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

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

MEMORANDUM IN SUPPORT OF MOTION TO VACATE INJUNCTION PENDING POSTING OF ADDITIONAL SECURITY

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned counsel, respectfully submit this Memorandum in support of their Motion To Vacate Injunction Pending Posting Of Additional Security. Because the Supreme Court of the Virgin Islands ("Supreme Court") vacated that portion of this Court's April 25, 2013 order (the "Injunction") allowing the use of Plaintiff Mohammed Hamed's ("Hamed" or "Plaintiff") interest in more than $43,000,000 held in escrow pursuant to a District Court criminal restraining order as "additional security" and remanded the matter to this Court "to consider whether additional bond is required," Defendants respectfully request this Court to vacate the Injunction until Plaintiff posts additional security in the amount of not less than $21,957,130.02, representing the amount of additional security Plaintiff claimed and this Court apparently thought was being provided to Defendants in the Injunction.

PROCEDURAL BACKGROUND

1. On April 25, 2013, this Court entered a preliminary injunction as follows:

> **ORDERED,** that Plaintiff's Emergency Motion to Renew Application for TRO, filed January 9, 2013, seeking entry of a temporary restraining order or, in the alternative, preliminary injunction is **GRANTED**, as follows:

> **ORDERED**, that the operations of the three Plaza Extra Supermarkets 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. It is further
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> **ORDERED** that no funds will be disbursed from supermarket operating accounts without the mutual consent of Hamed and Yusuf (or designated representative(s)). It is further
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> **ORDERED** that all checks from all Plaza Extra Supermarket operating accounts will require two signatures, one of a designated representative of Hamed and the other of Yusuf or a designated representative of Yusuf. It is further
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> **ORDERED** that a copy of this Order shall be provided to the depository banks where all Plaza Extra Supermarket operating accounts are held. It is further
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> **ORDERED** that Plaintiff shall forthwith file a bond in the amount of Twenty-Five Thousand Dollars ($25,000.00) with the Clerk of the Court, and shall provide notice of the posting to Defendants. (Plaintiff's interest in the "profits" accounts of the business now held at Banco Popular Securities shall serve as additional security to pay any costs and damages incurred by Defendants if found to have been wrongfully enjoined.)

Hamed v. Yusuf, 58 V.I. 117, 137-8, 2013 V.I. LEXIS 25, *37-9 (Super. Ct. April 25, 2013).

2. In opposing the Defendants' Emergency Motion For Reconsideration Of The Preliminary Injunction Order And For Stay Of Same Pending Posting Of Adequate Bond (the "Emergency Motion"), Plaintiff argued he had "established at the preliminary injunction hearing that all of the profits from the operations of the Plaza Extra Supermarkets since 2003

have been deposited in this Banco Popular account, where they remain. Those accounts now contain in excess of $43,000,000." See Plaintiff's Opposition to the Emergency Motion at p. 4. Hamed went on to argue that "this Court certainly did not err in finding that 50% of these funds belong to the plaintiff. Moreover, the use of the plaintiff's 50% interest of this $43 million fund as part of the bond is certainly 'erring on the high side' of what is needed to protect the defendants, as they have urged the Court to do, citing Mead Johnson & Co. v. Abbott Labs, *supra*." Id. at p. 5. Finally, Hamed concluded that "the finding that half of these escrowed profits (totalling in excess of $43,000,000) could and does serve as half of the bond was not 'clear error[.]'" Id. at p. 6.

3. In its May 31, 2013 Order Denying Bond Modification, this Court found as follows:

> Defendants have admitted in this action that Plaintiff is entitled to 50% of the profits of three Plaza Extra Supermarkets stores. Evidence produced at the hearing shows that profits from the operations of these stores since at least 2003 has been deposited into investment accounts now frozen in connection with the pending tax evasion prosecution in Federal Court with a current balance in those accounts in excess of $43 million.[1] On these bases, the Court determined that a cash bond in the amount of $25,000, together with the additional security of Plaintiff's interest in the "profits" accounts constituted a bond sufficient to pay costs and damages that might be sustained by Defendants if found to have been wrongfully enjoined.

4. In his Opposition Brief filed in the Supreme Court on June 27, 2013 at p. 33, Plaintiff argued as follows:

> Here, contrary to the Appellants' assertions, there was extensive testimony and evidence over two days of hearings regarding Plaza Extra's financial records and business operations submitted by both parties. The court then required Hamed to post a substantial bond of $25,000 plus his 50%

[1] In his Opposition to Defendants' Motion to Stay Preliminary Injunction Pending Appeal at ftn. 6, filed on June 27, 2013 in the Supreme Court, Hamed set forth an exact number - $43,914,260.04 (the "District Court Funds") – instead of the round "in excess of $43 million" figure routinely used by Plaintiff and this Court.

> interest in the $43 million of escrowed store profits, clearly "erring on the high side." In short, the setting of the bond in this case fully complied with the procedural requirements of Rule 65(c).

5. On appeal, the Supreme Court held that this Court did not abuse its discretion in issuing the Injunction, but that it did abuse its discretion in ordering that funds outside of Plaintiff's and this Court's control serve as security. Accordingly, the Supreme Court affirmed the portion of the Injunction granting Plaintiff's Motion for Preliminary Injunction, but vacated the portion of the Injunction allowing the use of the District Court Funds as security and remanded for reconsideration of the injunction bond. Yusuf v. Hamed, 2013 V.I. Supreme LEXIS 67, *43 (2013). In addressing that portion of this Court's bond determination found to be in error, the Supreme Court concluded as follows:

> Here, the Superior Court cannot release the funds held pursuant to the District Court's order, and therefore is unable to assure that Yusuf and United can "readily collect damages" in excess of the $25,000 bond in the event that they ultimately succeed on the merits. Accordingly, ordering the funds held by the District Court to be used as part of the injunction bond constituted an abuse of discretion, and we vacate the portion of the Superior Court's order directing these funds to serve as security. Because the Superior Court's decision to set the $25,000 cash bond was premised on these funds serving as additional security, we remand for the Superior Court to consider whether **additional** bond is required in light of this holding.

Id. at * 41 (emphasis supplied).

6. On October 24, 2013, the Supreme Court issued its mandate, which provided in pertinent part that "[t]he certified copy of the Opinion and Order of the Court, attached hereto, constitute the **MANDATE** of this Court." (Emphasis in original). A copy of the mandate and the referenced order is attached as **Exhibit 1**.

ARGUMENT

I. THE MANDATE REQUIRES THIS COURT TO CONSIDER WHETHER AN ADDITIONAL BOND IS REQUIRED, WHICH SHOULD NOT BE LESS THAN $21,957,130.02.

As the Supreme Court unequivocally stated, "we remand for the Superior Court to consider whether additional bond is required in light of this holding." Indeed, after quoting the same language from the Supreme Court's opinion in his Memorandum in support of Motion To Reduce The Bond (the "Memo"), Plaintiff acknowledged that the Supreme Court directed "only that this Court determine if any **additional** bond is needed." See Memo at p. 1 (emphasis supplied).

Defendants respectfully submit that pursuant to the Supreme Court's mandate, this Court may only consider whether additional security is required under the circumstances. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 140 (1940) ("a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest"); Moore v. New York Cotton Exchange, 270 U.S. 593, 603 (1926) (referring to the "ministerial duty of complying with the mandate"). See also United States v. Ben ZVI, 242 F. 3d 89, 95 (2d Cir. 2001) ("The mandate rule 'compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.' Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless forgone, the mandate rule generally prohibits the District Court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.") (citations omitted). The mandate rule requires that "where issues have been explicitly or implicitly decided on appeal, the district court is obliged, on remand, to follow the decision of the appellant court." Burrell v. United States, 467 F.3d 160, 165 (2d Cir.

2006)(citation omitted). The lower court is "barred from reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals." Id.

Because the mandate rule requires this Court to adhere to the directives of the Supreme Court, this Court can only consider whether an additional bond is required. Although the Defendants sought a bond in the amount of $80 million in the Emergency Motion, an amount that Defendants still maintain is appropriate given the Supreme Court's directive that "'courts should err on the high side' in setting the amount of security," Yusuf, 2013 V.I. Supreme LEXIS 67, * 38 (citation omitted), this Court determined that a bond in the approximate amount of $22 million was more appropriate. See May 31, 2013 order quoted in ¶ 3 on p. 3 above. Indeed, Plaintiff has effectively conceded that this Court did not err in setting the amount of the security. See ¶ 2 and 4 on p. 2-3 above. Accordingly, Defendants respectfully submit that the bond amount should not be less than $21,982,130.02, which represents 50% of the $43,914,260.04 that Plaintiff acknowledged comprised the District Court Funds, plus the $25,000 cash bond already posted. Clearly, this approximately $22,000,000 bond was what this Court contemplated when it initially established the bond and denied the Emergency Motion in its order dated May 31, 2013.

Like the Plaintiff, the Supreme Court had no problem with the amount of the bond. Rather, the Supreme Court took issue with the ability of the District Court Funds to serve as "additional security" since neither Plaintiff nor this Court could exercise control over them. Since the Supreme Court has already determined that the District Court Funds cannot serve as the additional security previously required by this Court, Defendants respectfully submit that

the bond amount - $21,982,130.02 or $22 million - should remain the same.[2] Plaintiff should simply be required to post a cash bond or a bond countersigned by a qualified surety or secured by unencumbered property worth at least $21,975,000 ($22 million - $25,000 already posted).

II. THE INJUNCTION SHOULD BE VACATED UNTIL PLAINTIFF ACTUALLY POSTS THE ADDITIONAL SECURITY REQUIRED BY THIS COURT.

As the Supreme Court has stated, a preliminary injunction is an extraordinary and drastic remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. Yusuf, 2013 V.I. Supreme LEXIS 67, *9. Plaintiff, as the party seeking injunctive relief, has the burden "to demonstrate that posting a full bond is impossible or impractical, and to propose a plan that will provide adequate security for the appellee." See The Bank of Nova Scotia v. Pemberton, 964 F. Supp. 189, 192 (D.V.I. 1987) (discussing burden in connection with a stay pending appeal, which applies the same standards as an injunction). Since the Supreme Court's decision in this case, Plaintiff has proposed no such plan to "provide adequate security." Rather, Plaintiff's only "plan" is to reduce the insignificant security currently in place ($25,000) to the paltry sum of $5,000, which amounts to no security at all. See Motion to Reduce The Bond. Defendants hereby incorporate the arguments set forth in their Opposition To Motion To Reduce The Bond.

In this case, the Court essentially accepted the bond terms proposed by Plaintiff when it originally established the bond in the amount of $25,000 plus Plaintiff's 50% interest in the District Court Funds.[3] Obviously, this Court contemplated a total bond in the approximate

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[2] Although Defendants do not waive their arguments supporting a much higher bond, as set forth in the Emergency Motion and the Opposition To Motion To Reduce The Bond filed concurrently with this motion, Defendants would not contest an appropriate bond in the amount of $22 million.

[3] In his proposed findings of fact and conclusions of law, Hamed proposed a bond in the amount of $5,000 plus his interest in the District Court Funds.

amount of $22 million. The Supreme Court then determined that the District Court Funds could not serve as additional security. Nevertheless, Plaintiff has enjoyed the benefits of the Injunction since April 25, 2013 even though on September 30, 2013 the Supreme Court determined that more than $21.5 million of "additional security" for the bond provided no security at all.

As the Supreme Court acknowledged, Fed. R. Civ. P. 65(c) "provides that a court may issue a preliminary injunction '**only if** the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.'" Yusuf, 2013 V.I. Supreme LEXIS 67, * 38. See also J&S Dev. Corp. v. Montrose Global Assets, Inc., 279 Fed. Appx. 131, 133 (3d Cir. 2008) ("In order to have been properly issued as an injunction, however, the Preservation Order would have to have certain infirmities remedied. Most notably, no security was given as is required by Rule 65(c) . . ."); First American Dev. Group/Carib, LLC v. WestLB AG, 2012 V.I. Supreme LEXIS 39, * 18 (2012) (granting stay only "upon Appellant's posting in the Superior Court of a bond countersigned by a qualified surety or secured by unencumbered property of a value equal to or greater than the bond in the amount of . . . $74,650,000 . . . ."). Likewise, the Injunction in this case should be vacated and thereafter become operative only upon Plaintiff posting a cash bond, a bond countersigned by a qualified surety or secured by unencumbered property of a value equal to at least $21,975,000.

For all of the foregoing reasons, Defendants respectfully request this Court to vacate the Injunction pending Plaintiff's posting of an appropriate bond in an amount not less than $22 million and providing such further relief as is just and proper under the circumstances.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: November 15, 2013 By: */s/ G. Hodges*

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2013, I caused the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO VACATE INJUNCTION PENDING POSTING OF ADDITIONAL SECURITY** to be served upon the following via e-mail:

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