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

YUSUF YUSUF, derivatively on behalf of Plessen Enterprises, Inc.,	)	Case No. SX-13-CV-120
Plaintiff,	)	Civil Action for Damages and Injunctive Relief
v.	)	JURY TRIAL DEMANDED
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and FIVE-H HOLDINGS, INC.,	)	
Defendants,	)	
and	)	
PLESSEN ENTERPRISES, INC.,	)	
Nominal Defendant.	)	

HAMED DEFENDANTS' REPLY IN SUPPORT OF THEIR SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT (AS TO COUNTS IV, VI AND VII OF PLAINTIFF'S COMPLAINT)

The Hamed Defendants files this Reply in Further Support of the Second Motion for Partial Summary Judgment (As to Counts IV, VI and VII of Plaintiff's Complaint) and, in further support of their Second Motion for Summary Judgment (the "Motion"), respectfully state as follows:

I. INTRODUCTION

On December 7, 2016, the Court allowed the above-captioned plaintiff, Yusuf Yusuf ("Plaintiff") to amend his complaint after Defendants withdrew their objections to amendment. This Second PSJ Motion revises Defendants' previous motion for partial summary judgment as necessary to conform the Hamed Defendants' request for partial summary judgment to the First Amended Complaint.

There is no dispute that the three Counts for which partial summary judgment is sought **sound in equity**: Count IV ("Unjust Enrichment"), Count VI ("Accounting") and Count VII ("Injunction"). As set forth in Plaintiff's prayer for relief, Plaintiff's corresponding requests for relief are:

> F. Ordering the disgorgement to Plessen of all funds and assets that were unlawfully misappropriated from its possession; [now moot[1]]
>
> G. Enjoining, preliminarily and permanently, the Defendants' benefit, use or enjoyment of Plessen's misappropriated funds; [now moot[2]][and]
>
> H. Awarding a full accounting of all monies, funds and assets that the Defendants received from Plessen[3]

Nor is there any dispute that the V.I. Supreme Court has recently held: "Because unjust enrichment is an equitable remedy, it – like all equitable remedies – is inappropriate where a legal remedy is available." Cacciamani & Rover Corp. v. Banco Popular De Puerto Rico, 2014 WL 4262098, at *2 (V.I. Aug. 29, 2014) (citing Mitsubishi Int'l Com. v. Cardinal Textile Sales, 14 F.3d 1507, 1518 (11th Cir.1994) ("It is axiomatic that equitable relief is only available where there is no adequate remedy at law.") and 1 DAN DOBBS, REMEDIES 750-52, 807- 11 (2d ed. 1993)).

Nor is there any dispute as to the salient facts – which Plaintiff repeats at some length, but which are uncontested:

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[1] This has been rendered moot, as the Court has returned this entire amount to Plessen from the Court account.

[2] This has been rendered moot, after the court returned this entire amount to Plessen from the Court account, Defendants can no longer benefit or enjoy the use of the funds.

[3] Yusuf has been asked in discovery and at Rule 37 conference what additional amounts are meant here – and has been unable to define, quantify or otherwise even describe such amounts.

1. Waleed Hamed removed $460,000 from a Plessen account on March 27, 2013.
2. On April 19, 2013 he replaced $230,000, through a court account.
3. On April 1, 2015, he replaced the balance through a court account.
4. That entire $460,000 was retained in a court account until the parties agree, in 2017, to the disbursement to Plessen – and the amount has been disbursed to Plessen.

Thus, it seems the case has devolved in an action for the amount due to Plessen (one half of which ultimately belongs to the Hameds) for either the (1) statutory interest due to Plessen for 23 days use of $460,000 and 2 years use of $230,000 -- if one assumes the removal was wrongful, or (2) "unjust enrichment" for the Hamed's use of those funds. At the statutory prejudgment interest rate of 9%, that would be approximately $42,000.

II. Yusuf's Procedural Argument and Long Recitation of the Facts Is Misplaced.

a. First, Yusuf makes a **procedural argument** that has been specifically rejected by the V.I. Supreme Court – that in a motion for summary judgment must, under Rule 56.1 of the District Court Local Rules ("LRCi"), parties must provide a separate statement of undisputed facts. The Supreme Court has specifically held that Local Rule 7 controls, not LRCi 56.1.

> Significantly, the Superior Court's rigid application of District Court Rule 56.1 to this case is in clear conflict with prior precedent of this Court. See Estick, 2015 V.I. Supreme LEXIS 10, at *20 n.7, 2015 WL 1777884 ("[R]egardless of the validity of Superior Court Rule 7, this Court's holdings ... remain controlling authority until this Court sets those rulings aside."). As we have previously held, federal rules such as District Court Rule 56.1 "should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure." Sweeney, 60 V.I. at 442 (emphasis added). Although not cited by the Superior Court in either its July 12, 2013 or September 4, 2013 opinions, this Court has already held that the fact that a summary judgment motion is deemed uncontested due to a procedural defect—such as not filing

> a timely opposition—is not grounds for accepting the moving party's undisputed facts as true. Martin v. Martin, 54 V.I. 379, 389 (V.I.2010). Significantly, we held that "[t]he trial court may not accept as true the moving party's itemization of undisputed facts; instead, the court must satisfy itself that the evidence in the summary judgment records supports this relief." Id. Based on this holding—which must take precedence over the Superior Court's interpretation of District Court Rule 56.1, see Estick, 2015 V.I. Supreme LEXIS 10, at *20 n.7, 2015 WL 1777884; Sweeney, 60 V.I. at 44211—**it was clearly error for the Superior Court to disregard the record and treat the facts set forth in the Government's cross-motion for summary judgment as uncontested simply because Vanterpool's summary judgment motion failed to include a serially-numbered separate statement of undisputed facts.**

Vanterpool v. Government of Virgin Islands, 63 V.I. 563, 583-84 (V.I. 2015) (emphasis added) (internal footnotes omitted). Thus, Yusuf's long, irrelevant discussion of facts – and his statement at page 3 of the Opposition – should be disregarded:

> The Hamed Defendants fail to set forth a separate statement of undisputed material facts, instead contending that only three facts are relevant.

For the purpose of summary judgment, the Hameds stated that even if all of Yusuf's facts are taken as correct, but that the $460,000 has been returned, the only relief available is "at law" – the $42,000 damages for the two years at the statutory interest rate for $230,000 and less than a month at $460,000.[4]

III. YUSUF'S ARGUMENT REGARDING UNJUST ENRICHMENT IS INCORRECT.

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[4] The FAC removed the efforts to equitably trace the funds and Yusuf admits that this amount is all he can possibly recover at page 11 of the Opposition.

> From the standpoint of restitution, the gains enjoyed by the Hamed Defendants from their use [month long] of the $460,000.00 and, in particular, their extended [one year] use of the $230,000.00 are damages to which Plaintiffs are entitled.

Yusuf intentionally miscomprehends why the equitable **remedy** of unjust enrichment exists and, more importantly, that it is a remedy only available when no adequate remedy exists at law. See Brumbelow v. Law Offices of Bennett & Deloney, P.C., 372 F. Supp. 2d 615, 623, 2005 WL 1287441 (D. Utah 2005) ("To the extent the plaintiff argues that unjust enrichment is a tort, and that corporate officers who direct or participate in a tortuous act are individually liable, the court disagrees. Unjust enrichment sounds neither in tort, nor contract, but is an equitable claim based on restitution.") (internal footnotes omitted). Yusuf first cites a 2001 ***criminal case*** from Washington for the "hornbook law that a misappropriation of money" cannot be remedied by return of the funds plus damages at law. See Opposition at p. 6. Such a proposition is obvious in a ***criminal*** matter. However: (i) this Action is a ***civil*** matter and there is no such civil rule here or elsewhere; (ii) the Yusufs have already tried and failed to have the facts of this case litigated as a criminal matter and the Court dismissed the case; and (iii) ***the Yusufs are are being sued civilly for malicious prosecution because of their bad acts in connection with the now-dismissed criminal matter***. The only law applicable here is the V.I. Supreme Court's declaration in Cacciamani that there can be no equitable remedy for unjust enrichment where there is a remedy at law. To suggest that no legal remedy exists here is absurd.

It is undisputed that any use of its funds of which Yusuf claims Plessen[5] has been deprived is recoverable with the statutorily allowed interest[6] under the action for recovery of funds and the

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[5] Plessen is the purportedly aggrieved party in this Action, as Yusuf purports to be acting derivatively on behalf of Plessen. Yusuf has not sued in his capacity as an individual.

[6] 11 V.I.C. § 951 (Legal rate of interest) provides: "(a) The rate of interest shall be nine (9%) per centum per annum on: (1) all monies which have become due; (2) money received to the use of another and retained beyond a reasonable time without the owner's consent, either express or implied."

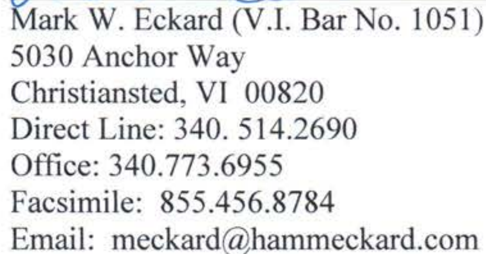
corporate statutes of the USVI. The action for debt is sufficient to recover funds taken by a director, ***but even if it were not, before resort to equity, the plaintiff must first attempt recovery at law under statutes such as 13 V.I.C. § 71 – which has been applied to provide an adequate remedy at law under such circumstances***. See, e.g., Goddard's Ltd. v. Bank v. Nova Scotia, 5 V.I. 376 (D.V.I. 1966).

According to Yusuf's argument, every single action at debt or for recovery of corporate funds would evade the statutory and legal remedies and, instead, allow an endless adventure through the question of "what did the defendant do with the funds?" And to what end – the amount Yusuf might recover that way will likely be less than the statutory 9%. A recovery of interest at a high statutory rate was intended by the Legislature, and does statutorily provide to Plessen as much or more as the formulation the Yusufs attempt. Yusuf has not cited (and cannot cite) one single ***civil*** decision where full recovery of all funds plus statutory interest pursuant to applicable "at law" relief was replaced by a hypothetical recovery for unjust enrichment.

This is simply another in a long series of the Yusufs' embarrassing, "scorched Earth" cases brought to harass the Hamed family as (attempted) retaliation against the Hameds for humiliating the Yusufs over their attempted theft of Mohammad Hamed's half of the Plaza Extra Partnership *– most of which litigation the Yusufs have either lost or had to dismiss in disgrace*. That this is a futile, sad effort with no real point is obvious where Yusuf has spent more than the $42,000 plus whatever little extra might be at issue in this case -- to litigate the instant motion alone. . .much less the entire action which is costing the parties and the court system hundreds of thousands of dollars.

Respectfully submitted,

HAMM ECKARD, LLP



Dated: February 21, 2017 By: ______________________________

Mark W. Eckard (V.I. Bar No. 1051)
5030 Anchor Way
Christiansted, VI 00820
Direct Line: 340. 514.2690
Office: 340.773.6955
Facsimile: 855.456.8784
Email: meckard@hammeckard.com

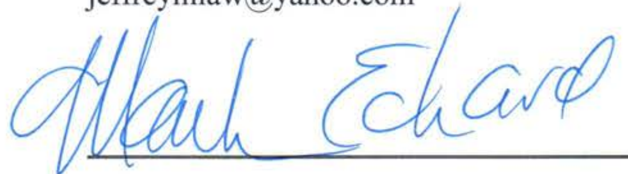
Counsel for Waleed Hamed, Waheed Hamed, Mufeed Hamed, Hisham Hamed and Five-H Holdings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I served a copy of the foregoing by email, as agreed by the parties, on:

Gregory H. Hodges
Charlotte K. Perrell
Stefan B. Herpel
Law House, 10000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00802
ghodges@dtflaw.com
cperrell@dtflaw.com

Jeffrey B. C. Moorhead
1132 King Street
Christiansted, VI 00820
jeffreymlaw@yahoo.com



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