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

YUSUF YUSUF, derivatively on behalf of PLESSEN ENTERPRISES, INC.,

Plaintiff,

vs.

WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and FIVE-I-I HOLDINGS, INC.,

Defendants,

-and-

PLESSEN ENTERPRISES, INC.,

Nominal Defendant.
_____/

CASE # SX-13-CV 120

CIVIL ACTION FOR DAMAGES AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, Plaintiff, Yusuf Yusuf ("Yusuf"), by and through undersigned counsel and hereby files his Opposition to Defendant' Waleed Hamed's Motion to Dismiss and submits as follows:

INTRODUCTION

Plaintiff bought this lawsuit derivatively on behalf of Plessen Enterprises, Inc. ("Plessen") to recover damages to Plessen resulting from Defendant, Waleed Hamed's, wrongful withdrawal of $460,000.00 from Plessen's bank account for his and the other Defendants' benefit.[1] The Complaint asserts seven counts against the Defendants. They include: a) Breach of Fiduciary Duty and Waste of Corporate Assets against Waleed Hamed, b), Conversion against Waleed Hamed and Waheed

[1] Plaintiff is pleased that Defendants admit to the wrongfulness of Waleed Hamed's removal of the funds from Plessen in their statement, "Defendants stood ready to deposit the funds in a neutral account to protect them from **a similar looting and diversion** to places unknown" (emphasis added). Defendants' Memo. of Law at 4.

Hamed, and c) Fraud/Constructive Trust, Unjust Enrichment, Civil Conspiracy and Accounting against all the Defendants.

Defendant's motion seeks dismissal of the Verified Complaint on the basis the required verification is not valid. Plaintiff disagrees.

The verification submitted with the Complaint is a statement by Yusuf Yusuf to the effect that:

VERIFICATION

> . . . the facts [in the Complaint] are true and correct **to the best of my knowledge, information and belief.**
>
> I declare under penalty of perjury pursuant to 28 U.S.C. section 1746, that the foregoing is true and correct.

Defendants' Memo. of Law at 3. (Highlighted text added by Plaintiff).

Defendants contend, "[t]his obviously is not a verification pursuant to 28 U.S.C. § 1746…" Def. Memo. of Law at 3. They suggest four separate rationales. The first argues that the expression, "upon information and belief" converts the verification, "to a LACK of the ability to swear the facts in the Complaint are true and correct." This conclusory opinion is wrong because it does not represent a fair reading of the subject phrase, flies in the face of case law that has explicitly held the phrase to be a valid part of a verification and because there are at least two federal jurisdictions that actually include the phrase in some of their form verifications. And finally, even if the verification were found to be invalid the Court may, as a matter of law, permit the Plaintiff to file an affidavit correcting any deficiency.

The second basis is without merit because it is premised on a misstatement of Fed. R. Civ. P. 23.1(b)(3)(A). The third argues that Plaintiff has failed to plead facts with particularity to show a demand on the board would have been futile. That argument is totally without merit because it relies on a case which is easily distinguished from the case sub judice and because it ignores substantial

case law that holds a demand on a board of directors is excused where half of the members of an even numbered board are alleged to be interested or lack independence, which is the situation in the case *sub judice.*

Defendant's fourth rationale makes the incomprehensible argument that the case should be dismissed because the Defendants have deposited half of the funds wrongfully taken from Plessen and because, in any event, the Court may only consider facts that existed at the commencement of the action.

In sum, Defendant's motion is utterly bereft of any valid factual or legal basis according to which the Court could reasonably dismiss the Complaint.

MEMORANDUM OF LAW

I. DEFENDANT'S FAILURE TO MOVE TO DISMISS BEFORE THE FILING OF A RESPONSIVE PLEADING WAIVES THE ARGUMENT

The Defendant filed his Answer on May 6, 2013, and did not move to dismiss on any ground before the filing of said responsive pleading. Fed. R. Civ. P. 12(b) requires that "[a] motion asserting any of these defenses [Rule 12(b)(1)-(7)] *must be made before pleading if a responsive pleading is allowed*" (Rule 12(b) flush language (emphasis added)). The manner in which a Plaintiff moves to dismiss for failure to comply with Fed. R. Civ. P. 23.1 is by way of a Rule 12(b)(6) motion to dismiss. *See Shaev v. Saper,* 320 F.3d 373, 377 (3d Cir. 2003) (motion to dismiss under Rule 12(b)(6) granted by district court for failure to comply with Rule 23.1). Accordingly, the Defendant's belated motion to dismiss is time barred and he has waived his argument for his failure to comply with Rule 12(b)'s timeliness requirement.

II. THE VERIFICATION IS PROPER BUT SHOULD THE COURT DETERMINE OTHERWISE THE DEFECT MAY BE CURED BY AN AFFIDAVIT

Defendant contends the Complaint must be dismissed because the verification contains the expression, "to the best of my knowledge, information and belief." Defendant argues that the inclusion of this expression converts the verification, "to a LACK of the ability to swear the facts in the Complaint are true and correct!" Defendant's Memo. of Law at 4. Defendant's hypercritical interpretation of the subject phrase is rhetorically challenged.

When a person states a fact based on his knowledge, information and belief, unless he limits his statement with a term such as "assumes" or "presupposes" or deliberately makes a material false or misleading statement, he is saying he is basing his assertion on knowledge and information and that he believes it. In short, contrary to Defendant's curious construction of the language objected to, the phrase actually strengthens the fact alleged or is, at worst, nothing more than mere surplusage.

Further to the foregoing, we direct the Court attention to *Harper v. Plumbmaster, Inc.*, 77 Fair Empl. Prac. Cas. (BNA) 1058 (E.D. Pa. 1998)(holding the text, "I swear or affirm under penalty of perjury that I have read the above charge and that it is true to the best of my knowledge, information, and belief" constituted a valid verification). *See also,* New Hampshire Local Bankruptcy Rule, LBF 5005-4, which uses the language, "I, _____, the undersigned, hereby declare under penalty of perjury that the information I have given my attorney and the information contained in the document listed below is true and correct to the best of my knowledge and belief), and Minnesota Local Bankruptcy Rule, MN R USBCT Form 1007-3, which uses the following Verification "I, ____, the debtor(s) named in the foregoing financial review form, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief."

Even if the Court remains uncomfortable with Plaintiff's verification as presently constructed, as a matter of law, the Court may permit Plaintiff to file an affidavit that comports with 28 USC § 1746. *See Smachlo v. Birkelo*, 576 F. Supp. 1439, 1443 (D. Del. 1983)(citing *Weisfeld v. Spartans Industries, Inc.,* 58 F.R.D. 570, 577-578 (S.D.N.Y.1972), remedied the plaintiff's failure to verify the complaint by requiring the plaintiff to file an affidavit verifying the complaint when it was apparent that the failure to verify was a mere oversight).

The *Weisfeld* court explained:

> I note that the purpose of the rule is to ensure that a shareholder's derivative claim has some basis in fact, i.e., is not a strike suit. In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966), **the Supreme Court held that noncompliance with formal verification requirements of the federal rules applicable to stockholder actions will not be grounds for dismissal of the complaint where counsel for plaintiff has diligently investigated the possible charges prior to filing the complaint.** Here, plaintiff alleges serious irregularities with regard to the merger of Spartans and the Arlen Group into ARDC, which persuades this Court that plaintiff's claims are not in the nature of a strike suit. It appears, rather, that the failure to verify the complaint was merely an oversight on the part of plaintiff's counsel resulting from the necessary haste with which the complaint was prepared. Moreover, the vigor with which defendants have opposed the action belies any inference of collusion between the parties.
>
> [4] Under these circumstances, therefore, I shall not dismiss Count II, but shall require that plaintiff file an affidavit verifying his complaint and serve it upon the defendants within ten (10) days of the date of filing of this opinion. *Weiss v. Tenney Corp.*, 47 F.R.D. 283, 288 (S.D.N.Y.1969).

Weisfeld , 58 F.R.D. at 577-578 (emphasis added).

III. PLAINTIFF HAS SATISFIED THE "PARTICULARITY" REQUIREMENTS OF RULE 23.1

A. Defendant Has Misquoted Rule 23.1(b)(3)(A).

Defendant's incorrectly informed the Court, "Under Rule 23.1, before filing suit, the shareholder was required to not only to make ***an*** [sic] "effort" "to obtain the desired action from the directors or comparable authority..." (emphasis added). Defendant's Memo. of Law at 4. Rule 23.1(b)(3)(A) actually states, "The complaint must be verified and must:...(3) state with

particularity...(A) ***any*** effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members" (emphasis added). The distinction between *an effort* and *any effort* is crucial. The plain language of the statute does not require a plaintiff to make *an effort* to obtain action from the directors, it only requires a plaintiff to state in his complaint what action he took.

In the case *sub judice,* the Plaintiff complied with Rule 23.1(b)(3)(A) in paragraph 31 of the Complaint, which states, "Plaintiff YUSUF did not make a demand on the Board to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law, as set forth below." That statement is enough to identify *any effort* made.

B. <u>As A Matter Of Law And Fact, Plaintiff Has Pled Facts With Particularity To Show A Demand On The Board Would Have Been Futile</u>.

Defendant begins his analysis on this point by arguing: 1) Yusuf personally paid the Plessen taxes due with "his personal credit card," 2) he recites no corporate determination, minutes or resolution that would direct or allow him to do so, and 3) the Complaint does not recite AS A FACT that the corporate taxes were not paid. Based on the foregoing Defendant remarkably concludes there was no damage with regard to the company - only that Yusuf was allegedly unable to secure reimbursement. Defendant's Memo. of Law at 4-5. Defendant Waleed Hamed wrongfully deprives the company of $460,000.00 and Defendant believe Plessen was not damaged. This defies logic.

It is unclear how such assertions bear on the issue of whether Plaintiff has pled sufficient facts with particularity to sustain Plaintiff's contention a demand on the directors would have been futile. At most they <u>might</u> form the basis for some kind of imaginative affirmative defense, but they are otherwise irrelevant to the subject motion to dismiss.

Defendant then moves on to argue Plaintiffs' claims with respect to futility are conclusory. Defendant's Memo. of Law at 5. In support, thereof, he improperly refers the Court to only two (2) paragraphs of the Complaint that explicitly address the issue of futility. Following are the assertions pertaining to the issue of futility that have been pled:

WALEED HAMED's Misappropriation of $460,000

15. The current members of PLESSEN's Board are: Mohammed Hamed; Defendant WALEED HAMED; Fathi Yusuf; and Maher Yusuf. Attached as Exhibit "C"...

.
.
.

18. Plaintiff YUSUF is a shareholder of PLESSEN, was a shareholder of PLESSEN at the time of the wrongdoing alleged herein, has been a shareholder of PLESSEN continuously since that time, and will continue to be a shareholder of PLESSEN throughout the pendency of this action.

19. YUSUF, under Rule 23.1 of the Federal Rules of Civil Procedure, which applies in this action under Rule 7 of the Superior Court, has standing to bring this action and will adequately and fairly represent the interests of PLESS EN and its shareholders in enforcing and prosecuting its rights.

.
.
.

25. On or about March 27th 2013, Plaintiff YUSUF paid with his personal Banco Popular Visa credit card the 2011 property taxes of PLESSEN.

26. YUSUF was reimbursed for such payment by way of a check drawn on PLESSEN's bank account with Scotiabank.

27. However, YUSUF was subsequently informed that an employee of Scotia bank called Fathi Yusuf to inform Fathi Yusuf that the check made to pay Plaintiff YUSUF's Banco Popular Visa credit card account would not be honored, *i.e.*, the check would bounce, because of insufficient funds in PLESSEN's Scotiabank account.

28. It was then revealed that on March 27, 2013, Defendants WALEED HAMED & MUFEED HAMED, without authorization, issued check number 0376 on a PLESSEN in the amount of $460,000.00 from PLESSEN's Scotiabank account, made payable to Defendant WALEED HAMED. A copy of check number 0376 is attached as Exhibit "D" hereto.

29. Defendant WALEED HAMED then endorsed check number 0376 "for deposit only" and, upon information and belief, then deposited PLESSEN's $460,000 at issue in Defendant WALEED HAMED's personal bank account.

30. Further, the INDIVIDUAL DEFENDANTS and Defendant FIVE-H, among other improper acts, have individually and collectively obtained the benefit, use and enjoyment of PLESSEN's defalcated funds.

Demand on the Board is Excused as Futile

31. Plaintiff YUSUF did not make a demand on the Board to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law, as set forth below.
32. As noted, as of the time of the filing of this complaint, the PLESSEN Board comprised the following directors: Mohammad Hamed; Defendant WALEED HAMED; Fathi Yusuf; and Maher Yusuf.

33. Mohammad Hamed, who is Defendant WALEED HAMED's father, is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

34. Likewise, Defendant WALEED HAMED is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action, as WALEED HAMED faces a substantial likelihood of liability for the wrongdoings alleged herein, and his acts were not, and could not have been, the product of a good faith exercise of business judgment.

35. Separately, because both the Board and shareholders of PLESSEN are comprised 50-50% by members of the Hamed and Yusuf families, and because neither the Articles of Corporation nor the By-Laws of PLESSEN provide a tie-breaker mechanism in the event of a deadlock, any demand upon PLESSEN would be useless based on the familial relationships at issue, the lack of sufficient independence of the Hamed members to institute and vigorously prosecute this action and, again, the lack of a corporate tie-breaker mechanism.

In support of his "futility" argument, Defendant relies on *Abrams v. Mayflower Investors, Inc.*, 62 F.R.D. 361 (N.D. Ill. 1974). The case is disturbingly easy to distinguish on its facts, in that case the court found:

> The affidavit of defendant Baker filed herein shows who was on the Board of Directors of Mayflower on August 1, 1973. The defendants, in their respective motions, represent that that affidavit and the affidavits of other directors clearly demonstrate that when this action was commenced and since October 1972 the majority of the directors (6 to 3) were independent, and never had any connection with the subject matter of this action.[3] The plaintiff has failed to effectively controvert these affidavits. It thus appears that the allegations contained in paragraph 12 are overly broad and conclusory and do not properly comply with the requirement of Rule 23.1 that the plaintiff present verified allegations of facts which justify the allegation that it would be futile to make the demand.

In the case *sub judice*, Plaintiff's contentions in paragraphs 31 to 34 of the Complaint to the effect fifty (50) percent of the directors could reasonably be expected to deadlock a demand have not been refuted by any affidavits.

Here, Plaintiff has adequately stated a claim that a demand on the board of directors would have been futile--as a matter of law and fact—because fifty (50) percent of the board of directors (enough to effectively deny a demand) is comprised of Defendant Waleed Hamed and his father—both of whom are presumed to be *interested and lack independence* (*see infra*).[2] Under such conditions courts have routinely excused a demand. *See, e.g., Shaev v. Saper*, 320 F.3d 373, 378 (3d Cir. 2003)(Delaware law, a demand on a board of directors is excused where half of the members of an even numbered board are alleged to be interested or lack independence); *Beneville v. York,* 769 A.2d 80, 86 (Del. Ch. 2000) (As a doctrinal matter, it thus makes little sense to find that demand is refused in an evenly divided situation); *Weiss v. Sunasco Inc.*, 316 F.Supp. 1197 (E.D. Pa. 1970)(where a majority interest is held by directors named as defendants in action, no demand of shareholders need be made since it would obviously be futile)[3]; *Walden v. Elrod*, 72 F.R.D. 5 (W.D. Okla. 1976)(In a situation where a derivative suit is brought against the majority of the directors of a corporation for willful or negligent breach of their fiduciary duties, a demand on directors or shareholders as a prerequisite to the bringing of a suit is generally excused).

The facts of the case *sub judice* fall squarely within the parameters of the cited cases because half of the members of Plessen's board of directors are alleged to be interested or lack independence. Although Mohammad Hamed is not a defendant that fact is not enough to defeat a

[2] Whether a plaintiff's allegations of futility are sufficient to excuse demand in shareholder derivative action depends upon facts of each case and lies within discretion of district court. *Diduck v. Kaszycki & Sons Contractors, Inc., Diduck v. Kaszycki & Sons Contractors, Inc.*, S.D.N.Y.1990, 737 F.Supp. 792 (S.D.N.Y.1990), *affirmed in part, reversed in part on other grounds* 974 F.2d 270, *on remand* 870 F.Supp. 489.

[3] Note that where, as here, fifty (50) percent of the directors are defendants or interested persons such a situation is the practical equivalent of a majority.

claim of futility because common sense says he is, at a minimum, an interested party. Plaintiff need not allege more because "under Delaware law to survive a motion to dismiss for failure to make a demand on the board of directors prior to bringing a shareholder derivative claim, plaintiffs need not demonstrate a probability of success on the merits; rather, they need only establish a reasonable doubt that the board could have properly exercised its independent and disinterested business judgment in responding to a demand." *In re Veeco Instruments, Inc. Securities Litigation*, 434 F.Supp.2d 267(S.D.N.Y. 2006). A father's natural predisposition to protect his child is objectively sufficient to create a reasonable doubt as to whether Mohammad Hamed would seek to protect his son by deadlocking the board and making demand futile.

C. The Court May Not Consider Defendant's Tactical Tender to the Court

Defendant attempts to bolster their motion by arguing a demand would not have been futile because Defendant "deposited the Yusuf half of the funds immediately to a Court account." First, it implicitly assumes that a fifty (50) percent deposit is sufficient to make Plessen whole. Why would a disinterested board of directors be satisfied with getting only half of the funds wrongfully taken leaving Plessen less than whole? The notion that the Hamed family is somehow entitled to a fifty (50) percent shareholder's interest in the funds without the appropriate corporate resolution/minutes is preposterous and demonstrates a complete lack of understanding of black letter corporate law. Moreover, it does not adequately protect Plessen's inchoate interest in prejudgment interest, costs, attorney's fees and an award for punitive damages from the Defendants because of their tortious misconduct.

Second, and most importantly, the Court may not even consider Defendants' tactical deposit because it did not exist at the time the Complaint was filed. *See Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259, 276(3d Cir. 1978)(the futility of making the demand required by Rul

23.1 must be gauged at the time the derivative action is commenced, not afterward with the benefit of hindsight).

CONCLUSION

For the foregoing reasons, Plaintiff is entitled to an Order denying Defendant's motion.

Respectfully Submitted,

Joseph A. DiRuzzo, III, Esq.
USVI Bar # 1114
Fuerst Ittleman David & Joseph, Pl
1001 Brickell Bay Drive, 32nd Floor
Miami, Florida 33131
305.350.5690 (0)
305.371.8989 (F)
jdiruzzo@fuerstlaw.com

Nizar A. DeWood, Esq.
2006 Eastern Suburb, Suite 102
Christiansted, V.I. 00820
(340) 773-3444 (0)
(888) 398-8428 (F)

Dated September 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on Sept. 25, 2013, a true and accurate copy of the foregoing was forwarded via email and USPS to the following:

Mark W. Eckard, Esq.
PO Box 24849
Christiansted, VI 00824
Mark@markeckard.com

Carl J. Hartmann III, Esq.
5000 Estate Coakley Bay, L-6,
Christiansted, VI 00820
carl@carlhartmann.com

Joseph A. DiRuzzo, III, Esq.