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
Plaintiffs,	)	
V.	)	ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF
FATHI YUSUF and UNITED CORPORATION,	)	JURY TRIAL DEMANDED
Defendants.	)	

OBJECTION TO BILL OF COSTS

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned attorneys, respectfully submit this Objection to the Bill of Costs and Motion and Memorandum in Support of Request for Attorney's Fees Regarding Appeal ("Motion For Fees") filed by Plaintiff Mohammad Hamed ("Hamed" or "Plaintiff"). In support, Defendants state as follows:

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Hamed and Yusuf have a long history. Both are businessmen who have been engaged in the operation of grocery stores in St. Croix and St. Thomas. Their history, the nature of their relationship and that of their families are subject to varying interpretations, colored by their own perspectives and complicated by the fact that neither are attorneys or trained in legal matters. Consequently, the legal import of their descriptions as layman is not always the most accurate reflection of their business dealings and corresponding duties to one another. Conversely, the legal documents filed with various governing bodies including the Internal Revenue Service as well as the regulatory services associated with incorporation, which have been filed year after

year for over thirty (30) years[1], provide a more accurate reflection of the true and legal nature of the relationship between the two. Despite the fact that Hamed was never listed as a stockholder of United, is not a signatory to a single loan or other debt obligation of United, has never paid taxes for the profits of United[2], is not actively engaged in employment or a business of any kind and has not been so engaged for years, he, through his son, Waleed Hamed, filed suit against Yusuf and United contending the existence of an oral partnership and entitlement to half of the profits of the Plaza Extra supermarkets[3]. Hamed also filed a Motion for a Temporary Restraining Order and/or Preliminary Inunction.

Immediately thereafter, Yusuf and United filed a Motion to Dismiss the Complaint or, alternatively to strike and for a more definite statement. Before a resolution of the Motion to Dismiss, Hamed filed an Amended Complaint. Again, Yusuf and United filed a Motion to Dismiss the Amended Complaint. Yusuf and United's Motion to Dismiss remains pending.

On January 9, 2013, Hamed filed an "Emergency Motion" to renew the application for a temporary restraining order. An evidentiary hearing was held in which exhibits were introduced into the record. Subsequent to the hearing, Hamed filed numerous motions to supplement the record. Yusuf and United opposed these efforts as procedurally improper. On April 25, 2013, this Court granted Hamed's request for a preliminary injunction which relied upon much of the evidence submitted in the subsequent filings, which Yusuf and United were unable to challenge under cross-examination.

Appeal was taken from this Court's April 25, 2013 Order issuing the preliminary injunction which required the Yusuf and Hamed families to maintain joint management of the

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[1] Yusuf and his family incorporated United in 1979 as a USVI corporation and since then, they have maintained and owned United.

[2] No income tax filing of United has ever reflected Hamed as an asset owner, partner or shareholder of United.

[3] Hamed's new found contention of a 50% ownership interest in an oral partnership is a direct contradiction to the position taken earlier by his family in concurrent criminal proceedings.

supermarket stores and requiring that any distribution of funds from the Plaza Extra accounts be approved by a representative of both families. In addition, this Court ordered Hamed to post a $25,000.00 bond with the Court and that Hamed's interest in more than $43 million of profits held in escrow with the District Court "serve as additional security." After Motions for Reconsideration were filed and denied, Yusuf and United appealed the April 25, 2013 Order contesting two issues, to wit: a) whether the preliminary injunction was properly issued, and, b) whether the bond amount was legally insufficient or illusory.

The Supreme Court issued its Opinion on September 30, 2013, affirming in part, vacating in part, and remanding for reconsideration of the injunction bond. Yusuf v. Hamed, 2013 V.I. Supreme LEXIS 67, *24-5 (September 30, 2013). Specifically, the Supreme Court held "[T]he Superior Court did not abuse its discretion in issuing the preliminary injunction" but recognized that "[n]evertheless, the Superior Court did abuse its discretion in ordering that the funds outside of Hamed's and the Superior Court's control serve as security" for Yusuf and United in the event that the injunction is ultimately determined improper. Thus, the Supreme Court "vacate[d] the portion of the order using funds held by the District Court as security and remand[ed] for reconsideration of the injunction bond." Id, *43.

On October 15, 2013, Hamed filed a Motion for Costs and Attorney's Fees with the Supreme Court. The same day, the Supreme Court denied the motion without prejudice pursuant to V.I.S.CT. R. 30(b) wherein "if a party seeks attorney's fees as among the costs to be taxed, the amount of attorney's fees to be awarded – if any - shall be determined by the Superior Court on remand" and permitted Hamed the opportunity to "re-file" the motion with the Superior Court. Hence, on October 22, 2013, Hamed filed the Motion For Fees with this Court, seeking $68,996 in attorneys' fees for what Hamed contends was "successfully prosecuting the appeal." The

Defendants provide this Objection showing why the Motion For Fees should be denied or, if granted, should be only a significantly reduced amount to more accurately reflect the limited issues upon which Hamed prevailed and in accordance with a reasonable fee for such efforts.

II. ARGUMENT AND CITATION OF AUTHORITY

This Court should deny Hamed's Motion For Fees in its entirety or, in the event the Court awards fees, should only award fees in an amount more reflective of the limited success achieved by Hamed on appeal and commensurate with the reasonable fees incurred as to the limited issue in which Hamed prevailed.

A. Criteria for Award of Fees

The decision whether to award fees is a two step process both of which are within the court's discretion. Island Green, LLC v. Querrard, 2013 U.S. Dist. LEXIS 44147 at *3-4 (D.V.I. Mar. 27, 2013), citing Jo-Ann Lauder Ctr., Inc. v. Chase Manhattan Bank, N.A., 31 V.I. 226, 233 (D.V.I. 1995); see also Bedford v. Pueblo Supermarkets of St. Thomas, Inc., 18 V.I. 275, 277 (D.V.I. 1981) ("Both the decision to make such an award and the amount to be awarded are within the court's discretion.").

1. Step One - Whether to Award Fees

First, the Court must determine *whether,* in the exercise of discretion, fees should be awarded at all to a party as the prevailing party. El Fenix de P.R., Inc. v. Dallas, 30 V.I. 339, 341 (D. V.I. 1994). Thus, an award of attorney's fees to a prevailing party is not as of right, but rather is within the court's discretion. Buntin v. Continental Ins. Co., 525 F. Supp. 1077, 1083 (D. V.I. 1981). On occasion, courts have refused to make any award of attorney's fees. See, e.g., Vitex Mfg. Co. v. Wheatley, 70 F.R.D. 588, 590 (D.V.I. 1976) ("the matter is entirely up to the discretion of the court and discretion includes the option of fixing reasonable fees or

disallowing them in their entirety"); Collins v. Government of Virgin Islands, 366 F.2d 279, 286 (3d Cir. 1966) ("an award of attorneys' fees under 5 V.I.C. § 541(b) is a matter of judicial discretion"); Ice Cube Delivery, Inc. v. Virgin Islands Water & Power Auth., 9 V.I. 197, 201 (Mun. Ct. 1973) (denying request for fees and costs because "the facts warranted a judicial resolution and can serve a useful public purpose"); Smith v. Government of Virgin Islands, 361 F.2d 469, 471 (3d Cir. 1966) (vacating District Court's award of attorneys' fees because the District Court failed to consider the public interest served by the case).

Whether to award fees depends upon whether a party is the "prevailing" party. The statute does not define the term "prevailing party." Island Green, 2013 U.S. Dist. LEXIS 44147 at *13. However, courts have defined "prevailing party" to be determined by whether "a party has achieved at least some of the benefits which were sought in the litigation, even if a judgment is not finally obtained." Id. Generally, whether a party is the "prevailing" party is not known until the end of the litigation. However, where a party prevails on an interlocutory appeal, any award of fees for those appeal efforts would simply be taxed at the end of the litigation either as an addition to the amounts sought following a judgment in a party's favor, or as an offset against an adverse judgment, if the opposing party ultimately prevails. Beachside Assocs., LLC v. Fishman, 54 V.I. 418, 422 (Sup. Ct. 2010) (referring to taxing costs for successful interlocutory appeal upon "entry of final judgment in the Superior Court …").

As "prevailing party" can be defined as the achievement of at least some of the benefits sought in the litigation, a "prevailing party" is defined on a per issue basis. Island Green, *supra*. Therefore, prevailing only on one or two issues, will not entitle a party to seek all the fees they incurred, but rather potentially entitles them *only* to reasonable fees for a single attorney's work on those issues upon which they prevailed. Id. In Island Green, the District Court, in

considering fees incurred by one party relating to an appeal, determined that although the party ultimately was successful in getting the entire case against it dismissed, that as to the appeal efforts, the party prevailed on only two (2) out of the seven (7) counts. Hence, the Court awarded fees only for two/seventh's (2/7) of the total fees requested as this represented the fair and reasonable value of those issues upon which the party had prevailed. Id. at *8; see also Midland Nat'l Life Ins. Co. v. Sheridan, 2010 U.S. Dist. LEXIS 55565 at *4 (D.V.I. June 4, 2010) (awarding only 13% of the fees requested). Thus, the "normal award under section 541 is often only a minor fraction of what an attorney may reasonably have charged a client for the services involved in the litigation." Smith v. Gov't of the Virgin Islands, 5 V.I. 536, 540, 361 F.2d 469 (3d Cir. 1969). In fact, "[section 541] is not a vehicle for punishing a losing litigant, nor is it a license for the unrestricted employment of legal resources with the aim of taxing the loser with every last dollar spent by the parties and their attorneys in the successful prosecution or defense of a case." Skeoch v. Ottley, 278 F.Supp. 314, 316 (D. V.I. 1968). Hence, the Court first must determine *whether*, in the exercise of discretion, it would be appropriate to award fees to Hamed, *at all*, for the limited, partial victory he was able to maintain as to the injunction on the interlocutory appeal.

a. Limited and Tenuous "Success"

In considering whether to award fees, the Court must consider the limited nature of the initial victory achieved by Hamed. First, his "success" is tenuous. In affirming the injunction, the Supreme Court was clear to note that the findings sufficient to institute and maintain the injunction "are only for the purposes of the injunction and do not bind the jury" and "[a]s a general rule, decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'" Yusuf, 2013 V.I. Supreme LEXIS 67 at *24-5. Hence, while

Hamed may have been successful in his limited appeal efforts, the Court, in exercising its discretion whether to award fees, should factor in the limited scope of the success on the interlocutory appeal. The decision impacts only the actions of the parties during the course of the litigation and is not binding upon them as to the ultimate resolution of the case. In considering whether to award fees, "the benefits resulting to the client from the services" are relevant to the consideration. Judi's of St. Croix v. Weston, 2008 V.I. Supreme LEXIS 21 at *3 (Sup. Ct. 2008) (citation omitted). "The benefits [a party] received by counsel's labor on appeal may be short-lived." Id. at *6. As the purpose of the code section is to indemnify a party for his fees in the overall success of either pursuing or defending the action, a limited "win" on a matter that does not impact the ultimate outcome of the case should weigh heavily against the decision to award any fees at all in the first round of what will no doubt be a distended dispute.

b. Won Half, but also Lost Half

Hamed only prevailed as to half of the issues on interlocutory appeal. There were only two issues on appeal, to wit: a) whether a preliminary injunction was properly issued, and b) whether the bond amount was legally insufficient or illusory. Yusuf, 2013 V.I. Supreme LEXIS 67 at *9, *37. The Supreme Court viewed these as the two issues to be determined as reflected in its decision. The Supreme Court's Part III Discussion Section is divided into only two parts: Subsection A entitled "Preliminary Injunction" and Subsection B entitled "Injunction Bond." Id. In rendering its decision to "affirm the portion of the Superior Court's April 25, 2013 Order granting Hamed's motion for a preliminary injunction, but vacate the portion of the order using funds held by the District Court as security and remand for reconsideration of the injunction bond," Id. at *42, the Supreme Court clearly granted only a partial victory to Hamed as to half of the issues on appeal. While Hamed prevailed on one issue, he did not prevail on the other. The

fact that the success related only to a portion of the issues on appeal and was instituted to allegedly maintain the "status quo," likewise, are factors which weigh heavily against an award of fees at all.

c. Fees, If Any, Should only be Half

The fact that Hamed's success was limited to half of the issues on appeal, necessarily requires that if an award is made, that it should relate only to half of the total fees incurred. Hence, to the extent that any award is to be made (after adjusting for, *inter alia*, the hourly rate[4]) it must be divided in half as Hamed prevailed only on one of two issues.

Hamed contends that he has accounted for the partial loss by reducing the fee by only $1,800.00[5]. However, this reduction represents only 2.5% of the total fee and is clearly not reflective of the importance of the bond issue. The Court determined that the injunction was to remain but equally important was the counter balancing bond that was required to provide security to Yusuf and United as potential compensation for the irreparable harm that would be suffered in the event that the injunction is ultimately determined to be improper. The fact that a bond was ordered in an amount in excess of $21.5 million dollars demonstrates the importance and magnitude of the issue. A $21.5 million dollar bond and whether it was properly issued based upon in excess of $43 million dollars held by the District Court, cannot be said to be a minor or ancillary issue. Hence, the value of the bond and whether or not the substantial bond amount was, in essence, illusory as a result of being tied to funds over which the Superior Court had no control, was a substantial issue upon which Hamed lost.

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[4] The propriety of the hourly rate, the hours billed and the number of attorneys involved is addressed in Subsection 2(a) and (b).

[5] At first it appears that Hamed's counsel is reducing his fee by half to account for the bond issue, but upon further review, it is clear that Hamed's counsel has only allocated 3 hours at $600.00 per hour to the bond issue which he contends is half of the time he spent on the bond issue. Hence, Hamed allocates only 3 hours out of his 94 hours to account for the bond issue that he lost. In total, Hamed is seeking fees for 142.8 hours of attorney time (94 for Attorney Holt and 48.8 for Attorney Hartmann).

Moreover, time expended to demonstrate the need for the injunction necessarily impacted the corresponding need for the bond required to counter balance any harm resulting from the injunction. Given the interrelated nature of the arguments, work on one necessarily impacted the other. Hence, the arbitrary allocation of 2.5% of attorney time to the bond and 97.5% to the injunction is improper. Rather, the fees should be divided equally, apportioning half to the issues upon which he prevailed and half as to the bond issue upon which he did not prevail.

2. Step Two – What Amount Constitutes a Reasonable and Necessary Fee

Recognizing the purpose of such awards to operate as indemnification for a reasonable fee incurred, "[O]nce a court determines attorney's fees shall be awarded, it must then determine what constitutes a reasonable attorney's fee for a given matter." Island Green, *supra* at 6. The "presumptively reasonable 'loadstar' rate" is a calculation of the hours worked multiplied by the "reasonable hourly rate." Id. citing Hensley v. Eckerhart, 461 U.S. 424, 432 (1983); Jo-Ann Launder Ctr., Inc. v. Chase Manhattan Bank, N.A., 31 V.I. 226, 233, 234 (D.V.I. 1995). After performing this calculation, "a court may then adjust the amount to 'take into account any other relevant factors that are not already adequately represented in the lodestar calculation.'" Id. at 7, citing Equivest St. Thomas, Inc. v. Gov't of the V.I., 46 V.I. 447, 452 (D.V.I. 2004). A court may "reduce a fee award if a bill included an excessive amount of time to perform a task or contains duplicative entries." Id. citing Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 422 (3d Cir. 1993).

Further, since an award of attorney's fees is not intended as a full reimbursement to a prevailing party, this Court has "considerable latitude in this regard." Melendez v. Rivera, 24 V.I. 63, 66 (Terr. Ct. 1988). Instead, if an award is made, it is intended to be an indemnification for a fair and reasonable portion of a party's fees but not for the whole amount charged by an

attorney. Trailer Marine Transp. Corp. v. Charley's Trucking, Inc., 20 V.I. 286, 290 (Terr. Ct. 1984). Where there has only been limited success, the court should award only that amount of attorney's fees that is reasonable in relation to the results obtained. Id. at 289.

Here, the fees sought by Hamed are excessive in terms of the total amount sought, the rates charged and the hours allocated to the issue upon which he prevailed.

a. Hourly Rate – Too High

"The party seeking fees bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered in order to make out a prima facie case." Lanni v. N.J., 259 F.3d 146, 149 (3d Cir. 2001). In making this determination, this Court must consider only the rates normally charged by Virgin Islands attorneys. See Antilles Indus. v. Government of the Virgin Islands, 11 V.I. 604, 609 (D.V.I. 1975) (referring to the "reasonable rate for an attorney's time in the Virgin Islands"); Hodge v. Superior Court of the V.I., 2009 U.S. Dist. LEXIS 110340 at *12 (D.V.I. Nov. 24, 2009) (referring to the "customary and prevailing market rates in the Virgin Islands for similar services").

With regard to the reasonableness of the hourly rates, Virgin Islands courts "have generally concluded that a reasonable hourly rate in this jurisdiction ranges from $125 to $300 per hour." Cohen v. Skepple, 2013 U.S. Dist. LEXIS 94212 at *12 (D.V.I. July 5, 2013) citing Anthony on Behalf of Lewis v. Abbott, 2012 U.S. Dist. LEXIS 94323 at *5(D.V.I. July 9, 2012) (citing cases). In this case, the hourly rate charged by counsel for Hamed is significantly higher than the customary and standard rate employed by lawyers in the Territory of like and similar experience. Consequently, the hourly rate should be reduced for the purposes of any calculation to, at most, $300.00 per hour, which is one of the higher hourly rates for experienced counsel.

See Judi's of St. Croix Car Rental v. Weston, 2008 V.I. Supreme LEXIS 21 at *6 (S. Ct. 2008) (referring to the fact that "$ 300.00 per hour is at the high end of rates normally charged by Virgin Islands attorneys"). The rate of $600.00/hour is well in excess of the standard hourly rate charged by lawyers of like and similar experience for such work.

Further, the fact that Hamed sought an injunction with an accelerated appeal process created the compressed timeframe. To the extent that additional time and resources were utilized on an expedited basis, this is a circumstance and scenario which Hamed created by seeking the injunction and for which Yusuf should not be required to pay.

Moreover, Hamed seeks to recover fees for the time spent conferencing with the client on the case. However, such time is not allowed to be recovered. Dr. Bernard Heller Foundation v. Lee, 847 F.2d 83, 1988 U.S. App. LEXIS 6649 (3d Cir. 1988). It appears that some 8.75 hours were spent conferencing with the client. At the $600/hour rate, this equates to $5,250.00 in fees associated with client conferences. Hence, any award should be reduced by $5,250.00.

b. Number of Hours – Too Many

Hamed contends that he is entitled to recover some 142.8 hours of attorney time to file their response to the appeal taken by Yusuf and United. While an appeal requires much effort, 142.8 hours in one month, from June 9, 2013 through July 9, 2013 represents an excessive amount of time. In essence, Hamed is contending that an attorney spent nearly the entire month billing exclusively on this appeal. As with the hourly rate, the time spent is excessive. In this case, the appeal was interlocutory and therefore, involved only limited information and issues (i.e. there was not an entire trial transcript to review and absorb). Further, Hamed was the appellee which only required him to file a single response brief and then prepare for oral argument. Hence, the time billed and sought by Hamed is excessive and beyond that which

would adequately indemnify Hamed for reasonable fees incurred in the appeal efforts. Consequently, such fees are not reasonable and should be adjusted downward so as to be commensurate with a reasonable fee incurred by an appellee relating to an interlocutory appeal at the very early stages of the litigation.

B. Reasonable Rate Calculation and Adjustments

Although Defendants contend that no fees should be awarded for the reasons set forth above, in the event that the Court elects to award fees, Defendants submit that based upon the foregoing, those fees should be reduced and adjusted as follows:

[Calculations set forth on next page.]

FEE CALCULATIONS AND ADJUSTMENTS

A. Total Fees Claimed:

1. Attorney Holt Time at $600/hour:	$54,600.00	
2. Attorney Hartmann at $295/hour:	+$14,396.00	
Total Fees Claimed:		$68,966.00

B. Adjustment 1:

(Reduce hourly rate for Attorney Holt time to $300/hour from $600/hour, per Subsection A(2)(a)).

1. Attorney Holt Time at **only** $300/hr:	**$27,300.00**	
2. Attorney Hartmann at $295/hr:	+$14,396.00	
Adjusted Fees:		$41,696.00

C. Adjustment 2:

(Subtract $5,250.00 for fees not allowed for Client conferences, per Subsection A(2)(a)).

1. Adjusted Fees Per Adjustment 1:	$41,696.00	
2. Less $5,250.00 for Client Conf.:	- $5,250.00	
Adjusted Fees:		$36,446.00

D. Adjustment 3:

(Reduce adjusted fees by half to account for the fact that Hamed prevailed only as to one of the two issues on appeal):

1. Adjusted Fees after Adjustment 2:	$36,446.00	
2. Divide in half:	÷ 2	
Adjusted Fees:		$18,223.00*

*The Adjusted Fees of $18,223 represents 60 hours of attorney time at $300.00 per hour, which is more reasonable and commensurate with the time necessary for such efforts.

C. Any Award Should be Taxed at Conclusion of Case

An award of fees is to be determined according to the ultimate outcome of the litigation. Where a party prevails as to an issue on an interlocutory appeal, any fees assessed for such an award is

> …to be taxed upon the entry of a final judgment in the Superior Court together with any other costs awarded to [such party] if it is the prevailing party in the Superior Court proceedings, or, if [the opposing party] is the prevailing party in the Superior Court, offset against any costs awarded to [the opposing/prevailing party]…

Beachside Associates, LLC, 54 V.I. at 422.

At this stage, the litigation has only just begun. A preliminary injunction was sought, ordered, challenged, and affirmed. The corresponding bond was set in excess of $21.5 million dollars to provide security for the payment of any damages incurred by Defendants in the event that the injunction is ultimately found improper. The Supreme Court has tested the injunction and bond based upon a preliminary record, much of which has been challenged as improperly admitted into evidence. The Court affirmed the injunction but vacated and remanded for reconsideration of the bond. Hence, as the case is at the preliminary injunction and bond phase, the fight is far from over. Hence, it is unknown which party will ultimately prevail on the substantive issues as determined after preliminary dispositive motions, or a full and exhaustive discovery period, examination of the admissible evidence, and trial. As such, while a preliminary, interlocutory and only partial win, may entitle Hamed to an award of fees as to those portions of the appeal upon which he was able to maintain his injunction, he is not entitled to fees as to those portions in which he did not prevail and would be entitled only to a reasonable fee, not necessarily the fees he incurred. Hence, any award, should be taxed later upon the entry

of a final judgment in the case either as an addition to the final judgment, if rendered for Hamed, or as an offset against a judgment in favor of Yusuf and United.

III. CONCLUSION

For the foregoing reasons, Hamed's Motion for Fees as to the limited issue upon which he prevailed in the interlocutory appeal should be denied in its entirety as the ultimate outcome of the case is unknown and the limited "win" has no binding impact upon the case or the ultimate issues to be determined. However, in the event any fees are awarded, they should only be as to the limited issues upon which Hamed did prevail. Hamed prevailed on only one of two issues on appeal and therefore, a reduction by half is appropriate. Further, the rates charged are not commensurate with those customarily charged in the area and, therefore, must be reduced to more accurately reflect a "reasonable" fee as are the other adjustments noted herein. Hence, an award, if any, should be in an amount significantly less than the fees sought by Hamed.

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 **OBJECTION TO BILL OF COSTS** to be served upon the following via e-mail:

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INDEX OF EXHIBITS