

**FILED**

November 20, 2023 03:09 PM  
SX-2016-CV-00650  
TAMARA CHARLES  
CLERK OF THE COURT

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

**HISHAM HAMED, INDIVIDUALLY, AND  
DERIVATIVELY ON BEHALF OF SIXTEEN  
PLUS CORPORATION,**  
PLAINTIFF,  
v.  
**FATHI YUSUF, ISAM YOUSUF, AND  
JAMIL YOUSUF,**  
DEFENDANTS,  
v.  
**SIXTEEN PLUS CORPORATION,**  
NOMINAL DEFENDANT.

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**SIXTEEN PLUS CORPORATION,**  
PLAINTIFF/COUNTER-DEFENDANT,  
v.  
**MANAL MOHAMMAD YOUSEF,**  
DEFENDANT/COUNTER-PLAINTIFF.

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**MANAL MOHAMMAD YOUSEF,**  
PLAINTIFF/COUNTER-DEFENDANT,  
v.  
**SIXTEEN PLUS CORPORATION,**  
DEFENDANT/COUNTER-PLAINTIFF.

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**Civil Case No. SX-2016-CV-650**

DERIVATIVE SHAREHOLDER SUIT,  
ACTION FOR DAMAGES AND CICO  
RELIEF

**JURY TRIAL DEMANDED**

CONSOLIDATED WITH  
**Civil Case No. SX-2016-CV-065**

ACTION FOR DECLARATORY  
JUDGMENT, CICO, AND FIDUCIARY  
DUTY

COUNTERCLAIM  
**JURY TRIAL DEMANDED**

CONSOLIDATED WITH  
**Civil Case No. SX-2017-CV-342**

ACTION FOR DEBT AND  
FORECLOSURE

COUNTERCLAIM FOR DAMAGES

THIRD PARTY ACTION

**JURY TRIAL DEMANDED**

**ORDER OF THE SPECIAL MASTER**<sup>1</sup>

**THIS MATTER** is before the Special Master (hereinafter “Master”) for review *sua sponte* in furtherance of the Master’s duty to address all pretrial matters and any other matters agreed upon by the parties in the three consolidated cases—*Sixteen Plus Corp. v. Yousef*, Civil Case Number SX-2016-CV-065, *Hamed v. Yusuf, et al.*, Civil Case Number SX-2016-CV-650, and *Yousef v. Sixteen Plus Corp.*, Civil Case Number SX-2017-CV-342.

**BACKGROUND**<sup>2</sup>

**Sixteen Plus Corp. v. Yousef, Civil Case Number SX-2016-CV-065**

On February 12, 2016, Plaintiff Sixteen Plus Corporation (hereinafter “SPC”) filed a complaint against Defendant Manal Mohammad Yousef (hereinafter “MY”), *Sixteen Plus Corp. v. Yousef*, Civil Case Number SX-2016-CV-065 (hereinafter “065 Case”). In its complaint, SPC alleged in relevant part that: (i) SPC is the fee simple owner of certain real properties (hereinafter “Property”);<sup>3</sup> (ii) on September 15, 1997, SPC executed a mortgage on

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<sup>1</sup> On August 10, 2023, the Court entered an order in the three consolidated cases—*Sixteen Plus Corp. v. Yousef*, Civil Case Number SX-2016-CV-065, *Hamed v. Yusuf, et al.*, Civil Case Number SX-2016-CV-650, and *Yousef v. Sixteen Plus Corp.*, Civil Case Number SX-2017-CV-342—whereby the Court appointed the undersigned as the special master in these consolidated cases to address all pretrial matters and any other matters agreed upon by the parties. (Aug. 10, 2023 Order.)

<sup>2</sup> This section does not include the full factual and procedural background of the three consolidated cases; rather, it provides an overview and highlights various outstanding issues that the Master will address in this Order.

<sup>3</sup> According to the complaint, the Property includes the following real properties:

- Parcel No. 8, Estate Cane Garden, consisting of approximately 2.6171 U.S. Acres;
- Remainder No. 46A, Estate Cane Garden, consisting of approximately 7.6460 U.S. Acres;
- Parcel No. 10, Estate Cane Garden, consisting of approximately 2.0867 U.S. Acres;
- Road Plot No. 11, Estate Cane Garden, consisting of approximately 0.868 U.S. Acres;
- 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 consisting of approximately 42.3095 U.S. Acres;
- Remainder Matr. 32B, Estate Cane Garden of approximately 48.5175 U.S. Acres;
- Parcel No. 9 Estate Cane Garden, consisting of approximately 11.9965 U.S. Acres;
- Remainder Matr. 32A, Estate Granard, consisting of approximately 41.0736 U.S. Acres;
- Parcel No. 40, Estate Granard, consisting of approximately 14.9507 U.S. Acres;
- Remainder Matr. No. 31, Estate Diamond, consisting of approximately 74.4220 U.S. Acres;
- Parcel No. 4, Estate Diamond, consisting of approximately 5.8662 U.S. Acres;
- Parcel No. 1, Estate Diamond, consisting of approximately 61.2358 U.S. Acres;
- Parcel No. 3, Estate Diamond, consisting of approximately 6.9368 U.S. Acres;
- Parcel No. 2, Estate Diamond, consisting of approximately 6.5484 U.S. Acres;
- Road Plot No. 12, Estate Cane Garden, consisting of approximately 0.4252 U.S. Acres;

the Property to MY in the amount of \$4,500,000 (hereinafter “Mortgage”), (iii) “[MY] simply agreed for her name to be used as a ‘straw’ mortgagee, without any consideration given by her in exchange for the Mortgage”; (iv) that the Mortgage “was signed well over a year before the Property was purchase”; and (v) “the mortgage is unenforceable because [MY] did not give any consideration to [SPC] in exchange for the Mortgage.” (Compl.) As such, SPC sought judgment declaring the Mortgage recorded against the Property as “null, void and unenforceable.” (Id.)

On October 21, 2016, SPC filed a motion for summary judgment. On January 10, 2017, SPC filed a motion to have MY show cause “why it should not be held in contempt of court for not filing her response to the pending [October 21, 2016] motion for summary judgment after seeking an order from this Court that permitted a late filing to this motion by November 18, 2016.”<sup>4</sup> (Jan. 10, 2017 Motion.) SPC subsequently withdrew its October 21, 2016 motion.<sup>5</sup>

On March 29, 2017, MY filed an answer to complaint and a counterclaim against SPC. In her counterclaim, MY alleged in relevant part that: (i) “[o]n September 15, 1997, [MY], for good and valuable consideration, executed a promissory note (hereinafter “Promissory Note”) secured by [the Mortgage], the payment of which was secured by recording said mortgage against the [Property owned by SPC]”; (ii) that the Promissory Note and the Mortgage remains unpaid to date; and (iii) SPC “is contractually obligated to fulfill all of the terms and conditions of the Promissory Note and the [Mortgage].” (Counterclaim.) MY did not set forth any counts designating specific causes of action in her counterclaim as required by the Virgin Islands

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Road Plot No. 41, Estate Granard, consisting of approximately 0.4255 U.S. Acres; and  
Road Plot No. 6, Estate Diamond, of approximately 0.8510 U.S. Acres.

(Compl.)

<sup>4</sup> SPC’s January 10, 2017 motion to show cause remains pending in the 065 Case.

<sup>5</sup> On December 11, 2022, SPC filed a notice of withdrawal of its October 21, 2016 motion.

Rules of Civil Procedure,<sup>6</sup> but based on the substance, the Master deduced that MY sought judgment declaring that the Promissory Note and the Mortgage as “valid and fully enforceable.”<sup>7</sup> (Id.) On April 5, 2017, SPC filed its answer to MY’s counterclaim. On April 6, 2017, SPC filed an amended answer to complaint and counterclaim against SPC; it appears that only the answer portion was amended by MY and the counterclaim portion remains the same. Thus, there was no need for SPC to file another answer in response to the counterclaim. On July 11, 2017, MY filed a motion for protective order.<sup>8</sup>

**Hamed v. Yusuf, et al., Civil Case Number SX-2016-CV-650**

On October 31, 2016, Plaintiff Hisham Hamed (hereinafter “HH”), derivatively on behalf of SPC, file a verified complaint against Defendants Fathi Yusuf (hereinafter “FY”), Isam Yousuf (hereinafter “IY”), and Jamil Yousef (hereinafter “JY”) and Nominal Defendant SPC in a derivative shareholder suit, *Hamed v. Yusuf, et al.*, Civil Case Number SX-2016-CV-650 (hereinafter “650 Case”); on December 23, 2016, HH, on behalf of himself and derivatively on behalf of SPC, filed a first amended verified complaint in the 650 Case (hereinafter “FAC”),

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<sup>6</sup> Rule 8 of the Virgin Islands Rules of Civil Procedure provides that “[e]xcept as otherwise provided in these Rules, a pleading that states a claim for relief must contain:... a short and plain statement of the claim showing that the pleader is entitled to relief -- because this is a notice pleading jurisdiction -- and the pleading shall be set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts and defenses for each claim identified in the pleading...” V.I. R. CIV. P. 8(a)(2).

<sup>7</sup> In her counterclaim, MY alleged in relevant part:

WHEREFORE, the defendant/counter-claimant respectfully requests this Court enter an order declaring the Promissory Note and first Priority Mortgage executed by the plaintiff/counter-defendant valid and fully enforceable...

(Counterclaim.)

MY may have intended for her counterclaim to include other causes of action in place of, or in addition to, what the Master deduced. But, alas, MY failed to set forth any counts designating specific causes of action and MY cannot and should not expect the Master to parse through her allegations, decipher which causes of action are alleged, and determine which facts satisfy the elements of each. The Master cannot do MY’s job for her. See *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 622 (2017) (“The court may not assume the role of advocate or rewrite [pleadings] to include claims that were never presented.”) (quotation marks, brackets, and citations omitted); Cf. *Joseph v. Joseph*, 2015 V.I. LEXIS 43, \*5 (V.I. Super. Ct. Apr. 23, 2015) (“[I]n general, the Court will not make a movant’s arguments for him when he has failed to do so.”).

<sup>8</sup> On July 24, 2017, SPC filed an opposition. On July 24, 2017, SPC filed a first supplemental declaration in support of its position, and on August 7, 2017, SPC filed a second supplemental declaration in support of its position. On August 11, 2017, MY filed a reply thereto. MY’s July 11, 2017 motion for protective order remains pending in the 065 Case.

against Defendants FY, IY, and JY, and Nominal Defendant SPC. In his FAC, HH alleged the following counts: Count I-Civil Violation of the Criminally Influenced and Corrupt Organizations Act (against all defendants), Count II-Conversion (against all defendants), Count III-Breach of Fiduciary Duties (against FY), Count IV-Usurping of Corporate Opportunity (against FY), Count V-Civil Conspiracy (against all defendants), Count VI-Tort of Outrage (against all defendants). (FAC.) There are currently multiple pending motions in this matter, including several motions regarding the FAC—such as, FY’s January 9, 2017 motion to dismiss the FAC, HH’s January 20, 2017 motion for partial summary judgment, HH’s July 26, 2017, motion to amend, HH’s December 19, 2022 motion to amend the FAC, HH’s February 28, 2023 motion for leave to file a supplemental complaint to the FAC.

On January 24, 2023, the Court entered a scheduling order. On February 15, 2023, the parties filed a joint motion for enlargement of the January 24, 2023 scheduling order, which also remains pending.

***Yousef v. Sixteen Plus Corp., Civil Case Number SX-2017-CV-342***

On August 31, 2017, Plaintiff MY filed a complaint against Defendant SPC, *Yousef v. Sixteen Plus Corp.*, Civil Case Number SX-2017-CV-342 (hereinafter “342 Case”). In her complaint, MY alleged in relevant part that: (i) on September 15, 1997, SPC executed and delivered the Promissory Note in favor of MY in the amount of \$4,500,000; (ii) the Promissory Note was secured by the Mortgage which was recorded on February 22, 1999; (iii) on September 15, 1997, SPC executed a corporate acknowledgement on the Promissory Note and the Mortgage; (iv) SPC made three payments of interests to MY—in the amount of \$360,000 each in 1998, 1999, and 2000—“but otherwise failed to comply with the terms and condition of the [Promissory Note and the Mortgage]”; and (iv) “[MY], pursuant to the terms and conditions of [the Promissory Note and the Mortgage], has elected to declare the entire unpaid

principal sum, and all accrued interest and late charges, due and payable.”<sup>9</sup> (Compl.) MY did not set forth any counts designating specific causes of action in her complaint as required by the Virgin Islands Rules of Civil Procedure,<sup>10</sup> but based on the substance, the Master deduced the following causes of action: debt and foreclosure of real property mortgage.<sup>11</sup> On October 13, 2017, SPC filed an answer and counterclaims against MY/third-party claims against Third-Party Defendant FY. In its counterclaims, SPC alleged in relevant part that: (i) “[a]t all relevant times hereto, [MY] acted at the direction and under the control of [FY] regarding the allegations herein, working in concert with him to try to defraud [SPC] and the Hamed family members who own 50% of the stock in [SPC]”; (ii) SPC was formed on February 10, 1997 “to purchase a 300 plus acre parcel of land... from the Bank of Nova Scotia”; (iii) “[a]t the time it was formed and at all times up to the present, all of [SPC]’s stock has been owned 50% by family members of [FY] and 50% by family members of [MH]”; (iv) “[a]t the time [SPC] was formed, FY and Mohammad Hamed were 50/50 partners in a grocery business known as Plaza Extra

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<sup>9</sup> The Promissory Note and the Mortgage referenced in MY’s complaint in the 342 Case were the same documents referenced by MY in her counterclaim in the 065 Case.

<sup>10</sup> See *supra*, footnote 6.

<sup>11</sup> In her complaint, MY alleged in relevant part:

9. The defendant Sixteen Plus made three (3) payments of interest only in the amount of \$360,000.00 each in 1998, 1999, and 2000, but otherwise failed to comply with the terms and conditions of the Note and First Priority Mortgage (the “loan documents”), and is in default under those instruments despite demand for payment for failing to pay principal and interest when due.

...

WHEREFORE, the plaintiff Yousef respectfully requests that the Court enter judgment:

...

d) enforcing and foreclosing plaintiff Yousef’s first priority lien on the mortgaged premises determining the priority of liens in ordering the mortgaged premises to be sold in satisfaction of the total indebtedness to plaintiff Yousef and foreclosing upon any and all junior liens or encumbrances of any nature recorded after the date of the mortgage herein;

...

(Compl.)

MY may have intended for her complaint to include other causes of action in place of, or in addition to, what the Master deduced. But, alas, MY failed to set forth any counts designating specific causes of action and MY cannot and should not expect the Master to parse through her allegations, decipher which causes of action are alleged, and determine which facts satisfy the elements of each. The Master cannot do MY’s job for her. See *Phillip*, 66 V.I. at 622; Cf. *Joseph*, 2015 V.I. LEXIS 43 at \*5.

Supermarkets”; (v) “[FY] and Mohammad Hamed decided to buy the Land in question by providing the necessary funds to [SPC] – using only proceeds from the grocery store they owned” and “FY, acting for the partners, undertook the business arrangements regarding the purchase of the Land”; (vi) “[a]ll funds used to buy the Land came from the Plaza Extra Supermarkets partnership – and thus from [FY] and [Mohammad] Hamed as the only two partners”; (vii) FY, as part of his effort to cover up the fact that the source of the funds was from the Plaza Extra Supermarkets partnership, “as well as to try to shelter [IY] from exposure to criminal consequences from the effort to launder and use the case from the partnership’s supermarkets, [FY] and [IY] agreed to create a sham note and mortgage for the transaction, naming [FY]’s niece who lived in St. Martin, [MY], as the sham mortgagee”; (viii) FY explained to Mohammad Hamed and the Hamed shareholders of the SPC that the Promissory Note and Mortgage was “a business transaction to protect the property, that [MY] could never actually enforce the mortgage, and that [FY] could get it discharged at any time”; (ix) the Promissory Note and the Mortgage were executed by SPC in favor of MY on September 16, 1997 before the land in question was conveyed to SPC; and (x) on February 22, 1998, SPC recorded the deed to the land in question and the Mortgage was recorded on the same day.<sup>12</sup> (Counterclaims/Third-Party Claims.) In its counterclaims/third-party claims, SPC did not designate specific causes of action as required by the Virgin Islands Rules of Civil Procedure,<sup>13</sup> but based on the substance, the Master deduced the following cause of action: intentional infliction of emotional distress and declaratory judgment.<sup>14</sup> On December 14, 2017, Third-

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<sup>12</sup> The Promissory Note and the Mortgage referenced in SPC’s counterclaims in the 342 Case were the same documents referenced by MY in her complaint in the 342 Case and in her counterclaim in the 065 Case.

<sup>13</sup> See *supra*, footnote 6.

<sup>14</sup> In its counterclaim and third-party claim, SPC alleged in relevant part:

COUNT I

35. Plaintiff repeats and realleges all preceding paragraphs, which are incorporated herein by reference.

36. The actions of the Counterclaim Defendants were intentional, wanton, extreme, and outrageous.

Party Defendant FY filed a motion to dismiss the third-party complaint. On January 2, 2018, MY filed an answer to the counterclaim. On May 8, 2023, the Court entered an order whereby the Court granted SPC's May 1, 2023 motion to dismiss without prejudice third-party complaint against Third-Party Defendant FY and dismissed the third-party complaint without prejudice.

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37. The actions of the Counterclaim Defendants were culpable and not justifiable under the circumstances.

38. The actions of the Counterclaim Defendants caused injury to Sixteen Plus.

39. As such, the Counterclaim Defendants are liable for said injuries suffered by Sixteen Plus as a result of their intentional and unjustifiable misconduct.

Wherefore, the Defendant Sixteen Plus seeks dismissal of the Complaint as well as an award of compensatory and punitive damages against the Counterclaim Defendants, Manal Yousef and Fathi Yusuf, jointly and severally, along with an award of fees and costs as well as any and all other relief this Court deems appropriate.

#### COUNT II

40. Plaintiff repeats and realleges all preceding paragraphs, which are incorporated herein by reference.

41. During the course of the transactions, Fathi Yusuf filed tax returns and other official documents with the Government of the US Virgin Islands describing the transactions and obligations herein.

42. He attested under oath and signature on many occasions that it was he and Mohammad Hamed that had provided the funds to Sixteen Plus and were the mortgage holders not Manal.

43. Should Fathi Yusuf (individually and as the agent for Manal) be allowed to commit such tax fraud, submission of false documents and perjury -- and now state the opposite in this action, the actions of the Counterclaim Defendants would cause injury to Sixteen Plus.

44. As such, this Court needs to enter Declaratory Relief, finding that the Counterclaim Defendants are estopped from seeking foreclosure of the fraudulent Note and Mortgage and are liable for said injuries that would be suffered by Sixteen Plus as a result of their conduct.

Wherefore, the Defendant Sixteen Plus seeks the following relief:

- 1) An Order dismissing the Complaint with prejudice;
- 2) An Order declaring that Fathi Yusuf and Manal Yousef are estopped from asserting the actions herein;
- 3) An award of compensatory and punitive damages against the Counterclaim Defendants, Manal Yousef and Fathi Yusuf, jointly and severally;
- 4) An award of fees and costs; and
- 5) Any and all other relief this Court deems appropriate.

(Counterclaim/Third-Party Claim.)

SPC may have intended for its counterclaim/third-party claim to include other causes of action in place of, or in addition to, what the Master deduced. But, alas, SPC failed to set forth any counts designating specific causes of action and SPC cannot and should not expect the Master to parse through its allegations, decipher which causes of action are alleged, and determine which facts satisfy the elements of each. The Master cannot do SPC's job for it. *See Phillip*, 66 V.I. at 622; *Cf. Joseph*, 2015 V.I. LEXIS 43 at \*5.



**Consolidation of the 065 Case and the 342 Case**

On December 20, 2017, SPC filed two separate motions—one in the 065 Case and one in the 342 Case—to consolidate the 065 Case and the 342 Case pursuant to Rule 42(a) of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 42(a)”). On December 17, 2018, the Court entered an order—in the 065 Case and the 342 Case—whereby the Court granted SPC’s December 20, 2017 motions and ordered the consolidation of the 065 Case and the 342 Case.

On December 5, 2022, SPC filed a first motion—jointly in the 065 Case and the 342 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony,<sup>15</sup> which was identical to HH’s December 2, 2022 third motion—filed in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony.<sup>16</sup> On January 1, 2023, SPC filed a motion—jointly in the 065 Case and the 342 Case—for leave to amend its answers in the original, pre-consolidation 065 Case and 342 Case “to clarify his affirmative defense of ‘in pari delicto.’”<sup>17</sup> (Jan. 1, 2023 Motion.) On January 3, 2023, SPC filed a first motion—jointly in the 065 Case and the 342 Case—to compel discovery responses from MY as to address, agent’s information, accounting and tax information.<sup>18</sup>

On January 24, 2023, the Court entered a scheduling order—jointly in the 065 Case and the 342 Case. On February 15, 2023, the parties in the 065 Case and the 342 Case filed a joint

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<sup>15</sup> On February 17, 2023, Third-Party Defendant FY filed an opposition in the 065 Case and the 342 Case, and on February 21, 2023, Third-Party Defendant FY filed an opposition in the 065 Case and the 342 Case that is identical to his February 17, 2023 opposition. SPC’s December 5, 2022 first motion to compel discovery responses from FY remains pending in the 065 Case and the 342 Case.

<sup>16</sup> HH’s December 2, 2022 third motion to compel discovery responses from FY remains pending in the 650 Case.

<sup>17</sup> On February 13, 2023, Third-Party Defendant FY filed an opposition in the 342 Case. On February 14, 2023, SPC filed a reply thereto in the 342 Case. On February 21, 2023, MY filed an opposition in the 065 Case. On February 24, 2023, SPC filed a reply thereto in the 065 Case. SPC’s January 1, 2023 motion for leave to amend its answers remains pending in the 065 Case and the 342 Case.

<sup>18</sup> On February 6, 2023, MY filed an opposition in the 065 Case and the 342 Case. On the same date, February 6, 2023, SPC filed a reply in the 065 Case and the 342 Case. SPC’s January 3, 2023 first motion to compel discovery responses from MY remains pending in the 065 Case and the 342 Case.

motion—jointly in the 065 Case and the 342 Case—for enlargement of the January 24, 2023 scheduling order.<sup>19</sup> On February 22, 2023, SPC filed a motion—jointly in the 065 Case and the 342 Case—to file a brief in excess of page requirements and to file one exhibit included in HH’s reply to FY’s opposition to HH’s December 2, 2022 third motion—in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony,<sup>20</sup> which was identical to the HH’s February 21, 2023 motion—filed in the 650 Case—to file a brief in excess of page requirements and to file one exhibit included in HH’s reply to FY’s opposition to HH’s December 2, 2022 third motion—in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony.<sup>21</sup>

On April 20, 2023, MY filed a motion—jointly in the 065 Case and the 342 Case—for summary judgment.<sup>22</sup> In response, on April 25, 2023, SPC filed a motion—jointly in the 065 Case and the 342 Case—to defer summary judgment proceedings.<sup>23</sup> On August 15, 2023, a mediation report was filed—jointly in the 065 Case and the 342 Case—advising the Court that a zoom mediation conference was held on August 11, 2023 and that “[t]his matter has been recessed for further mediation with additional cases.” (Aug. 15, 2023 Report.)

**Consolidation of the 065 Case and the 342 Case with the 650 Case**

On January 9, 2019, HH—filed in the 650 Case—to consolidate the 650 Case with the 065 Case and the 342 Case. On May 1, 2023, the Court entered an order—jointly in the 065 Case, the 342 Case, and the 650 Case—whereby the Court granted HH’s January 9, 2019

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<sup>19</sup> The February 15, 2023 joint motion remains pending in the 065 Case and the 342 Case.

<sup>20</sup> SPC’s February 22, 2023 motion to file a brief in excess, etc. remains pending in the 065 Case and the 342 Case.

<sup>21</sup> HH’s February 21, 2023 motion to file a brief in excess, etc. remains pending in the 650 Case.

<sup>22</sup> MY’s April 20, 2023 motion for summary judgment remains pending in the 065 Case and the 342 Case.

<sup>23</sup> SPC’s April 25, 2023 motion to defer summary judgment proceedings remains pending in the 065 Case and the 342 Case.

motion to consolidate and ordered the consolidation of the 650 Case with the 065 Case and the 342 Case pursuant to Rule 42(a).

On September 1, 2023, SPC filed a motion—jointly in all three cases—to the Master for a status conference.<sup>24</sup>

## **DISCUSSION**

For the sake of simplicity, clarity, and efficiency, this Order will only address the outstanding issues in the 065 Case and the 342 Case, which were consolidated in 2018, along with some overlapping issues with the 650 Case; a separate order will address the outstanding issues in the 650 Case, which was not consolidated with the 065 Case and the 342 Case until later in 2023.

### **1. The 065 Case: SPC's January 10, 2017 motion to have MY show cause**

Given that SPC filed the January 10, 2017 motion to have MY show cause in connection for MY's failure to file her response to SPC's October 21 2016 motion for summary judgment and SPC subsequently withdrew its October 21, 2016 motion, the Court will deny as moot SPC's January 10, 2017 motion to have MY show cause.

### **2. The 065 Case: MY's July 11, 2017 motion for protective order**

In her motion, MY moved the Court to issue a “protective order prohibiting her deposition from proceeding in St. Croix, U.S. Virgin Islands on Friday, July 14, 2017, and barring plaintiff from noticing a deposition of [MY] in the U.S. Virgin Islands” and the Court to order “the attorneys for the plaintiff to take the deposition of [MY] by written questions pursuant to V.I. R. Civ. P. 31.” (Motion.) In its opposition, SPC argued the Court should deny MY's motion because a deposition under Rule 31 of the Virgin Islands Rules of Civil Procedure

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<sup>24</sup> SPC's September 1, 2023, SPC motion to the Master for a status conference remains pending in all three cases.

is not appropriate here. (Opp.) In her reply, MY essentially reiterated the arguments in her motion.

The Master notes at the outset that MY's motion for protective order was not compliant with Rule 26(c) of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 26(c)"), which governs protective orders, and Rule 37-1 of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 37-1"), which governs pre-motion discovery conferencing duties of all counsel—to wit, MY's motion did not include any certification required under Rule 26(c) and Rule 37-1(a), which mandate the moving party to certify that that parties engaged in substantive, good faith negotiations before filing the motion. *See* V.I. R. CIV. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending..." and "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."); V.I. R. CIV. P. 37-1(a) ("Prior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties and any self-represented parties shall confer in a good faith effort to eliminate the necessity for the motion -- or to eliminate as many of the disputes as possible."). At this juncture, in the interest of conserving judicial resources, the Master will order the parties in the 065 Case and the 342 Case to meet and confer in compliance with Rule 26(c) and Rule 37-1 as to the issues raised in MY's July 11, 2017 motion for protective order—including but not limited to whether they are agreeable to taking MY's deposition by telephone or other remote means, *see* V.I. R. CIV. P. 30(b)(4) ("The parties may stipulate -- or the court may on motion order -- that a deposition be taken by telephone or other remote means."),<sup>25</sup> and MY to file a supplemental certification to her July 11, 2017 motion that

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<sup>25</sup> Due to the COVID-19 pandemic, the landscape of litigation, especially depositions, has changed significantly since MY filed her motion in 2017. Remote depositions have become increasingly common nowadays.

explicitly states her compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 26(c) and Rule 37-1 with the following details: (i) whether the parties met and conferred in person, telephonically, or by videoconferencing,” or that the opposing party refused to meet and confer; and (ii) whether the parties are agreeable to taking MY’s deposition by telephone or other remote means. The Master will reserve ruling on MY’s July 11, 2017 motion for protective order.

**3. The 342 Case: Third-Party Defendant FY’s December 14, 2017 motion to dismiss the third-party complaint**

In light of the May 8, 2023 order dismissing the third-party complaint without prejudice, the Court will deny as moot Third-Party Defendant FY’s December 14, 2017 motion to dismiss the third-party complaint.

**4. The 065 Case and the 342 Case: SPC’s December 5, 2022 first motion to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony**

In its motion, SPC—by incorporating HH’s December 2, 2022 third motion—filed in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony—moved the Court to compel discovery responses from FY as to Interrogatories 1, 2, 3, and 24 in the 650 Case and Interrogatories 6-19 in the 065 Case and the 342 Case.

At the time SPC—a party in the 065 Case and the 342 Case—filed its December 5, 2022 motion in the 065 Case and the 342 Case, FY was still a third-party defendant in the 342 Case but FY was never a party in the 065 Case. However, as noted above, the third-party complaint has since been dismissed without prejudice. (May 8, 2023 Order.) Thus, currently, FY is only a party in the 650 Case and FY is not a party in the 065 Case or the 342 Case. This raises the question of whether constituent cases after consolidation under Rule 42(a) are merged into a single action and thereby losing their separate identities and turning those who are parties

in one suit into parties in another suit, or whether constituent cases after consolidation under Rule 42(a) remain independent as before and thereby retaining their distinct identities and not making those who are parties in one suit into parties in another suit. In other words, after the consolidation of 065 Case, the 342 Case, and the 650 Case under Rule 42(a), is SPC now a party in the 650 Case or does SPC remain as a nonparty in the 650 Case?

This distinction is significant because there is no provision in the Virgin Islands Rules of Civil Procedure that authorizes the service of interrogatories on a nonparty. Notably, the procedure for obtaining discovery by the use of interrogatories is found in Rule 33 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 33”), which is titled “Interrogatories to Parties” and provides, in pertinent part, that “[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.” V.I. R. CIV. P. 33(a)(1) (emphasis added). Thus, the Master must resolve this question before reaching the merits of SPC’s December 5, 2022 motion.

Rule 42(a) provides: “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” V.I. R. CIV. P. 42(a). Rule 42(a) is identical to its federal counterpart. Therefore, given a general lack of Virgin Islands precedent on this issue of whether consolidation merged the constituent cases, the Master turns to the federal courts’ interpretation of Rule 42(a) of the Federal Rules of Civil Procedure (hereinafter “Federal Rule 42(a)”) for guidance. *See Browne v. People of the V.I.*, 74 V.I. 601, 613 (V.I. 2021) (“Unlike subsection (a), subsection (b) of Rule 48 of the Virgin Islands Rules of Criminal Procedure is identical to its federal counterpart. Therefore, we may examine cases that interpret Federal Rule 48(b) for guidance about whether this provision as adopted in the Virgin Islands encompasses prosecutorial bad faith.”); *see also, Tip Top Constr. Corp. v. Austin*, 71 V.I. 549, 569 n.8 (V.I. 2019) (“Virgin Islands Rules of Civil

Procedure 26(a) and 37(c) are substantively identical to their federal counterparts, and therefore we look to persuasive precedent from the federal courts for guidance in the interpretation and application of these rules.”). In *Hall v. Hall*, the United States Supreme Court (hereinafter “Supreme Court”) addressed the issue of whether a judgment completely resolving one of several consolidated cases was an immediately appealable final decision even if another case remains ongoing. 138 S. Ct. 1118 (2018). The Supreme Court discussed the history of the term “consolidate,” and acknowledged that it was a term “with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. *Id.*, 138 S. Ct. at 1125, 1127. The Supreme Court further discussed the adoption of Rule 42(a) and its relationship with the consolidation statute. *Id.* (“Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute...[and that the consolidation statute] remained in force for 125 years, until its replacement by Rule 42(a)...From outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them...And just five years before Rule 42(a) became law, [the Supreme Court] reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases.”) (citing *Johnson v. Manhattan R. Co.*, 53 S. Ct. 721 (1933)). “The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of ‘consolidate’ in subsection (a)(2) [and] [i]t makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.” *Hall*, 138 S. Ct. at 1125. In summary, the Supreme Court pointed out that while courts “enjoy substantial discretion in deciding whether and to what extent to consolidate cases,” *Id.*, 138 S. Ct. at 1131, but emphasized—by citing various cases that illustrated the point—that the traditional understanding of consolidation is that “‘consolidation does not merge the suits; it is a mere

matter of convenience in administration, to keep them in step. They remain as independent as before,” *Id.*, 138 S. Ct. at 1127 (quoting *Johnson v. Manhattan R. Co.*, 61 F.2d 934, 940 (2d Cir. 1932)), and that “consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another,” *Id.*, 138 S. Ct. at 1127 (quoting *Johnson*, 53 S. Ct. at 721). In this instance, neither SPC nor HH defined which type of consolidation was requested in their respective motions, and the consolidation orders—consolidating the 065 Case and the 342 Case and later consolidating the 650 Case with the 065 Case and the 342 Case—did not define which type of consolidation was ordered. Given the lack of clarity, the Master looks to the longstanding history of consolidation under Rule 42(a)’s identical federal counterpart, which as outlined in *Hall*, indicated that consolidation under Federal Rule 42(a) “was understood not as completely merging the constituent cases into one, but as enabling more efficient case management while preserving the distinct identities of the cases and rights of the separate parties in them.” *Hall*, 138 S. Ct. at 1121. Thus, the Master concludes that SPC remains as a nonparty in the 650 Case and FY remains as a nonparty in the 065 Case and the 342 Case, and the Master finds it improper to evade the restriction on the use of interrogatories to parties by requiring a nonparty to respond to the interrogatories. As such, the Master will deny SPC’s December 5, 2022 first motion—in the 065 Case and the 342 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony.



**5. The 065 Case and the 342 Case: SPC’s January 1, 2023 motion for leave to amend its answers in the original, pre-consolidation 065 Case and 342 Case<sup>26</sup>**

In its motion, SPC moved to amend its answers “to clarify his affirmative defense of ‘in pari delicto.’” (Motion.) In support of its motion, SPC “incorporate[d] those facts and arguments” in HH’s December 19, 2022 motion—filed in the 650 Case—to amend the first amended verified complaint to join Manal Yousef as a defendant. (Id.; Exhibit B-HH’s December 19, 2022 Motion in the 650 Case.) In HH’s December 19, 2022 motion, HH argued that, in analyzing the appropriate considerations<sup>27</sup>—to wit, there is no undue delay, no bad faith or dilatory motive on the part of the movant, no repeated failure to cure deficiencies by amendments previously allowed, no undue prejudice to the opposing party by virtue of allowance of the amendment, and no futility of the amendment—the Court should grant his motion to amend the first amended verified complaint to join MY as a defendant in the 650 Case.<sup>28</sup>

In her opposition, MY argued that the Court should deny SPC’s motion. MY made the following assertions in support of her argument: (i) “This entire cause of action has been improperly instituted and should be dismissed, rather than amended” because given that

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<sup>26</sup> As noted above, Third-Party Defendant FY also filed an opposition to SPC’s January 1, 2023 motion on February 10, 2023. However, FY is no longer a party in the 342 Case when the third-party complaint was dismissed. As such, the Court will not consider FY’s February 10, 2023 opposition.

<sup>27</sup> HH referenced: *Davis v. UHP Projects, Inc.*, 74 V.I. 525, 536-37 (V.I. 2021).

<sup>28</sup> In his December 22, 2022 motion in the 650 Case, HH made the following assertions in support of his argument: (i) There is no undue delay since the defendants therein have not filed their answer due to the pending motions to dismiss. (HH’s Dec. 19, 2022 Motion 9); (ii) There is no bad faith or dilatory motive on the part of the movant HH because “[a]ll delays were caused by procedural matters not caused by any party, and COVID” and “[t]he docket reflects that [HH] has always responded to filings in a rapid and timely manner and has sought to move the case to the best of his ability under difficult circumstances.” (Id., at 10); (iii) There is no repeated failure to cure deficiencies by amendments previously allowed because “[t]he complaint in [the 650 Case] was amended once within the permissive time period...primary to add the conversion and civil conspiracy counts [the] [HH] voluntarily withdrew those two counts after the initial briefings revealed them to by [sic] duplicative.” (Id.); (iv) There is no undue prejudice to the opposing party by virtue of allowance of the amendment “[b]ecause no depositions have begun here [in the 650 Case]” and “because of the existing, extensive involvement of Manal’s counsel with [JY] and [IY], the amended allegations are factually similar and not a surprise nor are they prejudicial.” (Id.); and (v) There is no futility because “[MY] is central to the legal issues which have been joined” (Id., at 11.)

“Waleed Hamed and [FY] do not agree on this issue, a resolution by the Board of Directors of [SPC] could never have been obtained to authorize the institution of this lawsuit.” (Opp. 1-2); and (ii) “In pari delicto” defense “is not available to [SPC] due to the fact that Waleed Hamed has unclean hands based on his admission that the participated in a criminal conspiracy to skim \$60 Million from the United Corporation.” (Id., at 3.)

In its reply, SPC argued that MY’s argument as to SPC’s corporation authorization “is misplaced here, and previously discussed in other filings, it is incorrect” and as to SPC’s unclean hands “is premature at this juncture of the proceedings” because further discovery is necessary. (Reply 1-2.)

**a. Standard of Review**

Rule 15 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 15”) governs the amendment of pleadings. Rule 15(a)(1) provides that “[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” V.I. R. CIV. P. 15(a)(1). Rule 15(a)(2) provides that “[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave” and “[t]he court should freely give leave when justice so requires.” V.I. R. CIV. P. 15(a)(2). “[T]he decision to permit an amendment is vested in the sound discretion of the Superior Court.” *Powell v. FAM Protective Servs., Inc.*, 72 V.I. 1029, 1039 (V.I. 2020) (citing *Reynolds v. Rohn*, 70 V.I. 887, 899 (V.I. 2019)). The Virgin Islands Supreme Court explained in *Powell*, “[i]n ruling on a motion to amend, appropriate considerations include, but are not limited to, “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment.” 72 V.I. at 1039-40 (citing *Basic*

*Services, Inc. v. Gov't of the V.I.*, 71 V.I. at 666-67, 2019 VI 21, ¶26, 2019 V.I. Supreme LEXIS 32 at \*23 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)); see *UHP Projects, Inc.*, 74 V.I. at 536-37. Even as late as trial, Rule 15(b)(1) dictates that “[t]he court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence [relevant to the newly raised issue] would prejudice that party’s action or defense on the merits.” V.I. R. CIV. P. 15(b)(1). Rule 15-1 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 15-1”) requires that “[a] party moving to amend a pleading shall attach a complete -- and properly signed -- copy of the proposed amended pleading to the motion papers” and “[e]xcept as otherwise ordered by the court, any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must reproduce the entire pleading as amended specifically delineating the changes or additions and may not incorporate any prior pleading by reference.” V.I. R. CIV. P. 15-1(a).

**b. Analysis**

The Court notes at the outset: (i) SPC attached a copy of the redline version and clean version with its motion in compliance with Rule 15-1; (ii) SPC’s motion did not address the appropriate considerations for SPC’s motion to amend in the 065 Case and the 342 Case. More specifically, SPC incorporated HH’s argument as to the appropriate considerations for HH’s motion to amend the 650 Case but HH’s argument was not transferrable because he referenced facts specific to the 650 Case—for example, there is no pending motions to dismiss in the 065 Case and the 342 Case and the defendants in the 065 Case and the 342 Case have filed their answers; and (iii) MY’s opposition also did not address the appropriate considerations; instead, MY addressed the dismissal of SPC’s claims and the appropriateness of SPC raising “in pari delicto” as an affirmative defense, which would appear to be more aptly raised in a motion to dismiss and a motion to strike, respectively. Having been advised of the premises, the Court finds that there is no undue delay, no bad faith or dilatory motive on the part of SPC, no

repeated failure to cure deficiencies by amendments previously allowed, no undue prejudice to the opposing party by virtue of allowance of the amendment, no futility of the amendment, and that amending the answers in the 065 Case and the 342 Case will aid in presenting the merits of the defense. As such, the Master will grant SPC's January 1, 2023 motion for leave to amend its answers in the original, pre-consolidation 065 Case and 342 Case. *See* V.I. R. CIV. P. 15(a)(2) ("The court should freely give leave when justice so requires."); *see also, Powell*, 72 V.I. at 1039 ("the decision to permit an amendment is vested in the sound discretion of the Superior Court"). The Master will order SPC to file a clean copy of its first amended answer to the counterclaim in the 065 Case and a clean copy of its first amended answer to the complaint in the 342 Case, and thereafter, MY may file appropriate motions to address the arguments raised in her opposition if she so desires.

**6. The 065 Case and the 342 Case: SPC's January 3, 2023 first motion to compel discovery responses from MY as to address, agent's information, accounting and tax information**

In its motion, SPC moved the Court to compel MY to respond to its discovery requests. The Master notes at the outset that SPC's January 3, 2023 motion to compel was not compliant with Rules 37 of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 37"), which governs motion to compel, and Rule 37-1—to wit, SPC's motion did not include any certification required under Rule 37 and Rule 37-1(a), which mandate the moving party to certify that that parties engaged in substantive, good faith negotiations before filing the motion. *See* V.I. R. CIV. P. 37(a) ("On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."); V.I. R. CIV. P. 37-1(a) ("Prior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties and any self-

represented parties shall confer in a good faith effort to eliminate the necessity for the motion -- or to eliminate as many of the disputes as possible.”). In its motion, SPC simply indicated that its counsel and MY’s counsel have corresponded by mail regarding the discovery issues raised in the motion. (Motion, p. 3, Exhibit 1-a copy of MY’s counsel’s November 7, 2022 letter to SPC’s counsel in response to SPC’s counsel’s October 20, 2022 letter to MY’s counsel.) There was no indication that the parties met and conferred telephonically or by video conferencing. Rule 37-1 clearly states that “[m]ail or e-mail exchanges are not sufficient” to satisfy the good faith negotiation requirement under Rule 37-1 and mandates that, “[t]o the extent practicable, counsel are encouraged to meet in person at a mutually convenient location” and “[i]f, in the consideration of time and/or resources, counsel agree that meeting in person is not practicable, the conference may take place telephonically or by video conferencing.” V.I. R. CIV. P. 37-1(c)(2). It is “the responsibility of counsel for the requesting party to make any necessary arrangements for a conference.” V.I. R. CIV. P. 37-1(c)(1).

At this juncture, in the interest of conserving judicial resources, the Master will order the parties in the 065 Case and the 342 Case to meet and confer in compliance with Rule 37 and Rule 37-1 as to the discovery issues raised in SPC’s January 3, 2023 motion. *See Victor-Perez v. Diamondrock Frenchman's Owner, Inc.*, 2018 V.I. LEXIS 39, at \*9 (V.I. Super. Ct. Apr. 5, 2018) (“Courts in other jurisdictions applying procedural rules similar to those at issue here have been ‘unwilling to decipher letters between counsel to conclude that the [certification] requirement has been met’ on the grounds that the certification prerequisite is not an empty formality because ‘obliging attorneys to certify to the Court that they conferred in good faith results in a large number of cases in resolution of discovery disputes by counsel without intervention of the Court.’”). The Master will also order SPC to file a supplemental certification to its January 3, 2023 motion and explicitly state the movant’s compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 37

and Rule 37-1 with the following details: (i) whether the parties met and conferred in person, telephonically, or by videoconferencing,” or that the opposing party refused to meet and confer; and (ii) what specific issues were discussed during the conference, how each party believed legal authority applied to the facts before them, and how one or both parties attempted to resolve their impasse on each issue. *See Id.* (“Accordingly, in future, the Court requests parties to include in the certification itself what specific issues were discussed during the conference, how each party believed legal authority applied to the facts before them, and how one or both parties attempted to resolve their impasse on each issue. This request is to ensure that both procedural and substantive aspects of the good faith negotiation requirement are met.”). In fact, the Master will order that all future motions to compel to include a certification with such details. The Master will reserve ruling on SPC’s January 3, 2023 motion pending receipt of the supplemental certification.

**7. The 065 Case and the 342 Case: SPC and MY’s February 15, 2023 joint motion for enlargement of the January 24, 2023 scheduling order; and The 650 Case: HH, FY IY, and JY’s February 15, 2023 joint motion for enlargement of the January 24, 2023 scheduling order**

On February 15, 2023, the parties in the 065 Case and the 342 Case moved—jointly in the 065 Case and the 342 Case—for enlargement of the January 24, 2023 scheduling order therein and indicated that “[a] simultaneous mirror motion is being filed in the 650 action.” A copy of a proposed order with amended deadlines was attached to the motion. Most of the amended deadlines in the proposed order have already passed, and the 065 Case and the 342 Case have since been consolidated with the 650 Case. As noted above, on February 15, 2023, the parties in the 650 Case similarly moved—in the 650 Case—for enlargement of the January 24, 2023 scheduling order therein, and their motion remains pending.

At this juncture, the Master deny as moot the parties’ February 15, 2023 motions in their respective cases, grant leave to the parties in the 065 Case, the 342 Case, and the 650 Case

to jointly file a proposed amended scheduling order and order that the proffered amended scheduling order must note prominently on the first page the numbered amendment it represents—e.g., FIRST AMENDED SCHEDULING ORDER, SECOND AMENDED SCHEDULING ORDER, etc.

**8. The 065 Case and the 342 Case: SPC’s February 22, 2023 motion to file a brief in excess of page requirements and to file one exhibit included in HH’s reply to FY’s opposition to HH’s December 2, 2022 third motion—in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony**

In its motion, SPC indicated that it attached a copy of HH’s February 21, 2023 motion—filed in the 650 Case—to file a brief in excess of page requirements and to file one exhibit included in HH’s reply to FY’s opposition to HH’s December 2, 2022 third motion—in the 650 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony.

While not directly stated, it appears that SPC intended to incorporate the facts and arguments in HH’s February 21, 2023 motion—filed in the 650 Case. In light of the Master’s ruling above denying SPC’s December 5, 2022 first motion—in the 065 Case and the 342 Case—to compel discovery responses from FY as to FY’s “Fifth Amendment Assertions,” or in the alternative, to preclude further testimony, the Master will also deny SPC’s February 22, 2023 motion—filed in the 065 Case and the 342 Case.

**9. The 065 Case and the 342 Case: MY’s April 20, 2023 motion for summary judgment and SPC’s April 25, 2023 motion to defer summary judgment proceedings**

In her motion, MY argued that she is entitled to summary judgment in her favor and against SPC “because she can establish a case for her debt and foreclosure cause of action and there is no defense to the foreclosure cause of action.” (Motion.) In its motion, SPC argued that the Court should defer consideration of MY’s April 20, 2023 motion pursuant to Rule 56(d) of

the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 56(d)”) <sup>29</sup> because SPC cannot present facts essential to justify its opposition due to the following reasons: “1. The lack of any depositions [of MY, FY, and IY], 2. The failure to mediate as required by the statute, 28 V.I.C. §531, 3. The agreement(s) of the parties, and 4. The outstanding procedural and discovery motions.” (Motion; Decl. of Carl J. Hartmann, Esq., co-counsel of SPC.)

The Master must note at the outset that while MY filed her motion jointly in the 065 Case and the 342 Case, she only addressed her debt and foreclosure claims in the 342 Case, though arguably, she indirectly addressed her declaratory judgment claim in the 065 Case. The Master reminds the parties that, despite the overlapping facts of the 065 Case and the 342 Case, they are two separate cases, and the parties should not treat them as one and the same to avoid confusion as litigation proceeds. As noted above, the consolidation of the cases under Rule 42(a) did not result in the merger of the constituent cases into one but that they retained their separate identities. *See Hall*, 138 S. Ct. 1118.

At this juncture, the Master finds MY’s motion for summary judgment premature since discovery was not yet complete and that SPC has made an adequate showing under Rule 56(d) to stop the Master from considering MY’s motion for summary judgment on the merits at this time. But rather than deferring the consideration of MY’s motion for summary judgment, the Master finds it appropriate to deny the motion without prejudice. This approach is necessary because discovery is still ongoing, and it is impossible to tell what facts may emerge. As discovery continues, it will likely allow the parties to develop their facts and theories more fully, such that MY’s current motion for summary judgment may no longer be complete or

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<sup>29</sup> Rule 56(d) provides:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

V.I. R. Civ. P. 56(d).



relevant. Thus, denying MY's motion without prejudice will allow MY to revise or supplement her current motion as necessary or appropriate, such that it may more comprehensively address the facts as they exist at that point. Accordingly, the Master will deny without prejudice MY's April 20, 2023 motion and deny as moot SPC's April 25, 2023 motion.

**10. The 065 Case and the 342 Case: The August 15, 2023 Mediation Report**

On August 15, 2023, a mediation report was filed jointly in the 065 Case and the 342 Case. However, only the 342 Case deals with a foreclosure of real property mortgage action—to wit, the 065 Case deals with a declaratory judgment action and the 650 Case deals with a shareholder derivative action. Thus, only the parties in the 342 Case are required by statute to “provide the Court with evidence that a good faith effort was made to settle the matter through mediation.” Title 28 V.I.C. § 531(b).<sup>30</sup> Again, as noted above, the consolidation of the 065 Case, the 342 Case, and the 650 Cases under Rule 42(a) did not result in the merger of the three cases into one but that they retained their separate identities. *See Hall*, 138 S. Ct. 1118. At this juncture, the Court will order the parties in the 342 Case to file a joint notice to advise the Master as to when mediation will resume in the 342 Case.

**11. All Three Cases: SPC's September 1, 2023 motion to the Master for a status conference**

The Master must note at the outset that while the document's title indicated that SPC was the movant, the substance of the motion indicated that HH was the movant—to wit, the motion stated that “Hamed requests that a video conference be held to address the status, particularly the three outstanding motions to compel—how and when they will be dealt with by the Special Master: . . .,” that “Hamed believes that the matters can be decided on the (extensive)

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<sup>30</sup> Title 28 V.I.C. § 531(b) provides:

Prior to the entry of any judgment of foreclosure, the parties must provide the Court with evidence that a good faith effort was made to settle the matter through mediation. The type and form of the mediation report shall be prescribed by the Superior Court of the Virgin Islands.

Title 28 V.I.C. § 531(b).

papers—but will obviously cooperate fully in any hearing the Special Master deems necessary[.]” and that “Hamed requests that they be addressed in the following order: (Isam’s Bank Records, Fathi’s 5th Amendment Claims and Manal’s Responses)[.]” (Motion.) To further add to the confusion, the signature line of the motion indicated “Counsel for Hisham Hamed” and was signed by Carl J. Hartmann III, Esq., who is co-counsel for HH and co-counsel for SPC. (Id.) In fact, upon review of the three cases, this is not the first time that the parties treated SPC and HH as interchangeable in their filings. However, it is important to keep in mind that while SPC and HH are represented by the same counsel, they are not the same party and should not be treated as one and the same. Furthermore, as noted above, the consolidation of the cases under Rule 42(a) did not result in making those who are parties in one suit into parties in another suit. *See Hall*, 138 S. Ct. 1118. In this instance, SPC is not a party in the 650 Case and HH is not a party in the 065 Case or the 342 Case—to wit, HH is the plaintiff in the 650 Case and he brought this lawsuit against the defendants therein individually on behalf of himself and derivatively as SPC’s shareholder on behalf of SPC. *See V.I. R. CIV. P. 23.1(b)(1)* (“The complaint must be verified and must... allege that the *plaintiff was a shareholder or member* at the time of the transaction complained of, or that the plaintiff’s share or membership later devolved on it by operation of law...”). Thus, this motion should be more appropriately titled as “SPC’s motion in the 065 Case and 342 Case and HH’s motion in the 650 Case to the Master for a status conference.” This may seem like an unnecessary nuance but by correctly identifying the moving party and the case the motion was filed in, it ensures clarity, eliminates confusion, and avoids unnecessary motion practice in the wrong cases. As such, the Master will order the parties to correctly identify the moving party and the case the motion was filed in for future filings. At this juncture, the Master does not find the need to schedule a status conference and thus, the Master will deny without prejudice SPC’s September 1, 2023 motion to the Master for a status conference.

## **CONCLUSION**

Based on the foregoing, it is hereby:

**ORDERED** that SPC's January 10, 2017 motion to have MY show cause in the 065 Case is **DENIED AS MOOT**. It is further:

**ORDERED** that, **within sixty (60) days from the date of entry of this Order**, the parties in 065 Case shall **MEET AND CONFER** in compliance with rule 26(c) and Rule 37-1 as to the issues raised in MY's July 11, 2017 motion for protective order—including but not limited to whether the parties are agreeable to taking MY's deposition by telephone or other remote means, and MY shall **FILE** a supplemental certification to her July 11, 2017 motion that explicitly states her compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 26(c) and Rule 37-1 with the following details: (i) whether the parties met and conferred in person, telephonically, or by videoconferencing," or that the opposing party refused to meet and confer; and (ii) whether the parties are agreeable to taking MY's deposition by telephone or other remote means. It is further:

**ORDERED** that Third-Party Defendant FY's December 14, 2017 motion to dismiss the third-party complaint in the 342 Case is **DENIED AS MOOT**. It is further:

**ORDERED** SPC's December 5, 2022 first motion to compel discovery responses from FY as to FY's "Fifth Amendment Assertions," or in the alternative, to preclude further testimony in the 065 Case and the 342 Case is **DENIED**. It is further:

**ORDERED** SPC's January 1, 2023 motion for leave to amend its answer in the original, pre-consolidation 065 Case and 342 Case is **GRANTED**, and that, **within thirty (30) days from the date of entry of this Order**, SPC shall **FILE** a clean copy of its first amended answer to the counterclaim in the 065 Case and a clean copy of its first amended answer to the complaint in the 342 Case. It is further:

**ORDERED** that, within sixty (60) days from the date of entry of this Order, the parties in the 065 Case and the 342 Case shall **MEET AND CONFER** in good faith in compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 37 and Rule 37-1 as to the discovery issues raised in SPC's January 3, 2023 first motion to compel discovery responses from MY as to address, agent's information, accounting and tax information, and SPC shall **FILE** a supplemental certification to its January 3, 2023 motion that explicitly state its compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 37 and Rule 37-1 with the following details: (i) whether the parties met and conferred in person, telephonically, or by videoconferencing, or that the opposing party refused to meet and confer; and (ii) what specific issues were discussed during the conference, how each party believed legal authority applied to the facts before them, and how one or both parties attempted to resolve their impasse on each issue. It is further:

**ORDERED** that all future motions to compel **SHALL** include a certification that explicitly state the movant's compliance with the procedural and substantive aspects of the good faith negotiation requirement of Rule 37 and Rule 37-1 with the following details: (i) whether the parties met and conferred in person, telephonically, or by videoconferencing, or that the opposing party refused to meet and confer; and (ii) what specific issues were discussed during the conference, how each party believed legal authority applied to the facts before them, and how one or both parties attempted to resolve their impasse on each issue. It is further:

**ORDERED** that SPC and MY's February 15, 2023 joint motion for enlargement of the January 24, 2023 scheduling order in the 065 Case and the 342 Case is **DENIED AS MOOT** and HH, FY IY, and JY's February 15, 2023 joint motion for enlargement of the January 24, 2023 scheduling order in the 650 is **DENIED AS MOOT**. It is further:

**ORDERED** that, **within thirty (30) days from the date of entry of this Order**, the parties in all three cases **SHALL** jointly file a proposed amended scheduling order and the proffered amended scheduling order **MUST NOTE** prominently on the first page the numbered amendment it represents—e.g., **FIRST AMENDED SCHEDULING ORDER, SECOND AMENDED SCHEDULING ORDER**, etc. It is further:

**ORDERED** that SPC's February 22, 2023 motion to file a brief in excess of page requirements and to file one exhibit included in HH's reply to FY's opposition to HH's December 2, 2022 third motion—in the 650 Case—to compel discovery responses from FY as to FY's "Fifth Amendment Assertions," or in the alternative, to preclude further testimony in the 065 Case and the 342 Case is **DENIED**. It is further:

**ORDERED** that MY's April 20, 2023 motion for summary judgment in the 065 Case and the 342 Case is **DENIED WITHOUT PREJUDICE**. It is further:

**ORDERED** that SPC's April 25, 2023 motion to defer summary judgment proceedings in the 065 Case and the 342 Case is **DENIED AS MOOT**. **And** it is further:

**ORDERED** that SPC's September 1, 2023 motion to the Master for a status conference in all three cases is **DENIED WITHOUT PREJUDICE**.

**DONE and so ORDERED this 20 day of November, 2023.**

**ATTEST:**  
Tamara Charles  
Clerk of the Court

By: 

Court Clerk ~~Supervisor~~ ||

Dated: November 20, 2023

  
EDGAR D. ROSS  
Special Master

**FILED**

November 20, 2023 03:11 PM  
SX-2016-CV-00650  
TAMARA CHARLES  
CLERK OF THE COURT

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
District of St. Croix

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Hisham Hamed on Behalf of Sixteen  
Plus Corp.,  
Plaintiff

Case Number: SX-2016-CV-00650  
Action: Damages

v.

Fathi Yusuf et al,  
Defendant.

NOTICE of ENTRY  
of  
Order

To Joel H. Holt, Esq.

Kevin A. Rames, Esq.

:

\_\_\_\_\_  
Carl Joseph Hartmann, III., Esq.

\_\_\_\_\_  
Stefan B. Herpel, Esq.

\_\_\_\_\_  
James L. Hymes, III, Esq.

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Charlotte Kathleen Perrell, Esq.

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Please take notice that on November 20, 2023  
a(n) \_\_\_\_\_  
Order of the Special Master  
dated November 20, 2023 was/were entered  
by the Clerk in the above-titled matter.

Dated November 20, 2023

:

\_\_\_\_\_

Tamara Charles

\_\_\_\_\_  
Clerk of the Court

By:



\_\_\_\_\_  
Brianna Primus  
Court Clerk II