

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

HISHAM HAMED, individually, and
derivatively, on behalf of **SIXTEEN PLUS
CORPORATION,**

Plaintiff,

v.

**FATHI YUSUF, ISAM YOUSUF and
JAMIL YOUSEF**

Defendants,

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant.

Case No.: 2016-SX-CV-650

**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES
AND CICO RELIEF**

JURY TRIAL DEMANDED

PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS

The Plaintiff hereby moves for sanctions against Stefan Herpel, Lisa Komives and Fathi Yusuf pursuant to Rule 11.

The required 21 day Rule 11 letter was sent on February 17th, so this motion is now ready for filing. See Exhibit 1

The basis for the motion is more fully set forth in the memorandum being submitted in support of said motion, which is incorporated herein by reference. For the reasons set forth therein, it is respectfully submitted that the relief sought be granted.

Dated: March 14, 2017


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Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, I served a copy of the foregoing by mail and email, as agreed by the parties, on:

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February 17, 2017

Stefan Herpel
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Federal Rule of Civil Procedure, Rule 11 Notice

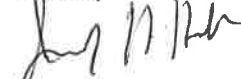
Dear Counsel:

This letter and the attachments are being sent to both of you pursuant to Rule 11 because of the Rule 56(d) filing you submitted on February 9, 2017, in *Hamed v Yusuf et al*, Case No.: 2016-SX-CV-650. In this regard, this letter places both of you and your client on notice that my client intends to file the attached motion for Rule 11 Sanctions, as well as the accompanying memorandum, unless you take the appropriate steps to comply with the "safe harbor" provisions of Rule 11 (c)(2) within 21 days from today.

The factual and legal bases for sending this Rule 11 letter are set forth in the attached draft pleadings, which are incorporated herein by reference. If you have any questions, or do not understand anything, please give me a call.

In the meantime, I suggest you both fully investigate the facts giving rise to this case, as well as those specifically related to the Rule 56 motion as to Count III of the First Amended Complaint. In my view, that investigation should include having a frank discussion with your client regarding the serious matters raised in this case.

Yours,



Joel H. Holt
JHH/jf
Enclosure



**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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**HISHAM HAMED, individually, and
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Plaintiff,

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Defendants,

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SIXTEEN PLUS CORPORATION,

a nominal Defendant.

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**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES
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JURY TRIAL DEMANDED

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
HIS MOTION FOR RULE 11 SANCTIONS**

The Plaintiff seeks Rule 11 sanctions against Stefan Heral, Lisa Komives and Fathi Yusuf pursuant to Rule 11 based on the Opposition Memorandum to Plaintiff's Partial Motion for Summary Judgment on Count III of the First Amended Complaint ("FAC"). That pleading was filed on February 9, 2017, and was signed by Stefan Heral, with an attached declaration signed by Lisa Komives, on behalf of one Defendant, Fathi Yusuf. See **Exhibit 1**. For the reasons set forth herein, it is respectfully submitted that sanctions should be entered against both counsel and their client, Fathi Yusuf.

I. Rule 11 Standard

Rule 11 authorizes this Court to enter sanctions against counsel, **or a party**, under certain circumstances. Rule 11(b) provides in part as follows:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause **unnecessary delay, or needlessly increase the cost of litigation;**

...

(4) the denials of factual contentions are warranted on the evidence or, **if specifically so identified, are reasonably based on belief or a lack of information.** (Emphasis added).

In short, these sections require a reasonable inquiry into the facts before filing the document and prohibit a filing interposed for the purpose of delay. A violation of either subsection (b)(1) or (b)(4) triggers the sanction provisions of this rule, which can be assessed against the lawyer **or the client** under the express wording of Rule 11.¹

Regarding sanctions, Rule 11(c)(1) provides as follows:

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11 has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Subsection 11(c)(4) then list a series of sanctions a court might consider. As stated in *Hilmon Co. v. Hyatt Int'l, S.A.*, 138 F.R.D. 66, 69 (D.V.I. 1991):

“Rule 11 ... is intended to discourage pleadings that are ‘frivolous, legally unreasonable, or without factual foundation....’ ” *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir.1986) (quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir.1986)). “The standard for testing conduct under Rule 11 is reasonableness under the circumstances.” *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.1988). **It is an objective test with subjective good faith being insufficient to avoid**

¹ See also, *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533,551 (1991) (Court can sanction anyone who is responsible for a Rule 11 violation).

sanctions. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir.1987). (Emphasis added).

See also, *M&T Mort. Corp. v White-Hamilton*, 49 F. Supp. 2d 802, 805 (D.V.I. 1999)

(The test for imposing Rule 11 sanctions is “reasonableness under the circumstances”).

Before Rule 11 sanctions can be sought, a party must comply with Rule (c)(2), giving the opposing party and his counsel 21 days to withdraw the offending pleading, which requirement was satisfied. See **Exhibit 2**.

II. Factual Background

This case arises out of a blatant effort by Fathi Yusuf to steal real property worth millions of dollars from a corporation in which he is an officer and director. The salient facts are set forth in the verified FAC, which can be summarized as follows:

- 1) In 1997, Mohammed Hamed and Fathi Yusuf decided to purchase 300 acres on the south shore of St. Croix, generally known as “Diamond Keturah,” from the Bank of Nova Scotia (“BNS”). To do so, they formed a corporation, Sixteen Plus, which they owned 50/50 through their respective family members. FAC ¶¶ 12-14
- 2) Yusuf has been an officer and director of Sixteen Plus since that time and remains so today. FAC ¶ 3.
- 3) Yusuf and Hamed agreed to pay for the purchase with profits from the Plaza Extra Supermarket they also jointly owned as 50/50 partners. FAC ¶¶ 15-19.
- 4) Yusuf decided he did not want the Government or BNS to know the source of the funds being used to buy the property, as he was diverting unreported cash from Plaza Extra to use for this purchase. Thus, he arranged to have the funds laundered by having cash taken to St. Martin and then sent back by wire transfer by his nephew, Isam Yousuf (“Isam”), into the account of Sixteen Plus at BNS. FAC ¶¶ 21-22.
- 5) To further hide the source of the funds, Yusuf and Isam decided to create a sham mortgage in 1997 for \$4.5 million in the name of another Yusuf relative in St. Martin, Manal Yousef (“Manal”). FAC ¶¶ 23.

- 6) Yusuf explained to the Hamed's that Manal would never enforce the mortgage, but that it would be executed and recorded to make it look like a valid mortgage, which was done. FAC ¶¶ 24-31.
- 7) The transaction was finally closed in 1999 and the 1997 Manal mortgage was recorded. FAC ¶ 31.
- 8) However, when Yusuf signed the corporate tax return for 1999 (filed in 2000), he verified under oath that the loan was owed to the shareholders (the Hamed's and Yusuf's). FAC ¶ 75 and Exhibit 9 thereto.
- 9) Yusuf, Isam and Wally Hamed (who signed the Manal mortgage) were subsequently indicted for money laundering and tax evasion related in part to the Diamond Keturah purchase. Indeed, the Government placed a lien against it as part of the criminal case. FAC ¶¶ 32-34
- 10) That case was subsequently dismissed, after taxes were paid and a fine was levied, releasing Yusuf and Wally Hamed from any criminal liability for the acts related to the 1997 purchase of Diamond Keturah. The Government also released the lien. FAC ¶¶ 52-54.
- 11) In 2010 Yusuf had a real estate Power of Attorney ("POA") drawn up for Manal to sign giving Yusuf full control over the mortgage, which she did. FAC ¶¶ 45-51.
- 12) The POA, **Exhibit 1** to the FAC, gave Yusuf full authority to execute any and all documents related to the mortgage. The POA also incorporated the language in 15 V.I.C. § 5-604 that allowed Yusuf **to release the mortgage or change the name on the mortgage.**
- 13) The POA signed by Manal then added the following broad indemnity language:

I hereby agree to release, indemnify, defend and hold my attorney-in-fact harmless for all claims arising by reason of his acts he so performs in accordance with this instrument and the law. (Emphasis added).
- 14) On September 14, 2012, Yusuf filed the 2011 corporate tax return for Sixteen Plus, again verifying that \$4.5 million note was owed to the Hamed and Yusuf shareholders (¶ 75 and FAC Exhibit 8).
- 15) Notwithstanding this verified filing, in December of 2012, Yusuf began to try to secure the property as his own through the POA by having a St. Martin lawyer send a demand letter to Sixteen Plus (c/o Wally Hamed) to collect the note secured by the mortgage, claiming a debt due of \$14,612,662.23 plus \$3,000,000 in late fees. FAC ¶55.

- 16) That letter and the response from Hamed's counsel explaining Yusuf's fraudulent conduct are attached to the FAC.
- 17) Yusuf then engaged in a series of additional acts in 2012 through 2016 to try to collect the sham mortgage, despite filing sworn tax returns denying the existence of the alleged Manal debt (FAC ¶ 75), and filing verified answers to interrogatories in the Superior Court claiming the debt was valid (FAC ¶¶ 65-66).
- 18) He also used it to retain local counsel to defend the declaratory judgment action filed against Manal by Sixteen Plus to have the mortgage declared void. FAC ¶¶ 77-78.

With these verified facts in mind, it is now appropriate to address the Rule 11 issues raised in the filing of the opposition to the pending motion for partial summary judgment.

III. The Offending Rule 11 Conduct

The Plaintiff filed a partial motion for summary judgment as to one count, Count III, of the FAC. Count III is a claim brought only against one Defendant—Fathi Yusuf—for breach of his fiduciary duty to the nominal Defendant corporation, Sixteen Plus, Inc., of which he is an officer and director.

On February 9, 2017, Fathi Yusuf had defense counsel, Stefan Herpel, sign a Rule 56(d) pleading in response to this Rule 56 motion, stating in part:

9. Pursuant to the requirements of Federal Rule of Civil Procedure 56(d), counsel for Mr. Yusuf is submitting a declaration herewith **which sets forth the information in possession of the movant and third parties which is necessary to challenge what are actually the highly disputed "facts" proffered in support of the Motion for Summary Judgment.** See Exhibit 1.

10. Therefore, in the absence of any discovery, **the facts necessary to oppose the Motion for Summary Judgment are not fully available to Mr. Yusuf**, and the Court may properly defer consideration of the same until discovery is complete. (Emphasis added).

Then, to support this assertion, a declaration signed by Lisa Komives, another attorney for Fathi Yusuf, was submitted that stated in relevant part:

5. For example, discovery is needed concerning whether the allegedly "sham mortgage," was in fact a sham, which of the Hameds were aware of the allegedly "sham mortgage," which of the Hameds consented to the "sham mortgage," communications the Hameds have had with third parties about the "sham mortgage," etc.

6. Discovery is also needed with respect to the 2010 power of attorney executed by Manal Yousef, who procured it, who has the original, what uses, if any, to which it has been put, etc.

7. Discovery is necessary concerning Sixteen Plus's tax returns, the information provided to the preparer, by whom it was provided, amendments thereto, etc.

8. Notably, Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint. Many "facts" which Hisham "verified" are outside of his personal knowledge and further represent "conclusory allegations" which are properly tested in the discovery process if the claim is not dismissed by the Court.

9. Therefore, it is plain that information crucial for Mr. Yusuf to properly defend against the Motion **is needed from both the Hameds and, potentially, third parties.** (Emphasis added).

There can be no doubt that this pleading and the attached declaration were made in bad faith and done for the sole purpose of delaying this matter.²

In this regard, Rule 11(b) specifically states:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the person's knowledge, information, and belief, **formed after an inquiry reasonable under the circumstances:**

.....

(4) the denials of factual contentions are warranted on the evidence or, **if specifically so identified, are reasonably based on belief or a lack of information.**

Rule 11 imposes an affirmative duty on counsel to conduct a reasonable inquiry into the facts prior to filing a pleading. *Bensalem Township v. International Surplus Lines Ins. Co.*, 3 F. 3d 1303, 1314 (3d Cir. 1994). Reliance upon a client's representations is

² Statements by counsel in a declaration accompanying a motion are subject to Rule 11 sanctions if warranted. See, e.g., *Hadley v. Gerrie*, 26 VI 203, 215 (D.V.I. 1991).

insufficient, **particularly where public and private information is readily available** at a reasonable cost. *Battles v. City of Ft. Myers*, 127 F.3d 1298, 1300 (11th Cir. 1997). Further, "[a]bsent...extenuating circumstances, an attorney cannot simply rely on the conclusory representations of a client,...." *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252,1255 (11th Cir. 1996).

However, in this case, counsel either failed to conduct a reasonable inquiry as required by these standards, or, if they did, failed to fairly represent to the Court what they discovered, as it is undisputed that a reasonable inquiry would have revealed that the only facts relevant to the Rule 56 motion are available in the readily available public and private records at no cost as follows:

- Sixteen Plus is a Virgin Islands corporation, of which Yusuf is an officer and director;
- Sixteen Plus owns real property on St. Croix that has a mortgage recorded against it in favor of Manal Yousef;
- The POA, *which is attached to the FAC*, gives Yusuf the authority to release the Manal Yousef mortgage, without exposing Yusuf to any liability as she indemnified him for all acts done pursuant to the POA.

More importantly, Yusuf has direct knowledge about all of the critical information listed in Komives' Rule 56(d) declaration, including:

- How the sham mortgage was created, as he orchestrated it;
- What Hameds knew about it;
- How the POA was obtained, as he had a Virgin Islands lawyer draft it and the sent to his nephew in St. Martin to have it signed before a notary there;
- How often it has been used (he is the only one who can use it);
- Where the original is now located;

- Who prepared the tax returns, as Yusuf had the returns prepared, **which he then signed** and filed.

Thus, it is misleading to suggest to the Court that more time is needed to do discovery on the very issues of which the client is completely knowledgeable.

Moreover, it is clear that the entire Rule 56(d) pleading was filed for only one purpose—to **unnecessarily delay** these proceedings, a violation of Rule 11(b)(1) in addition to the violation of Rule 11(b)(4), as clearly Yusuf could not file a sworn declaration himself without conceding liability.

In short, before filing the opposition memorandum, both defense counsel were required to have a reasonable basis for asserting a lack of knowledge of the relevant facts by their client. They either failed to undertake this inquiry, or if they did, they failed to be candid with the Court as to what that inquiry revealed. Either way, sanctions are warranted for both, as well as for Yusuf, due to their failure to reasonably investigate the facts before filing the pleading and the attached declaration in question. Sanctions are also warranted because of the unnecessary delay caused by this filing.

IV. Conclusion

For the reasons set forth herein, it is respectfully requested that this Court enter appropriate sanctions pursuant to Rule 11 against Fathi Yusuf and counsel who signed the offending pleading and declaration.

Dated: March 14, 2017



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, I served a copy of the foregoing by mail and email, as agreed by the parties, on:

Gregory H. Hodges
Stefan Herpel
Lisa Komives
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**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION**

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, pursuant to Federal Rule of Civil Procedure 56(d)¹, hereby opposes Plaintiff, Hisham Hamed's Motion for Partial Summary Judgment on his claim for breach of fiduciary duty as wholly premature given that: 1) a Motion to Dismiss Plaintiff's claim for breach of fiduciary duty is pending; and 2) no discovery has been conducted. In support, Mr. Yusuf states as follows.

1. On January 9, 2017, Mr. Yusuf timely filed a Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss") on the grounds that all counts were: 1) barred by the statute of limitations; 2) were insufficiently pled; and 3) were also properly dismissed for failure to join a required party.

¹ In *Rivera-Mercado v. General Motors Corp.*, 51 V.I. 307 (V.I. 2009), the Supreme Court of the Virgin Islands confirmed Federal Rule of Civil Procedure 56(f), the precursor to Rule 56(d), applies to practice in the Superior Court of the Virgin Islands.

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2. On January 20, 2017, Plaintiff filed an Opposition to the Motion to Dismiss.

3. On the very same day, Plaintiff filed a Motion for Partial Summary Judgment on his breach of fiduciary duty claim.

4. On February 6, 2017, Mr. Yusuf timely replied in support of his Motion to Dismiss.

5. Accordingly, the Motion to Dismiss is fully briefed and ripe for adjudication.

6. As a practical matter, providing a substantive response to a Motion for Summary Judgment when there is a pending Motion to Dismiss the same claim on which summary judgment is being sought is plainly a waste of resources.

7. Moreover, the parties have not conducted a Rule 26(f) conference, submitted a Rule 26(f) Report or proposed Scheduling Order to the Court, or engaged in any discovery.

8. As the Third Circuit has explained in *Doe v. Abington Friends School*, 480 F.3d 252, (3d Cir. 2007):

It is well established that a court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record. *See* FED.R.CIV.P. 56(c) (instructing that summary judgment be decided on the basis of the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any”) . . . In this vein, the [U.S.] Supreme Court has explained that “[a]ny potential problem with . . . premature [summary judgment] motions can be adequately dealt with under Rule 56(f).” Therefore, if the non-moving party believes that additional discovery is necessary, the proper course is to file a motion pursuant to Rule 56(f). District courts usually grant properly filed Rule 56(f) motions as a matter of course. . . . If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion.

Id. at 257 (some internal cites and quotations omitted); *see also* *Bethea v. Merchants Commercial Bank*, Civil Case No. 11-51, 2011 WL 4861873, at * 2 (D.V.I. Oct. 13, 2011) (“Plaintiff herein has had no opportunity to conduct discovery [.] . . . I find MCB’s motion for

summary judgment prior to discovery to be premature. Accordingly, I deny MCB's motion for summary judgment without prejudice to refiling after discovery has concluded.").

9. Pursuant to the requirements of Federal Rule of Civil Procedure 56(d), counsel for Mr. Yusuf is submitting a declaration herewith which sets forth the information in possession of the movant and third parties which is necessary to challenge what are actually the highly disputed "facts" proffered in support of the Motion for Summary Judgment. *See Exhibit 1.*

10. Therefore, in the absence of any discovery, the facts necessary to oppose the Motion for Summary Judgment are not fully available to Mr. Yusuf, and the Court may properly defer consideration of the same until discovery is complete. *See Federal Rule of Civil Procedure 56(d).*


11. A proposed order is being submitted herewith for the Court's consideration.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: February 9, 2017

By:


Stefan B. Herpel (V.I. Bar No. 1019)
Lisa Michelle Kömives (V.I. Bar No. 1171)
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Hamed v. Yusuf, et al.

Case No. 16-SX-CV-650

F. Yusuf's Opposition to Motion for Partial Summary Judgment

Page 4 of 4

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2017, I served the foregoing
*DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT* via e-mail addressed to:

Joel H. Holt, Esq.
Law Office of Joel H. Holt
2132 Company Street
Christiansted, USVI 00820
Email: holtvi@aol.com

Michelle Barber

**DUDLEY, TOPPER
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EXHIBIT 1

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DECLARATION

I, **LISA MICHELLE KÖMIVES**, pursuant to Superior Court Rule of Procedure 18, do declare and state as follows:

1. I am an attorney licensed to practice in the U.S. Virgin Islands.
2. I am Of Counsel at Dudley, Topper and Feuerzeig, LLP, the law firm representing Defendant, Fathi Yusuf ("Mr. Yusuf"), in the above-captioned matter and am personally involved with the defense of the case.
3. I make this declaration from my personal knowledge and could competently testify to the facts set forth herein.
4. Discovery on multiple issues is necessary in order to mount an opposition to Plaintiff's Motion for Partial Summary Judgment ("Motion") on his breach of fiduciary duty claim.
5. For example, discovery is needed concerning whether the allegedly "sham mortgage," was in fact a sham, which of the Hameds were aware of the allegedly "sham

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mortgage,” which of the Hameds consented to the “sham mortgage,” communications the Hameds have had with third parties about the “sham mortgage,” *etc.*

6. Discovery is also needed with respect to the 2010 power of attorney executed by Manal Yousef, who procured it, who has the original, what uses, if any, to which it has been put, *etc.*

7. Discovery is necessary concerning Sixteen Plus’s tax returns, the information provided to the preparer, by whom it was provided, amendments thereto, *etc.*

8. Notably, Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint. Many “facts” which Hisham “verified” are outside of his personal knowledge and further represent “conclusory allegations” which are properly tested in the discovery process if the claim is not dismissed by the Court.

9. Therefore, it is plain that information crucial for Mr. Yusuf to properly defend against the Motion is needed from both the Hameds and, potentially, third parties.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: February 9, 2017


LISA MICHELLE KÖMIVES