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.	)	
FATHI YUSUF AND UNITED CORPORATION	)	**ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF**
Defendant.	)	**JURY TRIAL DEMANDED**

OPPOSITION TO MOTION TO RECONSIDER AND MODIFY PRELIMINARY INJUNCTION TO TERMINATE EMPLOYEES MUFEED HAMED, WALEED HAMED AND WADDA CHARRIEZ

On May 9, 2013, defendants filed three motions, including a motion to reconsider and to modify the preliminary injunction to terminate Mufeed Hamed, Waleed Hamed, and Wadda Charriez. This memorandum addresses that motion for reconsideration or to modify this Court's Order.

While defendants' motion discusses multiple issues, it limits the relief sought to the request to modify the order entered in order to terminate these three employees for "employee misconduct," so this opposition memorandum is limited to that issue. However, one other matter needs to be addressed in light of the defendants' arguments regarding the alleged dissolution of the partnership.

The plaintiff will first discuss the applicable standard for addressing such motions, before addressing these issues.

I. Applicable Procedural Standard For Addressing This Motion

Regarding Motions For Reconsideration, District Court Local Rule 7.3, applicable in this Court pursuant to Superior Court Rule 7, provides:

> A party may file a motion asking the Court to reconsider its order or decision. . . .A motion to reconsider shall be based on:
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> 1. intervening change in controlling law;
> 2. availability of new evidence, or;
> 3. the need to correct clear error or prevent manifest injustice.

Moreover, "new evidence" must be based on something that was not available prior to the filing of the motion for reconsideration. *See, e.g., Worldwide Flight Services v. Government of Virgin Islands,* 51 V.I. 105, 2009 WL 152316 at *3 (VI Supreme Ct. 2009) (motions for reconsideration are not for arguments that could have been raised before but which were not raised); *In re Hartlage,* 54 V.I. 449, 2010 WL 4961744 (VI Supreme Ct. 2010) (motions for reconsideration are not permitted to address evidence that was previously available).

Regarding the Motion to Modify an Injunction, as noted by the case cited by defendants, *Tehan v. Disability Mgmt. Servs., Inc.,* 111 F. Supp. 2d 542 (D.N.J. 2000), the Third Circuit has adopted the following standard for granting such motions:[1]

> In the Third Circuit, however, "modification of a[ ] [preliminary] injunction is proper only when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable." *Favia v. Indiana Univ.* 7 F.3d 332 (3d Cir.1993); see also *Township of Franklin Sewerage Auth. v. Middlesex County Utils. Auth*, 787 F.2d 117, 121 (3d Cir.1986) (holding that "[t]he standard that the district court must apply when considering a motion to dissolve an injunction is whether the movant has made a showing that changed circumstances warrant the discontinuation of the order"). *Id.* at 550.

With these standards in mind, the plaintiff will now address the defendants' arguments.

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[1] While the Third Circuit no longer hears appeals from the local court system, absent a case on point from the VI Supreme Court, it can be presumed that local courts will still be guided by its decisions, particularly since the VI District Court is still bound by such holdings.

II. Dissolution of the Partnership

On April 25, 2013, the Court entered a preliminary injunction regarding a partnership formed in 1986, finding *inter alia* that a proposed notice of dissolution was given on February 12, 2012. (Memorandum ¶ 30 at p. 9.) The defendants argue that this finding somehow prohibits this Court from issuing an order dealing with the on-going business since it is now allegedly *dissolved*, citing *Browne v Ritchie,* 559 N.E. 2d 808 (Ill. App. 1 Dist. 1990). Presumably the defendants are relying upon provisions of Rule 7.3 in making this argument.

At the outset, the defendants misstate what the Court found in ¶ 30:

> 30. Thereafter, discussions commenced initiated by Yusufs counsel regarding the "Dissolution of Partnership." Pl. Ex. 10, 11, 12. On March 13, 2012, through counsel, Yusuf sent a Proposed Partnership Dissolution Agreement to Hamed, which described the history and context of the parties' relationship, including the formation of an oral partnership agreement to operate the supermarkets, by which they shared profits and losses. *Pl. Ex. 12* (footnote omitted). Settlement discussions followed those communications but have not to date resulted in an agreement. Tr. 58: 15-20, Jan. 25, 2013.

Thus, the Court only found that there was a "proposed" notice of dissolution, followed by unsuccessful negotiations to reach an agreement as to how the partnership should be dissolved.[2] Indeed the Court heard testimony at length about the continued, current operations of the three partnership assets—the three supermarkets—so dissolution of the businesses has not yet even begun to occur.

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[2] The exhibits referenced by the Court in ¶ 30 (Exhibits 10, 11 and 12) do not state "this partnership is dissolved." For example, Exhibit 11 states Yusuf's "desire" to terminate the partnership, followed by an analysis of what "will" need to be done to reach a "well-executed agreement" to effectuate such a termination. Similarly, Exhibit 12 uses the word "proposed" in outlining the partnership dissolution.

Thus, the *Browne* decision cited by the defendants is easily distinguishable, as the withdrawing partner had given notice that he was in fact terminating his business and dissolving the partnership. When his partner sued him to enjoin him from doing so, the Court held that a partner cannot be forced to continue the partnership since a partnership is not a contract that requires a partner to continue against his wishes. *Browne, supra* at 141-142.

In this case, Yusuf did not give notice that he intended to immediately cease and desist as to all operations. To the contrary, the parties then began to negotiate while continuing to operate the business which is the normal process set forth in the UPA.

More importantly, regardless of whether a dissolution notice had been given, a partnership that is "winding up" pursuant to Chapter VIII of the Uniform Partnership Act (UPA), codified at 26 V.I.C. §§ 171-177, can clearly still seek court oversight regarding this process pursuant to 26 V.I.C. §173(a).[3] Thus, even if Yusuf had formally given notice of dissolving the partnership, the plaintiff could still seek the judicial relief under the UPA, as codified in the Virgin Islands, which contains multiple remedies that can be sought from the Court.[4]

Thus, the defendants' assertion that this Court could no longer issue orders about the operation of the partnership is without merit as (1) no dissolution notice was

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[3] It would be an absurd result if a party who is violating the partnership rights of his partner could avoid judicial scrutiny simply by saying "I dissolve this partnership."

[4] In fact, the plaintiff has asked that the Court find that he is entitled to "buy out Yusuf" and operate the businesses without him pursuant to 26 V.I.C § 121(5) and §§ 121-123 as part of the relief sought in the complaint.

given (only a "proposed" notice was sent) and (2) even if a notice had been given, a court can become involved in the winding up of a partnership if needed.

III. "Employee Misconduct"

The request to modify or reconsider the injunction to now allow the defendants to terminate two members to the Hamed family and a key accounting employee, whose value was recognized by this Court,[5] appears to be purely vindictive in nature. In any event, the relief sought has no merit under a motion for reconsideration or a motion to modify this Court's Order.

A. Motion To Modify To Allow Termination

The request to modify the preliminary injunction to allow such action fails to meet the required standard for granting such motions, which requires a showing of "a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable." *See Tehan, supra* (citing *Favia v. Indiana Univ.,* 7 F.3d 332 (3d Cir.1993).

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[5] As this Court stated in part in Finding ¶ 40 at p. 11-12 (emphasis added):

> 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. . . . .*The incident that occurred on January 9, 2013, the same day that Plaintiff's 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.*

In this regard, there has been no change in the circumstances regarding Wadda Charriez, as the alleged basis for terminating her is the same evidence already presented to this Court. Rather than re-argue "old facts," the defendants have to show that Ms. Charriez has done something "new" warranting modification of the preliminary injunction to allow the defendants to fire her without consulting the Hameds.

Similarly, the request to terminate Waleed Hamed for alleged **"employee misconduct"** is based on a lawsuit filed against Waleed "Wally" Hamed (attached as Exhibit D the defendants' motion) on January 6, 2013, well before the hearings in late January.[6] Again, that evidence that was also available to the defendants prior to this Court's order, so it is not "new" evidence since the entry of the injunction. Thus, this evidence is not a proper basis for seeking modification of this Court's order.

The derivative lawsuit filed by Yusef Yusef on behalf of Plessen Enterprises, Inc., against Mufeed "Mafi" Hamed and Waleed "Wally" Hamed (attached as Exhibit A to the defendants' motion) is also not a change of circumstances since the preliminary injunction was issued. Equally important, that lawsuit involves another business that has nothing to do with the Plaza Extra Supermarkets. Thus, **those allegations have nothing to do with "employee misconduct"** which further demonstrates that the relief now sought is simply vindictive in nature.

In summary, none of the proffered reasons for seeking a modification of the preliminary injunction meets the required standard for granting such motions, as none of

[6] As noted in the defendants' motion, there is a pending motion to dismiss this case due to the statute of limitations defense, as the alleged misconduct occurred **in the 1990's**.

the events relied upon in seeking the relief in question occurred after the issuance of the preliminary injunction order.[7]

B. Motion To Reconsider To Allow Termination

Recognizing the weakness of its motion to modify the preliminary injunction, the defendants then ask this Court to reconsider its Order to allow Fahti Yusuf to terminate anyone he wants with or without cause. Presumably the defendants are relying upon the "clear error" provisions of Rule 7.3 in making this argument.

In making this argument, the defendants attempt to narrowly construe Mohammad Hamed's role in the partnership, suggesting his interest as a partner are no longer active. However, as this Court noted in Finding ¶ 31 at 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; 172:6-173:8; 202:18-25, 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.

One of the exhibits the court relied upon in making this finding was Exhibit 6 to Yusuf's 2002 deposition, where he stated under oath in part as follows:

> 4. Mohamed Hamed gave his eldest son, Waleed (a/k/a Wally), power of attorney to manage his interests for the family.

Thus, clearly Yusuf acquiesced in his partner's son performing in his father's stead and representing his father's interest in the partnership, which he has now done for more than 15 years -- just as his own sons now do much of what he once did.

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[7] None of this evidence is "new" either so these arguments fail under Rule 7.3 as well.

The Court clearly recognized this point, stating in part in Conclusion ¶ 14 at p. 18 as follows:

> 14. . . . By dividing the initial management of the business between the warehouse, receiving and produce (Hamed) and the office (Yusuf), the parties jointly managed the business. As years passed and additional stores opened, joint management continued with the sons of each of the parties co-managing all aspects of each of the stores.

Indeed, every Hamed or Yusuf family member who testified at the hearing acknowledged that this management arrangement had been in place for years. Moreover, Fathi Yusuf never testified to the contrary, nor has he submitted any affidavits that contradict the Court's findings. To the contrary, his sworn statements made more than a decade ago in the 2000 litigation in St. Thomas demonstrate that the stores have operated this way for a long, long time.

Thus, once the testimony of Mohammad Hamed quoted by the defendants is put into its historical context, as the Court did, there is no "clear error" in the Court's findings, as suggested by the defendants. Indeed, this Court's order was amply supported by the evidence of the management in place before Yusuf began to unilaterally remove funds and take other actions inconsistent with the joint management of the partnership.

Indeed, the Court found in Conclusion ¶ 21 at p. 20 that a preliminary injunction was warranted in part because:

> 21. The record reflects that Yusuf has arbitrarily addressed employee issues, including termination of a long-term high level employee and has threatened to close the stores. (See, Findings of Fact, ¶40). Evidence exists in the record to the effect that co-managers in Plaza Extra East no longer speak with each other (*Tr. 166:21-167:8, Jan. 25. 2013*), that employees are fearful for their jobs (*Tr. 158:18-159:12, Jan. 25, 2013*),

> and that the tensions between Yusuf and the Hamed family have created a "hard situation" for employees (*Tr. 187:5-188:8*). Plaintiff alleges that such circumstances that flow directly from his deprivation of equal participation in management and control of the supermarkets reflect his loss of control of the reputation and goodwill of the business which constitute irreparable injury, not compensable by an award of money damages. *S & R Corp. v. Jiffy Lube Intern., Inc.*, 968 F.2d 371,378 (3d Cir. 1992).

The desire to fire two members of the Hamed managers because of (1) an unrelated business transaction and (2) conduct *that allegedly occurred in the 1990's* is precisely the type of arbitrary conduct that warrants the relief entered, as such protection is clearly needed in this case.

In summary, the request to reconsider this Court's Order so as to allow Fathi Yusuf to terminate employees with or without cause is without merit under the applicable Rule 7.3 standard.

IV. Conclusion

For the reasons set forth herein, it is respectfully submitted that the motion to reconsider or modify the preliminary injunction so as to allow the defendants to discharge Mufeed Hamed, Waleed Hamed and Wadda Charriez be denied.

Dated: May 16, 2013

Joel H. Holt, Esq.
2132 Company Street
St. Croix, VI 00820
(340) 773-8709

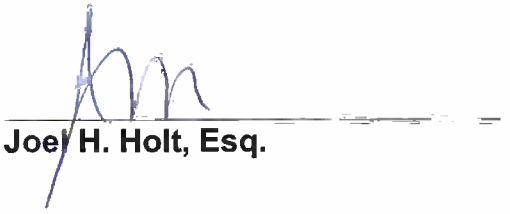
Carl J. Hartmann III, Esq.
Co-Counsel for Plaintiff
5000 Est. Coakley Bay, L6
Christiansted, VI 00820
340-642-4422

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th 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, 32nd. Fl.
Miami, FL 33131
305-350-5690
Email: jdiruzzo@fuerstlaw.com

NIZAR A. DEWOOD
The Dewood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820
340-773-3444
Email: dewoodlaw@gamil.com



Joel H. Holt, Esq.