**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. CROIX**
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| **YUSUF YUSUF,** derivatively on behalf of PLESSEN ENTERPRISES, INC.,<br><br>**Plaintiff,**<br><br>v.<br><br>**WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and FIVE-HOLDINGS, INC.**<br><br>**Defendants**<br><br>and<br><br>**PLESSEN ENTERPRISES, INC.**<br><br>**Nominal Defendant** | CIV. NO. SX-13-CV-120<br><br>**PLAINTIFF'S OPPOSITION TO STAY DISCOVERY** |

## PLAINTIFF'S OPPOSITION TO STAY DISCOVERY

**COMES NOW** Plaintiff, Yusuf Yusuf and files this opposition to the Defendant's Motion for Stay. A few points to note quickly. The entire 81 page motion including multiple exhibits) fail to argue why a stay is appropriate. In a rambling tirade against Fathi Yusuf (Plaintiff father), Defendants fail to address the merits of this case, and why a "stay" is appropriate. Further, Defendants counsel has repeatedly misled the Plaintiff and the non-controlling shareholders of this closely held corporation by feigning good faith cooperation in an effort to delay and frustrate discovery in this manner.

## FACTS

On March 17th, 2013, Defendant WALEED HAMED ("WALEED") along with his brother Defendant MUFEED HAMED ("MUFEED") wrongfully and without authority exonerated $460,000 from the accounts of the Plessen Corporation. Then both WALEED and MUFEED along with Defendants WAHEED HAMED ("WAHEED") and HISHAM HAMED ("HISHAM") used these proceeds to purchase real property for their own personal benefit. By the unauthorized and unnoticed removal of the $460,000, Defendant WALEED abused his status as vice-president, and board member of PLESSEN CORP, and temporarily caused the corporation to fail to meet certain current obligations. Plaintiff YUSUF YUSUF ("YUSUF"), a shareholder of Plessen's brought this action for various relief, including damages and the removal of Defendant WALEED as a corporate officer.

**Two (2) years later, this case is still before the court, and discovery remains substantially incomplete.** Defendants filed evasive and dishonest responses to interrogatories, and refused to disclose relevant information in response to Plaintiff's interrogatories and requests for production of documents. Plaintiff agreed to put off depositions based on Defendant's counsel's request, and mutually agreed to put off depositions since November of 2014 based on various requests by Defendant's counsel Mark Eckard. Moreover, Defendant's counsel Mark Eckard repeatedly assured Plaintiff's undersigned counsel of attempting to find mutually agreeable dates for required depositions. Having waited for months to schedule Defendants for their depositions, and without hearing any further from Defendants' counsel, on January 12th, 2015, Plaintiff noticed all Defendants with Deposition for March 10th, 2015.

On January 27th, 2015, in an effort to undermine the discovery process, Defendants filed this outrageous Motion for Stay, a rambling Motion with multiple exhibits that only mentions Defendants' implausible request for stay in two (2) sentences on page 7-8 of the Motion. The entire Motion fails to cite any reasons for the stay other than to bring up facts in an unrelated case. Defendants' Motion is an example of abuse of the discovery process that warrants nothing short of serious sanctions. The Motion to Stay evidences yet another delaying tactic, to prevent the full development of all relevant evidence and to obscure their manipulation of the record[1] before this court, with the aim of frustrating Plaintiff's efforts to depose Defendants in a timely manner. Defendants fail to state why they are entitled to a "stay" – other than to bring up an unrelated litigation in an effort to mislead this court into assuming there is a connection that somehow warrants a stay. As shown below, Defendants Motion to Stay must be rejected.

## ARGUMENT

### Defendants Have Not Established Good Cause for a Discovery Stay

Federal Rule of Civil Procedure 26(c) allows a court to stay part of or all of the discovery process for good cause shown. FED.R.CIV.P. 26(c); see also Hachette Distribution, Inc. v. Hudson County News Co., 136 F.R.D. 356, 357 (E.D.N.Y. 1991); Continental Illinois National Bank & Trust Co. of Chicago v. Caton, 130 F.R.D. 145, 148 (D. Kan. 1990). Like each of the Federal Rules of Civil Procedure, Rule 26(c) is to "be construed to secure the just, speedy, and inexpensive determination of every action." FED.R.CIV.P. 1; see also Hachette, 136 F.R.D. at 357. Rule 26(c) therefore protects against oppression or undue burden and expense. See Twin City Fire Ins. Co. v. Employers Ins. Of Wausau, 124 F.R.D. 652, 653 (D. Nev. 1989); see also

[1] For example, the Defendants manipulated the record and abused their position as officers of the corporation by declaring their removal of the $400,000 dividends a year later.

Hachette, 136 F.R.D. at 357. A showing that discovery may involve some inconvenience and expense does not suffice to establish good cause for issuance of a protective order. *Lehnert v. Ferris Faculty Assoc.* MEA-NEA, 556 F. Supp. 316 (W.D.Mich. 1983); see also Continental, 130 F.R.D. at 148 (D. Kan. 1990). In addition, bare assertions that discovery should be stayed because pending motions will probably be sustained are insufficient to justify the entry of an order staying discovery. Continental, 130 F.R.D. at 148.

Motions to stay discovery are not favored because when discovery is delayed or prolonged it can create case management problems, which impede the court's responsibility to expedite discovery and may also cause unnecessary litigation expenses and problems. See *Coca-Cola Bottling Co. of the Lehigh Valley v. Grol*, 1993 WL 13139559 *2 (E.D.PA. March 8, 1993). In deciding whether to stay discovery pending a motion to dismiss a court must balance the harm produced by delay against the possibility that the motion will be granted thus eliminating the need for discovery. See Id. (citing Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988). "A party seeking a stay of discovery carries the heavy burden of making a 'strong showing' why discovery should be denied." Turner Broadcasting Sys. v. Tracinda Corp., 175 F.R.D. 554 (D. Nev. 1997) (Citing Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).)"; see also Continental, 130 F.R.D. at 148 ("bare assertions that discovery will be unduly burdensome or that it should be stayed because pending dispositive motions will probably be sustained, are insufficient to justify the entry of an order staying discovery generally.")

In this case the Defendants are asking for a stay of discovery pending an appeal in an unrelated litigation or in the alternative pending the resolution of their motion to dismiss however courts have determined that awaiting the outcome of a motion to dismiss is not sufficient grounds

to order a stay of discovery. See, Twin City Fire, 124 F.R.D. at 653 ("[A] pending motion to dismiss is not ordinarily a situation that in and in itself would warrant a stay of discovery."); see also People with Aids Health Group v. Burroughs Wellcome Co., Civil Action No. 91-0574, 1991 U.S. Dist. LEXIS 14389 (D.D.C. 1991) (where a mere assertion that a motion to dismiss will be granted was not sufficient to justify a stay of discovery). The party seeking to stay discovery has the burden of showing good cause and adequate reason for the order.

In this matter, Defendants' primary reason for the stay is their hope that the appeal of the related litigation will resolve in a manner that moots the claims in this case. Without argument or supporting facts, Defendants baldly assert:

> Here there are two reasons to grant the stay, each of which is independent of each other. First, the pending appeal should be allowed to be resolved, which would moot this case. Second, if this Court does not want to wait in the outcome of that appeal, this Court should stay discovery until it has had time to address the pending motion to dismiss.

See, Defendants' Motion at p. 7-8.

In Pollara v. Chateau St. Croix, LLC, 2013 WL 2948081 (2013) 58 V.I. 455, the Supreme Court reversed a ruling of the Superior Court on the ground that the judgment was based on an insufficiently developed factual record. Similarly, the decision upon which Defendants rely that is being appealed in the related matter is being challenged on among other grounds that the Court's conclusions were based on an incomplete and insufficient factual record. Specifically, the decision that the Defendants hope will be resolved in their favor is being challenged on the express grounds that the Superior Court ruled on an insufficient factual record and based its conclusions of law on facts it acknowledged were disputed. The notice of appeal expressly points out that

> [Fn.3] Although the composition of the Board of Directors was disputed by the parties, the Superior Court found, **without conducting an evidentiary hearing**, that "for the limited purpose of addressing this Motion ... Plessen has three directors: Mohammad Hamed, Waleed Hamed, and Fathi Yusuf." *Id.* at *2-3 n. 2.
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> [Fn. 4] One of those disputed actions, a 30- year lease, approved by the two Hamed Directors of Plessen, to a company formed by Waleed Hamed and Mufeed Hamed on April 22, 2014, **eight days** before Plessen signed the lease, was described by the Superior Court as the "lynchpin' of Plaintiffs plan for winding up the Hamed-Yusuf Partnership...." *Id.* at*12. [Emphasis added].

In Pollara, the Supreme Court reversed the decision finding as follows:

> **This case presents a myriad of issues and unanswered questions. It is obvious that more fact finding and discovery needed to be conducted.** There are contradicting affidavits in the record addressing relevant issues. Accordingly, there are clearly different factual versions of the dispute between the parties, and it is essentially impossible to conclude that there is no genuine issue of material fact.

Pollara v. Chateau St. Croix, LLC, 2013 WL 2948081 * 11(2013) (emphasis added. Similarly here, the bald claim that the appeal will resolve the issues in Defendants' favor is at best "hopeful" given the myriad issues that are admittedly disputed and which were resolved without a sufficiently developed factual record. To stay this proceeding would compound injury to the Plaintiffs of having issues determined on the merits on less than a full factual record.

The Defendants argue, in the alternative, that the motion to stay should be granted pending resolution of their motion to dismiss. In *Weeks v. Leeward Islands Apothecaries, LLC,* 2010 WL 2160281, (2010), in denying a similar motion to stay proceedings, the St. Croix Division of the District Court noted as follows:

> It is generally accepted that "a district court has broad discretion

> 'to stay discovery until preliminary questions that may dispose of the case are determined.' *Petrus v. Bowen,* 833 F.2d 581, 582 (5th Cir.1987). Such a stay is not, however, automatically granted whenever a motion to dismiss is pending...." *Keystone Coke Co. v. Pasquale,* No. Civ. A. 97-6074, 1999 WL 46622 at *1 (E.D.Pa. January 7, 1999) (citations omitted).

As the United States District Court for the Northern District of California observes:

> Had the Federal Rules contemplated that a motion to dismiss under Fed.R. Civ. Pro. [sic] 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.... Furthermore, a stay of the type requested by defendants, where a party asserts that dismissal is likely, would require the court to make a preliminary finding of the likelihood of success on the motion to dismiss. This would circumvent the procedures for resolution of such a motion. *Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 40 (N.D.Cal.1990).
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> Based upon the foregoing, the Court finds that Defendants have failed to carry their "heavy burden of making a 'strong showing' why discovery should be denied." *Id.* (citing *Blankenship v. Hearst Corp.,* 519 F.2d 418, 429 (9th Cir.1975)).

Similarly here, the Defendants have not met their heavy burden of a "strong showing" that this matter should be stayed.

Date: February 24, 2015

Respectfully submitted,

**DeWood Law Firm**
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*By:* _____

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 24th day of February, 2015, I caused a true and exact copy of the foregoing **PLAINTIFF'S OPPOSITION TO STAY DISCOVERY** to be served on the below parties of record by email (as agreed to by the parties).

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