

**IN THE SUPERIOR COURT OF THE VIRGIN ISLAND
DISTRICT OF ST. CROIX**

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

Plaintiff,

v.

FATHI YUSUF, ISAM YOUSUF and
JAMIL YOUSUF,

Defendants,

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant.

Case No.: SX-2016-CV-00650

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

JURY TRIAL DEMANDED

**HISHAM HAMED’S REPLY
TO FATHI YUSUF’S OPPOSITION
TO HAMED’S MOTION TO AMEND HIS FIRST AMENDED COMPLAINT
(TO JOIN MANAL YOUSEF AS A DEFENDANT)**

On December 18, 2022, Hisham Hamed (“Hamed”) filed a *Motion to Amend his First Amended Complaint* (“FAC”) seeking to join Manal Yousef (“Manal”) as a defendant. Following a mutually agreed extension, on January 23, 2023, Fathi Yusuf (“Fathi”) filed his timely opposition. Undersigned counsel submits the following in reply.

Hamed notes that he is simultaneously submitting his motion for leave to file a supplemental complaint—although that Second Amended and Supplemental Complaint (“SASC”) is *identical* to the Second Amended Complaint (“SAC”) already submitted with this motion.

1. Facts and Law Not Disputed in the Opposition

Fathi does not dispute the following facts and law in Hamed’s motion:

—*This motion is controlled by V.I. R. CIV. P. 15(a)(2).* Fathi does not discuss the applicable standards—he cites no caselaw regarding amendment, nor does he discuss Rule 15(a).

—*Rule 15(a)(2) provides: “The court should freely give leave when justice so requires.”* Fathi does not respond to this. To the contrary, as discussed below, he attempts to suggest, without any citations, that the standard is far more onerous than it is.

—*The V.I. Supreme Court’s decision in Davis v. UHP Projects, Inc.,¹ controls here.* Hamed asks that his virtually verbatim discussion of *Davis*, as it was not even addressed by Fathi, be deemed conceded.

—*Fathi Yusuf (“Fathi”), Isam Yousuf (“Isam”) and Jamil Yousuf (“Jamil”) have not yet answered the FAC.* The fact that no answers have been filed is *mentioned* in the opposition—but the effect of that absence pursuant to Rule 15(a) and *Davis* is not disputed. Thus, this should be deemed conceded.

—*All three of those defendants filed motions to dismiss stating Manal is a necessary party.* Again, this is *mentioned* in the opposition, but not in the context of either the rule or *Davis*. Thus, it is not disputed, and should be deemed conceded. Instead Fathi (again) makes the puzzling assertion, at 1 of the opposition, that Hamed “fails to join an indispensable party, Manal Yousef.”

—*No depositions have been taken in the action, and time for taking is enlarged.* The opposition contains no dispute of Hamed’s discussion of this under *Davis*—or how these defendants might be prejudiced in any manner discussed by that court. Thus, this should also be deemed conceded.

II. Fathi’s Assertions

Fathi makes four basic assertions. Hamed will address each of the four, *verbatim*, as they appear in his opposition.

1. At 1, (in the introduction) “there currently remains pending since January 2017, Yusuf’s Motion to Dismiss Plaintiff’s First Amended Complaint (“FAC”)” And, at 2, (numbered section II): “Fatal deficiencies in the first amended complaint remain, thus, amendment would be futile.”
2. At 1: “since the statute of limitations has long since passed on these claims, there is nothing that can be done to resurrect the stale claims.”
3. At 2, (numbered section I): “Plaintiff seeks more than to just add a party.”
4. At 3: “[There has been] undue delay as to the addition of Manal Yousef.”

III. Hamed’s Replies on a Point-by-Point Basis

¹ See 74 V.I. 525 (2021).

1. *At 1*, “there currently remains pending since January 2017, Yusuf’s Motion to Dismiss Plaintiff’s First Amended Complaint (“FAC”)” And, at 2, (numbered section II): “Fatal deficiencies in the first amended complaint remain, thus, amendment would be futile.”

It is apparent that if the Court decides the two pending motions to dismiss first, and they are granted in full, the instant motion to amend will be of no effect. If, however, this motion is granted first, it is likely defendants will either replace or revise their motions to dismiss. In either case, there appears to be no reason to re-argue those motions here.

2. *At 1*: “since the statute of limitations has long since passed on these claims, there is nothing that can be done to resurrect the stale claims.”

Fathi next makes the argument that the statute of limitations has run, which *prevents amendment*. Although this too is addressed in the motions to dismiss, because it is referred to repeatedly in the opposition, Hamed responds.

In his 2017 motion to dismiss, Fathi argues, at 2, that the SOL ran long before this litigation began—it was “complete in 1997.”

Plaintiff has failed to plead a viable CICO conspiracy claim given that the alleged conspiracy was complete in 1997 when the alleged “sham mortgage” was given by Sixteen Plus.

Hamed noted then that he was not pursuing the original 1997 creation of a sham note and mortgage here, but rather *new acts* in which defendants used, within the SOL, documents known by them to be false—to commit a new series of illegal and tortious acts intended to defraud, steal from and bankrupt Sixteen Plus. The origination of the documents is irrelevant to the SOL. The documents being used for the CICO conspiracy from 2015 to the present could be *any* documents—of *any* date, of *any* origin—so long as the defendants knew them to contain false information *when used*. That Fathi, Wally, Isam and Manal created them, or the dates of creation are immaterial to the SOL in this action by Hisham Hamed regarding new acts. Thus, Manal is accused of *presently* being a co-conspirator in a *present*

conspiracy to use documents that she and the other CICO conspirators know² (from their historical involvement) falsely recite consideration she never provided.

Indeed, one of the new (post-FAC) facts is that Manal filed her own foreclosure action in 2017 using documents that falsely related that the funds used to buy the land were hers—*and continues to press the litigation every day.*³ It is alleged in the Second Amended Complaint (“SAC”) that the present, continuing prosecution of this post-FAC litigation is an ongoing, central act in furtherance. As discussed in detail below, every day she, with the assistance of her family members, maintains the current legal action and they all make endless false statements in support, that ongoing conspiracy tolls the SOL.⁴ Thus, in addition to the original criminal and tortious acts alleged in the FAC involving mail fraud, wire fraud, and other non-litigation acts, both the maintenance of that litigation and many false, post-FAC statements (both here and in the companion 65/342 foreclosure action) are

² Again, the fact that she joined with others in the new use of the documents and that they recite false statements is the critical point, not that she was one of the creators—or that she gained this knowledge she is using now in 1997. There is no statute of limitations on the source of knowledge of items being used to press false claims in the present.

³ Nor is the concept of litigation being one of the acts in a CICO conspiracy a novel one, even in this case. One of the primary, original acts in furtherance of the conspiracy, alleged in the December 23, 2016 FAC, was Fathi's bringing of the 2015 litigation to terminate Sixteen Plus and trigger the foreclosure--with Manal's participation. On July 27, 2015, Fathi Yusuf filed ST-2015-CV-000344, an action against “Sixteen Plus Corporation....Mohammad A. Hamed, Waleed M. Hamed, Waheed M. Hamed, Mufeed M. Hamed, and Hisham M. Hamed”. That action sought:

3. An order dissolving...Sixteen Plus and directing the windup of the corporation[]; [and]
4. An order appointing a receiver for...Sixteen Plus to sell the real estate holdings of both corporations. . . .”

⁴ *In Microsoft Corp. v. Damphu's, Inc.* it was held that the conspiracy remains ongoing throughout the pendency of the lawsuit. C.A. No. 8092-VCP, 2013 Del. Ch. LEXIS 263, 2013 WL 5899003, at *12 (Del. Ch. Oct. 31, 2013)(“Microsoft alleges that St. Clair commenced its patent infringement suit in Delaware in furtherance of its conspiracy.”)

alleged to be in furtherance of that conspiracy. Such allegations are the province of the plaintiff, and his well-pleaded averments control at this stage of the proceedings.⁵ He alleges present and continuing acts well within the SOL.

Fathi's opposition does not discuss the ubiquitous caselaw which demonstrates that neither continuing litigation in furtherance of a conspiracy nor false discovery responses within such litigation are exempt from being considered continuing acts in furtherance of that conspiracy. See e.g., *Burns v. C.R. England, Inc.*, No. 3:04-cv-304-GPM, 2007 U.S. Dist. LEXIS 27088, at *6 (S.D. Ill. Apr. 12, 2007):

On January 26, 2006, Plaintiffs filed their Motion for Leave to File a Third Amended Complaint (Doc. 71). This time, Plaintiffs sought "to add additional charging allegations as to the conspiracy counts." (Doc. 71, P 2). On February 23, 2006, the Court granted the motion, finding that the additional claim is related to those made in the Second Amended Complaint (Doc. 72). Plaintiffs then filed their Third Amended Complaint, alleging that Defendants, in furtherance of the conspiracy:

Filed a false sworn answer to an interrogatory asserting Leonard Ray Karnes had "slept 8 hours or greater in Effingham, Illinois" when they knew such answer was false and fraudulent as evidenced by the vehicles Qualcomm software program, information they had in their possession when the answer was filed, but withheld from plaintiffs.

(Doc. 73). Both Defendants answered the Third Amended Complaint on March 20, 2006 (Doc. 76, 77). On June 23, 2006, the District Court then set a final pretrial conference for August 14, 2006 (Doc. 86). (Emphasis added.)

See also *Correia v. Town of Framingham*, No. 12-10828-NMG, 2013 U.S. Dist. LEXIS 116282, at *3-4 (D. Mass. July 24, 2013):

That conspiracy, the plaintiffs suggest, continued during the litigation of this case. The plaintiffs cite an interrogatory response, signed by Carl, denying that Brown had asserted his Fifth Amendment rights when questioned about the incident by internal affairs investigators. Doc. No. 52 at 6-7. Pointing to the

⁵ Under the well-pleaded-complaint rule, the plaintiff is 'the master of the complaint'. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1763 (2019). More importantly "[a]t this stage, Plaintiffs' allegations must be taken as true and they [should] be allowed discovery into" the allegations in the complaint. See, e.g., *Hogan v. Cleveland Ave Rest., Inc.*, No. 2:15-CV-2883, 2018 U.S. Dist. LEXIS 49587, at *10-11 (S.D. Ohio Mar. 26, 2018).

testimony of other police department witnesses that Carl was present when Brown did, in fact, assert his right to remain silent (and, further, that Carl personally instructed investigators to communicate directly with Brown's attorney), the plaintiffs allege Carl's interrogatory response was a lie intended to further the conspiracy to protect Brown.

Nor does Fathi address the historical or other contexts for his *sub voce* proposition that maintenance of litigation should not be considered a component of a conspiracy—or would have no tolling effect by its continuation.⁶ Since the 1950's it has been widely accepted that litigation can be a component act in a conspiracy—threatening it, bringing it, *maintaining on a daily basis for the wrongful ends of the conspiracy* and making false

⁶ Just to be clear, Hamed alleges that:

1. There exists what Hamed alleges to be a sham note and mortgage—it is immaterial that Fathi and Manal were also the creators or that the creation dates were prior to 2012. What is critical is that they have a note and mortgage for which Hamed alleges they KNOW there was no actual consideration--and that they are part of a joint effort to obtain the underlying property. (It is also not material, at this stage, whether Hamed is correct—that it is a sham mortgage, or that Fathi and Manal know this. This is notice pleading. All that is important is that Hamed has reasonably alleged this to be so based on many uncontroverted facts, and, thus, has a reasonable basis for his belief and allegations.)
2. Using that sham note and mortgage, Manal and Fathi have acted together with the other defendants, to wrongfully bankrupt Sixteen Plus, cause its destruction and thereby obtain the land.
3. To do so, Fathi filed an action in 2015 to dissolve Sixteen Plus, and specifically asked the corporation be dissolved and the mortgage be foreclosed.
4. Manal filed an action in 2017 to foreclose and obtain a deficiency judgment to the same ends. Manal's suit continues and is prosecuted regularly.
5. To do so, Manal and Fathi have made false statements in their complaints in both of those cases, as well in their motions in this Manal's action and this case, in furtherance of the conspiracy.
6. To do so, Manal and Fathi have caused documents containing false and fraudulent assertions to be sent through the mail and over wire to the U.S. Virgin Islands from a foreign jurisdiction, in furtherance of the conspiracy.
7. To do so, Manal and Fathi have given false testimony in discovery in her case as well as in this case.

statements therein in furtherance of the conspiracy have all been accepted as actionable ever since the *Borax* cases.⁷ From that time on, there have been many, many cases where litigation has been accepted as a significant act in furtherance of the conspiracy. See, e.g., *Benoit v. Burlington Indus.*, No. 74 Civ. 441 (WCC), 1974 U.S. Dist. LEXIS 6470, at *13-14 (S.D.N.Y. Oct. 2, 1974); *Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 435 (E.D.N.Y. 2021)(“Defendants acted in furtherance of the conspiracy by: enacting specific litigation to target [Plaintiffs]. . . .”); *Microsoft Corp. v. Amphus*, *supra.*, at *39-40 (Del. Ch. Oct. 31, 2013)(“Microsoft’s conspiracy claims against St. Clair can be characterized as “arising from” St. Clair’s attempt to achieve the conspiratorial goal by filing a patent lawsuit to enforce the *Vadem* Patents in the Delaware District Court; and *United States v. Mitan*, No. 08-760-1, 2009 U.S. Dist. LEXIS 101213, at *1 (E.D. Pa. Oct. 30, 2009)(evidence of defendants’ purported use of actual or threatened litigation to further their conspiracy was similarly deemed admissible.)

Contrary to what Fathi implies, the allegation that Manal is involved in the present conspiracy was raised in the 2017 foreclosure action, immediately after Manal filed her own

⁷ From 1918 to 1951, a great and protracted battle was fought over the mineral Borax. Several times the Suckow faction brought cases based on a conspiracy that alleged litigation was a tool in the conspiracy to injure plaintiffs. *These were conspiracy, not antitrust actions.* The cases were originally dismissed largely because of statute of limitations issues, which was a problem in addressing extended conspiracies at that time. However, the law on litigation of such conspiracies grew and became more sophisticated. In 1950, the Ninth Circuit Court of Appeals decided *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.*, 185 F.2d 196 (9th Cir. 1950). And in 1951, the U.S. Supreme Court denied certiorari at 340 U.S. 943 (1951).

There, the plaintiffs instituted an action to recover damages caused by an alleged conspiracy of Borax Ltd. and its affiliates, in conjunction with American Potash and Chemical Corporation and Stauffer Chemical Company, and others, to control the borax industry. The plaintiffs alleged that following a series of acts starting in 1918, in 1929, primarily that the defendants entered into a continuing conspiracy to control the world supply of borax and, in furtherance of the conspiracy, commenced litigation against Suckow as part of the conspiracy—for the purpose of eliminating it as a competitor.

action (342). On October 12, 2017, Sixteen Plus filed a counterclaim. In it, at paragraphs 33 and 34, her part in the conspiracy is discussed by Sixteen Plus—the same one Hamed alleges on Sixteen Plus' behalf, derivatively, in this action:

33. Sometime in 2017, Fathi Yusuf arranged with Manal Yousef to now claim the Note and Mortgage were valid so she could attempt to foreclose on it, *even though she knew it was a fraudulent mortgage, so they could improperly take control of the primary asset of Sixteen Plus, Inc., defrauding it and the Hamed family members who own 50% of the stock in Sixteen Plus, Inc.*

34. *As part of this agreement, Fathi Yusuf and Manal Yousef agreed to split the proceeds of any foreclosure sale between themselves and other members of their families, despite knowing that such conduct would defraud Sixteen Plus of its primary asset. (Emphasis added.)*

In addition to the filing and continuation of the foreclosure action itself, Manal has undertaken a large number of other recent, additional acts in furtherance of the conspiracy. New statements from her and her counsel, as to facts previously unknown to Hamed, clearly show her acts to be in concert.⁸ However, Manal and her counsel have recently made it clear that she was fully participatory. This is newly adduced information—all within the last few months, much less the SOL. It is also very clear now that she within just the past few months she has been active in, and given significant support to the conspiracy here, to wit:

1. With no documentation she has *made extensive new* statements concerning the million dollars she has received in interest. She, within the SOL, has for the first time, admitted *she paid no taxes* on those alleged funds, she has also *recently* refused to supply critical tax returns that are relevant to those payments and the alleged gifts at the center of this case. See Exhibit 1 to the motion to amend, Letter from Atty. Hymes to Atty Hartmann, dated November 7, 2022. ("My client has indicated that she has not paid taxes on any interest payments paid to her by your clients. Therefore, I see no need for you to obtain copies of her tax returns for the years 1990 - 2000.)
2. She has repeatedly—up to the filing of this reply (since agreeing to do so in 2017) failed to provide her passports, which would show travel related to the conspiracy during both the original formation of the note and currently. That is a new act in

⁸ Thus the filing of the simultaneous motion for leave to supplement.

support of the conspiracy. Not only were these agreed to in 2017,⁹ but again in November of 2022, by her counsel in his referenced letter (Exhibit 1 to the motion)—but they still have not been provided.

3. She alleges (and the defendants very much rely on the fact) that she has received that million dollars in interest, but in 2022 she refused to provide the basics that would allow this claim to be investigated:
 - i. Contrary to the opening language of Rule 26, she has recently refused her address, which prevents Hamed from investigating ownership status, value and credit basics. See Exhibit 1. (Atty Hymes: “You indicated to me that you required a description of the present address for my client so that you may serve her with process. I will not provide you with that address. If you need to serve her with process, it may be done through me.”)¹⁰
 - ii. Although the “gifts” she presently alleges she received from her father are a central factual issue here (also relied on heavily by the other conspirators) she has refused to provide any banking information directly related to the alleged interest she received. (Atty Hymes: “Access to the financial records of Island Appliances and my clients will not be granted. **Your clients have denied making any payments of interest. Therefore, they have no reason to look in bank accounts for those funds.**”) (Emphasis added.)¹¹
 - iii. She has, recently, first asserted a new, preposterous story to explain why she

⁹ Letter from Atty. Holt to Atty. Hymes, dated August 1, 2017. (“In follow up to our Rule 37 conference, I want to memorialize what I understand we agreed on. . . .3. Regarding Manal's passports, you are obtaining copies as promptly as you can, which you will then file under seal with the Court, notifying me when you do.”)

¹⁰ In his letter, Manal’s counsel incorrectly characterized this as solely being about the ability to serve her with process in Palestine. However the record is clear. He initially stated, in the Rule 16 conference, it would be provided—and it was almost entirely discussed as a standard request to any party where financial matters are involved, *to do credit and other financial investigation—as well as a possible Hague Convention service for discovery assistance*. At 2 of Hartmann’s letter to Hymes, dated October 20, 2022.

Item 8: We asked for her present address, and if it was not a place with valid physical addresses, that it be described by route and physical appearance. You asked why I would want that. I responded that (1) it is a standard discovery inquiry of a party, and (2) I intend to have or may have process served on her locally. You said you would provide this.

¹¹ It is completely baffling as to why, when Manal concedes that Hamed contests the issue of any such interest payments, she would deny the existence of and access to her bank records for that period.) In the absence of *any* supporting documents or tax records about a million dollars in cash from either Isam or Manal regarding interest payments—it would seem contemporaneous bank records would be of highest importance. Her refusal is another current act in furtherance as well.

has no documents or proof of receiving a million dollars in untaxed income—and at the same time, she has first stated that she neither has or had bank or other accounts of any type:

Certainly, these recent transgressions are just allegations currently, but they are all: (1) recent, (2) post-FAC, (3) extremely material to the claims here, and (4) as is the case with any complaint, within the purview of the Plaintiff at this stage of the proceedings. The motion and Hamed's motion to compel Isam's banking records both demonstrate the existence of significant factual and documentary support for these allegations—far exceeding the low bar of notice pleading.

3. *At 2, (numbered section 1): "Plaintiff seeks more than to just add a party."*

Contrary to both the accusations in the opposition and its tone—and totally in line with the idea of changing "facts" in amendments—*Hamed has not changed a single word in the actual "counts."* *No legal theory has been altered at all and none have been added.*

The Second Amended Complaint ("SAC") adds both Manal's name and Manal's participation in the conspiracy. It quite properly adds facts that describe both the several effects and implications of that involvement. Thus, changes were made to the following paragraphs for four allowable, related reasons:

1. To directly insert her, and give Hamed's factual view of both her acts and her family relationship to the other defendants are important. See, e.g. paragraphs 23, 24, 25, 47,¹² 50,¹³ 52, 56, 57, 59, 60, 69, and 72-76.
2. Make the point that when Manal is also viewed as a defendant, it is clear that this was a family-based CICO conspiracy to destroy the jointly-owned Sixteen Plus—and thus it is important that the actual funds which were used to purchase the land

¹² Changed: "~~The St. Martin Defendants~~ Isam Yousuf, Manal Yousef and Jamil Yousuf ("the St. Martin Defendants") were central to this effort to embezzle the Sixteen Plus funds.

¹³ Upon information and belief, the power of attorney was drawn up by a Virgin Islands lawyer retained by Fathi Yusuf and executed at the request and direction of the St. Martin Defendants by Manal Yousef on St. Martin.

were 50/50 the family funds of the Hameds and Yusufs. See, e, g., paragraphs 21,¹⁴ 22,¹⁵ and 28.¹⁶

3. Both Wally Hamed and Fathi Yusuf were principal actors along with Manal, her brother (Isam) and her nephew (Jamil). See, e.g., paragraphs 19,¹⁷ 20,¹⁸ 22,¹⁹, and 79-80.²⁰
4. And finally, that both prior criminal litigation and investigations have revealed the facts of these family relationships and joint action—and thus, all of these facts must certainly be known to her and the other defendants. See, e.g., paragraph 38.

¹⁴ Changed: “All funds used to buy the Land came from funds removed from the Plaza Extra Supermarkets partnership by the Hamed and Yusuf families, 50/50 —~~and thus from Yusuf and Hamed as the only two partners.~~”

¹⁵ Changed: “as he did not want them to know the two families were ~~was~~ secretly diverting unreported cash from the Plaza Extra Supermarket to Sixteen Plus as part of a money laundering effort. The following details of that 1996-1997 effort are presented here. . . .”

¹⁶ Changed: “as those funds ~~came solely from the partnership and~~ belonged 50/50 to the Hameds and Yusufs.”

¹⁷ Added: “some of which were also carried out under that instruction by Waleed Hamed and Maher Yusuf.”

¹⁸ Changed: “using partnership funds rather than ~~involving~~ his partner Mohammad Hamed (or his son, Waleed) directing the purchase.”

¹⁹ Changed: “To accomplish this, Fathi Yusuf had large sums of cash delivered to Isam Yousuf in St. Martin, who thereafter directed and coordinated, with the assistance of Manal and Yusra, deposited the deposit of those funds into various accounts in St. Martin. Fathi Yusuf then directed the process by which he, Waleed Hamed and Isam Yousuf then transferred the partnership’s funds. . . .”

²⁰ 79. Indeed, the Fathi Yusuf and the other Defendants were wrongfully attempting to hide the fact that Fathi Yusuf ~~was the real plaintiff in interest~~ —~~and that Manal Yousef had not personally contacted counsel in the USVI to represent her alleged interests~~ —~~and his family members were trying to steal the Land.~~

80. To further this Plan, Fathi Yusuf ~~retained~~ provided Manal Yousef and Isam Yousuf with funds to pay USVI counsel to represent him “acting” as Manal Yousef represent the interests of the —~~and then represented to the USVI Court that Manal Yousef had retained USVI counsel, when she had not in fact done so. He did not disclose that the suit was actually being brought by him, that he was the true party in interest, or the existence of the wrongfully undisclosed power of attorney conspiracy..~~

Only paragraphs 26 and 27 arguably fall outside of such a direct connection. However, paragraph 26 explains how the purpose of the false documents was: “to change the apparent owner of the funds [to Manal] to evade taxes. . . .” and paragraph 27 has language added to explain why having the note in Manal’s name would work on a long-term basis to protect the land from creditors:

Once the statute of limitations ran out on the tax evasion, all of the actual corporate filings of Sixteen Plus would be completely accurate and free from criminal liability. Nor could the tax authorities or other entities seize the land without having to fight about Manal’s claims.

In addition, some wording was changed as in paragraph 29, to soften terminology like “laundering” to terms like “transfer”—to make the text less pejorative. (“The note and mortgage exceeded the amount ~~laundered through~~ transferred from St. Martin by \$500,000.”) Finally, some factual errors were corrected as in paragraph 62, where the suit mentioned was filed in 2015, not 2016.

4. At 3: “[*There has been*] undue delay as to the addition of Manal Yousef.”

Fathi does not address *Davis* or Hamed’s discussion of applicable law and holding in that case. All that is presented in opposition is a wordy argument with not a single word of legal support. Moreover, the wordy argument is utterly wrong on the law. Fathi argues:

Plaintiff should not be allowed now, at this late date—years later—to attempt to rectify this failure. Nothing in the recent discovery which has taken place in this case has changed the fact that Plaintiff’s claims relate to Manal Yousef’s mortgage and that she was a necessary party. Plaintiff should not be afforded the ability to attempt to rectify this blatant failing so late in the litigation. Failure to have added her remains a basis for dismissal of the FAC and Plaintiff should not be able to now attempt to rectify this failing.

This makes it obvious why *Davis* was avoided. This is “unfairness” language and suggests there must be some manifest injustice before amendment should be allowed because amendment might make it more likely the plaintiff will succeed than existed in the

original complaint. *Davis* directly contradicts this, focusing on actual, apparent, procedural prejudice;

the prejudice cannot simply be that UHP Projects may lose the case on the merits if the amended pleading is allowed; rather, “[t]o constitute prejudice, the amendment must compromise [the defendant's] *ability to present [its] case.*” (Emphasis added.)

Fathi does not address, argue or prove any “compromise” to the defendants “ability to present [their] case”. Fathi merely states that there has been no “newly discovered evidence” *significant enough* to suggest the “need” to amend. This is, therefore, basically an attempt to graft Rule 59(e) standards and the higher level of “newly discovered evidence creating a disadvantage” onto the far more liberal Rule 15(a) process—a trick which is repeatedly tried and always fails. See this distinction discussed in *DeGruy v. Wade*, 586 F. App'x 652, 655 (5th Cir. 2014).

Ordinarily, a district court has greater discretion to deny a motion under Rule 59(e) than under Rule 15(a). Rule 59(e) motions "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Rosenzweig*, 332 F.3d at 864. A motion to amend under Rule 15(a), however, "permit[s] liberal amendment to facilitate determination of claims on the merits," *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (Former 5th Cir. Nov. 1981), *imposing serious restrictions on the judge's discretion to deny the motion, id. Absent a strong, declared reason for the denial, a reviewing court will hold the denial of a Rule 15(a) motion to be an abuse of discretion.* (Emphasis added.)

There is no shame or impropriety in seeking “to cure the potential deficienc[ies] by amendment” at what is still a very early stage in these proceedings. *Zavian v. Pride Fin., LLC*, Civil Action No. 15-1920 (ES) (MAH), 2016 U.S. Dist. LEXIS 85158, at *7-8 n.3 (D.N.J. June 30, 2016)

No factors militate against granting the relief Plaintiff seeks. First, the Court notes that a Pretrial Scheduling Order for this case was entered only on March 2, 2016 [D.E. 15], which sets a deadline of June 1, 2016 for any motions to add new parties or amend pleadings. Although Defendants argue that the Plaintiff ***could have*** drawn a broader class definition in the original Complaint but failed to do so, Plaintiff is now seeking to cure the potential deficiency by

amendment, which was filed shortly after Defendants disclosed to Plaintiff that there were only seven members of the putative class. Leave to amend is generally granted where, during the course of discovery, a party discovers "new evidence." See, e.g., Slade v. Fauver, No. CIV.A.90-1417, 1990 U.S. Dist. LEXIS 13356, 1990 WL 153960, at *4 (D.N.J. Sept. 24, 1990) (granting leave to amend where new claims were discovered and "proposed amendments had no dilatory purpose and no significant discovery or pretrial preparation had taken place . . ."); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1460 (D.N.J. 1986) (granting motion to amend upon discovery of new evidence where it did "not appear that the amendment would cause undue delay or that plaintiffs have a dilatory motive."). Plaintiff asserts that while Defendants' Answer denied there were forty class members, it was not until January 28, 2016 that Defendants reported there were only seven members of the putative class. Pl.'s Reply Br., March 14, 2016, D.E. 17....(Emphasis added.)

In the end, all Fathi really argues is that Hamed "could have" added all of this in 2017, immediately after Manal filed her suit—or that Hamed "could have" amended before written discovery and motions to compel ended just a few months ago. But that is not the standard. There is no legal support for replacing the word "could" with "must." Fathi's argument would mean that, even when no answers have been filed, discovery is still outstanding and Judge Brady's new Scheduling Order has just issued—even when discovery answers were received just two months before the motion—amendment would not be proper. It is apparent why no cases are cited for this proposition and there is no discussion of *Davis* or the concept of prejudice as requiring the "compromise of a defendant's ability to present its case."

As for the suggestion that there has been no new evidence adduced. Hamed again notes that in both this case and the companion foreclosure, the cases were "re-started" and written discovery was propounded up to September 15, 2023, the new responses were due by October 15th, and initial motions to compel have not even been fully opposed, much less replied to. And in just that short time, Hamed has learned new and fascinating things from

the defendants and Manal. Filed simultaneously is a motion to supplement. A very abbreviated list of the new facts set out there, in no particular order of importance, are:

- a. For the first time, Fathi Yusuf now claims that he never even saw the Power of Attorney that so entirely favored him, and *totally* excluded the Hameds. Not only that, but he now maintains that it was Hamed, not he who provided it to Manal. Imagine Hamed's surprise when he learned of his OWN subterfuge in trying to give Fathi *the total power to take and dispose of the land for Fathi's sole benefit!* This is sworn to under oath by not only Fathi but also Isam and Manal. What a tremendous coup this would have been for Hamed at the exact time that the Criminal Settlement was being completed and Fathi was about to claim ownership of 100% of the supermarkets! This new fact applies to the very heart of the conspiracy alleged.
- b. Though Isam and Manal have sworn under oath that they received a million dollars (cash) in 'interest' from Sixteen Plus on THIS note, they have just recently revealed that they have no supporting documents, never put any of it in any bank or other institution, never paid taxes on the income anywhere, have spent every cent with no ability to state when, where or how—and, to put a cherry on it—will not provide Manal's contemporaneous bank account statements, tax filings or even her address. She alleges she never has had a bank account and does not have any now. This allegation of the million dollars goes to the fundamental point they are all trying to make that the note was partially performed. And further new disclosures allege that while never depositing, keeping or transferring those through in any institution, Isam would dole out small amounts to Manal in cash as she needed it—presumably from under his mattress to under hers—as no record exists of these transfers either—or of her expenditures or the assets obtained.
- c. Manal was not, as Fathi repeatedly informed both Hamed in discovery and the Court in pleadings, either on St. Martin or at the address Fathi gave. She was back in Palestine. In fact, she had gone there a decade before—presumably to get a better bang for the buck on her untaxed million dollars. Yet, oddly, the letters to Hamed in 344 (his 2015 case that has been dismissed) came from St. Martin, and from a St. Martin lawyer. Fathi filed a motion to be protected from giving her STM contact information to Hamed, and when ordered to do so, said he didn't have it. And, as it now turns out, she wasn't really there.

IV. Conclusion

Like *Davis* this case involves a motion to amend at a very early stage of the proceedings despite the length of time the action has been pending. The refusal to engage on the facts and law in the instant motion are both dispositive and telling. The Rule is liberal and our Supreme Court's directions are even more so. Thus, the motion should be granted.

Dated: February 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, discounting captions, headings, signatures, quotations from authority and recitation of the opposing party's own text, this document complies with the page and word limitations set forth in Rule 6-1(e) and that on **February 6, 2023** I served a copy of the foregoing by email and the Court's E-File system, as agreed by the parties, to:

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