

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

YUSUF YUSUF, ON BEHALF OF
PLESSEN ENT., INC. **Plaintiff**)
)
)
)
vs)
)
WALEED HAMED)
WAHEED HAMED)
MUFEED MOHAMMAD HAMED)

CASE NO. SX-13-CV-0000120

ACTION FOR: DAMAGES - CIVIL

Defendant

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: ✓ MARK ECKARD, ESQ.
NIZAR DEWOOD, ESQ.
JEFFREY B.C. MOORHEAD, ESQ.
ALL JUDGES OF THE SUPERIOR COURT
ALL MAGISTRATES OF THE SUPERIOR COURT
IT/LAW CLERKS/LAW LIBRARY/BLUE BOOK

Please take notice that on August 16, 2016 a(n) MEMORANDUM
OPINION AND ORDER dated August 15, 2016 was entered by the Clerk in the
above-entitled matter.

Dated: August 16, 2016

Estrella H. George
Acting Clerk of the Court



JANEEN MARANDA
COURT CLERK II



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

**YUSUF YUSUF, derivatively on behalf of
PLESSEN ENTERPRISES, INC.,**

Plaintiff,

v.

**WALEED HAMED, WAHEED HAMED,
MUFEED HAMED, HISHAM HAMED and
FIVE-H HOLDINGS, INC.,**

Defendants,

and

PLESSEN ENTERPRISES, INC.,

Nominal Defendant.

SX-13-CV-120

**CIVIL ACTION FOR DAMAGES
AND INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Waleed Hamed's motion to dismiss for failure to comply with Federal Rule of Civil Procedure 23.1,¹ filed on September 3, 2013 (hereinafter, "Motion"). Plaintiff Yusuf Yusuf's filed an opposition on October 1, 2013 (hereinafter, "Opposition"). Waleed Hamed filed a reply on October 2, 2013 (hereinafter, "Reply").

BACKGROUND²

On April 16, 2013, Yusuf Yusuf, derivatively on behalf of Plessen Enterprises, Inc. (hereinafter, "Plessen"), filed a verified shareholder derivative complaint (hereinafter, "Verified Complaint") against Waleed Hamed, Waheed Hamed, Mufeed Hamed, Hisham Hamed, and Five-H Holdings, Inc.³ as a result of Waleed Hamed's alleged fraudulent misappropriation of approximately

¹ It appears that Yusuf Yusuf misconstrued Waleed Hamed's motion to be a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12. Waleed Hamed's motion to dismiss focused solely on Yusuf Yusuf's failure to comply with Federal Rule of Civil Procedure 23.1 and did not address Federal Rule of Civil Procedure 12.

² This opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

³ According to the Verified Complaint, Waleed Hamed, Waheed Hamed, Mufeed Hamed, and Hisham Hamed are principal beneficial owners and officers of Five-H Holdings, Inc. (Verified Compl. ¶¶ 20-23)

\$460,000.00 from Plessen's corporate account for his personal benefit and the benefit of all Defendants. (Verified Compl. ¶ 1) The Verified Complaint alleged seven causes of action against Defendants: Count I – Fraud/Constructive Trust; Count II – Conversion (against Waleed Hamed and Mufeed Hamed only); Count III – Breach of Fiduciary Duties (against Waleed Hamed only); Count IV – Waste of Corporate Assets (against Waleed Hamed only); Count V – Unjust Enrichment; Count VI – Civil Conspiracy; and Count VII – Accounting. (Verified Compl.) According to the Verified Complaint, Plessen's board of directors is comprised of Mohammad Hamed, Waleed Hamed, Fathi Yusuf, and Maher Yusuf. (Verified Compl. ¶ 15)

On May 6, 2013, Waleed Hamed filed an answer in response to the Verified Complaint. Thereafter, Waleed Hamed filed this instant Motion. On April 30, 2014, Waheed Hamed, Mufeed Hamed, Hisham Hamed, and Five-H Holdings, Inc. filed an answer to the Verified Complaint.

STANDARD OF REVIEW

A shareholder derivative lawsuit permits a shareholder to file a lawsuit against officers, directors, and third parties to enforce a corporate cause of action. *See* Fed. R. Civ. P. 23.1(a).⁴ Federal Rule of Civil Procedure 23.1⁵ (hereinafter, "Rule 23.1") sets forth the pleading requirement a plaintiff must comply with when filing a derivative shareholder derivative complaint.

⁴ Rule 23.1(a) provides:

(a) PREREQUISITES. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

⁵ Federal Rule of Civil Procedure 23.1 is applicable to the Superior Court via Superior Court Rule 7. The Court is cognizant that "the Federal Rules of Civil Procedure should represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from [the Supreme] Court reveals the absence of any other [applicable] procedure." *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (V.I. 2015). There are currently no applicable Virgin Islands statutes, Superior Court rules, or Supreme Court precedents that are directly on point regarding the procedural requirements of shareholder derivative actions.

Judges and attorneys in the Superior Court have relied on the provisions of Rule 23.1 in the past when dealing with shareholder derivative actions. *See e.g., Turnbull v. Parker*, ST-11-CV-429, 2011 V.I. LEXIS 41 (Super. Ct. 2011); *Romney v. Thomas*, SX-98-CV-339, 2000 V.I. LEXIS 23, *3 (Terr. Ct. 2000) (unpublished) ("A plaintiff filing a shareholder derivative action must comply with the pleading requirements established by Rule 23.1"); *Joseph v. Gardiner*, SX-11-CV-16, 2015 V.I. LEXIS 38 (Super. Ct. 2015) (unpublished) (The court found that the plaintiff's

Rule 23.1 provides in relevant part:

(b) PLEADING REQUIREMENTS. The complaint must be verified and must:

- (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
- (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
- (3) state with particularity:
 - (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
 - (B) the reasons for not obtaining the action or not making the effort.

DISCUSSION

In his Motion, Waleed Hamed argued that the Verified Complaint must be dismissed for failure to comply with Rule 23.1 because: (1) the Verified Complaint was not properly verified; (2) Yusuf Yusuf failed to state with particularity “any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members” and “the reasons for not obtaining the action or not making the effort”; and (3) there are no damages.⁶ (Motion, p. 2)

I. The Verification Requirement

Waleed Hamed argued that the verification submitted with the Verified Complaint is not a verification pursuant to 28 U.S.C. § 1746 as it claims. (Motion, p. 3) More specifically, Waleed Hamed claimed that the use of the qualifying statement—“the facts are true and correct to the best of my knowledge, information and belief”—invalidates the verification. (Id, at p. 4) Waleed Hamed

complaint for a shareholder derivative action satisfied the demand requirement under Rule 23.1.) At this time, until there are more local guidance with regard to the procedural requirements of shareholder derivative actions, the Court believes it is good practice to continue abiding by the prerequisites and pleading requirements set forth in Rule 23.1 to maintain consistency in the Superior Court. Thus, applying Rule 23.1 here is not a “mechanistic and uncritical reliance” of the Federal Rules of Civil Procedure.

⁶ The Court will only address the first two arguments. Waleed Hamed’s third argument is merely a theory with no basis in law.

claims that, by including the qualifying statement, Yusuf Yusuf “swears to a LACK of the ability to swear the facts in the Complaint are true and correct!” (Id.) (emphasis in original)

Aside from Waleed Hamed’s self-serving, conclusory sentences, Waleed Hamed failed to cite to any authority to support his assertion that this verification is not valid. The Supreme Court of the Virgin Islands has established that in order for a motion to be properly before the court, parties must support their arguments by citing the proper legal authority, statute or rule. *See Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009); *see also, Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 238-239 (V.I. 2013) (The rules of this Court require an appellant's brief to “contain the contentions of the appellant with respect to each of the issues presented, and the reasons therefor, *with citations to the authorities, statutes, and parts of the record relied on.*”) (emphasis in original); *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, n. 13 (V.I. 2016) (“Members of the Virgin Islands Bar... must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments...”) Thus, Waleed Hamed’s conclusory sentences without the support of any legal authority was a deficient argument in this Motion. Counsels are reminded to fully brief all questions of law relevant to the issues that are being litigated.

Assuming, *arguendo*, that Waleed Hamed properly supported his argument, his assertion is still without merit. Title 28 U.S.C. § 1746 provides that if the verification is executed within “the United States, its territories, possessions, or commonwealths” then the verification should be subscribed, “as true under penalty of perjury, and dated, in substantially the following form: ... ‘I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).’”

Here, Yusuf Yusuf included the following language in his verification:

I, *Yusuf Yusuf*, hereby verify that I have authorized the filing of the foregoing Verified Shareholder Derivative Complaint; that I have reviewed the Complaint; and that the facts therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury pursuant to 28 U.S.C. section 1746, that the foregoing is true and correct.

The qualifying statement—“the facts are true and correct to the best of my knowledge, information and belief”—does not, in and of itself, make the verification invalid. *See e.g., United States v. 8 Gilcrease Lane*, 587 F. Supp. 2d 133, 139 (D.D.C. 2008) (The court found the verification for the complaint, which contained that language “I...declare under penalty of perjury, pursuant to 28 U.S.C. § 1746...everything represented herein is true and correct to the best of my knowledge and belief,” sufficient under Title 28 U.S.C. § 1746.); *Clark v. Schaller*, 2007 U.S. Dist. LEXIS 14693, fn. 3 (E.D. Wis. 2007) (unpublished) (The court found the verification for the complaint, which contained the language “Plaintiff...declares under penalty of perjury that the foregoing is true and correct to the best of his knowledge and belief...,” sufficient under Title 28 U.S.C. § 1746.) Moreover, the verification submitted by Yusuf Yusuf is dated and signed by Yusuf Yusuf, and the second paragraph included language substantially similar to the language required by Title 28 U.S.C. § 1746. Accordingly, the Court finds that Yusuf Yusuf’s verification is valid and comports with the requirements of Title 28 U.S.C. § 1746.

II. Particularity Requirement

Waleed Hamed argued that under Rule 23.1, “the shareholder was required to not only to make an effort to obtain the desired action from the directors or comparable authority but to also state that effort in the Complaint.” (Motion, p. 4) (internal quotations omitted) Waleed Hamed claimed that Yusuf Yusuf did neither. (Id.) Waleed Hamed asserted that “[c]onclusory allegations of a stockholder that demand on corporation to institute action would be futile because the board was dominated by those whose conduct was subject matter of complaint fails to comply with the Rule 23.1 requirement that plaintiff present verified allegations of fact to justify an allegation of futility of demand.” (Id, at p. 5)

In his Opposition, Yusuf Yusuf pointed out that the plain language of Rule 23.1 “does not require a plaintiff to make *an effort* to obtain action from the directors, it only requires a plaintiff to state in his complaint what action he took.” (Opp., p. 6) (emphasis in original) Yusuf Yusuf argued that the statement—“Plaintiff YUSUF did not make a demand on the Board to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law...”—was “enough to identify *any effort* made.” (Id.) (emphasis in original) Furthermore, Yusuf Yusuf explained that the demand on Plessen’s board of directors would have been futile because the Hamed family and the Yusuf family each had 50% control. (Id., at p. 9) Thus, Yusuf Yusuf concluded that his Verified Complaint was in compliance with Rule 23.1. (Id., at 5-10)

In his Reply, Waleed Hamed contended that the cases cited by Yusuf Yusuf in his Opposition are inapposite and reiterated his argument that the Verified Complaint was not in compliance with Rule 23.1. (Reply)

Courts have sometimes excused the shareholder plaintiff from the demand requirement under Rule 23.1 where such a demand would have been futile and where the shareholder plaintiff has alleged with particularity the reasons why a demand would have been futile. *See e.g., Joseph v. Gardiner*, SX-11-CV-16, 2015 V.I. LEXIS 38 (“In a derivative lawsuit, the shareholder must make a demand on the board of directors of the corporation to take action to correct the wrongdoing, or allege the reasons for the plaintiffs’ failure for not making the effort.”); *Bethea v. Merchs. Commer. Bank*, 2014 U.S. Dist. LEXIS 124764, *73 (D.V.I. 2014) (The court found that the plaintiff has sufficiently pled the futility of making a demand to the board “[b]ecause (i) [the plaintiff’s] allegations implicate the majority of the board in wrongdoing, (ii) [the plaintiff] alleges that he was cut out of the loan approval process after objecting to the loans, and (iii) when [the plaintiff] tried to ask the board to address his concerns via a whistleblower complaint, his allegations were ignored.”); *Lewis v. Curtis*, 671 F.2d 779, 784 (3d Cir. 1982) (“Courts will excuse the derivative

plaintiff from the demand requirement when his complaint alleges that a majority of the directors have participated in the underlying wrongdoing or that the board is controlled by the alleged wrongdoers.”)

Here, Yusuf Yusuf acknowledged that he did not make a demand on Plessen’s board of director (hereinafter, “Board”).⁷ Thus, the Court is not concerned with whether his demand was adequate, but rather, whether Yusuf Yusuf should be excused from making a proper demand because it would have been futile. Yusuf Yusuf alleged in the Verified Complaint that the Board consisted of a 50-50 split between the Yusuf family and the Hamed family—two Hamed directors: Mohammad Hamed and Waleed Hamed; and two Yusuf directors: Fathi Yusuf and Maher Yusuf.⁸ Yusuf Yusuf further alleged that Waleed Hamed, as a director and the Vice President of Plessen, committed fraud, conversion, breach of fiduciary duties, waste of corporate assets, unjust enrichment, and civil conspiracy, when Waleed Hamed fraudulently misappropriated approximately \$460,000.00 from Plessen’s corporate account for his personal benefit and the benefit of all Defendants.⁹ Certainly,

⁷ Yusuf Yusuf alleged in the Verified Complaint:

Demand on the Board is Excused as Futile

31. Plaintiff YUSUF did not make a demand on the Board to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law, as set forth below.

32. As noted, as of the time of the filing of this complaint, the PLESSEN Board comprised of Mohammed Hamed; Defendant WALEED HAMED; Fathi Yusuf; and Maher Yusuf.

33. Mohammad Hamed, who is Defendant WALEED HAMED’s father, is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

34. Likewise, Defendant WALEED HAMED is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action, as WALEED HAMED faces a substantial likelihood of liability for the wrongdoings alleged herein, and his acts were not, and could not have been, the product of a good faith exercise of business judgment.

35. Separately, because both the Board and shareholders of PLESSEN are comprised 50-50% by members of the Hamed and Yusuf families, and because neither the Articles of Corporation nor the By-Laws of PLESSEN provide a tie-breaker mechanism in the event of a deadlock, any demand upon PLESSEN would be useless based on the familial relationships at issue, the lack of sufficient independence of the Hamed members to institute and vigorously prosecute this action and, again, the lack of a corporate tie-breaker mechanism.

⁸ Yusuf Yusuf alleged in the Verified Complaint:

15. The current members of PLESSEN’s Board are: Mohammed Hamed; Defendant WALEED HAMED; Fathi Yusuf; and Maher Yusuf.

16. PLESSEN’s current Officers are: Mohammed Hamed (President), Defendant WALEED HAMED (Vice President) and Fathi Yusuf (Treasurer and Secretary).

⁹ Yusuf Yusuf alleged in the Verified Complaint:

Yusuf Yusuf could not expect Waleed Hamed to vote in favor to file suit against himself to remedy these alleged misdeeds. The other Hamed director, Mohammad Hamed, is the father of the alleged wrongdoer. Yusuf Yusuf alleged that Mohammad Hamed, as the father of Waleed Hamed, is neither disinterested nor independent. In a scenario where half of the directors of an even-numbered board are alleged to be interested and lack independence, the directors who cannot impartially consider the demand essentially have the power to prevent the corporation from filing suit. Given this reality, it would be illogical for the Court to refuse to excuse demand for futility. Accordingly, the Court finds that Yusuf Yusuf has sufficiently alleged circumstances under which a demand would have been futile and thus, satisfied the demand requirement under Rule 23.1.

CONCLUSION

The Court will deny Waleed Hamed's Motion to Dismiss, as Yusuf Yusuf's verification was sufficient and Yusuf Yusuf was excused from making a demand upon the Board. An Order consistent with this Memorandum Opinion will follow.

DONE and so ORDERED this 15th day of August, 2016.

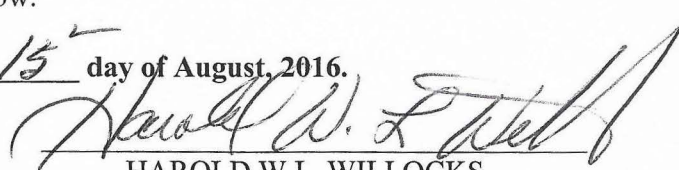
ATTEST:

Estrella H. George
Acting Clerk of the Court

By: _____

Court Clerk Supervisor

Dated: _____



HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

CERTIFIED A TRUE COPY

DATE: _____

ESTRELLA H. GEORGE

ACTING CLERK OF THE COURT

BY: _____

COURT CLERK

2. Plaintiff YUSUF brings this shareholder derivative action on behalf of PLESSEN against a member and officer of PLESSEN's Board of Directors (the "Board") and others, including certain shareholders of PLESSEN, to remedy, among other things, the fraudulent misappropriation of PLESSEN's assets, including the recent unauthorized transfer by WALEED HAMED of approximately \$460,000 from PLESSEN's bank accounts, representing approximately 99 percent (99%) of the monies in those accounts, for the benefit of the INDIVIDUAL DEFENDANTS as well as FIVE-H; breach of fiduciary duties; corporate waste; conversion; unjust enrichment; civil conspiracy; and other relief, including the imposition of a constructive trust and an accounting, and other preliminary and permanent injunctive relief.

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Plaintiff,

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MUFEED HAMED, HISHAM HAMED and
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PLESSEN ENTERPRISES, INC.,

Nominal Defendant.

SX-13-CV-120

CIVIL ACTION FOR DAMAGES
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby:

ORDERED that Defendant Waleed Hamed's Motion to Dismiss is **DENIED**.

DONE and so ORDERED this 15th day of August, 2016.

ATTEST:

Estrella H. George
Acting Clerk of the Court

By: [Signature]

Court Clerk Supervisor

Dated: 8/16/16

[Signature]

HAROLD W.L. WILLOCKS

Administrative Judge of the Superior Court

CERTIFIED A TRUE COPY

DATE: 8/16/16

ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT

BY: [Signature]

COURT CLERK II