its Memorandum Opinion & Order. (**JA116, 216**).

C. Statement of the Standard of Review

The Superior Court's grant of summary judgment is subject to plenary review by this Court.[3] "In reviewing the Superior Court's grant of summary judgment, this Court applies the same test the Superior Court should have utilized, and—like the Superior Court—may not weigh the evidence or determine the credibility of witnesses."[4]

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[3] *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014).
[4] *Pedro v. Ranger Am. of the Virgin Islands, Inc.*, 63 V.I. 511, 515 (2015).

The summary-judgment standards are well established. A party against whom relief is sought may move for summary judgment, with or without supporting affidavits, on all or part of a claim.[5] The judgment is a drastic remedy that should only be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.[6] This court has held that "this Court's jurisprudence has consistently favored—wherever possible—the adjudication of negligence cases by a jury, a preference codified by the Legislature in 5 V.I.C. § 1451(a), instead of by a single judge at summary judgment." *Rymer v. Kmart Corp*., 2018 WL 461388, at *2 (V.I. January 18, 2018)(quoting *Machado*, 61 V.I. at 399). The court: (1) may not weigh the evidence or determine the credibility of witnesses; (2) must view all inferences from the evidence in the light most favorable to the nonmoving party and take the nonmoving party's conflicting allegations as true if properly supported; and (3) deny summary judgment—a drastic remedy—when the non-movant presents actual evidence amounting to "more than a scintilla, showing a genuine issue for

[5] *See* V.I. R. CIV. P. 56(c).
[6] *See* V.I. R. CIV. P. 56(c)(2); *Machado*, 61 V.I. at 379 (V.I. Oct. 16, 2014)

trial"[7] and "may amount to less (in the evaluation of the court) than a preponderance."[8]

D. Statement of Related Cases and Proceedings

This case has not previously been before this Court. Appellants are not aware of any other related case except that claims against additional defendants (VITELCO and Oakland Benta) are still pending in the Superior Court. Those defendants have filed summary judgment motions[9] as to all Appellants' claims against them. Those motions have been fully briefed since November 2015 and are awaiting a decision by the Superior Court.

E. Statement of the Case and Summary of Argument

Due to word constraints, Appellants will discuss the facts and evidence relevant to each argument in their Argument section. In short, Appellants initiated this action in the Superior Court on March 1, 2002. (**JA110** at 1). The operative complaint asserts the following claims against defendants the Daily News, Davis,

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[7] *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527-28 (V.I. 2013).

[8] *United Corp. v. Tutu Park Ltd.*, 55 V.I. 702, 707 (2011)(internal citations and quotations omitted).

[9] In November 2011, VITELCO filed four (4) motions for judgment on the pleadings, two (2) of which were joined by Defendant Oakland Benta ("Benta"). By Order entered September 23, 2015, the Superior Court converted the pleadings-based motions to ones for summary judgment and ordered supplemental briefing. (**JA7** at 879). The Superior Court has not ruled on those dispositive motions. Additionally, the Superior Court did not certify as final its entry of judgment in favor of Holland Redfield.

and Redfield, VITELCO, and Oakland Benta ("Benta"): Defamation and Conspiracy to Commit Defamation as to Senator Donastorg; Intentional/Negligent Interference with Business Relationships and Conspiracy to Commit Intentional/Negligent Interference with Business Relationships as to Senator Donastorg; Intentional/Negligent Infliction of Emotional Distress as to all Appellants; Invasion of Privacy and Conspiracy to Commit Invasion of Privacy as to all Appellants; and Punitive Damages. (**JA228**)

The defamation claims brought by Senator Donastorg—a public figure—relate to two articles published by Daily News while Davis was the editor.[10] His defamation claim also includes false statements made by Daily News' agent Redfield on a radio show. There is no credible dispute that the articles in the newspaper and statements made on the radio show stated false facts. There was a genuine dispute of material fact as to falsity, and the Appellees' request for summary judgment should have been denied.

There was a genuine dispute of material fact regarding the actual-malice element of the defamation claim. However, believing that normal summary judgment standards must be suspended for defamation claims of public figures, the

[10]Before the Superior Court, Donastorg, Jr. took issue with more than two dozen articles that were published by the Daily News. For purposes of appeal, he is limiting his request for reversal to two of these articles.

Superior Court determined that "to survive summary judgment, a plaintiff that has alleged defamation by implication must introduce clear and convincing evidence from which a reasonable jury could conclude that the defendant not only knew that the statement was false, but also that the defendant intended to communicate the defamatory meaning over the non-defamatory meaning."[11]

The Superior Court also determined that "[i]n the context of the underlying defamation action brought by a public official regarding a matter of public concern, the question becomes 'whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." "The question [of] whether the evidence in the record ... is sufficient to support a finding of actual malice is a question of law." *Id.* at 233.

Various state supreme and appellate courts applying state law and state summary judgment rules of civil procedure have rejected this heightened evidentiary standard. On plenary review, this Court should reject it too and apply this jurisdiction's established summary judgment standards. This Court does not

[11] *Donastorg v. Daily News Publ'g Co.*, 63 V.I. 196, 224 (V.I. Super. Ct. Aug. 19, 2015), *judgment entered,* 2021 VI SUPER 3U.

have a different standard for fraud claims which also requires a clear and convincing burden of proof. [12]

The Superior Court rejected recognizing a false light claim of invasion of privacy in the Virgin Islands. This was in error, and most jurisdictions, including the Virgin Islands, recognize this claim. This Court should hold that recognition of this claim represents the soundest rule for the Virgin Islands. Like his defamation claim, there were genuine disputes of material facts that precluded summary disposition.

There were genuine disputes of material facts regarding Appellants' intrusion-into-seclusion invasion of privacy claims. This claim was premised on a highly invasive investigation into the private life of Appellants commissioned by Appellees' agents Jeffrey Prosser (Prosser), ICC, and Benta. The invasive investigation uncovered, among other things, the private social security number of Senator Donastorg and his nonpublic personal bank account numbers and cash balances. This information was then disclosed in an investigative report to Prosser and others.

Daily News and Davis took conflicting positions at summary judgment regarding their liability for the investigative report. In their summary judgment

[12] *Wilkinson v. Wilkinson*, 70 V.I. 901, 919 (2019).

briefing, they argued that there could be no civil conspiracy with co-defendants VITELCO and Benta because they couldn't "conspire with themselves." Then at other times in their summary judgment briefing, they maintained that they could not possibly be responsible for the investigative report commissioned by "separate" companies. The conflicting positions, in and of themselves, created a genuine dispute of material fact that mandated denial of summary judgment.

There were genuine disputes of material fact regarding Appellants' intentional infliction of emotional distress claim based on the highly invasive investigation into their private lives and genuine disputes of material fact regarding Senator Donastorg's claim for tortious interference of existing business relationships.

II. ARGUMENT

A. The use of a higher evidentiary summary judgment standard for defamation claims should be rejected.

The Superior Court determined that for Senator Donastorg—a public figure—to survive summary judgment, he had to submit clear and convincing evidence. *Donastorg*, 63 V.I. at 233, 244. However, this higher burden of proof at the summary judgment stage directly conflicts with this Court's established precedent in all other types of cases. *See* Section I.C, above. This higher evidentiary standard at summary judgment is also problematic because establishing

actual malice requires the plaintiff to prove that the "defendant not only knew that the statement was false, but also that the defendant intended to communicate the defamatory meaning over the non-defamatory meaning." *Id.* at 233. Therefore, state of mind is an essential element of a defamation case brought by a public figure. When the state of mind is a critical element in the nonmoving party's claim, it is inappropriate to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility.[13]

The Superior Court relied on *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 584, 591 (V.I. 2012) which mechanically relied upon *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) as forming the basis for this higher evidentiary standard at summary judgment. But summary judgment is a matter of civil procedure under V.I. R. Civ. P. 56 and not an issue of substantive law. This Court

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[13] *Handi Inv. Co. v. Mobil Oil Corp.*, 550 F.2d 543, 547 (9th Cir. 1977)("'When an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment. (Authorities omitted.) It is important, and ordinarily essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue.'")(*quoting Consolidated Elec. Co. v. U.S. for Use and Benefit of Gough Indus., Inc.*, 355 F.2d 437 (9th Cir. 1966); *LM Insur. Corp. v. All-Ply Roofing Co., Inc.*, 2019 WL 366554, at *11 (D.N.J. Jan. 30, 2019)("'[A] defendant's state of mind typically should not be decided on summary judgment.'")(*quoting Landau v. Lucasti*, 680 F. Supp. 2d 659, 670 (D.N.J. 2010); and § 2730 Actions Involving State of Mind, 10B Fed. Prac. & Proc. Civ. § 2730 (4th ed. Apr. 2022 update)("Moreover, it frequently has been observed that when state of mind, … is involved, credibility often will be central to the case and summary judgment inappropriate.").

and the Superior Court are not bound to follow federal law when it comes to matters of procedure. *Antilles Sch., Inc.,* 64 V.I. at 418 (making clear that territorial courts are not bound to mechanically follow every precedent from the U.S. Supreme Court and noting that rules of civil procedure are a question of Virgin Islands law).

The U.S. Supreme Court in *Anderson* adopted a heightened evidentiary standard on summary judgment in defamation cases in federal court, with *Anderson* opining that "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson*, 477 U.S. at 255-256.

The majority in *Anderson* adopted this heightened evidentiary standard over a vigorous dissent from Justice Brennan, *Id.* at 257-268, and a separate dissent from Justice Rehnquist and Chief Justice Burger. *See Id.* at 268-273. Justice Brennan understood that the U.S. Supreme Court's adoption of a rule requiring application of a clear and convincing evidentiary standard at the summary judgment stage of defamation cases, would usurp the role of the jury as the finder of fact, and "could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would," raising grave

concerns concerning the constitutional right of civil litigants to a jury trial. *Id*. at 266-267.

Various state supreme and appellate courts applying state law and state rules of civil procedure have rejected *Anderson*'s heightened evidentiary standard. *See Huckabee v. Time Warner Ent. Co. L.P.*, 19 S.W.3d 413, 420–423 (Tex. 2000). While state courts are split on the issue, the view of those rejecting the higher evidentiary standard is better and in keeping with the already established summary judgment standards of this jurisdiction. In fraud cases or cases involving a request for punitive damages, the burden of proof is clear and convincing. However, this Court has never departed from traditional summary judgment standards. The trial evidentiary burden of proof has never been a factor in the summary judgment analysis in these cases. Courts of this jurisdiction review the *trial* record to determine if the plaintiff established his case with clear and convincing evidence under V.I. R. Civ. P. 50.

In *Huckabee v. Time Warner*, the Texas Supreme Court explained why it declined to adopt the clear and convincing standard at the summary judgment stage:

> We decline to adopt the clear-and-convincing requirement at the summary judgment stage. In *Casso v. Brand*, 776 S.W.2d 551 (Tex.1989), we held that neither the United States Constitution nor the Texas Constitution mandated a special summary judgment procedure

> in public-figure defamation cases. *Id*. at 555–57. We concluded that the United States Supreme Court's requirement that a plaintiff come forward with sufficient proof to allow a jury finding of actual malice by clear-and-convincing evidence was based merely on federal procedure. See id. at 555–56. … Requiring the trial court to determine at the summary judgment stage whether a reasonable juror could find the evidence to be clear and convincing suggests that the trial court must weigh the evidence. … Texas law has always emphasized that trial courts must not weigh the evidence at the summary judgment stage. … Instead, a trial court's only duty at the summary judgment stage is to determine if a material question of fact exists. … Unless constitutionally mandated, we see no reason to upset this traditional demarcation between fact-finder and judge by requiring trial courts to weigh the evidence at the summary judgment stage. … Furthermore, the clear-and-convincing standard provides little guidance regarding what evidence is sufficient for a plaintiff to avoid summary judgment. … On a cold summary judgment record, without having observed a single witness, it would take keen insight to forecast accurately whether probative evidence would or would not produce a 'firm belief or conviction' in the mind of the trier of fact. … After a record has been established at trial, courts must independently review the record to determine if the jury's finding of actual malice was, as a matter of law, supported by clear and convincing evidence. … We believe it obvious that this determination may be more easily and accurately made after a trial on the merits. … We therefore believe that if a fact issue exists at the summary judgment stage, the evaluation about whether a reasonable jury would find the plaintiff's evidence to be clear and convincing is best made after the facts are fully developed at trial.".

Id. Accord Chester v. Indianapolis Newspapers, Inc., 553 N.E.2d 137, 140–141 (Ind. Ct. App.1990); *Moffatt v. Brown*, 751 P.2d 939, 942–944 (Alaska 1988); *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 516 A.2d 220, 235–236 (N.J. 1986).

This Court is not bound to follow *Anderson* in applying V.I. R. Civ.P. 56[14], and the state courts that have rejected a higher evidentiary standard at the summary judgment stage represent the better choice for the Virgin Islands and preserves the right of civil litigants—even public figures—to a jury trial. Being elected to public office should not result in a person's right to a jury trial being infringed. The state supreme and appellate courts of Texas, Indiana, New Jersey, and Alaska declined to follow *Anderson* and its heightened evidentiary summary standard. This Court should too.

[14] This Court similarly rejected application of the rules of procedure of the Federal Arbitration Act as being inapplicable in Virgin Islands courts. *World Fresh Mkt. v. P.D.C.M. Assocs., S.E.*, No. CIV. 2011-0051, 2011 WL 3851739, at *2 (V.I. 2011).

B. There were genuine disputes of material fact regarding Senator Donastorg's defamation claim[15]

1. Virgin Islands Law on Defamation

In the Virgin Islands, defamation contains the following elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[16] A statement is defamatory if, "it tends so to harm the reputation of another as to lower him in the estimation

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[15] The Daily News' negative coverage of Senator Donastorg was continuous and unrelenting. **JA2987** ("The public's right to know"—May 29, 1998); **JA2993** ("Vitelco disputes PSC study"—July 15, 1998); **JA2986** ("Senator: no conflict of interest with firm selling hospital"—March 21, 1997); **JA3007** ("Legislation reduction on agenda for Rules Committee"—June 12, 2001); **JA3009** ("Setting the record Straight"—June 14, 2001); JA3002 ("Donastorg, IDC director wrangle over accusations of abuses"—November 1, 2000); **JA2994** ("ICC, Donastorg square off over Vitelco tax breaks"—June 9, 2000); **JA3067** ("GERS as political fodder"—March 1, 2004); **JA3068** ("Registering V.I. automobiles"—April 6, 2004);**JA3070**("Blind eye to cockfighting? Animal cruelty nonetheless!"—August 22, 2004); **JA3024** ("Volunteerism is nice, but …"—October 29, 2003); **JA3022** ("No TV contract yet, but ESPN will visit St. Thomas boxing cite"—October 28, 2003); **JA3027** ("No ESPN contract yet for V.I. boxing card"—November 1, 2003); **JA3042** ("Boxing and tourism, a TKO; maybe "Spongebob" can help"—December 11, 2003).

[16] *See Chapman v. Cornwall*, 58 V.I. 431, 444 (V.I. 2013); *see also Joseph*, 57 V.I. at 581-82 ("This Court has adopted the basic elements for a claim of defamation set forth in the Second Restatement of Torts."); *Kendall v. Daily News Publ'g Co.*, 55 V.I. 781, 787 (V.I. 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 558 for the elements of defamation) (internal quotation marks omitted), *aff'd*, 716 F.3d 82 (3d Cir. 2013).

of the community or to deter third persons from associating or dealing with him,"[17] and the "falsity" of the statement also must go to the "gist" or "sting" of the defamatory statement.[18] A defendant cannot use truth as a defense when "the implication of the communication as a whole was false," even if the statement is "literally accura[te]"—defamation may be established where a statement, viewed in context, creates a false implication.[19] A defamatory communication may consist of a statement in the form of an opinion if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.[20] Opinions that imply allegations of defamatory acts are themselves defamatory and actionable, and when the underlying facts are not disclosed, that statement of opinion is, therefore, reasonably capable of a defamatory meaning.[21] A court must look to the "fair and natural meaning which will be given it by reasonable persons of ordinary intelligence" and examine the publication as a whole and in context[22] to determine

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[17] *See Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014).
[18] *See id*.
[19] *See id*.
[20] *See* RESTATEMENT (SECOND) OF TORTS § 566 (1977); *Avins v. White*, 627 F.2d 637 (3d Cir. 1980); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).
[21] *See, e.g., Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96, 107 (3d Cir. 1988); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985).
[22] *See Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186, 189 (3d Cir. 1998).

its likely effect on the reader and the effect it is likely to produce, "in the minds of the average persons among whom it is intended to circulate."[23]

One who slanders another is subject to liability, although no special harm results if the publication imputes to the other a matter incompatible with her business, trade, or profession.[24] One who publishes a slander that ascribes to another conduct, characteristics, or a condition that would adversely affect his fitness for the proper conduct of her lawful business, trade, or profession, is subject to liability without proof of special harm.[25]

In *Kendall v. Daily News Publishing*, this Court held that where the statements are uttered by a media defendant and involve matters of public concern, the burden of proving the falsity of each statement falls on the plaintiff.[26] Second, only statements that are "provable as false" are actionable; hyperbole and expressions of opinion not provable as false are constitutionally protected.[27] Finally, the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the

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[23] *See Burton v. Teleflex Inc.*, 707 F.3d 417, 434 (3d Cir. 2013); *see also Tucker v. Fischbein*, 237 F.3d 275, 282 (3d Cir. 2001).
[24] *See* RESTATEMENT (SECOND) OF TORTS § 570(c) (1977); *McDonald v. Davis*, 51 V.I. 573 (D.V.I. 2009).
[25] *See* RESTATEMENT (SECOND) OF TORTS § 573 (1977); *Sprauve v. CBI Acquisitions, LLC*, 2010 WL 3463308, at *11 n.9 (D.V.I. Sep. 2, 2010).
[26] *See Kendall*, 55 V.I. at 788.
[27] *See id*.

statement was made with 'actual malice.'"[28] Actual malice is a statement made "with knowledge that it was false or with reckless disregard of whether it was false."[29]

2. June 12, 2001, "Legislation Reduction on Agenda for Rules Committee" Written by Hal Hatfield.

Senator Donastorg demonstrated genuine disputes of fact regarding whether Appellees published the article "Legislation Reduction on Agenda for Rules Committee" with actual malice. The 'actual malice' standard "is a subjective one, based on the defendant's actual state of mind" at the time the statement was made." *Donastorg*, 63 V.I. at 223–24.

On June 12, 2001, The Daily News published a "news story" that allegedly "multiple people" edited. **(JA3007-08; JA941-42)**. The news story claimed Senator Donastorg—whose job is a legislator—"ironically"[30] "voted no" on a bill he proposed that would reduce the number of Virgin Islands Senators. Appellee and editor Davis admitted there is no attribution to a source for the story and that

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[28] *See id*.
[29] *See id*.; *see also Masson v. New Yorker Mag., Inc*., 501 U.S. 496, 510-11 (1991); *See Milkovich v. Lorain J. Co*., 497 U.S. 1 (1990).
[30] The ordinary meaning of the word "ironically" is "in a way that is different or opposite from the result you would expect." *Ironically,* CAMBRIDGE ACADEMIC CONTENT DICTIONARY, *https://dictionary.cambridge.org/dictionary/english/ironically*.

no one contacted Senator Donastorg to verify the story. **(JA1099-100; JA947-49; JA3007-08)**. Daily News admitted that the vote was a matter of public record and falsely reported that Senator Donastorg voted against his bill when he did not. Senator Donastorg called Daily News and told them the article was completely false. **(JA1617-18)**.

Based on the author's use of the word "ironically" in the article, the author knew that Senator Donastorg not voting on his bill was the exact opposite of what any ordinary and reasonable person would expect. **(JA948-49; JA3007-08)**. Senator Donastorg specifically asked Hal Hatfield—the same reporter who admitted he could get a bonus for writing negative information about Senator Donastorg—who the source was for the false statement that Senator Donastorg voted against his bill. Hatfield could not identify any particular person as the source. **(JA1625, 1626)**.

Daily News refused to fully retract the false story or rewrite the story **(JA1630-31)** and admitted that a full retraction of a story would merit the same play and should be kept on par with the original story. **(JA909-10)**. It printed a "correction" days later in a small box that arguably required the reader to use a

magnifying glass to see.[31] **(JA3009)**. The correction states that the source of the factual inaccuracy was an unidentified staffer. **(JA950-51; JA1105-06; JA1625-27)**. Virgin Islands constituents were calling Senator Donastorg about the article. They were angered and confused as to why he voted against his bill, demonstrating the obvious harm of the false article—the harm Appellees intended. **(JA1628-32)**. The article casts Senator Donastorg as an incompetent legislator in that he would "ironically" vote against his bill. It was wholly malicious that the "correction" was placed so inconspicuously when the false article was prominent and caused Senator Donastorg such harm with his voters. **(JA1629)**.

It is without dispute that the information was false. Moreover, a jury could conclude that the article was published with reckless disregard for the truth and intent to defame. Daily News paid reporters to write negative stories about Donastorg. Hal Hatfield, Daily News agent, and reporter who wrote the article, previously told Senator Donastorg that he was going to write a negative story about him so that he could collect a bonus in the presence of at least three witnesses. (**JA1441-45, 1592; JA3087-88**). Reporter Will Jones, a former agent of Daily

[31] Appellees' half-hearted "retraction" does not absolve them of liability. As other courts have noted, a retraction of a libel or slander is not ordinarily a defense to an action for the defamation because "[t]housands may have read the libelous matter that never saw its refutation." Annotation, *Retraction as affecting right of action or amount of damages for libel or slander,* 13 A.L.R. 794 (internal citations and quotations omitted).

News, also told Senator Donastorg that he could collect a bonus for writing a negative story about him. (**JA1445-46, 1582-83**). Jones confirmed that Ed Crouch (a manager at Daily News) offered to pay him extra money to manufacture a story about a supposed police cover-up of Senator Donastorg firing a gun and causing a disturbance. When Will Jones refused, he was ostracized and removed as Bureau Chief. (**JA2941-43**). Reporter Tim McDonald also testified under oath at his trial that "Lowe and Jason continually demeaned [Senator Donastorg], insulted him. They called him an idiot, and they made fun of him, and were very demeaning in general to him. They called him corrupt [and] incompetent." **(JA2905-06)**. Eunice Bedminster also confirmed that employees Perry Brothers and Will Jones were offered money if they wrote negative stories about Donastorg. **(JA2773).** Senator Donastorg was "somebody they'd picked out as one of the people they were after" to write stories about him that "weren't fair." **(JA2725)**.

Daily News' hostility resulted from legislative actions Senator Donastorg took that involved VITELCO and ICC.[32] **(JA1614; 2842)**. Will Jones, a senior reporter for The Daily News, told Senator Donastorg that Prosser, Crouch, and VITELCO had a "hands-on" approach to running The Daily News and placed undue pressure on the reporters. **(JA1580-88**). Elizabeth Coggins, an executive for

[32] It is undisputed that ICC was the parent company of Daily News and was wholly owned by Jeffrey Prosser.

Daily News, admitted Prosser was vindictive—he "would get hard feelings"—and that it was widely and publicly known that Senator Donastorg was a Prosser enemy. **(JA2322-23)**.

Daily News was not allowed edit editorials sent to it by ICC or refuse to publish them. **(JA837).** "Letters-to-the-editor" content was an ICC function. **(JA848).** ICC is responsible for the editorial content, and The Daily News publishes the content. **(JA983).** Prosser owned and controlled ICC as CEO and Chairman, and Prosser, through ICC, owned and controlled The Daily News and its content. **(JA896)**.[33]

The article contained false facts that were intended to ruin Senator Donastorg's reputation in the community by making him out to be incompetent. Whether the article was published with actual malice implicates a question of fact as it goes to the state of mind. There were genuine disputes of facts that warranted a denial of summary judgment.

3. May 29, 1998, "The Public's Right to Know" Editorial

On May 29, 1998, Daily News published an editorial entitled "The public's right to know," which refers to Senator Donastorg as a "rogue" senator. The article

[33] For example, Appellees admitted that Daily News did not report on any aspect of the story that Prosser and ICC had investigated Senator Donastorg and invaded his privacy although the other Virgin Islands papers gave it front page coverage. **(JA1089)**.

claims that Senator Donastorg—based on his role in asking for transparency in a public agency concerning Prosser's company—was the most "anti-business" Senator in recent memory who was trying to "cripple" the local economy. The editorial also stated that Donastorg's "hallmark" has been to attempt to abolish government agencies who don't do his bidding, that he has "no support from anyone else in the legislature" for questioning the PSC and that he was improperly "playing politics with the economic wellbeing of the people he represents". The editorial also claimed that Donastorg had no legitimate motivation for questioning why the PSC was protecting VITELCO by refusing to produce a public report regarding telephone rates and called Senator Donastorg a "rogue" senator. (**JA2987; JA1435-36**). Senator Donastorg is, himself, a businessman, and he's never been "anti-business," and he didn't take any actions designed to "cripple" the Virgin Islands economy. (**JA1722-26**). Whether the policies that Senator Donastorg (a legislator) supported or his proposed bills would cripple the economy is provably false.

Penny Feuerzeig, a top editor of the paper, resigned over this editorial because "the Editorial written by Prosser defending VITELCO rates . . . destroyed the last shred of credibility that may have remained" after Prosser took over the paper. **(JA931-934; JA2988-89)**. Jason Robbins, Daily News's corporate

representative on the issue, admitted that Daily News had no basis for rebutting "anything that Mrs. Feuerzeig has to say about [the editorial]" **(JA934-35)**.

Despite promises by Prosser that ICC was not going to interfere with the news operations at The Daily News because he "didn't want to destroy the integrity of the newspaper" **(JA2561-66)**—Prosser appointed Ed Crouch to the editorial board who immediately replaced an editorial Feuerzeig wrote with the one critical of Senator Donastorg drafted under a "conflict of interest." **(JA2568, 2575-77)**. Feuerzeig and Ariel Melchoir (another Daily News employee) felt the same way: "disappointed they wanted to use it, and the contents of it was way out of line, and it was in conflict with what we're trying to do." **(JA2568)**. Feuerzeig quit over this editorial. **(JA2569; JA932-33; JA2987)**.

The editorial contained provable false facts that were intended to ruin Senator Donastorg's reputation in the community. Whether the editorial was published with actual malice implicates a question of fact as it goes to the state of mind. There were genuine disputes of material facts that warranted a denial of summary judgment.

4. Redfield's Statements on the Sam Topp Radio Show

"Special harm" is 'the loss of something having economic or pecuniary value ... [which] must result from the conduct of a person other than the defamer or the

one defamed and must be legally caused by the defamation.' However, a plaintiff need not prove the existence of special harm in those categories of defamatory statements that are actionable on their face or actionable *per se.* Among those categories of defamation that are actionable *per se* is the radio broadcast of defamatory communication. "Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript." *Schrader-Cooke v. Gov't of Virgin Islands*, 2019 V.I. SUPER 67 ¶ 62. (internal citations and quotations omitted).

In 1998, Prosser hired Redfield when he left the Legislature of the Virgin Islands to work for VITELCO in public relations as "Director of Government Affairs and Employee Development." (**JA1190, 1202-03, 1210-13; JA3071-78**). Shortly after Redfield started, he was promoted to Vice President of Corporate Affairs, working directly for ICC, and held this position during the entire period relevant to this lawsuit. However, his VITELCO "employee number" remained the same, and his "starting service date" remained the same until he was terminated in 2007. (**JA1220-23, 1235-36, 1243; JA3071-78; JA853-54**). As V.P. of Corporate Affairs, Redfield dealt with "media issues" and was "working for, you know, the different entities under that umbrella." (**JA1224**). ICC was a holding company that "oversaw all the other different companies," and Redfield was tasked with "dealing

with problems, dealing with issues related to these companies." (**JA1247**). These entities included those "that were under Innovative Communications." (**JA1224-25**). Redfield also acted as, "well, an in-between at times," "between the entity, the holding company, and the—and the different subsidiaries." (**JA1226**). Redfield's job covered "service-related issues with the different companies." (**JA1237-38**). Redfield consulted with J. Lowe Davis on issues; Davis and Redfield attended board meetings together. (**JA1277**). Redfield made press releases *on behalf of Daily News*, including a press release about this lawsuit because The Daily News was one of ICC's subsidiaries. (**JA1328-34; JA3047-54**). Therefore, at all material times, Redfield was acting as an agent of Daily News when his defamatory statements were made on the Sam Topp Radio Show.

On the radio, Redfield falsely claimed that the invasive investigation commissioned by Prosser (central to the invasion of privacy claim) into Senator Donastorg and his family's private lives related to an "alleged event that took place, back in—in that time period where it was alleged that he had flown on an AT&T aircraft down to a jazz festival in St. Lucia." Redfield admitted he didn't have any information that Senator Donastorg flew on an AT&T jet to a jazz festival, but he nevertheless stated, "This is what instituted the investigation." **(JA1371-72).** Redfield also admitted that he had no evidence and conducted no

investigation into whether Senator Donastorg had any relationship with AT&T. (**JA1298**). Redfield admitted no facts were disclosed to him that revealed any connection between Senator Donastorg and AT&T: "none." (**JA1303; 1304**). Redfield admitted he did nothing to verify any connection between Senator Donastorg and AT&T or a plane trip, and he was not aware of any facts to support the allegation. (**JA1304-06, 1314**). Regarding the AT&T connection, Redfield admitted that he went on air with the allegation without a "shred of evidence" to support that statement. (**JA1314-15**). Redfield made these statements knowing how easy it is to ruin a person's reputation in a small community. (**JA1316-17**). Redfield testified that he didn't care whether his statements on the radio ruined Senator Donastorg's reputation in the community. (**JA1317**). Redfield admitted that he made the AT&T accusation without calling Senator Donastorg to get his side of the story. (**JA1318**).

Senator Donastorg did not take a trip to St. Lucia on an AT&T plane. Redfield's publication of this information on the Sam Topp Show and repeated to others was false. (**JA1461-62, 1468**). Redfield spread lies that Senator Donastorg was "in bed with" AT&T and accused Senator Donastorg of lying about taking perks from AT&T. (**JA1462-63**). Redfield's defamatory publications damaged Senator Donastorg and caused members of the public to approach him about his

"corruption" and his being in bed with AT&T. (**JA1519-20**). Members of the public called Senator Donastorg's office about Redfield's radio broadcast, and some believed the false accusations of corruption. (**JA1521-22**). The false charges cost Donastorg the gubernatorial election in 2006. (**JA1522**).

Redfield's radio statements, made while an agent of the Daily News, contained false facts intended to ruin Senator Donastorg's reputation in the community by making him a corrupt politician. Whether the statements were made with actual malice necessarily implicates a question of fact as it goes to the state of mind. There were genuine disputes of material facts that warranted a denial of summary judgment on this issue.

C. There were genuine disputes of material fact regarding Senator Donastorg's false light claim.[34]

1. Virgin Islands Law on False Light Invasion of Privacy

The Superior Court determined that recognizing a false light invasion of privacy claim is not the soundest rule for the Virgin Islands.[35] A majority of

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[34] Courts have held that "A false light claim involving a public figure, like a defamation claim, requires proof of actual malice." *Parsi v. Daioleslam*, 890 F.Supp.2d 77, 92 (D.D.C. 2012)(internal citations and quotations omitted).

[35] *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 644 (Tenn. 2001)("A majority of jurisdictions addressing false light claims have chosen to recognize false light as a separate actionable tort. Most of these jurisdictions have adopted either the analysis of the tort given by Dean Prosser or the definition provided by

jurisdictions recognize this claim. This Court should hold that the Virgin Islands does as well.

A "false light" claim imposes liability on a person who publishes material that is either "not true" or even "where true information is released if the information tends to imply falsehoods. …",[36] "is highly offensive to a reasonable person, …".[37] and "is publicized with knowledge or in reckless disregard of its falsity."[38] This does not depend upon making public any facts concerning the

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the *Restatement (Second) of Torts*.")(internal citations omitted); and *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787-788 (Ariz. 1989).

[36] *See Graboff*, 744 F.3d at 136-137 (*quoting Santillo v. Reedel*, 634 A.2d 264, 267 (Pa. Super. Ct. 1993), and *Larsen v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1188 (Pa. Super. Ct. 1988) (en banc)(citing RESTATEMENT (SECOND) OF TORTS § 652E), comments a, c and d)); *Godbehere*, 783 P.2d at 787 (*citing Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985); and *Romaine v. Kallinger*, 537 A.2d 284, 290 (N.J. 1988)(*quoting* Annotation, "False Light Invasion of Privacy–Cognizability and Elements," 57 *A.L.R.* 4th 22, 104 (1987)).

[37] *See Graboff*, 744 F.3d at 136. *Accord Weiser Law Firm, P.C. v. Hartleib*, 2022 WL 970757, at *17–18 (D. Pa. Mar. 31, 2022)(district court found that statements that accused plaintiffs of employing fraudulent schemes to drum up frivolous lawsuits and of engaging in fraudulent billing practices cast Plaintiffs as greedy, dishonest, and unethical and "could have been highly offensive to a reasonable person. *See Krajewski v. Gusoff*, 53 A.3d 793, 809–810 (Pa. Super. Ct. 2012) (holding that statements that a city councilwoman was 'systematically pilfering the public purse' and 'accessing money that did not belong to [her]' supported a claim for false light) …"); *Anderson v. Perez*, 677 Fed.Appx. 49, 52–53 (3d Cir. 2017)(same); *West*, 53 S.W.3d at 644, 646; RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c.

[38] *See Graboff*, 744 F.3d at 136. *Accord Kane v. Chester Cnty.*, 811 Fed.Appx. 65, 72 (3d Cir. 2020)(To establish a false light invasion-of-privacy claim, a plaintiff "must show that a defendant publicized a highly offensive statement with

private life of the individual as long as the publicity portrays the individual in a false light or false position.[39] The interest protected is the interest of the individual to be free from the defendant painting the individual "in an objectionable false light or false position, or in other words, otherwise than as he is."[40] Although in many cases the false light publicity is also defamatory, it is not necessary that the plaintiff prove he was also defamed.[41] It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so places him before the public in an objectionable false

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knowledge or in reckless disregard of its falsity."); and *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906–907 (Utah 1992); and RESTATEMENT (SECOND) OF TORTS § 652E.

[39] *See Kane*, 811 Fed.Appx. at 72; *Graboff*, 744 F.3d at 136-137; *Russell*, 842 P.2d at 906–907; RESTATEMENT (SECOND) OF TORTS § 652E; RESTATEMENT (SECOND) OF TORTS § 652E, cmt. a.

[40] *See Rivera v. Garguilo*, 2022 WL 1059520, at *6 (Conn. Super Ct. Mar. 4, 2022); *Welling v. Weinfeld*, 866 N.E.2d 1051, 1058 (Ohio 2007); *Godbehere*, 783 P.2d at 787; *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 79–80 (Miss. 1986); RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b.

[41] *See Newkirk v. GKN Armstrong Wheels, Inc.*, 168 F.Supp.3d 1174, 1201 (D. Iowa 2016)(*citing Anderson v. Low Rent Hous. Comm'n of Muscatine*, 304 N.W.2d 239, 248 (Iowa 1981)); *Moore v. Sun Pub. Corp.*, 881 P.2d 735, 743–744 (N.M. Ct. App. 1994); *Prescott*, 497 So.2d at 80; *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 99–100 (Cal. 1986)(in bank); RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b.

position or false light.[42] When a plaintiff meets these elements he is entitled to a remedy even if one is not available for defamation.[43]

The false-light publicity must be of a kind that would be highly offensive to a reasonable person,[44] i.e., a reasonable person would be justified feeling seriously offended and aggrieved,[45] like when there is a major misrepresentation of his character, history, activities, or beliefs.[46]

As discussed by a Pennsylvania appellate court addressing a false-light claim under Restatement § 652E involving a series of articles and editorials

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[42] *See Vasquez v. Whole Foods Market, Inc.*, 302 F.Supp.3d 36, 67 (D.D.C. 2018); *Graboff*, 744 F.3d at 136-137; *Santillo*, 634 A.2d at 267; *Godbehere*, 783 P.2d at 787; *Larsen*, 543 A.2d at 1188; *Romaine*, 537 A.2d at 290 Annotation, "False Light Invasion of Privacy–Cognizability and Elements," 57 *A.L.R.* 4th at 104; RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b.

[43] *See* RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b.

[44] *See Anderson*, 677 Fed.Appx. at 52–53; *Graboff*, 744 F.3d at 136; *Weiser Law Firm,* 2022 WL 970757, at *17–18; *Krajewski*, 53 A.3d at 809–810; *Dodrill v. Arkansas Democrat Co.,* 590 S.W.2d 840, 845 (Ark. 1979); RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c.

[45] *See Welling*, 866 N.E.2d at 1057-1058; *Lovgren*, 534 N.E.2d at 990; RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c.

[46] *See Flynn v. Cable News Network, Inc.*, 2021 WL 5964129, at *4 (S.D.N.Y. Dec. 16, 2021); *Iglesias v. O'Neal*, 2020 WL 416197, at *3 (D.N.J. Jan. 27, 2020); *Welling*, 866 N.E.2d at 1058; *Moore*, 881 P.2d at 744; *Godbehere*, 783 P.2d at 787 RESTATEMENT (SECOND) OF TORTS § 652E; and RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c.

brought by a public figure against a media defendant, the elements of the claim differ substantially from defamation and do not require proof of the falsity of any particular fact, only that the scenario depicted created a false impression:

> The trial court concluded, in the first instance, that the extension of First Amendment protections effectively undermines Krajewski's false light claims, as she could not prove falsity and actual malice. Trial Court Opinion, 9/29/11, at 27 (citing Snyder, supra). We disagree. Proof of false light does not devolve on evidence that every single statement is itself false, but rather that the scenario depicted created a false impression, even if derived from true statements. As our discussion of Krajewski's related defamation claim elucidates, significant indicia of falsity is apparent in the Northeast Times' treatment of the Holmesburg Library closing, suggesting a causal relationship the paper could not document, and an obligation by Krajewski to disgorge a meal from the public trough that, arguably, she had not consumed. Naturally, such suggestions would tend to cast her in a false light. We have little doubt that a significant number of readers would infer that Krajewski and others like her were systematically pilfering the public purse, accessing money that did not belong to them. That impression is rendered more virulent by the obvious linkage the paper's content draws between the Krajewski's participation in the DROP program and the closing of the Holmesburg Library. At very least, the page appears to suggest that Krajewski could have stopped the closing of the library had she chosen to do so and that, instead, she elected to "take the money and run."[47]

The Superior Court rejected recognizing a false light claim for invasion of privacy. While the Superior Court's assertion that there is no binding precedent in the Virgin Islands which has recognized a false light claim is correct, *Donastorg*,

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[47] *See Krajewski*, 53 A.3d at 809. *Accord Kane*, 811 Fed.Appx. at 72; *Graboff*, 744 F.3d at 136.

63 V.I. at 319, the Superior Court's determination that no Virgin Islands court "has addressed a cause of action for false light invasion of privacy.", *Donastorg*, 63 V.I. at 320., was an error. On the contrary, various courts in the Virgin Islands interpreting territorial law have recognized a false light invasion of privacy claim.

In *Martinez del Valle v. Officemax North America, Inc.*, Civil No. 2013-24, (Docket Entry slip op. at p. 5 n. 7 Dkt. # 464 (D.V.I. June 11, 2014), the U.S. District Court recognized that "[u]nder Virgin Islands law, invasion of privacy encompasses four separate torts: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. Restatement (Second) of Torts §§ 625B-E. …", and held that as to a claim for false light invasion of privacy, the Restatement defines such claim as "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." This is consistent with other decisions by Virgin Islands courts. *See Friendly Grocery and Gas Station, LLC v. Pan Caribbean Broad. de P.R., Inc.*, 2013 WL 12460440, at *2, 6-7 n. 55 (V.I. Super. May 24,

2013); *Francis v. Pueblo Xtra Intern., Inc.*, 412 Fed.Appx. 470, 474, 476 (3d Cir. 2010); *Anderson v. Gov't of the V.I.*, 199 F.Supp.2d 269, 271, 275, 278-279 (D.V.I. 2002).

Therefore, regarding Step 1 of the *Banks*[48] analysis, various Virgin Islands courts have previously recognized a claim for false light invasion of privacy.

Regarding Step 2 of the *Banks* analysis, the Superior Court acknowledged "the widespread recognition of a cause of action for false light invasion of privacy, …," and that "[a] majority of jurisdictions recognize a cause of action for false light invasion of privacy." *Id.* at 320-321. The vast majority, at least 35 different jurisdictions which Appellants have found, have adopted the false light invasion of privacy claim. *See Glennon v. Rosenblum*, 325 F.Supp.3d 1255, 1265–1266 (N.D.Ala. 2018)(*citing Johnston v. Fuller*, 706 So.2d 700, 701 (Ala. 1997); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 784-790 (Ariz. 1989); *Dodrill v. Ark. Democrat Co.*, 590 S.W.2d 840, 844–846 (Ark. 1979); *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 97–100, 102-106, 108 (Cal. 1986); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1328–1330 n. 20 (Conn. 1982); *Przywara v. Kenny*, 2016 WL 916578, at *4 (Del.Com.Pl. Mar. 9, 2016); *Vasquez v. Whole Foods Market, Inc.*, 302 F.Supp.3d 36, 62-65, 67 (D.D.C. 2018)(*citing*

[48] *Banks v. Int'l Rental & Leasing*, 55 V.I. 967 (2011).

Doe v. Bernabei & Wachtel, PLLC, 116 A.3d 1262, 1267 (D.C. 2015); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 500, 502-503 (Ga. Ct. App. 1966); *Ching v. Dung*, 477 P.3d 856, 865, 872 (Haw. 2020); *Peterson v. Idaho First Nat. Bank*, 367 P.2d 284, 287 (Idaho 1961); *Am. Family Mut. Insur. Co., S.I. v. Carnagio Enter., Inc.*, 2022 WL 952533, at *10 (N. D. Ill. 2022)(*citing Lovgren v. Citizen's First Nat'l Bank of Princeton*, 534 N.E.2d 987, 989 (Ill. 1989); *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991); *Anderson v. Low Rent Hous. Comm'n of Muscatine*, 304 N.W.2d 239, 248-250 (Iowa 1981); *Jones v. Fed. Commc'n Comm'n*, 2020 WL 6343218, at *3 (D.Kan. Oct. 29, 2020)(*citing Finlay v. Finlay*, 856 P.2d 183, 185, 189 (Kan. Ct. App. 1993); *McCall v. Courier-J. & Louisville Times Co*., 623 S.W.2d 882, 887–889 (Ky. 1981); *Hewitt v. 3G Energy Servs., LLC*, 2019 WL 2402963, at *7 (W.D.La. June 4, 2019)(*citing Tate v. Woman's Hosp. Found.*, 56 So.3d 194, 197 (La. 2011); *Equifax Servs., Inc. v. Cohen*, 420 A.2d 189, 200 (Me. 1980); *Harnish v. Herald–Mail Co.*, 286 A.2d 146, 152 (Md.Ct.App. 1972); *Deitz v. Wometco West Mich. TV*, 407 N.W.2d 649, 655–656 (Mich.App. 1987); *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 79–81 (Miss. 1986); *Turner v. Welliver*, 411 N.W.2d 298, 306 (Neb. 1987); *Sponcey v. Banner-Churchill Hosp.*, 2012 WL 2575345, at *8 (D.Nev. 2012)(*citing P.E.T.A. v. Bobby Berosini, Ltd.,* 895 P.2d 1269, 1278 (Nev. 1995), *distinguished on other grounds City of Las Vegas*

Downtown Redevelopment Agency v. Hecht, 940 P.2d 134, 138 (Nev. 1997); *Romaine v. Kallinger*, 537 A.2d 284, 289-292 (N.J. 1988); *Moore v. Sun Pub. Corp.*, 881 P.2d 735, 742–744 (N.M.App. 1994); *Welling v. Weinfeld*, 866 N.E.2d 1051, 1052-1059 (Ohio 2007); *McCormack v. Okla. Pub. Co.*, 613 P.2d 737, 739-742 (Okla. 1980); *Robillard v. Opal Labs, Inc.*, 337 F.Supp.3d 962, 971 (D.Or. 2018)(*citing Marleau v. Truck Ins. Exch.*, 37 P.3d 148, 153-154 (Or. 2001); *Krajewski*, 53 A.3d at 809-810; *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 751–752 (R.I. 2004); *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979); *West*, 53 S.W.3d at 641-648; *Cox v. Hatch*, 761 P.2d 556, 563–64 (Utah 1988); *Hoyt v. Klar*, 2021 WL 841059, at *2 (Vt. Mar. 5, 2021); *Eastwood v. Cascade Broad. Co.*, 722 P.2d 1295, 1296-1297 (Wash. 1986); and *Blankenship v. Napolitano*, 451 F.Supp.3d 596, 619–620 (S.D.W.Va. 2020) (*citing Taylor v. W. Va. Dep't of Health & Human Res.*, 788 S.E.2d 295, 315–316 (W.Va. 2016).

Finally, the soundest rule would be to adopt the majority position and recognize a claim for false light invasion of privacy in the Virgin Islands. The Superior Court's arguments against adopting such a claim are not persuasive. The Superior Court's contention that the development of the law in this jurisdiction is

not advanced enough to adopt a false light privacy claim is perplexing.[49] And Appellants are unable to discern why the Superior Court felt that Virgin Islands courts are somehow less capable of assessing the merits of this claim when brought by litigants.

Additionally, while the Superior Court contends that the tort of false light invasion of property is so similar to defamation that the false light claim should not be recognized as a separate tort, *Donastorg*, 63 V.I. at 321, the two torts are different, and they address different aspects of privacy. "False light is a distinct cause of action. Defamation and false light, though frequently compared, have different elements and protect different interests."[50] The disclosure requirements between the two torts are distinct.[51] Another crucial distinction between the two

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[49] *Donastorg*, 63 V.I. at 321-323, 325 (referencing "the present development of the Virgin Islands Judiciary", describing "the infancy of the common law in the Virgin Islands.", and that while "there may come a day" where claim should be adopted, "it is not this day.").

[50] *See* Nathan E. Ray*, Let There Be False Light*: *Resisting the Growing Trend Against an Important Tort*, 84 Minn. L. Rev. 713, 715, 734, nn. 11, 12, 112-124 (Feb. 2000) ("False light invasion of privacy involves exposing an otherwise private individual to unwanted and false publicity. By contrast, defamation, with which false light is often compared, involves damage to reputation from a false communication, not necessarily publicized, that exposes an individual to hatred, contempt, or ridicule."); *Blankenship*, 451 F.Supp.3d at 619–620; *Vasquez*, 302 F.Supp.3d at 62; *Godbehere*, 783 P.2d at 786-788; and *Goodrich*, 448 A.2d at 1327-1328.

[51] *See* 84 Minn. L. Rev. at 735 n. 117-118; and *Welling*, 866 N.E.2d at 1057.

torts is the difference between having to prove whether a statement is defamatory or not.[52] Additionally, the defenses for the two torts also differ.[53]

While the Superior Court raised potential First Amendment concerns when involving a media defendant, various courts[54] and other legal authorities[55] have considered and rejected these concerns as overblown, and that recognition of the tort of false light does not significantly infringe on First Amendment rights of defendants. These authorities have a better argument than the handful of cases in the minority that the Superior Court relied on, which go against the clear trend. The recognition of the false light privacy claim by this Court is needed to "maintain[n] the integrity of the right to privacy" and "complemen[t] the other right-to privacy torts." *See Welling*, 866 N.E.2d at 471; and *West*, 53 S.W.3d at 646 (same).

2. There were genuine disputes of material fact regarding Senator Donastorg's false light claim

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[52] *See* 84 Minn. L. Rev. at 735 n. 119-123; and *Tidmore v. Bank of Am.*, 2017 WL 467473, *7-8 (N.D.Ala. Feb. 3, 2017).
[53] *See* 84 Minn. L. Rev. at 736 n. 124.
[54] *See Welling*, 866 N.E.2d at 1058-1059.; and *West*, 53 S.W.3d at 647.
[55] *See* Bryan R. Lasswell, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action,* 34 S. Tex. L.Rev. 149, 173 (1993); and 84 Minn. L. Rev. at 729-734, 751 nn. 91-111, and Sean M Scott, *The Hidden First Amendment Values of Privacy*, 71 Wash. L. Rev. 683, 713 (1996).

Since the Superior Court declined to adopt false light invasion of privacy tort, it did not determine if there were genuine disputes of fact as to this claim. Senator Donastorg submits that for the reasons raised in Section II.B.2, 3, 4 regarding the June 12, 2001 "Legislation Reduction Agenda for Rules Committee" article, the May 29, 1998, "The Public's Right to Know" editorial, and Holland Redfield's statements on the Sam Topp show, there are genuine disputes of fact that mandate denial of summary judgment. Appellees reported false facts that portray Senator Donastorg as stupid enough to vote against his bill and anti-business and wanting to ruin the Virgin Islands economy even though he is a small business owner. Holland Redfield, the agent of Appellees, falsely stated that Senator Donastorg was on a free AT & T plane to St. Lucia, implying kickbacks and corruption.

The article, editorial, and radio show statements painted Donastorg in a false light and would be highly offensive to any reasonable person. It was highly offensive to Senator Donastorg's constituents, who called him furious that he voted against his bill and accused him of corruption.

D. There were genuine disputes of material fact regarding the intrusion on seclusion claim.

1. Virgin Islands Law on Intrusion Upon Seclusion

Appellants agree with the Superior Court's conclusion that this Court should recognize a cause of action for intrusion upon seclusion based upon the legal principles outlined in § 652B of the Restatement (Second) of Torts, *See Donastorg*, 63 V.I. at 317-319. However, Appellants disagree with the Superior Court's application of the elements of the cause of action to the facts of the case.

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.[56] *This claim does not depend upon any publicity given to the person whose interest is invaded or to his affairs*;[57] it consists solely of an intentional interference with his interest in solitude or seclusion of a kind that would be highly offensive to a reasonable person.[58] The invasion *may be by some*

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[56] *See Winig v. Kang*, 2022 WL 1555171, at *4 (Pa.Super. May 17, 2022); *Gomez v. Forster & Garbus, LLP*, 2022 WL 1078210, at *5 (D.N.J. Apr. 7, 2022); and RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[57] *See Lee v. Calhoun*, 948 F.2d 1162, 1165 (10th Cir. 1991)("Section 652B liability does not require publication of private matters."); *Luken v. Edwards*, 2011 WL 1655902, at *5 (N.D.Iowa May 3, 2011)("Unlike other forms of invasion of privacy, intrusion upon seclusion does not require publication."); and RESTATEMENT (SECOND) OF TORTS § 652B, comment a.

[58] *See Neal v. U.S.,* 2022 WL 1155903, at *30 (D.Md. Apr. 19, 2022); *Friedman v. Martinez*, 231 A.3d 719, 722 (N.J. 2020); and RESTATEMENT (SECOND) OF TORTS § 652B, comment a.

form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.[59] The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.[60]

Appellants agree with the Superior Court that Virgin Islands courts have recognized a cause of action for intrusion upon seclusion which "protects an individual from 'intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.'" *Donastorg*, 63 V.I. at 317 n. 426, 428 (V.I.Super. 2015)(*citing* RESTATEMENT (SECOND) OF TORTS § 652B, cmt. a.; and *Anderson v. Gov't of the V.I.,* 199 F.Supp.2d 269, 278 (D.V.I. 2002); *Venzen v.*

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[59] *See Elman v. Gioeli*, 2021 WL 5277819, at *6 (Conn.Super. Aug. 25, 2021); *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 491–492 (9th Cir. 2019); and RESTATEMENT (SECOND) OF TORTS § 652B, comment b.

[60] *See Nayab*, 942 F.3d at 491–492; *Hossfeld v. Compass Bank*, 2017 WL 5068752, at *11 (N.D.Ala. Nov. 3, 2017); and RESTATEMENT (SECOND) OF TORTS § 652B, comment b.; *see also Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976); and *Firstbank Puerto Rico v. Webster*, 2013 WL 436702, at *3–4 (V.I. Super. Ct. Jan. 17, 2013). See also *See Burton v. Mason*, 2022 WL 433695, at *5 (Conn.Super. Jan. 21, 2022); *Hernandez v. Quinn*, 2018 WL 3135302, at *8–9 (Pa.Super. June 27, 2018); *Murphy v. Spring*, 58 F.Supp.3d 1241, 1270–1271 (N.D.Okla. 2014); *Thayer Corp. v. Reed*, 2011 WL 2682723, at *10 (D.Me. July 11, 2011); and RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b, illustrations.

Abraham, 18 V.I. 385, 388-389 (D.V.I. 1981); and *Firstbank Puerto Rico v. Webster,* 2013 WL 436702, at *3 (V.I. Super. Jan. 17, 2013). V.I. cases have recognized a claim for intrusion upon seclusion based upon § 652B of the Restatement (Second) of Torts. *See Venzen,* 18 V.I. at 388-389; and *Webster,* 2013 WL 436702, at *3.

Regarding Step 2 of the *Banks* analysis, the Superior Court acknowledged that "[a]t least forty-three jurisdictions recognize a common law cause of action for intrusion upon seclusion, …" *Donastorg*, 63 V.I. at 317. Appellants have similarly found that the vast majority of jurisdictions, at least 45 jurisdictions other than the Virgin Islands, have adopted this tort. *See Phillips v. Smalley Maint. Servs., Inc.*, 435 So.2d 705, 708–709 (Ala. 1983); *Wal-Mart, Inc. v. Stewart*, 990 P.2d 626, 632-634 (Alaska 1999); *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 30 F.Supp.2d 1182, 1187 (D.Ariz. 1998); *Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 644-649 (Ark. 2002); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 489-497 (Cal. 1998); *Pearson v. Kancilia*, 70 P.3d 594, 598-599 (Colo.App. 2003); *Rafferty v. Hartford Courant Co.*, 416 A.2d 1215, 1216–1217 (Conn.Super. 1980); *State v. Holden*, 54 A.3d 1123, 1128–29 n. 18 (Del.Super. 2010); *Danai v. Canal Square Assocs.*, 862 A.2d 395, 399–400 (D.C. 2004); *Bollea v. Clem*, 937 F.Supp.2d 1344, 1352, 1354-1355 nn. 5, 7 (M.D.Fla. 2013); *Ass'n Servs., Inc. v.*

Smith, 549 S.E.2d 454, 458–459 (Ga.App. 2001); *Sailola v. Mun. Servs. Bureau*, 2014 WL 3389395, at *11–12 (D.Haw. July 9, 2014); *Hoskins v. Howard*, 971 P.2d 1135, 1140–1142 (Idaho 1998); *Lawlor v. N. Am. Corp. of Ill.*, 983 N.E.2d 414, 423–425 (Ill. 2012); *Van Jelgerhuis v. Mercury Fin. Co.*, 940 F.Supp. 1344, 1368 (S.D.Ind. 1996); *Koeppel v. Speirs*, 808 N.W.2d 177, 180–186 (Iowa 2011); *Froelich v. Adair*, 516 P.2d 993, 995–997 (Kan. 1973); *Clark v. Teamsters Loc. Union 651*, 2017 WL 6395850, at *4–5 (E.D.Ky. Dec. 13, 2017); *Knight v. Penobscot Bay Med. Ctr.*, 420 A.2d 915, 917–919 (Me. 1980); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116–1117 (Md.App. 1986); *Polay v. McMahon*, 10 N.E.3d 1122, 1125–1128 (Mass. 2014); *Dalley v. Dykema Gossett*, 788 N.W.2d 679, 685-691 (Mich.App. 2010); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233-235 (Minn. 1998); *Candebat v. Flanagan*, 487 So.2d 207, 209-210, 212 (Miss. 1986); *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 331–332 (Mo.App. E.D. 2014); *N.M. ex rel. Balderas v. Tiny Lab Prods.*, 457 F.Supp.3d 1103, 1123–1127 (D.N.M. 2020); *Sabrina W. v. Willman*, 540 N.W.2d 364, 368–370 (Neb.App. 1995); *Kuhn v. Acct. Control Tech., Inc.*, 865 F.Supp. 1443, 1448–1449 (D.Nev. 1994); *Fischer v. Hooper,* 732 A.2d 396, 400–401 (N.H. 1999); *Birnbaum v. U.S.*, 436 F.Supp. 967, 976–978 (E.D.N.Y. 1977), *affirmed in part and reversed in part on other grounds*, 588 F.2d 319, 323–326, 335sd (2nd Cir.

1978); *Miller v. Brooks*, 472 S.E.2d 350, 353–354 (N.C.App. 1996); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 17–22 (N.J. 1992); *Mangelluzzi v. Morley, 40 N.E.3d 588, 594–595 (Ohio Ct. App. 2015); Chandler v. Denton*, 741 P.2d 855, 864 n. 21 (Okl. 1987); *Mauri v. Smith*, 929 P.2d 307, 308-312 (Or. 1996); *DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa.Super. 1986); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 660–661 (S.D. 2003); *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 209–213 (Tenn.Ct.App. 2000); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Gallegos v. LVNV Funding LLC*, 169 F.Supp.3d 1235, 1245–1246 (D.Utah, 2016); *Hodgdon v. Mt. Mansfield Co., Inc.*, 624 A.2d 1122, 1129 (Vt. 1992); *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981); *Biser v. Mfrs. & Traders Tr. Co.*, 211 F.Supp.3d 845, 857–858 (S.D.W.Va. 2016); *Fischer v. Mt. Olive Lutheran Church*, 207 F.Supp.2d 914, 927–28 (W.D.Wisc. 2002); *Howard v. Aspen Way Enters., Inc.*, 406 P.3d 1271, 1273–1278 (Wyo. 2017).

Regarding Step 3 of the *Banks* analysis, Appellants agree with the Superior Court that the soundest rule would be to adopt the clear majority position and recognize a claim for intrusion upon seclusion in the Virgin Islands as outlined in § 652B of the Restatement (Second) of Torts.

2. There are genuine disputes of fact regarding Appellants' intrusion on seclusion claim.

Oakland Benta did security work for Prosser, ICC, and the subsidiaries. Based on Prosser's directive, he commissioned an investigation into Senator Donastorg and his family's private lives. (**JA1510-12)**. Dennis Sheraw is the President of Dennis Sheraw and Associates, a private investigation firm. (**JA2589-2590**). Julie Erickson is a former Dennis Sheraw and Associates employee and Sheraw's daughter. (**JA2589**; **JA2198-99**). Erickson, who conducted the investigation, isn't licensed as a private investigator and never has been. (**JA2199-200**). Benta, an agent of Appellees, contacted Sheraw to conduct unlimited "carte blanche" investigations into numerous people, including Senator Donastorg, and various local lawyers, such as Riel Falkner, Public Service Commission consultant Jamshed Madan, and Senator Donastorg's family and associates.(**JA2590-97**; **JA2204**, **2210-11**, **2222**, **2226**). Prosser, Benta, Crouch (manager of Daily News), Al Sheen, and Redfield were contact persons for Sheraw or persons with whom Sheraw discussed the report. (**JA2598-99**, **JA2665-66**).

No writing governed the terms of the engagement, and there were no limits placed on the scope of the investigation into Senator Donastorg. (**JA2600-01**). Sheraw advised ICC and the related companies in writing as early as 1990 that the reports he was generating contained information that was obtained "confidentially" and that "cannot be released or disseminated." (**JA2605-06**; **JA3233-34**; **JA3489-**

90). Sheraw's instructions to his investigator were to "dig up anything and everything" on the targets, and he did so because ICC and related companies instructed him that they were "looking for negative information." (**JA2608-09**). Sheraw's company obtained confidential information through techniques like "pretext" calling, which is industry slang for calling an organization and telling a lie and giving false identification to gain access to confidential information and obtaining information from confidential phone records from ICC and VITELCO. (**JA2615-16**, **JA2639-40**). Sheraw and his company dug up personal information like Social Security Numbers on targets and family members by gaining access to private employee files, tax records, banking records, and confidential credit reports. (**JA2613-20**). Banking information and Social Security Numbers are private,[61] as recognized by Holland Redfield when he balked at providing his Social Security Number during his deposition "because it's confidential information, and I just don't feel it's appropriate." (**JA1178**). Redfield also testified that ICC considered things like personnel records, Social Security Numbers, salaries, pay scales, "these type of things" to be private, confidential, and protected from disclosure. (**JA1337-42; 3489-90**).

[61]V.I. R. Civ. P. 5.2 titled "Privacy Protection for Filings Made in Court, requires litigants redact social security numbers, birth dates and financial account information because this is private information.

Concerning Senator Donastorg and all of his family members, the evidence shows Sheraw gathered "confidential source information" from "law enforcement" sources and campaign contributors; gathered birth dates and private bank-account information that is "difficult to obtain and highly confidential in nature and should be handled accordingly,"; and made "pretext calls" to gain confidential information from medical providers including the St. Thomas Hospital, to find "indiscretions"; and made pretext calls to lawyers and colleges like California State University, Fullerton. (**JA2645-58**; **JA2213**, **2221**, **2226-27**, **2230-31**, **2236-53**, **2257**). Sheraw considers the "raw data," sources, and confidential information he gathers to be "trade secrets" and "confidential." (**JA2662-63**).

When Senator Donastorg learned about the investigation, he was shocked and angry that Appellees were trying to destroy his life with the investigation into his private affairs. (**JA1496-505**). Senator Donastorg's family, the other Appellants, were also terrified and distressed. (**JA2944**; **JA1903-07**; **JA1962-77; JA2945; JA2946; JA1998-2011; JA2948; JA2949; JA2947; JA2949; JA2950**). Senator Donastorg disclosed the fact of the investigation to the St. Croix Avis because he feared for his life and thought coverage of the issue might protect him. (**JA1501-02**). Senator Donastorg was intimidated by the penetration into his private affairs and the penetration of his private bank accounts. (**JA1502**). In

addition to the report, Prosser, Redfield, and ICC, had Senator Donastorg followed in 2000, 2001, and 2002. **(JA1503-04)**. Daily News reporter, Joseph Tsidulko, also improperly tried to get confidential information from a government agency about alleged claims that Donastorg was not paying child support which was just false. (**JA2951-52**). Senator Donastorg was terrified by Prosser, ICC, VITELCO, and the related company's actions, including creating the investigative file, penetrating his bank accounts, invading his privacy, and invading his family's privacy, and finding out the places he frequented in his personal life. (**JA1504-05**).

The Superior Court suggested that because 23 V.I.C. § 1301(f)(2) authorizes the investigation of a person regarding, '(t)he identity, habits, conduct, movement, whereabouts, affiliations, associations, transactions, reputation or character of any person or group [sic] persons, organization, society, other group of persons or partnership or corporation" Appellants could not establish liability. To the contrary, § 1301 is the "definitions" section of the "Licensing of Private Security Guards and Investigative Agencies," subsection of the "Private Security Guards and Investigative Agencies" Act, Title 23, Chapter 27, of the Virgin Islands Code. 23 V.I.C. § 1302(b) provides that no person shall engage in the *type of conduct* described in § 1301(f)(2) for another without first obtaining a license from the commissioner. Nothing contained in § 1301(f)(2): (1) describes the standards for

conducting investigations; or (2) provides immunity or a privilege for those who engage in such investigations. No provision of Chapter 27 authorizes an investigator to access private birth dates and banking information through false pretenses, access private medical information in violation of statutes like HIPPA by false pretenses, or unreasonably intrude into the seclusion of others through the use of improperly obtained Social Security Numbers and pretext calling to obtain protected and private, non-public information.

There were genuine disputes of material facts that warranted a denial of summary judgment on this issue.

E. There are genuine disputes of fact regarding "integrated enterprise" and "separate entities."

Courts recognize that a party seeking summary judgment may fail to meet its burden of showing no genuine issue of material fact through the moving party's own conflicting positions on issues of material fact. *See Duncan v. Fleetwood Motor Homes of Ind., Inc.*, 518 F.3d 486, 488, 491-492 (7th Cir. 2008)(circuit court reversed grant of summary judgment for defendant who it found was not entitled to summary judgment based on its "inconsistent litigation positions" and the circuit court found that to reach this conclusion, the court need not look beyond the defendant's own presentation on summary judgment since defendant's positions were "impossible to reconcile."); *Zapfel v. Xerox Corp.*, 2021 WL 2011213, *1, 8-

13 (Conn. Super. Apr. 21, 2021)(defendant's summary judgment motion denied on issue of change of control when "the defendant took conflicting positions on this issue, …"); *Limary v. United Parcel Serv., Inc.*, 2017 WL 4169410, at *4-5 (D.Idaho Sept. 20, 2017)(district court found that defendant who sought summary judgment "ha[d] not met their burden of proof to establish the absence of a genuine issue of material fact" on the issue of wrong party in light of defendant's "conflicting position" on this issue); *Dudash v. Southern-Owners Insur. Co.*, 2017 WL 1598974, at *4–5 n. 11 (M.D.Fla. Apr. 28, 2017)(summary judgment was denied to a plaintiff who had "assert[ed] conflicting positions in her [summary judgment] motion and response."); *In re R & D Homes II, Inc.*, 2009 WL 2105720, at *1 (Bkrtcy. M.D.N.C. July 13, 2009)(bankruptcy court denied trustee's motion for summary judgment since there was an existing genuine issue of material fact regarding status as a creditor preventing summary judgment from being granted where trustee had "taken conflicting positions" about whether defendant was a creditor of the Debtor); and *Ray v. Libbey Glass, Inc.*, 133 F.Supp.2d 610, 614, 618–19 (N.D.Ohio 2001)(district court denied defendant's summary judgment motion to dismiss plaintiff's disability where statement made in affidavit of defendant's key witness, its workers' compensation coordinator, was "in direct conflict with" defendant's position in its summary judgment motion).

In opposing summary judgment, Appellants briefed why the summary judgment record showed that: (1) Prosser, owned, operated, and controlled ICC, VITELCO, and The Daily News, and operated them in a joint and integrated fashion to achieve both his personal and business objectives; (2) Prosser and VITELCO used The Daily News to publish both editorials and news articles that furthered Prosser and VITELCO's interests; (3) The Daily News completely ceded its editorial function to ICC with ICC being solely responsible for the editorial content of The Daily News; (4) The Daily News could not refuse to publish any editorial sent to it by ICC or even edit such editorials, although no disclaimer or anything else in the Daily News newspaper gave the public notice of this. (**JA642-646, 650-651, 654-657, 669, 676-681, 683-684, 695, 697-698, JA713-749, 750-752, 761-768, 776-785, 793-800)**.

Daily News and its editor, Davis, took wholly inconsistent positions in seeking summary judgment which the Superior Court ignored. In their motion and supplemental motions for summary judgment, they sought summary judgment because, according to them, Daily News, ICC VITELCO, and Benta are separate and distinct entities and persons. (**JA3118-3119, 3122, 3132-3133**, **JA3163-3164)**. They then took the opposite position and argued that Appellants' civil conspiracy claims failed because the Appellees and the related entities couldn't conspire with

themselves. Appellees explicitly argued that operations of a corporate enterprise must be judged as a single actor even if nominally organized into separate divisions and that the coordinated activity of a parent corporation, such as ICC, and its wholly owned subsidiaries, such as Daily News and VITELCO, must be viewed as that of a single enterprise, with a complete unity of interest, whose objectives are common, not disparate. They also argued that their general corporate actions are guided or determined not by two separate corporate consciousness, but one. **(JA3120-3121, JA3162-3163, 3167-3170)**.

The conflicting positions of The Daily News and Davis in the summary judgment record on the issue of whether they and their nonparty parent company and other subsidiaries are separate entities or so interrelated with complete unity of interest as to constitute a single enterprise should have resulted in the denial of summary judgment. Defendants Daily News and Davis' conflicting and inconsistent positions on summary judgment demonstrate that there are genuine issues of material fact in controversy which require a jury as the finder of fact to decide.

F. There are genuine disputes of fact regarding Appellants' claim of intentional infliction of emotional distress.

1. Virgin Islands Law on Intentional Infliction of Emotional Distress

Appellees did not contest that this jurisdiction recognizes a claim for intentional infliction of emotional distress, but no local statute addresses the claim, and post-*Banks*, this Court has yet to undertake a *Banks* analysis and adopt a claim for intentional infliction of emotional distress as part of the common-law of the Virgin Islands or state the elements of such claim.[62] Under the Restatement, to recover for intentional infliction of emotional distress, a plaintiff must show that the defendant, "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to" the plaintiff,[63] and that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[64]

After conducting a *Banks* analysis, the Superior Court in *Joseph* previously ruled that the RESTATEMENT (SECOND) OF TORTS § 46 reflects the common law of this jurisdiction:

> First, the general rule of this section has been adopted by virtually every Virgin Islands court to address intentional infliction of emotional distress. Second, a review of the case citations listed in the

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[62] *See Joseph v. Sugar Bay Club & Resort*, Civil No. ST-13-CV-491, 2014 WL 1133416, at *2-4 (V.I. Super. Mar. 17, 2014).
[63] *See* RESTATEMENT (SECOND) OF TORTS § 46 (1977).
[64] *See* RESTATEMENT (SECOND) OF TORTS § 46, comment d.

> Restatement (Second) of Torts § 46 suggests that a majority of jurisdictions have adopted a similar rule to § 46. Finally, considering the longstanding application of this construction of Intentional Infliction of Emotional Distress in Virgin Islands courts, the Court finds that the Restatement (Second) of Torts § 46 represents the soundest rule for the Virgin Islands, and is in accord with local public policy.[65]

The Superior Court adopted the *Joseph* holding "that the principles of law summarized in Section 46 of the Restatement (Second) of Torts represented the soundest rule of law for the Virgin Islands." and incorporated by reference the reasoning set forth in *Joseph*. *Donastorg*, 63 V.I. at 295.

Since the Superior Court's *Joseph* decision, numerous other Virgin Islands courts have applied § 46 of the Restatement (Second) of Torts and recognized causes of action for intentional infliction of emotional distress consistent with most jurisdictions. *See James v. Mosler*, 2021 VI SUPER 53U, ¶¶ 18-20, 2021 WL 2117819, at *4 n. 34-38; *Aaron v. V.I. Gov't Hosp. & Health Facilities Corp.*, 2021 VI SUPER 30P, ¶¶ 15-17, 2021 WL 3291750, at *6–7 n. 26; *Lawaetz v. Hamm*, 2020 VI SUPER 039U, ¶ 54, 2020 WL 1875262, at *11 n. 51 (V.I. Super. Apr. 3, 2020); *Dorval v. Sapphire Vill. Condo. Assoc.*, 2020 WL 902524, at *4–5 (D.V.I. Feb. 25, 2020); *Dorval v. Fitzsimmons*, 2020 WL 376989, at *5 (D.V.I. Jan. 23, 2020); *Schrader-Cooke v. Govt. of V.I.*, 72 V.I. 218, 246–247 n. 18

[65] *See Joseph*, 2014 WL 1133416, at *3 (internal footnotes omitted).

(V.I.Super. 2019); *Arno v. Hess Corp.*, 71 V.I. 463, 507–508 (V.I.Super. 2019); *Todman v. Hicks*, 70 V.I. 430, 444–445 n. 53-55 (V.I.Super. 2019); *Tutein v. InSite Towers, LLC*, 2018 WL 6599163, at *5–6 (D.V.I. Dec. 17, 2018); *Dorval v. Mkt.*, 2018 WL 6258864, at *3 (D.V.I. Nov. 30, 2018); *Poleon v. Gov't of V.I.*, 2018 WL 3764086, at *19 (D.V.I. Aug. 8, 2018); *Matthews v. Law Enf't Supervisor's Union*, 2017 WL 4127757, at *4–5 (D.V.I. Sept. 11, 2017); *Frazer v. Police Benevolent Ass'n, Local 816,* 2017 WL 2495487, at *10–11 n. 100-101 (V.I.Super. June 7, 2017); *Nelson v. Long Reef Condo, Homeowners Assn.*, 2017 WL 1823040, at *4 (D.V. I. May 5, 2017); *Mercer v. Govt. of the V.I. Dept. of Educ.*, 2016 WL 5844467, at *15 (D.V.I. Sept. 30, 2016); *Diaz v. Ramsden*, 67 V.I. 81, 86–91 n. 19, 26, 29 (V.I.Super. 2016); *Gerard v. Dempsey*, 2016 WL 9503684, at *5–6 (V.I.Super. Aug. 22, 2016); *Fenster v. DeChabert*, 65 V.I. 20, 64–65 n. 145-146 (V.I.Super. 2016); *Nelson v. Long Reef Condo. Homeowners Assn.*, 2016 WL 4154708, at *27–28 (D.V.I. Aug. 5, 2016); *Stevens v. Louise*, 2016 WL 9454137, at *3 (V.I.Super. June 13, 2016); *Est. of Burnett v. Kazi Foods of the V.I.*, 69 V.I. 50, 61–62 (V.I.Super. 2016); *Hiss v. Com. Sec., LLC., Inc.*, 2016 WL 3092511, at *4–5 (V.I.Super. Apr. 8, 2016); and *Pickering v. Arcos Dorados P.R., Inc.*, 2015 WL 6957082, at *4–5 (V.I.Super. Nov. 9, 2015).

This Court should recognize a cause of action for intentional infliction of emotional distress and adopt the principles set out in § 46 of the Restatement (Second) of Torts as the soundest rule of law for the Virgin Islands. The elements of intentional infliction of emotional distress under § 46 are whether a defendant: (1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress. *Donastorg*, 63 V.I. at 295.

1. There are genuine disputes of fact regarding Appellants' intentional infliction of emotional distress claim

The investigation, which invaded Donastorg, and his family's privacy combined with false statements and news stories, is undoubtedly reckless, extreme, and outrageous behavior that exceeds possible bounds of decency. Appellees' conduct went beyond the accepted norm of mere criticizing a public figure and instead evidences extreme and outrageous conduct designed to threaten, bully, and intimidate Senator Donastorg and to ruin him, which is abusive and illegal. This multi-year pattern of investigation and intimidation caused him to suffer from severe emotional distress. The investigation was conducted on all the members of Senator Donastorg's family. They, too, were injured by the outrageous conduct of Appellees. Senator Donastorg was shocked and angry and suffered anxiety,

depression, and fear that Appellees were trying to destroy his life by investigating his private affairs. (**JA1496-505**). Senator Donastorg's family was also terrified and distressed. (**JA2944**; **JA1903-07**; **JA1962-77; JA2945; JA2946; JA1998-2011; JA2948; JA2949; JA2947; JA2949; JA2950**). Appellees had Senator Donastorg followed in 2000, 2001, and 2002. (**JA1503-04**).

G. There are genuine disputes of fact regarding Senator Donastorg's claim for tortious interference with existing business relationships

1. Virgin Islands Law on Tortious Interference with Existing Business Relationships

This Court recently announced the elements of a tortious interference with existing contracts claim and stated the four elements of such cause of action. *Jahleejah Love Peace v. Banco Popular de P.R.*, 2022 WL 374274 (V.I. Feb. 7, 2022)(*citing Rondon v. Caribbean Leasing & Eco. Transp., Inc.*, 74 V.I. 397 (V.I.Super. 2021).[66] This Court should hold that existing and prospective business relationships fall within the cause of action as recognized in *Love Peace*, consistent

[66] The V.I. Superior Court in *Rondon,* adopted by reference the *Banks* analysis which the Superior Court had undertaken below in this case as to whether the Virgin Islands should adopt a claim for interference with existing contracts, and what should be the elements of such claim, if adopted. *See* 2021 VI SUPER 72, ¶¶ 31, 32, 2021 WL 2941866, at *10.

with RESTATEMENT (SECOND) OF TORTS § 766, other secondary sources[67] and precedent following Section 766.

As the RESTATEMENT (SECOND) OF TORTS § 766 recognizes,

> The liability for inducing breach of contract is now regarded as but one instance, rather than the exclusive limit, of protection against improper interference in business relations. The added element of a definite contract may be a basis for greater protection; **but some protection is appropriate against improper interference with reasonable expectancies of commercial relations even when an existing contract is lacking.** The improper character of the actor's conduct and the harm caused by it may be equally clear in both cases.[68]

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[67] *See* 9 American Law of Torts § 31:39, Part IV Business Torts, Chapter 31 Interference with Contractual or Business Relations (March 2022 Update)("In general, to establish prima facie proof of tortious interference, a plaintiff must show:

(1) existence of a contractual or business relationship or expectancy;
(2) an intentional act of interference by a party outside that relationship or expectancy;
(3) proof that the interference caused the harm sustained; and
(4) damages. …

Underlying the tort of interference is the concept that the law draws a line beyond which an individual may not go in intentionally interfering with the business affairs of others.").

[68] *See* Restatement (Second) of Torts § 766 (1979), comment c. (emphasis added). *Accord Onyeoziri v. Spivok*, 44 A.3d 279, 286 (D.C. 2012)(recognizing that Restatement (Second) of Torts § 766 reaches both "intentional interference with existing business relations' and intentional interference with existing contractual relationship); and *White Sands Group, L.L.C. v. PRS II, LLC*, 32 So.3d 5, 14–15 (Ala. 2009)("Indeed, [i]t is not necessary that the prospective relation be expected to be reduced to a formal, binding contract. … It is the right to do business in a fair setting that is protected. … The existence of a binding contract is one factor for consideration in the determination of whether the actor's conduct is improper.

As to Step 1 of the *Banks* analysis, the Superior Court recognized that various Virgin Islands courts had recognized a claim for "interference with 'business relationships' …"[69]. Other Virgin Islands court decisions have also recognized a claim for interference with business relationships.[70]

Regarding Step 2 of the *Banks* analysis, most other jurisdictions, at least 31 jurisdictions other than the Virgin Islands, have recognized a claim for tortious interference with business relationships. *See Fitzpatrick v. Hoehn*, 262 So.3d 613, 627–628 (Ala. 2018); *Singh v. Malhotra*, 2018 WL 1004282, at *5 (Ariz.App. Feb.

Thus, the inquiry in this tort is which interests along the *continuum* of business dealings, are protected.")(internal citations and quotations omitted)(*citing* Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of this* Commercial *Tort,* 35 Cumb. L.Rev. 317, 330 (2004–2005)).

[69] *Donastorg*, 63 V.I. at 279 n. 270 (*citing Pemberton Sales & Serv., Inc. v. Banco Popular de P.R.*, 877 F. Supp. 961 (D.V.I. 1994); *Fountain Valley Corp. v. Wells,* 98 F.R.D. 679 (D.V.I. 1983); *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983), *affirmed in part and reversed in part Wells v. Rockefeller*, 728 F.2d 209, (3d Cir. 1984)(circuit court reversed summary judgment ruling for defendant on interference with business relations claim since the evidence raised issues of contested fact regarding such claim precluding summary judgment); and *Storage on Site, LLC v. Slodden*, 57 V.I. 94 (V.I. Super. 2012)).

[70] *See, i.e., Island Airlines, LLC v. Bohlke*, 2022 VI SUPER 20, ¶¶ 61-62, 2022 WL 474132, at *13 (V.I.Super. Feb. 14, 2022) (superior court denied defendants' motion to dismiss intentional interference with existing economic interests claim); *Arvidson v. Buchar,* 72 V.I. 50, 62 (V.I.Super. 2019)(Superior Court granted defendant's motions to compel discovery related to claims of alleged interference with business relations); *Forever Flowers Grande, LLC v. Yacht Haven Grande, LLC*, 2010 WL 11718881, at *3 (V.I.Super. Sept. 8, 2010)(superior court stated elements of claim for tortious interference with business relations).

22, 2018); *Jim Orr and Assocs., Inc. v. Waters*, 773 S.W.2d 99, 102 (Ark. 1989); *Butler Am., LLC v. Ciocca*, 2021 WL 4902375, at *3 (Conn.Super. Oct. 4, 2021); *Bradley v. Regul. Ins. Servs., Inc.*, 1999 WL 459059, at *3–4 (Del.Super. Apr. 20, 1999); *Econ. Rsch. Servs., Inc. v. Resol. Econs., LLC*, 208 F.Supp.3d 219, 228 (D.D.C. 2016); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 814–815 (Fla. 1994); *NationsBank, N.A. v. SouthTrust Bank of Ga., N.A.*, 487 S.E.2d 701, 705–706 (Ga.App.1997); *Smith-Shrader Co., Inc. v. Smith*, 483 N.E.2d 283, 289–290 (Ill.App. 1 Dist.1985); *Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1249 (N.D.Ind. 2005); *Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558, 561 (Iowa 1988); *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 511 A.2d 492, 497 (Md. 1986); *Sensitech, Inc. v. LimeStone FZE*, 2022 WL 227132, at *3 (D.Mass. Jan. 26, 2022); *Moore v. Moore*, 2019 WL 3315360, at *7 (Mich.App. July 23, 2019); *Clinch v. Heartland Health*, 187 S.W.3d 10, 14–15 (Mo.App. W.D. 2006); *Bolz v. Myers*, 651 P.2d 606, 610–611 (Mont. 1982); *In re R.O.A.M., Inc.*, 14 B.R. 963, 966-967 (Bkrtcy.Nev. 1981); *684 East 222nd Realty Co., LLC v Sheehan*, 128 N.Y.S.3d 273, 275 (N.Y.A.D. 2 Dept., July 22, 2020); *Northern Chem. Blending Corp., Inc. v. Strib Industries, Inc.*, 2018 WL 4043487, at *6–7 (Ohio App. 8 Dist. Aug. 23, 2018); *Tuffy's, Inc. v. City of Okla. City*, 212 P.3d 1158, 1165 (Okla. 2009); *Reser's Fine Foods, Inc. v. Bob Evans Farms, Inc.*, 2016

WL 3769361, at *15 (D.Or. July 13, 2016); *Rouse Phila. Inc. v. Ad Hoc '78*, 417 A.2d 1248, 1256 (Pa.Super. 1979); *Selle v. Tozser*, 786 N.W.2d 748, 753 (S.D. 2010); *Crouch v. Schnuck Markets, Inc.*, 2009 WL 10664191, at *6 (W.D.Tenn. July 27, 2009); *Steinmetz & Assocs., Inc. v. Crow*, 700 S.W.2d 276, 277–278 (Tex.App. 4 Dist. 1985); *Eldridge v. Johndrow*, 345 P.3d 553, 565–566 (Utah 2015); *Bumgarner v. Fischer*, 2019 WL 4734428, at *3 (Va.Cir.Ct. Jan. 17, 2019); *JKR, LLC v. Linen Rental Supply, Inc.,* 2010 WL 3298775, at *2 (Wash.App. Div. 1 Aug. 23, 2010); *Ferrell v. Rose*, 2011 WL 13364564, at *2 (W.Va. May 27, 2011); *Roeming v. Peterson Builders, Inc.*, 1995 WL 759997, at *4 (Wis.App. Dec. 27, 1995); and *Davenport v. Epperly*, 744 P.2d 1110, 1111–1112 (Wyo. 1987).

As to Step 3, the soundest rule would be to adopt the majority position and recognize a claim for tortious interference with plaintiffs' business relationships in the Virgin Islands following the rule outlined in § 766 of the Restatement (Second) of Torts and the comments to that section.

1. There were genuine disputes of material fact regarding Senator Donastorg's tortious interference claims

Senator Donastorg testified in his deposition that his business relationships suffered when his personal telephone service was cut for over three weeks. VITELCO, the co-defendant that Donastorg claims is part of Appellees' joint

enterprise, failed to respond to calls to repair his lines for over three weeks, which directly interfered with Donastorg's business as a Senator and as a business owner.

Senator Donastorg also testified that Defendants or their agents (i.e. Sheraw) called his business clients and asked questions about their business dealings, which Donastorg learned from a client MD McCaley. As a result, the client wanted to discontinue doing business with Donastorg's company, Carrier Medical Supplies. **(JA1552-1556)**. Senator Donastorg identified contractual relations with which Appellees interfered. Senator Donastorg contends that based on the record as a whole, a reasonable jury could conclude that Appellees tortiously interfered with his business or prospective business relationships.

III. CONCLUSION AND PRAYER FOR RELIEF

Appellants respectfully request that this Court reverse the Superior Court's entry of summary judgment in favor of Appellees and remand this case for a jury trial on all claims.

RESPECTFULLY SUBMITTED
LEE J. ROHN AND ASSOCIATES, LLC
Attorneys for Appellants

DATED: July 15, 2022

BY: */s/ Rhea R. Lawrence*

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CERTIFICATE OF SUPREME COURT BAR MEMEBERSHIP

The undersigned hereby certifies that pursuant to Virgin Islands Rule of Appellate Procedure 22(l) she is a member of the bar of the Supreme Court of the Virgin Islands.

DATED: July 15, 2022

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that **APPELLANTS' OPENING BRIEF** complies with Virgin Islands Rule of Appellate Procedure 22(f) and contains 14, 714 words towards the 15, 600-word limit requested by Appellants. A motion to exceed the word limit was filed on June 6, 2022, and remains pending. To avoid further delay, Appellants are filing their brief.

DATED: July 15, 2022

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on July 15, 2022, I electronically filed the foregoing with the Clerk of the Court using the VIJEFS system, which will send a notification of such filing (NEF) to the following:

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