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

Superior Court Civ. No. SX-2002-CV-00117 (STT)

APPELLANTS' REPLY BRIEF

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REPLY BRIEF

I. Appellees fail to comply with the Rules of Appellate Procedure.

Entire pages of Appellees' Opposition Brief are devoid of citation to the record or proper – if any – legal citation in violation of the requirements of V.I.R. App. P. 22 (a)(5), (d), and (m). At a minimum, Appellees waived sections I, J, and K (Opp., 42-45) in their entirety for failing to cite to the record and failing to cite any legal authority in support of their arguments. *Percival v. People,* 62 V.I. 477 (V.I. 2015).

II. The heightened summary judgment standard should be rejected.

Appellees only and unsupported argument to abandon Rule 56 in favor of the heightened standard is that it "protect[s] newspapers like The Daily News from frivolous defamation actions" and without it, "there would be a chilling effect on the newsgathering and publication process which would unduly compromise freedom of the press." (Opp., 21). Appellees highlight that in *Chester, Moffatt,* and *Dairy Stores*, the courts *upheld* the dismissal of plaintiffs' respective cases using the normal standard because the plaintiffs in those cases had no evidence of actual malice. *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 141 (Ind. App. 1990) ("The record before

us reflects that there is *no evidence* of actual malice on the part of Trotter or The Star."); *Moffatt v. Brown,* 751 P.2d 939, 945 (Alaska 1988) ("On the issue of actual malice, Brown has provided no evidence whatsoever to show that Moffatt subjectively entertained any serious doubts as to the truth of his statements. On the contrary, record shows that Moffatt did not entertain any doubts with regard to the truth of his statements."); *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 104 N.J. 125, 157 (N.J. 1986)("nothing in the record before us creates a genuine issue of material fact that any defendant knew the statements to be false or entertained serious doubts about their truth."). Therefore, it is obvious that well-established summary judgment is still an effective mechanism for disposing of defamation actions without the weighing of evidence embodied in the heightened standard.

Moreover, plaintiffs in public figure defamation cases must still satisfy the heavy burden of proving actual malice by clear and convincing evidence at the trial stage thereby protecting the important liberty interests inherent in matters of public concern. *See Huckabee,* 19 S.W.3d at 421.

The heightened standard violates pre-existing Virgin Islands law because, not only is it inconsistent with Rule 56, but – more importantly – it suggests that trial courts weigh evidence and, therefore, invades the province

of the jury—something this court has repeatedly rejected. *Huckabee,* 19 S.W.3d at 422; *accord Ostalaza v. People,* 58 V.I. 531, 546-47 (V.I. 2013)("[W]e decline to invade the province of the jury and overrule the jury's credibility determinations.")(*citing Nanton v. People,* 52 V.I. 466, 485-86 (V.I. 2009)); *Alexander v. V.I.,* 60 V.I. 486, (V.I. 2014).

Additionally, the facts of this case are distinguishable from *Huckabee, Chester, Moffatt,* and *Dairy Stores* because, under either standard, there is sufficient evidence to find actual malice and deny Appellees motion for summary judgment.

In *Huckabee,* HBO aired a film documentary regarding a judge's custody determination involving a four-year-old boy. 19 S.W.3d at 417. After the mother sought to limit the father's visitation after the child sustained an injury to his penis while in the father's care, the judge awarded custody to the *father* and denied the *mother* all access to the child. *Id.* The documentarians interviewed the judge, the psychologist appointed to the case, and an attorney unrelated to the case, among others. *Id.* at 418-19. The documentarians provided "extensive" and "detailed" affidavits as to the research steps and reasons for doubting the judge's ultimate decision. *Id.* at 424. The judge produced no evidence of actual malice, *Id.* at 425-26, 429, and was unable to

demonstrate the documentarians entertained substantial doubts about the film's truth. *Id.* at 430.

In *Chester,* an article was published portraying a landlord as a "self-ordained pastor who was speculating in real estate by purchasing property in the church's name to make a personal profit." 553 N.E.2d at 139. The landlord owned in excess of 60 properties in bad area of town, many of which were uninhabitable, transferred a number of the properties to "his church" (although he was not ordained and there was no record of his church), and subsequently had his tax benefits revoked because the properties were actually rented to tenants and not used for church purposes. *Id.* at 138-39. The landlord complained that the article did not convey a favorable impression of him and that the reporter was negligent in the investigation. *Id.* at 140. However, the reporter reviewed tax and property records, spent sixteen hours per week interviewing residents, contacted the Church of Christ denomination, and made other efforts. *Id.* at 138-41. The record reflected that "there is *no evidence* of actual malice." *Id.* at 141 (emphasis in original).

In *Moffat,* a newspaper published an article criticizing the governor's decision to appoint a physician to the Alaska medical board despite that nurses refused to work with the physician on second-term abortions. 751 P.2d at 940.

The physician filed suit and claimed that it was defamatory to say the physician's methods were "so horrible as to cause a boycott by every nurse employed at Valley Hospital." *Id.* at 944. A verifiable source, the hospital administrator, provided information that the majority of nurses refused to work with the physician based upon performing second trimester abortions, and that additional nurses had to be obtained because the nursing staff would not participate. *Id.* at 945. The court determined that the evidence showed there was "no evidence whatsoever to show that [the reporter] subjectively entertained any serious doubts as to the truth of [the] statements." *Id.* at 945.

In *Dairy Stores,* after a shortage of public water and a rise in bottled water sales, a reporter published a story indicating that the contents of a marketed spring sourced bottled water were questionable based upon testing that revealed chlorine in the water. 104 N.J. at 130-31. The reporter had the water tested at an independent state-certified testing laboratory and confirmed the results through repeated tests at two other laboratories. *Id.* At 130. The bottled water company claimed that no chlorine was added to the water and it came from a spring. *Id.* at 131. The court, after determining drinking water is of public concern, provided "nothing in the record before us creates a genuine issue of material fact that any defendant knew the statements to be

false or entertained serious doubts about their truth." *Id.* at 157. The court reasoned that the reporter "confirmed the positive test results through subsequent tests, all of which were reviewed by two other chemists. This procedure does not bespeak a reckless disregard for the truth." *Id.*

As explained in Appellants' Opening brief **and below** under each defamation claim, Appellees acted with actual malice under either summary judgment standard sufficient to overcome summary judgment.

III. Appellees concede they acted with bad intentions which is relevant to demonstrate actual malice.

Appellees argue that bad intentions are "irrelevant" to finding actual malice. (Opp., 34). Additionally, the Superior Court stated that bad intentions do "not constitute actual malice." (**JA127**). Both are mistaken; bad intentions are relevant to finding actual malice. Actual malice means that a statement is made "with knowledge that it was false or with reckless disregard of whether it was false." *See Donastorg v. Daily News Publ'g,* 63 V.I. 196, 233 (V.I. Super. 2015). In defamation matters, "reckless disregard" is defined as "[s]erious indifference to truth or accuracy of a publication." BLACK'S LAW DICTIONARY (11th ed. 2019), *reckless disregard* (2).

Actual malice "is a subjective standard, based on the defendant's actual state of mind." *Donastorg,* 63 V.I. at 223-24 (citing references omitted).

While "[p]roof of ill will, evil motive, [or] intent to injure" are "**insufficient**" in the context of public affairs, *Rosenblatt v. Baer,* 383 U.S. 75, 84 (1966)(emphasis added)(citing reference omitted), such evidence is relevant to determining whether a statement is made with actual malice because it is relevant to the defendant's actual state of mind. *See also Joseph v. Daily News Publ'g Co., Inc.,,* 57 V.I. 566 (V.I. 2012)("Neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite nor prejudice, on the other, **standing alone***,* are sufficient to establish either acknowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used.")(emphasis added)(citing *Goldwater v. Ginzburg,* 414 F.2d 324, 342 (2d. Cir. 1969)). While bad intentions are not "sufficient" and do not constitute actual malice "standing alone," they *contribute* to finding actual malice. Here, Appellees concede that there were bad intentions against Donastorg[1] which is relevant to finding actual malice.

[1] Appellees acknowledge that "Appellants spill much ink alleging that there were bad feelings or bad intentions directed by The Daily News to Senator Donastorg" (Opp., 28) and that "Appellants expend substantial effort attempting to document how The Daily News was hostile to him or that it treated him unfairly" (Opp., 34), yet Appellees *never* claim that these statements are untrue. Appellees merely claim that these assertions are irrelevant to a finding of actual malice.

IV. Defamation can be demonstrated with circumstantial evidence; direct evidence is not required.

Appellees incorrectly claim that the *only* way that Appellants can prevail on their defamation claims is for the author to **admit** he knew the statements were false or made with reckless disregard for their truth. (Opp., 23). Wrong. Defamation can be demonstrated with circumstantial evidence; direct evidence is not required. "Circumstantial evidence is to be given the same weight by the fact finder as direct evidence." *People v. Phillip,* ST-11-CR-669, 2011 WL 13389574, at *4 (V.I. Super. Dec. 19, 2011)(citing *U.S. v. Ramirez-Rodriguez,* 552 F.2d 883, 884 (9th Cir. 1977); *see also* Kevin F. Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* § 12 (5th ed. 2000)). Even in the criminal murder context, where the stakes—a defendant's liberty—are highest and there is the much higher beyond-a-reasonable-doubt burden of proof, this Court has provided:

> It is true that the People presented no direct evidence of [the defendant's] intent to murder [the victim]. This is not fatal to their case, however, for it is often true that there is no direct evidence of a person's intent. *See Rose v. Clark,* 478 U.S. 570, 581 (1986) (observing that in "many cases … there is no direct evidence of intent"). Instead, the conclusion that someone acted with a particular intent is typically established through circumstantial evidence. *Ibrahim v. Gov't of the V.I.,* 47 V.I. 589, 598 (D.V.I. App. Div. 2005). The jury is entitled to draw certain inferences from the evidence presented before them. *See Nicholas v. People,* 56 V.I. 718, 735 (V.I. 2012) (stating that the

> jury could infer actual malice from the defendant's shooting of the victim with a firearm in the back of her head).

Ostalaza v. People, 58 V.I. 531, 548 (V.I. 2013).[2] Indeed, "**intent is almost exclusively proved by circumstantial evidence providing rational and logical inference as to the defendant's state of mind**." *Wallace v. People,* 71 V.I. 703, 784 (V.I. 2019)(emphasis added)(Assoc. Justice Swan concurring in part)(citing reference omitted). Moreover, in the civil context, "[i]t is well-established that a plaintiff may establish an element of a cause of action through circumstantial evidence alone." *Liat (1974), Ltd. v. Cherubin,* 2022 V.I. 21, ¶ 19 (2022) (citing reference omitted).

Therefore, Appellants are only required to provide *circumstantial* evidence that there is a genuine dispute of material facts.[3]

V. The 2001 article was defamatory; retraction does not absolve liability.

The 2001 article entitled "Legislation Reduction on Agenda for Rules Committee" was defamatory and Appellees retraction does not absolve their

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[2] Discussions regarding intent are relevant. "Intent" is defined as "[t]he state of mind accompanying an act," (BLACK'S LAW DICTIONARY (11th ed. 2019), *intent*), and Appellants are required to demonstrate "actual malice" which "is a subjective standard, based on the defendant's actual state of mind," *Donastorg,* 63 V.I. at 223-24 (citing references omitted).

[3] *See supra* § III.

liability. It stated: "[i]ronically. Senator Donastorg voted no on his own bill." (**JA3008**). Appellees claim the article was "clearly" not defamatory, that it is protected opinion, and that there is a "nuanced difference" between voting no on one's own bill in its entirety and voting as to how the bill moves forward. (Opp., 27-28). Wrong. There is a vast difference between voting against a bill in its entirety and voting upon how that bill moves forward. Stating a senator definitively voted no on his own bill is not an opinion – it is a falsehood – and Appellees admit it. (Opp., 30)("The challenged News Article … incorrectly characterized his negative vote as a vote against the Bill.").

The article plainly indicated to readers that the author was in possession of objectively verifiable facts – not a subjective view. *Mills-Williams v. Mapp,* 67 V.I. 574, 588 (2017) *citing Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993)("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

The Superior Court acknowledged that "the story did not attribute a source to its factual representation, that Daily News did not contact Donastorg to verify the accuracy of the article, [and] that the article's author did not

reveal his source." (**JA143**)(footnotes omitted). The Superior Court then stated, "a reporter's failure to verify facts does not rise to the level of actual malice … and 'even an extreme departure from professional standards, **without more,** will not support a finding of actual malice.'" (**JA143**)(emphasis added)(citing reference omitted).

However, in this case there was more, much more, and the Supreme Court has upheld a finding of actual malice when:

> [I]t was "likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges. Although a failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."

McFarlane v. Sheridan Square Press, Inc., 91 Fl.3d 1501, 1509-10 (D.C. Cir. 1996) *citing Harte-Hanks Comms., Inc. v. Connaughton,* 491 U.S. 657, 692 (1989). Moreover, "[t]he bald assertion by the publisher that he believes in the truth of the statement may not be sufficient." *Dairy Stores,* 104 N.J. at 150 *citing St. Amant v. Thompson,* 390 U.S. 727, 732 (1968).

There is **more** here**.** As specifically discussed *supra,* Appellees concede that they acted with bad intentions towards Donastorg. The Daily News authored the article with the word "ironically" to highlight "a situation that might be of particular interest to readers" (**JA948**) and the word

"ironically" demonstrated that the author knew that Donastorg voting no on his own bill was the exact opposite of what a reasonable and ordinary person would expect (**JA948-49; JA3007-08**). The story was from an *unattributable* source. (**JA1625-26**). Yet, Appellees did *not* verify the information with Donastorg despite this being something that should happen. (**JA1100**)("Q. If you were going to report that a senator voted against his own bill, ironically, would you expect that reporter to contact the senator … to make sure that that was accurate?" … A. I would hope that he would."). The vote was a matter of public record, but the Daily News did not verify the story. (**JA1097; JA3007-08**).

The article's author **(JA1441-45; JA1592; JA3087-88)**, and other reporters (**JA1445-46; JA1582-83; JA2773**), admitted that they would receive bonuses for writing negative stories about Donastorg. Penny Feuerzeig quit because of articles written about Donastorg. (**JA2569; JA932-33; JA2987**). Some reporters quit because of how the Daily News was editorializing stories about Prosser enemies (**JA2708-09**) which was well-known to include Donastorg (**JA1643-50**). The Daily News had a list of people that were disfavored and an insignificant story would become "huge" based upon that person being disfavored. (**JA2710**). In contrast, if a negative

article was written regarding one of Prosser's friends, then reporters were reprimanded and told to quit. **(JA2708-09**).

In the aggregate, this evidence provides a clear and convincing genuine dispute of material fact that Appellees defamed Donastorg with actual malice. In contrast to the cases discussed in section II, the reporter was on notice that the story was not likely true given the unbelievable nature of the allegation that a senator would vote no against his own bill, no investigation was performed beyond a single unattributed source, and the reporter was incentivized to disregard the truth.

Appellees justify the defamation by claiming that they published a retraction. A retraction does not absolve a defendant of liability for defamation. *See Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 966 (Colo. App. 2009)("We agree with the reasoning of other courts that a retraction cannot entirely erase the injury sustained by a plaintiff," but a retraction may mitigate damages); *cf. Francis v. Lake Charles Am. Press*, 265 So.2d 206, 219 (La. 1972); *Sweaney v. United Loan & Finance Co.*, 468 P.2d 124, 129 (Kan. 1970); *Di Giorgio Corp. v. Valley Labor Citizen*, 67 Cal.Rptr. 82, 86 (Cal.App. 1968); *O'Leary v Hearst Magazines*, 4 N.Y.S.2d 79, 82 (Sup Ct.

1937). Appellees retraction has no bearing upon their liability– only the mitigation of damages.

VI. Appellees forfeited their defense to the 1998 editorial.

Appellees have forfeited their statute of limitations defense to the 1998 editorial entitled "The Public's Right Know" by failing to assert it for over 12 years into the litigation. It is well-established that the statute of limitations is an affirmative defense which is waived if untimely asserted. *See Rennie v. Hess Oil V.I. Corp.,* 62 V.I. 529, 536 (V.I. 2015) (citing references omitted). While Appellees asserted a statute of limitations defense in their answer (**JA242**), they failed to claim that Appellants' defamation claim was specifically barred with respect to the editorial until July 30, 2014 – over 12 years after Appellants initiated their action. (**JA314**). In doing so, Appellees forfeited their statute of limitations defense.

The Superior Court recently held that a defendant forfeited a defense by delaying 15 years before raising the issue despite asserting it in their answer to the complaint. *Gittins v. Bishop,* 2022 VI SUPER 100, ¶ 25. In *Gittens,* plaintiff initiated a medical malpractice action under the Virgin Islands Medical Malpractice Act ("MMA") in 2005. Complaint, *Gittens v. Bishop,* SX-2005-CV-566. In their answer, defendants asserted that the court

lacked subject matter jurisdiction. Answer, ¶ 2, *Gittens v. Bishop,* SX-2006-CV-566. In 2007, the court ordered plaintiff to show compliance with the MMA jurisdictional requirements by proving transmission of the complaint to the MMA Committee. *Gittens,* 2022 VI SUPER 100, ¶ 3. Plaintiff provided proof sent via U.S.P.S. instead of certified mail in violation of the claims-processing portion of the MMA. *Id.* Fifteen years later, defendants filed motions seeking dismissal for plaintiff's failure to comply. *Id.* at ¶¶ 1, 4. The court denied defendants' motions and held that defendants forfeited their right to seek dismissal by failing to raise the issue for 15 years despite asserting the defense in their answer. *Id.* at 25.

The same is true here. Appellees waited over 12 years to assert the affirmative defense of statute of limitations against Appellants' claim of defamation based upon the 1998 editorial. Appellees were aware that the editorial was at issue given they deposed Donastorg regarding the editorial *in its entirety* (**JA1718-1726**), and questioned Benedicta Donastorg (**JA1899**) and Eunice Bedminster (**JA2725**) about it. Additionally, Appellants deposed at least four Daily News employees regarding the article. (**JA464; JA576-577; JA816; JA2113; JA2166-JA2170**).

Despite repeated notice that the editorial formed a basis of the defamation claim, Appellees failed to assert that the editorial was barred by the statute of limitations until 12 years into the litigation thereby forfeiting the defense.

Even if the Court does not find Appellees forfeited their statute of limitations defense, Appellees conspired to defame Senator Donastorg thereby tolling when Appellees defamation claim began to run. A *Banks* analysis is required to determine whether conspiracy to defame is the soundest rule for the V.I. *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014); *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (2011).

Virgin Islands courts have recognized conspiracy to defame. *See Maclaskey v. Mecartney,* 58 N.E.2d 630, 632-634, 636-38 (Ill.App. 1 Dist. 1945)(reversing trial court's grant of a directed verdict for defendants in a conspiracy to libel case recognizing that statute of limitations did not commence to run until commission of the last overt act done in pursuance of the conspiracy); *Espinosa v. Redfield*, 69 V.I. 349, 360 (V.I. Super. 2018). Most other jurisdictions have recognized conspiracy to defame. *See Hoover v. Tuttle*, 611 So.2d 290, 293 (Ala. 1992)(recognizing conspiracy to defame); *cf. Perry v. Apache Junction Elementary School Dist. No. 43 Bd. of Trustees*,

514 P.2d 514, 517 (Ariz.App. 1973); *Ottinger v. Ferrell*, 287 S.W. 391, 392 (Ark. 1926); *Schessler v. Keck*, 271 P.2d 588, 591–592 (Cal.App. 2 Dist. 1954); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287, 1289-1290 (Colo. 1972)(en banc); *Kaufman v. Synnott*, 2021 WL 4295356, at *8 (Conn.Super., Aug. 27, 2021); *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 460–461 (Fla.App. 5 Dist. 1999); *Safety-Kleen Corp. v. Smith*, 417 S.E.2d 171, 172-173 (Ga.App. 1992); *Blubaugh v. American Contract Bridge League*, 2002 WL 31040339, at *8 n. 10 (S.D.Ind. July 31, 2002); *Cimijotti v. Paulsen*, 230 F.Supp. 39, 40–43 (D.Iowa 1964); *Ardoyno v. Ungar*, 352 So.2d 320, 321 (La.App. 1977); *Cohen v. Bowdoin*, 288 A.2d 106, 108-109, 112 (Me. 1972); *Patriot Group, LLC v. Edmands*, 136 N.E.3d 386, 396, (Mass.App.Ct. 2019); *Duma v. Carson City Hosp.*, 2016 WL 299775, at *6–7 (Mich.App. Jan. 21, 2016); *Jakula v. Starkey*, 200 N.W. 811, 812 (Minn. 1924); *Flowers v. Carville*, 292 F.Supp.2d 1225, 1234 (D.Nev. 2003); *D'Agostino v. Johnson & Johnson, Inc.*, 542 A.2d 44, 52 (N.J.Super.A.D. 1988); *Greer v. Skyway Broadcasting Co.*, 124 S.E.2d 98, 104-105 (N.C. 1962); *Cooke v. United Dairy Farmers, Inc.*, 2003 WL 21389646, at *4 (Ohio App. 10 Dist. June 17, 2003); *Auld v. Mobay Chemical Co.*, 300 F.Supp. 138, 139-141 (W.D.Pa. 1969); *Swafford v. Memphis Individual Practice Ass'n*,

1998 WL 281935, at *2, 12-13 (Tenn.App. June 2, 1998); *Dickson v. Afiya Center*, 636 S.W.3d 247, 255, 264 (Tex.App. 2021); *Massey Energy Co. v. United Mine Workers of America, AFL-CIO, CLC*, 2006 WL 2578631, at *1 (Va.Cir.Ct. Aug. 4, 2006); and *Evers v. Hager*, 1994 WL 479769, at *1 (Wis.App.,1994).

This Court should follow the majority and recognize conspiracy to defame as a cause of action as the soundest rule for the Virgin Islands. Appellants adopt by reference the *Banks* analysis conducted by the Superior Court in *Isaac v. Crichlow*, 63 V.I. 38, 64–65 (V.I.Super. 2015) and adopt the rule for civil conspiracies set forth in the RESTATEMENT (SECOND) OF TORTS § 876(a) as the soundest rule and the common law of this jurisdiction, such that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he does a tortious act in concert with the other or pursuant to a common design with him." *See* RESTATEMENT (SECOND) OR TORTS § 876(a).

As to accrual of civil conspiracy to defame claims, this Court should adopt as the soundest rule, the line of authority contained within the majority of jurisdictions which have recognized conspiracy to defame claims that finds that where all of the allegedly defamatory acts were committed pursuant to a

conspiracy by defendants to defame, then the statute of limitations should "not commence to run against any of the alleged libelous acts until commission of the last overt act done in pursuance of the conspiracy." *Schessler*, 271 P.2d at 592 (internal quotation omitted). *Accord Tuscumbia City School System v. Pharmacia Corp.*, 871 F.Supp.2d 1241, 1298 n. 4 (N.D.Ala. 2012)("With respect to the claim of conspiracy, although there are no Alabama cases on point, it appears generally settled that the statute of limitations on a conspiracy claim does not begin to run until the last overt act pursuant to the conspiracy has been committed.")(*citing Wyatt v. Union Mortgage Co.*, 598 P.2d 45 (Cal. 1979)(en banc)); *Ito v. Tokio Marine and Fire Ins. Co., Ltd.*, 2008 WL 2415452, at *1 (9th Cir. June 16, 2008); *Swafford*, 1998 WL 281935, at *12; and *White v. Bloom*, 621 F.2d 276, 280–281 (8th Cir. 1980).

Appellees cursorily claim that there was no proof that Donastorg was defamed by the article. Yet, Donastorg specifically testified that he received "a lot" of phone calls in his office from constituents that had supported him stating "[h]ow could you vote against your own initiative?" **(JA1617**). These constituents were "truly disappointed" that Donastorg had allegedly voted against his own bill. (**JA1628**). There is no evidence to dispute this testimony.

There is a genuine dispute of material facts that Donastorg was defamed by the article.

VII. There is a genuine dispute of fact regarding Redfield's statements on the Sam Topp Radio Show.

Appellees concede that Redfield's statements on the Sam Topp show were defamatory (Opp., 32)("Regardless of what Redfield said to Sam Topp…"), but contest that the defamatory statements made by Redfield are attributable to The Daily News. (Opp., 32-33).

Appellees claim that Appellants "intended to mislead the Court into concluding that Redfield was referring to The Daily News" by stating in the Opening Brief that: "[a]s V.P. of Corporate Affairs, Redfield dealt with 'media issues' and was 'working for, you know, the different entities under that umbrella.' (**JA1224**)." (Opp., 24). Redfield testified:

> Q. And so your title, when you went to ICC, was vice president of corporate affairs, is that correct?
> A. That's correct.
> Q. What were your job responsibilities as vice president of corporate affairs?
> A. Well, they were more detailed. It was basically, you know, **working for, you know, the different entities under that umbrella**. I mean, just basically **media issues**, whether it was the wireless, or whether it was Cable T.V., or that type of thing.

(**JA1224**)(emphasis added). Appellees claim this testimony is limited to ICC's telephone and cable television subsidiaries. (Opp., 33). However, it is

undisputed that ICC was the parent company of the Daily News. Redfield testified that ICC was a "holding company," that "owned all the other companies," and that ICC "oversaw all the other different companies," and his "major responsibilities were dealing with issues that related to these companies." (**JA1247**). Furthermore, Redfield admitted he acted as "an in-between at times," between the holding company, and the – and the different subsidiaries." (**JA1226**). His job covered "service-related issues with the different companies." (**JA1237-38**).

Further, in 2002, Redfield issued a press release on *behalf* of and as agent of the Daily News on ICC letterhead regarding this lawsuit and *denied* the allegations against the Daily News. (**JA1327-28; JA1330**)(The press release stated "[t]he allegations in the complaint are not only denied, but I am sure that these allegations will not hinder the Daily News from reporting about Senator Donastorg or any other public official as it sees fit."). Regarding the press release, Redfield testified:

> Q. Why are you, a spokesman for ICC, making a press release on behalf of the Daily News?
> …
> A. Well, in this particular case, it looks to me like it had to do with an issue of constitutionality, and, again, the newspaper having the right to print the information on anybody.

> Q. That's not the answer to my question. Why were you, as vice president, corporate vice president of ICC, making a press release on behalf of the Daily News?
> …
> Q. Sir, isn't this a press release about how the Daily New's [sic] freedom of press is being harmed?
> A. Well, I was speaking on behalf of Innovative, not the Daily News.
> Q. Really? What does Innovative have to do with the Daily New's [sic] freedom of press?
> A. Well, it's one of our – one of our subsidiaries, I guess, and it was a sensitive issue. And possibly I couldn't understand why there was a question with reference to they have the right to print information about anybody.
> Q. "Redfield further said, '**We** suspect that all **other** news media in the Virgin Islands, print or electronic, finds this assault on the press to be offensive, particularly when filed by an elected leader who is duly sworn to uphold the Constitution of the United States.'" Did you speak to any other news or media people to find out?
> A. No, I would assume they would. That's all.
> Q. **Well, who's "we," when you say "we" suspect?**
> …
> A. Well, we, I'm assuming the company.
> Q. What company.
> A. **Innovative.**

(**JA1329-1330**)(emphasis added).

Redfield's self-serving statements that he was speaking on behalf of ICC and every other subsidiary of ICC *with the lone exception of* the Daily News are belied by the fact that the press release provides "[w]e suspect **other** news media." (**JA1329-30**). It is axiomatic that one would not reference "other news media" if one were not speaking on behalf of a news media

outlet—the Daily News. The press release was issued on the letterhead of the parent company, by the parent company's Vice President, denying the allegations in the lawsuit against the news media outlet owned by the parent company. Additionally, in response to the question "[w]hat are you doing denying the allegations made by the Daily News?" Redfield responded "[w]ell, because I don't know how it would be slandering him if, in fact, this information supposedly was in a court record that he did." (**JA133**).

Appellees highlight that the words "Daily News" are absent from 7 pages of Redfield's 237-page deposition and absent from the Radio Show to somehow demonstrate that Redfield was not an agent of the Daily News. (Opp., 33). This evidence is unpersuasive and insufficient to overcome a genuine issue of fact when compared to Redfield's own statements and the press release issued on behalf of the Daily News.

So, no, Appellants were not misleading the Court. At all material times, Redfield was acting as an agent of the Daily News when he made defamatory statements on the Radio Show, because just as with his press release in 2002, Redfield made statements as an agent of ICC and *all* of its subsidiaries – not just the wireless and cable television subsidiaries as Appellees conveniently claim. This is a genuine dispute of fact.

VIII. False Light is the soundest rule for the V.I. consistent with V.I. precedent and most other jurisdictions.

In support of the Superior Court's determination that no Virgin Islands court has recognized false light as a cause of action, Appellees attempt to diminish three of the four cases Appellants cite which clearly demonstrate Virgin Islands courts do recognize the claim.[4] (Brief, pp. 27-37).

Appellees claim the *Martinez* court neither discusses false light nor relies upon the Restatement of Torts. (Opp., 35-36). However, Appellees rely upon the wrong opinion issued January 14, 2015 (Opp., 35) – not the June 11, 2014 opinion (Brief, 32). *Martinez* recognized false light as a tort in the V.I. based upon the Second Restatement of Torts. *Martinez del Valle v. Officemax North America, Inc.,* Civil No. 2013-24 (D.V.I. Jun. 11, 2014)(Docket Entry slip op. at p. 5 n. 7 Dkt. #464).

Appellees highlight that in *Francis v. Pueblo Xtra Int'l, Inc.,* the Third Circuit upheld the District Court's holding recognizing false light as a tort but finding that the plaintiff failed to provide sufficient evidence to sustain a claim. 412 F. App'x 470 (3d Cir. 2010). Then, Appellees claim that *Anderson v. Gov't of the V.I.,* 199 F.Supp.2d 269, 276 (D.V.I. 2002) only discusses false

[4] *See Donastorg,* 63 V.I. at 320; (**JA196**).

light "in passing" and is not "central to its holding." (Opp., 36). Regardless of the depth, *Francis* and *Anderson* both acknowledge false light as a cause of action. Finally, Appellees wholly fail to discuss *Friendly Grocery and Gas Station, LLC v. Pan Caribbean Broad. De P.R., Inc.,* 2013 WL 12460440, at *2 n. 55 (V.I. Super. May 24, 2013), which also acknowledges false light as a cause of action.

The Superior Court was incorrect and Virgin Islands courts have recognized false light as a cause of action. Appellees do not dispute any other aspect of Appellants' false light argument with any legal authority and concede that there were genuine disputes of material fact if this Court correctly determines that the Virgin Islands recognizes false light as a cause of action.

IX. There is a genuine dispute of material facts regarding Appellants' intrusion into seclusion claim.

Appellees concede Appellants legal authority regarding intrusion into seclusion. (Opp., 38). Appellees argue that because 23 V.I.C. § 1301(f)(2) is "silent" on the issue of whether confidential information (*e.g.,* social security numbers ("SSN"), banking information, medical information, and birth dates) can be obtained by a private investigator, Donastorg does not have a claim for

intrusion into seclusion.[5] Wrong. Appellants take issue with how the investigation was conducted as well as the fact that the highly confidential information was transmitted to Appellees.

First, the person that conducted the investigation into Donastorg, Julie Erickson, is not now and has never been licensed as a private investigator. (**JA2199-200**). Erickson should have been under the direct supervision of the President of the investigation agency, i.e. David Sheraw, which this Court has acknowledged is important to protect the public from unqualified investigators. *See* 23 V.I.C. § 1310; *see Benjamin v. Branch,* Civil No. 22-1980, 1980 WL 626254, *1 (V.I. July 18, 1980) ("The purpose served by the licensing of detective agencies … is to ensure that these firms are owned and operated by honest and reliable individuals. The quasi-police nature of the functions of such business organizations mandates protection of the public from unqualified operators."). There is no evidence to indicate that Erickson was properly supervised. (**JA2665**)("Q. How do you know that, sir? Every time I asked you [Sheraw] questions about the investigation, you said you weren't involved and you didn't know. How do you know this? A. Because I would have been involved in the surveillance.").

[5] It is undisputed this information is highly confidential and privileged.

Second, the method of investigation was improper. The investigative agency was tasked to "[d]ig up anything and everything that's out there." (**JA2609**). As previously discussed, 23 V.I.C. § 1301(f)(2) does not authorize a private investigator to obtain confidential and privileged information. Yet, Erickson admits to obtaining Donastorg's SSN, tax identification number for his business, and running bank account searches using this information, but conveniently has no recollection as to how she obtained this information. (**JA2226-27; JA2238**). Sheraw admits that agency had previously conducted background checks for Prosser for potential ICC employees using SSNs, but the SSNs were provided by Prosser. (**JA2594-95**). It therefore begs the question: how did Erickson obtain the SSNs of Donastorg, Donastorg's family and his associates.

Erickson also admits to conducting "pretext" calling to obtain information about Donastorg from universities (**JA2243**) and hospitals (**JA2228**). The investigation extended to "anyone that was associated with [Donastorg]." (**JA2221**). Sheraw obtained a copy of Donastorg's telephone service application but conveniently does not recall how it was obtained – the same service provided by Prosser's subsidiary. (**JA2641**). The investigation also included pretext calling to country clubs in Connecticut regarding his

associates (**JA2615**) and compiling SSNs for anyone associated with him (**JA2241; JA2614**).

Sheraw gave Prosser all the credit reports compiled during the investigation. (**JA2664**); (**JA2602**)("Q. Did you give anything in writing? A. Yes. … Our investigative report."); (**JA2607**)(providing "[t]he credit report herein enclosed was obtained confidentially" and "[t]his credit information is for your information only and cannot be released or disseminated.").

The New Hampshire Supreme Court has explicitly held that a plaintiff has a cause of action for intrusion into seclusion against a private investigator who sells a party's SSN to a client. *Resmburg v. Docusearch Inc,* 816 A.2d 1001 (N.H. 2002)("A person's SSN has attained the status of a quasi-universal identification number. At the same time, however, a person's privacy interest in his or her SSN is recognized by state and federal statutes, including RSA 260:14, IV-a (Supp. 2002) which prohibits the release of SSNs contained within drivers' license records. See also Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801-6809 (2000); Privacy Act of 1974, 5 U.S.C. § 552 (2000). … *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993)") (citing reference omitted). Sheraw and his employees were acting with actual authority at the direction of Prosser and the Daily News in obtaining the SSNs

and other confidential information and, therefore, The Dailly News is liable for invasion into Donastorg's privacy.[6]

Appellees claim that The Daily News never had access to the investigation, or the material based upon the testimony of J. Lowe Davis, but it is impossible for Davis to know whether The Daily News published any material from the investigation because of ICC's control of certain content. The Daily News was not allowed to edit editorials or refuse to publish editorials sent to it by ICC. (**JA848**). "Letters-to-the-editor" content was an ICC function. (**JA848**). ICC was responsible for the editorial content, and The Daily News published the content. (**JA983**). Therefore, Davis' self-serving testimony is irrelevant.

There is a genuine disputes of material facts regarding Plaintiffs' intrusion into seclusion claim sufficient to overcome a motion for summary judgment.

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[6] "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principle, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Rodriguez v. Jarrett,* Small Claims No. ST.-12-SM-177, 2012 WL 12518128, *2 (V.I. Super. Jun. 14, 2012)(*citing* RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006)).

X. The Daily News is liable for the actions of ICC and VITELCO.

As discussed *supra* in section I, Appellees argument is waived. Assuming *arguendo* it is not waived, Appellees claim that there is no concerted action between Prosser, ICC, and The Daily News and that Appellees inconsistent positions are merely argued in the alternative. (Opp., 42-43).

As previously discussed in the Opening Brief, Prosser owned and controlled ICC as CEO and Chairman, and Prosser, through ICC, owned and controlled The Daily News and its content. (**JA896**). As discussed *supra* in section V, the content of The Daily News was dictated by Prosser and bonuses were given to Daily News writers based upon whether the subject was a Prosser friend or enemy. As discuss *supra* in § IX, The Daily News was not allowed to edit or refuse to publish content sent to it by ICC. Prosser was pulling the strings of The Daily News through ICC and, therefore, The Daily News, ICC and Prosser are all one in the same.

XI. There is a genuine dispute of material fact regarding Appellants' NIED and IIED claims.

As discussed *supra* in section I, Appellees argument is waived. Assuming *arguendo* it is not waived, Appellees concede Appellants' legal authority. (Opp., 43-44). Appellees cursorily contend that they are not liable

because Appellants failed to demonstrate that "Sheraw's activities or findings are outside of the statutory parameters of an investigation by a licensed private investigator" or that the "Daily News had any involvement in the Prosser investigation or the Donastorg investigative report." (Opp., 44). As discussed *supra* in section IX, the investigation into Donastorg does subject the Daily News to liability. Also, as discussed *supra* in sections IX and X, The Daily News was involved in the investigation into Donastorg via Prosser and ICC.

XII. There is a genuine dispute of material facts regarding Appellants' Tortious Interference with Business claim.

As discuss *supra* in section I, Appellees have waived their argument. Assuming *arguendo* it is not waived, Appellees concede Appellant's legal authority. (Opp., 44-45). As discussed *supra* in section IX, the investigation into Donastorg does subject the Daily News to liability. As discussed *supra* Prosser, ICC, and its subsidiaries are all one in the same.

Donastorg testified in his deposition that he had an ongoing business relationship with MD McCaley from which he obviously derived a benefit. (**JA1552-53**). Appellees agent, the private investigator, contacted MD McCaley and made derogatory comments to MD McCaley as part of their investigation to obtain additional information regarding Donastorg.

(**JA1553**). This was done for the improper purpose of intending to injure Donastrog as conceded by Appellees in their brief. *See supra* § III. As a result of Appellees' private investigator making those comments to MC McCaley, a representative from MD McCaley told Donastorg that MD McCaley was "not going to continue doing business with [Donastorg]." (**JA1553**). Accordingly, there are genuine disputes of fact regarding Appellants' claim for tortious interference with existing or prospective business relationships.

The Superior Court's Order should be reversed in all respects.

RESPECTFULLY SUBMITTED
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DATED: February 28, 2023

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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: February 28, 2023

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that **APPELLANTS' REPLY BRIEF** complies with Virgin Islands Rule of Appellate Procedure 22(f) and contains 6,799 words towards the 3,900-word limit. A motion to exceed the word limit was filed simultaneous with this brief to avoid delay.

DATED: February 28, 2023

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on February 28, 2023, 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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