

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

MOHAMMED HAMED by his authorized agent)
WALEED HAMED,)
Plaintiff,) CIVIL NO. SX-12-CV-370
v.)
ACTION FOR DAMAGES, *et al.*
FATHI YUSUF and UNITED CORPORATON,)
Defendants.)

ORDER RE-SETTING INJUNCTION BOND

This matter is before the Court on remand by Order of the Supreme Court of the Virgin Islands entered September 30, 2013 and Mandate dated October 24, 2013 (S. Ct. Civ. No. 2013-0040) with respect to the injunction bond set by this Court's Order entered April 25, 2013. Also before the Court are Plaintiff's Motion to Reduce Bond, filed October 17, 2013; Defendants' Opposition to Motion to Reduce the Bond, filed November 15, 2013; Defendants' Motion to Vacate Injunction Pending Posting of Additional Security ("Motion to Vacate"), filed November 15, 2013; and Plaintiff's Opposition to Motion to Vacate Preliminary Injunction Pending Posting of Additional Security, filed November 19, 2013.

BACKGROUND

Following two days of hearings and multiple and copious filings of the parties, by Order entered April 25, 2013, the Court granted Plaintiff's motion and granted a preliminary injunction to maintain the status quo pending resolution of the action on the merits. In conjunction with the injunctive relief, the Court ordered that Plaintiff post a bond of twenty-five thousand dollars (\$25,000) and that Plaintiff's interest in the "profits" accounts of the business held at Banco Popular Securities, pursuant to an order issued in *United States v. United Corporation, et al.*, (District Court of the Virgin Islands, Crim. No. 2005-15) shall serve as additional security to pay

any costs and damages incurred by Defendants if they are hereafter found to have been wrongfully enjoined.

On Defendants' appeal, the Supreme Court found that the business funds held at Banco Popular Securities could not be used as additional security in connection with the injunction as these funds are outside of the control of both Plaintiff Hamed and the Superior Court. The Supreme Court remanded this limited issue for this Court to consider whether additional bond is required in light of ruling of the Supreme Court. Accordingly, this Court now considers whether additional bond is required.

DICUSSION

Federal Rule of Civil Procedure 65(c) states that a court can 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 the injunction bond is to provide "a fund to use to compensate incorrectly enjoined defendants." *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 240 (3d Cir.2003); *quoting Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir.1989).

Additionally, the injunction bond provides the most pragmatic form of relief to the enjoined party because "it is generally settled that, with rare exceptions, a [party] wrongfully enjoined has recourse only against the bond." *Sprint Commc'ns Co. L.P.*, 335 F.3d at 240; *quoting Instant Air Freight Co.* 882 F.2d at 804; *see also Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 210 n. 31 (3d Cir.1990).

The amount of the bond "is left to the discretion of the court." *See Hoxworth*, 903 F.2d at 210, *quoting Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d

Cir.1988). However, as noted by the Supreme Court, because a wrongfully enjoined party generally has recourse only against the injunction bond, when analyzing the appropriate pecuniary amount for a bond posting, "... courts should err on the high side." *Yusuf v. Hamed*, 2013 WL 5429498 *9 (VI. Sept. 30, 2013) citing *Meade Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir. 2000). Since the amount of the bond "is the limit of the damages the defendant can obtain for a wrongful injunction ... the bond can thus be viewed as a contract in which the court and plaintiff "agree" to the bond amount as the "price" of a wrongful injunction. *Sprint Commc'ns Co. L.P.*, 335 F.3d at 240 n. 5, quoting *The Continuum Co., Inc. v. Inceptis, Inc.*, 873 F.2d 801, 803 (5th Cir.1989).

Defendants argue that a bond in excess of \$25,000 is required, citing four reasons: If this Court's injunction is determined to have been entered erroneously, Defendants would unnecessarily: 1) have to pay the salaries of four employees Defendants claim they would have otherwise previously terminated; 2) be unable to collect certain rents Plaintiff allegedly owes to Defendant United Corporation; 3) bear legal compliance costs which Defendants' attorney avers to be associated with reviewing ongoing (separate) legal actions in light of the injunction issued in this case; and 4) suffer corporate deadlock which threatens the net equity and "the continued existence of the Plaza Extra supermarket operations." See Defendants' Opposition to Motion to Reduce the Bond, at 13.

These arguments are each addressed.

1. Employee Wages

Defendants contend that the preliminary injunction has prevented Defendants from terminating Plaintiff's four sons, Waleed Hamed, Waheed Hamed, Mufeed Hamed, and Hisham Hamed. See Declaration of John Gaffney, Exhibit 1 to Defendants' Emergency Motion for

Reconsideration of Preliminary Injunction Order and for Stay of the Same Pending Posting of Adequate Bond, filed May 9, 2013. According to Defendants, this will cost Defendants a total of \$1,388,000 per year (as each Hamed son earns \$347,000 per year as a manager at the Plaza Extra supermarkets).

Plaintiff argues that these expenses were being incurred prior to the issuance of the preliminary injunction and do not represent new expenses incurred as a result of the injunction. Further, Plaintiff argues that even if these employees were discharged, the partnership would necessarily be required to hire other individuals to fill these key management positions. As such, there is no added cost being incurred that requires the posting of a bond for these wages. *See Memorandum in Support of Motion to Reduce the Bond*, at 4.

Defendant responds that the duties executed by these four individuals could simply be reassigned to current employees without any operational impact and without the need to hire new personnel. *See Defendants' Opposition to Motion to Reduce the Bond*, at 10.

The Court is persuaded that the annual salaries paid to Plaintiff's sons do not necessarily reflect the value of their contributions to the businesses but declines to find that those contributions have no value. For purposes of setting the injunction bond, seeking to provide the enjoined party with sufficient relief in the event that the injunction were determined to have been entered in error, the Court will set the amount of one half of the salaries of these four individuals as an expense that could constitute financial loss to Defendants. Anticipating that the final adjudication shall be entered in this case within one year, the Court will order Plaintiff to post the sum of \$1,100,000 representing potential costs and damages to Defendants from payment of these salaries of these four employees. This covers approximately one half of one year's total salary for each of the four employees (\$695,000) plus one half of their total salaries accounting

for the seven months between the entry of preliminary injunction and the issuance of this Order (\$405,000).

2. Rent

Defendants claim that Defendant United is owed significant rent from the Sion Farm Plaza Extra supermarket. Specifically, Defendants argue that the present injunction prevents Defendants from satisfying said rental arrears from the parties' jointly controlled bank accounts. Defendants contend that "the Injunction effectively provides a shield to Plaintiff regarding rental payments" and that Plaintiff has no incentive to pay rent owed. *See* Defendants' Opposition to Motion to Reduce the Bond, at 11.

The issue of Defendants' legal rights to rents arising out of the operations of Plaza Extra supermarkets is fully briefed *via* Defendant United's Motion to Withdraw Rent and Plaintiff Response thereto. However, the Court will not address that issue in this Order. Through controller John Gaffney, Defendants allege that Plaintiff Hamed owes Defendant United approximately nine million dollars in unpaid rents from January 1, 1994 through May 1, 2013. This alleged debt preceded the injunction order by almost twenty years and does not set forth any issues of alleged financial losses to Defendants as an effect of this injunction. Further, any past due rents represent a joint obligation of the parties by virtue of the injunction Order. As to their claim for unpaid rents, defendants do not have "recourse only against the bond." *Sprint Commc'ns Co., L.P.*, 335 F.3d at 240. The purpose of an injunction bond as set out in in the text of Rule 65(c) is "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The bond is simply meant to provide "a fund to use to compensate incorrectly enjoined defendants." *Id.* at 240. In this case, if the injunction is determined to have been entered erroneously, Defendant United has the same recourse against

Plaintiff that it has had since January 1, 1994: to bring an action against for rental arrears against Plaintiff. Defendant has even demonstrated the ability to (potentially) collect unpaid rent by virtue of filing a Motion to Withdraw Rent. As such, this Court will not direct Plaintiff to contribute additional security as part of an injunction bond on the basis of any alleged rental arrears.

3. Legal Fees

Defendants contend that the injunction will force Defendants to expend considerable sums on legal fees regarding seventeen different personal injury lawsuits pending against Plaza Extra supermarkets as well as one criminal case. Defendants rely on the Declaration of their attorney, Nizar A. DeWood, who claims that various costs associated with the implementation and effects of the injunction will cost Defendants anywhere between \$380,000 to \$625,000 in total legal fees.¹ Attorney DeWood breaks this number down into \$75,000-\$100,000 in legal fees regarding the injunction's effect on the pending criminal case; \$255,000-\$425,000 in legal fees regarding the injunction's effect on the 17 pending civil cases; and \$50,000-\$100,000 for legal fees associated with litigating new counterclaims regarding this action that Defendants allege have come to light following this Court's April 25, 2013 Order. *See* Declaration of Nizar A. DeWood, Defendants' Emergency Motion.

Plaintiff argues that the impact of the preliminary injunction on Defendants' legal fees is considerably less than Defendants estimate. Plaintiff claims that much of the legal work concerning the 17 pending cases has already been accomplished for the sum of \$1,990. *See*

¹ Regarding the outstanding criminal case, Attorney DeWood states that he will need to move to vacate the criminal plea and seek indemnification from Plaintiff for alleged tax debt. Regarding the civil cases, Attorney DeWood states that he will need to review how the injunction affects the 17 civil cases, revise pleadings based on this Court's findings (re: injunction Order) and seek indemnification from Plaintiff. *See* Declaration of Nizar A. DeWood, Defendants' Emergency Motion.

Motion to Reduce Bond, at 5. Therefore, according to Plaintiff, Defendants' proffered legal costs (\$255,000-\$425,000) for the 17 civil cases is grossly over-exaggerated.

Plaintiff also contends that, since this Court issued the injunction, little work has been done regarding the pending criminal case. *Id.*, at 6. However, Plaintiff does not dispute that such work ("the guilty plea would have to be amended and an indemnity would have to be sought for taxes and fines paid") eventually needs to be performed by Defendants as a result of this Court's Injunction. *Id.* Plaintiff does not address Defendants' claims that they might incur attorney fees (\$50,000-\$100,000) for legal fees associated with litigating new counterclaims regarding this action.

It does appear that some security for impending legal fees regarding the 17 civil cases and one criminal case is appropriate. However, the Court finds that much of the proposed legal work set out as required in Attorney DeWood's Declaration covers work Defendants are already responsible for in seeking indemnification from Plaintiff Hamed, irrespective of the injunction Order. Additionally, compared to Defendants' evidence regarding the salaries of the four managers, Defendants' evidence regarding legal fees is imprecise and calls for a substantial amount of speculation. As a general principle, when setting an injunction bond, the amount should be supported by a rational basis and not pure speculation. *See generally Sprint Commc'ns Co., L.P.*, 335 F.3d; *see also AB Electrolux v. Bermil Indus. Corp.*, 481 F. Supp. 2d 325, 336-37 (S.D.N.Y. 2007).

This Court notes that, in certain civil cases, legal fees can be awarded to a prevailing party following a final judgment on the merits. *See* 5 V.I.C. §541. Criminal cases, however, rarely offer the prevailing party an opportunity to recoup expended legal fees. In light of the additional recourse available to prevailing civil litigants and the considerations expressed above,

the Court will direct Plaintiff to post the sum of \$100,000 as security against Defendants' legal fees regarding the one criminal case.

As for Defendants' argument that they should be protected from legal fees associated with litigating new counterclaims regarding this action, the Court is not persuaded. Plaintiff is not responsible for Defendants litigating viable counterclaims. Additionally, legal fees can be awarded, under certain circumstances, to a prevailing party following a final judgment on the merits. *See* 5 V.I.C. §541. Therefore, unlike costs associated with Defendants' direct compliance with the injunction (which Defendants may not otherwise be able to recover if this injunction was entered in error), legal fees associated with litigating new counterclaims regarding this action can potentially be recouped at a later date, and no additional security will be required concerning those potential costs.

4. Net Equity

Defendants argue that "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." *See* Defendants' Opposition to Motion to Reduce the Bond, at 14. As previously noted, the value of a bond must be premised on a rational basis and not on speculation. Neither in their pleadings nor in the Declaration of controller John Gaffney, have Defendants specified in what manner the net equity of United Corporation in the Plaza Extra supermarkets would change as a result of this injunction. Therefore, any security based on this argument would be purely speculative rather than founded upon some rational basis. Therefore, the Court declines to increase Plaintiff's security based on Defendants' net equity argument.

CONCLUSION

In examining whether additional security is required to “pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained” pursuant to Rule 65(c) in light of the arguments and evidence supplied by both Plaintiff and Defendants, the Court finds that additional security is required to ensure that Defendants will have adequate recourse should it later be determined that the injunction was entered in error.

As such, Plaintiff is directed to post the sum of One Million Two Hundred Thousand Dollars (\$1,200,000), less credit for the \$25,000 previously posted, as security available to pay costs and damages sustained by Defendants if they are hereafter found to have been wrongfully enjoined or restrained. On the basis of the foregoing, it is hereby

ORDERED that Plaintiff’s Motion to Reduce Bond is DENIED. It is further

ORDERED that Defendants’ Motion to Vacate Injunction Pending Posting of Additional Security is DENIED, as MOOT. It is further

ORDERED that Plaintiff Mohammad Hamed, or his authorized agent, shall forthwith file a bond in the amount of One Million Two Hundred Thousand Dollars (\$1,200,000), crediting the \$25,000 bond previously posted, with the Clerk of the Court, and shall provide notice of the posting to Defendants.

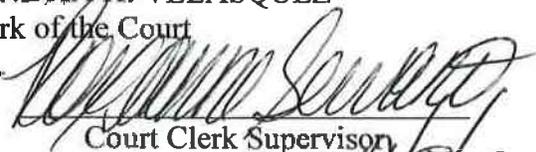
December 5, 2013



Douglas A. Brady
Judge of the Superior Court

ATTEST:

VENETIA H. VELASQUEZ
Clerk of the Court

By: 

Court Clerk Supervisor
12/5/13

CERTIFIED TO BE A TRUE COPY
This 5th day of Dec 20 13

VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT

By  Court Clerk