IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS,

PLAINTIFF,

V.

DARREN K. INDYKE, in his capacity as the EXECUTOR FOR THE ESTATE OF JEFFREY E. EPSTEIN and ADMINISTRATOR OF THE 1953 TRUST; RICHARD D. KAHN, in his capacity as the EXECUTOR FOR THE ESTATE OF JEFFREY E. EPSTEIN, and ADMINISTRATOR OF THE 1953 TRUST; ESTATE OF JEFFREY E. EPSTEIN; THE 1953 TRUST; PLAN D, LLC; GREAT ST. JIM, LLC; NAUTILUS, INC.; HYPERION AIR, LLC; POPLAR, Inc.; SOUTHERN TRUST COMPANY, INC.; JOHN AND JANE DOES,

DEFENDANTS.

Case No.: ST-20-CV-14

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

The Government of the United States Virgin Islands ("Government") hereby responds in opposition to the motion filed March 17, 2020 by Defendants Darren K. Indyke and Richard D. Kahn, Co-Executors of the Estate of Jeffrey E. Epstein ("Epstein Estate") and Co-Administrators of the 1953 Trust, to dismiss the First Amended Complaint. The Government states in opposition as follows.

INTRODUCTION

On January 15, 2020, the Government filed this action under the Criminally Influenced and Corrupt Organizations Act ("CICO"), 14 V.I.C. §§ 600 *et seq.* against the Epstein Estate and various Epstein-controlled entities. On February 5, 2020, the Government filed its Amended Complaint, adding, *inter alia,* Indyke and Kahn as Defendants in their capacities as Co-Executors of the Epstein Estate and Co-Administrators of the 1953 Trust.

The Government alleges that decedent Jeffrey E. Epstein engaged in a criminal sexual trafficking enterprise in the Virgin Islands, wherein he used his vast wealth and property holdings and a deliberately opaque web of corporations and companies to transport young women and girls to his privately-owned islands where they were held captive and subject to severe and extensive sexual abuse. Epstein committed suicide in prison in August 2019, after he was indicted and incarcerated on federal charges of trafficking and sexually abusing girls as young as age 14. Defendants Indyke and Kahn, in addition to being Co-Executors of the Epstein Estate, also are officers in several of the companies Epstein used in his criminal enterprise.

In their motion to dismiss, Defendants seek for the Epstein Estate and other entities and persons involved in Epstein's criminal enterprise to evade accountability as though none of the credibly-alleged sexual trafficking conduct ever occurred. They do this in part by portraying the Government and the remedies it seeks under CICO as somehow being at odds with the interests of Epstein's many victims. *See* Motion to Dismiss at 2. This invocation of Epstein's victims effectively concedes the truth of the Government's allegations, but the portrayal of conflict between the Government and Epstein's victims is false and meant as misdirection. The Government has placed Criminal Activity Liens on Epstein Estate property and assets used in the sex-trafficking enterprise precisely so that they will not be transferred or wasted, but instead will be preserved and their value may be used to satisfy the claims by Epstein's victims and the

Government without any further attempt to evade accountability. After the Government expressed concerns regarding certain provisions in the proposed victim compensation fund that violated the laws and public policy of the Virgin Islands, numerous improvements were made to the compensation program, agreed to by victims' counsel, the Government, and the Estate, and approved by the Probate Court. The Government since has released $4.36 million from its Criminal Activity Liens for the program's administrative expenses to launch the fund.

Once the false conflict between the Government and Epstein's victims is cleared away, Defendants' motion is no more than a series of misapplied legal arguments that cannot be reconciled with CICO or other Virgin Islands law giving the Government expansive enforcement power and remedies to redress, punish, and deter the kind of unlawful conduct at issue. The Court therefore should deny the motion to dismiss in its entirety.

STATEMENT OF FACTS

A. Jeffrey Epstein's Alleged Child Sex-Trafficking Enterprise

The Government filed its operative First Amended Complaint ("FAC") against the Epstein Estate, Indyke, Kahn, and various Epstein-owned entities on February 5, 2020. The Government alleges that decedent Jeffrey E. Epstein was a resident of the Virgin Islands and maintained a residence since 1998 on Little St. James Island, which he owned. FAC, ¶ 5. In 2016, he purchased a second island—Great St. James. *Id.* By this time, he was a registered sex offender because he was convicted in Florida of procuring a minor for prostitution. *Id.*, ¶ 6.

The Government alleges that Mr. Epstein for decades conducted an enterprise (the "Epstein Enterprise") whereby he used his web of businesses in the Virgin Islands to transport female victims, many of them children, to his privately-owned Little St. James Island, where they were sexually abused, injured, and held captive. *Id.*, ¶¶ 40-41. Flight logs show that between 2001 and 2019, girls and young women were transported to the Virgin Islands and then helicoptered to Little

St. James. *Id.*, ¶ 46. Air traffic controller reports state that some victims appeared to be as young as 11 years old. *Id.*, ¶ 51. Mr. Epstein and his associates lured these girls and young women to his island with promises of modeling and other career opportunities. *Id.*, ¶ 49. Once they arrived, they were sexually abused, exploited, and held captive. *Id.*

Mr. Epstein's privately-owned islands in the Virgin Islands were essential to the sex-trafficking enterprise. Little St. James is a secluded, private island, nearly two miles off-shore from St. Thomas with no other residents. *Id.*, ¶ 66. It is accessible only by private boat or helicopter, with no public or commercial transportation servicing the island. *Id.* When two victims, one age 15, attempted to escape from Little St. James, Mr. Epstein organized search parties that located them, returned them to his house, and then confiscated the 15-year old girl's passport to hinder her ability to escape again. *Id.*, ¶¶ 57-58. Mr. Epstein's acquisition of the second island—Great St. James—in 2016 provided an additional layer of security, allowing him to better ensure that authorities could not observe the sex-trafficking activity on Little St. James and that the victims could not escape. *Id.*, ¶ 67.

Mr. Epstein's Virgin Islands-based corporations and companies also played central roles in the criminal sex-trafficking enterprise. Defendant Plan D, LLC knowingly and intentionally facilitated the trafficking scheme by flying underage girls and young women into the Virgin Islands to be delivered into sexual servitude. *Id.*, ¶ 97. Defendants Great St. Jim, LLC and Nautilus, Inc.—for which Defendants Indyke and Kahn served, respectively, as Secretary and Treasurer—knowingly participated in the Epstein Enterprise and facilitated the trafficking and sexual servitude of underage girls and young women by providing the secluded properties at, from, or to which Epstein and his associates could transport, transfer, maintain, isolate, harbor, provide, entice, deceive, coerce, and sexually abuse them. *Id.*, ¶¶ 23-29, 98.

Defendant Southern Trust Company, Inc., of which Epstein was President/Director and Defendants Indyke and Kahn were respectively Secretary/Director and Treasurer/Director, fraudulently obtained tens of millions of dollars in tax exemptions from the Virgin Islands between 2012 and 2019. *Id.*, ¶¶ 37, 112. Southern Trust Company held itself out as providing "cutting edge consulting services" in the area of "biomedical and financial informatics." *Id.*, ¶¶ 104-106. In fact, it had only one full-time employee working on information technology before 2019, while numerous other administrative or support employees performed personal services for Epstein, and the company itself existed solely or primarily to secure tax benefits that helped support his criminal activities and properties in the Virgin Islands. *Id.*, ¶¶ 107-111, 113-114.

B. The Government's CICO Counts Against Defendants

The Government alleges that Defendants—the Epstein Estate and executors, as successors to Jeffrey Epstein, and other participants in the Epstein Enterprise—violated CICO by committing and conspiring to commit multiple criminal human trafficking offenses based upon the foregoing sex-trafficking conduct. *See id.*, ¶¶ 115-170 (Counts One through Eight). The Government further alleges that Defendants violated CICO by committing and conspiring to commit various child-abuse, neglect, rape, unlawful-sexual-contact, prostitution, and sex-offender-registry-related offenses based upon the foregoing sexual-abuse conduct. *See id.*, ¶¶ 171-258 (Counts Nine through Nineteen). The Government also alleges that Defendants engaged in a civil conspiracy to conceal the unlawful sexual abuse alleged. *See id.*, ¶¶ 281-287 (Count Twenty-Two).

In addition, the Government also alleges that Defendants violated CICO by committing and conspiring to commit fraudulent conveyances and fraudulent claims upon the Government based upon Epstein's transfers of assets in the days immediately preceding his jailhouse suicide and upon the foregoing Southern Trust Company tax benefit-related conduct. *See id.*, ¶¶ 259-280, 288-306 (Counts Twenty, Twenty-One, Twenty-Three, and Twenty-Four).

The Government seeks as relief for these Counts, in relevant part, civil penalties for each violation of law, treble damages, and compensatory and punitive damages for Defendants' civil conspiracy. *Id.*, Prayer for Relief ¶¶ J-L, O. The Government further seeks equitable relief, including but not limited to disgorgement of all ill-gotten gains, as warranted pursuant to 14 V.I.C. § 608(c)(4), to protect the rights of victims and innocent persons in the interest of justice and consistent with CICO's purposes. *Id., Prayer for Relief* ¶¶ N, P. In addition, the Government also seeks forfeiture and divestiture in favor of the Government as to all of Defendants' interests in any real and personal property in the U.S. Virgin Islands used to facilitate or further the goals of the criminal Epstein Enterprise, including but not limited to Little St. James and Great St. James Islands, and in any proceeds or funds obtained by Defendants during the course of the criminal Epstein Enterprise. *Id.*, Prayer for Relief ¶¶ D-F.

LEGAL STANDARDS

A motion to dismiss under V.I. R. Civ. P. 12(b)(6) must be decided based upon V.I. R. Civ. P. 8's pleading standards. The Virgin Islands is a "Notice" pleading jurisdiction. Under Rule 8(a)(2), a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief – because this is a notice pleading jurisdiction . . . ." Rule 8's adoption "eliminates the [federal] plausibility standard and instead will permit a complaint so long as it adequately alleges facts that put an accused party on notice of claims brought against it." *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (internal quotation marks and citation omitted); *see also* V.I. R. Civ. P. 8, Comment (this approach "declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.").

In applying this standard, the Court must "'view the facts alleged in the pleadings and the inferences to be drawn from these facts, in the light most favorable to the plaintiff.'" *Pedro v.*

Ranger Am. of the V.I., Inc., 70 V.I. 251, 264 (Super. Ct. 2019) (quoting *Benjamin v. AIG Ins. of P.R.*, 56 V.I. 558, 566 (V.I. 2012)).

A motion to dismiss under V.I. R. Civ. P. 12(b)(1) for alleged lack of subject-matter jurisdiction that raises a facial attack on the pleadings is "similar to a Rule 12(b)(6) motion to dismiss," *Brewley v. Gov't of the V.I.*, 59 V.I. 100, 102 (V.I. Super. Ct. 2012), and is decided under the same standard. *See, e.g., Nibbs v. Gov't of the V.I.*, No. ST-13-CV-520, 2015 V.I. LEXIS 120, at *7 n.18 (Super. Ct. Sep. 30, 2015) ("A facial attack on the court's jurisdiction filed pursuant to Rule 12(b)(1) is reviewed under the same standard applicable to a Rule 12(b)(6) motion . . . .").

ARGUMENT

In their Motion to Dismiss, Defendants raise a series of arguments that, if accepted, would nullify the Government's enforcement authority under CICO and other laws where a primary wrongdoer is deceased and his or her property and assets used in connection with the wrongful conduct go to probate. Indeed, some of these arguments would nullify the Government's enforcement authority altogether. This is contrary to CICO's express provisions, to other well-established Virgin Islands law giving the Attorney General authority to redress, punish, and deter unlawful conduct, and also to the estate administration law that Defendants invoke. The Court therefore should reject each of Defendants' arguments as set forth below.

A. The Doctrine of "Prior Exclusive Jurisdiction" and the "Probate Exception" Do Not Apply to the Government's Counts herein.

1. Prior Exclusive Jurisdiction

Defendants argue that the Court should dismiss the FAC pursuant to the "prior exclusive jurisdiction" doctrine based upon the pending probate action because "the Government brings an *in rem* action, seeking the Estate's divestiture of property and the forfeiture of that property to the Government." Motion to Dismiss at 9-10. This is incorrect.

The "prior exclusive jurisdiction doctrine holds that 'when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.'" *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (quoting *Marshall v. Marshall*, 547 U.S. 293, 211 (2006)). Thus, it "does not generally apply to situations where one action is in rem and the other in personam." *Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 192 (2d Cir. 2018). That is precisely the case here.

The Government's CICO Counts against the Epstein Estate (and other Defendants) arise under statutory provisions that are *in personam* in nature. As the Supreme Court has explained, "in general an action is considered *in personam* when it is 'brought against a person rather than property.'" *In re Najawicz*, 52 V.I. 311, 332-33 (2009) (quoting *Black's Law Dictionary* (8th ed. 2004) at 32). In *Najawicz*, the Supreme Court held that "CICO's criminal forfeiture provisions are *in personam* in nature" because "it is clear that forfeiture under 14 V.I.C. § 606 is a punishment imposed upon the owner of the property after he has been found guilty of violating CICO, rather than an action brought specifically against [Defendant's] property." *Id.* at 333.

As with the criminal forfeiture sought in *Najawicz*, the Government's Counts here are based upon Epstein's and the living Defendants' "conduct constituting a violation" of the Act, and its entitlement to this relief will vest when it "proves the alleged violation[s] by a preponderance of the evidence." 14 V.I.C. § 607.[1] Since the liability of decedent Epstein and the living Defendants is central to the Government's entitlement to forfeiture and other CICO remedies, this most clearly is an *in personam* action. *See Najawicz*, 52 V.I. at 333 ("'In contrast, criminal or *in*

[1] This Government enforcement action under CICO thus is markedly different from the type of civil forfeiture case that is deemed *in rem* in nature because the "property is the defendant in the case" and "[t]he innocence of the owner is irrelevant-it is enough that the property was involved in a violation to which forfeiture attaches.'" *In re Najawicz*, 52 V.I. at 332 (quoting *United States v. Sandini*, 816 F.2d 869, 872-73 (3d Cir. 1987)).

personam forfeiture differs because its prime objective is punishment of the owner. The owner or possessor of the property is the defendant, and the burden of proof falls on the government. Insofar as the forfeiture rests on illegal activity, the elements of the underlying crime must be established. . . .'") (quoting *United States v. Sandini*, 816 F.2d 869, 872-73 (3d Cir. 1987)); *see also United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985) ("RICO . . . imposes forfeiture directly on the individual as part of criminal prosecution rather than a separate *in rem* action against the property.") (internal quotation marks and citation omitted).

The prior exclusive jurisdiction doctrine thus does not apply to this *in personam* action, and Defendants' motion to dismiss on this ground should be denied.

2. The Probate Exception

So, too, should the Court reject Defendants' related argument for dismissal based upon the "probate exception." *See* Motion to Dismiss at 10-12. The probate exception primarily addresses the allocation of jurisdiction between state and federal courts. *See, e.g., Marshall v. Marshall*, 547 U.S. 293, 298 (2006) ("Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions."); *Wells Fargo, N.A. v. Estate of Pond*, Civil Action No. 2010-104, 2012 U.S. Dist. LEXIS 45366, at *15 (D.V.I. March 30, 2012) ("'[U]nder [the] 'probate exception' to diversity jurisdiction, federal courts cannot exercise jurisdiction over matters that would interfere with 'general jurisdiction of the probate or control of the property in the custody of the state court.'") (quoting *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 226 (3d Cir. 2008)).

Although some states also have chosen to apply the probate exception to state courts of concurrent jurisdiction, *see* Motion to Dismiss at 10 (citing *Burt v. R.I. Hosp. Trust Nat'l Bank*, No. PC/02-2243, 2006 R.I. Super. LEXIS 91 (R.I. Super. Ct. July 26, 2006)), Defendants cite no

cases where Virgin Islands Courts have done so. *Cf. Wells Fargo*, *supra*, 2012 U.S. Dist. LEXIS 45366, at *15 (discussing "'probate exception' to diversity jurisdiction"). Nor should they.

The probate exception is meant to preserve the limited jurisdiction of federal courts by excluding matters deemed local in nature and thus appropriate for state courts. This jurisdiction-limiting doctrine also is of dubious vintage. *See, e.g.*, *Marshall*, 547 U.S. at 299 ("Neither [the domestic relations nor the probate exception] is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history."). Since this case presents no question of federal court jurisdiction, no Virgin Islands law supports or should support applying the probate exception.

More fundamentally, this doctrine does not apply to limit this Court's jurisdiction here. The U.S. Supreme Court made clear that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Marshall*, *supra*, 547 U.S. at 312. But it "does not bar federal courts from adjudicating matters outside those confines," such as claims involving "a widely recognized tort." *Id.*; *see also Leskinen v. Halsey*, 571 F. App'x. 36, 38 (2d Cir. 2014) ("Nothing in the record demonstrates that Leskinen seeks to reach a res in the custody of a state court. Insofar as she sues for racketeering, common law fraud, willful negligence, and negligent misrepresentation, the relief sought may be at odds with concluded state probate proceedings, but the claims do not . . . ask the district court to administer an estate, probate a will, or perform another purely probate matter.").

The Government's Amended Complaint alleges that decedent Jeffrey Epstein and a network of affiliated entities and individuals violated CICO and other Virgin Islands law by fraudulently funding and operating a sex-trafficking enterprise in the Virgin Islands for over two decades. *See* FAC, ¶¶ 40-45. It does not seek to engage this Court in administering an estate or

probating a will, but rather in making precisely the rulings on legal and factual sufficiency, discovery, evidentiary, and other matters expressly vested in in this Court by CICO, 14 V.I.C. § 607(a), and regularly handled by this Court -- not by a probate court. *See generally Marshall*, 547 U.S. at 312 ("[N]o sound policy considerations militate in favor of extending the probate exception to cover the case at hand. Trial courts, both federal and state, often address [tortious] conduct of the kind Vickie alleges. State probate courts possess no special proficiency in handling such issues.") (internal quotation marks and citations omitted).

Defendants fall back on arguing that "the Government has issued Liens purporting to freeze all assets of the Estate, and has maintained that the Estate's Co-Executors cannot pay any of the ongoing expenses of the Estate without the Attorney General's prior review and approval." Motion to Dismiss at 11. These are not grounds for dismissal for two related reasons.

First, Defendants emphasize the Government's liens in order to portray this case again as an *in rem* action when, as demonstrated in § A.1, *supra*, the Government's CICO Counts are *in personam* in nature. *See also Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 259 n.12 (3d Cir. 2014) ("There are three circumstances in which the probate exception to jurisdiction applies: when the court is working to probate or annul a will, administer a decedent's estate, or ***assume in rem jurisdiction over property that is in the custody of the probate court.*** 'It does not bar federal courts from adjudicating matters outside those confines within federal jurisdiction.'") (quoting *Marshall*, 547 U.S. at 311-12) (emphasis added).

Second, CICO expressly authorizes the Attorney General upon filing a civil action to place a Criminal Activity Lien on property and assets used to carry out an unlawful enterprise, 14 V.I.C. § 610(a), (e), and gives the Attorney General authority to determine the terms and conditions for their release. 14 V.I.C. § 610(r). The Attorney General has appropriately exercised this authority to ensure that ***both*** the statute's law-enforcement objectives and Estate interests in legitimate

administration are served by approving release of $7.5 million for administration and preservation expenses to date. *See* Ex. A (March 9, 2020, 8:26am email for $5 million release and March 9, 2020, 7:30pm email for $2.5 million release). These are significant sums.

While the Attorney General has strived to ensure that both statutory law-enforcement and legitimate estate administration objectives are served, Defendants Indyke and Kahn try to jettison law-enforcement altogether through their motion. By their argument, *any* cause of action for damages or penalties based on a decedent's unlawful conduct would be deemed to interfere with probate and thereby strip this Court of jurisdiction. Defendants' motion to dismiss thus seeks to use Epstein's jailhouse suicide as a get-out-of-jail-free card and allow Epstein's beneficiaries to retain the instrumentalities of the enterprise at the ultimate expense of its victims.

Since the probate exception (like prior exclusive jurisdiction) does not apply, the Court should deny Defendants' motion to dismiss on these grounds.

B. The Probate Rules Invoked by Defendants Do Not Apply.

Defendants relatedly contend that the Government's CICO Counts are barred for failure to follow the procedural requirements of 15 V.I.C. § 606. *See* Motion to Dismiss at 13-15. This, too, is incorrect. The Government's CICO and common law causes of action based upon decedent Jeffrey Epstein's creation and operation of a sex-trafficking enterprise are not a "claim" to recover a debt from the Estate as is covered by § 606.

Section 606's timing and notice requirements apply only to a "claim" against an executor or administrator. 15 U.S.C. § 606(b). In *Ottley v. Estate of Bell*, 61 V.I. 480 (V.I. 2014), the Supreme Court addressed an action for partition of real property brought by a half-owner against the estate of the other half-owner and her heirs, who argued that the action was invalid for failure to comply with § 606(b). *See id.* at 485. The Supreme Court reversed dismissal of the action, holding that "an action for partition is not a 'claim' that is required to be presented to an estate's

executor or administrator under section 606." *Id.* at 498. The Court explained that § 606's coverage of "'claims' contemplates the debts that the deceased incurred during their lifetime and which a creditor is attempting to recover from the estate," whereas "[a]n action for partition is not an attempt to recover debt or property from an estate." *Id.* at 498-99.

The same is true as to the Government's request under CICO for forfeiture and divestiture. Since the Government has statutory causes of action that it seeks to enforce, and not a debt that it seeks to collect, 15 V.I.C. § 606's procedural requirements do not apply.

Nor do they apply on the ground that the Government seeks to recover "property" from an estate. As discussed, the Government's lien and forfeiture remedies arise through its CICO enforcement authority based upon decedent Epstein's and the other Defendants' allegedly criminal *conduct*, and not solely by virtue of their ownership of the property. *See* § I.A, *supra.*; *see also* 14 V.I.C. § 607(a) (Government's right to CICO remedies vests upon proof of criminal activity in violation of Act). By Defendants' argument, any claim for monetary relief under CICO would be precluded where assets available to satisfy the judgment are subject to probate. But the Legislature has created no such limitation. Since the Government's CICO Counts and remedies are based upon Epstein's (and other Defendants') allegedly criminal conduct, they are not claims for property owed or debt incurred during his lifetime covered by 15 V.I.C. § 606.[2]

[2] Defendants' citation to *Weinstein v. Carrane*, 1992 WL 151551 (N.D. Ill. June 22, 1992), *see* Motion to Dismiss at 14, does not support a contrary conclusion. In *Weinstein*, the court addressed state common law and RICO claims against the executor of the estate of a law firm partner of the alleged wrongdoer, which did not allege that the partner knew of the allegedly unlawful activity. *See* 1992 WL 151551, at *1. Based upon the facts presented, the Court dismissed the claims pursuant to the Illinois Probate Act without specifically addressing the RICO claim, finding that the "Plaintiffs have offered no basis in fact for the court to conclude that [the executor] could have reasonably ascertained a claim existed against [the deceased partner]." *Id.* at *2. This unpublished decision involving private RICO and common law claims not reasonably ascertainable by an executor has no bearing here, where the Government's claims are based upon conduct the Co-Executors are alleged not only to have known about, but to have directly participated in.

The Court thus should reject Defendants' arguments for dismissal based upon § 606.

C. The Government's Counts One Through Eighteen are Timely.

Defendants next incorrectly contend that Counts One through Eighteen must be dismissed for failure to plead a predicate act within CICO's statute of limitation. *See* Motion to Dismiss at 15. In the Virgin Islands, a statute of limitations is not grounds for a motion to dismiss. It raises a factual issue for summary judgment or trial. *See United Corp. v. Hamed*, 64 V.I. 297, 305 (2016) ("[A] statute-of-limitations defense was an issue of fact that must be decided by a jury. We agree."); *Gerald v. R.J. Reynolds Tobacco Co.*, 68 V.I. 3, 136 (Super. Ct. 2017) (Dunston, P.J.) ("Application of the discovery rule is typically a question of fact because it rests on when a party knew or should have known of its injury. An application of the fraudulent concealment tolling doctrine is likewise a factual inquiry that usually must be resolved by the trier of fact at trial.").

Defendants present a baseless attack on the sufficiency of the pleadings, as the Government satisfies all pleading requirements of the Virgin Islands Rules of Civil Procedure. The Government alleges a continuous pattern and practice of abusing minors and women in the Virgin Islands. *See* FAC, ¶¶ 40-104. Importantly, the Government alleges not only abuse of minors and women, but also a pattern and practice of concealing and funding the Epstein Enterprise's illicit activities. *See id.*, ¶¶ 93-104. These actions, occurring over a period of several decades, and only stopping with Epstein's arrest in 2019, are predicate acts through which the Epstein Enterprise was able to carry out and continue its unlawful scheme. Defendants' cite **no** supporting case law for their contention that one incident cannot constitute a predicate act, or that the Complaint's allegations cannot be read cumulatively to establish a pattern and practice under CICO. Therefore, Defendants' Motion to Dismiss Counts One through Eighteen must be denied.

When assessing CICO causes of action, courts look to the allegations in the Complaint as a whole. *See Harbison v. Auto Depo, LLC.*, No. ST-2016-CV-0000146, 2017 WL 2267000, at *5

(V.I. Super. Ct. May 24, 2017) (holding the CICO pleading requirement of predicate acts satisfied when considering the complaint as a whole); *Jefferson v. Bay Isles Assocs., L.L.L.P.*, 59 V.I. 31, 56 (Sup. Ct. 2011) (same). A plaintiff must "allege the defendants are an enterprise, or are associated with an enterprise, that engaged, either directly or indirectly, in a pattern of criminal activity." *Gov't of U.S.V.I. v. ServiceMaster Co., LLC*, No. SX-16-CV-700, 2019 WL 6358094, at *11 (Nov. 27, 2019). A pattern of criminal activity requires "'two or more' criminal acts, related to the enterprise, but not isolated acts, and at least one act must have been a felony." *Id.* The action "may be commenced within five years after the conduct made unlawful under section 605 [Violations], or when the cause of action otherwise accrues or within any longer statutory period that may be applicable." 14 V.I.C. § 607(h).

Defendants ask the Court to narrowly construe § 607 to include only deeds constituting predicate acts that occurred within five years of the Complaint. *See* Motion to Dismiss at 15. Additionally, they focus only on the instances of abuse, instead of the criminal enterprise as a whole. For this overly narrow interpretation, Defendants again cite no case law. Section 607 merely requires that an action be filed within five years of the "conduct made unlawful under section 605." 14 V.I.C. § 607(h). The Government has done so here.

The Government alleges a systematic abuse of minors and women occurring in the Virgin Islands over several decades until Epstein's arrest in July 2019. *See* FAC, ¶¶ 40-104. The Epstein Enterprise brought minors and women to the Virgin Islands with the explicit goal of sexually abusing them. *Id.* The Amended Complaint also alleges the underlying mechanism by which the Epstein Enterprise helped facilitate and perpetuate the abuse, including multiple acts of concealment and funding within the limitations period, such as Epstein's purchase of Great St. James, his exclusion of Government investigators, and his tax fraud. *Id.*, ¶¶ 66-104. These

allegations also constitute "'two or more' criminal acts, related to the enterprise," to plead an action under CICO. *See ServiceMaster*, *supra*, 2019 WL 6358094, at *11.

When the Amended Complaint's allegations are collectively considered, they are timely under CICO. *See, e.g.*, *Jefferson*, 59 V.I. at 56; *Harbison*, 2017 WL 2267000, at *5. As in *Jefferson*, the Amended Complaint contains numerous examples of abuse, such as forcing minors and young women to perform massages and sex acts, that establish Epstein's and his Enterprise's pattern and practice of abusing minors and young women, which only stopped with his arrest in July 2019. FAC, ¶¶ 56-65; *Jefferson*, 59 V.I. at 56. The Government thus more than adequately alleges conduct and an enterprise that continued well into the limitations period.

Ignoring the bulk of the Amended Complaint and its references to a mountain of evidence encompassing several decades of the Epstein Enterprise's unlawful acts, Defendants contend the allegations set forth in a single paragraph (FAC, ¶ 51) fail to establish a predicate act under CICO. Defendants intentionally misinterpret the conduct alleged in this paragraph as a one-off incident, *see* Motion to Dismiss at 15, when its plain language suggests otherwise: "***As recent[ly] as 2018***, air traffic controllers and other airport personnel seeing Epstein leave his plane with young girls some of whom appeared between the age of 11 and 18 years." FAC, ¶ 51 (emphasis added). Air traffic controllers and airport personnel saw Epstein with minor children multiple times in the five-year period. *Id.* The allegations, on their face, reflect multiple occasions in the last five years in which Epstein transported women and girls to the Virgin Islands, supporting an inference, particularly in the context of the other allegations of the Amended Complaint, that Epstein trafficked and sexually abused these victims here.

Section 607(h) also does not preclude application of common law doctrines for tolling a statute of limitations. The Government's extensive allegations here readily invoke two of these doctrines—fraudulent concealment and continuing violation. Each is addressed below.

First, this Court has adopted the fraudulent concealment tolling doctrine, explaining its application as follows:

> In order to toll the statute of limitations for fraudulent concealment, the plaintiff must allege and prove: (1) that the defendant affirmatively concealed or failed to disclose despite a duty to do so, material facts critical to plaintiff's cause of action; (2) that the defendant knew or had reason to know that the material fact had been concealed or suppressed; (3) that the defendant's conduct prevented plaintiff from discovering the nature of the claim within the limitations period; and (4) that the plaintiff could not have discovered the facts to identify the particular cause of action despite reasonable care and diligence.

Gerald, *supra*, 68 V.I. at 136 (citation omitted). Here, the Government alleges in detail the measures Epstein Enterprise participants took to conceal their sex-trafficking and other conduct related to funding and maintaining the Enterprise from Government detection. *See* FAC, ¶¶ 25, 29, 66, 74-75 (use of privately-owned islands); ¶¶ 34, 36, 46-47 (use of private transport to the islands); ¶ 63 (use of charitable foundations to conceal victim compensation); ¶ 67 (use of straw purchaser in acquisition of Great St. James Island to conceal involvement of Epstein as sex-offender); ¶¶ 76-77, 90-91 (employee confidentiality requirements); ¶¶ 70, 81, 83 (obstruction of government investigation); ¶ 82 (deception as to Epstein's travel as sex offender); ¶¶ 105-113 (Southern Trust Company tax fraud, concealment of true uses of funds). These allegations provide a more-than sufficient basis for allowing Counts One through Eighteen to go forward.

Second, under the continuing violations doctrine, "when a claim involves continuing or repeated conduct, the limitations period does not begin to run until the date of the last injury or when the wrongful conduct ceased." *Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 796 (2015) (quotation marks and citations omitted). Here, too, the Government alleges facts showing that Epstein Enterprise engaged in unlawful sex-trafficking conduct occurring continuously over the course of decades. *See* FAC, ¶¶ 34, 46-48, 51 (flight logs and other sources show repeated transport of underage girls and young women to Virgin Islands and then to Epstein's private island

between 2001 and 2019). Epstein Enterprise participants also engaged in continuous conduct to conceal their sex-trafficking during this period, especially in and after 2011 when Epstein was a registered sex offender. *See id.*, ¶¶ 73-92. So, too, did the Epstein Enterprise engage in continuous conduct to fraudulently obtain funding through Defendant Southern Trust Company's tax fraud on the Government between 2012 and 2019. *See id.*, ¶¶ 104-114. These extensive allegations of continuing unlawful conduct between at least 1998 and 2019 also provide a more-than sufficient basis for allowing Counts One through Eighteen to go forward.

These allegations present questions of fact for the jury to decide in determining the scope of the Epstein Enterprise's unlawful conduct that the Government may redress and punish through this action. *See, e.g., Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 469 (Super. Ct. 2017) ("Plaintiffs having adequately pled facts that plausibly suggest the fraudulent concealment tolling doctrine applies, the ultimate applicability of the doctrine depends on the resolution of factual issues, which must take place on the merits and not at the motion to dismiss stage."); *Glasgow v. Veolia Water N. Am., Operating. Servs., LLC*, No. 2009/019, 2010 U.S. Dist. LEXIS 99570, at *22-23 (D.V.I. Sept. 21, 2010) ("[T]wo specific allegations of discrimination supported continuing violation theory at motion to dismiss because at this stage is not required to plead with particularity all facts which support his claim.") (quotation marks and citations omitted). Since the Government's pleadings satisfy the statutory requirements of § 607(h) and (j), Counts One through Eighteen are timely and should not be dismissed.

D. The Government's CICO Counts are Based Upon "Criminal Activity" as Defined by the Statute.

Defendants Indyke and Kahn next contend that 17 of the Government's 23 CICO Counts must be dismissed for failure to allege "criminal activity" under the Act because these counts reference crimes that are not specifically listed within CICO. *See* Motion to Dismiss at 16-17

(citing FAC, Counts 1-16 and 19 as "alleg[ing] violations of Virgin Islands statutes that are not included in CICO's definition of 'criminal activity,' and thus cannot form the basis for a CICO claim."). Defendants here fundamentally misconstrue CICO's language and scope.

Under CICO, it is a violation of the Act to engage in "criminal activity." 14 V.I.C. § 605(a)-(d). The Act expansively defines "criminal activity" as follows:

> 'Criminal activity' means engaging in, attempting to engage in, conspiring to engage in, or soliciting or intimidating another person to engage in the crimes, offenses, violations or the prohibited conduct ***as variously described in the laws governing this jurisdiction including*** any Federal criminal law, the violation of which is a felony ***and, in addition***, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows . . . .

14 V.I.C. § 604(e) (emphasis added). Defendants' argument to dismiss 17 of the Government's Counts, all of which reference Virgin Islands Code criminal provisions that Defendants violated, would require the Court to ignore the plain language of the statute and contort its words to mean their opposite. The statutory phrase "laws governing this jurisdiction" would mean *not* all laws governing this jurisdiction, but rather *only* those laws specifically listed. The term "including" would become one of *exclusion*. And the term "in addition" would mean "but only." The Court should reject this argument for two related reasons.

First, CICO commands that its provisions "shall be liberally construed to achieve its remedial purpose." 14 V.I.C. § 602; *see also People of the Virgin Islands v. McKenzie*, 66 V.I. 3, 19 (Super. Ct. 2017) ("This interpretation is consistent with the Virgin Islands Legislature's instructions that the provisions of CICO be 'liberally construed to achieve its remedial purpose.'") (quoting § 602). Thus, any alleged ambiguity should be resolved in favor of the Act's application.

Second, Defendants' argument for construing the statutory term "including" narrowly as one of exclusion flies in the face of authority widely recognizing that statutes using variants of "include" should be construed expansively. *See, e.g., Thoeni v. Consumer Elec. Servs.*, 151 P.3d

1249, 1258 and n.41 (Alaska 2007) ("Because the legislature chose to use the word 'includes' rather than more exclusive terms, we interpret the definition as a non-exclusive list.") (citing 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 316 (6th ed. 2000)); *Bd. of Cty. Comm'rs v. Bassett*, 8 P.3d 1079, 1083 (Wyo. 2000) ("The use of the word 'includes' is significant because 'includes' generally signifies an intent to enlarge a statute's application, rather than limit it, and it implies the conclusion that there are other items includable, though not specifically enumerated."); *Schwab v. Ariyoshi*, 58 Haw. 25, 564 P.2d 135 (1977) ("The term 'includes' is ordinarily a term of enlargement, not of limitation, a statutory definition of a thing as 'including' certain things does not necessarily impose a meaning limited to the inclusion.").

Based on the express command of CICO itself, as well as widely recognized principles of statutory interpretation concerning the language at issue, the Court should hold that CICO's enumeration of Virgin Island Code criminal provisions is meant to be illustrative and that the Act covers all of the alleged "criminal activity" in the Government's Counts One through Sixteen and Nineteen, and should deny Defendants' motion to dismiss these Counts.[3]

Alternatively, even if § 604(e) were construed narrowly as Defendants urge (*which it should not be*), the Court still should not dismiss the Government's "conspiracy" Counts (Counts Two, Four, Six, Eight, Ten, Twelve, Fourteen, and Sixteen) because this section's catch-all provision for conspiracy, § 604(e)(38), necessarily reaches more broadly than the enumerated crimes. As discussed, § 604(e) includes "conspiring to engage in" crimes within its base definition

[3] Any other interpretation would freeze in time the crimes that would serve as predicates to a violation of CICO, a reading again at odds with the statute's remedial purpose. Likewise, it defies common sense that the legislature would, elastically, make *any* of the thousands of federal felony offenses a predicate to CICO, but limit the predicates under Virgin Islands law to only 37 enumerated crimes.

of criminal activity.[4] *See* 14 V.I.C. § 604(e). Section 604(e) then separately addresses conspiracy in its catch-all subsection, providing that CICO covers "[a]ny conspiracy to commit any violation of the laws of this Territory relating to the crimes specifically enumerated above." 14 V.I.C. § 604(e)(38). Thus, CICO expressly defines its reach to cover conspiracies to commit any violation of the laws of this territory if they relate to "the crimes specifically enumerated above." Any other interpretation would render § 604(e)(38) meaningless since conspiracy to commit covered crimes already is covered by the base of § 604(e). *Cf. DeFore v. Phillip*, 56 V.I. 109, 129 (2012) ("'We are reluctant to treat statutory terms as surplusage in any setting.'") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 31 (2001)).

Here, all of the Government's conspiracy counts Defendants seek to dismiss "relate to" conduct that violates statutes expressly enumerated in CICO's list of specific offenses. Counts Two, Four, Six, and Eight (Human Trafficking-Conspiracy) allege that Defendants conspired to engage in trafficking that was for the purpose of enticing female children and young women into sexual servitude and unlawful sex acts. *See* FAC, ¶¶ 123, 137-138, 151-152, 166-167. All of this conduct relates to commission of prostitution offenses under 14 V.I.C. §§ 1622 and 1624 (prohibiting keeping "a house or place for persons to visit for unlawful sexual intercourse or for any sexual, obscene or indecent purpose"), which are expressly covered by 14 V.I.C. § 604(e)(27). Counts Ten, Twelve, Fourteen, and Sixteen (Child Abuse and Neglect, Rape offenses-Conspiracy) allege that Defendants conspired to engage in conduct causing child sexual abuse and rape of

4 This is consistent with the Virgin Islands' broad definition of conspiracy, at 14 V.I.C. § 551(1), to include the conspiracy to "commit *any crime*." (emphasis added). Interestingly, the conspiracy statute first applies broadly to "any crime," *or*, later, to "any crime injurious to the public health, the public morals, or for the perversion or obstruction of justice or due administration of the laws." 14 V.I.C. § 551(5). As with CICO, listing, for apparent emphasis, a set of crimes does not limit the statute's broader prohibition of conspiracies to commit any crime.

female children and young women. *See* FAC, ¶¶ 180, 195-196, 211-212, 227-228. All of this conduct likewise relates to commission of prostitution offenses under 14 V.I.C. §§ 1622 and 1624, which are expressly covered by 14 V.I.C. § 1604(e)(27).[5]

Since the conduct alleged in these 17 Counts constitutes a covered crime and/or the basis for a conspiracy count under § 604(e), the motion to dismiss these Counts should be denied.

E. The Government's Pleading Satisfies Applicable Rule 8 Requirements.

Rule 8 "will permit a complaint so long as it adequately alleges facts that put an accused party on notice of claims brought against it[,]" *Mills-Williams*, 67 V.I. at 585, and "declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief," V.I. R. Civ. P. 8, Comment. Nonetheless, Defendants argue that the Court must apply a heightened pleading standard of particularity for fraud, coercion, or accomplice or conspiratorial accountability based upon 14 V.I.C. § 607(d). This is incorrect.

Section 607(d) applies to "any pleading, motion or other paper filed *by an aggrieved party* in connection with a proceeding or action under subsections (a) and (b) of this section. *See id.* (emphasis added); *see also id.* ("Where *such pleading*, motion or other paper includes an averment of fraud, coercion, or accomplice or conspiratorial accountability, it shall state, insofar as is practicable, the circumstances with particularity.") (emphasis added). The highlighted language is critical because the Government and "aggrieved party" are not synonymous under § 607. Section 607(a) makes this clear by referring separately to the Government and to aggrieved persons in delineating the scope of permissible civil actions under CICO. *See* 14 V.I.C. § 607(a) ("The Attorney General, *or any aggrieved person*, may institute civil proceedings against any person in

[5] Had the legislature meant to limit "criminal activity" under CICO to conspiracies to commit the listed offenses, it would not have needed the term "related to."

the Superior Court . . ..") (emphasis added). Section 607(d)'s pleading particularity requirement thus does not apply to the Government's Complaint herein.

Nor does V.I. R. Civ. P. 9(b)'s particularity requirement for fraud averments apply to the Government's CICO Counts. As the Court explained in *Servicemaster*, *supra*, "Rule 9(b) does not apply to statutory claims because 'when a statutory cause of action . . . is at issue, the key consideration when defining what must be alleged is not what a court pleading rule requires.' Rather, the focus is on the 'statutory elements created by the Legislature; and . . . whether the . . . facts averred . . .' in the pleading 'meet those essentials.'" 2019 V.I. Super. 164, ¶ 53 (quoting *Williams v. Leerdam*, No. ST-13-CV-449, 2015 V.I. LEXIS 148, *9 (Super. Ct. Dec. 16, 2015)). Defendants thus wisely did not invoke Rule 9(b), as it too would not support their erroneous argument for a heightened pleading standard of particularity.

Since the Government is not required to plead any of its CICO allegations with heightened particularity, the Court should reject Defendants' argument for dismissal on this ground.[6]

F. <u>The Government Pleads a CICO Enterprise.</u>

Under CICO, an "'[e]nterprise' includes any individual, sole proprietorship, partnership, corporation, trust, or other legal entity, or any union, association or group of persons, associated in fact although not a legal entity . . . ." 14 V.I.C. § 604(h). Although the Virgin Islands Supreme Court has not yet further defined an "association-in-fact" enterprise, this Court has applied the U.S. Supreme Court's definition under the federal RICO statute that "an 'association-in-fact'

[6] Even if fraud pleading requirements applied (and they do not), the Government has fully satisfied them. Not only does the Government allege numerous details regarding the details of carrying out, funding, and concealing the Epstein Enterprise, but CICO itself only requires particularity only "*insofar as is practicable*." 14 V.I.C. § 607(d) (emphasis added); *see also Servicemaster*, *supra*, 2019 V.I. Super. 164, at ¶ 55 ("courts do allow 'some leniency allowed for complex issues or transactions covering a long period of time.") (quotation marks and citation omitted); *id.* (a particularity requirement "must not be read to abrogate Rule 8(a) requiring notice pleading.").

enterprise . . . is 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" *Gov't of the U.S.V.I. v. Takata Corp.*, 67 V.I. 316, 370 (V.I. Super. Ct. 2017) (quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009)). Thus, an association-in-fact enterprise "'must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associations to pursue the enterprise's purpose.'" *Id.* (quoting *Boyle*, 556 U.S. at 946).

The "purpose" of a CICO enterprise "refers to the common interest or goal that the group of persons associate together in order to achieve." *Id.* (quotation marks and citation omitted). Here, the common purpose of the Epstein Enterprise participants was to engage in unlawful sex trafficking by identifying and recruiting female victims, including children, and transporting them to the Virgin Islands, where they were subject to sexual assault, abuse, and servitude, and to obtain funds necessary to support this conduct. FAC, ¶¶ 40-43. Each participant shared this purpose. *See id.*, ¶¶ 21, 25 (Nautilus, Inc.-ownership of Little St. James Island, where sexual abuse took place); ¶¶ 27, 29 (Great St. Jim, LLC-ownership of Great St. James Island, which shielded Little St. James); ¶¶ 30-32 (Poplar, Inc.-holder of Great St. James Island); ¶¶ 33-34 (Plan D, LLC-ownership of aircraft used to transport young women and girls to the Virgin Islands); ¶¶ 35-36 (Hyperion Air, LLC-ownership of helicopter used to transport young women and girls from St. Thomas to Little St. James Island); ¶¶ 37, 104-113 (Southern Trust Company, Inc.-maintain funding through fraudulently-obtained tax benefits).

The "relationships" within a CICO enterprise are demonstrated where its participants "worked together as a 'continuing unit' to achieve [the] common purpose." *Takata Corp.*, 67 V.I. at 372. Here, many of the same allegations demonstrate these types of relationships among the Epstein Enterprise participants and their longevity. *See, e.g.*, FAC, ¶ 24 (transfer of Little St. James Island from Epstein-controlled LLC to Defendant Nautilus, Inc.); ¶¶ 27, 32 (Great St. Jim,

LLC and Poplar, Inc. maintained ownership of Great St. James Island); ¶¶ 34-35 (Epstein's use of Plan D, LLC and Hyperion Air, LLC aircraft to, respectively, transport young women and girls to the Virgin Islands and then to his privately-owned Little St. James Island); ¶¶ 46, 51 (flight logs and other evidence show such transport occurring between 2001 and 2019).

Despite the foregoing, Defendants contend that the Government fails to plead a sufficiently distinct enterprise because of Epstein's involvement with all or many of these entities. *See* Motion to Dismiss at 20 ("This [association-in-fact] theory fails because, as the Amended Complaint pleads, the Epstein Enterprise consists entirely of entities formerly owned and controlled by a single person, Jeffrey Epstein."). Defendants are incorrect.

Common ownership interests do not preclude a finding that distinct but related companies may combine together to form an enterprise to achieve a specific unlawful purpose. *See, e.g.*, *ServiceMaster*, *supra*, 2019 V.I. Super. 164, ¶ 46 (alleged enterprise among Terminix USVI, Terminix LP ("the national company"), and ServiceMaster Co., LLC ("the direct or indirect parent company")); *id.*, ¶ 30 (holding that CICO enterprise allegations are sufficient); *see also Takata Corp.*, 67 V.I. at 339 n.37 (alleged enterprise among "Defendant TKH, a 'subsidiary of [Defendant] Takata Japan'"); *id.* at 372 (holding that CICO enterprise allegations are sufficient).

In *Takata Corp.*, defendants raised a similar argument, contending that the Government's allegations demonstrated only the "normal business relationship" among defendant entities. *Id.* This Court rejected that argument, holding that "TKH, Takata Japan, and Honda acted as a continuing unit to conceal the nature and extent of the defect in order to sell as many airbags and vehicles containing such airbags as possible in order to maximize their profits. Consequently, the structural 'relationship' of an 'association-in-fact' enterprise has been met." *Id.* at 375.

The Court should reach the same conclusion here. Decedent Epstein and the various different companies in which he had ownership, operational, or investment interests acted together

as a continuing unit to engage in unlawful sex-trafficking of young women and girls, to conceal this conduct over the course of decades, and to fraudulently obtain or maintain funding to continue this conduct. The Government properly and sufficiently pleads an association-in-fact enterprise under CICO, and Defendants' motion to dismiss on this ground should be denied.

G. The Government Pleads an Actionable Fraudulent Conveyance.

The Government alleges that moving Defendants Indyke and Kahn serve as both Co-Executors of the Epstein Estate and Co-Administrators of Defendant the 1953 Trust. FAC, ¶¶ 8-9. The 1953 Trust was created by Epstein, who just two days before his suicide amended the Trust's terms and revised his Last Will and Testament so that all of his property would be transferred to the Trust. *Id.*, ¶ 15. The Trust contains all of Epstein's financial assets and is responsible to pay damages for the acts he and the Epstein Enterprise committed. *Id.*, ¶ 16. The Government alleges upon information and belief that "in an effort to defeat the claims of creditors and avoid the oversight of the court probating his estate, Epstein days before his death transferred significant assets, including assets held by other Defendants, into The 1953 Trust[,]" *id.*, ¶¶ 262, 273, and claims this was a fraudulent conveyance. *Id.*, Counts Twenty, Twenty-One.

Defendants do not dispute the legal sufficiency of these allegations. Rather, they deny the allegations as a factual matter. *See* Motion to Dismiss at 23 ("The 1953 Trust, like many pure pour-over trusts, is unfunded and will remain so until such time as probate is complete."). This factual dispute over whether Epstein did or did not transfer assets to the Trust days before he committed suicide cannot be resolved on a motion to dismiss where no evidence is presented. *See, e.g., Evans-Freke v. Evans-Freke*, 70 V.I. 397, 402 (V.I. Super. Ct. 2019) ("The plaintiff is entitled to have his allegations taken as true and have disputed facts drawn in his favor."); *see also Epstein v. Fancelli Paneling, Inc.*, 55 V.I. 150, 156 n.2 (V.I. Super. Ct. 2011) ("Fancelli alleges in its Motion to Dismiss that Epstein is also a resident of New York, NY and Palm Beach, Florida.

However, the Court accepts as true the non-movant's factual allegations and construes factual disputes in favor of the non-moving party."). Since Defendants dispute the facts, not the legal sufficiency, of the fraudulent conveyance allegations, this Count should not be dismissed.

H. The Government Pleads Actionable Civil Conspiracy.

Defendants next contend that the Government's civil conspiracy Count (Count Twenty-Two) fails due to absence of an underlying tort. *See* Motion to Dismiss at 23-24. Notably, Defendants do not contend that a conspiracy did not exist, but merely that the Government fails to allege an underlying tort. Again, Defendants ask the Court to view this Count in a vacuum, instead of within the context of the entire Amended Complaint. When so situated, there are multiple examples of acts demonstrating an underlying tort. For example, the Amended Complaint alleges human trafficking, child abuse, child sexual abuse, forced labor, sexual servitude, rape, and sexual assault – all intentional torts that readily satisfy the predicate requirement. *See* FAC, ¶¶ 105-252.

A "'civil conspiracy consists of an agreement or combination to perform a wrongful act that results in damage to the plaintiff.'" *Isaac v. Crichlow*, 63 V.I. 38, 64 (Super. Ct. 2015) (quoting *Sorber v. Glacial Energy VI, LLC*, No. ST-10-CV-S88, 2011 V.I. LEXIS 34, at *5 (Super. Ct. June 7, 2011)). Civil conspiracy "requires a separate underlying tort as predicate for liability." *Sorber,* 2011 V.I. LEXIS 34, at *5. While non-binding, courts in other jurisdictions view complaints in their entirety to determine the existence of an underlying tort. *See, e.g.*, *Williams v. Aetna Fin. Co.,* 700 N.E.2d 859, 868 (Ohio 1998) ("After a comprehensive review of the record, we determine that the jury reasonably determined on the sum total of the evidence presented . . . ITT can be held liable for the intentional torts of its employee loan officers . . . .").

Throughout the Amended Complaint, the Government details multiple instances of Defendants' intentional tortious conduct, including forced labor, rape and sexual assault. *See* FAC,

¶¶ 40-104. These factual allegations, pled to support Counts under CICO, satisfy the underlying intentional tort of civil conspiracy. *See, e.g., Williams*, 700 N.E.2d at 868. The Government's allegations also are distinguishable from the pleadings found insufficient in *Donastorg v. Daily News Publ'g Co.*, No. ST-2002-CV-117, 2015 WL 5399263, at *73 (V.I. Super. Ct. Aug. 19, 2015). There, the Court found that the plaintiffs failed to introduce evidence sufficient to allege underlying tortious conduct. *Id.* Here, by contrast, the Amended Complaint alleges specific details supporting counts for child sexual abuse, rape, assault and many other intentional torts. *See* FAC, ¶¶ 40-104. Thus, when the Court views the Amended Complaint in its entirety, the "sum total of the evidence presented," *Williams*, 700 N.E.2d at 868, establishes an underlying intentional tort supporting the civil conspiracy count. The motion to dismiss this Count thus should be denied.

I. The Amended Complaint Pleads Actionable Fraud Upon the Government.

Defendants misunderstand the Government's allegations as to Defendant Southern Trust Company's tax benefits from the Economic Development Commission ("EDC"). The Government does not seek to revoke the benefits, which would procedurally require the notice and public hearing provisions under 29 V.I.C. § 722. Nor does it seek fines against Southern Trust Company under Section 723, which also would require a hearing and findings. Rather, the Government seeks the remedies available under Section 725, which requires no criminal conviction or procedural hurdles, nor any proof of "exhaustion" of any other administrative remedies. As such, the Government's allegations are not an "end-run" around any procedural requirements, but the appropriate line for enforcement by the Attorney General.

The Virgin Islands Code pertaining to the Economic Development Commission contains no language requiring exhaustion of administrative remedies, and Defendants' cited authority proves the same. Defendants cite *Virgin Islands Telephone Corporation v. Mills*, ST-17-CV-279, 2018 WL 3120823 (June 22, 2018), as ostensible support for their argument on exhaustion of the

EDC's statutory remedies. Yet *Mills* pertains to remedies available with the Board of Tax Review, not the EDC, and the distinct language of that governmental board's code. The facts in *Mills* are likewise distinct, with no allegations of false statements by the receiving entity, and no exceptions to the administrative relief in such a case. Most importantly, *Mills* makes clear that, exhaustion is statutorily mandated only where "a statute explicitly requires exhaustion prior to seeking judicial relief." *Id.*, at *3 (citations omitted). "[T]o determine whether or not exhaustion applies, the Court must first decide if the applicable statute explicitly requires it." *Id.*, at *4. No such requirement exists here. Instead, the EDC's statutory language specifically provides a carve-out for this exact scenario in which fraudulent statements and misrepresentations direct the Government to immediate remedies. *See* 29 V.I.C. § 725.

Nor does Defendants' cite to a Virgin Islands Attorney General opinion provide support for their "exhaustion" theory. *See* Motion to Dismiss at 26 (citing 2 V.I. Op. Att'y Gen. 134). This opinion from the Tax Exemption Ordinance references neither administrative remedies nor exhaustion thereof, but pertains instead to equal protection under the Organic Act. In no way does this opinion diminish the ability of the Government to seek immediate remedy under Section 725. Likewise, no authority precludes this Court from exercising subject matter jurisdiction over the remedies available under 29 V.I.C. § 725.

A plain reading of § 725 shows that any entity making false or fraudulent representations for benefits from the EDC may be penalized without necessity of procedural exhaustion:

> Any applicant or beneficiary who shall willfully make any **false or fraudulent statement or representation** as to any fact required or appropriate to the determination of the qualifications of eligibility of such applicant or beneficiary for benefits under this subchapter, or for the continuation or extension of the same, or who shall willfully make or present any claim for benefits under this subchapter knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $25,000 or imprisoned not more than two years, or both. In addition to the foregoing, any benefits previously granted under this subchapter to such applicant

> or beneficiary shall be deemed automatically revoked, **without necessity for the procedures established under section 722** of this subchapter , , ,

29 V.I.C. § 725 (emphasis added).

Defendants have no basis for their assertion that Section 725 requires a criminal conviction of false or fraudulent material representation, and they have cited no authority other than the Section itself that contains no such language. *See* Motion to Dismiss at 25. Defendants may not reinterpret the statute to remove the immediate remedy available to the Government based on the Defendants' fraudulent statements and representations. The fraudulent statements and representations upon which the Government relies for Section 725 are set forth in detail in the Amended Complaint. These allegations include that Defendants, as part of a conspiracy:

- Misrepresented the purpose, activities, employment, and income of the Southern Trust Company, Inc., in order to obtain and maintain valuable tax incentives to fund the criminal activities (FAC, ¶¶ 291, 301);

- Used Southern Trust Company to employ, pay, and conceal the activities of participants in the criminal activities of the Enterprise (*Id.*);

- Made and presented an application for tax incentives, testimony, and quarterly reports to the EDC, . . . knowing such claims to be false, fictitious, or fraudulent (*Id.*, ¶¶ 292, 302);

- Knowingly and willfully falsified, concealed or covered up material facts regarding the Southern Trust Company (*Id.*, ¶ 302);

- Submitted false or fraudulent affidavits, testimony, and an application about the purpose, activities, income, and employment of Southern Trust Company (*Id.*, ¶¶ 302, 303);

- Falsely represented that it was engaged in consulting services in financial and biomedical informatics (*Id.*, ¶¶ 293, 303);

- Knowingly benefitted financially from the false statements as part of the Epstein Enterprise, that funded the criminal activities in the Virgin Islands (*Id.*, ¶¶ 294, 304); and

- Acquired and maintained, directly or indirectly, an interest in or control of the Epstein Enterprise or real property (*Id.*, ¶ 295).

Each of these allegations satisfies Rule 8's notice-pleading standard for scienter and provides enough facts from which malice may reasonably be inferred. *See, e.g.*, *Yusuf v. Ocean Properties., Ltd.*, No. SX-15-CV-008, 2016 V.I. LEXIS 19, at *1 (Super. Ct. March 7, 2016) ("Because Plaintiff has made factual allegations concerning Defendant's behavior that could rise to the level of gross negligence depending on Defendant's state of mind, a fact-intensive evaluation of Defendant's state of mind is required and dismissal on the pleadings is inappropriate in this case.").

Applying Section 725 to the facts pled, Defendants' application, as well as affidavits and testimony submitted therewith, knowingly presented false or fraudulent representations "as to fact required or appropriate" relating to Southern Trust Company's eligibility for benefits. These were not singular representations, but continued for extension of the benefits over time and were material – necessary, in fact – for the receipt of benefits to Southern Trust Company. *See* FAC, ¶¶ 104-114, 291-297, 300-306; *see generally* 29 V.I.C. § 708 ("Specific requirements for granting of benefits"). Furthermore, these representations were material and necessary for the *continuation* of these benefits. *See id.*, ¶¶ 112, 291, 301; *see generally* 29 V.I.C. § 708 (listing requirements to "remain eligible for benefits"). Defendants' motion suggests that Southern Trust Company did not have an affirmative obligation to make the Government aware that it did not – and never did – engage in the business for which the incentives were granted. That is incorrect. *See* 29 V.I.C. § 722(a)(1) (revocation for failure to maintain compliance); § 725 (criminal penalties and revocation for willfully false representations "as to any fact required or appropriate . . . for the continuation of extension of [benefits eligibility])," and these knowingly false and fraudulent representations were intentionally designed to continue to fraudulently reap the benefits of the Virgin Islands government. The Government plainly sets forth not only these facts, but also that the intent behind the fraud was to allow Southern Trust Company to use the unlawfully obtained financial incentives to further fund Defendants' criminal activities in the Virgin Islands. *See* FAC, ¶¶ 294, 304.

The Amended Complaint's fraud-on-the-Government Counts meet every possible pleading standard, and Defendants' motion on these grounds should be denied.

J. The Government is Entitled to All Requested Remedies.

1. Civil Forfeiture is an Available Remedy Under CICO.

Defendants next argue that civil forfeiture is not an available remedy under CICO, even though the Supreme Court has squarely stated that it is. *See* Motion to Dismiss at 27 (quoting *In re Najawicz*, 52 V.I. 311, 333 (2009) ("CICO provides for both civil and criminal forfeitures . . . .")). Defendants ask this Court to ignore the Supreme Court's statement on this point as dictum that is incorrect. *See id.* at 27-28. The Supreme Court did not err on this point.

Under 14 V.I.C. § 607, the Government's remedies in civil cases include a judgment "ordering any defendant to divest himself of any interest in any enterprise, or in any real property[.]" 14 V.I.C. § 607(a)(1); *see also* 14 V.I.C. § 608(c) (addressing "property ordered forfeited, a fine imposed, or a civil penalty imposed in any criminal or civil proceeding under this chapter"). Defendants acknowledge the § 607 remedy, but dismiss it as irrelevant because "the Decedent no longer has an interest to be divested." Motion to Dismiss at 28.

This cavalier assertion fails on its own terms. *See* 5 V.I.C. § 77 ("A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer . . . ."); *see also First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1122 (D.D.C. 1996) ("Consequently, this Court joins those courts that have concluded that a civil RICO suit survives the death of the defendant."). More fundamentally, Defendants' invocation of Epstein's death *does nothing to differentiate between divestiture and forfeiture* as civil remedies available to the Government. Whether the Government seeks forfeiture, divestiture, or both (as here), Jeffrey Epstein still will be deceased. This argument thus is just another attempt to shield the Estate's assets from law enforcement.

Moreover, even if Defendants could distinguish between divestiture and forfeiture under § 607 (*which they cannot*), the Government still could obtain forfeiture here. Section 607 also provides that "[n]one of the above provisions shall be held to limit the existing equitable powers of the trial court." 14 V.I.C. § 607(a)(6). These equitable powers include the power to order forfeiture for proven misconduct. *See generally Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.*, 425 P.3d 1, 20 (Cal. 2018) ("[F]orfeiture of compensation is, in the end, an equitable remedy."); *Prozinski v. Ne. Real Estate Servs., LLC*, 797 N.E.2d 415, 424 n.9 (Mass. App. Ct. 2003) ("Forfeiture is an equitable remedy."); *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) ("[W]e look to the jurisprudential underpinnings of the equitable remedy of forfeiture.").

It is true that equity sometimes disfavors forfeiture. *See, e.g., Martin v. Domain*, 6 V.I. 599, 604 (1968) ("Equity relieves against a forfeiture where no real fault is committed . . . .") (internal quotation marks and citation omitted). This is not, however, a case where "no real fault is committed." To the contrary, the appalling, numerous, and well-documented allegations by the Government and dozens of Epstein's victims confirm that equity *commands* that Epstein's assets used for the unlawful sex-trafficking enterprise be forfeited.

Forfeiture thus is and should be an available civil or equitable remedy under CICO, and Defendants' motion to dismiss the Government's request for this relief should be denied.

2. <u>Punitive Damages are Available Against the Epstein Estate.</u>

Defendants' final argument is that punitive damages cannot be awarded against an estate. *See* Motion to Dismiss at 30-32. Defendants rely upon *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (2011), as support for this argument. *See* Motion to Dismiss at 30-32. It is not. *Banks* supports just the opposite conclusion—that punitive damages are available for causes of action against a deceased tortfeasor's estate under well-established Virgin Islands tort law principles.

In *Banks*, the Supreme Court explained how Virgin Islands common law is established under 1 V.I.C. § 4. Section 4 sets criteria for recognizing common law "in the absence of local laws to the contrary." 1 V.I.C. § 4. But *Banks* construed the phrase "local laws" expansively:

> [T]he phrase 'local law' means 'the law of a particular jurisdiction, as opposed to the law of a foreign state,' with 'law' referring to 'the aggregate of legislation, *judicial precedents*, ***and legal principles.***'

55 V.I. at 974 (quoting Black's Law Dictionary (9th ed. 2009) at 1023 and 962) (first emphasis in original; second emphasis added). The Supreme Court's emphasis in *Banks* that not only legislation, but also judicial precedent and underlying legal principles, constitute "local laws" that may be sources of common law development is critical to the question presented here.

This is because both a statute and well-established principles of Virgin Islands tort law strongly support punitive damages in this setting. The Virgin Islands survival statute provides unambiguously that "[a] thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury . . . ." 5 V.I.C. § 77; *see also Gerald*, *supra*, 67 V.I. at 477 ("In asserting survival claims, Plaintiffs are entitled to seek the relief available under 5 V.I.C. § 77, including punitive damages."). The statute provides no qualification whatsoever as to the tort causes of action or remedies that survive past the death of a defendant. Since an estate has unqualified capacity to sue and be sued, it makes no sense for it to be able to recover punitive damages and yet be unilaterally shielded from liability for them.

Well-established principles of Virgin Islands tort law also support punitive damages against the estate of a deceased tortfeasor. The Supreme Court recognizes that "Punitive damages are 'damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer *or deter others from behaving similarly* . . . .'" *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 824 (2017) (quoting Merriam-Webster's Dictionary of Law (2005) at 120) (emphasis

added); *see also Brathwaite v. Xavier,* 2019 V.I. Supreme LEXIS 37, 26-32 (July 16, 2019) (quoting *Cornelius*); *Creque v. Cintron*, 17 V.I. 69, 78 (Terr. Ct. 1980) ("[O]ne of the purposes of punitive damages is to deter future wrongdoing by the defendant and others by setting an example for the benefit of the public . . . ."); *id.* ("I am convinced that this purpose will be served by the inevitable echo of this case which will be heard throughout this jurisdiction . . . .").

These purposes of punitive damages under Virgin Islands law support awarding punitive damages against the estate of a deceased tortfeasor. This is precisely what courts in numerous, albeit a minority of, states have held. *See, e.g.*, *G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998) ("[T]he death of the tortfeasor does not completely thwart the purposes underlying the award of punitive damages. As noted, punitive damages are awarded to punish a defendant for certain outrageous acts and to deter him or others from engaging in similar conduct."); *Tillett v. Lippert*, 909 P.2d 1158, 1162 (Mont. 1996) ("Kenneth Lippert is now beyond the reach of this temporal Court. That fact, however, does not obviate the exemplary function of a punitive damages award in requiring Kenneth Lippert's estate to respond in punitive damages . . . ."); *Perry v. Melton*, 299 S.E.2d 8, 12 (W.Va. 1982) ("Punitive damages in this state serve other equally important functions and are supported by public policy interests going beyond simple punishment of the wrongdoer. Consequently, the reasons for them do not cease upon the death of the tort-feasor.").[7]

This is especially so here because of the reprehensible nature and the high public visibility of Epstein's unlawful sex-trafficking conduct. The decision in *G.J.D.*, *supra*, is instructive:

> By distributing photographs of G.J.D. performing sexual acts, Thebes unquestionably violated G.J.D's right to privacy, which is one of the most highly regarded rights in this Commonwealth. His distribution of these photographs, along with G.J.D.'s name, telephone number, and language indicating that she was

[7] *Cf. Crabtree v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005) (declining to permit punitive damages claims against an estate, but noting that "[i]f we ever encounter a case where a tortfeasor seems to have considered his own death as an escape from punitive damages incident to some intentional tort, we can address that issue at that time.").

> a prostitute, is nothing short of outrageous. The dissemination of the materials followed a pattern whereby Thebes, while residing with G.J.D., physically and psychologically abused her and her children. . . . [T]he law should be applied so as to have a deterrent effect on such conduct.

713 A.2d at 1130-31.

So should it here. The Government credibly alleges that Jeffrey Epstein used his Virgin Islands properties and network of Virgin Islands-based companies to fund with fraudulently-obtained tax benefits and operate a sex-trafficking enterprise in which dozens of underage girls and young women were held captive and sexually abused. Ample evidence will support these allegations, as over a dozen women have come forward with court filings and/or other public statements detailing their experiences of being trafficked to the Virgin Islands and subject to sexual assault and other forms of abuse by Epstein and his associates on Little St. James Island. *See* Gov't Opp. to Motion to Stay Discovery (filed May 11, 2020) at 10-11. The deterrent purposes of punitive damages under Virgin Islands law strongly support this remedy against Epstein's Estate.[8]

The Epstein Estate Co-Executors' motion to dismiss is an attempt to allow Epstein's beneficiaries to retain the instrumentalities of the enterprise at the expense of its victims. The Court should deny the motion and should allow the Government to proceed upon all of its claims.

CONCLUSION

For all of the reasons set forth, Defendants Indyke and Kahn's motion to dismiss the Government's First Amended Complaint should be denied in its entirety.

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[8] The Court thus should reject the analysis of this issue in *Doe v. Indyke*, No. 19-cv-10758, 2020 U.S. Dist. LEXIS 74738 (S.D.N.Y. April 28, 2020). There, the court held that punitive damages claims by one of Epstein's many victims for sexual assaults that occurred at his New York City townhouse, *see id.*, at *2-3, were governed by New York law, *id.* at *16. It then stated in dicta that Virgin Islands law would prohibit punitive damages against an estate because no statute or case law supports this and *Banks* requires following the *Restatement (Second)* and the majority of jurisdictions rejecting the claim. *See id.* at *19-21. This dicta by a U.S. district court is not controlling and is not persuasive because it ignores both the survival statute and the strong deterrent and exemplary purposes of punitive damages under Virgin Islands law that support an award against a wrongdoer's estate.

Respectfully submitted,

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Dated: June 11, 2020 By: _____

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing Opposition to Motion complies with the word and page requirements of V.I.R. Civ. P. 6-1(e) and a true and correct copy of the Opposition was served via regular mail, postage prepaid, with a courtesy copy sent by email to counsel of record on June 11, 2020 to:

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