

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

HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

Plaintiff,)

vs.)

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,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF AND DEFENSE COUNSEL'S
OPPOSITION TO PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS**

Defendant, Fathi Yusuf ("Mr. Yusuf"), Stefan B. Herpel, Esq. and Lisa Michelle Kömives, Esq., through undersigned counsel, pursuant to Federal Rule of Civil Procedure 11, hereby oppose Plaintiff, Hisham Hamed's Motion for Rule 11 Sanctions ("Rule 11 Motion") and, in support, state as follows.

I. INTRODUCTION & BACKGROUND FACTS

Plaintiff has brought a baseless motion for Rule 11 sanctions against Mr. Yusuf, Attorney Herpel and the undersigned as a litigation tactic.¹ Plaintiff claims that one of the positions taken in Mr. Yusuf's Opposition to the Motion for Summary Judgment (the "Opposition Brief") regarding the need for discovery in a case where discovery had not yet commenced was solely brought to delay this matter. *See* Rule 11 Motion, p. 6. Plaintiff also claims that counsel failed

¹ Notably, neither Attorney Herpel in thirty four (34) years of practice, nor the undersigned in twelve (12) years of practice, has ever been: 1) sanctioned by any tribunal; or 2) ever even received a Rule 11 safe-harbor letter prior to the one sent by Plaintiff's counsel in this case.

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to do a “reasonable inquiry into the facts before filing” the Opposition Brief. *Id.* Thus, Plaintiff argues Mr. Yusuf, Attorney Herpel and the undersigned violated Rule 11 and should be sanctioned.

The procedural history of this case is important to understand the context of the Rule 11 Motion and its lack of merit. Initially, Plaintiff filed a complaint which he quickly withdrew after being served with Mr. Yusuf’s Motion to Dismiss the same. He then filed a First Amended Complaint but later withdrew three causes of action after being served with Mr. Yusuf’s Motion to Dismiss the newly amended complaint. Plaintiff, obviously hoping to rehabilitate his case, also opposed the Motion to Dismiss his First Amended Complaint and, despite the fact that no discovery had been done, Plaintiff simultaneously filed a Motion for Partial Summary Judgment on his claim for breach of fiduciary duty.

Mr. Yusuf filed his Opposition Brief to the Motion for Partial Summary Judgment which he viewed as premature and an attached declaration of counsel. Together these filings argued that Mr. Yusuf’s earlier filed Motion to Dismiss precluded summary judgment on Plaintiff’s breach of fiduciary duty claim. (The Motion to Dismiss the First Amended Complaint argued the claim for breach of fiduciary duty was barred by: 1) the statute of limitations; 2) failure to allege a breach of the duty or harm arising therefrom; and 3) failure to join an indispensable party.) In addition, Mr. Yusuf argued Plaintiff did not have personal knowledge of the facts in the First Amended Complaint and, therefore, his averments were insufficient to support a summary judgment motion. Lastly, Mr. Yusuf argued, in the alternative, that discovery was needed in order to properly respond to the motion as the case was in the preliminary stages and discovery had not yet commenced. Mr. Yusuf also subsequently filed a motion for leave to file a sur-reply to Plaintiff’s Motion for Partial Summary Judgment—which motion Plaintiff did not oppose—

and the sur-reply expanded on the arguments set forth in the Opposition Brief and further explained that Plaintiff's own pleadings set forth a genuine issue of material fact as to whether the mortgage at issue is a sham. Plaintiff then filed his Rule 11 Motion in what appears to be an attempt to distract the Court from the meritorious arguments set forth in the Motion to Dismiss and in opposition to his Motion for Partial Summary Judgment.

Plaintiff's Rule 11 Motion grasps at straws, attempting to obtain sanctions for a fourth alternative argument. To wit, Plaintiff claims that the argument that discovery is needed in order to properly oppose Plaintiff's Motion for Partial Summary Judgment is sanctionable. Notably, Plaintiff made the same request for discovery in a concurrent dispute between the Hamed and Yusuf families and Bank of Nova Scotia, but yet argues here that the same conduct is sanctionable.² However, the need-for-discovery argument is a backup to the argument that the Motion for Summary Judgment fails for the reasons set forth in the Motion to Dismiss—statute of limitations, failure to plead breach and harm and failure to join an indispensable party—and to the argument that the Motion for Summary Judgment fails because Plaintiff has no personal knowledge of facts relevant to the same and to the argument that Plaintiff's own pleadings set forth a genuine issue of material fact as to whether the mortgage is a sham.

In order for this Court to impose sanctions, the moving party—Plaintiff—has to show that Mr. Yusuf's Opposition to the Motion for Summary Judgment was: 1) patently unmeritorious and/or frivolous; 2) completely lacking in factual or legal support; and 3) objectively unreasonable. Notably, a court should refuse to impose sanctions unless the moving party can show a complete lack of factual or legal support for a claim. In the instant case,

² In *Hamed v. Bank of Nova Scotia, et al.*, Superior Court Case No. SX-16-CV-429, Hamed argues that Bank of Nova Scotia's Motion for Summary Judgment was "vastly premature" and sought "discovery and protection from this obvious 'tactic' under Rule 56(d)."

Plaintiff has wholly failed to meet his burden and his request for the “extraordinary remedy” of Rule 11 sanctions is properly denied.

II. MEMORANDUM OF LAW

A. Attorney Herpel and Mr. Yusuf Are Not Subject to Rule 11 Sanctions

As a prefatory matter, the motion for sanctions should be denied with respect to Attorney Herpel given that he did not sign, file, or submit the Opposition to Plaintiff’s Motion for Partial Summary Judgment at issue. *See* Fed. R. Civ. P. 11 (Rule 11 applies when an attorney presents to the court “a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it . . .”).³ The Opposition at issue was prepared, signed and filed by the undersigned, Lisa Michelle Kömives, like the other motions, responses, replies and briefs filed in this matter. Likewise, the motion for sanctions should also be summarily denied with respect to Mr. Yusuf. The claimed violation for filing the Opposition for the purpose of unduly delaying the action is inapplicable to Mr. Yusuf as the undersigned made the decision to file the same based on the facts and circumstances of this case and her professional experience. Plaintiff’s remaining argument that counsel’s “failure to do a reasonable investigation” violated Rule 11, does not even arguably implicate Mr. Yusuf. Accordingly, Rule 11 sanctions against Attorney Herpel and Mr. Yusuf are properly denied.

B. Sanctions Should Only Be Imposed in Exceptional Circumstances Where a Filing is Patently Unmeritorious or Frivolous Which Do Not Exist in the Instant Case

Rule 11 is an extraordinary remedy, one to be exercised with extreme caution. *See Operating Engineers Pension Trust v. A–C Company*, 859 F.2d 1336, 1345 (9th Cir. 1988). Rule

³ Notwithstanding the fact that Attorney Herpel did not sign, file or submit the pleading, if the Court finds sanctions appropriate under these circumstances Attorney Herpel would accept responsibility as partner on the case.

11 sanctions are the rare exception not the general rule. Such sanctions can have an unintended detrimental impact on an attorney's career and personal well-being. *See Brown v. Federation of State Medical Boards of the U.S.*, 830 F.2d 1429, 1437 (7th Cir.1987).

The standard developed by courts for imposition of sanctions under Rule 11 is stringent because such sanctions: 1) are in derogation of the general American policy of encouraging resort to the courts for peaceful resolution of disputes; 2) tend to spawn satellite litigation counter-productive to efficient disposition of cases; and 3) increase tensions among the litigating bar. *See Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988). Sanctions should only be imposed "in the exceptional circumstances where a claim or motion is patently unmeritorious or frivolous." *Id.*; *see also Gary v. Braddock Cemetery and Consol. Energy*, 334 Fed.Appx. 465, 467 (3d Cir. 2009) ("It is well-established that Rule 11 sanctions are warranted only in exceptional circumstances in which the claim or motion is patently unmeritorious or frivolous.").

The U.S. Supreme Court has concluded that Rule 11 "imposes on any party who signs a pleading ... an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances." *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 616 (3d Cir. 1991) (citing *Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 111 S.Ct. 922, 933, 112 L.Ed.2d 1140 (1991); *see also Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.1988) (explaining the standard for testing conduct under Rule 11 is reasonableness under the circumstances). It is an objective test. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987); *see also Lony*, 935 F.2d at 616 (denying motion for Rule 11 sanctions regarding a motion for *forum non conveniens* explaining that "Lony contended sanctions were warranted because Du

Pont (1) pursued its *forum non conveniens* motion in an attempt to harass and impose costs on Lony . . . Lony’s [] allegation, standing alone, is without merit. As we noted earlier, Du Pont had a right to move for *forum non conveniens* dismissal, and nothing precluded a renewal of its motion to dismiss on that ground. Nor do we, using an objective standard, regard its motions as harassment.”). A court should refuse to impose sanctions unless the moving party can show a complete lack of factual or legal support for a claim. *See Gary*, 334 Fed.Appx. at 467. Thus, in order for this Court to impose sanctions, the moving party—Plaintiff—has to show that Mr. Yusuf’s Opposition to the Motion for Summary Judgment was: 1) patently unmeritorious and/or frivolous; 2) completely lacking in factual or legal support; and 3) objectively unreasonable. Plaintiff has utterly failed to meet his burden and his request for Rule 11 sanctions is properly denied.⁴

There is nothing frivolous, **or even out of the ordinary**, about asking the Court to defer a substantive response to a Motion for Summary Judgment where: 1) the Motion for Summary Judgment was filed only a few months into the case; 2) where a comprehensive motion to dismiss is pending; and 3) no discovery has been done. As the Court is well aware, typically summary judgments are not filed until the close of all discovery. Many lawyers even view an early filing of a summary judgment motion as bad strategy as the opposing side will request discovery and enjoy the benefit of knowing all of the arguments and factual contentions it needs to refute. Hence, filing a summary judgment motion before discovery has commenced is regularly and routinely defended by a need for additional discovery. There is nothing frivolous about espousing such a common defense.

⁴ If sanctions are imposed, Rule 11 directs the court to limit sanctions to “what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.” *Gary*, 334 Fed.Appx. at 467 (citing Fed. R. Civ. P. 11(c)(4)).

C. There is No Factual Basis to Contend that the Opposition Brief was Solely Brought for the Purposes of Undue Delay

Plaintiff provides no evidence in his Rule 11 Motion which would support the allegation the Opposition was brought for the purpose of unduly delaying the proceedings. Moreover, the case has not, in fact, been unduly delayed as a result of the Opposition Brief being filed. First, this case has barely begun and a comprehensive Motion to Dismiss is currently pending.⁵ Therefore, even if the Motion for Partial Summary Judgment were fully briefed, the Motion to Dismiss would remain outstanding.

Second, this is a multi-count case and Plaintiff's Motion for Partial Summary Judgment is only directed at one cause of action. Therefore, even if the Motion for Partial Summary Judgment were fully briefed, and the Court decided the Motion for Partial Summary Judgment in Plaintiff's favor, all the other claims in the case would remain outstanding and in need of adjudication. Under the circumstances, the Opposition cannot be said to have caused "undue delay." Nor is there any evidence that the purpose of filing the Opposition Brief was to cause any delay in the matter, let alone "undue" delay.

D. Plaintiff Falsely Contends that Counsel Failed to Conduct a Reasonable Factual Investigation Prior to Filing the Opposition to the Motion for Summary Judgment

In order to claim that the undersigned failed to conduct a reasonable factual investigation before filing the Opposition Brief, Plaintiff makes the misleading claim that only a very limited set of facts are "relevant" to Plaintiff's Motion for Summary Judgment, in an effort view certain facts in a vacuum. In the Rule 11 Motion, Plaintiff claims the sole relevant facts are:

- Sixteen Plus is a Virgin Islands corporation, of which Yusuf is an officer and director;

⁵ In contrast, this matter is not on the eve of trial where, say a motion to re-open fact discovery, could arguably "unduly delay" the adjudication of the case.

- Sixteen Plus owns real property on St. Croix that has a mortgage recorded in favor of Manal Yousef;
- The Power of Attorney which is attached to the First Amended Complaint gives Mr. Yusuf the authority to release the Manal Yousef mortgage without exposing Yusuf to any liability.

See Rule 11 Motion, p. 7.⁶ Plaintiff further incorrectly claims that allegation in paragraph 26 of the Complaint that the mortgage is a sham is not “relevant” to his breach of fiduciary duty claim. *See id.* (setting forth the only three “facts” Plaintiff claims are relevant to his summary judgment motion which do not include whether the mortgage is a sham). Whether the mortgage is or is not a “sham” is directly relevant and Plaintiff himself has previously admitted the issue is relevant in his Opposition to Mr. Yusuf’s Motion to Dismiss. In that filing, Plaintiff leaves no doubt that his claim that Sixteen Plus has been harmed by Mr. Yusuf’s “breach of fiduciary duty” absolutely depends on the mortgage being a sham. To wit, Plaintiff states:

The FAC then alleges that this act has harmed the Plaintiff, particularly since it is alleged that Yusuf is now using this POA to covertly defend the direct action taken by Sixteen Plus against Manal Yousef to void the sham mortgage, as alleged in ¶¶ FAC 72, 77-78, 96-98. Finally, the FAC alleges in ¶¶77-78, 98 that this conduct in retaining counsel to defend that action is causing direct harm to the company, as it provides a bogus defense in the lawsuit filed by Sixteen Plus to have the sham mortgage declared void.

Plaintiff’s January 20, 2017 Opposition to Motion to Dismiss, p. 13. If the mortgage is not a “sham,” defending the lawsuit seeking to have the mortgage declared void would be legitimate rather than bogus, and that lawsuit itself would be baseless. Thus, under those circumstances, Mr. Yusuf retaining and paying for counsel to defend a meritless lawsuit which could expose the corporation to prevailing party attorneys’ fees would actually mitigate, rather than create, harm

⁶ Notably, and exposing the lack of credibility to Plaintiff’s statement that these three facts are the only facts relevant to determining summary judgment, in both his Motion for Summary Judgment **and the Rule 11 Motion itself**, Plaintiff sets forth paragraphs upon paragraphs of allegations which he deems a summary of “the salient facts [] set forth in the verified FAC[.]” *See* Rule 11 Motion, p. 3.

to the corporation. Indeed, if the Manal Yousef mortgage is not a sham, any violations of fiduciary duties would be by Plaintiff and the other Hamed shareholders, and not by Mr. Yusuf. For, in that case, Plaintiff and the Hamed shareholders would have breached fiduciary duties to the corporation and to Mr. Yusuf by filing two meritless lawsuits challenging the validity of the loan and mortgage.

Moreover, as a matter of law, Manal Yousef giving Mr. Yusuf a power of attorney for a valid mortgage cannot breach any duties Mr. Yusuf owes to Sixteen Plus. Powers of attorney are given for convenience. Manal Yousef lives abroad and there would be nothing improper about giving a power of attorney to an uncle she trusts for convenience, on the belief that he would not use it in any way inconsistent with her lawful interests and instructions.

Thus, despite Plaintiff's disingenuous claims to the contrary, the foregoing and disputed issue of whether the Manal Yousef mortgage is a sham is clearly highly relevant to Plaintiff's motion for summary judgment on Plaintiff's breach of fiduciary duty claim. Understanding that the validity of the mortgage is a key issue in deciding Plaintiff's breach of fiduciary duty claim undermines Plaintiff's statement in his Rule 11 Motion that only the three facts set forth above are "relevant" to deciding the same. This fundamental understanding also wholly undermines Plaintiff's claim that counsel should be sanctioned for requesting discovery into the information the Hameds have about the mortgage and the mortgage being an alleged sham. Obviously, this information is relevant to opposing his motion for summary judgment on his breach of fiduciary duty claim.

Counsel did a reasonable investigation including, among other things, gathering information in the client's possession and reviewing the Mortgage itself which was signed on

Sixteen Plus's behalf by Plaintiff's older brother, Waleed Hamed,⁷ reviewing the promissory note to Manal Yousef referencing her \$4.5 million loan to Sixteen Plus, which was also signed by Waleed Hamed, and the corporate resolution of Sixteen Plus approving the promissory note and mortgage. *See* respectively, **Exhibits 1, 2 and 3**. Hence, on the face of all of the documentation, the mortgage appears to be legitimate, properly documented and recorded. Nonetheless, Plaintiff claims that, despite the foregoing documentation, the mortgage is a sham. Simply rejecting a position which is contrary to all of the documentary evidence does not mean that counsel failed to reasonably investigate the mortgage. Clearly, discovery is needed on this issue, among others. At a bare minimum, discovery from Waleed Hamed, who signed the note, the mortgage and the corporate resolution approving it, regarding why he now apparently contends it is a sham and his basis for contending that it is a sham, is needed.

If Mr. Yusuf attempted to substantively respond to Plaintiff's Motion for Partial Summary Judgment, without the benefit of discovery, solely by filing his declaration or affidavit, Plaintiff plainly would have claimed that it was a "self-serving" affidavit and, thus, insufficient to defeat summary judgment. Additionally, if Mr. Yusuf requested discovery in advance of filing a substantive response and the Court denied the same and granted summary judgment for Plaintiff, the issue of whether discovery should have been allowed is preserved for appeal. Therefore, under the circumstances, a request to take discovery before responding to Plaintiff's summary judgment motion plainly not was: 1) patently unmeritorious and/or frivolous; 2) completely lacking in factual or legal support; or 3) objectively unreasonable.

⁷ Waleed Hamed was the Hamed family member most directly involved in all of the various businesses that were jointly owned by his late father, Mohammad Hamed, and Mr. Yusuf—or by members of the Hamed and Yusuf families. Waleed Hamed is designated as Mohammed Hamed's "authorized agent" in the caption of the principal case in the dispute between the Hamed and Yusuf families, which is assigned to the Honorable Douglas A. Brady (Case No. SX-12-CV-370).

Moreover, if the Court does not agree that discovery is necessary for Mr. Yusuf to properly oppose Plaintiff's Motion for Partial Summary Judgment, the Court can deny the request for discovery and order Mr. Yusuf to file a substantive response. This does not mean that the garden-variety request to defer ruling on a motion for summary judgment when a motion to dismiss is pending and until discovery is taken is sanctionable conduct. Moreover, as a practical matter, the Court may ultimately agree that discovery is, in fact, necessary under these circumstances and sanctions clearly would not be appropriate if the Court so ruled.

E. The Opposition Brief Was Not Frivolous, Completely Lacking in Factual or Legal Support, or Objectively Unreasonable, Thus Sanctions Should Not Be Imposed for Filing the Same

The various arguments made in Mr. Yusuf's Motion to Dismiss served as a legal and factual basis in support of the Opposition Brief and demonstrate that the arguments raised were neither frivolous nor objectively unreasonable.

1. *Plaintiff's Claim for Breach of Fiduciary Duty is Barred by the Statute of Limitations and Failure to State a Claim and Failure to Join an Indispensable Party as Set Forth in Mr. Yusuf's Motion to Dismiss*

One of the grounds for dismissal set forth in the Motion to Dismiss is the statute of limitations. As discussed in the Motion to Dismiss (page 21), the statute of limitations for a breach of fiduciary duty claim is two years. *See* 5 V.I.C. 31(5) ("[A]ny injury to . . . rights of another not arising from contract not herein especially enumerated" has a two-year statute of limitations; *see also Guardian Ins. Co. v. Khalil*, 63 V.I. 3, 18 (Super. Ct. 2012) (breach of fiduciary duty claim "sound[s] in tort" and has a "two-year statute of limitations").

The main element of the breach of fiduciary duty count is the allegation that Mr. Yusuf obtained a power of attorney from Manal Yousef dated May 18, 2010, which gave him certain

powers regarding a mortgage given to her by Sixteen Plus Corporation (“Sixteen Plus”) in September of 1997, which mortgage Plaintiff contends is a sham.⁸ Because the power of attorney was given in 2010, it is well outside the two-year statute of limitations for such claims.

Plaintiff argues in the Reply in Support of his Motion for Partial Summary Judgment that in 2016, Mr. Yusuf “used his POA to act adversely to Sixteen Plus, hiring a lawyer to defend the action⁹ filed by Sixteen Plus to have the Manal Yousef mortgage declared void.” *See* Plaintiff’s Reply at p. 3. Even if he were doing so, this alleged act undertaken within the two-year limitations period cannot surmount the limitations defense. Because—even if Mr. Yusuf were funding the defense of the litigation against Manal Yousef—he would be doing so voluntarily, and not by virtue of an exercise of the power of attorney. He would not need a power of attorney – *i.e.*, he would not have to be Manal Yousef’s attorney-in-fact in order to choose to fund the defense of litigation brought by Sixteen Plus that he regards as meritless, that was filed without his knowledge or consent, and that could otherwise expose Sixteen Plus to prevailing party attorneys’ fees and other sanctions.

This also means that, as argued alternatively in Defendant’s Motion to Dismiss (at page 21), Plaintiff’s fiduciary duty claim must be dismissed because of the absence of any meaningful allegation that the power of attorney has ever been exercised in any way, let alone a way that has harmed the interests of the corporation. The First Amended Complaint does not allege (and

⁸ *See* Plaintiff’s January 20, 2017 Memorandum in Support of Motion for Partial Summary Judgment at p. 5 (stating Mr. Yusuf’s fiduciary duty “was breached here when Yusuf took the POA to enforce the mortgage” which Plaintiff alleges is a sham).

⁹As discussed in Mr. Yusuf’s January 9, 2017 Motion to Dismiss (at pp.1-2), the Hamed shareholder faction caused Sixteen Plus to file this lawsuit on February 12, 2016, against Manal Yousef challenging the validity of the loan and mortgage. The Hameds did not inform Mr. Yusuf in advance of the filing of the case. Sixteen Plus’s case against Manal Yousef (Case No. SX-15-CV-65) is pending before the Honorable Harold W.H. Willocks.

Plaintiff's Reply does not assert) that Mr. Yusuf has taken any action (either within or outside the two-year limitations period) which alters the loan or mortgage instruments, or changes the legal relations created by them. Rather, the mortgage is in precisely the same form today as it was when signed by Waleed Hamed and recorded many years ago.

2. *It is Clear that Plaintiff Does Not Have Personal Knowledge of Relevant Allegations in the Complaint Precluding Summary Judgment*

Mr. Yusuf also argued, in the alternative, in his Opposition Brief that "Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint," and that "many 'facts' which [he] verified are outside of his personal knowledge and further represent conclusory allegations . . ." See Mr. Yusuf's February 9, 2017 Opposition to Motion for Summary Judgment, Declaration of Counsel, at ¶ 8. This argument rests on the rule that a verified complaint "can be considered as equivalent to an affidavit" under Rule 56 only "to the extent that it meets the requirements for affidavits set out in Rule 56(e) [now Rule 56(c)(4)]." *Runnels v. Rosendale*, 499 F.2d 733, 734 n.1 (9th Cir. 1974). Rule 56(c)(4) requires affidavits or declarations used to support a motion for summary judgment to "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." For that reason, the allegations in a verified complaint can only be used to support a motion for summary judgment if "they are specific and clearly based on matters within the personal knowledge of the plaintiff, to which he [is] competent to testify." *Rosendale, supra*, 499 F.2d at 734, n.1; see also *Moran v. Selig*, 447 F.3d 748, 759 n.16 (9th Cir. 2006) ("[A] verified complaint may serve as an affidavit for purposes of summary judgment if it is based on personal knowledge and if it sets forth the requisite facts with specificity[.]"); *Colon v. Coughlin*, 58 F.3d 865, 872 (1st Cir. 1995) ("[A] verified pleading may serve as an affidavit only if it

contains facts known to be true in the affiant's own knowledge . . .") (citation omitted); *Walker v. Tyler County Commission*, 11 Fed.Appx. 270, 274 (6th Cir. 2001) (A verified complaint is the equivalent of an affidavit for summary judgment purposes "when the allegations contained therein are based on personal knowledge[.]") (emphasis in original) (citation to Fourth Circuit case and internal quotation marks omitted).

Plaintiff's response to the argument that he has not demonstrated he has personal knowledge of alleged facts which are crucial to his summary judgment motion is twofold. Plaintiff claims, without any citation to case law, that what Plaintiff knows from personal knowledge does not matter, because "this is a derivative action filed for the benefit of Sixteen Plus." Plaintiff's February 13, 2017 Reply to Mr. Yusuf's Opposition to Motion for Partial Summary Judgment, at p. 3. He also argues that "none of these facts is salient to Count III" in any event. *Id.* at p. 5, n.1.

Plaintiff's first argument is easily dispatched. Plaintiff cites no case law for the proposition that the Rule 56(e) requirements are inapplicable to derivative actions, and Defendant is aware of none.

As for the second argument, Plaintiff's own statements in his reply in support of his Motion for Summary Judgment and another brief filed in this case contravene his claim that none of the "facts" for which Plaintiff may not have personal knowledge are material for purposes of his entitlement to summary judgment. In that Reply, Plaintiff acknowledges that one of the "facts" which upon which his motion depends is that Yusuf has "hir[ed] a lawyer to defend the action filed by Sixteen Plus to have the Manal Yousef mortgage declared void." *Id.* at p. 3. And that ostensible "fact" is, in turn, based on paragraph 78 of the verified Amended Complaint, which alleges that "Fathi Yusuf retained USVI counsel" to defend the 2016 action challenging

the validity of the mortgage and note. *See* First Amended Complaint, p. 17, ¶ 78. Yet, Plaintiff fails to show in his Amended Complaint that his allegation that Mr. Yusuf retained Attorney Kye Walker to defend the case in front of Judge Willocks is based on personal knowledge.

As such, the Court cannot treat the paragraph 78 allegation as the equivalent of a sworn affidavit or declaration for purposes of Plaintiff's partial summary judgment motion. *See Walker v. Tyler County Commission, supra*, 11 Fed.Appx. at 274 (holding that a verified complaint could not be considered the equivalent of an affidavit where the "factual allegations in the complaint do not indicate which, if any, are based on personal knowledge," and "we cannot determine that the [Appellant's] allegation . . . is based on [his] personal knowledge"); *Weberg v. Franks, supra*, 229 F.3d at 526, n.13 (stating, in context of review of summary judgment ruling, that "[w]e have had to disregard many of Plaintiff's allegations because they were not made with Plaintiff's personal knowledge . . ."); *Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991) (considering, in a review of summary judgment ruling, "the factual averments of the [verified] complaint, to the extent demonstrated to come within [appellant's] personal knowledge," and rejecting all other averments of the complaint); *Cooper v. Diggs*, 2010 WL 2331067, *7 (W.D. Pa. 2010) (because "Plaintiff's verified complaint lacks such an affirmative demonstration of how Plaintiff knows [an allegation in his complaint], it cannot be treated as an affidavit for purposes of Rule 56").¹⁰ Since the paragraph 78 allegation cannot be treated as a sworn

¹⁰ Plaintiff's verification of the First Amended Complaint (at page 25) recites that he has "carefully read the Complaint" and that it "comports with the requirements set forth in items (1) through (3) of 14 V.I.C. §607(d) . . ." Section 607(d) provides that such a verification (as well as the certification of counsel made on page 24) means only that the complaint is "well grounded in fact," the relief sought "is warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law," and it was not filed "for any improper purpose, including to harass . . . or to force an unjust settlement . . ." It is not a statement by Plaintiff that the allegations of the Complaint are based on personal knowledge.

statement based on personal knowledge, Plaintiff's summary judgment motion would have to be denied even if the Court rejected Mr. Yusuf's arguments that the breach of fiduciary duty claim is time-barred and that the claim should be dismissed for failure to show that the power of attorney was ever exercised in a way that harmed the corporation. Hence, the advancing the argument that Plaintiff lacks personal knowledge of the allegations in the First Amended Complaint in opposition to Plaintiff's Motion for Partial Summary Judgment is not frivolous, has sufficient factual and legal support and is not objectively unreasonable.

3. *Plaintiff's Complaint Discloses Genuine Issues of Material Fact*

The fact that the breach of fiduciary duty claim can only be maintained if the note and mortgage are a sham, as alleged in paragraph 26 of the First Amended Complaint, has an additional implication. It means that the face of the First Amended Complaint discloses genuine issues of material fact which would preclude summary judgment for Plaintiff on the breach of fiduciary duty count. In paragraph 65(a) of the Amended Complaint, Plaintiff refers to Mr. Yusuf's sworn interrogatory answer in another case which stated Manal Yousef did indeed loan the money to Sixteen Plus, and in paragraph 66, Plaintiff alleges this statement by Mr. Yusuf is false. These two allegations of the First Amended Complaint are plainly an admission of a genuine issue of material fact regarding whether the Manal Yousef loan is, or is not, a sham.

4. *It is Well Established that a Party is Entitled to Discovery Before Responding to a Motion for Summary Judgment and the Need for Additional Discovery is Abundantly Clear*

Mr. Yusuf also argued in the alternative that discovery was needed and that summary judgment should be deferred under Rule 56(d) until that discovery had been completed. 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) (emphasis supplied); *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 refile after discovery has concluded.”).

At the very least, discovery from Waleed Hamed, who signed the note, the mortgage and the corporate resolution approving it, regarding why he now apparently contends it is a sham and his basis for contending that is a sham, is needed. In addition, because of Plaintiff’s lack of involvement with the Manal Yousef loan, mortgage and the Sixteen Plus corporate resolution approving the same, discovery regarding the basis for Plaintiff’s allegations that the note and mortgage are a sham is also needed. Mr. Yusuf does not have to merely rely on his denials of Plaintiff’s allegations in opposition to Plaintiff’s Motion for Partial Summary Judgment. He is entitled to discover the basis, if any, on which Plaintiff supports these allegations. These arguments clearly have both factual and legal support, are not frivolous and are objectively reasonable.

III. CONCLUSION

In order to obtain Rule 11 sanctions against the undersigned, the moving party—Plaintiff—has to show that Mr. Yusuf’s Opposition to the Motion for Summary Judgment was: 1) patently unmeritorious and/or frivolous; 2) completely lacking in factual or legal support; and 3) objectively unreasonable. Plaintiff has failed to meet his burden and his request for Rule 11 sanctions is properly denied.

Plaintiff argues that this Court should impose sanctions for an argument that was made in the alternative to three other arguments, where all four arguments advanced are well grounded in law and fact and objectively reasonable. The claim that the Opposition Brief was solely brought for the purpose of undue delay has no factual support. The contention that counsel failed to conduct a reasonable factual investigation prior to filing the Opposition Brief is incorrect and premised on the disingenuous claim that whether the mortgage at issue herein is or is not a sham is not relevant to Plaintiff’s breach of fiduciary duty claim. Moreover, Plaintiff’s claim for breach of fiduciary duty is arguably barred by the statute of limitations, failure to state a claim upon which relief may be granted, and failure to join an indispensable party as set forth in Mr. Yusuf’s pending Motion to Dismiss. Also, it is clear that Plaintiff cannot prevail on his Motion for Partial Summary Judgment due to his lack of personal knowledge of relevant facts and that the face of his pleadings contain a genuine issue of material fact. Further, it is well established when no discovery has been done, a party served with a summary judgment motion may request that the ruling on the same be deferred until the close of discovery. Thus, the Opposition was not: 1) patently unmeritorious and/or frivolous; 2) completely lacking in factual or legal support; or 3) objectively unreasonable. In contrast, however, Plaintiff’s Rule 11 Motion is plainly

baseless. Accordingly, the Court should deny Plaintiff's Rule 11 Motion and refuse to impose the "extraordinary remedy" of Rule 11 sanctions.


WHEREFORE, on the basis of the foregoing, Defendant, Fathi Yusuf, and attorneys Stefan B. Herpel and Lisa Michelle Kömives, respectfully request that the Court deny Plaintiff, Hisham Hamed's Motion for Rule 11 Sanctions, order Plaintiff to pay the attorneys' fees incurred in connection with opposing the Rule 11 Motion, as well as such other relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: April 3, 2017

By:



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2017, I served the foregoing, *DEFENDANT, FATHI YUSUF AND DEFENSE COUNSEL'S OPPOSITION TO PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS*, via e-mail addressed to:

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Christiansted, USVI 00820
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Michele Barker

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EXHIBIT 1

February 22, 1999

FIRST PRIORITY MORTGAGE

THIS MORTGAGE ("Mortgage") is made this 15 day of September, 1997, between Sixteen Plus Corporation, whose address is 4C & D Sion Farm, Christiansted, St. Croix, 00820, ("Borrower") and Manal Mohamad Yousef ("Lender") whose address is 25 Gold Finch Road, Pointe Blanche, St. Martin, N.A.;

WITNESSETH:

A. Borrower is justly indebted to Lender in the principal sum of Four Million, Five Hundred Thousand Dollars (\$4,500,000) or so much thereof as shall have been advanced and remains unpaid, which indebtedness is evidenced by a Promissory Note in such principal amount, dated of even date herewith and hereinafter referred to as the "Note" and bears interest at the rate or rates and under the terms set forth in the Note, (said Note is incorporated herein by reference and made a part hereof); and

B. Borrower wishes to secure the full and punctual payment of the Note and the indebtedness evidenced thereby, and interest thereon, and the full performance of all the provisions, conditions, covenants and agreements herein contained or in any other document executed in connection herewith, and also to secure the reimbursement to the Lender for any and all money which may be advanced as herein provided for, and for any and all costs and expenses herein provided for or which may arise in respect of this Mortgage or the indebtedness hereby secured or the Property herein mentioned (collectively "Obligations").

NOW, THEREFORE, the Borrower does hereby grant, convey and give to the Lender a first priority mortgage on the following described property (collectively "Property") to secure the full and punctual payment and performance of the Obligations:

SEE EXHIBIT A

Together with

(a) all improvements now or hereafter erected thereon, and all modifications, additions, restorations and replacements of such improvements; and all rights-of-way, uses, servitude, licenses, tenements, hereditament, appurtenances, rights, privileges, and easements now or hereafter belonging or pertaining thereto; and

(b) all the appliances, fixtures, equipment, building materials and other personal property now or hereafter owned by the Borrower and located on the premises described above, whether or not incorporated in the improvements constructed thereon, and necessary to the use and occupancy thereof; and

(c) all awards and other payments in respect of any taking (as described in Section 12 herein below) in respect of any of the foregoing, together with all amounts received by the Lender, or expended by the Lender pursuant to this Mortgage; and

(d) all of the Borrower's rights, benefits, title and interest as lessor, in and to any agreement to lease, leases, licenses, concession agreements and other agreements granting a right or privilege to use or occupy any portion of the Property (collectively "Leases") now or hereafter in existence and pertaining to all or any portion of the Property described above, together with any and all rents, issues, profits, revenues, income, earnest money or security deposits made pursuant to such Leases from the Property or any part thereof (collectively "Rents"), and any and all guarantees of performance under any such Leases.

IT IS HEREBY COVENANTED by the parties hereto that the Property is to be held and applied subject to the further terms herein set forth; and the Borrower, for the Borrower and Borrower's successors and assigns, hereby covenants and agrees with the Lender, as follows:

1. **THE NOTE.**

1.1 **Issuance and Payment of the Note.** The Borrower has issued the Note, and will duly and punctually pay the principal of the interest (if any) on the Note in accordance with the terms thereof, and will otherwise duly comply with the terms of the Note.

1.2 **Prepayment on Taking of the Property.** In case of any taking (as described in Section 11.2 hereof) of the Property, the portion of awards or other payments on account thereof shall be paid to the Lender and applied to the prepayment of the Note, together with interest (if any) on the principal amount of the Note so prepaid accrued to the date of such prepayment, and to the payment of all other indebtedness which this Mortgage secures. Any balance of such awards or other payments remaining after payment in full of the principal of and interest (if any) on the Note and all other indebtedness which this Mortgage by its terms secures shall be paid to the Borrower.

1.3 **Replacement of Note.** Upon receipt of evidence reasonably satisfactory to the Borrower of the loss, theft, destruction or mutilation of the Note and, in the case of nay loss, theft or destruction, upon delivery of an indemnity agreement reasonably satisfactory to the Borrower or, in the case of any such mutilation, upon surrender and cancellation of such Note, the Borrower will issue, in lieu thereof, a new Note, dated the date to which interest has been paid on the lost, stolen, destroyed or mutilated Note and otherwise of like tenor, with appropriate variations.

2. **AUTHORITY.** The Borrower represents and warrants that the Borrower has good and lawful right and authority to execute this Mortgage and to mortgage the Property, and that the Borrower is well seized and possessed of a fee simple title to the Property. The Borrower, at the Borrower's expense, will warrant and defend to the Lender and its successors and assigns, for the benefit of the Lender, such interest and the lien and interest of the Lender on and in the Property against all claims and demands and will maintain and preserve such lien as long as the Note is outstanding.

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3. **RECORDATION; PRESERVATION OF LIEN.** The Borrower at its expense, will at all times cause this Mortgage and any supplements hereto, and such other instruments as may be required by applicable law, to be recorded, registered and filed and to be kept recorded, registered and filed in such manner and in such places, and will pay all such recording, registration, filing or other taxes, fees and charges, and will comply with all such statutes and regulation, as may be required by law in order to establish, preserve and protect the lien of this Mortgage on all of the Property and the rights of the Lender hereunder.

4. **COMPLIANCE WITH APPLICABLE LAWS.** Borrower shall comply with all applicable laws, ordinances, rules, regulations, and codes applicable to the Property, including the use and possession thereof and any business located thereon. Borrower has received no notice of, and neither knows of, nor suspects any facts which might constitute any violations of any federal or territorial health, safety or environmental laws, codes, ordinances, rules or regulations with respect to the Property, including the use or possession thereof and any business located thereon.

5. **HAZARDOUS WASTE.** There shall be no emission, spill, release or discharge into or upon the air, soil or any improvements located thereon, surface water or ground water, or the sewer, septic system or waste treatment storage or disposal systems servicing the property, of any hazardous or toxic substances or wastes at or from the Property or otherwise and the Property shall be kept free from all such hazardous or toxic substance or wastes.

6. **LITIGATION.** No litigation, arbitration, condemnation, re-zoning or administrative proceedings are presently pending or, to Borrower's knowledge, threatened, which if adversely determined might have a material adverse effect on the Borrower, the financial condition of Borrower or upon the respective property rights of Borrower. Notwithstanding anything to the contrary set forth herein the parties recognize that a proposed land and water use plan may adversely impact the value of the property.

7. **PAYMENT OF TAXES, ETC.** Subject to Section 9 relating to contests, the Borrower will pay or cause to be paid all taxes, assessments (including, without limitation, all assessments for public improvements or benefits, whether or not commenced or completed prior to the date hereof), water, sewer or other rents, rates and charges, excises, levies, license fees, permit fees, inspection fees and other authorization fees and other charges, in each case whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any character (including all interest and penalties thereon), which at any time may be assessed, levied, confirmed or imposed on or in respect of or be a lien upon (a) the Property or any part thereof or any rent therefrom or any estate, right or interest therein, or (b) any occupancy, use or possession of or activity conducted on the Property or any part thereof. Such payments will be made before any fine, penalty, interest or cost may be added for nonpayment, and the Borrower will furnish to the Lender, upon request, official receipts or other satisfactory proof evidencing such payments.

8. **CONSTRUCTION LIENS.** Subject to Section 9 relating to contests, the

Borrower shall not, without the Lender's prior written approval, directly or indirectly create or permit or suffer to be created or to remain, and will discharge, or cause to be discharged within thirty (30) days after issuance thereof, any construction lien with respect to the Property or any part thereof, or the Lender's interest therein.

9. **PERMITTED CONTESTS.** The Borrower or a tenant under any lease, at its expense, may contest (after prior written notice to the Lender) by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any mechanics' lien, construction lien, or taxes or other charges enumerated in Section 7 or lien therefor or the application of any instrument of record referred to in Section 8 provided, that (a) in the case of unpaid mechanics' liens, construction liens, or taxes or other charges enumerated in Section 7 or liens therefor, such proceedings shall suspend the collection thereof from the Borrower, the Lender and the Property; (b) neither the Property nor any part thereof or interest therein would be in any danger of being sold, forfeited or lost; (c) neither the Borrower nor the Lender would be in any danger of any additional civil or any criminal inability for failure to comply therewith (except interest, or penalties in the nature of interest, and attorney's fees or court costs) and the Property would not be subject to the imposition of any additional lien as a result of such failure; and (d) the Borrower shall have deposited adequate monies with respect thereto with the lender, who shall have the power to pay such contested amounts in the event the Property is in danger of forfeiture or the Lender is in danger of being held civilly or criminally liable with respect thereto, or, in the event the contested matter is the subject of litigation, the Borrower shall have deposited in a fund administered by the court adequate moneys therefor (as determined by the Lender).

10. **NOTICES CONCERNING THE PROPERTY.** The Borrower will deliver to the Lender, promptly upon receipt of the same, copies of all notices, certificates, documents and instruments received by the Borrower which materially affect the Property.

11. **TAKING; APPLICATION OF AWARD.**

11.1. **Borrower to Give Notice, etc.** In case of any taking of all or any part of the Property, or any interest therein or right accruing thereto as the result of or in lien or in application of the exercise of the right of condemnation or eminent domain during the term hereof, the Borrower shall promptly give to the Lender written notice generally describing the nature of the proceedings and negotiations for such taking and the nature and extent of the taking which might result therefrom, as the case may be. The Lender may appear in any such proceedings and negotiation, and the Borrower shall promptly give to the Lender copies of all notices, pleadings, determinations and other papers in any such proceedings. The Borrower will in good faith and with due diligence file and prosecute any claim or claims for any award or payment on account of any taking of the Property, will pay all costs and expenses (including, without limitation, attorneys' fees and the expense of the Lender) in connection with any such taking and seeking and obtaining any award or payment on account thereof. Such costs and expenses shall constitute indebtedness secured by this Mortgage.

11.2 Taking. In the case of a taking of whatever nature, total or partial, of the Property or any portion thereof, any payment or award on account of such taking shall be collected and paid over in accordance with the provisions of Section 1.2 hereof.

12. INTENTIONALLY OMITTED.

13. INTENTIONALLY OMITTED.

14. NO CREDIT FOR PAYMENT OF TAXES. The Borrower shall not be entitled to any credit against the Principal of and interest, if any, on the Note, or any other sums which may become payable under the terms thereof or hereof, by reason of the payment of any tax on the Property or any part thereof.

15. EVENTS OF DEFAULT: DECLARATION OF NOTICE DUE. If one or more of the following events (herein referred to as "Events of Default") shall occur:

(a) if the Borrower shall fail to pay any principal of or interest, if any, on the Note when the same becomes due and payable (whether at maturity or on a date fixed for any interest payment, any installment payment, any prepayment or otherwise) and such default is not cured within fifteen (15) days after the payment due date; or

(b) if the Borrower shall fail to perform or comply with any of the other terms of this Mortgage and such default is not cured within thirty (30) days after the effective date of written notice from Lender to Borrower; or

(c) if the Borrower shall make an assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts as they become due, or shall file a petition in bankruptcy, or shall be adjudicated a bankrupt or insolvent, or shall file a petition seeking any arrangement, composition, readjustment or similar relief under any present or future statute, law or regulation, or shall file an answer admitting or not contesting the material allegations of a petition filed against it in any such proceeding, or shall seek or consent to or acquiesce in the appointment of any trustee or receiver; or

(d) if, within sixty (60) days after the commencement of any proceeding against the Borrower which seeks any arrangement, composition or similar relief under any present or future statute, law or regulation, such proceeding shall not have been dismissed, or if, within sixty (60) days after the appointment of any trustee or receiver of the Borrower, without the consent or acquiescence of the Borrower, such appointment shall not have been vacated; or

(e) if the Borrower assigns or sells, or further encumbers, its interest in all or any part of the Property or if the Beneficial Ownership of Borrower shall change in violation of paragraphs 30, 31 and/or 32;

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Then and in any such event (regardless of the pendency of any proceeding which has or might have the effect of preventing the Borrower from complying with the terms of the Mortgage), the Lender may at any time, without notice to declare the entire unpaid principal balance and all other indebtedness evidenced by the Note and/or secured by this Mortgage to be immediately due and payable, without presentment, demand, protest or notice, all of which are hereby waived.

16. **REMEDIES OF THE HOLDER OF THE NOTE.**

16.1 **Legal Proceedings.** If an Event of Default shall have occurred, the Lender may proceed to foreclose this Mortgage and to protect and enforce its rights by any action at law, suit in equity or other appropriate proceeding, whether for the specific performance of agreement contained herein, or for an injunction against the violation of any of the terms hereof, or in aid of the exercise of any power granted hereby or by law.

16.2 **Cost of Enforcement.** The Borrower shall pay on demand all costs and expenses (including, without limitation, attorneys' fees and expenses) incurred by or on behalf of the Lender in enforcing this Mortgage, the Note, or any of the other documents executed in connection herewith, or occasioned by any default hereunder or thereunder. Such costs and expenses shall constitute indebtedness secured by this Mortgage.

16.3 **No Waiver.** Neither failure or any delay on the part of the Lender to exercise any right, remedy, power or privilege provided for herein or by statute or at law or in equity or otherwise shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, remedy, power or privilege preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

17. **INTENTIONALLY OMITTED.**

18. **FORECLOSURE.** If an Event of Default shall have occurred, the Lender may at any time proceed at law or in equity or otherwise to foreclose the lien of this Mortgage as against all or any part of the Property. Borrower hereby expressly waives all rights to require Lender to first resort to the sale of any portion of the Property before foreclosing upon and/or selling any other portion(s) of the Property which is subject to this Mortgage and Borrower hereby agrees that Lender, at Lender's sole discretion, may elect to sell any one or more portion of the property in one or more Marshal's sales.

19. **APPOINTMENT OF RECEIVER.** If an Event of Default shall have occurred, the Lender shall be entitled, as a matter of right without regard to the adequacy or inadequacy of the Lender's security, to the appointment of a receiver for all or any part of the Property, whether such receivership is incidental to a proposed sale of the Property or otherwise, and the Borrower hereby consents to the appointment of such a receiver and shall not oppose any such appointment.

20. **PURCHASE OF PROPERTY BY THE HOLDER OF THE NOTE.** The Lender may be a purchaser of the Property or of any part thereof or of any interest therein at any foreclosure sale thereof and may apply upon the purchase price the indebtedness secured hereby owing to the Lender. The Lender shall, upon any such purchase, acquire good title to the properties so purchased, free of the lien of this Mortgage and free of all liens and encumbrances subordinate to the Mortgage.

21. **RECEIPT A SUFFICIENT DISCHARGE TO PURCHASER.** Upon any sale of the Property or any part thereof or any interest therein pursuant to foreclosure, the receipt of the officer making the sale under judicial proceedings shall be sufficient discharge to the purchaser for the purchase money, and such purchaser shall not be obliged to see to the application thereof.

22. **APPLICATION OF PROCEEDS OF SALE.** The proceeds of any sale of the Property or any part thereof or any interest therein pursuant to foreclosure or otherwise hereunder, together with any other monies at any time held by the Lender pursuant to this Mortgage, shall be applied to pay:

FIRST: All costs and expenses of the sale of the Property or any part thereof or any interest in connection therewith, or all costs and expenses of entering upon, taking possession of, removal from, holding, operating and managing the Property or any part thereof, as the case may be, reasonable attorneys' fees, and any taxes, assessments or other charges, prior to the lien of this Mortgage, which the Lender may consider it necessary or desirable to pay;

SECOND: All amounts of principal and interest at the time due and payable on the Note (whether at maturity or on a date fixed for any installment payment or any prepayment or by declaration and acceleration or otherwise), and in case such monies shall be insufficient to pay in full the amount so due an unpaid upon the Note, then, first, to the payment of all amounts of interest at the time due and payable on the Note, without preference or priority of any installment of interest over any other installment of interest, and, second, to the payment of all amounts of principal a the time due and payable on the Note, without preference or priority of any amount of principal over any other amount of principal;

THIRD: Any other indebtedness secured by this Mortgage and at the time due and payable (whether by acceleration or otherwise);

FOURTH: Any indebtedness secured by any lien on the Property which is subordinate to the lien of this Mortgage; and

FIFTH: Any balance to the Borrower.

23. **REMEDIES CUMULATIVE.** Each right, power and remedy of the Lender

provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise of any one or more of such rights, shall not preclude the simultaneous or later exercise of any or all such other rights, powers or remedies.

24. **NO WAIVER, ETC.** No failure by the Lender or the holder of the Note to insist upon the strict performance of any term hereof or to exercise any right, power or remedy consequent upon a breach thereof, shall constitute a waiver of any such term or any such breach. No waiver of any breach shall affect or alter this Mortgage, which shall continue in full force and effect with respect to any other then existing or subsequent breach.

25. **FURTHER ASSURANCES.** The Borrower at its expense will execute, acknowledge and deliver all such instruments and take all such actions as the Lender from time to time may reasonably request for the better assurance to the Lender of the Property and rights now or hereafter subjected to the lien hereof or assigned hereunder or intended so to be subjected or assigned.

26. **INDEMNIFICATION BY THE BORROWER.** The Borrower will protect, indemnify and save harmless the Lender from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against the Lender by reason of (a) its Mortgage interest in the Property, or receipt of any rent or other sum therefrom; (b) any accident, injury to or death of persons or loss of or damage to property occurring on or about the Property; (c) any use, non-use or condition of the Property; (d) any failure on the part of the Borrower to perform or comply with any of the terms of this Mortgage or the terms of any other documents executed in connection herewith; or (e) performance of any labor or services or the furnishing of any materials or other property in respect of the property or any part thereof for construction or maintenance or otherwise. Provided, however, that the foregoing indemnification provision shall not be applicable to any occurrence arising after the Lender retakes possession of the Property in connection with a default by the Borrower. Any amounts payable to the Lender under this Section which are not paid within ten (10) days after written demand therefor by the Lender shall bear interest at the rate set forth in the Note from the day of such demand and shall be secured by this Mortgage. In case any action, suit or proceeding is brought against the Lender by reason of any such occurrence, the Borrower, upon the Lender's request, will at the Borrower's expense resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by the Borrower and approved by the Lender. Such obligations of the Borrower under this Section as shall have accrued at the time of any termination or satisfaction of this Mortgage shall survive any such termination or satisfaction.

27. **RIGHT OF HOLDER OF THE NOTE TO PERFORM BORROWER'S COVENANTS, ETC.** If the Borrower fails to make any payment or perform any act required

to be made or performed hereunder, the Lender, after such notice to the Borrower as may be reasonable under the circumstance, and without waiving or releasing any obligation or default, may (but shall be under no obligation or default, may (but shall be under no obligation to) at any time hereafter make such payment or perform such act for the account and at the expense of the Borrower, and may enter upon the Property or any part thereof for such purpose and take all such action thereon as, in the opinion of the Lender, may be necessary or appropriate therefor. All sums so paid by the Lender and all costs and expenses (including, without limitation, attorney's fees and expenses) so incurred, together with interest thereon at the rate set forth in the Note, from the date of payment or incurring, shall constitute indebtedness secured by this Mortgage and shall be paid by the Borrower to the Lender on demand.

28. **PROVISIONS SUBJECT TO APPLICABLE LAW.** All rights, power and remedies provided herein may be executed only to the extent that the exercise thereof does not violate any applicable law, and are intended to be limited to the extent necessary so that they will not render this Mortgage invalid, unenforceable or not entitled to be recorded, registered or filed under any applicable law. If any term of this Mortgage shall be held to be invalid, illegal or unenforceable, the validity of other terms of the Mortgage shall in no way be affected thereby.

29. **NOTICES.** All notices and other communications hereunder shall be in writing and shall be deemed to have been given when hand delivered or mailed by first class certified mail, postage prepaid, return receipt requested, to the address given at the beginning of this Mortgage or at such other address as a party may have furnished to the other party by written notice.

30. **ASSIGNMENT.**

30.1. **Assignment by Borrower.** This Mortgage shall be binding upon the Borrower and the Borrower's successors and assigns, and all persons claiming under or through the Borrower or any such successor or assign, and shall inure to the benefit of and be enforceable by the Lender and the successors and assigns thereof; provided, however that the Borrower hereby agrees that the Borrower will not sell, assign or convey the Borrower's interest in the Property until all amounts of principal and interest at the time due and payable under the Note have been paid in full, without the prior written consent and approval of the Lender, which consent may be withheld for any reason or no reason at all. If legal or equitable title to the Property or any part thereof shall hereafter change by any means or if the Property or any part thereof shall be further encumbered without Lender's consent, then the indebtedness secured hereby shall become immediately due and payable upon demand of Lender and same shall constitute an Event of Default.

30.2. **ASSIGNMENT BY LENDER.** The Note and this Mortgage may at any time be assigned, in whole or in part, by the Lender and the benefits, advantages, rights and obligations of the Lender hereunder shall inure to the successors and assigns of the Lender. M

31. **TRANSFER OF THE PROPERTY; ASSUMPTION.** If all or any part of the Property or an interest therein is sold or transferred by the Borrower without the Lender's prior written consent (which consent may be withheld for any reason or no reason at all), the Lender may, at the Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable and same shall constitute an Event of Default.

32. **CHANGE OF OWNERSHIP.** In the event beneficial ownership of the Property shall change by any means without the Lender's consent (which consent may be withheld for any reason or no reason at all, then the indebtedness secured hereby shall become immediately due and payable upon demand of the Lender and same shall constitute an Event of Default. For the purposes of this provision, if the Borrower is a corporation, any sale or other change in the controlling or controlling beneficial interest of the corporate stock of Borrower to persons not shareholders of the Borrower as of the date hereof shall be considered a change of ownership requiring the Lender's consent.

33. **ASSIGNMENT OF RENTS.** Borrower hereby absolutely and unconditionally assigns and transfers to Lender all the Rents of the Property, including those now due, past due or to become due by virtue of any one or more of the Leases, regardless of to whom the Rents of the Property are payable. Borrower hereby authorizes Lender or Lender's agents to collect the Rents and hereby directs each tenant of the Property to pay such Rents to Lender or Lender's agents; however, prior to written notice given by Lender to Borrower of the default by Borrower of any covenant or agreement of Borrower in this Mortgage and the expiration of any period of cure therefor, Borrower shall have the right to collect and receive all Rents of the Property as trustee for the benefit of Lender and Borrower, to apply the Rents so collected to the sums secured by this Mortgage with the balance, so long as no such breach has occurred, to the account of Borrower, it being intended by Borrower and Lender that this assignment of Rents constitutes an absolute assignment and not an assignment for additional security only. Upon delivery of written notice by Lender to Borrower of the default by Borrower of any covenant or agreement of Borrower in this Mortgage and the expiration of any period of time therefor and without the necessity of Lender entering upon the taking and maintaining full control of the Property in person, by agent or by a court-appointed receiver, Lender shall be immediately entitled to possession of all Rents of the Property as specified in this paragraph as the same become due and payable, including, but not limited to Rents then due and unpaid, and all such Rents shall immediately be held by Borrower as trustee for the benefit of Lender only; however, the written notice by Lender to Borrower of the breach by Borrower shall contain a statement that Lender exercises its rights to such Rents. Borrower agrees that commencing upon delivery of such written notice of Borrower's breach by Lender to Borrower, each tenant of the Property shall make such Rents payable to and pay such Rents to Lender or Lender's agents on Lender's written demand to each tenant therefor, delivered to each tenant personally, by mail or by delivering such demand to each rental unit, without any liability on the part of the tenant to inquire further as to the existence of a default by Borrower.

33.1 Borrower hereby covenants that Borrower has not executed any prior

assignment of the Rents, that Borrower has not performed and will not perform any acts and has not executed, and will not execute, any instrument which would prevent Lender from exercising its rights under this paragraph, and that at the time of execution of this Mortgage there has been no anticipation or prepayment of any of the Rents of the Property for more than one (1) month prior to the due dates of such Rents. Borrower covenants that Borrower will not hereafter collect or accept payments of any Rents of the Property more than one (1) month prior to the due dates of such Rents. Borrower further covenants that Borrower will execute and deliver to Lender such further assignments of Rents of the Property as Lender may from time to time request.

33.2 Upon Borrower's default of any covenant or agreement of Borrower in this Mortgage, and upon the notice and expiration of period to cure, if any, Lender may in person, by agent or by a court-appointed receiver, regardless of the adequacy of Lender's security, enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases and subleases, the collection of all Rents of the Property, the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. In the event Lender elects to seek the appointment of a receiver for the Property upon Borrower's breach of the covenant or agreement of Borrower in this Mortgage, Borrower hereby expressly consents to the appointment of such receiver. Lender or the receiver shall be entitled to receive a reasonable fee for so managing the Property.

33.3. All Rents collected by Lender pursuant to this Section 33 shall be applied as provided in Section 22 hereof. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall not be liable to Borrower, anyone claiming under or through Borrower or anyone having an interest in the Property by reason of anything done or left undone by Lender under this paragraph.

33.4. If the Rents of the Property are not sufficient to meet the costs, if any, of taking control of and managing the Property and collecting the Rents, any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by this Mortgage. Unless Lender and Borrower agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law.

33.5. Any entering upon and taking and maintaining of Control of the Property by Lender or the receiver and any application of Rents as provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender under applicable law or as provided herein. This assignment of Rents of the Property shall terminate at such time

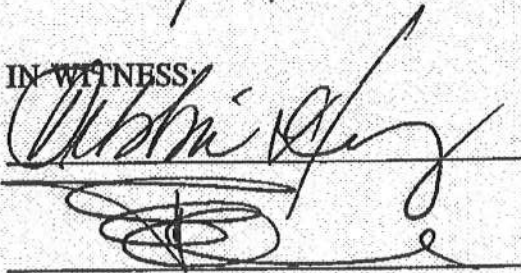
as this Mortgage ceases to secure indebtedness held by Lender.

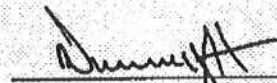
34. MISCELLANEOUS. This Mortgage may be changed, waived, discharged, or terminated only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. The headings in this Mortgage are for convenience of reference only and shall not limit or otherwise affect the meaning hereof. This Mortgage shall be governed by and construed in accordance with the laws of the United States Virgin Islands.

35. INTEREST AND ADVANCES TO PROTECT COLLATERAL. This Mortgage secures and shall secure the Obligations. Without limiting the foregoing, this Mortgage secures any and all interest on the indebtedness, costs of collection, and any advances made by the Lender reasonably necessary for protection of the collateral or otherwise authorized hereby.

IN WITNESS WHEREOF, the Borrower has caused this Mortgage to be duly executed on the date first above written:

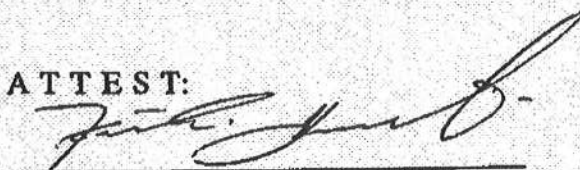
DATED: 9/15/97

IN WITNESS:




Waleed Hamed, President
Sixteen Plus Corporation

[CORPORATE SEAL]

ATTEST:


Rathi Yusuf, Secretary

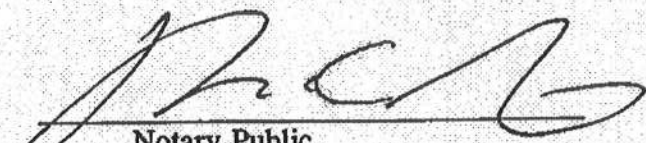
ACKNOWLEDGEMENT FOR CORPORATION

TERRITORY OF THE VIRGIN ISLANDS)
)ss:
DISTRICT OF ST. CROIX)

On this 15th day of September, 1997, before me the undersigned officer, personally appeared **Fathi Yusuf**, known to me (or satisfactorily proven) and this person acknowledged under oath, to my satisfaction, that:

- (a) this person is the Secretary of Sixteen Plus Corporation, the corporation named in this Contract;
- (b) this person is the attesting witness to the signing of this document by the proper corporate officer who is **Waleed Hamad**, the President of the corporation;
- (c) this document was signed and delivered by the corporation as its voluntary act duly authorized by a proper resolution of its Board of Directors;
- (d) this person knows the proper seal of the corporation which was affixed to this document; and
- (e) this person signed this proof to attest to the truth of these facts.

SIGNED AND SWORN to before me on
this 15 day of September, 1997.



Notary Public


22nd Feb
2:51 o'clock p.m.
Recorded and Entered in Recorder's Book for the
District of St. Croix, Virgin Islands of the U.S.A.
Photo copy 1079 Page 33
No. 7108/1999 and noted in Real Property Records
ll: 37.11 Page 27.186; 304, 305 + 3

508.50



EXHIBIT A

1. Parcel No. 8, Estate Cane Garden, of approximately 2.6171 U.S. Acres.
2. Remainder No. 46A, Estate Cane Garden, of approximately 7.6460 U.S. Acres.
3. Parcel No. 10, Estate Cane Garden, of approximately 2.0867 U.S. Acres.
4. Road Plot No. 11, Estate Cane Garden, of approximately 0.0868 U.S. Acres.
5. Parcel No. 11, Estate Retreat, Matr. No. 37B of Company Quarter and Peter's Minde, Matr. No. 37A and 37BA, Company Quarter, and No. 54 Queen's Quarter all of approximately 42.3095 U.S. Acres.
6. Remainder Matr. 32B, Estate Cane Garden of approximately 48.5175 U.S. Acres.
7. Parcel No. 9 Estate Cane Garden, of approximately 11.9965 U.S. Acres.
8. Remainder Matr. 32A, Estate Granard, of approximately 41.0736, U.S. Acres.
9. Parcel No. 40, Estate Granard of approximately 14.9507 U.S. Acres.
10. Remainder Matr. No. 31, Estate Diamond, of approximately 74.4220 U.S. Acres.
11. Parcel No. 4, Estate Diamond, of approximately 5.8662 U.S. Acres.
12. Parcel No. 1, Estate Diamond, of approximately 61.2358 U.S. Acres.
13. Parcel No. 3, Estate Diamond, of approximately 6.9368 U.S. Acres.
14. Parcel No. 2, Estate Diamond, of approximately 6.5484 U.S. Acres.
15. Road Plot No. 12, Estate Cane Garden, of approximately 0.4252 U.S. Acres.
16. Road Plot No. 41, Estate Granard, of approximately 0.4255 U.S. Acres.
17. Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.



20th Feb
8:51 o'clock P.M.
Recorded and Entered in Recorder's Book for
District of St. Croix, Virgin Islands of the U.S.A.
Photo-copy Page 33
No. 1108/1999 and noted in Real Property Register
II: 32, 166 Page 277, 186, 304, 305 & 306
Regina J. Robinson
15

EXHIBIT 2

\$4,500,000

September 15, 1997
St. Croix, U.S.V.I.

PROMISSORY NOTE

FOR VALUE RECEIVED, Sixteen Plus Corporation ("Maker") promises to pay to the order of Manal Mohamad Yousef ("Holder") of 25 Gold Finch Road Pointe Blanche, St. Martin, N.A.;, or such other place as Holder may designate to Maker in writing from time to time, the principal sum of Four Million, Five Hundred Thousand Dollars (\$4,500,000) together with interest at 8% per annum in lawful money of the United States of America.

Such indebtedness shall be paid as follows:

Payments of interest only (\$360,000 per year) will be made on the anniversary of the date of this note for five years, with payment of the full principal due five years from the date of this note.

This Note is secured by a first priority mortgage ("Mortgage"), dated of even date, in favor of the Holder encumbering certain real property known as:

SEE EXHIBIT A

In further consideration for this loan, Maker agrees to pay to Holder 20% of the net profit received from the sale of the property described in Exhibit A at the time of sale.

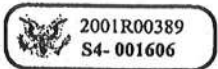
Maker shall pay to holder a late charge in the event that any installment is not received by the Holder on the date that it is due. The late charge shall be computed as follows:

Principal Balance		then applicable		number of days
Outstanding on Note	x	prime rate of	x	between date
		<u>interest plus 1/2%</u>		installment due
				and date
	365			installment
				received.

All payments received by Holder shall be applied as follows: first, to any unpaid late fees, costs and expenses; second, to any unpaid accrued interest; and finally, the balance, if any, to principal.

This Note may be prepaid in whole or in part at any time without penalty or premium. Partial prepayments shall be applied as set forth herein and shall not cause a change in the due date or amount of the installments unless otherwise agreed by the Holder in writing.

It is hereby expressly agreed that should any default be made in the payment of principal and interest as stipulated above, and if such monetary default remains uncured for a period of fifteen (15) days, or if there is any default in any of the terms and conditions of the Mortgage, subject to the Notice provision, if any, in said instrument, then a default shall exist hereunder, and in such event the principal indebtedness evidenced hereby, and any other sums advanced or



due hereunder or under the Mortgage, at the option of the Holder without notice or demand, at once become due and payable and may be collected forthwith, and the entire unpaid principal balance of this Note shall thereafter bear interest at a per annum rate equal to eighteen percent (18.0%) per annum simple interest. A default shall be cured hereunder only upon the occurrence of the following:

- Payment of the sum and/or performance of the obligation which was the basis of the default; and
- Payment of all sums (including late fees and subsequent installments) and/or performance of all obligations which have become due hereunder as of the date of cure.

In the event this Note, or any part thereof, is collected by or through an attorney-at-law, Maker agrees to pay all costs of collection including, but not limited to, attorney's fees and court costs. Any notice sent in connection with this Note shall be sent in compliance with the notice provisions contained in the Mortgage.

Presentment for payment, demand, protest, notice of demand, protest and non-payment are hereby waived by Maker.

This Note is intended as a contract under and shall be construed, interpreted, and enforceable in accordance with the laws of the United States Virgin Islands.

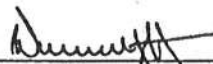
As used herein, the terms "Maker" and "Holder" shall be deemed to include their respective heirs, successors, legal representatives and assigns, whether by voluntary actions of the parties or by operation of law. In the event that more than one person, firm or entity is a Maker hereunder, then all references to "Maker" shall be deemed to refer equally to each of said persons, firms, or entities, all of whom shall be jointly and severally liable for all of the obligations of Maker hereunder.

IN WITNESS WHEREOF, Maker has caused this Note to be executed by its duly authorized officer effective the date first above written.

DATED: 9/15/97

MAKER:

SIXTEEN PLUS CORPORATION


Waleed Hamed, President

[Corporate SEAL]

ATTEST:


Fathi Yusuf, Secretary



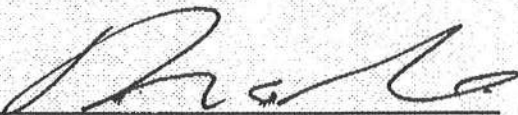
ACKNOWLEDGEMENT FOR CORPORATION

TERRITORY OF THE VIRGIN ISLANDS)
) SS:
DIVISION OF ST. CROIX)

On this 15 day of Sept., 1997, before me the undersigned officer, personally appeared Waleed M. Hamed, known to me (or satisfactorily proven) and this person acknowledged under oath, to my satisfaction, that:

- (a) this person is the President of Sixteen Plus Corporation, the corporation named in this Note;
- (b) this document was signed and delivered by the corporation as its voluntary act duly authorized by a proper resolution of its Board of Directors;
- (c) this person knows the proper seal of the corporation which was affixed to this document; and
- (d) this person signed this proof to attest to the truth of these facts.

SIGNED AND SWORN to before me on
this 15 day of Sept., 1997.



Notary Public



EXHIBIT A

1. Parcel No. 8, Estate Cane Garden, of approximately 2.6171 U.S. Acres.
2. Remainder No. 46A, Estate Cane Garden, of approximately 7.6460 U.S. Acres.
3. Parcel No. 10, Estate Cane Garden, of approximately 2.0867 U.S. Acres.
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5. Parcel No. 11, Estate Retreat, Matr. No. 37B of Company Quarter and Peter's Minde, Matr. No. 37A and 37BA, Company Quarter, and No. 54 Queen's Quarter all of approximately 42.3095 U.S. Acres.
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17. Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.

MA

EXHIBIT 3

SIXTEEN PLUS CORPORATION

SUPERIOR COURT
THE VIRGIN ISLANDS

2017 MAR -6 PM 4:44

UNANIMOUS CONSENT OF DIRECTORS
IN LIEU OF A MEETING

Pursuant to the provisions of Title 13, V.I.C. § 67b, the undersigned, constituting all of the Directors of Sixteen Plus Corporation (the "Company"), do hereby unanimously consent to the actions set forth below as though such actions had been taken at a meeting of the Board of Directors:

1. The Directors hereby approve the terms of a Promissory Note and First Priority Mortgage between the Company and Manal Mohamad Yousef.

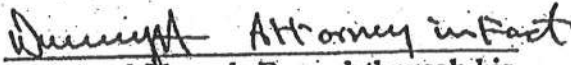
2. The President or Vice President are authorized to execute any and all documents on behalf of the Corporation that they may deem necessary or appropriate to carry out the obligations of the Corporation, including, without limiting the generality of the foregoing, the execution of a Note and Mortgage substantially in the form attached as exhibits hereto.

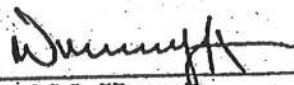
3. The Company agrees to borrow \$4,500,000 from Manal Mohamad Yousef in accordance with the terms of the aforesaid Promissory Note.

This written consent shall be filed with the minutes of the Corporation.

DATE: September 15, 1997.


Fathi Yusuf


Mohamad Hamed, By and through his
attorney-in-fact, Waleed M. Hamed


Waleed M. Hamed

295-1412