

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

<b>MOHAMMAD HAMED By His Authorized Agent WALEED HAMED</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>CIVIL NO. SX-12-CV-370</b>
<b>v.</b>	)	
	)	
<b>FATHI YUSUF AND UNITED CORPORATION</b>	)	<b>ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF JURY TRIAL DEMANDED</b>
	)	
<b>Defendant.</b>	)	
	)	

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**OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO  
STAY PRELIMINARY INJUNCTION**

The plaintiff, Mohammad Hamed, hereby responds to defendants' motion to stay the preliminary injunction issued in this case. Presumably defendants filed pursuant to Rule 62(c). That rule deals with stays of an injunction pending appeal, as the defendants have also filed a notice of appeal.

Without any evidentiary support, the defendants claim the preliminary injunction has caused it economic chaos, with secured and unsecured creditors "flapping in the wind," but those claims are unsupported by any affidavits or other evidence and in fact are untrue. See **Exhibit 1**. Likewise, the suggestion that the day-to-day supermarket operations will "grind to a halt" with the loss of "good will" as a result of the injunction is also unsupported by the evidence and is without merit. See **Exhibit 1**. Indeed, the only problem with the injunction to date is the defendants' failure to comply with it, which violations the plaintiff is trying to amicably resolve. See, e.g., **Exhibit 2**.

With this comment in mind, it is respectfully submitted that the motion be denied for the reasons set forth herein.

## **I. Applicable Standard For Reviewing Motions To Stay**

The United States Supreme Court has succinctly set forth the standard for addressing motions to stay an order or judgment in *Hilton v. Braunskill*, 481 U.S. 770 (1987) as follows:

Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed.Rule Civ.Proc. 62(c); Fed.Rule App.Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id* at 776.

With this standard in mind, the plaintiff will now address the defendants' motion.

## **II. Defendants have not made a strong showing they will prevail on the merits**

In order to prevail on this issue, defendants need to make a "strong showing" they will prevail on the merits of the case, a difficult hurdle to overcome. In their motion, the defendants raise multiple arguments that have already been extensively briefed before this Court. As such, plaintiff will only briefly respond to these issues, which will be addressed in the order raised on pp. 6-12 of defendants' motion regarding the "likelihood of success on the merits."

### **1. "Damages Case"**

The defendants argue that this is just a "damages case" so that equitable relief in the form of an injunction is improper. This Court took note of that assertion in Conclusion ¶ 18 at p. 19 of its Memorandum Opinion. This Court then established what is needed to demonstrate irreparable harm in Conclusion ¶ 19. After taking note of the

plaintiff's reasons for seeking injunctive relief in Conclusion ¶ 20, the Court explained in Conclusions ¶¶ 21-22 why the evidence in this case demonstrated that the plaintiff would suffer irreparable harm if injunctive relief were not granted, finding that such relief was warranted. Thus, these Conclusions explain why this is not just a damages case, so that basis for seeking a stay is without merit.

## **2. Statute of Frauds**

The statute of frauds issue was extensively briefed by the plaintiff in his pre-hearing pleadings, as well as in his proposed findings of fact -- which are incorporated herein by reference. This Court then addressed this issue in Conclusions ¶¶ 6 and 7, p. 15, explaining why this defense was not applicable. Again, the Court's ruling on this issue explains why this basis for seeking a stay is without merit, so no further discussion of this issue is warranted.

## **3. Statute of Limitations**

The statute of limitations defense was not previously raised in this case, nor was it raised in the pending motion for reconsideration of the preliminary injunction order. Thus, it is difficult to understand why it supports a new finding that the defendants have a strong likelihood of prevailing on the merits of this issue. In any event, Mohammad Hamed's claims are clearly not barred by the statute of limitations, as the partnership is still operational.

Indeed, Maher Yusuf (testifying as the President of United) stated at the January 25, 2013 hearing that his father and Mr. Hamed had a *presently effective* agreement to operate the three Plaza Extra Supermarkets (See 1/25 Tr at p 214:2-15):

Q Why are you sending the notices to Mohammed Hamed?

A Because Mohammad Hamed has a business agreement.

Q So he does have a business agreement?

A He does have a business agreement.

Q To operate the store?

A To operate the store.

Q And you understand the agreement is to share the profits 50/50?

A Yes.

Q And you're still sending these letters to Mr. Hamed in 2012 and 2013, so take it that business agreement is still in place?

A As far as I know.

Moreover, the violations of Hamed's partnership rights all occurred in 2012 and 2013, as noted in the hearing testimony and this Court's findings.

The defendants' motion also refers to Fathi Yusuf divesting himself of his interest in United, but the critical transfer of Yusuf's stock where he diluted his interest to 7.5% (which this Court found to be relevant in Finding ¶ 41, p. 12) was not known to Mr. Hamed until after this case was filed in 2012, so why the defendants think this issue is barred by the statute of limitations is unknown.<sup>1</sup>

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<sup>1</sup> This dilution of Yusuf's interest in United from a majority owner to a minority owner was first raised in pleadings in this case, as noted in the plaintiff's proposed findings:

96. The defendants have averred in pleadings before this Court that Yusuf recently diluted his ownership in United down to just 7.5%, arguing on page 11 of the defendants Rule 12 opposition memorandum (PEX 2, p 11) as follows:

Even if the Amended Complaint sufficiently alleges that a "Hamed & Yusuf partnership" exists, the only relief Mohammad Hamed would be entitled to is a fifty percent (50%) share of **Defendant Yusuf's 7.5% ownership of Defendant United's outstanding stocks.** (Emphasis added.)

Thus, the statute of limitations defense is not a valid defense, even if it had been timely raised, as the plaintiff's alleged breach of the partnership agreement all stem out of conduct that occurred in 2012 and 2013. As such, this argument does not support the entry of a stay of this Court's Order.

#### 4. Retirement of Mohammad Hamed

The defendants' argue that the retirement of Mohammad Hamed is the equivalent of him withdrawing from the partnership and terminating his interest in the partnership, supposedly making him nothing more than a "creditor" of the partnership. Again, this argument was not previously raised.

In any event, while Hamed did not participate in the supermarket operations on a day-to-day basis after 1996, he testified that he gave his eldest son, Wally Hamed, a power of attorney to act for him and to undertake his responsibilities. Several years later Fahti Yusuf provided both sworn testimony and discovery responses stating that he acknowledged that Wally was acting for his father pursuant to this power of attorney. *Thus, Yusuf clearly agreed that the partnership was operating under these conditions.*<sup>2</sup>

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<sup>2</sup> This issue was addressed at the hearing, as noted in Plaintiff's Proposed Findings and Conclusions ¶¶ 24-25:

24. In that litigation, Yusuf signed an affidavit stating in ¶¶ 2-5, and 7 as follows (Depo Exhibit 6 to PEx 1): . . . .

- Mohamed Hamed gave his eldest son, Waleed (a/k/a Wally), power of attorney to manage his interests for the family.

25. Consistent with Yusuf's affidavit, both Mohammad and Waleed Hamed testified -- and the Court finds -- that Hamed and Yusuf agreed that Waleed Hamed a/k/a Wally Hamed, would act on his father's behalf as to Hamed's partnership rights and obligations pursuant to a power of attorney. 1/25 Tr, pp 46:1-10; 47:5-7; 47:18-48:2 and 202:18-25.

This Court then found as follows at Finding ¶ 31 on p. 9:

31. Although Plaintiff retired from the day-to-day operation of the supermarket business in about 1996, Waleed Hamed has acted on his behalf pursuant to two powers of attorney from Plaintiff. *Tr. 45:24-48:2; 172:6-1 73:8; 202: 1 8-25, Jan. 25, 2013; Pl. Ex. 1, Affidavit of Fathi Yusuf, Depos. Exh. 6, 4.* Both Plaintiff and Yusuf have designated their respective sons to represent their interests in the operation and management of the three Plaza Extra stores. *Tr. 31:6-35:11, Jan. 25, 2013.*

As such, the facts do not support a finding that the plaintiff had withdrawn from the partnership or terminated his interest. Indeed, Yusuf has never submitted any sworn statements to this effect either.

In short, this is just another (belated) “lawyer created” argument unsupported by any facts, so that this issue does not support the entry of a stay either.

##### 5. Partnership Distributions

This Court found in Conclusion ¶ 13, pp. 17-18, that the plaintiff and Fathi Yusuf not only agreed to share profits, but in fact shared such profits from the supermarket operations. Defendants have both admitted this repeatedly, stating that not only is Mr. Hamed entitled to such profits -- but *has received them to date*. For example, in defendants' memorandum in support of their Rule 12 motion, the defendants admitted this (D.V.I. Docket No. 29 at p. 3)(emphasis added):

In 1986, due to financial constraints, Defendant Yusuf and Plaintiff Hamed entered into an oral joint venture agreement. The agreement called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets....**Plaintiff Hamed received 50% of the net profits thereafter.**

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As a result to these admissions, this Court stated in Finding ¶ 15 at 5 (emphasis added):

**Yusuf has admitted in this case** that he and Hamed "entered into an oral joint venture agreement" in 1986 by which Hamed provided a "loan" of \$225,000 and a cash payment of \$175,000 in exchange for which "Hamed [was] to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets" in addition to the "loan" repayment. **Yusuf states** that the parties' agreement provided for "a 50/50 split of the profits of the Plaza Extra Supermarket stores." *Pl. Ex. 2, p.3,4*. Indeed, **Yusuf confirms** that "[t]here is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store .... **The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is.**" *Pl. Ex. 3, p.11*.

Even United's President, Maher Yusuf, conceded this fact. 1/25 Tr at p 214:2-11.<sup>3</sup>

As such, there was ample evidence of partnership distributions.<sup>4</sup> Thus, this aspect of the defendants' motion must be denied as well.

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<sup>3</sup> Indeed, defendants admit on page 3 of their companion *Motion to Reconsider and Modify Preliminary Injunction to Terminate Employees Mufeed Hamed, Waleed Hamed and Wadda Charriez* (filed at the same time as this motion) that they previously agreed in arguments to this Court that Mohammad Hamed is entitled to 50% of the profits of the operations of the Plaza Extra Supermarkets.

<sup>4</sup> As set forth in the plaintiff's proposed findings submitted to this Court, there is un-refuted testimony that these profits were split 50/50 between the plaintiff and Yusuf:

32. Over the years, Hamed and Yusuf have jointly shared the profits and losses. 1/25 Tr, p 44:12-15.

33. They shared profits from the Plaza Extra Supermarket operations in part by using them to purchase multiple properties throughout the Virgin Islands, including the real property where Plaza West is located, always splitting the ownership of these properties 50/50, with members of the each family owning 50% of each such corporation used to buy the properties. 1/25 Tr, pp 39:11-41:13.

## **6. Partnership “Termination”**

This issue was addressed on pages 3 to 5 of the plaintiff’s response to the defendants’ motion for reconsideration or to modify the injunction, filed at the same time as this response. That argument is incorporated herein by reference, as there is no need to repeat it in full once again. As noted therein, this issue is also without merit.

### **III. The defendants are not irreparably harmed by the preliminary injunction**

The defendants argue that they are irreparably harmed by the preliminary injunction, but they failed to submit any evidence to support this assertion. How can the Court even be expected to consider this critical issue without any evidence being proffered by the defendants to support these assertions? In any event, the dire consequences the defendants assert have created “irreparable harm” to them have not in fact occurred. See **Exhibit 1**.

Thus, despite their rhetoric, the defendants have not offered any evidence that would support a finding of irreparable harm to them as a result of the preliminary injunction, which only re-established the status quo that has existed for decades in running these very successful supermarkets.

### **IV. The preliminary injunction does not substantially injure other parties**

The defendants failed to even address this issue, arguing instead that there would be no irreparable injury to the plaintiff if the motion to stay was granted. Of course, this assertion is directly contrary to the findings made by this Court, which found that the plaintiff would be irreparably harmed if the relief sought was not granted.



In any event, the defendants have made no showing that the preliminary injunction substantially injures any other party, so this factor is totally unsupported by any evidence as well.

**V. The public interest lies with the issuance of the injunctive relief.**

This Court fully addressed the public interest in Conclusions ¶¶ 26 and 27, p. 22. The defendants' bald assertion that these three stores will now close and these employees will be laid off is unsupported by any evidence. In fact, these three stores are all open and these employees all continue to be fully employed today. See **Exhibit 1**. As such, this argument is without merit as well.

**VI. Rule 65(c)**

This issue was addressed in full in the plaintiff's response to the defendants' motion challenging the bond required in this case, filed at the same time as this response. That argument is incorporated herein by reference, as there is not a need to repeat it in full here. As noted therein, this issue is also without merit.

**VII. The Pending Rule 12 Motion**

The defendants argue that this Court should have ruled on the pending Rule 12 motion before addressing the injunction issue. While a court may chose to proceed in that fashion, there is no requirement that it do so. In fact, the defendant did request such a ruling during the hearing or prior to the entry of the preliminary injunction.

Moreover, the Court's ruling makes it clear that the plaintiff has stated a viable claim and that he is likely to succeed on that claim, demonstrating that the pending Rule 12 motion is without merit and should be summarily denied. Indeed, the defendants'

Rule 12 memorandum as well as their reply memorandum both concede that the plaintiff is entitled to 50% of the profits, as repeatedly noted. Likewise, the plaintiff's opposition to the defendants' Rule 12 motion also makes it clear why that motion should be denied.

In any event, the fact that this motion is pending does not support the entry of a stay, particularly since it obviously has no merit.

**VIII. Conclusion**

As noted in *Millennium Pipeline Co., L.L.C. v. Certain Permanent and Temporary Easements*, 812 F.Supp.2d 273 (W.D.N.Y. 2011):

As one court has observed, "[l]ogic dictates that a court will seldom [issue an order or judgment and] then turn around and grant [a stay] pending appeal, finding, in part, that the party seeking [the stay] is likely to prevail on appeal, i.e. that it is likely that the court erred in [issuing the underlying order or judgment]." *Id.* at 275.

For the reasons set forth herein, it is respectfully submitted that this case falls within the mainstream of such motions, so that the motion to stay the preliminary injunction should be denied.

Dated: May 16, 2013



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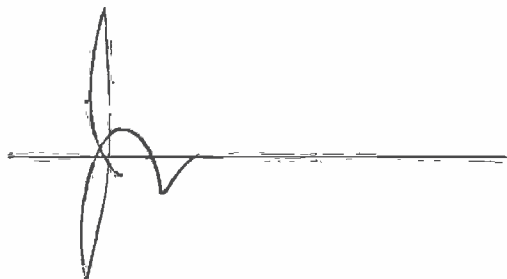
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of May 2013, I caused a true and exact copy of the foregoing to be served by mail and email to:

Joseph A. DiRuzzo, III  
Fuerst Ittleman David & Joseph, PL  
1001 Brickell Bay Drive, 32<sup>nd</sup>. Fl.  
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The Dewood Law Firm  
2006 Eastern Suburb, Suite 101  
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340-773-3444  
Email: [dewoodlaw@gmail.com](mailto:dewoodlaw@gmail.com)

A handwritten signature in black ink, appearing to read "Nizar A. Dewood", is written over a horizontal line. The signature is stylized with a large loop on the left side and a smaller loop on the right side.

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 WALEED HAMED**

I, Waleed Hamed a/k/a Wally Hamed, declare, pursuant to 28 U.S.C.

Section 1746, as follows:

1. I have personal knowledge of the facts set forth herein.
2. Despite the defendants telling this Court that there are problems with secured and unsecured creditors, no such problems exist, as all creditors are being paid in the normal course of business. Indeed, no creditor has questioned anything regarding this Court's order.
3. The three Plaza Extra Supermarkets are open as usual, with all 600 employees working as scheduled, without any negative feedback from the employees or the public.

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

Dated: May 16, 2013

  
\_\_\_\_\_  
Waleed Hamed a/k/a Wally Hamed



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May 7, 2013

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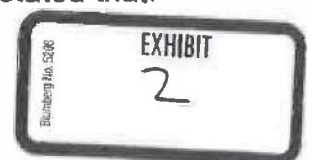
**RE: Suit filed against WADDA CHARRIEZ, SX-13-CV-152**

Dear Attorney DeWood:

I am writing you regarding the lawsuit you filed against Wadda Charriez on May 3<sup>rd</sup>. As you know, Ms. Charriez was specifically identified by Judge Brady as being an employee of Plaza Extra Supermarkets, at ¶ 40 of the opinion:

40. On January 8, 2013, Yusuf confronted and unilaterally terminated 15 year accounting employee Wadda Charriez for perceived irregularities relative to her timekeeping records of her hours of employment, threatening to report her stealing if she challenged the firing or sought unemployment benefits at Department of Labor, *Tr. 181:20-185:16, Jan. 25, 2013*. Charriez had a "very critical job" with Plaza Extra (*Tr 179:17-19, Jan. 25, 2013*), and the independent accountant retained by Yusuf agreed that she was "a very good worker" and that her work was "excellent." *Tr. 94:2-6, Jan. 31, 2013*. Because the Hamed co-managers had not been consulted concerning the termination or shown any proof of the employee's improper activity, Mafeed Hamed instructed Charriez to return to work the following day. *Tr. 179:4-24; 185:17-186:8, Jan. 25, 2013*. On Charriez' January 9, 2013 return to work, Yusuf started screaming at her, and told her to leave or he would call the police. *Tr. 186:9-187:1, Jan. 25, 2013*. Yusuf did call police and demanded on their arrival that Charriez, and Mufeed Hamed and Waleed Hamed be removed from the store, and threatened to close the store. *Tr. 93:5-94:15; 164:19- 165:18; 187:5-188:8, Jan. 25, 2013*. The incident that occurred on January 9, 2013, the same day that Plaintiffs Renewed Motion was filed, coupled with other evidence presented *demonstrates that there has been a breakdown in the co-management structure of the Plaza Extra Supermarkets. Tr. 141:25-142:18;143:1 7-146:19; 166:21-167:8, Jan 25, 2013.* (Emphasis added.)

In the Court's April 25<sup>th</sup> Order accompanying the memorandum opinion, he stated that:



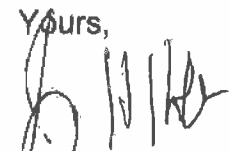
1. The operations of the three Plaza Extra Supermarket stores shall continue ***as they have throughout the years prior to this commencement of this litigation***, with Hamed, or his designated representative(s), and Yusuf, or his designated representative(s), ***jointly managing each store, without unilateral action by either party, or representative(s), affecting the management, employees, methods, procedures and operations.*** (Emphasis added.)

The bringing of a legal action against a Plaza Extra Supermarket management employee without an agreement of the Hameds violates the Court's order. Indeed, the retention of your firm to represent Plaza Extra Supermarkets without the approval of the Hameds violates the "without unilateral action" provisions of the Court's Order.

I prefer to resolve this breach of the Court's Order without having to involve the Court. As such, please remedy this breach by promptly dismissing this case this week and sending me a stamped copy of the Notice of Dismissal. Otherwise you will leave my client with no alternative but to ask that you and your client be held in contempt of the Court's Order.

If you have any questions, please let me know as well.

Yours,



Joel H. Holt  
JHH/jf