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.	)	

OPPOSITION TO MOTION TO REDUCE THE BOND

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned counsel, respectfully submit this Opposition to the Motion To Reduce The Bond (the "Motion") filed by Plaintiff Mohammad Hamed ("Hamed" or "Plaintiff") on October 17, 2013. Because the Motion seeks relief that is inconsistent with or contrary to the mandate of the Supreme Court of the Virgin Islands ("Supreme Court") and because a reduction in the amount of the bond to the nominal amount sought by Plaintiff ($5,000.00) is not supported by any facts or law, the Motion should be summarily denied.

PROCEDURAL BACKGROUND

1. On April 25, 2013, this Court entered a preliminary injunction (the "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

> **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
>
> **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
>
> **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
>
> **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% 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

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[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.

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 ONLY AUTHORIZES THIS COURT TO CONSIDER WHETHER AN ADDITIONAL BOND IS REQUIRED, NOT A REDUCED BOND.

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 the Motion (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 any consideration of reducing the bond would be clearly outside the scope of the Supreme Court's mandate. 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, not whether the bond may be reduced. 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, * 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, as further explained in Defendants' Motion To Vacate Injunction Pending Posting Of Additional Security, filed concurrently with this Opposition, 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 million bond was what this Court contemplated when it initially established the bond and denied the Emergency Motion in its order dated May 31, 2013.

II. EVEN IF REDUCTION OF THE BOND IS NOT BARRED BY THE MANDATE RULE, A FURTHER REDUCTION OF AN ALREADY INSIGNIFICANT BOND TO A NOMINAL AMOUNT IS INCONSISTENT WITH THE FACTS AND CONTROLLING LAW.

At page 1-2 of his Memo, Plaintiff quotes at length from the Supreme Court's decision as follows:

> Federal Rule of Civil Procedure 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." The purpose of this security is to guarantee that the enjoined party will be compensated for the expenses of complying with an erroneously issued injunction, as well as placing the moving party on notice of the maximum amount of compensation it could be forced to pay. Sprint, 335 F.3d at 240. Because "[i]t is generally settled that, with rare exceptions, a defendant wrongfully enjoined has recourse only against the bond," Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F. 2d 797, 804 (3d Cir. 1989) (collecting cases), "Courts should err on the high side" in setting the amount of security. Meade Johnson & Co. v. Abbott Laboratories, 201 F3d 883, 888 (7th Cir. 2000).

Yusuf, 2013 V.I. Supreme LEXIS 67, *38-9.

Initially, it should pointed out that Plaintiff is wrong when he claims that it is Defendants' burden to prove the amount needed for a bond. See Memo at p. 3 citing AB Electrolux v. Bermil Indust. Corp., 481 F. Supp. 2d 325, 336-7 (S.D. N.Y. 2007). Plaintiff is attempting to turn the burden of proof with respect to injunctive relief on its head. 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 has further ignored local authority clearly placing the burden on the party seeking injunctive relief "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).

As repeatedly acknowledged by Hamed, it is well established that courts should "err on the high side" when setting the amount of security under Fed. R. Civ. P. 65(c). This is because:

> If the judge had set the bond at $50,000,000, 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.

Mead Johnson, 201 F.3d at 888. Here, 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.[2] Obviously, this Court contemplated a total bond in the approximate amount of $22 million. The Supreme Court then determined that the District

[2] 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.

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. Now, with only $25,000 serving as actual security, Plaintiff has the audacity to request a reduction of the bond to the paltry sum of $5,000 based upon the specious argument that "there is no evidence in the record to support the need for a bond other than a nominal bond."

Defendants have already provided this Court with sworn testimony supporting the reasonableness of their potential costs and damages arising out of the issuance of the injunction[3], while Plaintiff, in sharp contrast, has offered nothing more than the argument of his counsel. Defendants' potential costs and expenses include the following: (1) employee wages; (2) rent; (3) legal compliance costs and fees; and (4) the loss of United's net equity.

EMPLOYEE WAGES

As set forth in the declaration of John Gaffney dated May 8, 2013 (the "Gaffney Declaration") filed in support of the Emergency Motion, Plaintiff's four sons (the "Hameds") are employees of United and are currently being paid $347,000 each to serve as co-managers of the three supermarket stores. By way of comparison, Mr. Ronald B. Freeman, CPA, who is the Chief Financial Officer and Vice President of Finance for Ingels Markets, Incorporated, a supermarket chain in the Southeast United States with over 200 supermarkets and over 8,000 employees is paid $362,000 a year. See http://finance.yahoo.com/q/pr?s=IMKTA; see also http://finance.yahoo.com/q/pr?s=ARDNA (showing that CFO of 17-store chain was paid a $250,000 annual salary).

[3] Defendants incorporate and rely upon their Emergency Motion and supporting exhibits.

The Injunction enjoins the Defendants from taking "unilateral action . . . . affecting the management, employees, methods, procedures and operations [of the three Plaza Extra Supermarkets stores]." Accordingly, the Injunction effectively guarantees the continued employment of the Hameds regardless of whether their employment is needed or of any benefit to the successful operation of the supermarket stores, since it is a forgone conclusion that none of the Hameds will agree to the termination of their lucrative employment packages.

In his Memo, Plaintiff argues that the continued employment of the Hameds and Wadda Charriez whose total compensation from April 2013 through May 2015 is $2,866,442, see Gaffney Declaration at ¶ 5, does not support the need for any bond for two reasons, namely, the salaries were already being paid prior to the entry of the injunction and the salaries do not represent any additional costs because if these employees are discharged, replacement employees would need to be hired. The mere fact that these employees were on the job prior to entry of the Injunction has absolutely no significance and Plaintiff has not bothered to demonstrate any significance. What is important, however, is that the Injunction effectively precludes the termination of their employment for any reason without their consent, which presumably will never be given. The assumption that all of these employees are "key" employees as opposed to being unnecessary employees is not supported by any sworn testimony or record evidence. In fact, the existing record evidence reflects that Wadda Charriez is neither "essential" nor "irreplaceable." See Transcript of Preliminary Injunction hearing held on January 31, 2013 at p. 30-1 (testimony of Yusuf Yusuf) and page 91 (testimony of John Gaffney). There is no previous testimony and Plaintiff has offered no evidence supporting his argument that "if these employees were discharged, the partnership would still have to hire individuals to work these key management positions . . . ." Attached as **Exhibit 2** is the

declaration of Mahar Yusuf ("Yusuf Declaration") establishing that all of the Hameds could be terminated and their job duties reassigned to existing employees of United without any operational impact on the supermarket stores other than an annual savings of $1,388,000. See Yusuf Declaration at ¶ 4.

Moreover, Waleed Mohammad, Waheed Mohammad, Mufeed Mohammad, and Wadda Charriez are all defendants in cases pending in this Court alleging serious malfeasance. See ST-13-CV-101; SX-13-CV-3; SX-13-CV-152; and SX-13-CV-120. Thus, in addition to effectively requiring United to continue paying the inflated salaries of the Hameds and the salary of Charriez by enjoining their continued employment, the Injunction also affords these individuals with ongoing opportunities to engage in further malfeasance to the serious detriment of Defendants. Because the Injunction effectively requires United to continue paying these salaries irrespective of employee malfeasance, these employee earnings are a proper bond component if Defendants are ultimately found to have been wrongfully enjoined or restrained. See Stouder v. M&A Technology, Inc., 2010 U.S. Dist. LEXIS 85616, at * 9 (D. Kan. Aug. 19, 2010) (including income, i.e., base salary plus commissions, as bond component). Given the already existing claims for serious malfeasance concerning four of these employees, the bond amount should be significantly increased to account for the prospect that the continued employment of malfeasors provides them with a continuing opportunity to harm their employer.

RENT

At page 4 of the Memo, Plaintiff does not dispute that rent is due and owing to United for the Sion Farm location. Rather, he argues that the Injunction does not enjoin United from seeking to collect rent from the alleged partnership for occupying the Sion Farm location. It

appears that Plaintiff hopes this Court will completely ignore the fact that Defendants have submitted sworn testimony that as of May 8, 2013, Plaintiff owes millions of dollars in unpaid rent. See Gaffney Declaration at ¶ 8-9. Plaintiff has not submitted any declaration establishing that he owes no part of this huge rental obligation. Rather, he blithely says "come and get it," since the Injunction does not, according to him, preclude any action to recover rent or the premises occupied. But this argument ignores the fact that the Injunction effectively provides a shield to Plaintiff regarding rent payments. With the Injunction in place, Plaintiff clearly has no incentive to pay even the undisputed rent since he can exercise an absolute veto concerning any checks being drawn on the supermarket account for the payment of rent. For this reason, the unpaid rent is a proper component of the bond that should be posted to provide the necessary security for Defendants' costs and damages if the Injunction is ultimately determined to have been wrongly entered.

LEGAL COMPLIANCE COSTS/FEES

In support of the Emergency Motion, Defendants relied upon the detailed declaration of Nizar A. DeWood (the "DeWood Declaration"), which estimated Defendants' legal costs and expenses as a result of the preliminary injunction in the federal criminal case pending against United, 17 civil cases against United, and this case. The total estimated fees and costs was $380,000 to $625,000, not $255,000 to $425,000 as claimed by Plaintiff. See Memo at p. 5. No countervailing estimates have been submitted by Plaintiff. Nonetheless, Plaintiff argues, without any support, that "time has demonstrated that these 'estimates' were nothing but unfounded speculation." Id. At best, Plaintiff's comments are unfounded speculation.

As for the 17 civil cases, Plaintiff focuses on only two of the items of estimated expense set forth in ¶¶ 10(a) and (b) of the DeWood Declaration and then relies on the declaration of

Waleed Hamed dated October 17, 2013 (the "Hamed Declaration") stating that "[t]he only charges for reviewing matters related to the preliminary injunction are found in the May billing from John K. Dema, whose billings for this issue totaled $1,990.00 (redacted excerpts attached) . . . ." See Hamed Declaration at ¶ 3. Plaintiff completely ignores the estimated expenses set forth in ¶¶ 10(b) and (e) of the DeWood Declaration, which involved the much more time consuming process of appropriately joining Plaintiff as a defendant or third-party defendant in the 17 cases and taking the necessary steps to hold him personally responsible in light of his purported 50% partnership interest in the Plaza Extra Supermarket stores. Defendants respectfully submit that the estimate of $255,000 to $425,000 to accomplish this is a conservative estimate and, as our Supreme Court has observed, "'courts should err on the high side' in setting the amount of security." Yusuf, 2013 V.I. Supreme LEXIS 67, * 38-9.

As for the criminal case, while it may true that no motion to vacate or amend the guilty plea has been filed, as addressed in ¶ 9(a) of the DeWood Declaration, Plaintiff effectively ignores the matters addressed in ¶ 9(b) of the DeWood Declaration ("seek from Mohammad Hamed an indemnification for all taxes, fines and other penalties that United Corporation d/b/a Plaza Extra already has paid, for which liabilities this Court now has determined Mohammad Hamed is jointly and/or severally liable") by disingenuously stating that "no such activities have taken place." While indemnification may not have been sought or recovered to date, Plaintiff has not suggested that Defendants are time barred from seeking such indemnification. Given the $16,586,132 in taxes paid by United for tax years 1996 through 2010 and the $1,005,000 United will pay, see page 5-6 of the Joint Motion To Request Scheduling Of Sentencing Hearing filed in the criminal case against United on November 13, 2013 attached as **Exhibit 3,** there is little doubt that Plaintiff will vigorously resist all indemnification efforts

thereby making Mr. DeWood's estimate of $75,000 to $100,000 extremely conservative. Again, since this Court must err on the high side, the full amount should be included in the bond.

NET EQUITY

Plaintiff makes no effort whatsoever to contest the statement in the Gaffney Declaration that as of December 31, 2011, United's net equity exceeds $68,000,000. Then, Plaintiff falsely claims that Defendants are arguing that the $68,000,000 net equity is "now somehow lost, so it needs to be protected by a bond in this amount." See Memo at p. 6. Defendants have never argued that the net equity has already been lost. Rather, they have argued and continue to argue that the Injunction seriously imperils United by imposing a regime destined to create corporate deadlock and threatening the continued existence of the Plaza Extra supermarket operations. See, e.g., Emergency Motion at ¶ 8-9 on p. 3-4 and Yusuf Declaration at ¶ 5.

Plaintiff goes on to argue:

> Of course, if the injunction is found to have been entered improperly, **this accounting figure will be the unchanged**, which is clearly why even Mr. Gaffney did not opine otherwise. In short, this is not an "expense" the Defendants will have to incur as a result of the preliminary injunction, as it is nothing more than a "lawyer created" issue created to try to inflate the bond requirement in this case.

See Memo at p. 6 (emphasis in original). This argument neither makes sense nor is it supported by any admissible evidence. If the Injunction is found to have been entered improperly, there is no dispute that the purpose of the bond is to shift back to the Plaintiff any losses occasioned by the improperly issued injunction. See Mead, 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"). Moreover, if the Injunction is ultimately found to have been entered improperly, Plaintiff offers no explanation whatsoever as to why he claims "this [$68,000,000] accounting figure will be the [sic] unchanged . . . ."

The "complete injury occasioned" by potential errors in this action includes United's net equity, which eventually could be entirely lost if the supermarkets tank as a result of the unworkable regime imposed by the Injunction. This element of potential loss is not merely a "lawyer created" issue designed to inflate the bond requirement of this case. If anything, it is a critical element that this Court must consider because it is required to err on the high side in setting security. In quoting Mead with approval, the Supreme Court also effectively adopted the Mead court's rationale that an error in setting the bond too high is not serious, because United "still would have to prove its loss" at the end of this case to collect on the bond. Mead, 201 F.3 at 888. However, "an error in [setting the bond too low] produces irreparably injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." Id. (citations omitted).

By asking this Court to reduce the existing $25,000 cash bond (which is nominal in itself) to the absurdly low figure of $5,000, Plaintiff is inviting this Court to violate the letter and spirit of the Supreme Court's mandate as well as the controlling law that clearly requires this Court to err on the high side in setting security.

For all of the foregoing reasons, Defendants respectfully request this Court to summarily deny the Motion to Reduce the Bond and to provide them with such further relief as is just proper under circumstances.

DUDLEY, TOPPER and FEUERZEIG, LLP

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

Gregory H. Hodges (V.I. Bar No. 174)
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail:ghodges@dtflaw.com

and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00830
Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2013, I caused the foregoing **OPPOSITION TO MOTION TO REDUCE THE BOND** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

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

/s/ N. DeWood

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 DECLARATORY RELIEF
v.	)	
FATHI YUSUF and UNITED CORPORATION,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

EXHIBIT 1

(Mandate from Supreme Court dated October 24, 2013)

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF and UNITED CORPORATION, **Appellants/Defendants,** **v.** **MOHAMMAD HAMED, by his authorized agent, WALEED HAMED,** **Appellee/Plaintiff.**	**S. Ct. Civ. No. 2013-0040** Re: Super. Ct. Civ. No. 370/2012 (STX)

TO: **Venetia H. Velazquez, Esq., Clerk of the Superior Court**
Joseph A. DiRuzzo, III, Esq.
Joel H. Holt, Esq.
Carl J. Hartmann, III, Esq.
K. Glenda Cameron, Esq.

MANDATE

Please take notice that on September 30, 2013, a(n) **OPINION OF THE COURT** and **ORDER OF THE COURT** were entered by the Clerk in the above-entitled matter. The certified copy of the Opinion and Order of the Court, attached hereto, constitute the **MANDATE** of this Court.

Dated: October 24, 2013

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Cheryl Burton
Deputy Clerk II

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF and UNITED CORPORATION, Appellants/Defendants, v. **MOHAMMAD HAMED, by his authorized agent, WALEED HAMED,** Appellee/Plaintiff.	**S. Ct. Civ. No. 2013-0040** Re: Super. Ct. Civ. No. 370/2012 (STX)

On Appeal from the Superior Court of the Virgin Islands
Argued: July 9, 2013
Filed: September 30, 2013

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Joseph DiRuzzo III, Esq.
Fuerst Ittleman David & Joseph, PL
Miami, FL
Attorney for Appellants,

Joel H. Holt, Esq. (argued)
Carl J. Hartmann III, Esq.
St. Croix, U.S.V.I.
Attorneys for Appellee.

ORDER OF THE COURT

CABRET, Associate Justice.

AND NOW consistent with the reasons outlined in the Opinion of even date, it is hereby

ORDERED that the Superior Court's April 25, 2013 Order is **AFFIRMED** with respect to the preliminary injunction entered in favor of Appellee, and **VACATED** with respect to the injunction bond; it is further

ORDERED that this matter is **REMANDED** for the Superior Court to set bond in accordance with the Opinion of even date; and it is further

ORDERED that copies of this Order be directed to the appropriate parties.

SO ORDERED this 30th day of September, 2013.

FOR THE COURT:

MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Dated: 9/30/2013

Copies to (with accompanying Opinion of the Court):
Justices of the Supreme Court
Judges and Magistrates of the Superior Court
Joseph DiRuzzo III, Esq.
Joel H. Holt, Esq.
Carl J. Hartmann III, Esq.
K. Glenda Cameron, Esq.
Veronica J. Handy, Esq., Clerk of the Supreme Court
Venetia H. Velazquez, Esq., Clerk of the Superior Court
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book
Westlaw
Lexis/Michie

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 DECLARATORY RELIEF
v.	)	
FATHI YUSUF and UNITED CORPORATION,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

EXHIBIT 2

(Declaration of Maher Yusuf)

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

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

DECLARATION OF MAHER YUSUF

Maher Yusuf declares, pursuant to 28 USC §1746 and Super. Ct. R. 18, under the penalties of perjury, that the following is true and correct:

1. I have been the President of United Corporation for more than 20 years and I have managed the Plaza Extra – West store since 1998.

2. Hisham Hamed, Mufeed Hamed, Waheed Hamed, and Waleed Hamed (collectively, the "Hameds") are all employees of United Corporation.

3. Each of the Hameds currently receives annual compensation of $347,000. Waleed Hamed is rarely seen in the Plaza Extra - East store he purportedly co-manages. In fact, I am unaware of any meaningful work Waleed Hamed has done on behalf of Plaza Extra – East for more than one year. Hisham Hamed is absent from the Plaza Extra - West store he purportedly co-manages about as often as he is present. Although Mufeed Hamed and Waleed Hamed may be present more regularly at the stores they purportedly co-manage (respectively, Plaza Extra – East and Plaza Extra – Tutu Park), their contribution to the profitability of the stores is minimal, at best, and certainly does not justify the large salaries they are paid.

4. All of the Hameds' jobs could be terminated and their duties could be assumed by other employees of United Corporation. The primary effect such termination would have on the operations of the supermarket stores would be an annual savings of $1,388,000 in compensation paid to these unnecessary employees. Such termination would have no negative effect on the operations of the Plaza Extra supermarket stores.

5. Since this Court entered the preliminary injunction on April 25, 2013, the Hameds have repeatedly used the injunction to block decisions made by me, my brothers, and my father with no apparent regard for the best interests and profitability of the supermarket stores. Because my father, Fathi Yusuf, always had the ability to make the ultimate decision if there was any disagreement with the Hameds and the injunctive prevents him from continuing to do so, there have been numerous instances of stalemate and gridlock that have adversely affected the business of the supermarket stores.

Dated: November 15, 2013

Maher Yusuf

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 DECLARATORY RELIEF
v.	)	
FATHI YUSUF and UNITED CORPORATION,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

EXHIBIT 3

(Joint Motion to Request Scheduling of Sentencing Hearing dated November 13, 2013)

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

UNITED STATES OF AMERICA, and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff, v. UNITED CORPORATION d/b/a Plaza Extra, Defendant.	CRIMINAL NO. 2005-015

JOINT MOTION TO REQUEST SCHEDULING OF SENTENCING HEARING

The government and counsel for United Corporation (United) have conferred and jointly file this motion to respectfully request the Court schedule the sentencing hearing for United Corporation's guilty plea.

At the end of the hearing on July 16, 2013, the Court informed the parties that because the Plea Agreement is binding on the Court, two issues needed to be resolved in order for the Court to proceed with sentencing in this case. First, the monitor should be in place. Kaufman, Rossin & Co., an accounting firm based in Miami, Florida, has been retained as the monitor. An engagement letter dated August 15, 2013 has been signed, a retainer has been paid, and United has agreed to bear all costs associated with the monitoring engagement during the one-year term of probation as contemplated by the Plea Agreement.

The second issue raised by the Court required all tax returns to be filed and all taxes owed to be paid prior to sentencing. Specifically, Waleed Hamed and Waheed Hamed must file individual income tax returns and pay all taxes owed in full prior to sentencing. (See Hearing TR. at 163-167). Since this case was initially indicted in September, 2003, and the Court was only recently assigned,

it may be helpful to provide some background regarding the tax loss issue as it has evolved during the litigation of this case.

I. Status of Case Prior to Negotiation of Plea Agreement

The undersigned counsel for the United States has been assigned to this case since February, 2007. During 2007, 2008, and 2009, the parties were litigating virtually every aspect of the case. In December, 2009, the parties jointly requested the assistance of Magistrate Judge Geoffrey W. Barnard to mediate a resolution to the criminal case. That motion was granted by Senior District Judge Raymond L. Finch on December 31, 2009 (Doc. No. 1234). The parties individually submitted mediation statements to Judge Barnard. On January 27, 2010, prior to meeting with the parties individually, Judge Barnard asked the parties to summarize their positions in open court regarding the taxes due for the years 1996 through 2001. The defendants said they were prepared to write a check for $4.9 million, estimating unpaid gross receipts taxes at $1.9 million and unpaid corporate and individual income taxes at $3 million. The government's total estimate for unpaid gross receipts taxes and corporate and individual income taxes was $23 million.

With Judge Barnard's continued guidance throughout the mediation, and with the participation of representatives from the Virgin Islands Bureau of Internal Revenue (VIBIR) and the government of the Virgin Islands, the parties negotiated the terms for a guilty plea by United Corporation.

II. Plea Agreement

On February 26, 2010, United Corporation, through its president Maher Yusuf, pleaded guilty to Count Sixty of the Third Superseding Indictment, willfully making and subscribing a 2001 U.S. Corporation Income Tax Return (Form 1120S), in violation of Title 33, Virgin Islands Code,

Section 1525(2). (Doc. Nos. 1247, 1248). The government agreed to dismiss the charges as to all individual defendants in exchange for United, the individual defendants and the shareholders of United all agreeing to file appropriate tax returns and pay taxes owed to the VIBIR prior to the expiration of United's agreed-upon term of one year of probation. The two-page Exhibit 1 to the Plea Agreement set forth the position of each party as to the amount of gross receipts taxes, corporate income taxes, and individual income taxes due to the VIBIR for the years 1996, 1997, 1998, 1999, 2000, and 2001 - the years at issue in the criminal case as charged in the Indictment. The table below briefly summarizes the position of each party (rounded to nearest dollar)[1]:

Tax year(s)	Type of tax	Government estimate	Defendant estimate
1996 - 2001	Gross Receipts	$2,857,874	$1,904,022
1996 - 1998	Corporate income	$8,568,711	$915,334
1999	Individual income	$3,219,568	$0
2000	Individual income	$4,487,610	$0
2001	Individual income	$4,756,904	$0
TOTAL		**$23,890,667**	**$2,819,356**

Given the fact the parties were so far apart in their estimates of the taxes owed, Section III.A.3. of the Plea Agreement set forth a procedure for the restitution to be determined by the Court. (Doc. No. 1248 at 4-5).

During the period March through August, 2010, the parties and representatives from the VIBIR met on several occasions and exchanged correspondence regarding the basis for their

[1] For 1996, 1997, and 1998, United Corporation was a C corporation, requiring it to pay corporate income taxes. In 1999, United Corporation became an S Corporation for tax purposes, which meant that all income for Plaza Extra operations was reported, and all taxes were paid, by the individual shareholders of United on their individual income tax returns.

respective positions. By a letter dated August 20, 2010, the government rescinded all prior offers to mediate the tax loss after the defendants took the position that not only were no additional taxes owed, but Mr. Fathi Yusuf was owed a refund of $209,401 for 1999, $167,802 for 2000, and $479,362 for 2001. On August 26, 2010, the parties filed a joint motion requesting an evidentiary hearing regarding the defense assertion that a statute of limitations precluded the payment of restitution for any year other than 2001, the year for which United admitted committing tax fraud through its guilty plea.

On September 3, 2010, the government filed its Motion for Ruling Regarding Statute of Limitations (Doc. No. 1280). The government argued the Plea Agreement clearly stated that restitution was to be paid for each year 1996, 1997, 1998, 1999, 2000, and 2001, and the assertion of a civil statute of limitations was a potential breach of the Plea Agreement. The government further argued that payment of restitution for all years was critical to its agreement to dismiss all pending charges against individual defendants. The government's evidence of fraud was similar for every year, so the only way the VIBIR would be made whole for the fraud committed by United was for 100% of the shareholders to pay income taxes on 100% of the unreported income for 1996 through 2001, not their proposal to pay only 32.5% of the unreported income for 2001 (Mr. Fathi Yusuf's share). Moreover, in its Reply to Defendants' Surreply (Doc. No. 1291), the government emphasized that is was very unusual for the VIBIR to agree to be limited in its civil collection activity as part of a criminal tax case, and that it was "disingenuous for the defendant to insist that the VIBIR be prohibited from collecting any other taxes due for the years 1996, 1997, 1998, 1999, 2000, and 2001, and then proclaim that it will only pay taxes for 2001." (Id. at 6).

On December 14, 2010, an evidentiary hearing was held before Judge Barnard. The government presented testimony and documentary evidence to support its position that the evidence of tax fraud committed in 2001 was identical to the evidence of fraud in 1996 through 2000. After the hearing Judge Barnard met with the parties separately to facilitate additional mediation. As a result of the mediation conducted by Judge Barnard, the parties entered into the Plea Agreement-Addendum which was filed with the Court on February 7, 2011. (Doc. Nos. 1303, 1304). The terms of the Plea Agreement-Addendum required United to pay $10 million to the VIBIR for settlement of all corporate and individual taxes owed for the years 1996 through 2001, to pay a $5,000 fine and to pay a $1 million substantial monetary penalty. On July 19, 2011, United entered into a closing agreement with the VIBIR regarding the individual and corporate taxes owed for years 1996 through 2001. United paid the VIBIR $10 million in full payment of these taxes.

The parties and representatives of the VIBIR continued to meet to try to resolve the tax issues for the years 2002 through 2008, as contemplated by Section XI. of the Plea Agreement. The parties were unsuccessful. On February 4, 2013, the government filed its Request for Additional Mediation. (Doc. No. 1323). Following numerous pleadings filed by all parties, the request was ultimately granted and additional mediation took place with Judge Barnard on June 19-20, 2013. Prior to the mediation session, United and the Yusuf shareholders filed their outstanding income tax returns for 2002 through 2010 with the VIBIR. Counsel for Waleed Hamed and Waheed Hamed previously informed representatives of the VIBIR that they were close to finishing their individual income tax returns for 2002 through 2010 and would be filing them soon. As reflected in the Plea Agreement-Second Addendum filed on June 24, 2013, a payment of $6,586,132 was remitted to the VIBIR (Doc. No. 1373).

On August 30, 2013, United Corporation tendered two official checks to the Clerk of Court in St. Croix: a $5,000 payment for the statutory fine and a $1 million payment for the substantial monetary penalty. Since the guilty plea was entered in February, 2010, a total of $16.5 million has been remitted to the VIBIR for payment of gross receipts taxes, corporate income taxes, and individual income taxes. When added to the recent payments, United and its shareholders have paid all sums required by the Plea Agreement. Based on the extensive litigation over all financial issues while the case was pending, the government drafted the Plea Agreement with multiple safeguards to allow it to continue to force United, its shareholders, and the individual defendants to pay their tax liabilities during the term of United's probation. The government never expected, under any scenario, to have the luxury of not needing to request the Court's intervention to enforce payment obligations during the one-year term of probation. To now be in the position of only having approximately $300,000 individual income taxes of the Hameds unpaid prior to sentencing, or 0.018% of the total $16.5 million, is a testament to the skillful mediation by Judge Barnard.

III. Discussion of the Tax Loss Issue at the July 16, 2013 Hearing

Mohammed Hamed, who was not charged in the criminal case, is the father of Waleed Hamed and Waheed Hamed. In September, 2012, Waleed Hamed, acting as the authorized agent for his father, filed a lawsuit in the Superior Court of the Virgin Islands against Fathi Yusuf and United Corporation regarding the ownership and control of the Plaza Supermarket stores.

In February, 2010, when the Plea Agreement was negotiated, signed by all individual defendants and shareholders of United Corporation, and entered in court, no one raised the issue of the ownership or control of United. (Plea Agreement, Doc. No. 1248).

In January and February, 2011, when the Plea Agreement-Addendum was negotiated, signed by all individual defendants and Warren Cole, attorney for the unindicted shareholders of United Corporation, and filed with the Court, no one raised the issue of the ownership or control of United. (Plea Agreement-Addendum, Doc. No. 1304).

In July, 2011, when the Closing Agreement was drafted between United Corporation and the VIBIR and signed by the shareholders of United, and a check for $10 million was remitted to the VIBIR in full payment of all gross receipts taxes, corporate taxes, and individual income taxes of Waleed Hamed, Waheed Hamed, and the Yusuf shareholders of United Corporation, for the years 1996, 1997, 1998, 1999, 2000, and 2001, no one raised the issue of the ownership or control of United.

The filing of the civil lawsuit in September, 2012, brought an abrupt end to the joint defense agreement between the Yusufs and the Hameds which had existed for many years. At the hearing on July 16, 2013, the Hameds argued that United was obligated to pay their individual income tax liabilities for the years 2002 through 2010. This extraordinary demand is akin to an arsonist torching a building for insurance money and then complaining when the insurance company does not pay the claim due to arson. The government of the United States, the government of the Virgin Islands, and the taxpaying citizens of the VIBIR are in a much better financial position today than even the most optimistic observer would have believed possible when the corporate guilty plea was entered in February, 2010. The Court should allow the sentencing of United to take place, and allow the VIBIR, through its civil process, to ensure Waleed Hamed and Waheed Hamed file all required income tax returns and pay all income taxes due.

IV. Other remaining issues

The parties were further instructed to raise any other outstanding issues with the Court prior to scheduling the sentencing hearing. (TR. at 171). Issues previously raised with Magistrate Judge Barnard during mediation, such as the procedure to transfer documents from the criminal case to the independent records custodian, may be supervised by Judge Barnard or the Court during the term of probation. The parties are unaware of any other issues which need to be resolved prior to the sentencing hearing.

V. Conclusion

For the reasons outlined above, and as discussed during the July 16, 2013 hearing, the government and counsel for United respectfully request the Court schedule the sentencing to take place as soon as possible on a date convenient to the Court and to the parties.

Respectfully Submitted,

Dated: November 13, 2013

s/Lori A. Hendrickson
Lori A. Hendrickson
Trial Attorney
United States Department of Justice, Tax Division

Dated: November 13, 2013

s/Joseph A. DiRuzzo, III [by LAH with permission]
Joseph A. DiRuzzo, III
Attorney for defendant United Corporation

CERTIFICATE OF SERVICE

I, Lori A. Hendrickson, certify that on November 13, 2013, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

Henry C. Smock, Esquire
Suites B18-23 Palm Passage
P.O. Box 1498
St. Thomas, Virgin Islands 00804'
smock@islands.vi

Derek M. Hodge, Esquire
Mackay & Hodge
P.O. Box 303678
St. Thomas, VI 00804
derek@mackayhodge.com

John K. Dema, Esquire
Law Offices of John K. Dema, P.C.
1236 Strand Street, Suite 103
St. Croix, VI 00820-5008
jdema@lojkd.com

Gordon Rhea
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
grhea@rpwb.com

Randall P. Andreozzi
Andreozzi, Bluestein, Fickess, Muhlbauer,Weber, Brown LLP
9145 Main Street
Clarence, NY 14031
rpa@abfmwb.com

Pamela Lynn Colon, Esquire
Law Offices of Pamela Lynn Colon, LLC
2155 King Cross Street, Suite 3
Christiansted, VI 00820
pamelalcolon@msn.com

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, pl
1001 Brickell Bay Drive
32nd Floor
Miami, Florida 33131
jdiruzzo@fuerstlaw.com

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820
dewoodlaw@me.com

Alphonso Andrews, Esquire
U.S Attorney's Office
Federal Building & U.S Courthouse
5500 Veterans Drive, Suite 260
St. Thomas VI 00802-64254
alphonso.andrews@usdoj.gov

Nelson Luis Jones
U.S. Attorney's Office
Ron De Lugo Federal Bldg.
5500 Veterans Drive, Suite 260
St. Thomas, VI 00802
nelson.jones@usdoj.gov

Mark Daly
United States Department of Justice
Washington, D.C. 20530
mark.f.daly@usdoj.gov

s/ Lori A. Hendrickson
Lori A. Hendrickson