

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VIRGIN ISLANDS TAXI ASSOCIATION,

Plaintiff,

vs.

CASE NO. ST-97-CV-117

**VIRGIN ISLANDS PORT AUTHORITY,
FREDDY LETTSOME, EAST END
TAXI SERVICES, INC., THE RITZ-CARLTON
VIRGIN ISLANDS, INC., and CANEEL BAY
RESORT,**

Defendants,

**THE ST. THOMAS-ST. JOHN HOTEL
ASSOCIATION, INC.,**

Intervenor.

MEMORANDUM OPINION

Before the Court is Defendants' July 15, 2015, Motion to Dismiss.¹ For the following reasons, Defendants' Motion will be granted.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Plaintiff commenced this action on February 12, 1997, claiming that, in violation of Plaintiff's exclusive franchise agreement with the VI Port Authority, VIPA permitted non-VI Taxi Association operators to pick up passengers without pre-paid vouchers and the other Defendants solicited or contracted with independent drivers to pick up passengers directly from the airport.²

¹ VITA responded on August 17, 2015, and Defendants replied on August 31, 2015.

² On December 29, 1986, the Virgin Islands Legislature enacted Act No. 5231 (the "Act"), which granted Plaintiff, with limited exceptions for pre-paid transportation with tour operators, the "exclusive right to provide public taxicab services from the terminal facility" at Cyril E. King Airport on St. Thomas (the "Airport") for a period of ten years, with potential renewal by the franchisee for a subsequent ten year term. Under the Act, if "the franchisee remains in

Through a March 10, 1997, Order, the then Territorial Court issued a preliminary injunction, and on September 22, 1997, the Appellate Division of the District Court affirmed. On May 9, 2004, VITA filed a motion for sanctions, and on June 13, 2006, the Superior Court found all Defendants in contempt and issued sanctions.

Defendants appealed, and on February 6, 2008, the Appellate Division reversed the Superior Court's decision and determined that "VITA failed to show noncompliance with the preliminary injunction" and failed to present any evidence to "reveal even one instance where a particular passenger was transported in violation of the March 10, 1997 preliminary injunction or the August 3, 2005 order."³ The case was remanded to the Superior Court to determine whether VITA properly renewed the exclusive franchise, but VITA appealed to the Third Circuit. On January 12, 2011, the Third Circuit determined that, although the Appellate Division's exercise of jurisdiction over the interlocutory appeal was proper and fines imposed clearly met the definition of criminal contempt sanctions, the Third Circuit did not have jurisdiction over the appeal because the Appellate Division did not issue a final order.⁴

Plaintiff filed a motion for partial summary judgment on September 11, 2012, and amended it on September 17, 2012, stating that "[VITA] is entitled to judgment as a matter of law on the issue of its renewal of its exclusive taxi franchise."⁵ Defendants objected in a November 5, 2012, opposition, claiming that there was no evidence of a valid renewal by VITA. On August 1, 2013,

possession of the premises after the expiration of [the] franchise... it shall be deemed to be occupying the premises as a tenant month to month".

³ *E. End Taxi Services, Inc. v. V.I. Taxi Ass'n, Inc.*, 49 V.I. 658, 684 (D.V.I. App. Div. 2008).

⁴ *E. End Taxi Servs., Inc. v. V.I. Taxi Ass'n, Inc.*, 411 F. App'x 495, 499 (3d Cir. 2011) ("Because the order of the Appellate Division was not a final order, we have no appellate jurisdiction over the VITA's appeal. Accordingly, we will dismiss the VITA's appeal. However...we do have jurisdiction to review the limited question of the Appellate Division's determination of its own jurisdiction...[and] [i]t is also clear that the Appellate Division had jurisdiction to hear the defendants' interlocutory appeals because criminal contempt sanctions are considered final and appealable in pending actions by parties and non-parties.").

⁵ Pl.'s Sept. 11, 2012, Mot. for Partial Summary Judgment, p. 20.

this Court ruled in favor of VITA and found appropriate renewal of the franchise agreement under Act No. 5231 for an additional ten years.

Defendants sought reconsideration of the Court's August 1, 2013, Order,⁶ arguing that the Court failed to address Defendants' argument that Plaintiff's acceptance of the airport taxi contract with Defendant Virgin Islands Port Authority "was statutorily insufficient to initiate the [franchise]" under Act No. 5231 by the statutory deadline, making it impossible for VITA to have validly renewed the franchise.⁷ On September 24, 2013, VITA replied with a motion for sanctions against East End Taxi Association, claiming that the motivation of East End's motion was for the improper purpose of delay. On August 7, 2014, the Court denied Defendants' request, finding that the motion for reconsideration was untimely, that the Defendants did not establish the existence of clear error or manifest injustice, and that the request was not supported by new evidence or law.

On October 6, 2014, a hearing was held on Plaintiff's pending motions for sanctions against East End Taxi Services, Inc., Attorney Charles Engeman and Attorney Engeman's client, CBI Acquisitions. At the conclusion of the hearing, the Court took the motions for sanctions under advisement and ordered the parties to submit written briefs by November 14, 2014.⁸ Defendant Plantation Bay, Inc., f/k/a Caneel Bay Resorts' filed a brief on behalf of Defendants on November 14, 2014,⁹ but Plaintiff did not respond by the Court's deadline. Instead, on November 20, 2014, Plaintiff filed a motion for extension of time to respond, which Defendants opposed on December 3, 2014. Plaintiff's failed to file a timely response. On June 15, 2015, the Court denied Plaintiff's

⁶ The Aug. 1, 2013, Opinion and Order were issued by the Hon. James S. Carroll, III.

⁷ Defs. East End Taxi Services, Inc., and Freddy Lettsome's Aug. 16, 2013, Mot. for Reconsideration of the Court's Order Granting Plaintiff Partial Summary Judgment Regarding Franchise Renewal, p. 6.

⁸ The order was reduced to writing in an October 31, 2014, Order.

⁹ Defendants Freddy Lettsome and East End Taxi Services, Inc., filed a notice of joinder on November 14, 2014. On the same date Defendant Ritz-Carlton filed a notice of joinder with supplemental notes. On November 17, 2014, Intervenor, the St. Thomas-St. John Hotel Association, Inc., also filed a notice of joinder.

motions for sanctions, indicated its unwillingness to dismiss the action without a properly filed motion to dismiss and briefing by both parties, and ordered Defendants to file any motion to dismiss by July 1, 2015.¹⁰

ANALYSIS

Defendants assert that the action must be dismissed because VITA may not re-litigate the issue of civil or criminal contempt sanctions for the relevant period, March 10, 1997, to March 1, 2006. Alternatively, Defendants argue the case should be dismissed because of Plaintiff's failure to prosecute and because laches bars VITA from seeking "monetary sanctions stemming from violations of the preliminary injunction that have not yet been alleged by VITA."¹¹ Defendants acknowledge that "the only period of time in which VITA is not foreclosed by the law of the case from seeking damages is the period June 14, 2006, to April 30, 2007"¹², yet maintain that the doctrine of laches precludes any attempt to now litigate any claim for damages from that period. Defendants also contend that nothing in Act No. 5231 gives VITA a private right of action for damages for an alleged violation of its exclusive franchise by VIPA. Further, Defendants posit that, since VITA claimed that damages were incalculable, thus necessitating a preliminary injunction, judicial estoppel precludes VITA's current claims for compensatory damages.¹³ Plaintiff responds that VITA is entitled to a permanent injunction, discovery on the issue of successor in interest and contempt damages for violations of the injunction both before and after this Court's contempt rulings through present, and a hearing to determine the proper

¹⁰ Defendants timely filed for an extension of time, which was granted by the Court on July 17, 2016.

¹¹ Defs.' Aug. 31, 2015, Joint Reply, p. 23.

¹² Defs.' July 15, 2015, Mot. to Dismiss, p. 12.

¹³ *Id.* at 13.

amount of contempt damages. Plaintiff maintains that Defendants have been continuously violating the injunction since this Court conducted the contempt hearings.

I. Permanent Injunction

The Court clearly indicated in its June 15, 2015, opinion that any relief requested would be limited to events related to the franchise agreement and renewal under Act No. 5231, as well as the amended preliminary injunction from May 27, 1997.¹⁴ Defendants assert that there is no longer any basis for a finding of a violation of Act No. 5231 that would justify the issuance of a permanent injunction. The allegedly wrongful behavior is not recurring because Act No. 5231, upon which VITA's Complaint is based, expired in 2007 and VITA no longer possesses an exclusive franchise based on Act No. 5231. VITA's continued occupation of the airport premises after the expiration of Act No. 5231 has only been as a month to month tenant.¹⁵

Plaintiff contends that the Court has resolved every merits-related defense to entry of a permanent injunction against Defendants, claiming the last remaining hurdle is disposing of Defendants' claim that the injunction is "moot" because the exclusive franchise is now granted by Act No. 7452 rather than through the automatic renewal provisions of Act No. 5231. Further, Plaintiff claims that, since the provisions of Act No. 7452 are substantively the same as those of Act No. 5231, the Court should reject this argument as a matter of law, grant a permanent injunction, and permit discovery on the issue of damages from contempt sanctions. Plaintiff urges

¹⁴ Defendant Ritz-Carlton also emphasized that the preliminary injunction should be dissolved because the Plaintiff no longer has any conceivable legal basis for seeking a permanent injunction because the Act which formed the basis of the injunction expired on its terms in 2007. Def. Ritz-Carlton's Nov. 14, 2014, Joinder in Plantation Bay's Brief in Response to Order of Oct. 31, 2014.

¹⁵ "Indeed, if the franchise had expired pursuant to Act 5231(f), then VITA would no longer have the exclusive right to transport passengers from the airport, even if it continued to occupy the space reserved for it at the airport and consequently was obligated to pay VIPA for such use pursuant to Act 5231(m)." *E. End Taxi Services, Inc.*, 49 V.I. at 682.

the Court to employ the preliminary injunction “sliding scale” analysis adopted by the Supreme Court of the Virgin Islands in *3RC & Co. v. Boynes Trucking Sys.*¹⁶ for evaluating whether to grant a permanent injunction.

While the Supreme Court has stated that the analysis required for a preliminary injunction is distinct from that for a permanent injunction,¹⁷ the Supreme Court has not taken a position regarding whether the “sliding scale” analysis adopted in *3RC & Co. v. Boynes Trucking Sys.* applies to a permanent injunction. Although the Supreme Court has awarded injunctive relief¹⁸ and has reviewed cases on appeal regarding the Superior Court’s issuance of permanent injunctions,¹⁹ the Supreme Court has not conducted a *Banks* analysis, the framework for determining the appropriate rule of law in this jurisdiction.²⁰ *Banks* requires the Court to engage in a three-factor analysis: first, determine which common law rule Virgin Islands courts have applied in the past; second, identify the rule adopted by a majority of courts of other jurisdictions; and third, most importantly, decide which common law rule is soundest for the Virgin Islands.²¹ As a result, the Court will perform a *Banks* analysis to determine the appropriate standard for a permanent injunction for this jurisdiction.

¹⁶ S. Ct. Civ. No. 2015-0016, ___ V.I. ___, 2015 V.I. Supreme LEXIS 22, at *5 (V.I. July 23, 2015).

¹⁷ See *Tip Top Constr. Corp. v. Gov’t of the V.I.*, S. Ct. Civ. No. 2014-0006, 2014 V.I. Supreme LEXIS 15, at *3 n.1 (V.I. Feb. 14, 2014) (unpublished) (recognizing the analysis for a preliminary injunction and a stay pending appeal is the same and distinct from that for a permanent injunction).

¹⁸ *In re V.I. Bar Ass’n Comm. on the Unauthorized Practice of Law*, 59 V.I. 701, 739 n.26 (V.I. 2013) (awarding a permanent injunction against the unauthorized practice of law).

¹⁹ See *Caribbean Healthways, Inc. v. James*, 59 V.I. 805, 811-12 (V.I. 2013) (reversing the Superior Court’s issuance of the permanent injunction finding the injunction to be internally inconsistent, and broader than necessary to restrain the impermissible conduct); see e.g., *Hansen v. O’Reilly*, 62 V.I. 494, 508 (V.I. 2015) (finding the Supreme Court is “not bound to follow a permanent injunction of the District Court issued in a second case involving some of the same parties and the same issues.”).

²⁰ “Because courts could no longer derive principles of common law through rote application of the Restatements of the Law as mandated by 1 V.I.C. § 4, the Supreme Court provided a framework for determining the appropriate rule of law. This framework applies to every court called upon to determine a question of Virgin Islands law, including the Supreme Court itself.” *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *5 (V.I. Super. Ct., Dec. 18, 2015).

²¹ *Gov’t of the V.I. v. Connor*, 60 V.I. 597, 605 (V.I. 2014); *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *8.

Prior to the establishment of the *Banks* analysis, Courts in this jurisdiction tended to consider the same four factors as those adopted by the Supreme Court for a preliminary injunction, the exception being that, for a permanent injunction, the Court must consider the merits of the case.²² Nevertheless, the Superior Court has not uniformly applied a standard.²³ For example, in several cases the Court made oral rulings after a hearing, limiting the number of opinions in which the Court listed and analyzed factors for injunctive relief.²⁴ Additionally, permanent injunctions have been issued far less frequently than their preliminary injunction counterpart.

Turning to the second factor, while there is not unanimity among other jurisdictions regarding the factors to be considered, the majority of jurisdictions agree that the most important distinction for a permanent injunction is the Court's ability to determine the merits of the claims.²⁵ Recently, the Supreme Court of the United States addressed the appropriate test to be utilized.

²² "With respect to a permanent injunction, a court must consider whether: '(1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest.'" *Beachside Assocs. v. Bayside Resort, Inc.*, 2011 V.I. LEXIS 68, *20 (V.I. Super. Ct., Nov. 25, 2011) (quoting *Kendall v. Russell*, Civil No. 2007-126, 49 V.I. 602, 618 (D.V.I. 2008)); see *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 2015 V.I. LEXIS 141, *29 (V.I. Super. Ct., Nov. 10, 2015) ("Unlike a permanent injunction, a preliminary injunction functions as a provisional remedy pending the ultimate disposition of a case.").

²³ See e.g., *S & C Corp. v. Hodge*, 1990 V.I. LEXIS 10, *15 (V.I. Terr. Ct. 1990) (not distinguishing between a preliminary or permanent injunction standard, and finding "the Plaintiff must show the existence of irreparable harm and the absence of an adequate [and speedy] remedy at law; the probability of ultimate success on the merits; and that the threat of harm [to the Plaintiff] outweighs the harm [or threat thereof] to the opposing party"; in the case before the Court that the public interest will not be disserved or subverted by the granting of injunctive relief" to receive a preliminary or permanent injunction); *Hodge v. Luis*, 1984 V.I. LEXIS 25, *10-11 (V.I. Terr. Ct. 1984) (after finding a party was likely to suffer irreparable harm and substantial prejudice, while the government would suffer no prejudice, exercising its inherent equitable power, the Court issued a permanent injunction).

²⁴ See e.g., *Marsh-Monsanto v. St. Thomas-St. John Bd. of Elections*, 60 V.I. 41, 47 (V.I. Super. Ct. 2014) (after an evidentiary hearing, the Court announced its decision on the pending motions and the issue of permanent injunctive relief at a subsequent hearing); *Dyer v. Worldwide Protein*, 1985 V.I. LEXIS 19, *2-3 (V.I. Terr. Ct. 1985) (holding a four-day bench trial to determine the merits of the injunction).

²⁵ See e.g., *Md. Comm'n on Human Rels. v. Downey Communs.*, 110 Md. App. 493, 517, 678 A.2d 55, 67 (1996) ("A permanent injunction is, as its name indicates, 'an injunction final or permanent in its nature granted after a determination of the merits of the action.' But a permanent injunction is not 'permanent' in the sense that it must invariably last indefinitely. Rather, it 'is one granted by the judgment which finally disposes of the injunction suit.'" (citations omitted)); *Classroomdirect.com, LLC v. Draphix, LLC*, 992 So. 2d 692, 702 (Ala. 2008) ("In regard to the Motion for Permanent Injunction, the Court considered the elements necessary to issue a permanent injunction, namely, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion....”²⁶

Prior to this holding in *eBay Inc. v. MercExchange, L.L.C.*, none of the circuits applied this particular four-factor test.²⁷ While some state courts utilize an identical or similar four-factor test,²⁸ others do not consider the success on the merits and focus on the risk of harm and right to equitable relief.²⁹

is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve the public interest.”); *Roper v. Jolliffe*, No. 05-14-00500-CV, 2015 Tex. App. LEXIS 10462, at *16 (App. Oct. 9, 2015) (“A permanent injunction is an equitable remedy for some other cause of action and requires a liability finding after a final hearing on the merits.”); *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191 (2d Dist. 2006) (“A permanent injunction is an equitable remedy...where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate.” (citation omitted)); see *Sierra Club v. DOT of Haw.*, No. 29035, 2009 Haw. LEXIS 118, at *12-15 (May 13, 2009) (considering the success on the merits, the possibility of irreparable injury; and the public interest).²⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006). See also *Waters v. Ricketts*, No. 8:14CV356, 2016 U.S. Dist. LEXIS 13515, at *7 (D. Neb. Feb. 4, 2016) (“The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” (citations omitted)).

²⁷ “In a plurality of the circuits – the First, Fifth, Seventh, Tenth, D.C., and Federal Circuits – courts had sometimes used a four-part test consisting of success on the merits, irreparable injury, balance of harms, and the public interest. The Sixth Circuit had used a different four-part test: success on the merits, irreparable injury, no adequate remedy at law, and the public good. The Fourth Circuit had applied a three-part test: no adequate remedy, balance of equities, and the public interest. The Eighth Circuit had applied its own three-part test: irreparable harm, balance of equities, and the public interest.” Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1025-1026 (2015) (collecting cases).

²⁸ See e.g., *River Springs Ranch Prop. Owners Ass’n v. L’Heureux*, No. 1 CA-CV 09-0560, 2010 Ariz. App. LEXIS 1285, at *8 (Ct. App. Oct. 26, 2010) (unpublished) (quoting *eBay Inc.*, 547 U.S. at 391); *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009) (“When determining whether to grant injunctive relief, the trial court should consider such factors as the adequacy of other remedies, the danger that the plaintiff will suffer irreparable harm without the injunction, the benefit to the plaintiff, the harm to the defendant, and the public interest.”); *Inner-Tite Corp. v. Brozowski*, 27 Mass. L. Rep. 204 (Mass. Super. 2010) (“The standard for issuing a permanent injunction requires a finding that: ‘(1) the plaintiffs [will] prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction.’” (internal quotation and citation omitted)).

²⁹ See e.g., *Kocken v. Wisconsin Council 40*, 301 Wis. 2d 266, 732 N.W.2d 828 (2007) (“Before the circuit court can issue a permanent injunction, ‘a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and injure the plaintiff.’ A permanent injunction will not be granted unless there is the threat of

Considering the most important factor, the soundest rule for the Virgin Islands, this Court finds that the four-factor preliminary injunction analysis from *3RC & Co. v. Boynes Trucking Sys.*,³⁰ is not the best common law rule for this jurisdiction. Unlike preliminary injunctions, where previous Supreme Court precedent has established a four factor test, with the burden of proving the factors on the party seeking the injunction,³¹ here the Supreme Court has offered little precedent as to the appropriate factors to be considered, only recognizing the distinct nature between permanent injunctions and preliminary injunctions. Nevertheless, this Court agrees with the Supreme Court's recognition of the importance of equitable relief. "Despite the fact that the Superior Court of the Virgin Islands — like almost all modern American courts — exercises both equitable and legal authority, the division between law and equity remains meaningful to defining the remedies available in a particular action."³² Significantly, in the same context, the Supreme Court agreed with the Superior Court that, since courts possess "more flexibility in considering equitable remedies than it does in considering legal remedies...the application of a strict, sequential multi-factor test would be entirely inconsistent with this 'hallmark of equity jurisdiction.'"³³

irreparable injury that cannot be compensated with a remedy at law." (citations omitted)); *Freyou v. Iberia Par. Sch. Bd.*, 657 So. 2d 161, 164 (La.App. 3 Cir.) ("A permanent injunction is an extraordinary remedy appropriately ordered only to prevent damage that is likely to occur in the future rather than to punish for past damage. Thus, no injunction may be issued when the situation sought to be enjoined has already been remedied." (citations omitted)); *Indiana Family and Social Services Admin. v. Hospitality House of Bedford*, 704 N.E.2d 1050 (Ind. Ct. App. 1998) ("Permanent injunctions are limited to prohibiting injurious interference with rights. If an injunction is overbroad or if it becomes an instrument of wrong through changed circumstances, it is subject to modification through the court's continuing equity jurisdiction." (citations omitted)); *DeLong v. Parmelee*, 157 Wash. App. 119, 150, 236 P.3d 936, 951-52 (2010) ("And, as with temporary injunctions, an individual seeking a permanent injunction must demonstrate that (1) he has a clear legal or equitable right, (2) he has a well-grounded fear of immediate invasion of that right, and (3) that the acts he is complaining of have or will result in actual and substantial injury. Moreover, the trial court must precisely tailor a permanent injunction to prevent a specific harm." (citations omitted)).

³⁰ *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *5.

³¹ *Id.* at *14-18.

³² *Id.* at *10.

³³ *Id.* (citing *SBRMCOA*, 62 V.I. at 186, [WL], at *8 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (Ginsburg, J., dissenting))).

However, the Supreme Court has suggested that the crux of equitable relief is the need to limit its use to circumstances where other legal remedies are unavailable, finding a party must demonstrate that “the injunction is necessary to avoid ‘certain and imminent harm for which a monetary award does not adequately compensate.’”³⁴ Additionally, the Supreme Court determined that when a permanent injunction is granted, the order must be specific and “‘cannot be broader than necessary to restrain the unlawful conduct,’³⁵ [and] must ensure that it is narrowly tailored ‘to fit the particular circumstances of the case.’”³⁶ This finding further supports the need to restrict the use of permanent injunctions to circumstances where other legal remedies are unavailable.³⁷

As a result, the Court believes a four-factor test is appropriate, but finds it necessary to restate the standard, combining factors from *eBay Inc. v. MercExchange, L.L.C.* and state courts. With respect to a permanent injunction, a court must consider whether: (1) the moving party has shown actual success on the merits; (2) the moving party has suffered irreparable harm; (3) the remedies at law are inadequate; and (4) the injunction would be in the public interest. A permanent injunction is typically issued after a trial on the merits, but when a case can be disposed on the merits, it is unnecessary to evaluate the injunctive factors.³⁸ Further, since an injunction is an extraordinary remedy, its purpose is not to punish, but to prevent damage that is likely to occur in the future. Thus, when the situation is remedied or becomes moot, an injunction is not appropriate.

Further, the Supreme Court has found in the context of preliminary injunctions that the moving party “has the burden of making some showing on all four injunction factors. But in

³⁴ *Id.* (quoting *Yusuf v. Hamed*, 59 V.I. 841, 854 (V.I. 2013) (internal quotation marks and citation omitted).

³⁵ *Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 700 (V.I. 2011) (remanding the Superior Court’s permanent injunction for being overly broad) (quoting *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 545 (3d Cir. 1986)).

³⁶ *Id.* (quoting *Brow v. Farrelly*, 994 F.2d 1027, 1038, 28 V.I. 345 (3d Cir. 1993)).

³⁷ See *Yusuf*, 59 V.I. at 842 (finding a preliminary injunction to be an “extraordinary and drastic remedy... and may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”).

³⁸ *Mapp v. Fawkes*, 61 V.I. 521, 531 n.7 (V.I. 2014).

considering whether to grant or deny the preliminary injunction, the Superior Court..." must consider the factors together and weigh them against one another to determine whether the party is entitled to injunctive relief.³⁹ The Court does not find it necessary to deviate from this standard of analysis and finds its application to permanent injunctions appropriate. Generally, a court is required to make findings of fact after an evidentiary hearing before granting a preliminary injunction. But, in limited circumstances, an evidentiary hearing is not necessary if it is clear that there are no factual disputes.⁴⁰ Here, the Court finds the same principle to be true for a permanent injunction.

Applying this standard to the current case, although Plaintiff maintains that the issue is not moot because the exclusive franchise is now granted by Act No. 7452 and the provisions of Act No. 7452 are substantively the same as Act No. 5231, the Court disagrees. "A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion."⁴¹ It is undisputed that the exclusive franchise premised on Act No. 5231 expired in 2007. While the Court recognizes the similarities between Act No. 5231 and Act No. 7452, Act No. 7452 does not mention Act No. 5231, and the terms of each Act are not identical. For example, under Act No. 7452, VITA's franchise is for five years instead of ten.⁴² VITA has had since 2012 to seek leave to file an amended complaint incorporating Act No. 7452, but has failed to do so as of the date of this Opinion.

³⁹ 3RC & Co., 2015 V.I. Supreme LEXIS 22, at *14-18

⁴⁰ *Id.* at *19-22.

⁴¹ *Der Weer v. Hess Oil Virgin Islands Corp.*, 60 V.I. 91, 99, [WL], at *3 (V.I. Super. Ct. 2014) (citations omitted); *Haynes v. Otley*, 61 V.I. 547, 558 (V.I. 2014) ("[T]he mootness doctrine in the Virgin Islands is a non-jurisdictional claims-processing rule that has been incorporated into Virgin Islands law only as a matter of judicial policy." (citations omitted)).

⁴² Defs.' July 15, 2015, Mot. to Dismiss, compare Ex. 2 at §1(f) with Ex. 25 at §1(f).

Alternatively, even applying the factors for a permanent injunction, an injunction is not warranted. As discussed above, VITA would be unable to establish actual success on the merits for its claims. Here, the Court indicated it would limit relief to events related to Act No. 5231, and it is undisputed that Act No. 5231 has expired. Based on this undisputed fact, the Court is able to make a determination on the merits and deny VITA's request for a permanent injunction. Without a showing on the first factor, VITA fails to meet its burden of making a showing on each of the factors as the Supreme Court requires. Even assuming *arguendo* that VITA had a claim on the merits, since the preliminary injunction was upheld by the Appellate Division of the District Court, VITA has essentially had a permanent injunction protecting its interest for the entire period of Act No. 5231, without having to successfully prove the merits of its claims.⁴³ Therefore, VITA will not be able to prove irreparable harm. Further, it appears there are other remedies at law that are adequate to compensate VITA for its injuries.⁴⁴

Lastly, a permanent injunction would not serve the public interest, since the Act has expired and enforcement would be a waste of government resources. While the Court did not schedule a separate hearing for the permanent injunction, based on the foregoing, there is no longer an active claim on the merits that would justify the issuance of a permanent injunction, and it would be meaningless to issue one now based on an expired Act.

⁴³ See *Pate v. Gov't of the V.I.*, 2014 V.I. LEXIS 112, *6-7 (V.I. Super. Ct., Dec. 11, 2014) ("Although granted without a full adjudication on the merits, a preliminary injunction has all of the force of a permanent injunction during its period of effectiveness and it binds defendant, defendant's representatives, and persons with actual notice of the order who are acting in concert with defendant in the same way as does a permanent injunction." (internal quotations and citations omitted)).

⁴⁴ See *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *22 (When the moving party's "loss is a matter of simple mathematic calculation, [it] fails to establish irreparable injury....").

II. Contempt Sanctions and Law of the Case

On May 9, 2004, VITA filed a post-judgment motion for rule to show cause and monetary fine, seeking a finding of contempt and sanctions against Defendants, after which the Court ordered Defendants to show cause why they should not be held in contempt. Specifically, VITA requested an award of damages for lost business for the period March 10, 1997, when the preliminary injunction was issued, to June 24, 2005, when the contempt hearing was held. On September 2, 2005, VITA submitted an estimate of costs and damages to the Court from 1997 through 2005 and requested damages in the amount of “\$750,000 or such other sum as the Court deems just and equitable for the Defendant Virgin Islands Port Authority’s contempt.” In its June 13, 2006, opinion, the court found all Defendants in contempt and assessed a \$1,000 per day fine, retroactive to March 1, 2006, for continued violations, but found it improper to award the \$750,000 in damages as a sanction. At the September 7, 2006, show cause hearing, the Court directed that a \$105,000 retroactive fine would be paid to the registry of the Superior Court for Defendants’ failure to follow the Court’s Order, after which the Defendants filed interlocutory appeals to the Appellate Division of the District Court.

On appeal, the Appellate Division considered: “(1) whether VITA properly renewed its franchise under Act [No.] 5231; (2) whether the contempt sanctions imposed by the June 13, 2006, order, and the September 7, 2006, verbal order were civil or criminal in nature; and (3) whether the evidence adduced at the show cause hearings was sufficient to support the findings of contempt and sanctions imposed against the appellants.”⁴⁵ Ultimately, the Appellate Division reversed the Superior Court’s findings of contempt and vacated the imposition of sanctions.

Assuming the validity of the March 10, 1997, preliminary injunction and the August 3, 2005, order...the Court finds that VITA failed to show noncompliance with the preliminary

⁴⁵ *E. End Taxi Services, Inc.*, 49 V.I. at 671.

injunction and order by clear and convincing evidence. The evidence adduced at the March 1, 2006, hearing showed that East End, Caneel, and the Ritz had, on occasion, transported passengers from the Cyril E. King Airport. However, VITA failed to present any evidence to demonstrate that East End, VIPA, Caneel, or the Ritz ever transported or facilitated the transportation of passengers from the airport who had not prepaid for their transportation before arriving in St. Thomas. The record does not reveal even one instance where a particular passenger was transported in violation of the March 10, 1997, preliminary injunction or the August 3, 2005, order. Therefore, the Superior Court's imposition of civil contempt constituted an abuse of discretion.⁴⁶

Notwithstanding the fact that the Appellate Division remanded the issue of franchise renewal to the Superior Court, the Appellate Division independently considered the issue of sanctions.

Defendants argue that the Appellate Division's ruling is the law of the case. The Supreme Court of the Virgin Islands has recognized that "the law-of-the-case doctrine, [applies] 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"⁴⁷ However, in *Hodge v. Bluebeard's Castle, Inc.*,⁴⁸ the Supreme Court found, "[b]ut even if we were to adopt some form of the law-of-the-case doctrine with regard to this Court's decisions, treating the Appellate Division's remand as the law of the case would be inappropriate here."⁴⁹ Nevertheless, Defendants maintain that the Supreme Court has authority to review and reverse the Appellate Division's holding, but the Superior Court does not. The Court agrees. Given the date the current case was commenced in the Superior Court, it appears the Third Circuit retains certiorari jurisdiction, but this determination is outside the scope of the jurisdiction of this Court.⁵⁰

⁴⁶ *Id.* at 684-85.

⁴⁷ *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 688 (V.I. 2015).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ "But on December 28, 2012 — following the recommendation of the Third Circuit Judicial Council — President Barack Obama signed H.R. 6116 into law, ending the Third Circuit's certiorari jurisdiction 10 years early. Despite this, the Third Circuit recently held that the effective date of this legislation — 'apply[ies] to cases commenced on or after' December 28, 2012, Pub. L. No. 112-226, § 3 — referenced the date a case was commenced by filing a complaint in the Superior Court of the Virgin Islands, as opposed to the date a case is commenced in the Third

VITA maintains that the issue of contempt sanctions can be revisited on remand or again on appeal because the Appellate Division only had jurisdiction to consider criminal contempt sanctions. The remedy for civil contempt includes compensation for “plaintiff’s actual loss or a defendant’s actual profit resulting from the disobedience.”⁵¹ The Appellate Division noted that “the record below contains scant evidence of the loss to VITA or the profit to East End, VIPA, Caneel, and the Ritz caused by the contemptuous conduct during the relevant period from March 1, 2006, through June 13, 2006.”⁵² Even still, “when a contempt order contains both a punitive and a coercive dimension, [f]or purposes of appellate review it will be characterized as a criminal contempt order.”⁵³ Because the \$1,000 per diem fine contempt order was both punitive and coercive, for purposes of appellate review the contempt order was a final judgment for criminal contempt and the Appellate Division properly exercised jurisdiction to review the June 13, 2006, order.⁵⁴ Additionally, “since the retroactive fine of \$105,000 was fixed, unconditional, lacked a sufficient evidentiary basis, and was not made payable to VITA, the Court finds that it was a criminal contempt sanction.”⁵⁵

Circuit seeking a writ of certiorari to the Supreme Court of the Virgin Islands.” *Id.* at 689 n.10 (citing *UIW-SIU ex rel. Bason v. Gov’t of the V.I.*, 767 F.3d 193, 206 (3d Cir. 2014), cert. denied 135 S. Ct. 1734 (2015)).

⁵¹ *E. End Taxi Services, Inc.*, 49 V.I. at 675; see also *In re Rogers*, 56 V.I. 325, 340 (V.I. 2012)(citations omitted) (“Civil contempt may be coercive or compensatory. If a fine is coercive instead of compensatory, the contemnor must retain the ability to purge the contempt. Per diem fines typically coerce a contemnor, permitting the contemnor to “purge” the contempt by conforming to the court’s directive.”).

⁵² *E. End Taxi Services, Inc.*, 49 V.I. at 676.

⁵³ *Id.* at 678 (quoting *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 567 (5th Cir. 1990)).

⁵⁴ *Id.* at 678-79.

⁵⁵ *Id.* at 678 (citing *United States v. Pozsgai*, 999 F.2d 719, 735 (3d Cir. 1993) (holding that a contempt order labeled by the district court as “civil” was actually a criminal contempt because the order was retroactive, seeking to penalize previous violations, and was punitive, serving no compensatory purpose)).

As a result, the Court is unpersuaded by VITA's argument that the Appellate Division failed to address the civil sanctions, since the Appellate Division was able to construe the sanctions as criminal for purposes of the appeal.⁵⁶ The Appellate Division clearly reversed

the Superior Court's findings of contempt against East End, VIPA, Caneel, the Ritz, and Jencks. The Court will also reverse all findings made by the Superior Court in the June 13, 2006, memorandum opinion and order and all verbal findings made during the September 7, 2006, show cause hearing as based on insufficient evidence. The Court will vacate the \$105,000 retroactive contempt fine, the \$1,000 per diem fine, and the arrest warrant for Jencks.⁵⁷

Further, the Court recognized that the remand was a "case remand" and not a "record remand," so that the Court is not bound by the Appellate Division's factual view of the record.⁵⁸ However, the Court finds it unnecessary to differ from the Appellate Division's ruling and to revisit the issues of contempt sanctions for the relevant period.

The sanctions having been vacated, VITA is foreclosed from re-litigating any claims for damages for the period of March 10, 1997, when the Court granted the preliminary injunction, to June 13, 2006, when the Court issued its Order for contempt sanctions. Defendants assert that VITA has not sought to file an amended complaint to incorporate post-1997 acts as part of this case and that "the only period of time in which VITA is not foreclosed by the law of the case from seeking damages is the period June 14, 2006, to April 30, 2007."⁵⁹ But, Defendants assert that VITA is foreclosed from claiming damages for even that period because of judicial estoppel and alternatively, laches. Further, Defendants argue that, since the preliminary injunction in this case merely tracks the language of Act No. 5231, the Appellate Division's finding is necessarily the

⁵⁶ *Id.*

⁵⁷ *Id.* at 685.

⁵⁸ See *V.I. Taxi Ass'n v. V.I. Port Auth.*, 59 V.I. 148, 156 (V.I. Super. Ct. 2013) (finding the Court was not bound by the Appellate Division's statements relating to the validity of the renewal of the franchise agreement.)

⁵⁹ Defs.' July 15, 2015, Mot. to Dismiss, p. 12.

equivalent to a finding that VITA failed to prove any violations of the exclusive franchise that would entitle VITA to damages.

III. PBI is not a Proper Party

Defendant Plantation Bay, Inc., f/k/a Caneel Bay Resort (“PBI”) seeks dismissal claiming the injunctive-relief claims against it are moot since it sold Caneel Bay Resort in 2004 and therefore, should be released from liability. VITA believes that PBI is still responsible for contempt damages from violation of the preliminary injunction before the sale. Further, VITA maintains that PBI is a proper party to this litigation and that VITA should be granted discovery to determine whether PBI and its successor were “merged” or “substantially consolidated” to conclude if the new entity should or should not be part of any injunctive relief going forward based on successor liability.⁶⁰

Defendant PBI replies and asserts that successor liability is immaterial to resolving the motion to dismiss and argues that successor liability only confers liability on the successor corporation, CBI Acquisitions, Inc., for the predecessor corporation’s torts. Additionally, after the sale in 2004, VITA stipulated to the fact that Caneel Bay, Inc. sold and transferred all of its assets to CBI effective May 10, 2004, and that since that time Caneel Bay, Inc. has changed its corporate name to Plantation Bay, Inc., and has not operated in the Virgin Islands.⁶¹ Here, while the Court agrees with VITA that the issue of successor liability is not firmly established in the Virgin Islands, the Court need not establish the law in this matter since the Court has determined that all of the pre-2004 contempt sanctions against PBI have been vacated by the Appellate Division. Furthermore, the Court denied VITA’s request to amend its Complaint to add CBI as a party to

⁶⁰ Pl.’s Aug. 17, 2015, Opposition, p. 30.

⁶¹ Defs.’ Aug. 31, 2015, Joint Reply, p. 25; Stipulation dated Sept. 1, 2006.

this litigation in 2012. As a result, the Court agrees with Defendants that any discovery requests related to the sale are irrelevant and all claims against PBI should be dismissed.

IV. Private Right of Action for Damages

Defendants assert that VITA's Complaint failed to include a cause of action for which damages could be awarded.⁶² Specifically, Defendants claim there is nothing in Act No. 5231, which grants VITA a right to pursue a damage remedy for any alleged violation of VITA's exclusive franchise by VIPA or any interference with that franchise. While Defendants rely on *Haynes v. Otley*⁶³ in support of their argument that "whether a private right of action exists is whether the text of the statute itself expressly states a private right to file suit,"⁶⁴ *Haynes* is not binding on this Court. Rather, the Supreme Court of the Virgin Islands "has repeatedly held, it is presumed that the Virgin Islands Legislature will not create a right without a remedy, and thus "statutes which are silent as to who has standing should be broadly interpreted to confer standing."⁶⁵ Although the Court agrees with Defendants that Act No. 5231 does not explicitly address the issue of remedies, this in itself does not foreclose the right of VITA to pursue damages.

V. Judicial Estoppel

There are two issues before the Court regarding VITA's ability to pursue damages: first, whether VITA should be judicially estopped from making a claim for damages based on its initial representation that damages were incalculable, and second, whether VITA should be allowed to

⁶² Defs.' Nov. 14, 2014, Brief in Response to the Order of Oct. 31, 2014, p. 2.

⁶³ No. 2014-70, 2014 U.S. Dist. LEXIS 154161 (D.V.I. Oct. 28, 2014)(other citations omitted).

⁶⁴ *Id.* at *11.

⁶⁵ *Mapp v. Fawkes*, 61 V.I. 521, 534 n. 11 (V.I. 2014) (quoting *Bryan v. Fawkes*, 61 V.I. 201, 223, [WL], at *9 n.12 (V.I. 2014) (other citations omitted); see also *Haynes v. Otley*, 61 V.I. 547, 576 (V.I. 2014) ("In reaching this decision, we express no opinion as to what statutory or common law remedy is appropriate; while Haynes invoked 5 V.I.C. § 80 in his amended complaint, he also stated that the Superior Court possessed jurisdiction under 4 V.I.C. § 76, which generally grants the Superior Court jurisdiction over civil disputes. Thus, Haynes could, in addition to or instead of pleading a claim under 5 V.I.C. § 80, assert other equitable claims under 4 V.I.C. § 76.").

pursue damages at law since it received equitable relief. When VITA moved for a preliminary injunction in 1997, VITA claimed that its monetary damages were incalculable. In the Court's March 10, 1997, Order granting VITA a preliminary injunction, the Court found irreparable harm and concluded "[t]he Taxi Association established that, due to the infringement of its exclusive franchise by the defendants and others, it and its members daily suffer incalculable economic loss." Specifically the Court recognized "[w]hile the Plaintiff has alleged that it may be entitled to damages, the Court questions whether the Plaintiff could establish to any degree of certainty the revenue lost by it and its approximately four hundred (400) members due to the direct competition of innumerable others who are allegedly soliciting fares and transporting persons, on a daily and continuing basis, from the Cyril E. King Airport."⁶⁶

On February 6, 2006, VITA filed a Motion for a Temporary Restraining Order, Contempt Finding and Enforcement of This Court's Orders, wherein VITA outlined "[f]acts [s]upporting the [v]iolation of this Court's March 10, 1997 Order and this Court's August 3, 2005 Order."⁶⁷ In so doing, VITA specifically argued that "[d]espite enlisting the assistance of a consultant to calculate its compensatory damages, compensatory damages may not be accurately and completely calculated due to insufficient data, including but not limited to, vouchers, passenger lists and invoices[.]"⁶⁸ a verbatim quote of the Affidavit of then President of VITA, Winston Parker, which was attached as an exhibit in support of VITA's motion.⁶⁹ As a result, VITA argued that "Defendants, in concert with each other, have made it [sic] difficult, if not impossible, for VITA

⁶⁶ *Id.*

⁶⁷ VITA's Mot. for a Temporary Restraining Order, Contempt Finding and Enforcement of this Court's Orders, p. 3.

⁶⁸ *Id.* at 6 ¶ 19 (citing Parker Aff. ¶ 20, attached as Exhibit E) (attesting that "[d]espite enlisting the assistance of a consultant to calculate its compensatory damages, compensatory damages may not be accurately and completely calculated due to insufficient data, including but not limited to, vouchers, passenger lists and invoices").

⁶⁹ *Id.* at Ex. E ¶ 20.

to calculate its compensatory damages” and that, while damages awarded for civil contempt are “limited to the actual loss suffered by the aggrieved party . . . perfect mathematical certainty is not required . . . [and] Defendants should not be permitted to benefit by the uncertainty it [sic] has caused.”⁷⁰

In ruling on VITA’s February 6, 2006, Motion, the Court denied VITA’s request for a Temporary Restraining Order, finding the factors did not weigh in favor of the requested injunctive relief and noting that VITA “already has obtained a preliminary injunction against Defendants.”⁷¹ Specifically, the Court found that a “risk” of irreparable harm was not enough to warrant the requested injunctive relief in that, for harm to be irreparable, it “must be of a peculiar nature, so that compensation in money cannot atone for it.”⁷² The Court concluded that VITA did not demonstrate the requisite irreparable harm, reasoning that VITA “has an adequate remedy at law . . . [because t]he crux of [VITA’s] grievances is the economic loss it has suffered from Defendants’ and non-parties’ violations . . . As monetary loss is the main point of contention, there exists an adequate remedy at law. As such the harm done to Plaintiff is not irreparable.”⁷³ Importantly, the Court also recognized that VITA “cannot seek to get through the back door by contempt proceeding, what it is unable to get in a direct action for damages. The established rule in contempt proceedings is that any damages awarded may be awarded only to a party in the proceeding.”⁷⁴

In its June 13, 2006, Memorandum Opinion, wherein the Court found Defendants in contempt for violating the Preliminary Injunction, the Court stated “Plaintiff sought an award of \$750,000.00 in damages due to lost business . . . [and w]hile this amount appears to be conservative

⁷⁰ *Id.* at 10 (internal quotation marks omitted) (citations omitted).

⁷¹ *See generally* Feb. 14, 2006, Order, p. 4.

⁷² *Id.* (citing *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)).

⁷³ *Id.*

⁷⁴ Def. Caneel’s Feb. 28, 2006, Response to Pl.’s Estimate of Costs and Damages, at 4.

given the period of the violation involved *i.e.* March 10, 1997 to June 24, 2005, it would be improper to award such damages as a sanction for Defendants' conduct while trial of the matter is pending."⁷⁵ Nevertheless, the Appellate Division of the District Court noted that "the record below contains scant evidence of the loss to VITA or the profit to East End, VIPA, Caneel, and the Ritz caused by the contemptuous conduct during the relevant period from March 1, 2006, through June 13, 2006."⁷⁶ Additionally, the Court noted,

[b]oth figures cited by VITA suffer from the same fundamental flaw. VITA has failed to provide any evidence or assertions regarding what portion of the \$ 1,105 or \$ 2,500 figures represented the actual profit received by the Ritz or Caneel. Without even a rough breakdown of new and gross revenues for taxi fares, there is an insufficient evidentiary basis for the imposition of compensatory fines.⁷⁷

Adding to the confusion surrounding VITA's representations to the Court for calculable damages, the Court has also made conflicting rulings on VITA's entitlement to damages at trial in connection with injunctive relief. VITA has also changed positions, first stating damages are incalculable, and now maintaining that VITA can't calculate the majority of its damages.

To the extent VITA now wishes to prosecute a claim for money damages, Defendants believe VITA asserts that claim in bad faith because, contrary to VITA's requests for injunctive relief, VITA alleges "the exact opposite- that damages are awardable and calculable."⁷⁸ Further, Defendants rely on *Murray v. Silberstein*,⁷⁹ a Third Circuit case in which the court applied judicial estoppel to prevent a plaintiff from seeking damages after previously obtaining a preliminary injunction based on the argument that damages, including back pay, were not available. Defendants assert that VITA should be judicially estopped from asserting any claims for

⁷⁵ *E. End Taxi Services, Inc.*, 49 V.I. at 676 (quoting June 13, 2006, Memorandum Opinion, p. 21).

⁷⁶ *Id.* at 676.

⁷⁷ *Id.* at 677.

⁷⁸ Defs.' July 15, 2015, Mot. to Dismiss, p. 14.

⁷⁹ 882 F.2d 61, 66 (3d Cir. 1989).

compensatory damages, including any outstanding claims from the Complaint, damages based on Act No. 5231, and damages for the period June 14, 2006, to April 30, 2007.

The Supreme Court of the Virgin Islands has recognized judicial estoppel as “estoppel that prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.”⁸⁰ Although the Supreme Court has defined the doctrine in at least one opinion,⁸¹ the Supreme Court has yet to explicitly adopt the doctrine.⁸² As a result, to determine the appropriate standard for this jurisdiction, the Court must examine the following three-factors known as a *Banks* analysis: first, which common law rule Virgin Islands courts have applied in the past; second, identify the rule adopted by a majority of courts of other jurisdictions; and third, most importantly, determine which common law rule is soundest for the Virgin Islands.⁸³

Courts in the Virgin Islands have recognized the doctrine of judicial estoppel, but have generally not analyzed the factors to be considered when applying the doctrine.⁸⁴ For example, in *Benjamin v. Coral World VI, Inc.*,⁸⁵ the Court defined judicial estoppel as “‘a fact-specific, equitable doctrine, applied at courts' discretion’ that ‘rests on the basic notion that, absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and

⁸⁰ See *Fontaine v. People of the V.I.*, 56 V.I. 571, 583 n.7 (V.I. 2012) (citing *Boston v. Virgin Islands*, 46 V.I. 520, 526 (V.I. 2005) (quoting Black's Law Dictionary 571 (7th ed. 1999)).

⁸¹ *Id.*

⁸² Recently, the Supreme Court has implied that the Superior Court should give greater weight to its decisions in footnotes. However, while the Supreme Court simply defined judicial estoppel in a footnote, rather than taking a position, the Superior Court finds a *Banks* analysis to be necessary here. See *Ventura v. People of the V.I.*, No. 2014-0021, 2016 V.I. Supreme LEXIS 15, at *37-39 (V.I. May 4, 2016) (“Instead, it should have given greater weight to our decision in *Joseph*, in which we held that Super. Ct. R. 135 is a claims processing rule.” (citing *Joseph v. People of the V.I.*, 60 V.I. 338, 347 n.7 (V.I. 2013)).

⁸³ *Connor*, 60 V.I. at 605; *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *8.

⁸⁴ See e.g., *Walters v. Walters*, 60 V.I. 768, 775 n.7 (V.I. 2014) (“Although ‘unsworn representations of an attorney are not evidence,’ an attorney’s client may nevertheless be bound by such statements under the doctrines of judicial admissions and judicial estoppel.” (internal citation and other citations omitted)); *Fontaine*, 56 V.I. at 583 n. 7; *Benjamin v. Coral World VI, Inc.*, 2014 V.I. LEXIS 35, *7-8 (V.I. Super. Ct., June 12, 2014).

⁸⁵ 2014 V.I. LEXIS 35, *7-8 (V.I. Super. Ct., June 12, 2014).

then seek an inconsistent advantage by pursuing an incompatible theory.”⁸⁶ Further, “[o]nce the Court determines that positions are irreconcilably inconsistent, it must also find that the party’s position was changed in bad faith and that there is no lesser sanction that would adequately remedy the damage done by the misconduct.”⁸⁷ Additionally in *Walters v. Walters*,⁸⁸ the Supreme Court recognized that, “[a]lthough ‘unsworn representations of an attorney are not evidence,’ an attorney’s client may nevertheless be bound by such statements under the doctrines of judicial admissions and judicial estoppel.”⁸⁹

Turning to the second factor, the majority of jurisdictions have adopted judicial estoppel in some form.⁹⁰ Recently, the Supreme Court of the United States reviewed the doctrine in *New Hampshire v. Maine*,⁹¹ recognizing that it is a judicially created equitable doctrine and that “other courts have uniformly recognized that its purpose is ‘to protect the integrity of the judicial process’ by ‘prohibiting parties from deliberately changing positions according to the exigencies of the

⁸⁶ *Id.* (citing *Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014) (on appeal from D.V.I.) (quoting *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010))).

⁸⁷ *Id.* at *7-8 (citing *Prosser v. Carroll (In re Prosser)*, 534 F. App’x 126, 130 (3d Cir. 2013) (quoting *In re Kane*, 628 F.3d at 638)).

⁸⁸ 60 V.I. 768, 775 n. 7 (V.I. 2014).

⁸⁹ *Id.* (internal citation omitted). While the Supreme Court claims to have recognized the doctrine of judicial admission, the Supreme Court has not performed a *Banks* analysis on this doctrine. See *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 133 (V.I. 2009) *overruled in part on other grounds by Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564 (V.I. 2012).

⁹⁰ See e.g., *Gottlieb v. Kest*, 141 Cal. App. 4th 110, 131, 46 Cal. Rptr. 3d 7, 19 (2006); *Dougan v. Dougan*, 301 Conn. 361, 372, 21 A.3d 791, 798 (2011) (“We have recently decided that the doctrine of judicial estoppel may be invoked under certain circumstances.” (citation omitted)); *Ex parte Jackson Hosp. & Clinic, Inc.*, 167 So. 3d 324, 332 (Ala. 2014) (“this Court ‘embrace[d] the factors set forth in *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), and join[ed] the mainstream of jurisprudence in dealing with the doctrine of judicial estoppel.” (citation omitted)); *Lone Star Engine Installation Ctr., Inc. v. Gonzales*, No. 05-14-01616-CV, 2016 Tex. App. LEXIS 5006, at *19 (App. May 11, 2016) (“Rather, the trial court should determine if applying judicial estoppel is appropriate in light of the specific facts of each case and the doctrine’s purpose of protecting the integrity of the judicial process.” (citation omitted)); *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538-39, 160 P.3d 13, 15 (2007) (“The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and ... waste of time.” (internal quotations and citations omitted)).

⁹¹ 532 U.S. 742, 750, 121 S. Ct. 1808, 1815 (2001).

moment.”⁹² The Supreme Court first applied the doctrine over a hundred years ago,⁹³ while state courts have utilized estoppel for even longer.⁹⁴ The doctrine is also known as preclusion of inconsistent positions,⁹⁵ fact preclusion, judicial preclusion, or estoppel in pais. Nevertheless estoppel is not uniformly applied, and courts consider different factors. In *New Hampshire v. Maine*, the Supreme Court recognized three primary factors utilized by federal courts including, whether “a party’s later position is ‘clearly inconsistent’ with its earlier position”⁹⁶, “whether the party has succeeded in persuading a court to accept that party’s earlier position”⁹⁷, and “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”⁹⁸

However, other approaches used by courts have been categorized as a “success test”, “a fast and loose test”, or complete rejection of the doctrine. The success test is defined as “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.”⁹⁹

⁹² *Id.* at 750 (internal citations and other citations omitted) (“‘Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.’ *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’ *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000).”).

⁹³ *Davis*, 156 U.S. at 689. *But see Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982) (citing *Davis* as an example of equitable estoppel rather than judicial estoppel since *Davis* does not use the term judicial estoppel).

⁹⁴ See e.g., *Succession of Harris*, 39 La. Ann. 443, 445, 2 So. 39, 40-41 (1887) (“The general doctrine that a party is bound by his judicial declarations and is estopped from subsequently denying them is well established and supported by the numerous authorities cited by the learned counsel for opponents.”); *Fogler v. Clark*, 80 Me. 237, 242, 14 A. 9, 11 (1888).

⁹⁵ *Fontaine*, 56 V.I. at 583 n.7 (citing *Boston*, 46 V.I. at 526).

⁹⁶ *Id.* (citing *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997)).

⁹⁷ *Id.* (citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982)).

⁹⁸ *Id.* (citing see *Davis*, 156 U.S. at 689; *Philadelphia, W., & B. R. Co. v. Howard*, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel forbids use of “intentional self-contradiction . . . as a means of obtaining unfair advantage”); see also 18 Wright § 4477, p. 782.

⁹⁹ *Davis*, 156 U.S. at 689.

Generally this test requires a showing of a benefit to the party asserting an inconsistent position from the prior proceeding. Without a benefit to a party, courts find it unnecessary to apply judicial estoppel for inconsistent positions taken by a party. Alternatively, the fast and loose test does not require the success of a party's inconsistent position, but instead focuses on "whether a litigant is intentionally contradicting earlier statements in order to obtain an unfair advantage in a judicial forum. Additionally, a court may require that the litigant be acting in bad faith."¹⁰⁰

Generally courts utilizing the fast and loose test have rejected a formulaic approach to applying judicial estoppel, but also limit the doctrine's application. For example, the Third Circuit rejects the success test¹⁰¹ and considers judicial estoppel to be "an extraordinary-remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice."¹⁰² Lastly, some courts reject the use of judicial estoppel. Arguments against judicial estoppel include the belief that it limits a party's pleading right in terms of the ability to plead in the alternative, while other courts have found that the doctrine prevents the determination of cases on their merits, specifically when the factual circumstances have changed.¹⁰³

¹⁰⁰ See Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel*, 64 U. CHI. L. REV. 873, 878-879 (1997) (citing *Hicks v Andrew Johnson Bank*, 1990 Tenn App LEXIS 181, *6-7 (party need not prevail in first suit before judicial estoppel will be applied); *North Jersey Savings and Loan v Fidelity and Deposit Co*, 283 NJ Super 56, 660 A2d 1287, 1299 (1993) (estopping litigant from changing a position that was raised but not decided in the first litigation); *Zwemer v Production Credit Assn of Midlands*, 792 P2d 245, 247 n 3 (Wyo 1990) (Judicial estoppel applies whether the position first assumed has been successful or not.); *Amsac Mechanical Supply Co v Federer*, 645 P2d 73, 79 (Wyo 1982) (applying judicial estoppel without inquiring into success of earlier position because litigant had "blown hot and cold"))).

¹⁰¹ *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) ("We begin by determining whether as a general rule a party must have benefitted from her prior position in order to be judicially estopped from subsequently asserting an inconsistent one. We readily conclude that the doctrine of judicial estoppel in this circuit contains no such requirement.").

¹⁰² *Fontaine*, 56 V.I. at 583 n.7 (quoting *Ryan Operations G.P.*, 81 F.3d at 365) (citing *Boston*, 46 V.I. at 526).

¹⁰³ Deeks, *supra* note 100, at 878-879 (collecting cases) (citing *see e.g., Southern Pacific Transportation Co v ICC*, 69 F3d 583, 591 n 3 (DC Cir. 1995) ("This court, however, has firmly disapproved of judicial estoppel in prior cases."); *Brodie v General Chemical Corp*, 1996 US App LEXIS 418, *11 (10th Cir.) (unpublished opinion) ("This court does not recognize the principle of judicial estoppel.")).

Turning to the most important factor, the soundest rule for the Virgin Islands, this Court concludes that adopting the doctrine of judicial estoppel is a necessary addition to the common law of this jurisdiction. Not only is the doctrine important for instances where a party changes positions during the pendency of a single case, but also when the Court may be faced with difficult questions involving claims by a party in separate proceedings. Further, the Court finds the doctrine necessary to prevent fraud against the Court and to preserve the Court's function of truth seeking in its administration of justice. After considering the various factors and tests utilized by other jurisdictions, the Court finds the "success test" relies too heavily on a party's success with their inconsistent position rather than considering the harm caused by the fraud to the Court. However, the Court also is not convinced that the "fast and loose" test is appropriate for this jurisdiction if it requires a separate analysis of whether the party is changing their position in bad faith. While the Court agrees with the definition of judicial estoppel cited by the Supreme Court of the Virgin Islands¹⁰⁴, and generally agrees with this Court's previous reliance on the factors considered by the Third Circuit¹⁰⁵, considering the best rule for the Virgin Islands, the Court now finds it unnecessary to consider whether the party changed its position in bad faith. Instead, the Court recognizes the importance of a determination involving whether a party is in fact asserting inconsistent positions, which then prejudices the opposing party in the proceeding before the Court. Additionally, the Court believes that it is necessary to leave some discretion with the Court, rather than adopt a strict multi-factor test, so that judicial estoppel may be applied on a case by case basis.

Applying these factors here, the Court will first consider if VITA presented inconsistent positions to the Court. VITA responds that it did not commit fraud by arguing that it could never

¹⁰⁴ See *Fontaine*, 56 V.I. at 583 n.7 (citing *Boston*, 46 V.I. at 526).

¹⁰⁵ See *Benjamin*, 2014 V.I. LEXIS 35, *7-8 (citing *In re Prosser*, 534 F. App'x 126, at 130) (quoting *In re Kane*, 628 F.3d at 638) (relying on the Third Circuit).

prove the full extent of its economic loss, believing that it can never obtain complete proof of each time Defendants violated the Act because of the sheer number of violations and that VITA should not be precluded from recovering contempt damages for the losses it can prove. In the Verified Complaint dated February 11, 1997, Plaintiff requested “damages for all revenues and fares lost to unauthorized and illegal operators who openly violate the terms of Plaintiff’s exclusive franchise” and “damages to be proven at trial.” In Count I, Plaintiff alleged there was “no adequate remedy at law in that V.I.P.A. has advised Plaintiff that it lacks the ability to enforce paragraph 1 (e) of the Act No. 5231,”¹⁰⁶ and under Count IV, “[t]he pick up and transportation of such passengers by non VITA drivers is a violation of Plaintiff’s exclusive franchise, all to its damage and injury.”¹⁰⁷ Under Count V, Plaintiff claims “[t]he conduct of the defendants including the VIPA has resulted in loss of earnings and fares reviews [sic] to the Plaintiff and its members.”¹⁰⁸ VITA further asserts, “Plaintiff is entitled to damages for all revenues and fares lost to unauthorized and illegal operators who openly violate the terms of Plaintiff’s exclusive franchise”¹⁰⁹ and judgment against the Defendants for damages to be proven at trial.¹¹⁰

In VITA’s Opposition to the Motion to Dismiss, it now seeks damages for: “(1) lost profits based on Defendants[’] use of improper vouchers and VIPA’s failure to enforce the franchise agreement; (2) profits Defendants made using improper vouchers; and (3) damages for the expenses VITA incurred to maintain its presence at the airport and the fee it paid to VIPA for the right to an exclusive franchise during any period in which Defendants defeated its right to maintain

¹⁰⁶ Pl.’s Feb. 12, 1997, Compl. ¶ 14.

¹⁰⁷ *Id.* at ¶ 31

¹⁰⁸ *Id.* at ¶ 35

¹⁰⁹ *Id.* at ¶ 37

¹¹⁰ *Id.* at 7.

an exclusive franchise by violating the injunction.”¹¹¹ As explained below, VITA only has the ability to bring a claim for damages on behalf of the association and not any individual taxi drivers. Assuming, *arguendo*, that VITA could seek damages on behalf of individual taxi driver members, VITA has failed to prosecute those claims. On April 26, 2006, VITA filed a motion to amend its Complaint and to join the V.I. Taxi Driver’s April 21, 2006, Motion to Intervene as Plaintiffs.¹¹² By VITA’s own concession, it recognized in its Reply to Defendants’ Oppositions to VITA’s Motion to Intervene and Amend the Complaint that:

[M]any of the individual Taxi Driver have been working at the airport over the last ten years and lost significant income- the bulk of the damages lie with the individual drivers. On the other hand, their interest and [VITA’s] interests are likely to diverge . . . [VITA’s] interest is driven towards protecting its statutory and contractual rights in the future. The individual Taxi Drivers, contrary to [VITA], do not have a perpetual existence- some have retired, others are planning retirement, some gave up and changed occupations. The individual Taxi Drivers’ primary interest is to collect the monies illegally obtained by the Defendants that are [sic] rightfully belong to them.”¹¹³

On February 2, 2012, the Court denied Plaintiff’s motion to amend its Complaint for Plaintiff’s failure to comply with LRCi 15.1. As of the date of this opinion, Plaintiff has failed to seek leave to file an amended complaint in compliance with the rules. Notably, in the Court’s June 15, 2015, Opinion, the Court addressed Defendants’ claim, asserted in response to the Court’s October 31, 2014, Order, that VITA lacks associational standing to bring an action for damages on behalf of its members. The Court determined that Defendants failed to raise the issue of associational standing in a timely manner and that the issue had therefore been waived.

¹¹¹ Pl.’s Aug. 17, 2015, Opposition, p. 34.

¹¹² Defs.’ July 15, 2015, Mot. to Dismiss, Ex. 16, Ex. 17.

¹¹³ Pf.’s June 23, 2006, Reply to Mot. to Intervene, pp. 10-11.

Nevertheless, Plaintiff still did not seek to file any claim on behalf of the members. As a result, any claims for damages on behalf of the individual members of the Taxi Association are dismissed.

Defendants believe that VITA should be judicially estopped from pursuing damages because VITA has presented irreconcilably inconsistent theories of recovery. “In contrast to legal remedies like money damages, injunctive relief is an equitable remedy. [C]ourts of equity developed these remedies in order to provide relief that was unavailable in courts of law, [i]t is axiomatic that equitable relief is only available where there is no adequate remedy at law.”¹¹⁴ While the Court recognizes that VITA clearly stated a cause of action for damages in its Complaint, VITA has since waived its right to pursue those damages, based on its allegations that the damages were incalculable made to receive injunctive relief. Additionally, by VITA’s own admission, it recognized that the bulk of any damages are to individual taxi drivers, which appears to encompass the remainder of damages outside of the scope of those alleged for injunctive relief and determined to be incalculable.

As a result, the Court finds that VITA presented inconsistent theories in making its initial representation that damages were incalculable and then asserting that some damages are now in fact calculable. Further, the Court finds Defendants would be prejudiced if VITA was allowed to pursue damages, including discovery of damages. Therefore, VITA is judicially estopped from pursuing damages that it previously stated were incalculable and is foreclosed from seeking damages based on its award of equitable relief.

¹¹⁴ *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *11 (internal quotations and other citations omitted).

VI. Failure to Prosecute

Even though the Court finds that VITA is judicially estopped from asserting a claim for damages, the Court will consider Defendants' alternative basis for requested dismissal, failure to prosecute. Typically a motion to dismiss for failure to prosecute is governed by Fed. R. Civ. P. 41(b), which states "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."¹¹⁵ However, the sanction of dismissing a case under Fed. R. Civ. P. 41(b) is not available until the Court expressly weighs and considers each of the six factors articulated by the Third Circuit in *Poulis v. State Farm Fire and Cas. Co.*¹¹⁶ The Supreme Court of the Virgin Islands adopted the six *Poulis* factors in *Halliday v. Footlocker Specialty, Inc.*,¹¹⁷ which are as follows:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense."¹¹⁸

"Although a court must explicitly address and balance each of these factors in its analysis, not all of the six (6) factors need to be satisfied" or weigh in favor of dismissal for dismissal to be warranted."¹¹⁹

¹¹⁵ In the absence of a local statute, case law, or Superior Court of the Virgin Islands rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court by V.I. Super. Ct. R. 7. Dismissal under Fed. R. Civ. R. 41(b) is considered an adjudication on the merits.

¹¹⁶ *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

¹¹⁷ 53 V.I. 505 (V.I. 2010)

¹¹⁸ *Id.* at 510 (citing *Poulis*, 747 F.2d at 868).

¹¹⁹ *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 469 (V.I. 2013) (internal citation and citations omitted); *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 186 (V.I. 2012) (citing *Halliday*, 53 V.I. at 511).

A. The extent of the party's personal responsibility.

In analyzing the first factor in *Poulis*, the Third Circuit distinguished the instances in which plaintiff's counsel is responsible for the dilatory conduct from those where "there had been 'flagrant bad faith' on the part of the [client] as well as 'callous disregard' by their counsel of their responsibilities."¹²⁰ Here, Defendants allege VITA is solely responsible for the failure to prosecute this matter in a timely manner and assert Plaintiff has benefitted from the "seven (7) year gap in prosecution [from 1997 to 2004], as VITA has essentially granted itself a de facto permanent injunction via its failure to prosecute."¹²¹ Further, Defendants point to the fact that VITA failed to comply with the Court's October 31, 2014, Order by not filing a brief before November 14, 2014, and subsequently failing to file a brief at all, leading the Court to issue its Order on June 15, 2015, without VITA's response. Previously, the Court has found in a case pending for more than six years that "[a]lthough it would be reasonable for [the client] to rely to some extent on her counsel's diligence and dedication to move the matter forward, at some point the responsibility becomes that of the client's [sic] to ensure that the case is progressing."¹²² Here, Defendants contend that between 1997 and 2004, when the case remained pending without action, VITA was responsible for moving the matter forward, claiming that courts are unwilling to assume that attorneys refuse to prosecute their client's cases.¹²³

VITA responds that VITA was not responsible for moving for a permanent injunction, since the Court did not issue a scheduling order requiring it to do so within a certain length of time,

¹²⁰ *Poulis*, 747 F.2d at 868 (citing *NHL v. Metro. Hockey Club*, 427 U.S. 639, 640-641 (1976)) (The United States Supreme Court upheld the sanction of dismissal of the case under Fed. R. Civ. P. 37 for plaintiffs' failure to provide complete answers to interrogatories in the face of "several admonitions by the Court . . . [and] warnings that their failure to provide certain information could result in the imposition of [this] sanction").

¹²¹ Defs.' July 15, 2015, Mot. to Dismiss, p. 17.

¹²² *Sanchez v. Hughes*, 2011 V.I. LEXIS 16, *4 (V.I. Super. Ct., Mar. 21, 2011).

¹²³ *Id.* at *7.

and that the record in this case shows that VITA has in fact been prosecuting the damages-for-contempt phase of this case since it filed contempt motions in 2004. Further, VITA claims Defendants are responsible for any delay because Defendants refused to substantively answer discovery requests and initiated an appeal that effectively stayed the case until 2013, benefiting Defendants. However, VITA fails to address the seven year time gap or their failure to respond from November 2014 until their opposition to this motion on August 15, 2015.

Defendants reply by re-asserting that the burden to move the case forward was on VITA, regardless of the absence of a scheduling order, and argues that VITA's failure to seek a scheduling order is evidence of its dilatory conduct and its tactical decision to treat the preliminary injunction as a permanent injunction. Further, Defendants respond that VITA did not request discovery until mid-2006. Defendants defend any stay based on their appeal, primarily from 2006 through 2008, noting its success in overturning the contempt sanctions. Instead, Defendants highlight the fact that it was VITA that filed a "meritless appeal of clearly interlocutory order from the Appellate Division" to the Third Circuit, causing an additional three year delay from 2008 to 2011.

The Court is unconvinced by VITA's attempt to blame the delay in this case on Defendants' appeal. Moreover, VITA waited until 2006 to even attempt to file an amended complaint and to add the individual taxi drivers and since then has had numerous opportunities to seek leave to file an amended complaint based on violations of the Act that could justify relief, but has failed to do so. Unlike the circumstances in *Poulis*, which "guides under the assumption that a plaintiff wants to pursue his claim," VITA has failed to timely pursue its case.¹²⁴ Although the Court recognizes that the responsibility for failing to prosecute does not rest entirely with VITA, as it is unclear

¹²⁴ *Harvey v. Rawlins d/b/a Player's Club and Diamond Crest, LTD*, Case No. SX-07-CV-005 (V.I. Super. Ct., Nov. 5, 2015).

what advice was given by counsel, the Court finds this factor nonetheless weighs in favor of dismissal, given these circumstances.

B. The prejudice to the adversary.

Defendants assert they have been severely prejudiced by VITA's failure to prosecute. Determining prejudice, in terms of a motion to dismiss on that basis, means evaluating the "burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy" rather than irremediable harm.¹²⁵ The burden is generally "demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory behavior or increased difficulty in the opposing parties' ability to present or defend their claim(s) due to the improper behavior."¹²⁶ Additionally, delays in the discovery process can "impede[] a defendant's ability to prepare effectively a full and complete trial strategy."¹²⁷

This action has been pending since 1997, and Defendants allege that, due to the significant delay caused by VITA's failure to prosecute, the Defendants are facing the prospect of defending claims, with limited evidence, for which the factual basis occurred over eighteen (18) years ago with limited evidence. Furthermore, Defendants claim that they have been prejudiced because they have been forced to operate their businesses under a cloud of uncertainty for the past eighteen (18) years. Further, Defendants state they have been forced to defend meritless accusations of violations of the preliminary injunction and point to the fact that VITA has not alleged a single violation of the preliminary injunction since the Appellate Division issued its Order in 2008. Comparing the case to a similar District Court action, Defendants express concern over the

¹²⁵ *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 290-91 (V.I. 2010) (quoting *Majestic Const., Inc. v. JCB Int'l, Inc.*, 48 V.I. 437, 443 (D.V.I. App. Div. 2006)) (internal quotations omitted).

¹²⁶ *Molloy*, 56 V.I. at 189 (citations omitted); see also *Caravelle Land I, LLC v. USVI Mgmt. Corp.*, 2014 V.I. LEXIS 55, *7-8 (V.I. Super. Ct. 2014) (citing *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984)).

¹²⁷ *Watts*, 54 V.I. at 292 (citing *Carter v. Ryobi Electronics*, 250 F.R.D. 223, 229 (E.D. Pa. 2008)).

potential lack of evidence resulting from the poor record keeping of VITA, the possibility that relevant witnesses are now deceased or their memories have faded, and the likelihood that relevant documents have gone missing.¹²⁸

VITA notes that Defendants are unable to point to any violations of a scheduling order or any discovery requests outstanding because the case was stayed. Instead, VITA claims that it has been prejudiced by the delay caused by the appeals because Defendants failed to respond to discovery requests since before the stay. While Defendants maintain that they are the only ones prejudiced in this action and that VITA failed to preserve evidence, VITA counters that Defendants “spoiled” evidence in violation of their discovery obligations, specifically evidence related to the vouchers. Defendants claim that, while VITA cannot support their allegations of “spoiled” evidence, Defendants have documented several instances of VITA admitting to poor record keeping concerning this lawsuit.

Nevertheless, VITA admits that it failed to file a status report requested by the Court and “apologizes for this omission”, explaining the status report “apparently fell through the cracks during the period when there was substantial confusion in this case as to representation.”¹²⁹ VITA relies on the fact that it believes this was its only omission during the entire pendency of the case and points to Defendants’ failure to claim specific prejudice. However, the Court finds Attorney

¹²⁸ Defendants support their claims based on testimony from a District Court hearing involving events occurring from around 2006 to the present. *See* Ex. 27 District Court Hearing Transcript of March 30, 2015 (Attorney Rohn stating that “I want to remind this Court that the V.I. Taxi Association is a – predominantly made up of a group of elderly gentlemen. Most of whom are over 50. Many of them are over 70 who run the V.I. Taxi Association. They are not sophisticated people.”).

¹²⁹ VITA opposition at 21. Specifically, VITA claims that, during the fall of 2014, Attorney Griffiths was acting as lead counsel, but was appointed as Acting Attorney General, thus withdrawing from most of her cases. “Rohn, at the request of Griffiths, withdrew from this Superior Court case, but then Griffiths was terminated by VITA and Rohn re-noticed her appearance.”

Rohn's argument unpersuasive since she filed a notice of appearance on December 1, 2014, the same day as the motion for extension of time to respond to the Court's October 31, 2014, Order.

Unlike in other cases where plaintiffs have refused to participate in fashioning a workable scheduling order or failed to participate in discovery proceedings, making it difficult for a defendant to obtain crucial information imperative to developing a trial strategy, here, when prompted, Plaintiff has been responsive to discovery but has failed to timely move the case forward toward resolution. Additionally, it appears that both sides face similar challenges in terms of discovery and the potential lack of evidence from poor record keeping and the absence of relevant witnesses. However, "unlike a plaintiff, a defendant possesses no affirmative duty to take any steps to bring a case to trial prior to filing a motion to dismiss for failure to prosecute."¹³⁰ Thus, a defendant is not required to "incur the expense and inconvenience of conducting discovery if [the plaintiff's] inaction gave him the hope or expectation that the case would never be tried."¹³¹ Consequently, it appears VITA has impeded resolution on the merits.

Upon finding Defendants are prejudiced by the lack of prosecution, the Court must then "determine the extent of that prejudice in order to determine how heavily to weigh that factor as part of its balancing test."¹³² If the Court makes a finding of prejudice suffered as a result of the delay, the Supreme Court of the Virgin Islands instructs that this factor weighs in favor of dismissal "only slightly."¹³³ Here, the Court's determination rests on the inherent prejudice suffered by

¹³⁰ *Watts*, 54 V.I. at 292 (citing *Ely Valley Mines, Inc. v. Hartford Acc. and Indem. Co.*, 644 F.2d 1310, 1317 (9th Cir. 1981) ("Although delay caused by a defendant may be considered by the court, the primary responsibility for furthering a case is upon the plaintiff and his attorney") (other citations omitted)).

¹³¹ *Id.* (citing *Ternes v. Knispel*, 374 N.W.2d 879, 881 (N.D. 1985) (citations omitted)).

¹³² *Id.*

¹³³ *Id.* at 293 ("Under these circumstances, as well as the absence of any evidence in the record indicating that Two Plus Two was actually prejudiced, the Superior Court lacked a factual basis to find that the prejudice to Two Plus Two had been 'substantial.' Therefore, while the second *Halliday* factor does support dismissal because of the inherent prejudice Two Plus Two suffered as a result of the delay, it does so only slightly").

Defendants in Plaintiff's failure to pursue a permanent injunction, failure to seek leave to accurately file an amended complaint, and failure to respond to Defendants' motion, even after requesting an extension of time to file a response. Because there is no evidence in the record that Defendants have actually been prejudiced, this factor weighs only slightly in favor of dismissal.

C. A history of dilatoriness.

In addressing this factor in *Poulis*, the Third Circuit examined a party's history of meeting court ordered deadlines. For example, a party's repeated failure to comply with time limits imposed by the Court demonstrated a pattern of dilatoriness that was "intolerable,"¹³⁴ recognizing that "[i]f compliance is not feasible, a timely request for an extension should be made to the court."¹³⁵ Both the Third Circuit and the Supreme Court of the Virgin Islands have found that, to be considered dilatory, the circumstance must reflect a plaintiff's failure to comply with multiple orders of the Court.¹³⁶

Again, Defendants maintain that VITA has a long history of dilatoriness in this matter and rely on Plaintiff's failure to seek a permanent injunction after the Appellate Division of the District Court affirmed the Court's grant of a preliminary injunction to VITA in 1997. Defendants reassert that the burden to move the case forward was on VITA, while VITA responds it had no duty to pursue. Defendants maintain that VITA's failure to seek a scheduling order is evidence of VITA's dilatory conduct and VITA's tactical decision to treat the preliminary injunction as a

¹³⁴ *Poulis*, 747 F.2d at 868.

¹³⁵ *Id.*

¹³⁶ *Molloy*, 56 V.I. at 191 (citing *Poulis*, 747 F.2d at 868) (finding a history of dilatory behavior because "[u]nlike the *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982)] case, for example, where there was *only one failure to comply in a timely manner*, i.e. in obtaining local counsel, in this case there has been a pattern of dilatoriness."))

permanent injunction. VITA asserts that it has a history of diligent prosecution in this case with meritorious victories.¹³⁷

Further, Defendants point to Plaintiff's failure to respond to the Court's Order of October, 31, 2014, even after untimely filing for an extension of time on November 20, 2014. Significantly, the parties were ordered to submit briefs concerning the status of the case, the remaining matters that require the Court's attention, and whether the case should be dismissed or a hearing conducted on the issue of damages.¹³⁸ Attorney Rohn defended VITA's failure to respond based on confusion between counsel for VITA regarding representation. However, Attorney Griffiths had withdrawn as counsel by December of 2014, and Attorney Rohn filed a notice of appearance on December 1, 2014, the same day as the motion for extension of time to respond to the Court's October 31, 2014, Order. Defendants assert that Attorney Rohn and VITA have no excuse for failing to comply with the Court's Order, and the Court agrees. Without any reply from Plaintiff, the Court was forced to rule on the motion, but, instead of dismissing the case, determined it was appropriate to give Plaintiff another opportunity to respond to the instant motion.

Here, both parties have a history of seeking extensions, and the Court cannot fault either party for their untimeliness in this regard. While VITA maintains it was not required to pursue a permanent injunction, the Court disagrees, as the Plaintiff has the burden of pursuing the case on the merits. Nevertheless, since a finding of dilatoriness requires circumstances reflecting a

¹³⁷ VITA outlines its involvement in the procedural history as follows: VITA relied on the preliminary injunction until it determined that Defendants were violating the injunction, VITA defended the appeal, and then timely appealed to the Third Circuit. On remand, VITA filed summary judgment motions, requested discovery that was refused because of the stay, and obtained a victory on the issue of associational standing. Pl.'s August 17, 2015, Opposition, p. 21.

¹³⁸ The order was reduced to writing in an October 31, 2014, Order.

Plaintiff's failure to comply with multiple orders of the Court,¹³⁹ the Court is unable to make such a finding here since Defendants were unable to point to more than one instance.

The circumstances of this case are similar to those in *Molloy v. Independence Blue Cross*,¹⁴⁰ where the Supreme Court of the Virgin Islands found no history of dilatoriness, when, "after five years of vigorous litigation and two years of waiting on the trial court, the delay attributable to the [plaintiffs'] failure to respond to the [one order by the trial court] . . . is less than two months."¹⁴¹ Delays caused by the Court do not contribute to Plaintiff's history of dilatoriness. Here, significant delay was caused by the appeals, specifically the appeal to the Third Circuit, which stayed the case for three years. However, the Court is unable to fault either party for their appeals and the impact on the timeline for the case. Because the Court is unable to find a clear history of dilatoriness by Plaintiff in this case, this factor weighs against dismissal.

D. Whether the conduct of the party or the attorney was willful or in bad faith.

For the fourth factor, the Court must "examine whether Plaintiff's counsel has engaged in willful or flagrantly bad faith behavior."¹⁴² "Willfulness involves intentional or self-serving behavior."¹⁴³ In order for this factor to weigh in favor of dismissal, the Court is required to "point to specific evidence to justify its determination of willfulness or bad faith."¹⁴⁴ "When there is no

¹³⁹ *Molloy*, 56 V.I. at 191 (citing *Poulis*, 747 F.2d at 868) (finding a history of dilatory behavior because "[u]nlike the *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982)] case, for example, where there was only one failure to comply in a timely manner, i.e. in obtaining local counsel, in this case there has been a pattern of dilatoriness.").

¹⁴⁰ 56 V.I. 155 (V.I. 2012).

¹⁴¹ *Id.* at 190-191; see *Browne v. Gore*, 57 V.I. 445, 452 (V.I. 2012) (citing *Molloy*, 56 V.I. at 190) (The Supreme Court of the Virgin Islands explained that in *Molloy*, "plaintiffs did not engage in history of dilatoriness when '[t]he certified docket entries reflect that discovery had concluded, that the prior judge issued a January 11, 2005 Order of Readiness for Trial, and had decided the last pending motion on April 28, 2005,' for 'the two year delay [wa]s attributable entirely to the Superior Court for failing to set a trial date.'").

¹⁴² *Dospiva v. Murray*, 2015 V.I. LEXIS 31, *8 (V.I. Super. Ct., Mar. 30, 2015) (citing *Poulis*, 747 F.2d at 868).

¹⁴³ *Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 875 (3d Cir. N.J. 1994)).

¹⁴⁴ *Molloy*, 56 V.I. at 192 (citing *Poulis*, 747 F.2d at 868-69).

evidence of willfulness on the record, the Court must presume that [a party's] failure to respond to the prompting order was not willful and that this factor also does not favor dismissal.”¹⁴⁵ Delay is sufficient for a finding of willfulness or bad faith when there is “evidence on the record that Plaintiff has repeatedly ignored the Court's orders or flouted the Court's authority.”¹⁴⁶

While Defendants recognize the record does not contain specific instances of bad faith, Defendants maintain that, to the extent VITA had the obligation to move the case to final resolution and failed to do so, VITA's actions demonstrate bad faith. Specifically, Defendants argue that VITA added an additional 7.5 years to this litigation by obtaining a *de facto* permanent injunction without a ruling on the merits of the case. In VITA's response, it claims that “Defendants are trying to parlay their failure to move for relief from the injunction during this period-instead they engaged in self-help and willfully violated this Court's injunction-into a claim that VITA should somehow be punished for being satisfied with the injunctive relief they obtained.”¹⁴⁷

The Court agrees with Defendants that, although a specific instance of bad faith is not present in the record, VITA held the burden to pursue resolution on the merits and the delay was unreasonable, especially in light of the fact that the preliminary injunction has extended beyond the life of Act No. 5231. As a result, this factor weighs only slightly in favor of dismissal.

E. The meritoriousness of the claim or defense.

“In considering whether a claim or defense appears to be meritorious for this inquiry, we do not purport to use summary judgment standards. A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery

¹⁴⁵ *Caravelle*, 2014 V.I. LEXIS 55, at *10 (citing *Molloy*, 56 V.I. at 192) (internal quotations omitted).

¹⁴⁶ *Id.* at *12 (“Absent evidence on the record that Plaintiff has repeatedly ignored the Court's orders or flouted the Court's authority, delay is insufficient for a finding of willfulness or bad faith”) (citing *Adams*, 29 F.3d at 876).

¹⁴⁷ Pl.'s Aug. 31, 2015, Opposition, p. 22.

by plaintiff or would constitute a complete defense.”¹⁴⁸ Nevertheless, at early stages of litigation, where “little discovery and no evidence [has been] presented to the Court[,]” it is difficult for courts to conclude “with much certainty whether the Plaintiffs’ claims are meritorious.”¹⁴⁹

In ruling on the preliminary injunction, the Court found that VITA had shown a reasonable probability of success on the merits, but since 1997 the Court has not considered the actual merits of the claim. However, while Plaintiff failed to timely pursue a permanent injunction, the Act upon which the preliminary injunction was based expired in 2007.¹⁵⁰ As a result, Defendants maintain that VITA cannot have a valid claim for a permanent injunction in this matter based on violation of a statute that expired over eight (8) years ago and also that Plaintiff failed to state an appropriate action for damages. Additionally, Defendants believe that VITA does not have a meritorious claim pending because it has not made any new allegations of violations of the preliminary injunction, and the Appellate Division of the District Court rejected VITA’s claims for violations between 1997 and 2006 and did not remand the issue of sanctions back to the Superior Court. Again, Defendants maintain that VITA does not have a valid claim left to be decided by this Court. In response, VITA cites the Court’s June 15, 2015, Memorandum Opinion, in which the Court recognized that, although “the Act which formed the basis of the 1997 injunction expired and was replaced by a new Act, the Court is unwilling to recognize expiration as a defense for violations of a Court Order that occurred while the Act was in full effect.” Here, based on the foregoing analysis, the Court is satisfied that Defendants did not violate the preliminary injunction for the relevant period. Nevertheless, the Court clearly limited the events that could still qualify for relief to those related to the “franchise agreement and renewal under Act

¹⁴⁸ *Poulis*, 747 F.2d at 869-870 (citations omitted).

¹⁴⁹ *Caribbean Island Adventures, Inc. v. Marzano*, 2011 V.I. LEXIS 49, *8 (V.I. Super. Ct. 2011).

¹⁵⁰ See Defs.’ July 15, 2015, Mot. to Dismiss, at Ex. 2.

No. 5231, and the amended preliminary injunction from May 27, 1997.”¹⁵¹ As a result, the Court finds that VITA does not have meritorious claims for purposes of the *Halliday* factors, based primarily on the explanations above that VITA is not entitled to a permanent injunction, because of VITA’s prior award of equitable relief, and as a result of judicial estoppel.

F. The effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions.

Since dismissal is a sanction of last resort, the Court must “consider whether a lesser sanction would better serve the interests of justice.”¹⁵² “In general, a sanction should be directed toward the particular abuse that has occurred” and “may include excluding evidence, precluding witnesses from testifying, striking portions of pleadings, or imposing monetary sanctions to compensate the harmed party for reasonable expenses.”¹⁵³

Defendants maintain that the only appropriate sanction in this matter is dismissal of VITA’s Complaint and that all of the alternative sanctions fail to adequately remedy the prejudice to Defendants. Again, Defendants maintain that they can no longer receive a fair trial over eighteen (18) years after the relevant events occurred, given VITA’s own admissions that evidence has gone missing, witnesses have died or moved off-island, and the memories of the remaining witnesses have faded. VITA maintains that Defendants failed to allege any violations of a scheduling order, discovery obligation, or any other personal procedural rule or litigation obligation that VITA violated that would justify the extreme sanction of dismissal. Defendants disagree and believe that VITA’s intentional refusal to prosecute in conjunction with VITA’s meritless appeal of an

¹⁵¹ Defendant Ritz-Carlton also emphasized the fact that the preliminary injunction should be dissolved because the Plaintiff no longer has any conceivable legal basis for seeking a permanent injunction in this case because the Act which formed the basis for the injunction expired on its terms in 2007. Defendant Ritz-Carlton’s November 14, 2014, Joinder in Plantation Bay’s Brief in Response to Order of October 31, 2014.

¹⁵² *Caravelle*, 2014 V.I. LEXIS 55, at *10 (citing *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990)).

¹⁵³ *Andrews v. Gov’t of V.I.*, 132 F.R.D. 405, 413 (D.V.I. 1990).

interlocutory order to the Third Circuit, which delayed the case for an additional (3) years, denying Defendants the opportunity to defend their claims on the merits in a timely fashion, make dismissal the only option to cure the prejudice to Defendants.

VITA delayed prosecuting this case to resolution on the merits on numerous occasions and that the damages VITA is seeking could have been timely prosecuted years ago, even with the numerous stays during the appeals. However, the Court recognizes VITA is actively pursuing its case now, even if only because VITA is now faced with potential dismissal.

Although the Court finds that the *Poulis* factors slightly favor dismissal, except for lack of a history of dilatoriness, the Court recognizes that alternative theories of dismissal raised by Defendants, as discussed above, offer stronger support for dismissal of this case. Nevertheless, as an alternative theory, the Court still finds that dismissal is slightly justified under the analysis for failure to prosecute, but recognizes that this form of dismissal is traditionally reserved for cases where a plaintiff is currently failing to participate in an action, rather than for a plaintiff's failure to prosecute at the beginning of the action.

VII. Laches

As another option, Defendants claim that the doctrine of laches bars any claims for damages as sanctions arising from violations of the preliminary injunction between 1997 and 2003 and any monetary sanctions stemming from violations of the preliminary injunction that have not yet been alleged by VITA. Laches is an affirmative defense “that bars a plaintiff's claim where there has been an inexcusable delay in prosecuting the claim in light of the equities of the case and prejudice to the defendant from the delay.”¹⁵⁴ “Laches requires proof of (1) lack of diligence by

¹⁵⁴ *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 330 (V.I. 2007)(citations omitted);

the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”¹⁵⁵ Under Fed. R. Civ. P 8(c), laches is an affirmative defense used to respond to a complaint. Here, Defendants limit their argument of laches to VITA’s claims for sanctions resulting from alleged violations of the preliminary injunction, and not in response to allegations in the Complaint.

The Court entered a preliminary injunction in favor of VITA on March 10, 1997. In a motion for sanctions in May 2004, VITA asserted violations of the preliminary injunction occurring between 1997 and 2003. On February 6, 2006, VITA asserted violations of the injunction against the taxi and hotel defendants for the period of 1997 through 2005.¹⁵⁶ Defendants believe that VITA unreasonably delayed enforcing its rights, thereby greatly prejudicing Defendants ability to defend. Defendants point to the fact that VITA’s sanctions motion, VITA’s estimate of costs, and VITA’s motion for contempt all contain little or no actual evidence of the violations pre-dating 2003 and state that VITA failed to present evidence nine (9) years ago to support its assertions of the violations between 1997 and 2003. Further, Defendants claim that, since VITA has never alleged violations of the preliminary injunction between 2006 and 2007, any potential claims from this time period would also be barred by the doctrine of laches. Finally, Defendants claim that VITA failed to produce any evidence of violations when the Court held contempt hearings on June 24, 2005, and March 1, 2006.

VITA argues that Defendants are unable to raise laches as a defense since Defendants did not raise the defense on appeal from the first set of contempt hearings and that, after suit is filed, allegations of delay or failure to prosecute must be evaluated under the *Halliday* factors.

¹⁵⁵ *Id.* (citing *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534, 543, 5 L. Ed. 2d 551 (1961)).

¹⁵⁶ See Defs’ July 15, 2015, Mot. to Dismiss, Ex. 12.

Additionally, VITA claims that Defendants failed to articulate any procedural rule that would support a laches-based dismissal.

However, laches is an affirmative defense and must be pled and proved in the trial court before being raised on appeal.¹⁵⁷ While VITA claims that laches cannot be used to bar post-Complaint allegations of contempt, Defendants disagree and cite *Derek & Constance Lee Corp. v. Kim Seng Co.*, in which a district court's dismissal of a motion for civil contempt sanctions under the laches doctrine was upheld.¹⁵⁸ Defendants re-assert that VITA cannot now claim for the first time alleged violations of the preliminary injunction, which would require the Court to consider events from over eight (8) years ago involving Act No. 5231, which expired in 2007. While the Court agrees that Defendants would be prejudiced if forced to defend these claims based on the delay, the Court is unwilling to dismiss the claims based on laches, since the Supreme Court of the Virgin Islands has only recognized laches in terms of an affirmative defense in response to a Complaint.¹⁵⁹ In so ruling, the Court is by no means foreclosing arguments by parties in the future utilizing laches in other situations, but here, where the claims can be dismissed based on other doctrines, the Court finds the doctrine of laches inapplicable.

¹⁵⁷ *Haynes*, 61 V.I. at 576 n.18; *see also* Fed. R. Civ. P. 8(c).

¹⁵⁸ 467 F. App'x 696, 698 (9th Cir. 2012).


¹⁵⁹ *See In re the Suspension of Joseph*, 60 V.I. 540, 542 (V.I. 2014) ("Laches, an equitable defense, is distinct from the statute of limitations, a creature of law, and precludes an action if an omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party."); *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 330 (V.I. 2007)(citations omitted); *Haynes*, 61 V.I. at 576 n.18.

CONCLUSION

For the foregoing reasons, the Court will grant Defendants' July 15, 2015, Motion to Dismiss. An Order consistent with this Opinion shall follow.

Dated: June 8, 2016


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

Attest: Estrella H. George
Acting Clerk of the Court _____
by: 
Donna D. Donovan
Court Clerk Supervisor 6 / 10 / 2016

CERTIFIED A TRUE COPY

DATE: 6-13-16
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 
Camell A. Clarke
Court Clerk II