

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF AND UNITED
CORPORATION,

Appellants/Defendants,

v.

MOHAMMAD HAMED By His
Authorized Agent WALEED HAMED,

Appellee/Plaintiff.

S. Ct. Civ. No. 2013-CV-0040

Re. Super. Ct. Civ. No. 2012/370

APPELLEE'S OPPOSITION TO APPELLANTS' RULE 17 MOTION

Appellee ("Hamed") hereby opposes Appellants' Rule 17 motion to strike Waleed Hamed as the "authorized agent" of Appellee. At the outset of this response, Hamed respectfully notes that Appellants did not mention the history of this issue in their recitation of the "Relevant Procedural Background," which needs to be expanded as it relates to this motion as follows:

- Appellants filed this same motion below. **See Exhibit A attached.**
- Hamed opposed that motion. **See Exhibit B attached.**
- Appellants filed a reply. **See Exhibit C attached.**
- The court denied the motion. **See Exhibit D attached.**

Thus, it is respectfully submitted that this Rule 17 motion now pending before this Court should be denied for two reasons.

First, the issue is not properly before this Court as it was not a proper subject for this interlocutory appeal. Moreover, if it were, it was not timely raised in this appeal.

Second, as noted in the court below (Exhibit B), the relief sought has no merit. In this regard, Rule 17 provides in part as follows:

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. . . .

To resolve any questions about who is the proper party, Rule 17(c) allows a party to clarify any doubt about this issue, stating as follows:

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

See, ICON Group, Inc. v. Mahogany Run Dev. Corp., 829 F.2d 479, 477 (3d Cir. 1987)(ratification cures any question about who the party in interest might be).

Thus, to eliminate any doubt about this issue, Hamed filed a declaration confirming and ratifying this fact pursuant to Rule 17(a)(3), which was attached to his opposition memorandum.¹ **See Exhibit 1 to Exhibit B attached.**

In denying this motion, the court below held as follows (**Exhibit D**):

In this case, there is no attempt to make Waleed Hamed the Plaintiff. Plaintiff Mohammed Hamed has designated the power to litigate matters involving Plaza Extra to Waleed Hamed by executing a Power of Attorney. **Any doubt as to whether this action is being prosecuted by the real party in interest was dispatched in Plaintiff Hamed's Response to Defendants' Rule 17 Motion to Strike Representative. See Declaration of Plaintiff Mohammed Hamed** (Emphasis Added)

¹ It is somewhat incredible for Appellants to repeatedly suggest that there is no such evidence in the record on this point in light of this declaration.

It is respectfully submitted that this Court should reach the same conclusion if it finds this issue is properly before it, which Appellee respectfully submits it is not.

It is simply incredible that Appellants would re-file this same motion again without referencing the motion practice below on this exact same Rule 17 issue, including Mohammad Hamed's declaration, much less the court's order denying that motion. However, that is an issue for this Court, not the Appellee.

In summary, for the reasons set forth herein, it is respectfully submitted that Appellants' Rule 17 motion should be denied in all respects.

Dated: July 8, 2013

/s/ Joel H. Holt

Joel H. Holt (Bar # 6)
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/s/ Carl J. Hartmann, III, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2013, I electronically filed the foregoing **APPELLEE'S OPPOSITION TO APPELLANTS' RULE 17 MOTION** with the Clerk of the Court using the VISCEFS system, which will send a notification of such filing (NEF) and I caused two true and exact copies of the foregoing to be served by mail to:

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131
305-350-5690
Email: jdiruzzo@fuerstlaw.com

Dated: July 8, 2013

/s/ Joel H. Holt

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED, by his)
authorized agent, WALEED HAMED,)
)
 Plaintiffs,)
)
v.)
)
FATHI YUSUF and UNITED CORPORATION,)
)
 Defendants.)
_____)

CIVIL NO. SX-12-CV-370

DEFENDANTS' MOTION TO STRIKE SELF-APPOINTED REPRESENTATIVE

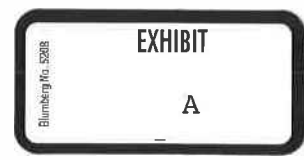
Defendants, pursuant to Rule 17 of the Federal Rules of Civil Procedure, hereby move to strike Waleed Hamed as Plaintiff Mohammad Hamed's self-appointed representative or "authorized agent," and request that the Court do so prior to resolving any other substantive motions.

Introduction

Rule 17 provides that an incompetent litigant may sue or be sued through a representative only when the representative is a "general guardian," "committee," "conservatory" or "like fiduciary." Fed. R. Civ. P. 17(c)(1). Here, although Plaintiff Mohammad Hamed seeks to prosecute this action through a self-appointed representative, *i.e.*, "his authorized agent Waleed Hamed," Mohammad Hamed has failed to establish any valid basis to do so under Rule 17 or otherwise. Accordingly, prior to the resolution of any other substantive motions, Defendants move to strike Waleed Hamed as Plaintiff Mohammad Hamed's putative representative or agent.

Relevant Procedural Background

1. Plaintiffs initiated this action on or about September 17, 2012, the date of the Complaint.



2. Defendants timely removed the action on October 4, 2012. (Oct. 4, 2012 Notice of Removal, Case No. 1:12-cv-99 (Doc. # 1)).¹

3. On October 11, 2012, among other pleadings and papers filed in the District Court, Plaintiffs filed a motion for remand. (Oct. 11, 2012 Motion for Remand (Doc. # 13); Oct. 11, 2012 Memorandum in Support of Motion for Remand (Doc. # 14)).

4. On October 19, 2012, Plaintiffs subsequently filed a First Amended Complaint, and a separate "Comparison Document," comparing the original Complaint with the First Amended Complaint. (Oct. 19, 2012 First Amended Complaint (Doc. # 15); Oct. 19, 2012 Comparison Doc. (Doc. # 17)).

5. On November 16, 2012, the District Court granted Plaintiffs' motion for remand and remanded the action to this Court. (Nov. 16, 2012 Order (Doc. # 39)).

6. Based on the papers filed in this Court prior to removal, and those filed in the District Court prior to remand, the following substantive motions are pending:

- (a) Plaintiffs' Motion for a Temporary Restraining Order and/or a Preliminary Injunction, and accompanying Memorandum, both dated September 18, 2012 (collectively, the "TRO Motion");
- (b) Defendants' Motion to Proceed on the TRO Motion as a Motion for Preliminary Injunction dated September 28, 2012;
- (c) Defendants' Motion to Strike or, Alternatively, for Leave to File Sur-Reply dated November 2, 2012 (Doc. # 23);
- (d) Defendants' Renewed Motion to Dismiss and accompanying Memorandum, both dated November 5, 2012 (Doc. ## 28 and 29, respectively);

¹ The citation in this motion to any pleadings and papers filed in the District Court refers to docket entries in Case No. 1:12-cv-99, District Court of the Virgin Islands, Division of St. Croix. Defendants hereby adopt and incorporate those pleadings and papers as if they had been filed in this Court, and respectfully request that this Court otherwise give effect to all pleadings and papers filed in the District Court while the action was in federal court.

- (e) Plaintiffs' Motion and Memorandum for Order to Show Cause dated November 6, 2012 (Doc. # 31); and
- (f) Plaintiffs' Motion for Partial Summary Judgment dated November 11, 2012 (Doc. # 34).

7. However, as addressed below, prior to the resolution of any of the foregoing motions, the Court should strike Waleed Hamed as Mohammad Hamed's supposed agent.

Relevant Factual Background

8. Mohammad Hamed's central allegation in this action is a purported "50/50 partnership" between himself and Fathi Yusuf. (Comparison Doc. at ¶ 9).

9. Yet, Mohammad Hamed seeks to prosecute the action by and through a representative, *i.e.*, "his authorized agent Waleed Hamed," his son, without complying with Rule 17 in any respect. (*Id.* at ¶ 2).²

10. There is no record before this Court to establish that Waleed Hamed has been properly appointed as a general guardian, committee, conservator or like fiduciary for his father or his father's affairs. Rather, Mohammad Hamed merely asserts that he has provided Waleed Hamed with "a power of attorney to act on [his] behalf in all aspects of the Plaza partnership business . . . with Fathi Yusuf." (Sept. 17, 2012 Aff. of Mohammad Hamed (Doc. # 1-5) at ¶ 4).

11. Significantly, the record is blank regarding the details of Mohammad Hamed's competency, including the purported basis, if any, supporting his desire to proceed through a representative or "authorized agent."

12. The record is also devoid of any details regarding the scope of Waleed Hamed's supposed authorization to represent Mohammad Hamed in this action; and devoid of any details

² Mohammad Hamed also attributes the allegations in this action to certain unnamed additional "authorized agents" acting "from time to time" – *i.e.*, alleging that "[t]he acts referenced [in the First Amended Complaint] attributable to Mohammad Hamed are acts done either directly by Mohammad Hamed or for him by his authorized agents, all of whom are family members acting as his authorized agent, from time to time." (Comparison Doc. at ¶ 2).

regarding the unnamed additional "authorized agents" representing Mohammad Hamed from "time to time." (Comparison Doc. at ¶ 2).

13. Defendants – and this Court – thus are left guessing as to the competency of Mohammad Hamed and the scope of any supposed authority bestowed upon Waleed Hamed by his father vis-à-vis this action.

Analysis

A. Legal Standards

Federal Rule of Civil Procedure 17 limits litigation through a representative to two types of litigants: minors and incompetent persons. Fed. R. Civ. P. 17(c). When a minor or an apparent "incompetent" plaintiff seeks to prosecute an action through a representative, the rule further requires that the representative be one of the following: "(A) a general guardian; (B) a committee; (C) conservator; or (D) a like fiduciary." Fed. R. Civ. P. 17(c)(1). Federal Rule of Civil Procedure 17 applies to this Court pursuant to SUPER. CT. R. 7.

B. Mohammad Hamed Has Failed to Comply with Rule 17

Here, in seeking to prosecute this action through a representative, Plaintiff Mohammad Hamed has failed to comply with Rule 17. Indeed, as noted above, the record is devoid of any facts regarding Mohammad Hamed's competency to proceed with or without a representative. The record also lacks any facts to support a claim that Waleed Hamed has been properly appointed as a "general guardian," "conservator" or "like fiduciary," as required by Rule 17(c)(1).

Accordingly, under Rule 17, Waleed Hamed should be stricken as Plaintiff Mohammad Hamed's "authorized agent." Because a determination regarding this issue will have significant implications for the subsequent course of proceedings, Defendants seek a ruling on this motion prior to the resolution of any other substantive motions.

Conclusion

For the foregoing reasons, and prior to the resolution of any other substantive motions, Defendants pray that the Court enter an Order striking Waleed Hamed as Mohammad Hamed's self-appointed representative or "authorized agent"; and granting any additional relief that the Court deems appropriate and just under the circumstances.

Respectfully submitted,



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Dated: Nov. 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, a true and accurate copy of the foregoing was forwarded via USPS and email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.



Joseph A. DiRuzzo, III

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,)	
)	
Plaintiff,)	CIVIL NO. SX-12-CV-370
v.)	
)	ACTION FOR DAMAGES,
FATHI YUSUF and UNITED CORPORATION,)	INJUNCTIVE AND
)	DECLARATORY RELIEF
)	
Defendants.)	JURY TRIAL DEMANDED
)	

**PLAINTIFF HAMED'S RESPONSE
TO DEFENDANTS' RULE 17 MOTION TO STRIKE REPRESENTATIVE**

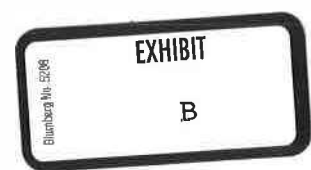
Plaintiff submits this memorandum in response to Defendants' Rule 17 motion to strike Waleed Hamed as the "authorized agent" of Plaintiff Mohammad Hamed. The plaintiff in this case is Mohammed Hamed, not Waleed Hamed. In this regard, Rule 17 provides in part as follows:

**Rule 17. Plaintiff and Defendant; Capacity; Public Officers
(a) Real Party in Interest.**

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. . . .

Defendant is apparently confused about either the caption or Rule 17. Rule 17 prevents a person or entity for filing a suit in the place of the party in interest. In that event, the plaintiff here would have been "Wally Hamed" or "Wally Hamed as the authorized agent for Mohammad Hamed." However, the plaintiff is listed in the caption and described in the amended complaint as Mohammad Hamed. (Dist. Ct. D.E. 15). There is no attempt to make Waleed Hamed the Plaintiff.

Thus, Mohammad Hamed can neither "join" nor "substitute" as suggested by the defendants. Similarly, Waleed Hamed cannot be "stricken" as the party in interest or



plaintiff -- as he is not listed as either. However, this analysis is not necessary as Rule 17(c) allows for a party to clarify any doubt about this issue. Stating as follows:


(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

See, e.g., *ICON Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 477 (3d Cir. 1987) (ratification cures any question about who the party in interest might be).

In this regard, to the extent there is any doubt about this issue, attached is a declaration confirming and ratifying this pursuant to Rule 17(a)(3). Exhibit 1. In short, the motion is clearly mooted by the filing of this declaration.

Thus, the motion should be denied in all respects. A proposed order is attached that makes it clear that Mohammad Hamed is the party plaintiff bringing this action.

Dated: December 4, 2012



Joel H. Holt, Esq.
Counsel for Plaintiff
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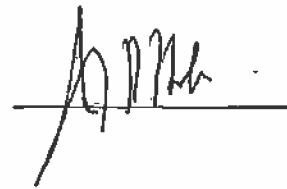
Carl J. Hartmann III, Esq.
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Christiansted, VI 00820

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2012, a true and accurate copy of the foregoing was forwarded via USPS and email to the following:

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Nizar A. DeWood
The Dewood Law Firm
Eastern Suburb, Suite 101
Christiansted, VI 00820



IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, *by his authorized*
agent WALEED HAMED,)

Plaintiff,)

v.)

FATHI YUSUF and UNITED CORPORATION,)

Defendants.)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE AND
DECLARATORY RELIEF

JURY TRIAL DEMANDED

DECLARATION OF PLAINTIFF MOHAMMED HAMED

I, Mohammad Hamed, declare, pursuant to 28 U.S.C. Section 1746, as follows:

1. I am the plaintiff in the captioned action before this Court.
2. If there is any doubt with regard to my status as the plaintiff and real party in interest in this action, I hereby confirm and ratify that I am the plaintiff pursuing this claim against the defendants.
3. I also confirm that my son Waleed Hamed is not the plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.



Mohammad Hamed



**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED, by his)
authorized agent, WALEED HAMED,)
)
Plaintiffs,)
)
v.)
FATHI YUSUF and UNITED CORPORATION,)
)
Defendants.)
_____)

CIVIL NO. SX-12-CV-370

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO STRIKE
SELF-APPOINTED REPRESENTATIVE**

Defendants hereby reply to the Hameds' Response dated December 4, 2012 ("Response") to Defendants' Motion to Strike Self-Appointed Representative under Rule 17(c)(1) of the Federal Rules of Civil Procedure ("Motion to Strike").

Introduction

The Hameds raise two assertions in opposition to Defendants' Motion to Strike: (a) because the caption of this action identifies Mohammed Hamed as the nominal plaintiff, then, according to the Hameds, there can be no Rule 17 violation; and alternatively, (b) even if they have violated Rule 17, a declaration "confirming and ratifying" the violation somehow "moot[s]" the violation. As set forth below, both assertions are fundamentally flawed, as courts must look beyond form to address the substance of a claim; and the alternative attempt to "ratify[]" the instant Rule 17 violation is misplaced, as Defendants seek to strike Waleed Hamed as Plaintiff Mohammad Hamed's self-appointed representative or "authorized agent" under *Rule 17(c)(1)*, not dismiss the action under *Rule 17(a)(3)* for failure to join a real party in interest.



A. Substance and Intent, Not Form, Control

In attempting to elevate form over substance, the Hameds assert that, because “the plaintiff is listed in the caption and described in the amended complaint as Mohammad Hamed,” then, according to the Hameds, “[t]here is no attempt to make Waleed Hamed the Plaintiff.” (Response at 1). However, “[a] pleading will be judged by its substance rather than according to its form or label . . .” *Lewis v. AG of the United States*, 878 F.2d 714, 722 n.20 (3d Cir. 1989). Indeed, “[c]ourts must look beyond form to address the substance of a claim.” *Knapper v. Bankers Trust Co.*, 407 F.3d 573, 585 (3d Cir. 2005) (citing *Lewis*); see also *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1259 (3d Cir. 1977) (“Substance and intent, not mere form, are [the] critical factors”).

Here, irrespective of the form of the caption, the *substance* and *intent* of the amended complaint reflect Mohammad Hamed’s clear desire to prosecute this action by and through a self-appointed representative, *i.e.*, “his authorized agent Waleed Hamed,” his son. (Comparison Doc. at ¶ 2). Mohammad Hamed also attributes the allegations in this action to certain unnamed additional “authorized agents” acting “from time to time.” (*Id.*). Thus, in seeking to prosecute this action by and through a representative and other agents acting “from time to time,” Mohammad Hamed has triggered Rule 17(c)(1) but otherwise failed to comply with the requirements thereunder. See Fed. R. Civ. P. 17 (limiting litigation by incompetent persons through a representative to a properly appointed “general guardian,” “conservator” or “like fiduciary”).

B. The Purported Ratification is Misplaced

Alternatively, the Hameds submit a “declaration” by Mohammed Hamed purporting to “confirm[] and ratify[]” the instant Rule 17 violation “pursuant to Rule 17(a)(3),” and then assert that Defendants’ Motion to Strike is somehow “mooted by the filing of this declaration.” (Response

at 2 (citing *ICON Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 477 (3d Cir. 1987))). The Hameds' reliance on the declaration is entirely misplaced.

Significantly, Defendants have not moved to dismiss this action "for failure to prosecute in the name of the real party in interest" under Rule 17(a)(3). *See* Fed. R. Civ. P. 17(a)(3) (providing that "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."). Rather, as set forth in the Motion to Strike, Defendants have moved to strike Waleed Hamed as Plaintiff Mohammad Hamed's "authorized agent." (*See* Motion to Strike at 4). The motion is brought pursuant to Rule 17(c)(1) regarding representation of incompetent litigants – not Rule 17(a)(3) regarding ratification, joinder, or substitution of real parties in interest. (*Id.*)

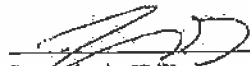
The subject declaration, which the Hameds have submitted "pursuant to Rule 17(a)(3)" (Response at 2), is therefore irrelevant to a resolution of the Motion to Strike. *ICON*, the only case on which the Hameds rely, is likewise easily distinguished on this basis. *See ICON*, 829 F.2d at 477 (remanding dismissal for failure to join interested parties under Rule 17(a) and Rule 19).

Moreover, even if the declaration were relevant, which it is not, the document – as with the entire record – is devoid of any facts regarding Mohammad Hamed's competency to either "confirm" or "ratify" the requirements of Rule 17(c)(1), including, but not limited to, facts addressing his competency to proceed with or without a representative and otherwise supporting a claim that Waleed Hamed has been properly appointed as a "general guardian," "conservator" or "like fiduciary," as required by the Rule. The declaration's admissibility is also highly dubious, as it lacks material information regarding its preparation and execution, including, among other evidentiary issues, identification of *when* and *where* it was signed.

Conclusion

Based on the foregoing, and on the underlying Motion to Strike, Defendants pray that the Court -- prior to resolving any other substantive motions -- enter an Order striking Waleed Hamed as Mohammad Hamed's self-appointed representative or "authorized agent"; and granting any additional relief that the Court deems appropriate and just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012, a true and accurate copy of the foregoing was forwarded via USPS and email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.



Joseph A. DiRuzzo, III

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMED HAMED, by his authorized agent)	
WALEED HAMED,)	
)	Plaintiff,
v.)	
)	
FATHI YUSUF and UNITED CORPORATON,)	CIVIL NO. SX-12-CV-370
)	
)	Defendants.)

ORDER

THIS MATTER is before the Court on Defendants' Motion to Strike Self-Appointed Representative filed on November 26, 2012 and Plaintiff Hamed's Response to Defendants' Rule 17 Motion to Strike Representative.

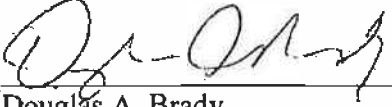
FRCP 17 requires that "an action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). Furthermore, a party is allowed to clarify who the party in interest is pursuant to Rule 17(a)(3).

In this case, there is no attempt to make Waleed Hamed the Plaintiff. Plaintiff Mohammed Hamed has designated the power to litigate matters involving Plaza Extra to Waleed Hamed by executing a Power of Attorney. Any doubt as to whether this action is being prosecuted by the real party in interest was dispatched in Plaintiff Hamed's Response to Defendants' Rule 17 Motion to Strike Representative. See *Declaration of Plaintiff Mohammed Hamed, Exhibit 1*. Accordingly, it is

ORDERED that Defendants' Motion to Strike Self-Appointed Representative is DENIED

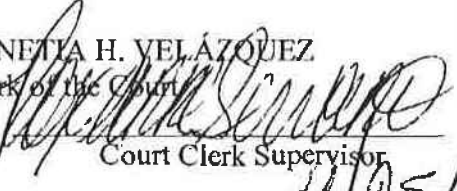
ORDERED that a copy of this Order be served upon all parties FORTHWITH.

Dated: April 25, 2013



 Douglas A. Brady
 Judge of the Superior Court

ATTTEST:

VENETIA H. VELAZQUEZ
 Clerk of the Court
 By: 
 Court Clerk Supervisor
 4/25/13

