IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

JAMAL A. MORTON, individually and on behalf of all others similarly situated, Plaintiff, vs. THE UNITED STATES VIRGIN ISLANDS, The Honorable ALBERT BRYAN, JR., in his official capacity as the Governor of the United States Virgin Islands, JOEL A. LEE, in his official capacity as the Director of the Bureau of Internal Revenue, CLARINA MODEST ELLIOT, in her official capacity as acting the Commissioner of the Department of Finance, Defendants.	CASE NO. 3:20-CV-109 CLASS ACTION CASE

OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

COME NOW Defendants, by and through the undersigned counsel, to oppose Plaintiff's Motion for Preliminary Injunction. For the reasons set forth below, Defendants pray Plaintiff's Motion be DENIED.

I. INTRODUCTION

Plaintiff seeks a preliminary injunction to enjoin the Defendants from "their on-going failure to comply with the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, as mirrored to the USVI." Plaintiff's motion misstates the law, misstates the facts, and carelessly applies them to an unworkable result. First, while it is true that pursuant to the CARES Act *advance payments* must be made no later than December 31, 2020, Section 2202(c)(1) of the CARES Act creates a credit on each taxpayer's 2020 tax due. To the extent that an eligible taxpayer does not receive an advance EIP (the basis for Plaintiff's suit), he or she has not lost the opportunity to receive the payment. To the contrary, by filing a 2020 tax return (even with zero income), an eligible taxpayer can claim the credit

due. Second, Plaintiff presumes BIR's position with respect to the eligibility of incarcerated taxpayers under the CARES Act, and premises its arguments on this presumed interpretation that has no basis in fact.

Plaintiff fails to comprehend that Defendants merely serve as an intermediary between eligible Virgin Islands taxpayers on the one hand, and U.S. Treasury on the other. Defendants take no position on the eligibility of incarcerated persons. We merely distribute the federal funds we have been provided in accordance with the conditions that are provided by the U.S. Treasury. And finally, Plaintiff assumes that an injunction in the present matter will somehow make funds available to Defendants to make payments. To be clear, Defendants are not in possession of unrestricted federal funds available to make EIP payments to incarcerated individuals, and the Virgin Islands Legislature has not appropriated funds to fund any EIP payments locally.

The Territory holds federal CARES Act funds in trust, pursuant to an EIP Implementation Plan[1] (the "Plan") authorized and funded by the United States Treasury Department. Treasury included the following restrictions in the Plan: CARES Act Trust Fund monies cannot be used by VIBIR to pay EIPs to incarcerated persons (Exhibit A -Declaration of Joel A. Lee ¶9); with the exception of certain Social Security recipients identified by the United States Treasury the Plan prohibits VIBIR from the automatic issuance of EIPs without a being in possession of a substantiating, signed, tax return from each corresponding eligible individual. (Exhibit A -Declaration of Joel A. Lee ¶11); While Section 2201(c)(1)(A) of the CARES Act provides that the federal government will bear the cost of all EIP payments to eligible persons, Treasury has limited payment

[1] The EIP Implementation Plan is an agreement between the Territory of the United States Virgin Islands and the United States Treasury. Treasury imposes strict non-disclosure restrictions on all communications and transactions with mirror code possessions including the Territory. Defendants are in possession of a redacted version of the Plan which may be provided to the Court for *in camera* review upon request or otherwise pursuant to a court order after Treasury has been given notice and an opportunity to seek a protective order.

from the EIP Trust Fund to certain persons and has prohibited VIBIR from making payments for EIPs to certain persons, including incarcerated individuals. Exhibit A -Declaration of Joel A. Lee ¶9. Because Treasury has not provided funds that can be paid to incarcerated persons, to the extent that incarcerated persons are eligible taxpayers under the CARES Act, the CARES Act is in essence a *de facto* un-funded mandate to the Territory.

By the terms of Plan, program funds cannot be used by Defendant, VIBIR to pay claims to incarcerated persons. Even if an injunction is granted, the terms of the EIP prohibits Defendants from using EIP Trust Fund monies to pay claims of incarcerated persons; and payment is unlikely as the Virgin Islands Legislature has not appropriated funds for such purpose. Defendants are therefore unable to remit EIP to incarcerated persons unless and until funds are made available and authorized by the U.S. Treasury or the Virgin Islands Legislature appropriates funds for such purpose.

As more fully discussed below, Plaintiff has failed to name an indispensable party (the United States of America), and on that basis he is unlikely to succeed on the merits. A ruling that Virgin Islands incarcerated persons are eligible taxpayers would be merely advisory in the absence of fund source to pay them. Moreover, to the extent that Plaintiff is an eligible person under the CARES Act, he will not suffer an irreparable harm if payments are not remitted by December 30, 2020, because he can file a 2020 return in January to receive payment, or if the Court determines that the filing of returns is unnecessary, it may order retroactive payments to those who it determines were unlawfully deprived (again, subject to provision of funds from the federal government for such purposes).

II. PRELIMINARY INJUNCTION STANDARD

Preliminary injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 586 (3d Cir. 2002). "A plaintiff seeking a preliminary injunction must establish that he

is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc..,* 555 U.S. 7 at 20 (2008). The "**failure to establish any element . . . renders a preliminary injunction inappropriate.**" *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999) (emphasis added). And the movant bears the burden of showing that these four factors weigh in favor of granting the injunction. *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014).

In *Winter* several environmental organizations sought a preliminary injunction against the Navy's use of sonar in training exercises, alleging that it would cause serious harm to various species of marine mammals. *Winter*. at 13-14. The Supreme Court rejected the Ninth Circuit's holding that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 21. And it "agree[d] with the Navy that the Ninth Circuit's 'possibility' standard is too lenient. [The Court's] frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Id.* at 22. The Supreme Court also noted that "[i]ssuing a preliminary injunction based only on a *possibility of irreparable* harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

Winter tells us that, at minimum, we must consider whether irreparable injury is likely in the absence of an injunction, we must balance the competing claims of injury, and we must pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *Salinger,* 607 F.3d at 79 (quotation marks omitted). A presumption of irreparable harm that functions as an automatic or general grant of an injunction is inconsistent with these principles of equity. *Id.; see*

also Munaf v. Geren, 553 U.S. 674, 689-90, (2008) (noting that an injunction is an "extraordinary and drastic remedy" that "is never awarded as of right" (quotation marks omitted)). *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 217 (3d Cir. 2014).

In *Monsanto Co v. Geertson Seed Farms*, a case involving violations of the National Environmental Policy Act of 1969 ("NEPA"), the Court rejected the Ninth Circuit's holding that "an injunction is the proper remedy for a NEPA violation except in unusual circumstances." 561 U.S. 139 at 157 (2010). Rather, the Court held that an injunction should issue "only if the traditional four-factor test is satisfied" and "[n]o . . . thumb on the scales is warranted." *Id.*

It is therefore clear that in order to obtain a preliminary injunction, Plaintiffs must prove both (1) that they are likely to experience irreparable harm without an injunction and (2) that they are reasonably likely to succeed on the merits. **A court may not grant this kind of injunctive relief without satisfying these requirements, regardless of what the equities seem to require**. *See AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994); *Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982). **If relevant, the court should also examine the likelihood of irreparable harm to the nonmoving party and whether the injunction serves the public interest.** *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000).

III. ARGUMENT

Plaintiff asks the Court to follow the lead of the Northern District of California in *Scholl v. Mnuchin et. al.*, to enjoin Defendants from denial of Economic Impact Payment ("EIP") claims they allege incarcerated taxpayers are entitled receive under the Coronavirus Aid, Relief, and Economic Security Act. However, the *Scholl* injunction was premised upon a theory that incarcerated people are dependent upon the stimulus payment to provide for their bare necessities, and while plaintiffs' claims

for stimulus payments could be satisfied by monetary payments, they would nonetheless suffer irreparable harm because they would lack the bare necessities of life if they were delayed. *Scholl v. Mnuchin, No. 20-cv-05309-PJH, 2020 U.S. Dist. LEXIS 176870 (N.D. Cal. Sep. 24, 2020).* This premise runs afoul of Third Circuit jurisprudence.

Third Circuit Standard for Preliminary Injunctions

In the Third Circuit, "a plaintiff seeking preliminary relief must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ferring Pharm., Inc.*, 765 F.3d at 210 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The movant bears the burden of showing that these four factors weigh in favor of granting the injunction. See *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990). The "failure to establish any element … renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999); see also *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982) ("[A] failure to show a likelihood of success or a failure to demonstrate irreparable injury, must necessarily result in the denial of a preliminary injunction."). *Beberman v. United States Dep't of State*, 675 F. App'x 131, 133 (3d Cir. 2017) (unpublished).

A. Plaintiff Will Not Suffer Irreparable Harm in the Absence of Preliminary Relief

This case is clearly about Plaintiff's "right" to monetary payments from *CARES* Act funds. While couched as an injunction to prevent Defendants from *violating the CARES Act* practically speaking, Plaintiff's seeks a mandatory injunction to force payment before entitlement to payment has been established. It is well settled in the Third Circuit that injunctions will not be granted where plaintiff can be made whole with monetary payments at the conclusion of Plaintiff's case. *Morton v. Beyer* infra. Moreover, with respect to a mandatory injunction, a heightened standard applies. *Bennington*

Foods, LLC v. St. Croix Renaissance Grp., LLP, 528 F.3d 176, 179, 49 V.I. 1176 (3d Cir. 2008). Therefore, Plaintiff bares a "particularly heavy" burden, *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994), requiring him to show a substantial likelihood of success on the merits and that his "right to relief [is] indisputably clear," *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013) (quoting *Communist Party of Ind. v. Witcomb*, 409 U.S. 1235, 1235, (1972)). *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 320 (3d Cir. 2020).

As the party seeking relief, Plaintiff must, "by a clear showing, carr[y] the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972, (1997) (*per curiam*), on "each of the four prongs of the preliminary injunction standard." *United States v. Roach*, 947 F. Supp. 872, 877 (E.D. Pa. 1996). Injunctive relief is "'an extraordinary remedy' and 'should be granted only in limited circumstances.'" *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quoting *Am. Tel. & Tel Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). "The purpose of a preliminary injunction is to preserve the status quo, not to decide the issues on their merits." *Samuel v. V.I. Joint Bd. of Elections*, No. 2012-0094, 2013 U.S. Dist. LEXIS 3689, at *10 (D.V.I. Jan. 6, 2013).

To demonstrate irreparable harm, Plaintiff "must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992). "The preliminary injunction must be the only way of protecting the plaintiff from harm." *Id.* "The requisite feared injury or harm must be irreparable — not merely serious or substantial, and it must be of a peculiar nature, so that compensation in money cannot atone for it." Id. at 91-92 (internal quotation marks omitted). Thus, a litigant seeking injunctive relief must "articulate and adduce proof of actual or imminent harm which cannot otherwise be compensated by money damages . . . to sustain its substantial burden of showing irreparable harm." *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102-03 (3d Cir. 1988). "Establishing a risk of irreparable

harm is not enough." ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987). *Kamdem-Ouaffo v. Task Mgmt.*, 792 F. App'x 218, 221 (3d Cir. 2019).

The Third Circuit has never upheld an injunction "where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law." See *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1145 (3d Cir. 1982); see also *Sampson v. Murray*, 415 U.S. 61, 90, (1974) ("[A] temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."). *Kamdem-Ouaffo v. Task Mgmt.*, 792 F. App'x 218, 221 (3d Cir. 2019).

> It is not enough "for the harm to be serious or substantial, rather, it must be so peculiar in nature that money cannot compensate for the harm." *Bieros v. Nicola*, 857 F. Supp. 445, 445 (E.D. Pa. 1994) (citing *Ecri v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)). The word irreparable ' "means that which cannot be repaired, retrieved, put down again, atoned for[.]" ' *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976) (quoting *Gause v. Perkins*, 56 N.C. 177, 3 Jones Eq. 177, 69 Am. Dec. 728 (1857)).

Beberman v. U.S. Dep't of State, Civil Action No. 2014-0020, 2016 U.S. Dist. LEXIS 38946, at *6-7 (D.V.I. Mar. 24, 2016) affirmed 675 Fed. Appx. 131, 2017 U.S. App. LEXIS 564 (3d Cir. V.I., Jan. 12, 2017).

> It is well-established that "[t]he irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages. This is not an easy burden." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000). In *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987), the Third Circuit found that not even termination from a job sufficed for irreparable harm. Plaintiff claimed that he would be irreparably harmed unless he was employed while his lawsuit was pending because his wages were his sole source of income. The Court held: "Although we are not insensitive to the financial distress suffered by employees whose wages have been terminated, we do not believe that loss of income alone constitutes irreparable harm." *Id.* at 372. The nature of the remedy there was "purely economic in nature and thus compensable in money," and did not warrant injunctive relief. *Id.*

Id.

In *Morton* even though the Third Circuit found that there was a likelihood of success on the merits in the case of a government employee terminated without pay, it concluded that there was no irreparable harm present where there the employee's remedy was economic and compensable in money. It reached this conclusion despite the fact that the employee in question was "someone who

lives, in effect, on his salary." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 802 (3d Cir. 1989). The district court had determined that deprivation of that salary would be "economically irreparable and c[ould] not be cured by giving the money back at a subsequent date." *Id.* But the Third circuit overruled, saying the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm even where there is substantial likelihood of success on the merits. *Id.*

Similar to *Morton*, the *Instant Air Freight* Plaintiff argued that without the preliminary injunction entered by the district court "Instant's business will be completely destroyed, its employees and jobs will be lost and its goodwill and business reputation will be ruined. . . . *Instant* will be forced to lay off most, if not all, of its 70 employees and will lose everything it has built over the past two decades." Nonetheless, the court held that the crucial issue in determining whether the district court abused its discretion in finding irreparable injury in this case is the question of whether money damages provide an adequate remedy at law. *Id.* The Third Circuit has repeatedly relied upon *Samson v. Murray* (and not the dissent, as Northern District of California did in *Scholl*) speaking to the standards for granting preliminary injunctions:

> It seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . 'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1964) (quoting *Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (1958)). And it repeatedly quotes its earlier opinions in *Arthur Treacher's* that "[w]e have never upheld an injunction where the claimed injury constituted a loss of money or loss capable of recoupment in a proper action at law." *Instant.* at 1145,

and *Frank's GMC*, 847 F.2d 100 (3d Cir. 1988) that "the availability of adequate monetary damages belies a claim of irreparable injury." *Id.* at 102. On this basis the *Instant* court held:

> Here the monetary damages which Instant alleges it is suffering are capable of ascertainment and award at final judgment if Instant prevails. These money damages will fully compensate Instant for its losses. See *Arthur Treacher's*, 689 F.2d at 1146. As we stated in *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987), "although we are not insensitive to the financial distress suffered by [the plaintiff], we do not believe that loss of income alone constitutes irreparable harm." In determining whether a remedy in damages for a breach of contract would be adequate the following circumstances are significant: "(a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected." Restatement (Second) of Contracts § 360 (1981).

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800-02 (3d Cir. 1989). It is clear then, that claims for economic harm can be satisfied post trial, and such delay will not give rise to irreparable harm such that preliminary injunctive relief is proper.

1. Plaintiff's Attempt to Recast Economic Harm

Plaintiff's sole argument rests on precedent from outside of this circuit –non-binding precedent - which itself sprung out of a *dissenting opinion* in *Samson v. Murray* supra. Plaintiff's argument is that for someone with limited or no income who seeks economic relief, a delay will be irreparable because the plaintiff will be deprived the bare necessities of life pending judicial resolution. Plaintiff's argument fails for two reasons. First, he bears the burden of proving that he will indeed be deprived of such necessities, and he has not tendered any evidence, or even a declaration to that point in support of his motion. And Second, the Third Circuit has repeatedly rejected similar notions.

As discussed above, in the leading case, *Morton v. Beyer*, the plaintiff sued for unlawful discharge and claimed that he would be irreparably harmed unless he were to be employed pending suit. His argument was much like the Plaintiff's –that because his wages were his sole source of income, the money he sought (through continued employment) would provide for his bare necessities; and that

without an injunction he would go without and therefore be irreparably harmed. The Third Circuit considered and rejected his argument:

> We acknowledged that Morton was likely to succeed on the merits. However, notwithstanding the plaintive (and understandable) problems that Morton faced, **we reversed the district court's injunction order because although we are not insensitive to the financial distress suffered by employees whose wages have been terminated, we do not believe that loss of income alone constitutes irreparable harm**.

Morton v. Beyer, 822 F.2d 364, 371-72 (3d Cir. 1987).

This court recently considered a similar "bare necessities" argument in *Parris v. United States,* No. 2017-0012, 2017 U.S. Dist. LEXIS 32205 (D.V.I. Mar. 7, 2017). In that case the plaintiff sought an injunction for the immediate return of the approximately $23,000 that law enforcement officers allegedly removed from his luggage. He argued that he would suffer "irreparable harm" because "the seizure of $23,000.00 denies him of his ability to work and provide for the immediate shelter, food, education and necessities for himself and his family." This court rejected the necessities argument noting:

> Plaintiff's argument that the continued loss of the money prevents him from working and providing the necessities for him and his family fails to show injury "of a peculiar nature, [such] that compensation in money cannot atone for it." *Beberman*, 2017 U.S. App. LEXIS 564, [WL], at *3 (quoting ECRI, 809 F.2d at 226). In this regard, the Court finds the case of *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987) to be instructive. In *Morton*, the plaintiff was suing for unlawful discharge and argued that, without his salary, he would be irreparably harmed during the pendency of his trial. Id. at 371-72. The district court agreed, finding that the plaintiff "lives, in effect, on his salary" and that depriving him of the salary "would be economically irreparable and could not be cured by giving the money back at a subsequent date." *Id.* at 372 (internal quotations and brackets omitted). **The Third Circuit reversed the district court and held that the plaintiff had failed to show irreparable harm. Id. In so holding, the Third Circuit reasoned that the plaintiff's claimed injury "is purely economic in nature and thus compensable in money**." *Id.* The Third Circuit noted that "[a]lthough we are not insensitive to the financial distress suffered by employees whose wages have been terminated, we do not believe that loss of income alone constitutes irreparable harm." *Id.*

Parris v. United States, No. 2017-0012, 2017 U.S. Dist. LEXIS 32205, at *8-9 (D.V.I. Mar. 7, 2017).

The very nature of Plaintiff's claim –a $1200 payment (more or less) makes it clear that his claimed injury is economic in nature and thus compensable in money damages. *Morton* supra. And it is well settled in the Third Circuit that where a plaintiff alleges a continued loss of money prevents plaintiff from providing the necessities for him and his family, he "fails to show injury "of a peculiar nature, [such] that compensation in money cannot atone for it." *Beberman* supra. This is even true where he alleges that the payment sought will be used to provide for the bare necessities of life. *Morton supra. See also Paris supra.* On this basis Plaintiff cannot prove irreparable harm, and preliminary injunctive relief must be denied. *Id.*

2. Even if the Third Circuit Were to Adopt an Exception, Plaintiff has not Proven Necessity.

Plaintiffs cite arguments from the Northern District of California's injunction against the IRS as a basis for summary issuance of an injunction in the Virgin Islands. However that decision was in part based upon the court's finding that "Plaintiffs' injury is actual and imminent in the sense that defendants already denied payments to them and the injury is not merely a speculative fear about future harm that may or may not happen." *Scholl v. Mnuchin*, No. 20-cv-05309-PJH, 2020 U.S. Dist. LEXIS 176870, at *16 (N.D. Cal. Sep. 24, 2020). citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 560 (1992). However, even if the court were to buy Plaintiff's argument that delayed payments are irreparable where they would otherwise go to provide necessities, in the present case Plaintiff has not alleged that he or anyone else has been denied payment by VIBIR, nor has he or anyone else put forward a scintilla of evidence, through declaration or otherwise, supporting the notion that a delay in payment will mean that he or she goes without necessities. No, Plaintiff merely speculates that an unanswered letter to VIBIR from the plaintiff's bar means that VIBIR has adopted the IRS' view and would deny his claim if he made one, and from there he rests upon conclusory statements that assume harm where there is none.

While the Northern District of California followed the dissent in *Samson* to hold that delayed payment was irreparable because: "[m]any employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the essentials of life—e.g,., to buy food, meet mortgage or rent payments, or procure medical services" *Sampson*, 415 U.S. at 101 (Marshall, J., dissenting) (citations omitted), and held that irreparable harm *can exist* where a plaintiff lacks the resources to procure the basic necessities of life, *Scholl v. Mnuchin*, No. 20-cv-05309-PJH, 2020 U.S. Dist. LEXIS 176870, at *47 (N.D. Cal. Sep. 24, 2020), it did so based upon a plethora of declarations and affidavits by which:

> [P]laintiffs and amici have demonstrated that prisons do not provide all basic necessities required by incarcerated persons, including food and hygiene, arguing that incarcerated people supplement their food with items from the commissary, based in part upon plaintiffs submission of evidence that some institutions have reduced the number of calories or meals provided to inmates, and because the plaintiffs in that case also presented evidence that some penal institutions require inmates to pay for their own soap and personal hygiene items.

Id. In the present matter, Plaintiff has submitted no declarations or affidavits suggesting that penal institutions in the Virgin Islands are depriving incarcerated taxpayers of the bare necessities of life in general, or that he himself must supplement the food, clothing and shelter provided by the prison because they fall below the standard necessary for basic support. To grant injunctive relief in the absence of evidentiary proof of these facts, would indeed be speculative and contrary to the Supreme Court's holding in *Lujan*.

3. Even if Plaintiff Could Prove Irreparable Harm (and He Cannot) Class Injunction is Improper

Some courts have uncritically treated a group as a collective when a would-be class has petitioned for certification[2]. The Third Circuit disagrees:

[2] See, e.g., *Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034 (E.D. Mich. 1994). In *Hinckley*, the court found irreparable harm to the 500 plaintiffs when only one of the two named plaintiffs in the proposed class presented

> We see no reason why the pendency of a class action certification petition should alter our analysis. We have no basis on which to judge the viability of the class certification request, which we understand to be contested. Merely petitioning for class certification cannot provide plaintiffs the right to be treated collectively. Furthermore, a class action determination focuses on similarities between the legal claims of the parties, see Fed. R. Civ. P. 23(a), while a preliminary injunction determination, by requiring a showing of irreparable harm, depends in many cases (including this one) on circumstances entirely independent of legal rights: the particular resources available to each member of the class to weather hardships pending a trial.

Adams v. Freedom Forge Corp., 204 F.3d 475, 490-91 (3d Cir. 2000). A preliminary injunction may not be based on facts not presented at a hearing, or not presented through affidavits, deposition testimony, or other documents, about the particular situations of the moving parties. "The elasticity that the opposite conclusion would permit would essentially shift the burden to the defendant to disprove widely believed facts and would turn the preliminary injunction balancing process on its head." *Id.*

> In lieu of (or in addition to) "common sense," many of these cases pursue an additional approach, resting a preliminary injunction for many on the testimony of a few. This is not inappropriate so long as the plaintiffs lay an adequate foundation from which one could draw inferences that the testifying plaintiffs are similarly situated--in terms of irreparable harm--to all the other plaintiffs. When a court, such as the District Court, concludes that there is clear evidence that most, but not all, individuals will be harmed, it treats each individual only as part of an aggregate; in contrast, when a court infers a risk of harm to all individuals although only a few testify, it is reasoning inductively. The former mode of analysis is unacceptable; the latter is the daily work of fact-finders. **In short, in the absence of a foundation from which one could infer that all (or virtually all) members of a group are irreparably harmed, we do not believe that a court can enter a mass preliminary injunction.**

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evidence of threatened harm, and none demonstrated that money would not be an effective compensation. See *id*. at 1044-45. The court based its order, in part, on the fact that it was dealing with a potential class. "The court will take into consideration the irreparable harm faced by putative class members before class certification because of the nature of injunctive relief at this stage of the litigation." *Id*. Likewise, in *Lapeer Cty. Medical Care Facility v. Michigan*, 765 F. Supp. 1291, 1301 (W.D. Mich. 1991), the court treated a group of noncertified plaintiffs as a class. The court analogized the preliminary injunction order to dismissal orders and compromise negotiations, in which a court can treat a non-certified potential class as a unit. *Cf. Musto v. American General Corp.*, 615 F. Supp. 1483, 1504-05 (M.D. Tenn. 1985), rev'd on other grounds, 861 F.2d 897 (6th Cir. 1988) (treating certified class collectively for irreparable harm determination).

> There are many rearrangements--not just scrimping and saving rearrangements--that individuals involved in a legal battle must endure pending the conclusion of a suit, and very few will be without some anguish. As we have stated, "injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3d Cir. 1992) (quoting *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980))."

Id.

The Supreme Court, moreover, has instructed that the tool of the preliminary injunction should be reserved for "extraordinary" situations, *Sampson,* 415 U.S. at 88, 92, and "the dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat." *Holiday Inns of America, Inc. v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969) (emphasis added).

Plaintiff starts from a false premise that all prisoners are destitute and do not receive basic necessities while incarcerated. Plaintiff has offered no evidence that all potential class members are similarly situated. There is no doubt that some may be impoverished. However, it is equally as possible that some prisoners possess great wealth. To assume that all prisoners will go without necessities during the course of litigation in the absence of an injunction would require unfair and unsupported inferences. Absent more than Plaintiff's conclusory assertions, a mass preliminary injunction applicable to all cannot issue. *Adams supra.*

4. Plaintiff's Requested Injunction may result in Irreparable Harm to Defendants

Plaintiff asserts that Defendant will not be harmed by an injunction. However, Plaintiff is unaware of the relationship between the VIBIR and the United States Treasury with respect to the federal funds provided to enable the Territory to make payments under the CARES Act. Given that EIPs are in many ways fictitious rebates –they are payable even if no tax was paid, they cannot simply be treated like any other refund of monies overpaid by taxpayers and held by the Territory. There must be a source of funds to pay them. While the CARES Act is indeed made applicable to the Territory by way of the Mirror Tax Code, the Mirror Tax Code by itself does not provide advance

funding for the EIPs. Because the Territory is without advance funds to pay EIPs, the United States Treasury has transferred funds to an EIP Trust Account (a transfer that is not contemplated in the Mirror Tax Code). The funds transferred by Treasury are governed by the Plan which contains the terms upon which federal monies will be provided by the federal government to the Territory, and the terms upon which the Territory will disburse them.

Among other things, the Plan excludes payments to "incarcerated individuals." (Exhibit A - Declaration of Joel A. Lee). Pursuant to the Plan, the Territory is only authorized to remit EIPs to eligible individuals who have filed a 2018 or 2019 tax return, or an alternative form that may be prescribed by the VIBIR in order to receive a 2019 Advance Refund. *Id.* The VIBIR has not prescribed an alternate form. This does not limit an eligible individual from being able to claim a tax credit for such benefits on a 2020 USVI Individual Income Tax Return. These restrictions do however prevent the Territory from utilizing EIP Trust Fund monies to make payments to individuals who have neither filed a tax return, nor an alternative form that may be developed by VIBIR. *Id.*

The Plan provides that payments received from the federal government shall be held in trust. *Id.* Accordingly, Payments made contrary to the terms of the Plan must be reimbursed to the trust fund by the VIBIR, or the Virgin Islands Government. Of significant importance to this matter, the Plan specifies that the United States has not waived its sovereign immunity for a suit by either USVI or the residents of USVI in connection with the EIPs paid or payable to either USVI or its residents. However, the USVI is liable to the United States for any erroneous or unauthorized payments made that it does not recover.

Clearly then, the EIP Trust Fund is not Defendants' property, and those monies are not available to VIBIR to make EIP payments to incarcerated individuals. Defendants merely act as payment agent for the United States of America, and it is black letter law that an agent is subject to a

duty to its principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent. Restat. 2d of Agency, § 383. "Unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of the principal. He is also obliged to act only as authorized, or where no instruction has been given, in accordance with reasonable customs, good faith and discretion, § 383." *Walter v. Netherlands Mead, N.V.*, Civil No. 284-1963, 1973 U.S. Dist. LEXIS 5188, at *32-33 (D.V.I. Mar. 27, 1973). An order to remit EIPs to incarcerated individuals as Plaintiff requests will require Defendants to violate the Plan and remit EIPs contrary to the principal's (U.S. Treasury) manifest consent, which turn will expose the USVI to liability for breach of contract under the plan, and for common-law breach of fiduciary duty an agent owes its principal. At the same VIBIR pursuant to the Plan, be estopped by express waiver under the Plan from recovering damages from the United States. (Declaration of Lee).

On one hand, Plaintiff might have to wait for a judgment to recover economic relief if he is successful. In the meantime, Morton's food, clothing, shelter, and medical care remain assured. On the other hand, if an injunction issues and Defendants are forced to remit EIPs to incarcerated individuals on contravention of the Plan, Defendant will be exposed to liability to the federal government pursuant to the terms of the Plan; it will be exposed to liability having wrongfully paid claims to incarcerated persons if the United States is successful in its appeals in *Scholl*; or if it uses other funds on hand in the absence of local legislative approval, VIBIR could potentially be liable to the People of the Virgin Islands for misappropriation of local funds in violation of 33 V.I.C. § 3101[3]. The equities clearly lie in favor of Government and against a preliminary injunction.

[3] No officer or employee of the Virgin Islands shall make or authorize an expenditure from, or create or authorize an obligation under, any appropriation or fund in excess of the amount available therein; nor shall any such officer or

B. LIKELIHOOD OF SUCCESS ON THE MERITS

As pled, Plaintiff's case as presented has little likelihood of success on the merits. This is in part because Plaintiff has failed to name a necessary party who is not subject to suit and the suit is therefore subject to dismissal pursuant to Fed. R. Civ. P. 19. Because the CARES Act is not self-executing as to the provision of funds for EIPs in the territories, Defendants' compliance with any decision mandating Defendants to pay EIPs to incarcerated individuals must be predicated on an order that the U.S. Treasury amend the Plan or otherwise provide supplemental unrestricted funding. In the absence of supplemental funding or amendment of the Plan by Treasury Payment by VIBIR would be legally impossible.

1. FAILURE TO NAME AN INDISPENSIBLE PARTY

A. The United States of America is a Necessary Party.

Complete relief cannot be afforded in the absence of the United States as a party defendant in this suit because the United States is the source of funds for all EIPs, (CARES ACT Section 2201(c)(1)(A)), but its Treasury has not provided funds to Defendant that can be used to pay EIPs to incarcerated persons. (Exhibit A -Declaration of Joel A. Lee). Pursuant to the Plan all funds received to date are restricted in delivery. *Id.* Unless and until the United States Treasury provides funds to make EIPs to incarcerated persons, an order to pay would be of limited significance as there are no funds in the Government's possession and no sums have been appropriated for that purpose. *Id.* The only funds provided by Treasury for payment of EIPs is held in a trust account with significant restrictions pursuant to the Plan. *Id.* An order that Defendant -withdraw the EIP Trust Account (federal funds) to make payments prohibited by the Plan (the contract governing Defendant's use of

employee involve the government in any contract or obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law. 33 V.I.C. § 3101

federal funds) would deprive the United States Treasury of property, in violation of the Plan and without due process because they are not party to this suit. The U.S. Treasury is the owner of the EIP Trust Account funds and is a necessary party because "[w]ithout [them] as parties . . . . their interests in the subject matter [the EIP Trust Account] are not protected." *In re Republic of Philippines*, 309 F.3d at 1152; see Fed. Rule Civ. Proc. 19(a)(1)(B)(i) *Philippines v. Pimentel*, 553 U.S. 851, 863-64 (2008).

B. The United States is Not Subject to Suit

It is Treasury's position, (recognized in the Plan) that the United States has not waived its sovereign immunity for a suit by either USVI or the residents of USVI in connection with the EIPs paid or payable to either USVI or its residents. Pursuant to Section 2201(c)(1)(A) of the CARES Act, the U.S. Treasury will pay the initial transfer to USVI and pay additional amounts to USVI of the remaining EIP amounts to be paid by USVI BIR to eligible individuals pursuant to the terms of this Plan. The U.S. Treasury will not be liable for any payments or adjustments beyond the aggregate EIP amounts to be paid by USVI to eligible individuals pursuant to the terms of this Plan.

While the Northern District of California ruled against Treasury as to sovereign immunity, it did so because sovereign immunity had been waived for certain Administrative Procedure Act claims. The issue will be slightly different in the present matter. Treasury is one step removed from the process as Plaintiffs are challenging nonpayment under the Mirror Tax Code. Defendant's inability to remit EIPs to incarcerated persons is not solely due to an interpretation of "eligible taxpayer" by the IRS, but rather is due to the United States Treasury prohibition that "incarcerated persons" cannot receive the EIP from the EIP Trust Fund. We cannot remit EIPs to incarcerated individuals because Treasury has not advanced the funds for payment to incarcerated individuals, and because the Territory has no means to make EIP payments outside of the Plan as –the legislature has not appropriated funds for this purpose. For these reasons, the *Scholl* analysis with respect to sovereign

immunity is inapplicable, and Defendants are unaware of any statutory waiver that would apply to this case as pled.

Dismissal is appropriate where the United States is a necessary party but has not consented to be sued. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 373-375 (1945) (dismissing an action where the Under Secretary of the Navy was sued in his official capacity, because the Government was a required entity that could not be joined when it withheld consent to be sued); See also *Minnesota v. United States,* 305 U.S. 382, 386-388 (1939) (dismissing the action for nonjoinder of a required entity where the United States was the owner of the land in question but had not consented to suit). The clear rule emanating from these cases is that a case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign. *Philippines v. Pimentel* supra.

IV. CONCLUSION

The Third Circuit has not upheld injunctive relief where the claimed injury constituted a loss of money, a loss which is recognized as capable of recoupment in a proper action at law. Plaintiff's claims are purely economic and thus Plaintiff cannot show the irreparable harm necessary to sustain his application for preliminary injunctive relief. Neither can Plaintiff show a likelihood of success on the merits, because he has failed to name the United States, who is an indispensable party that is not subject to suit. VIBIR takes no position on the eligibility of incarcerated persons for Economic Impact Payments. While the CARES Act does not contemplate the Territory bearing the loss for any EIP payments, the United States Treasury has not seen fit to allow and provide funds to pay prisoners pursuant to its EIP Implementation Plan. As an unfunded intermediary, the Territory is legally unable to provide Plaintiff the relief he seeks.

WHEREFORE, Defendants pray that Plaintiff's Motion for Preliminary Injunction be denied.

Respectfully submitted,

DENISE N. GEORGE, ESQ.
ATTORNEY GENERAL

By: /s/ Ariel M. Smith

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Ariel M. Smith, Esq.
Chief, Civil Division
34-38 Kronprindsens Gade
GERS Bldg., 2nd Floor
St. Thomas, USVI 00802
Tel: (340) 774-5666
Email: ariel.smith@doj.vi.gov

By: /s/ Christopher M. Timmons
CHRISTOPHER M. TIMMONS, ESQ.
Assistant Attorney General
Department of Justice
213 Estate La Reine, RR1 Box 6151
Kingshill, St. Croix VI 00850
Tel: (340) 773-0295
christopher.timmons@doj.vi.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2020, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Joseph A. DiRuzzo, III
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
jd@diruzzolaw.com

/s/ Ariel M. Smith, Esq