IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF and UNITED CORPORATION,

Appellants/Defendants,

v.

S. Ct. Civ. No. 2013-0040
Re: Super. Ct. Civ. Co. 370/2012 (STX)

MOHAMMAD HAMED by his
authorized agent WALEED HAMED,

Appellee/Plaintiff.
_____/

APPELLANTS' *RENEWED* MOTION TO STAY PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

Appellants/Defendants Fathi Yusuf and United Corporation respectfully renew their joint request for a temporary stay of the Superior Court's April 25, 2013 Preliminary Injunction Order pending this interlocutory appeal.

Relevant Background[1]

1. This appeal addresses the Superior Court's extraordinary and drastic grant of an equitable preliminary injunction in this commercial dispute regarding an alleged *de jure* partnership.

2. The Superior Court (the Honorable Douglas A. Brady) entered the subject injunction on or about April 25, 2013. [JA-005].

3. The injunction is plainly mandatory in nature, requiring, among other things, the following relief: that (i) a Hamed and a Yusuf signature must be on every check from all Plaza Extra Supermarket operating accounts; (ii) "no funds will be disbursed from supermarket operating accounts without the mutual consent of Hamed and Yusuf (or designated representative(s))"; and (iii) the Hameds and Yusufs must "jointly manage[e] each store, without unilateral action by either

[1] Appellants filed their substantive Opening Brief in this appeal, together with a Joint Appendix, on June 13, 2013. The citation herein to "JA" refers to records included in the foregoing Joint Appendix. Appellants also adopt and attach as "Composite Exhibit A" hereto their May 28, 2013 Motion to Stay (and the exhibits thereto).

party, or representative(s), affecting the management, employees, methods, procedures and operation." [JA-027].

4. On May 9, 2013, Appellants filed three substantive motions with the Superior Court relating to the injunction: a Motion to Reconsider and to Modify Preliminary Injunction to Terminate Employees [JA-1725 to JA-1791]; an Emergency Motion for Reconsideration of Preliminary Injunction Order and for Stay of Same Pending Posting of Adequate Bond [JA-1792 to JA-1817]; and an Emergency Motion to Stay Preliminary Injunction Order [JA-1818 to JA-1885].

5. Appellants timely noticed this appeal on May 13, 2013. [JA-001].

6. On May 28, 2013, Appellants filed in this Court a motion to stay the injunction order pending appeal; and, concurrently therewith, a separate motion for an expedited review of the appeal. At the time of those May 28, 2013 appellate motions, the Superior Court had not yet rendered a ruling on any of the May 9, 2013 trial court motions referenced above.

7. Given the Superior Court's inaction, on May 31, 2013, this Court denied Appellants' motion to stay *without prejudice* to renew the motion if "the Superior Court denied their requested relief." (May 31, 2013 Order at 1).

8. Via a separate Order on the same date, this Court also granted Appellants' request for an expedited review of the appeal. (May 31, 2013 Order and Expedited Briefing Schedule).

9. The Superior Court then ruled on two of the May 9, 2013 trial court motions, *denying* the Emergency Motion for Reconsideration of Preliminary Injunction Order and for Stay of Same Pending Posting of Adequate Bond and *denying* the Emergency Motion to Stay Preliminary Injunction Order. (*See* May 31, 2013 Order Denying Bond Modification [JA-1969 to JA-1970]

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("Bond Modification Order") (attached as Exhibit "B" hereto); May 31, 2013 Order Denying Motion to Stay [JA-1971 to JA-1972] ("Stay Order") (attached as Exhibit "C" hereto)).[2]

10. On June 13, 2013, as noted above, Appellants filed their substantive Opening Brief in this appeal, together with a Joint Appendix consisting of five volumes.

11. In the present motion, given the entry of the Orders below denying a stay, Appellants respectfully renew their joint request for a temporary stay of the underlying injunction pending this Honorable Court's consideration of the issues raised in Appellants' Opening Brief.

12. As discussed herein, the threadbare Orders below, which are each two pages in length, do not provide any meaningful analysis supporting the trial court's denials of a stay; do not address any of Appellants' substantive arguments in opposition; do not distinguish any of Appellants' cases; and do not rely on a single case.

13. Rather, in denying Appellants' entire merits-based emergency motion for reconsideration of the preliminary injunction in a mere sentence, the Stay Order provides that the injunction somehow preserves the *status quo* simply because the injunction says so, *i.e.*, the "[Superior] Court's Order entered on April 25, 2013 specifically required that the *status quo* of the business operations be maintained." ([JA-1971] at 1). In other words, the only legal support for the Stay Order is the trial court's own *ipse dixit*.

14. Further, in denying a modification of the present $25,000 injunction bond, the Bond Modification Order is premised on two flawed "bases." ([JA-1969]). First, the trial court concluded that Appellants "proffer no case law to the effect that a second and separate hearing on the setting of security bond [sic] is required or appropriate." (*Id.*). Appellants' bond motion [JA-1792 to JA-

[2] Although the Superior Court's Bond Modification Order and separate Stay Order are both dated May 31, 2013, the Clerk of the Court "certified" the Orders on June 6, 2013. (*See* JA-1970 and JA-1972, respectively). Undersigned counsel did not receive the Orders until June 10, 2013, via e-mail.

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1817] in fact proffered **seventeen (17)** separate cases supporting the necessity of a bond hearing. The trial court ignored those cases without any analysis or justification. Second, the trial court's conclusion that *Appellee's* "interest in the 'profits' accounts of the [supermarket] business" somehow serves as *Appellants'* "additional security" [JA-1969 to JA-1970] is legal error.

15. Under these circumstances, a temporary stay of the injunction pending this Honorable Court's resolution of this expedited appeal is clearly warranted.

Argument

A. Legal Standards

i. Injunctions

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). It should "never [be] awarded as of right." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Health & Human Servs.*, App. No.13-1144, 2013 U.S. App. LEXIS 2706, at *3 (3d Cir. Feb. 7, 2013) (citation omitted). Rather, an injunction "'should be granted only in limited circumstances.'" *Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship*, 938 F. Supp. 304, 307 (D.V.I. 1996) (quoting *American Telephone & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994) (additional citation omitted)). "'This proposition is particularly apt in motions for preliminary injunctions, when the motion comes before the facts are developed to a full extent through the normal course of discovery.'" *Barclays*, 938 F. Supp. at 307 (quoting *American Telephone*, 42 F.3d at 1427). Further, "when the preliminary injunction is directed not merely at preserving the status quo but, as in this case, at providing mandatory relief, the burden on the moving party is *particularly heavy*." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980) (emphasis added).

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"[T]he standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction." *Conestoga*, 2013 U.S. App. LEXIS 2706, at *2-3. However, "[s]ince the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987).

Thus, when "a serious legal question is involved" (indeed, as here, *many* serious legal questions are involved), a stay pending appeal may be granted by "present[ing] a substantial case on the merits and show[ing] that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (citations omitted). *See also Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1454 (11th Cir. 1986). A stay is also warranted based on irreparable harm. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (granting stay pending appeal upon possible "utter[] destr[uction]" of *status quo*); *Devcon Corp. v. Woodhill Chem. Sales Corp.*, 455 F.2d 830, 832 (5th Cir. 1980) (granting stay where appellee failed to show irreparable harm "during the relatively short interval in which the case was being tried.").

ii. Security Bonds and the Necessity of a "Full Hearing" Thereon

It is undisputed that the partial evidentiary hearings below were limited to the merits of the injunction request only, and not to a full discussion of the bond amount. ([JA-1969] at 1 (acknowledging that the trial court heard "[n]o evidence" at the hearings, "or thereafter, relative to the costs and damages [Appellants] would sustain if it were to be determined that injunctive relief had been entered wrongfully.")). In this context, a trial judge's failure to set a full hearing to determine the proper amount for a security bond constitutes reversible error. *See, e.g., Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012) (reversing preliminary injunction where, as here, trial judge failed to conduct a "full hearing" on the bond amount); *H.I. Constr., LLC*

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v. Bay Isles Assocs., LLLP, 53 V.I. 206, 223 (Superior Ct. 2010) (noting that a trial judge "is unable to impose a reasonable bond as part of an order for injunctive relief" absent evidence, as here, of the enjoined party's "financial ability" as a measure of its potential damages resulting from any injunction); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 189 (3d Cir. 1990) (concluding that a preliminary injunction "must be set aside" absent evidence, as here, of "the value of assets encumbered" or "the likely amount of [the plaintiff's] expected recovery" upon the entry of any injunction).

Significantly, "an error in [setting the bond too low] produces irreparable injury [to the enjoined parties], because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 887-88 (7th Cir. 2000); *see also Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991). The bond requirement under Federal Rule of Civil Procedure 65(c) is thus interpreted "very strictly." *Hoxworth*, 903 F.2d at 210. *See also Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, No. 3:06-CV-1105, 2011 U.S. Dist. LEXIS 119438, at *9-10 (M.D. Pa. Oct. 17, 2011). Indeed,

> [t]here are important policies undergirding a strict application of the bond requirement . . .. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 805-06 n.9 (3d Cir. 1989). An incorrect interlocutory order may harm defendant and a bond provides a fund to use to compensate incorrectly enjoined defendants. *Id.* at 804. Such protection is important in the preliminary injunction context, for because of attenuated procedure, an interlocutory order has a higher than usual chance of being wrong. *Id.* (citation omitted).

Hoxworth, 903 F.2d at 210 (internal quotation omitted). "Plaintiffs too derive some protection from the bond requirement, for defendants injured by wrongfully issued preliminary injunctions can recover only against the bond itself." *Id.* at 210 n.31 (citation omitted).

"Very strict" application of the bond requirement fulfills an additional key purpose: to deter "rash applications" for preliminary relief by causing plaintiffs to "think carefully beforehand." *Id.* at

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211 (citing *Instant Air Freight*). *See also Howmedica*, 461 Fed. Appx. at 198 ("The bond serves to inform [plaintiffs] of the price they can expect to pay if the injunction was wrongfully issued.") (citation and quotation omitted); *Mead Johnson*, 201 F.3d at 888 ("Shifting back to the plaintiff the complete injury occasioned by the errors that sometimes occur when preliminary relief is issued after an abridged judicial inquiry will hold in check the incentive [plaintiffs] have to pursue [preliminary injunctive] relief"); *Zambelli Fireworks Mfg. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) ("The requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers.").

Accordingly, trial courts "should err on the high side" when setting the amount of a security bond under Rule 65(c). *Mead Johnson*, 201 F.3d at 888. As the court explained in *Mead Johnson*,

> [i]f the [trial] judge had set the bond at $ 50 million, as [defendant] requested, this would not have entitled [defendant] to that sum; [defendant] still would have to prove its loss . . .. *An error in setting the bond too high thus is not serious.* . . . Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond.

Id. (emphasis added) (citations omitted). *See also Arlington*, 2011 U.S. Dist. LEXIS 119438, at *9-16 (holding it would be "manifestly unjust" to maintain a bond at below 100% "of the damages [the enjoined party] will purportedly suffer should the preliminary injunction be deemed erroneous"). Trial courts also should hold a "full hearing" on the bond requirement when, as here, the initial preliminary injunction hearing was "devoted to the merits of that request, rather than to fixing the amount of bond." *Mead Johnson*, 201 F.3d at 887.

B. Appellants Present a Substantial Case on the Merits and Show that the Balance of the Equities Weighs Heavily in Favor of Granting a Stay Pending Appeal

When "a serious legal question is involved," a stay pending appeal may be granted by "present[ing] a substantial case on the merits and show[ing] that the balance of the equities weighs

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heavily in favor of granting the stay." *See Ruiz*, 650 F.2d at 565; *see also Griepentrog*, 945 F.2d at 153 (granting stay where the appellants "present[ed] a compelling argument that the district court erred"); *Garcia-Mir*, 781 F.2d at 1454 (granting stay "[w]hile expressing no opinion on the actual merits of the [injunction] order below" where the appellants "present[ed] an unusual legal question" that the courts in that circuit had not yet squarely addressed). This appeal involves *many* "serious" and "unusual" legal questions presenting "compelling argument[s]" that the trial court erred in granting the instant mandatory preliminary injunction.

For example, as addressed in greater detail in Appellants' June 13, 2013 Opening Brief and May 28, 2013 Motion to Stay, Appellants present the following such legal questions and compelling arguments, among others:

1. whether, as a threshold matter, Appellee – who is either, at worst, a criminal tax evader, or, at best, a criminal tax non-filer, and who, if believed in this action, duped a Virgin Islands federal district court in a related criminal action – even had standing to seek equitable relief when he did not come to the trial court with clean hands (*see, e.g., Salomon Smith Barney Inc. v. Vockel*, 137 F. Supp. 2d 599, 603-4 (E.D. Pa. 2000) (denying motion for preliminary injunction where, irrespective of its merits, the plaintiff in that case "d[id] not come into the court with clean hands"));

2. whether the trial court erred by taking judicial notice of findings of fact and supposed "pre-litigation admissions" [JA-020] from a different decades-old action as substantive proof of the matters asserted in this action (*see, e.g., Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases));

3. whether Appellee, as the movant below, failed to carry his heavy burden of establishing his entitlement to an equitable mandatory injunction, including where to the outside world, including the tax authorities and a federal district court, he had been a *total stranger* to the very partnership he now claims has existed for the past 26 years (*see, e.g., In re PCH Assocs.*, 949 F.2d 585, 602-03 (2d Cir. 1991) ("mo[st] important[]" "evidentiary fact[]" relating to partnership issues is "conduct of the parties . . . *with respect to third parties*") (finding no joint venture relationship where, among other reasons, "nothing in th[e] record indicat[ed] that any third parties that dealt with the [business or defendant]

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believed [the movant] to be a participant in the business or looked to [the movant]'s creditworthiness as a basis for doing business"));

4. whether an alleged partner or joint venturer can obtain an equitable mandatory injunction establishing a *de jure* partnership on a preliminary record where there are "competing inferences" and other "litigable" questions as to the nature of the relationship of the parties and their intent (*see, e.g., United States v. USX Corp.*, 68 F.3d 811, 827 (3d Cir. 1995) ("Where, as here, the facts permit competing inferences concerning the existence of an agreement to form a joint venture, the issue must be submitted to the fact finder."); *Envirogas Inc. v. Walker Energy Partners*, 641 F. Supp. 1339, 1346 (W.D.N.Y. 1986) (finding, in partnership dispute, that movant seeking preliminary injunction failed to establish likelihood on the merits where, as here, there were "litigable questions as to the nature of the relationship of the parties and their intent under the [partnership] agreements" at issue in that case));

5. whether the trial court erred in finding irreparable injury [JA-023 to JA-024] based on *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) and *Health and Body Store, LLC v. Just-Brand Limited*, No. 11-cv-6638, 2012 U.S. Dist. LEXIS 129917 (E.D. Pa. Sept. 11, 2012), which cases are easily distinguished and actually support Appellants' position (*see Anderson*, 125 F.3d at 159 (finding that the government's witnesses were "completely uncredible" and that the "sole reason" for the subject police surveillance operation, which the court in that case enjoined, was an unlawful retaliation to a lawsuit filed against the Police Department); *Health and Body Store*, 2012 U.S. Dist. LEXIS 129917, at *2-3 (denying initial preliminary injunction motion in that trade case, in which, unlike here, goodwill was pegged to the exclusive control of a unique commodity (websites), and corporate filings and "certain tax documents reflected" the existence of a joint venture));

6. whether the trial court erred in finding a "depriv[ation]" of Appellee's alleged "rights to equal participation in the management and conduct of the business" [JA-025] where the record evidence, including Appellee's *own testimony*, expressly contradicted such finding, as Appellee concedes that, since the very beginning, Appellant Fathi Yusuf alone has been and "is in charge of everybody" and in charge of the management and conduct of the business at "all the three store[s]" [JA-1545 at ¶ 115]; that Appellee's sons are all mere "employees" of Appellant United Corporation d/b/a Plaza Extra and thus are not in any alleged partnership with Fathi Yusuf [JA-1545 at ¶ 116]; that Appellee has signed "nothing" to guaranty the supermarkets' losses or to otherwise document any alleged interest in the supermarket operations [JA-1544 to JA-1545 at ¶ 114]; and that, regardless, Appellee disassociated himself from those business operations a "[l]ong time" ago when he "retired" in 1996 [JA-1545 at ¶ 119];

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7. whether the trial court erred in finding that the "loss of control of the reputation and goodwill of the business [] constitute irreparable injury" [JA-024] in this action where such finding directly conflicted with both the record evidence (which, prior to the injunction, reflected absolutely normal operations) and the great weight of legal authority (*see, e.g., IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007) (holding that injuries such loss of goodwill, consumers and reputation are "limited to 'the special problem of [consumer] confusion that exists in cases involving trademark infringement and unfair competition"') and that "the line of cases recognizing loss of goodwill or reputation as irreparable harm is not applicable" when, as here, the alleged injury "is not analogous to the harm caused by consumer confusion"));

8. whether the trial court erred in finding that Fathi Yusuf "arbitrarily addressed employee issues, including termination of a long-term high level employee" [JA-024] where the record reflects that the subject employee (Wadda Charriez) was neither "high level" nor indispensable and, regardless, that her termination (based on a chronic falsification of time records and undisputed violation of company policies) was, as even Appellee's own witness concedes, "totally reasonable" and thus not arbitrary (*see* [JA-1565 to JA-1569 at ¶¶ 233-56]; [JA-1533 at ¶¶ 163-66]; [JA-1559 at ¶¶ 201-02]; [JA-1574 to JA-1575 at ¶¶ 292-94]);

9. whether the trial court erred in finding that the "[m]ost troubling" aspect of its irreparable injury analysis was the hearsay testimony of Wally Hamed submitted *after* the close of the evidentiary hearings and "*after* [the trial court's] Opinion was largely completed" [JA-025 (added emphasis)], as the trial court's heavy reliance on this post-hearing evidence as substantive proof was procedurally improper and otherwise violated Appellants' due process rights to cross-examine Wally Hamed on the hearsay testimony at issue (*see, e.g., Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 821 (11th Cir. 2010) (noting that a trial court abuses its discretion when it "follows improper procedures in making a determination"));

10. whether the trial court erred in finding that the balance of harms favored the imposition of an injunction [JA-025 to JA-026] where the trial court acknowledged "the animosity that exists between the parties" [JA-026] yet (a) forced the parties to "jointly manag[e] each store" [JA-027] for the first time in their history, notwithstanding the parties' undisputed management structure since 1979 with Fathi Yusuf alone as the ultimate decision-maker and tie-breaker of all management decisions [JA-1545 at ¶¶ 115-16] and (b) forced an at-will oral partnership (which legal determination Appellants dispute) to continue *ad infinitem*, notwithstanding that the Virgin Islands Uniform Partnership Act allows a partner to dissolve an at-will partnership at any time with notice of the partner's express will to withdraw as a partner (*see* 26 V.I.C. § 171);

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11. whether the trial court erred in finding, under *Kings Wharf Island Enterprises, Inc. v. Rehlaender*, 34 V.I. 23 (Terr. Ct. 1996), that the public interest favored injunctive relief [JA-026] absent any finding of fact or other credible record evidence that, prior to the injunction, the Plaza Extra Supermarkets "w[ere] placed in danger of bankruptcy" (*cf. Kings Wharf*, 34 V.I. at 29); that "other businesses associated with" the Plaza Extra Supermarkets "were threatening to cease operating" with the supermarkets (*cf. id.*); that the Plaza Extra Supermarkets were not "be[ing] properly maintained" in the normal course of business (*cf. id.*); that the supermarket "premises [were not] available for public use" (*cf. id.*); or that the Plaza Extra Supermarkets, or any of them, were "an integral part of the St. Croix [and/or St. Thomas] economy" (*cf. id.*); as, in sharp contrast, prior to the injunction, the hearing testimony uniformly reflected normal business operations at the Plaza Extra Supermarkets (*see, e.g.,* [JA-1562 to JA-1563 at ¶¶ 220-22; JA-1569 to JA-1570 at ¶ 257; JA-1571 to JA-1572 at ¶ 271; JA-1552 at ¶ 157; JA-1558 to JA-1559 at ¶ 199; JA-1555 at ¶ 176]);

12. whether the injunction, to the extent that it restrains disputed labor and other employer-employee issues at the Plaza Extra Supermarkets, including by forcing an alleged oral at-will partnership to continue *ad infinitem*, is void *ab initio* as a matter of law (*see* 24 V.I.C. §§ 341-42 (prohibiting injunctions that, among other things, prohibit a person from refusing to remain in any relation of employment); and, as discussed in greater detail below,

13. whether the present $25,000 security bond is legally insufficient.

The record in this Court and below also reflects that the balance of the equities related to a temporary stay of the trial court's injunction pending this Honorable Court's review of same weighs heavily in favor of granting the stay. Indeed, the trial court's injunction is plainly unsound and unworkable, as, among other things, it eliminates the stores' prior sole tie-breaker, *i.e.*, Fathi Yusuf, who alone maintained the supermarkets' successful operations for decades prior to the entry of the injunction and thus overhauls the *status quo* and threatens the supermarkets' continued existence. The injunction also threatens to substantially injure third parties, including, without limitation, litigants who have sued Appellant United Corporation d/b/a Plaza Extra in other actions. (*See, e.g.,* [JA-1976 to JA-1984] (involving the rights of a litigant in a pending personal injury action)).

Further, because this Court has granted an expedited review of the appeal, the prejudice, if any, to Appellee of a temporary stay pending an expedited appeal would be minimal. Tellingly, in

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the period between Appellee's initial injunction request [JA-082] on September 18, 2012, on a feigned "emergency" basis, through the entry of the subject injunction on April 25, 2013, Appellee failed to credibly show that it had suffered any irreparable harm whatsoever. In contrast, among other irreparable harm, Appellants are suffering irreparable harm based on the current low bond and will continue to do so until this Court rules in the matter. *See Mead*, 201 F.3d at 887-88 ("an error in [setting the bond too low] produces irreparable injury [to the enjoined parties], because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond").

Separately, a temporary stay will afford the trial court additional time to rule on Appellants' November 5, 2012 Renewed Motion to Dismiss.[3] *See, e.g., Gilles v. Garland*, 281 Fed. Appx. 501, 503 (6th Cir. 2008) (noting trial court's issuance of "a calendar order directing that the preliminary injunction motion be held in abeyance pending a ruling on the motion to dismiss"); *Leslie v. Federal Nat'l Mortgage Ass'n*, No. 3:10-cv-963, 2010 U.S. Dist. LEXIS 79180, at *6 (D. Conn. Aug. 5, 2010) (noting trial court's grant of "Motion to Stay consideration of the TRO and preliminary injunction motions pending resolution of [Fed. R. Civ. P. 12] motion to dismiss," raising, as here, Rule 12(b)(6) challenges for failure to state a cause of action).

Accordingly, because Appellants present a substantial case on the merits and show that the balance of the equities weighs heavily in favor of granting a stay, a temporary stay pending this expedited appeal is warranted.

[3] As noted in Appellant's May 28, 2013 Motion to Stay (at p. 20), Rule 12 challenges should be resolved at the earliest stages of litigation to, among other reasons, conserve judicial resources and avoid potentially conflicting opinions between trial and appellate courts in the same proceeding.

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C. The Trial Court's Stay Order Is Mere *Ipse Dixit*

As noted above, the trial court's Stay Order [JA-1971 to JA-1972] denying a stay pending rests solely on the trial court's own *ipse dixit*.[4] (*See* [JA-1971] (providing that the injunction maintains the *status quo* because the injunction says so)). However, the trial court's "reasoning here amounts to little more than simply pointing to [words in its own rulings] and proclaiming them clear" or correct. *United States v. Yermian*, 468 U.S. 63, 77-78 (1984) ("the magic wand of *ipse dixit* does nothing to resolve th[e] ambiguity" at issue). Moreover, the record, including Appellee's own testimony, belies the trial court's reasoning, because, since the very beginning of the alleged partnership, Fathi Yusuf alone was in "charge" of the management and conduct of the business at "all the three store[s]" [JA-1545 at ¶ 115] until the trial court in its injunction required that each store be "jointly manag[ed]" [JA-027] for the first time by a Hamed and a Yusuf without Fathi Yusuf as the tie-breaker of any operational deadlock.

Thus, this Honorable Court's forthcoming reasoned resolution of this appeal, beyond the trial court's mere *ipse dixit* in its 2-page Stay Order, provides an additional basis supporting a temporary stay of the injunction pending appeal.

D. The Trial Court's Bond Modification Order is Flawed

The Bond Modification Order is premised on two "bases" [JA-1969], both of which are flawed.

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[4] The term *ipse dixit* in this context refers to a logical fallacy wherein a supposed legal conclusion merely "assum[es] the very point in issue." *Northbrook Ins. Co. v. Kuljian Corp.*, 690 F.2d 368, 375 (3d Cir. 1982). *See also Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 fn. 4 (1993) (*ipse dixit* is not a "reasoned conclusion"); *District 1199P, Nat'l Union of Hosp. and Health Care Emp. v. Nat'l Labor Relations Bd.*, 864 F.2d 1096, 1104 (3d Cir. 1989) (*ipse dixit* "frustrates" judicial review by undermining an appellate court's ability to determine whether the trial court properly exercised its discretion); *Marino v. Bowers*, 657 F.2d 1363, 1371-72 (3d Cir. 1981) (in the context of the "*ipse dixit* of a court," "[i]t is important that courts have the confidence of the public in the disposition of disputes submitted to them. That support is in part based upon the belief that judges are bound by law, which is applied impersonally and impartially.").

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1. The Case Law Warrants Modification of the Present Low Bond

First, in denying Appellants' motion for reconsideration to modify the present $25,000 injunction bond, the trial court incredibly – and incorrectly – concluded in its Bond Modification Order that Appellants "proffer no case law to the effect that a second and separate hearing on the setting of security bond [sic] is required or appropriate" [JA-1969]. The trial court apparently blindly accepted Appellee's similar such cursory claim. ([JA-1933] (claiming, in opposition to the bond motion, that Appellants' request for a separate bond hearing in this action is, according to Appellee, "without any legal support at all, as no such requirement exists under Rule 65, nor has *any* court ever held that such a requirement exists")). However, Appellants' bond motion [JA-1792 to JA-1817] in fact proffered **seventeen (17)** separate cases supporting the appropriateness of a separate bond hearing under the facts of this action. The cases likewise establish that the failure to conduct a proper bond analysis constitutes reversible error.

The trial court simply ignored those cases. Indeed, Federal Rule of Civil Procedure 65(c) requires a separate bond hearing in certain situations, including, where, as here, the injunction hearing and record evidence fail to directly address:

- the "financial ability" of the party to be enjoined as a measure of its potential damages resulting from any injunction, *see, e.g., H.I. Construction*, 53 V.I. at 223 (clarifying that a trial court "is unable to impose a reasonable bond as required as part of an order for injunctive relief" absent testimony on the Rule 65(c) considerations, including the enjoined party's "financial ability"));

- "the value of assets encumbered" or "the likely amount of [the plaintiff's] expected recovery" upon the entry of any injunction (*see, e.g., Hoxworth*, 903 F.2d at 189 (concluding that a preliminary injunction "must be set aside" absent such evidence)); and

- the "full" consequences of any injunction or the "necessary findings" supporting the bond determinations (*see, e.g., Howmedica*, 461 Fed. Appx. at 198 (reversing preliminary injunction where, among other reasons, trial judge failed to conduct a "full hearing" on the bond amount); *Mead Johnson*, 201 F.3d at 887 (expressing concern, as alternate basis to reverse preliminary injunction, over

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> trial judge's failure to "alert[]" the enjoined party in advance of an injunction hearing that the hearing would be devoted to anything other than the merits of the injunction request); *Hill*, 939 F.2d at 632 (noting that a trial court "abuses" its discretion in setting bond amount when it "fails to require an adequate bond or to make the necessary findings in support of its [bond] determinations")).

In the present action, it is undisputed that the preliminary injunction hearings on January 25 and 31, 2013, were devoted to the merits of Plaintiff's request for a preliminary injunction – and not to the merits of the bond amount of any injunction. ([JA-1969]). It is also clear that the present $25,000 bond is completely devoid of a credible evidentiary basis and otherwise bears no rational relationship to the evidentiary record below, which, again, did not address the "full" bond consequences. Under the foregoing unique facts, a proper bond hearing therefore is required.[5]

2. <u>The Trial Court's "Additional Security" is Legal Error</u>

Together with the nominal $25,000 cash security, the trial court also concluded in its Bond Modification Order that *Appellee's* "interest in the 'profits' accounts" of the supermarket business now held at Banco Popular somehow serves as *Appellants'* "additional security" [JA-1969 to JA-1970]. That conclusion is legal error.

A Rule 65(c) bond, among other purposes, protects "*incorrectly enjoined defendants.*" *Hoxworth*, 903 F.2d at 210-11 (emphasis added) (noting that such bonds also deter "rash applications" for

[5] Alternatively, as noted in Appellants' Bond Motion [JA-1802], the trial court could have dispensed with a separate bond hearing by adopting the reasonable damages figure that Appellants suggested via sworn testimony. *See, e.g., Arlington*, 2011 U.S. Dist. LEXIS 119438, at *12-13 (noting that the court therein "specifically relied upon [the enjoined party]'s calculation of lost profits, which was asserted by [the party]'s counsel"); *Christiana Indus. Inc. v. Empire Elecs., Inc.*, 443 F. Supp. 2d 870, 884 (E.D. Mich. 2006) (granting emergency motion for reconsideration to increase bond amount from $100,000 to $2.5 million where "Plaintiff d[id] not contest the amount presented by Defendant as its potential loss"); *Merry Maids, L.P. v. WWJD Enters., Inc.*, No. 8:06CV36, 2006 U.S. Dist. LEXIS 49788, at *8 (D. Neb. July 20, 2006) (adopting "figure suggested by the defendants" as bond amount where "the matter of the security required by Rule 65(c) was not discussed or argued at the time of the [initial injunction] hearing").

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preliminary relief). *See also* Fed. R. Civ. P. 65(c) (protecting "wrongfully enjoined or restrained" defendants). As one court has summarized,

> Such protection is important for two reasons. First, a defendant wrongfully enjoined has recourse *only* against the bond; there is no independent action for damages in the absence of a bond. Second, because of the attenuated procedure involved in an application for a preliminary injunction, an interlocutory order has a higher than usual chance of being wrong.

Alexander v. Edwards, 811 F. Supp. 1025, 1034 (D.N.J. 1993) (internal citation and quotation omitted). Accordingly, trial courts "should err on the high side" when setting the amount of a security bond under Rule 65(c). *Mead Johnson*, 201 F.3d at 888. Indeed, as here,

> [w]here a defendant wrongfully enjoined would suffer significant economic harm, posting of a nominal bond would defeat the very purposes of the bond requirement. Such a result belies both the language and spirit of Rule 65 . . . and is not supported by the case law in [the Third] Circuit."

Alexander, 811 F. Supp. at 1038-39 (citation omitted).

a. <u>Appellants Have Not "Admitted" Entitlement to Relief in This Action</u>

The trial court's reliance of Appellants' alleged "admi[ssion]" that Appellee "is entitled to 50% of the profits of the three Plaza Extra Supermarket stores" [JA-1969] is misplaced, as Appellants have not "admitted" that Appellee is entitled to any relief in this action whatsoever. Rather, Appellants have moved to dismiss the First Amended Complaint as a matter of law, which motion remains pending. Appellants also affirmatively deny the existence of any alleged *de jure* partnership between Fathi Yusuf and Mohammad Hamed, just as the Hameds themselves affirmatively denied the existence of any such partnership for decades when it suited them to do so, including before the District Court of the Virgin Islands (Finch, J.) in the related criminal action.

Further, as noted in Appellants' Opening Brief (at pp. 19-20), Fathi Yusuf's decades-old deposition testimony in a *different action*, in which Appellee was not a party, cannot be used as

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substantive proof of the matters asserted in *this action*. *See, e.g.*, 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (a court "cannot take judicial notice of truth of facts found in another case"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases). At best, Fathi Yusuf merely "committed to a position at a particular point in time [more than 12 years ago]. It does not mean that [he] made a judicial admission that formally and finally decides an issue" in this action. *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991); *see also AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n. 9 (3d Cir. 2009) (noting that a jury must resolve these issues upon a full record). Similarly, Maher Yusuf merely testified in this action about an ambiguous "agreement" between Fathi Yusuf and Mohammad Hamed as to "[o]nly profits," and about which agreement Maher Yusuf did not otherwise know any "details." ([JA-696] at 34:20-24; [JA-697] at 35:1). Clearly, the "agreement" that Maher Yusuf referenced during the injunction hearings is *different than* the partnership agreement that Appellee has alleged in this action.

In short, any attempt to usurp the jury's resolution of the heart of this commercial dispute, *i.e.*, whether or not a partnership exists, is factually unsupported on the present record and legally improper. Nor does it serve as a proper basis for an injunction bond.

b. <u>Regardless, the Bank Monies Do Not Constitute "Additional Security"</u>

The trial court, without citation to any authority, concluded that *Appellee's* "interest in the 'profits' accounts" somehow serves as *Appellants'* "additional security" [JA-1969 to JA-1970]. Appellee, in his opposition below, similarly claims that "it is certainly proper for the Court to use such funds as part of the bond." ([JA-1937] (relying on *Scarcelli v. Gleichman*, No. 2:12-cv-72, 2012 U.S. Dist. LEXIS 57776, at *13-14 (D. Me. Apr. 25, 2012)). Both are wrong.

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Specifically, any reliance on Appellee's interest in the supermarket funds independent of this action again overlooks that Rule 65(c) bonds are designed to protect incorrectly or wrongfully enjoined defendants, *i.e.*, Appellants here. Fed. R. Civ. P. 65(c). In addition, because "the damages for an erroneous preliminary injunction cannot exceed the amount of the bond," those damages must be expressly included as a bond component. *Mead*, 201 F.3d at 888 (citation omitted). Thus, upon a finding that Appellants were wrongfully enjoined, the trial court's "additional security" would be **zero**, because the illusory security is not expressly included as a cash component of the present bond; and, because, if Appellants (or either of them) prevail, Appellee's interest in those funds based on any partnership claim would be **zero**. The trial court thus has used Appellants' respective monies to secure Appellee's bond!

Scarcelli v. Gleichman does not support Appellee's position. *First*, the procedural posture of *Scarcelli* is easily distinguished from the posture in this action. The foreign individual defendant in *Scarcelli*, involving a breach of fiduciary duty pursuant to the terms of a written limited partnership agreement, was not directly served a copy of the summons and complaint – and never even appeared in the action. *See* 2012 U.S. Dist. LEXIS 75516, at *2 (D. Me. May 31, 2012) (noting that, because "[a]lternative service" was made and the defendant (Pamela Gleichman) in that case failed to answer or otherwise respond to the complaint therein, a default was entered by the Clerk and then a default judgment by the court).

Based on Gleichman's "failure to plead or otherwise defend" that action, the court in *Scarcelli* deemed "the facts stated in the complaint [to be] taken as true." *Id.* at *2. Similarly, because Gleichman "failed to appear," the court also found that "notice to [Gleichman was not] required prior to the entry of default judgment." *Id.* at *3. In addition, relying on Second Circuit law that "[a]n evidentiary hearing is not required to establish a breach of fiduciary duty if the defendant has

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defaulted," the court "determine[d] that no evidentiary hearing [wa]s required in th[at] case" prior to ruling on the plaintiff's default judgment motion. *Id.* *Scarcelli* is distinguishable on those procedural bases alone.

Second, substantively the analysis in *Scarcelli* is also inapposite to the facts in this action. For example, in granting a preliminary injunction in *Scarcelli*, the court there "deem[ed] all of the allegations contained in the [complaint] admitted for purpose of the pending [injunction motion]" based on Gleichman's "default." 2012 U.S. Dist. LEXIS 57776, at *1-2 (attached as Exhibit "D" hereto). No default exists in this action such that any allegation in the First Amended Complaint may be admitted for the instant bond considerations or otherwise.

Third, addressing the "likelihood of success on the merits" factor of the preliminary injunction test, the court in *Scarcelli* based its analysis on the express terms of the parties' written limited partnership agreement, *i.e.*, "Section 4 of the Limited Partnership Agreement regarding allocation of profits, losses and distributions." *Id.* at *3. The court specifically found that "[n]o dispute exist[ed]" regarding those written terms, which unambiguously "require[d] payment of all capital proceeds and surplus cash, if any, to [the plaintiff Scarcelli, on behalf of a limited partnership trust]," notwithstanding Gleichman's possible entitlement to a portion of those capital proceeds as a "success fee." *Id.* at *11 (noting, under Connecticut law, that the undisputed contract terms also shifted the burden of proof to Gleichman, an absent defendant, "to demonstrate that the conduct in question [wa]s not a breach of fiduciary duty"). Thus, the court in *Scarcelli* found that the unopposed record before it "show[ed] a very substantial likelihood of success on [plaintiff Scarcelli]'s claims," where defendant "Gleichman's default on the [complaint] establishe[d] her failure to meet her burden to demonstrate [any legal entitlement] to whatever she may claim as a 'success fee.'" *Id.* (finding that the unopposed record also "demonstrate[d] that [Gleichman]

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breached her fiduciary duty to provide requested information to other partners"). Again, no such record, including an unambiguous written partnership agreement, exists in this action for purposes of the instant bond considerations or otherwise.

Finally, the bond/security analysis in *Scarcelli* was premised upon two additional findings that are absent in this action. First - the unopposed record in *Scarcelli* "contain[ed] substantial evidence of liabilities, debts and defaults of [Gleichman] in matters unrelated . . . that support[ed] the conclusion that [Gleichman] [wa]s experiencing substantial financial distress and [wa]s unable to meet her financial obligations when due." *Id.* at *6. No such evidence – let alone "substantial evidence" – of liabilities, debts and defaults exists here that would support any conclusion regarding Defendants' supposed "substantial distress and [inability] to meet [their respective] financial obligations when due." *Id.* Second - the court in *Scarcelli* "note[d] that given the nature of [Gleichman]'s default it is highly unlikely that there would be a later finding that she was wrongly enjoined." *Id.* at *14. Here, in sharp contrast, there is no default or unopposed record. Rather, as set forth in Appellant's Opening Brief and in the present record, the likelihood of a wrongful enjoinment is very real.[6]

At bottom, *Scarcelli* – like each of Appellee's preliminary injunction cases if analyzed in a full context – is easily distinguished and in fact supports Appellants' position.

Conclusion

Wherefore, Appellants respectfully request that this Honorable Court enter an Order granting a temporary stay of the Superior Court's April 25, 2013 preliminary injunction pending this expedited appeal; and awarding any additional relief as is deemed proper. A proposed such Order is attached as Exhibit "E" hereto.

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[6] In contrast to the circumstances in *Scarcelli*, it is highly likely in this action "that there would be a later finding that [Appellants Fathi Yusuf and/or United Corporation] w[ere] wrongly enjoined." 2012 U.S. Dist. LEXIS 57776, at *14. *See also Hoxworth*, 903 F.2d at 210 ("because of attenuated procedure, an interlocutory order has a higher than usual chance of being wrong") (citation omitted).

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Respectfully submitted,

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Dated: June 24, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on VISCEFS on June 24, 2013, and, pursuant to Rule 15(d), that the Clerk will electronically serve the foregoing on:

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/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III DN: cn=/s/ Joseph A. DiRuzzo, III, o=Fuerst Ittleman, PL, ou, email=jdiruzzo@fuerstlaw.com, c=US Date: 2013.06.24 11:43:54 -04'00'

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