

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, etc.
FATHI YUSUF and UNITED CORPORATON,)
))
 Defendants.)

ORDER

This matter is before the Court on Plaintiff's Motion to Partially Reconsider/Clarify Bond Order ("Motion to Reconsider"), filed December 13, 2013; Defendants' Opposition to Plaintiff's Motion to Partially Reconsider/Clarify Bond Order ("Opposition"), filed December 23, 2013; Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion to Partially Reconsider/Clarify Bond Order ("Reply"), filed December 27, 2013; Plaintiff's Notice of Filing Bond, filed December 27, 2013; Plaintiff's Notice of Posting Bond, filed December 27, 2013; and Plaintiff's Motion to Supplement Record re Reconsideration/Clarification of Bond Order ("Motion to Supplement Record"), filed January 10, 2014.

Also before the Court are Defendants' Emergency Motion to Vacate Injunction Due to Plaintiff's Failure to Forthwith File the Required Bond ("Motion to Vacate"), filed December 16, 2013; Plaintiff Hamed's Opposition to Defendants' "Emergency Motion" Re Bond ("Plaintiff's Opposition"), filed December 23, 2013; and Defendants' Reply to Plaintiff's Opposition to Defendants' Emergency Motion to Vacate Injunction, filed January 9, 2014 ("Defendants' Reply").

BACKGROUND

On December 5, 2013, this Court ordered (“Bond Order”) Plaintiff 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.” As of December 27, 2013, Plaintiff had posted a total of \$51,000 in cash with the Clerk of the Superior Court. On that same date, Plaintiff filed his Notice of Filing Bond wherein, among other things, Plaintiff pledged several parcels of unencumbered real property with assessed tax values totaling \$636,000. By his Notice, Plaintiff also seeks to post an assignment of his purported rights to cash receivables in the amount of \$223,200 (increasing monthly) in ByOrder Investments LLC, held in escrow by Attorney Carl Beckstedt.

By his filings, Plaintiff asks the Court to reduce the Injunction Bond because the Bond Order included an amount potentially necessary to cover attorney’s fees to be incurred in the pending District Court criminal matter relating to an amendment to the guilty plea of Defendant United Corporation, which apparently will not be sought; and because the Bond Order set potential losses for salaries to be paid based in part upon bonuses that have been withheld. *See* Plaintiff’s Motion to Reconsider, at 2; Reply, at 3-5. Defendants argue that these portions of the Bond Order remain viable “to cover the anticipated expenses of seeking indemnity from the Plaintiff for the millions of dollars in taxes and fines paid to date by United” and because the Bond Order set the bond amount based upon only one half of the salaries of the Hamed managers. *See* Opposition, at 4; Defendants’ Reply, at 4-5.

Plaintiff also moves for an order clarifying that he may post certain unencumbered real property¹ as well as several miscellaneous interests in satisfaction of the bond, as follows:

- 1) Cash yet to be received but allegedly due to the four Hamed sons for annual bonuses and accrued vacation pay. However, both parties agree that these payments will not be forthcoming, and will therefore not be available as a portion of the required bond.
- 2) Assignment of Plaintiff Hamed's 31% interest in cash assets escrowed with Attorney Carl Beckstedt, on behalf of ByOrder Investments LLC., which would presently amount to \$223,200 toward the Injunction Bond.
- 3) Assignment of Plaintiff's (and sons') 50% interest in cash assets of Plessen Enterprises, Inc., currently in the amount of \$123,500.
- 4) Assignment of Plaintiff's (and sons') 50% interest in the stock of Plessen Enterprises, Inc., which owns real property, 50% of which is valued for tax purposes at approximately \$4,850,600.
- 5) Assignment of \$802,966 allegedly due Hamed from Defendants as proceeds of the sale of jointly owned property ("the Dorothea Transaction").

Defendants offer no authority in support of their objection to Plaintiff's posting of unencumbered real property to satisfy the bond, arguing only that real property is not a liquid asset and its value in the current market is uncertain. *See* Defendants' Reply, at 5.

Defendants further argue that the Hamed sons' annual bonus and vacation pay is a discretionary perk and not an entitlement. The Yusuf side of Plaza Extra's management has

¹ Plaintiff seeks leave to post the following real property: Plots 6-F and 6-H Estate Carlton valued at \$236,300; Plots 100-E, 100-F and 100-G Estate La Grande Princesse valued at \$73,500; and Waleed Hamed's Plot 6-C Estate Carlton valued at \$326,200.

determined that no year-end bonuses should be paid. Therefore, since the Yusuf family will not be signing or receiving these checks, these funds are unavailable for posting in satisfaction of the bond.

Additionally, Defendants argue that any assignment of Hamed's interest in the escrow account held by Attorney Beckstedt is also illusory. ByOrder Investments LLC is a member-managed company and Defendant United Corporation is the sole member. Since United refuses to allow any of these assets to serve as security in the instant matter, no portion of this escrow account can be used for the Injunction Bond.

Defendants contend that Plaintiff's interest in the cash assets of Plessen Enterprises, Inc. cannot be used as security as those assets are required to maintain Plessen's operations which are wholly distinct from Plaza Extra. Further, Plaintiff's sons are defendants in a derivative shareholder suit involving Plessen filed by Defendant Yusuf; the outcome of that lawsuit could affect the availability of these funds. Defendants apply the same reasoning in their opposition to Plaintiff's arguments for posting Plaintiff's (and sons') 50% stock interest in Plessen as security.

Finally, Defendants argue in their Motion to Vacate that because Plaintiff failed to post the Injunction Bond "forthwith" following the Court's Bond Order, the preliminary injunction should be vacated. Plaintiff's Opposition cites his right to timely move the Court for reconsideration pursuant to LRCi 7.3 and Super. Ct. R. 7, as he has, which excuses his delay in posting the bond.

DISCUSSION

The amount of the Injunction Bond "is left to the discretion of the court." *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir.1988). The Parties have

suggested bond values which are poles apart. (Plaintiff argued for a bond of \$5,000 while Defendants argued that a bond of \$22 million was required.) In resolving issues regarding the Injunction Bond, the Court is guided by principles set out by the Virgin Islands Supreme Court.

In its September 30, 2013 Opinion of the Court on the appeal of the preliminary injunction, the Supreme Court cautioned against applying funds that are “outside of both Hamed's and the Superior Court's control.” *Yusuf v. Hamed*, Civ No. 2013-0040, 2013 WL 5429498, at *9 (V.I. September 30, 2013). When proffered assets cause confusion or present uncertainty regarding “how much... money will remain once the... proceedings have concluded,” these assets are insufficient for the purposes of satisfying an injunction bond. *Id.*, *See also Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir.1989). Ultimately, funds held in escrow outside of the Court's control “stand in contrast to situations in which the security is held in escrow pursuant to an order of the enjoining court, in which case the enjoining court itself could allow a wrongfully enjoined party access to the restricted funds at any time.” *Id.*, *See, e.g., Anthony v. Texaco, Inc.*, 803 F.2d 593, 599 (10th Cir.1986).

I. Real Property as Security

Plaintiff Hamed is permitted to post unencumbered real property as security partially satisfying the Injunction Bond. Defendants' objection to this practice is presented without citation to any authority. The Supreme Court has approved this practice with regard to supersedeas bonds, which serve the same purpose as the Injunction Bond in this case. *See First American Development Group/Carib, LLC v. WestLB AG, et al.*, 2012 WL 1526100, at *5 (V.I. April 30, 2012). This security, when properly recorded, is within this Court's control. While not the equivalent of cash, the posting of these properties provides basic assurances that certain

assets will be available to Defendants should it later be found that the injunction was entered erroneously. Plaintiff will be required to cause the Court's Order of Encumbrance to be recorded against the respective properties and to provide proof to the Court and Defendants. Once properly recorded, the pledges of these properties shall constitute posted security in the amount of \$636,000, representing the tax appraised value of the properties, in partial satisfaction of the Injunction Bond.

II. Annual Bonus and Accrued Vacation as Security

Plaintiff will not be permitted to post an assignment of the Hamed sons' unpaid annual bonus and vacation pay as a portion of the bond. Such a purported assignment would be truly illusory as it appears that these discretionary payouts will not be forthcoming. It is not currently within the purview of the Court to require such payments and no order permitting the posting would offer adequate protection in the event that Defendants are found to have been wrongfully enjoined.

Further, the Court will not reduce the Injunction Bond by the amount of the Hamed sons' anticipated annual bonus and vacation pay amounts. A motion for reconsideration must be based on either the "intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice." LRCi 7.3.

Arguably, the fact that year-end bonuses will not be issued this year constitutes new evidence. However, in exercising its discretionary power to set the bond originally, the Court applied only one-half of the brothers' four salaries, seeking to determine from poorly documented records the damages Defendants might sustain if later found to have been improperly restrained. Despite the fact that, in setting the bond amount, the Court utilized

information provided by Defendants as to the Hamed managers' past and expected future compensation, including annual bonuses, the exclusion of those bonuses constitutes a relatively minor adjustment in the parties' relationship within the context of their multi-million dollar enterprise. As the Court is admonished to "err on the high side," and in finding no need to correct clear error or prevent manifest injustice, the Court will not reduce the bond based upon nonpayment of bonuses to the Hameds. *See Yusuf v. Hamed*, 2013 WL 5429498, at *9. The question is not now before the Court as to whether the failure to pay bonuses constitutes a violation of the preliminary injunction.

III. Assigned Interest in ByOrder Investment LLC as Security

The Court will not allow Plaintiff to post as security any alleged interest in escrowed funds held for the benefit of ByOrder Investment LLC. Neither this Court nor Plaintiff has the ability to exercise control over these escrowed funds, and as such, they may not be utilized to satisfy any portion of the Injunction Bond.

IV. Assigned Interest in Plessen Enterprises, Inc. as Security

The Court will not allow Plaintiff to post as security any alleged interest, either based upon cash reserves or upon an interest in unencumbered stock, in Plessen Enterprises, Inc. The Supreme Court's Opinion in the appeal of the preliminary injunction in this matter notes the impropriety of a purported pledge of security where separate legal proceedings are involved that "present uncertainty regarding how much... money will remain once the... proceedings have concluded." *Yusuf v. Hamed*, 2013 WL 5429498, at *9.

Defendants indicate that the parties to this action are parties to an ongoing shareholders derivative action involving Plessen Enterprises, Inc. which could affect Plaintiff's interest in that

entity and the viability of any security based upon such interest. The future availability of these assets is in question to pay the costs and damages Defendants may sustain if found to have been wrongfully enjoined. As is true of the escrowed funds of ByOrder Investment LLC, the assets of Plessen Enterprises, Inc. are outside the Court's control and may also be unavailable to Plaintiff. As such, the Court will not allow Plaintiff to post his interest (and his sons' interests) in stock or assets of Plessen as security.

V. Assignment of Amounts Receivable from Dorothea Transaction as Security

The Court also will not allow Plaintiff to post his claimed interest in monies yet to be received as proceeds of the Dorothea Transaction as security. As is the case with several of Plaintiff's proposed forms of security, this Court has no control over the proposed security and no means by which to access and utilize the proposed security to compensate Defendants for proven costs and damages, should it later be determined that the injunction was entered erroneously. Anything other than cash, a surety bond or the posting of unencumbered real property with the Court fails to provide Defendants with the type of readily accessible security required for the injunction bond. Money that is allegedly owed to Plaintiff but has not been received from a previous transaction (the Dorothea Transaction) is not the type of security (especially where disputed by Defendants) that will suffice in partial satisfaction of the current Injunction Bond.

VI. Amount of Injunction Bond Remains Unchanged

The Court will not reduce the Injunction Bond for the reason that Defendants no longer intend to seek to amend the guilty plea in the District Court criminal action. Defendants' claims that the bond set here should be sufficiently high to cover potential attorney's fees and

anticipated expenses of seeking indemnity from the Plaintiff for the millions of dollars in taxes and fines paid to date by United Corporation. *See* Opposition, at 4. Defendants' pursuit of indemnification claims presumably will not occur in the criminal action, but rather in the context of one or more civil proceedings where Defendants, if successful, may recover costs pursuant to 5 V.I.C. §541. Nonetheless, despite the imprecise forecast of future costs that Defendants may incur in the criminal action relative to Plaintiff's claims, issues of interest to Plaintiff loom in connection with that action, including potentially shared responsibility for taxes and fines of United and the division of the escrowed profits' accounts. In light of these facts, considering the very substantial sums involved, the Court will exercise its discretion to keep intact the \$100,000 earmarked in the Bond Order as security for potential costs and fees that may be incurred by Defendants in the criminal action in the event that they have been wrongfully enjoined. For the reasons noted, the Injunction Bond will remain at \$1.2 million.

VII. Defendants' Motion to Vacate is Denied

Defendants move to vacate this Court's April 25, 2013 Order issuing the preliminary injunction on the basis of Plaintiff's failure to file the bond required by the Bond Order "forthwith." Defendants correctly note that the Fed. R. Civ. P. 65(c) requires that the Court may only issue a preliminary injunction when the moving party gives security in an amount that the Court considers proper. However, in light of the procedural history and circumstances of the parties, Plaintiff will be given the opportunity to comply with the Bond Order. The initial Order issuing the preliminary injunction was appealed to the Supreme Court, wherein the parties were given ample opportunity to address the issue of the proper amount of the Injunction Bond. Both

before and after the December 5, 2013 Bond Order, the parties have further addressed the issue before this Court. Plaintiff timely moved for reconsideration and clarification of the Bond Order.

Further, by his January 9, 2014 Declaration, Plaintiff states that he does not have sufficient cash to post the required bond as a result of the temporary restraining order freezing the Plaza Extra profits' accounts in the District Court criminal action against Defendant United Corporation. By Declaration dated January 10, 2014, Plaintiff's counsel indicates that Virgin Islands insurance professionals have advised him that no market exists for personal bonds such as required here. *See* Motion to Supplement Record, exhibits 4 and 5.

Plaintiff has sought to comply with the Bond Order by posting cash (\$51,000) and unencumbered real property (\$636,000). Plaintiff has not demonstrated that posting of the full bond amount, although difficult, is impossible or impracticable. *See First American Development Group/Carib, LLC., supra*, 2012 WL 1526100, at *5, n.7, *citing Thompson v. Florida Wood Treeters, Inc., Civil No.2006-224, 2010 WL 3119918, at *5 (D.V.I. Aug. 4, 2010)*.

In addition, Plaintiff has proposed alternative plans to provide the security required by the Bond Order. *James v. Antilles Insurance, Inc.*, 27 V.I. 55, 58 (Terr. Ct. 1992). Specifically, Plaintiff proposes to post personal surety bonds of certain individuals or to secure bank loans to meet his obligations under the Bond Order. *See* Motion to Supplement Record, exhibit 5. Plaintiff proposes in the alternative that the Hamed managers will assign one half of their future salaries to pay to the Clerk of the Court to satisfy the bond amount, and states that he "can and will post the full bond" once the Court addresses his Motion to Reconsider. Reply, at 9. The posting of unencumbered real property, of personal surety bonds of individuals, supported by

verifiable assets, and of the proceeds of bank loans will be acceptable security. Pledges by the Hamed managers to assign future salaries will not be accepted.

The dissolution of the preliminary injunction that has been effectively in place for eight months is a remedy unnecessary in these circumstances. Plaintiff will be given the opportunity to post one or more surety bonds or other security to satisfy in full the requirements of the Bond Order and of this Order on or before close of business January 31, 2014. As such, Defendants' Motion to Vacate will be denied.

On the basis of the foregoing, it is hereby

ORDERED that Plaintiff's Motion to Supplement Record is GRANTED. It is further

ORDERED that Plaintiff's Motion to Reconsider is GRANTED, in part, and DENIED, in part. It is further

ORDERED that Plaintiff's Notice of Filing Bond is ACCEPTED as to pledges of real property, as follows: by Plaintiff as Trustee of the Mohammad A. Hamed Living Trust dated September 12, 2012, as to Plots 6F and 6H Estate Carlton (\$236,300 value) and Plots 100-E, 100-F and 100-G Estate La Grande Princesse (\$73,500 value); and by Waleed Hamed as to Plot 6-C Estate Carlton (\$326,200 value); and Plaintiff shall cause the Order of Encumbrance, entered herewith, relative to said real property to be recorded forthwith against the respective properties and shall provide proof of recording to the Court and Defendants. It is further


ORDERED that Plaintiff's Notice of Filing Bond is REJECTED as to: Plaintiff's assignment of his purported interest in escrowed funds held for the benefit of ByOrder Investments LLC; Plaintiff's posting of an assignment of his (and sons') purported 50% interest in cash held by Plessen Enterprises, Inc. and of stock in Plessen Enterprises, Inc.; Plaintiff's

posting of an assignment of any receivable purportedly due from Defendants as proceeds of the Dorothea Transaction; and Plaintiff's posting of 50% of future payments of bonuses, vacation pay, salaries or other compensation purportedly due the Hamed managers from Plaza Extra. It is further

ORDERED that Plaintiff shall on or before close of business January 31, 2014 file with the Clerk of the Court the balance due on the Injunction Bond in the amount of \$513,000 (\$1,200,000 bond amount, less \$51,000 cash bond posted, less \$636,000 unencumbered real property pledged) in a form consistent with this Order, and shall provide notice of the posting to Defendants. It is further

ORDERED that Defendants' Motion to Vacate is DENIED.

January 15, 2014



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

1/15/14