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

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| **HISHAM HAMED**, derivatively, on behalf of **SIXTEEN PLUS CORPORATION**,<br><br>Plaintiff,<br><br>vs.<br><br>**FATHI YUSUF, ISAM YOUSUF** and **JAMIL YOUSEF**,<br><br>Defendants,<br><br>and<br><br>**SIXTEEN PLUS CORPORATION,**<br><br>a nominal defendant. | Case No.: 2016-SX-CV-650<br><br>DERIVATIVE SHAREHOLDER SUIT, ACTION FOR DAMAGES, CICO RELIEF, EQUITABLE RELIEF AND INJUCTION<br><br>**JURY TRIAL DEMANDED** |

**DEFENDANT FATHI YUSUF'S RESPONSE TO PLAINTIFF'S "NOTICE OF SUPPLEMENTAL AUTHORITY"**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, hereby responds to Plaintiff, Hisham Hamed's "Notice of Supplemental Authority," dated April 10, 2017.

## I. INTRODUCTION

Plaintiff incorrectly claims both that: 1) the new Virgin Islands Rules of Civil Procedure have transformed the Virgin Islands into "notice pleading" jurisdiction; and 2) because the Virgin Islands is now a "notice pleading" jurisdiction, the Court should not apply the *Twombly/Iqbal* standard when ruling on Mr. Yusuf's Motion to Dismiss. To the contrary, the Supreme Court of the Virgin Islands ("SCVI") recognized the Virgin Islands as a "notice pleading" jurisdiction years prior to the recent enactment of the Virgin Islands Rules of Civil Procedure. Further, the SCVI—while recognizing the Virgin Islands as a notice pleading jurisdiction—has specifically held that motions to dismiss are to be evaluated using the three-

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part analysis set forth in *Twombly* and *Iqbal*. The new rules of civil procedure do not change these basic and long established principles. The new Virgin Islands Rule of Civil Procedure 8 merely represents a change in citation from Federal Rule of Civil Procedure 8 made applicable to the Superior Court by previous Superior Court Rule 7. Therefore, given that Plaintiff's "supplemental authority" is in diametric opposition to binding precedent of the SCVI—none of which was cited by Plaintiff in derogation of Virgin Islands Rule of Civil Procedure 11(e)—it is properly disregarded by the Court.

## II. MEMORANDUM OF LAW

### A. The Virgin Islands Is Now and Has Always Been a Notice Pleading Jurisdiction

Prior to the enactment of the Virgin Islands Rules of Civil Procedure, Federal Rules of Civil Procedure 8 and 12(b)(6) applied to cases in Superior Court. *See Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2012) ("Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7, which provides that "[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by ... the Federal Rules of Civil Procedure."). Importantly, Federal Rule of Civil Procedure 8 embodies the liberal pleading procedure known as "notice pleading" and has been so recognized by the SCVI. *See Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011) (explaining that Rule 8 requires only a short and plain statement of the claim and its grounds, and thus embodied the liberal pleading procedure known as "notice pleading"). Accordingly, because Federal Rule of Civil Procedure 8 previously applied to proceedings in Superior Court, the Virgin Islands' "notice pleading" standard pre-dated the enactment of the Virgin Islands Rules of Civil Procedure. Thus, Plaintiff's claim that the Virgin Islands has become a "notice

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pleading" jurisdiction with the enactment the Virgin Islands Rules of Civil Procedure is incorrect.

### B. The Supreme Court of the Virgin Islands Has Determined that the Three-Part Analysis Set Forth in *Twombly* and *Iqbal* Applies in this Jurisdiction, a Notice Pleading Jurisdiction

During the time Federal Rule of Civil Procedure 8 applied and required notice pleading in the Superior Court, the SCVI specifically adopted *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. *See e.g., Brady v. Cintron*, 55 V.I. 802, 822-3 (V.I. 2011). Further, the SCVI recognized that "in *Twombly* the [U.S.] Supreme Court expressly reaffirmed that Rule 8 requires only a short and plain statement of the claim and its grounds, and thus did not abandon the liberal pleading procedure known as 'notice pleading.'" *See Joseph*, 54 V.I. at 650 (internal quotation marks omitted).[1] The SCVI also explained that in *Twombly* and *Iqbal* the U.S. Supreme Court interpreted Federal Rule of Civil Procedure 8 to require a complaint to set forth a plausible claim for relief, and articulated the proper three-part standard for evaluating motions to dismiss for failure to state a claim. *See Brady*, 55 V.I. at 822-3 (citing *Robles v. HOVENSA, LLC,* 49 V.I. 491, 501 (V.I. 2008). Thus, the SCVI concluded, "under *Robles, Twombly,* and *Iqbal,* courts must undertake a three step analysis to determine whether a complaint states a plausible claim for relief." *Id.* at 823. The appropriate analysis when deciding a motion to dismiss was—and remains—as follows:

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[1] *See also Hamilton v. Palm*, 621 F.3d 816, 817, 819 (8th Cir. 2010) (decisions in *Twombly* and *Iqbal* did not abrogate notice pleading standard of Fed.R.Civ.P. 8(a)(2)); *Doss v. Clearwater Title, Co.*, 551 F.3d 634, 639 (7th Cir. 2008) ("The [U.S.] Supreme Court's decision in *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts."); *Gross v. Nationwide Credit, Inc.*, Case No. 1:10-CV-00738, 2011 WL 379167, at *3 (S.D. Ohio 2011) ("The federal rules still provide for notice pleading, not fact pleading, and *Iqbal* and *Twombly* did not rewrite the rules. What *Iqbal* and *Twombly* do require is that plaintiffs provide factual allegations from which a court may plausibly infer a cause of action.").

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

*Id.* Because the Virgin Islands was a "notice pleading" jurisdiction prior to the enactment of the Virgin Islands Rules of Civil Procedure, the SCVI's decisions during that period adopting *Twombly* and *Iqbal* plainly still apply. Accordingly, Plaintiff's "Notice of Supplemental Authority" which incorrectly claims: 1) a recent transformation of this jurisdiction to a "notice pleading" jurisdiction; and 2) the three-part test for evaluating a complaint previously established by the SCVI no longer applies because of that alleged change, should be wholly ignored by the Court and the *Twombly/Iqbal* three-part test applied when deciding Mr. Yusuf's Motion to Dismiss Plaintiff's First Amended Complaint.

Respectfully Submitted,

**DUDLEY, TOPPER AND FEUERZEIG, LLP**

**DATED**: May 3, 2017 By:

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of May, 2017, I served the foregoing *DEFENDANT FATHI YUSUF'S RESPONSE TO PLAINTIFF'S "NOTICE OF SUPPLEMENTAL AUTHORITY,"* which complies with the page and word limitations set forth in Rule 6-1(e), via electronic mail addressed to:

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