IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS'EMERGENCY MOTION TO VACATE INJUNCTION DUE TO PLAINTIFF'S FAILURE TO FORTHWITH FILE THE REQUIRED BOND

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned counsel, respectfully submit this Reply to Plaintiff's "Opposition to Defendants' 'Emergency Motion re Bond" filed on December 23, 2013 (the "Opposition").

All the briefs filed to date by Plaintiff Mohammad Hamed ("Plaintiff" or "Hamed") are simply efforts to avoid or delay posting of the $1.2 million bond (the "Bond") this Court determined must be "forthwith" filed in its December 5, 2013 Order (the "Bond Order"). Because Plaintiff has clearly failed to comply with the Bond Order over one month after its entry, the preliminary injunction that is conditioned upon the posting of the Bond must be vacated.

A. The Time for Contesting the Amount of the Bond Is Over.

The issue as to the amount of the Bond has been briefed extensively[1] by both sides. The Court will recall that Plaintiff has already made arguments, which the Court has rejected, seeking to reduce the bond from $25,000.00 to a mere $5,000.00. Instead, the Court issued the nine (9) page Bond Order, setting forth the reasoning for the amount of the Bond and required it to be posted "forthwith." Although the Bond Order clearly decided the amount of the Bond, Plaintiff has ignored it. Rather than simply complying, Plaintiff wants more – seeking not only a further reduction in the bond amount, but also to pledge real estate, which he does not personally own since he conveyed it to a Trust days before filing this suit,[2] and other "assets," which are not certainly available "to assure that Yusuf and United can 'readily collect damages' ... in the event they ultimately succeed on the merits." Yusuf vs. Hamed, 2013 V.I. Supreme LEXIS 67, * 40-41(2013). In his latest move to steamroll this request and feign compliance with the Bond Order, Plaintiff has not even waited for permission from the Court, but instead has simply gone forward and filed a "Notice of Filing Bond" in an amount *he* determined was acceptable ($290,000 less than the amount set in the Bond Order) and secured in a manner *he* determines adequate. As this Court is well aware, Defendants have advocated for a bond far more significant than the $1.2

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[1] The redetermination of the amount and security for the injunction bond was mandated by the Supreme Court on October 24, 2013 (S. Ct. Civ. No. 2013-0040). Plaintiff filed a Motion to Reduce the Bond on October 17, 2013, which Defendants opposed and briefs were submitted by both sides. Further, Defendants filed a Motion to Vacate the Injunction Pending Posting of Additional Security, which Plaintiff opposed and briefs were filed by both parties. Hence, the issue of the amount of the bond already has been thoroughly briefed, analyzed and decided in the Bond Order.

[2] According to an unauthenticated title opinion on the letterhead of Island Title Services Corporation included as part of Plaintiff's Notice of Filing Bond, the real estate Plaintiff purports to pledge is owned by the "Mohammed A. Hamed Living Trust" and Hamed transferred the property to the Trust by Warranty Deed dated September 12, 2012, five days before filing this civil action. While Hamed appears to be the Trustee, it is unclear, without reviewing the Trust document itself, whether there is authority to pledge the property of the Trust. At the very least, the burden would be upon Hamed to demonstrate that he has the authority and ability to pledge the Trust property as security. Hence, this is an additional hurdle which makes the pledging of real property, which is not even held in Hamed's name, an unacceptable means by which to post the bond and why the bond should be posted in cash.

million set in the Bond Order. Plaintiff has utterly failed to establish why it would be impossible or impracticable to post the Bond in cash or countersigned by a qualified surety much less a valid reason for reducing the amount of or the security for the Bond.

B. There is No Basis for a Further Reduction.

Hamed argues that the Bond should be further reduced because "Defendants have conceded they are no longer considering amending the Plea in the criminal case (upon which this $100,000 figure was based)," see Opposition at p. 3, and because certain bonuses are not being paid to members of Plaintiff's family, when the bond amount was based in part upon those bonuses. The Opposition was supported only by the declaration of Plaintiff's counsel who claimed to have "personal knowledge of the foregoing facts" without identifying what "foregoing facts" he was referring to and by a group of documents attached as Exhibit B that Plaintiff did not even make a passing attempt to authenticate.

On December 23, 2013, Defendants filed and served their Opposition to Plaintiff's Motion to Partially Reconsider/Clarify Bond Order ("Opposition To Reconsideration"), which set forth their arguments why this Court should not reconsider the amount of the Bond and Defendants will not rehash those arguments here. On December 27, 2013, Plaintiff filed his Reply to the Opposition To Reconsideration ("Reconsideration Reply"), once again taking up his arguments concerning reducing the amount of the Bond, among other arguments.

A point must be made here regarding the Reconsideration Reply, which relies upon two declarations and Plaintiff's purported "Pledge of Interest In ByOrder Investment, LLC," that Defendants saw for the first time upon receipt of the Reconsideration Reply. This is not the first time Plaintiff has attempted to "sandbag" Defendants with new evidence and arguments in a reply document, to which Defendants have no right, under LRCi 7.1(a), to further respond or reply. *See* Defendants' Reply to Plaintiff's Opposition to Motion to Vacate Injunction Pending Posting of

Additional Security filed on December 2, 2013 at n. 4. Because a reply brief is clearly not the time to present new evidence or arguments, see, e.g., Great Lake Reinsurance (UK) PLC v. Kranig, 2013 U.S. Dist. LEXIS 82337 n. 15 (D.V.I. 2013), Defendants submit this Court should simply ignore the evidence and arguments submitted for the first time in the Reconsideration Reply. Although Plaintiff seeks to improperly rely upon two new declarations in his Reconsideration Reply, it is telling that he does not use the opportunity to address two glaring omissions in his motion papers, namely, the complete absence of admissible evidence showing that it would be impossible or impracticable for Plaintiff to file the Bond pursuant to the Bond Order or that Waleed Hamed is authorized to speak on behalf of his brothers. These omissions were clearly pointed out in Defendants' Opposition To Reconsideration.

In any event, this Court has determined that $100,000 of the Bond was required "as security against Defendants' legal fees regarding the one criminal case." Although Plaintiff claims that Defendants' Counterclaim "did not include any asserted counterclaim for indemnity for ... taxes and fines," see Reconsideration Reply at p. 3, Defendants beg to differ. Although Defendants submit that such indemnity claims are subsumed under the counts of the Counterclaim seeking declaratory relief, in an abundance of caution, Defendants will timely amend the Counterclaim to assert a separate count based on United's indemnity claims. [3]

The Court also set the Bond based upon only "one half of the salaries of these four individuals." (Bond Order, p. 4). Hence, the Bond amount is already discounted and does not even fully compensate for the Hamed family salaries being paid, but rather only would compensate for *half* of the losses associated with those salaries. Therefore, bonus or no bonus, the bond is already at a reduced amount relative to the potential losses and should not be further

[3] Pursuant to Fed. R. Civ. P. 15(a)(1), Defendants have until January 13, 2014 to amend their Counterclaim "as a matter of course."

reduced, particularly because the Court must "err on the high side" when setting the amount of the security. See Yusuf, 2013 V.I. Supreme LEXIS 67, * 38.

C. "Assets" That are not Certainly Available to Assure That Defendants Can Readily Collect Damages Will Not Suffice.

It is inconceivable how Plaintiff, who has been able to retire and live off of the net income from the Plaza Extra Stores for eighteen (18) years and owns substantial real estate, cannot (or will not) post the Bond in cash. Neither, Plaintiff nor his son and "authorized agent" have submitted a declaration that Plaintiff is unable to do so. Instead, Plaintiff attempts to pledge non-liquid, contingent, and disputed assets valued at less than the court ordered Bond amount. Real Estate, especially in the current market, is clearly not a liquid asset, nor is its value certain. The purpose of the bond is to provide readily available security to the Defendants in the event that the injunction is later determined to have been improper. Defendants should not be made to further bear the risk as to the fluctuating value of the assets pledged or the inability to convert the pledged assets into cash.

However, the problem is easily solved and requires no further Court intervention. If Plaintiff views the real estate to be so valuable and if it is otherwise unencumbered as he contends, then Plaintiff can borrow against it and post the bond with the loan proceeds. Alternatively, he can convince a qualified surety company to countersign the Bond based upon the security of these assets.

Likewise, Plaintiff's alleged interests in ByOrder Investments, LLC are clearly disputed. Plaintiff does not dispute that ByOrder Investments, LLC is a member-managed limited liability company and United is the sole member, as set forth at page 8 of the Opposition To Reconsideration. At best, any previous efforts to agree on disbursement of certain proceeds held

by Attorney Carl Beckstedt never materialized. Plaintiff either has no transferable interest or the interest he has is contingent and uncertain.

Moreover, Plaintiff even acknowledges that the combined value he attributes to these disputed assets does not equal the amount required for the Bond. Hence, even if Plaintiff was able to reduce these assets to cash, Plaintiff is still short. Rather than securing the necessary assets to satisfy the Bond in full and in cash, instead, Plaintiff seeks to circumvent the Bond Order and post only as much as Plaintiff (rather than the Court) believes would be proper and in the form that Plaintiff choses.

D. Untimely Excuses Do Not Equate to Posting of the Bond "Forthwith."

Plaintiff argues that because he launched his objections to the Bond within a few days after learning of the Bond Order that he acted timely. As pointed out in Defendants' Opposition To Reconsideration, the time for Plaintiff to raise all of these arguments was when he opposed Defendants' Motion to Vacate Injunction Pending Posting of Additional Security, which was filed on November 18, 2013. In any event, excuses and arguments do not constitute a timely posting of the Bond. Further, attempting to use assets which are non-liquid, contingent, disputed and in an amount less than required, also does not constitute a timely posting of the Bond. The Bond Order was issued on December 5, 2013 and was received by counsel on December 10, 2013. It is now one month later and the Bond set in the Bond Order has not yet been posted.

CONCLUSION

Plaintiff's efforts epitomize the "day late and a dollar short" adage. The time for arguing over the amount of the bond is over. The Bond has been set, albeit in an amount significantly less than sought by Defendants. The denial of Plaintiff's Motion for Partial Summary Judgment makes clear that the existence of the alleged partnership is very much an open and contested issue. Hence,

it is not a foregone conclusion that Plaintiff is a partner of Yusuf. Therefore, the injunction, which substantially limits United's and Yusuf's authority and control over the operations of the Plaza Extra Stores ultimately may be determined to be improper. Consequently, Plaintiff must post the Bond to assure that Defendants can "readily collect damages" in the event they ultimately succeed on the merits. Plaintiff has failed to do so and appears unwilling to do so. Thus, Defendants submit there is just cause to vacate the preliminary injunction due to Plaintiff's failure to forthwith comply with the Bond Order.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: January 9th, 2014 By: _____

Gregory H. Hodges (V.I. Bar No. 174)
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail:ghodges@dtflaw.com

and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00830
T. (340) 773-3444
F: (888) 398-8428
Email: info@dewood-law.com
Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT a true and exact copy of the foregoing was served via electronic mail on this the 9th day of January, 2014 to wit:

Joel H. Holt, Esq. (V.I. Bar No. 6)
Law Office of Joel H. Holt
2132 Company Street
Christiansted, USVI 00820
Email: holtvi@aol.com
Counsel for Plaintiff

Carl J. Hartmann III, Esq.
5000 Estate Coakley Bay
Unit L-6
Christiansted, USVI 00820
Email: carl@carlhartmann.com
Co-Counsel for Plaintiff

Nizar A. DeWood