

The court ordered the parties to brief by August 7, 2015 the issue of consolidation, and whether the court should order discovery completed within sixty (60) days (irrespective of whether this case will ultimately be consolidated with the Partnership case). Accordingly, Plaintiff Yusuf respectfully files this Memorandum opposing consolidation of this matter with the *Hamed v. Yusuf* partnership matter, and respectfully request an order to complete discovery within sixty (60) days.

Before addressing consolidation, three important points are worth pointing out. First, this matter has been pending before this honorable court for well over two years, and any consolidation will unnecessarily further delay disposition of this case. Second, unlike the pending Partnership case, the issues here are narrow, specific, and relate to undisputed facts (the unlawful misappropriation of \$460,000 from Plessen Enterprises by Defendants Waleed Hamed and Mufeed Hamed). Third, because discovery here could be completed within sixty (60) days, this case can be ready for trial in short order, rendering moot many of the pending discovery motions. Therefore, not consolidating this matter will in fact maximize judicial economy, the very issue that concerns this honorable court.

As will be demonstrated, this court should not consolidate this case with any other pending action involving the Yusuf and Hamed parties. The issues here are unique to its limited facts. Therefore, the possibility of “inconsistent” verdicts/decisions between this matter and the *Hamed v. Yusuf* matter should not be a cause for concern because of the material differences in facts and legal issues. Further, to consolidate this matter with the much larger and more complex *Hamed v. Yusuf* litigation is likely to result in confusion of the issues, and certainly make for unmanageable litigation and trial.

A jury will find it easier to follow the narrow but important issues in this litigation, as opposed to trying to isolate the issues here from the more demanding *Hamed v. Yusuf* litigation.² Thus, for the reasons below, Plaintiff Yusuf respectfully requests that this matter not be consolidated with the *Hamed v. Yusuf* partnership matter, and to order the parties to complete discovery within sixty (60) days.

Finally, regardless whether this honorable court is inclined to consolidate, at minimum, the court should grant Plaintiff's Motion to amend the complaint, and order discovery to be completed within sixty (60) days to minimize any further delays.

FACTS

Background: The Derivative Case

On April 16, 2013, Plaintiff Yusuf filed this suit (on behalf of Plessen) against Defendants Waleed and Mufeed Hamed for damages and corporate misconduct arising out of the Hamed Defendants' misappropriating \$460,000 of Plessen funds strictly for Defendants' personal gain.³ The funds were taken without authorization and knowledge of Fathi Yusuf⁴ or the Yusuf shareholders. The essence of this action is thus limited to corporate misconduct and breach of fiduciary duties relating to the Hamed defendants' misappropriation of Plessen funds. More specifically, this case relates to Defendant Waleed Hamed's corporate misconduct as it pertains to Waleed Hamed's abuse of his corporate office and duties as a Plessen director. Unlike the *Hamed v. Yusuf* matter, the events and issues in this matter are narrower, deal with unrelated legal issues

² The *Hamed v. Yusuf* litigation deals with a business relationship spanning 27 years, with large business operations, and complex partnership issues, as opposed to this matter which covers only a few dates and events.

³ On March 18, 2013, Defendant Waleed Hamed and Mufeed Hamed stole \$460,000 dollar from Plessen to close on a personal real estate deal. The money was taken without notice and/or prior authorization of Fathi Yusuf, Plessen's treasurer/secretary. Defendants aware of the theft and its implications tried the following in an effort to excuse their conduct: 1) Depositing \$230,000 into the clerk's registry. 2) Holding a first-ever board of director's meeting on April 30, 2015 to declare the embezzled funds as "dividends," and 3) deposited the stolen funds in the court's registry on March of 2015.

⁴ Fathi Yusuf is the treasurer/secretary of Plessen Enterprises

and claims for relief, and have no relation to the complex and demanding issues of the Partnership litigation.

Hamed v. Yusuf: The “Partnership” Case

On September 12, 2012, Plaintiff Mohammed Hamed sued Defendant Fathi Yusuf to declare as “partnership” his 27 year business agreement with Defendant Yusuf. Defendant Yusuf counterclaimed for liquidation and accounting from Mohammed Hamed and his sons.⁵ The *Hamed v. Yusuf* litigation raises, *inter alia*, the following significant issues:

- 1) The largest business operation in the U.S. Virgin Islands.
- 2) Millions of dollars of potential accounting and other claims between the parties;
- 3) Disputes as to liquidation orders;
- 4) Complex taxation and partnership accounting issues

Clearly, the *Hamed v. Yusuf* litigation involve myriad complex partnership issues that have nothing to do with Defendant Waleed and Defendant Mufeed’s misappropriation of funds from Plessen.

Discovery Issues: Defendants’ Outstanding Depositions

Defendants have refused to attend Plaintiff’s duly noticed depositions causing discovery to remain incomplete as of July 30, 2015. In ever evolving attempts to avoid depositions, defendants first sought to stay discovery (by filing a meritless Motion to Stay and a Motion for Protective Order), then deposited the stolen funds with the court’s registry, then argued that Judge Brady’s decision in the *Hamed v. Yusuf* matter somehow makes the issues in this case moot. However, Defendants time and time again intentionally omit advising this honorable court that Judge Brady

⁵ Waleed Hamed, Waheed Hamed, Mufeed Hamed, and Hisham Hamed (as agents of their father and as former employees of United Corporation).

specifically declined to address the merits of this instant litigation, and the legal consequences of Defendants' financial misdeeds in this derivative case.

ISSUE(S)

1. Whether this matter should be consolidated with the *Hamed v. Yusuf* litigation?
2. Whether the court should compel Defendants' depositions to conclude discovery?

DISCUSSION

A. This Matter Should Not Be Consolidated With *Hamed v. Yusuf*.

Background: Consolidation

Consolidation is governed pursuant to Fed. R. Civ. P. 42(a), made applicable to the Superior Court by Rule 7 of the Superior Court Rules. Rule 42 states in relevant part: "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). Rule 42(a) provides for consolidation when actions pending in the same court "involve a common question of law or fact." *Richardson v. Virgin Islands Housing Authority*, 18 V.I. 351, 357 (D.V.I.1981).

It is well established that consolidation is "permitted as a matter of convenience and economy in administration, but it does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties to one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

The Three Consolidation Factors

Three elements must be examined by a court in deciding whether to consolidate: (1) whether the common issue is the principle issue, (2) whether consolidation will cause delay in one of the cases, and (3) whether consolidation will "lead to confusion or prejudice in the trial of a case." *Farahmand*, 2002 U.S. Dist. LEXIS 22473, at *4. If the evidence in one case is not relevant

to the issues in the other, the unrelated evidence would create confusion by consolidating the two cases. *Farahmand*, 2002 U.S. Dist. LEXIS 22473, at *5 (internal citations omitted). An example of delay in a case would be discovery being further along in one case than the other. *Farahmand*, 2002 U.S. Dist. LEXIS 22473, at *5.

1. *The Issue of Waleed Hamed's "Corporate Misconduct" Is Not The Principal Issue in Hamed v. Yusuf.*

As stated earlier, this derivative action involves corporate misconduct due to Defendant Waleed Hamed's theft of Plessen assets (\$460,000). This issue is unrelated to the more substantial and complex partnership operations of the Plaza Extra Supermarket stores. Further, Plaintiff Yusuf is not a party in the Partnership case. Here, Plaintiff Yusuf seeks to hold Defendant Waleed accountable to Plessen and its shareholders not only for misappropriation, but also to remove Waleed as a corporate officer/director of Plessen. Moreover, Defendant 5-H Holdings, LLC ("5-H") is not a party in the Partnership case, and the relief requested from Defendant 5-H and its members has no connection and relevance to the *Hamed v. Yusuf* matter.

2. *Consolidation Will Cause Unnecessary Delay*

This derivative matter has been pending before this honorable court for over two years. Written discovery has been propounded, and answered. Absent unforeseen issues, the only thing remaining is to complete discovery by taking Defendants' depositions, something Defendants have repeatedly tried repeatedly to stop. To consolidate this matter with the much more complex and issue-loaded Partnership case would cause this matter to be unnecessarily delayed. The following additional points are offered for the court's consideration:

- a. *Hamed v. Yusuf* is far from ready for trial. Discovery has been stayed pending the orderly liquidation of the partnership. The issues between the parties involves primarily monetary and partnership tax issues. "Who owes what, and how much?" is likely to be the overwhelming issues in the partnership case.
- b. *Hamed v. Yusuf* will require financial and tax experts to layout the parties' competing financial claims. Thus, discovery is likely to include examination of

financial reports, monetary figures, and application of complex accounting and partnership laws.

- c. This derivative action however is totally different. Experts are unlikely. The number of witnesses are limited, and the evidence is confined to a few dates and events.

3. Consolidation Will Lead To Unnecessary Complexity & Confusion:

Last, but most importantly, consolidation of this relatively straightforward corporate matter with the much larger and more complex Partnership matter will lead to confusion. First, Plaintiff Yusuf's claims and the relief sought are completely different, and have no relationship with respect to the factual and legal raised in the Partnership case. The confusion is illustrated below.

<u>This Case</u>	<u>Hamed v. Yusuf</u>
The parties are not similar.	Plaintiff Yusuf is not a party in the Partnership case. While the Hamed sons are joined as third party defendants in the Partnership case, they are only joined to provide a thorough and proper accounting as former employees and agents of Mohammed Hamed.
Discovery is almost complete and expert testimony is unlikely.	Discovery is nowhere near complete, and expert testimony is necessary. There are numerous Motions pending that will require substantial time to resolve.
Relief sought here is governed under the Virgin Islands Corporation statutes.	Relief sought here relates to partnership rights, accounting, and liquidation.
Legal Issues here are direct, and entitlement to relief is less complex. Trial time should be no more than 2 days.	Legal and factual issues are complex. Accounting issues are substantial, and trial is likely to last well over two weeks.

When considering the issues raised above, the potential for confusion and delay is clear. Again, the issues in this derivative action relate to corporate misconduct, and misappropriation of Plessen funds for personal gain, while the issues in *Hamed v. Yusuf* relate to complex partnership laws.

B. THE COURT SHOULD COMPEL DEFENDANTS' DEPOSITIONS TO COMPLETE DISCOVERY.

As stated before, discovery is almost complete in this matter, save for Defendants' refusal to attend Plaintiff's duly noticed depositions. Thus, even if the court is inclined to consolidate this matter, at minimum there is no reason why discovery should not be completed. Thus, the court should order defendants' depositions be completed within sixty (60) days. As not to repeat the discovery issues here, the court's attention is respectfully directed to Plaintiff's Response Opposition to Defendants' Motion to Stay Discovery (dated February 25, 2015), and Plaintiff's Motion To Hold Defendants' Counsel Mark Eckard In Contempt & To Show Cause (dated April 9, 2015). Both motion detail Defendants' discovery violations, including Defendants intentional failure to appear for Plaintiff's duly noticed depositions.

CONCLUSION

This matter and the *Hamed v. Yusuf* litigation should not be consolidated because both matters are unrelated in terms of legal and factual issues. Moreover, this matter has been pending for more than two years before this honorable court. Thus, the court should order discovery be completed within sixty (60) days to avoid unnecessary delays, notwithstanding whether the court's decision to consolidate.

Dated: August 6, 2015

Respectfully submitted

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CERTIFICATE OF SERVICE

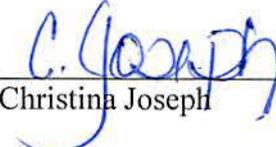
IT IS HEREBY CERTIFIED that on this 7th day of August 2015, a true copy of the foregoing Plaintiff's Memorandum was served on the parties of record by email as agreed to by the parties.

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