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

MOHAMMAD HAMED, by his authorized agent, WALEED HAMED,	)	
Plaintiffs,	)	
v.	)	**Case No.1:12-cv-99**
FATHI YUSUF and UNITED CORPORATION,	)	
Defendants.	)	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO STRIKE

Plaintiffs Mohammad Hamed and Waleed Hamed raise two reasons in their opposition (Doc. # 30) why, in their view, Defendants' motion to strike (Doc. # 23) should be denied. Both reasons are misplaced.

A. The Motion to Strike is Independent of any Rule 65 Hearing

First, Plaintiffs argue that the motion to strike is a "delaying tactic," because, according to the Plaintiffs, "if the defendants feel that it is necessary to rebut any evidence or arguments offered by the plaintiff[s], they can simply do so at the Rule 65 hearing." (Opp. at 1). This argument is nonsensical. As a threshold matter, if the Plaintiffs truly believed that it was necessary to rebut any evidence or arguments offered by the Defendants in the underlying motion to strike, the Plaintiffs – under their own extraordinary logic – "simply" could have done so themselves at the presumed Rule 65 hearing *without* having filed their written opposition or the offending written declaration of Waleed Hamed (Doc. # 18-5). Indeed, under Plaintiffs' logic, a motion for a preliminary injunction would be the only written evidence that a court needs to consider the motion, as, according to Plaintiffs, the parties "can simply" consider all other evidence or arguments at a presumed Rule 65 hearing. Any such procedure for considering preliminary injunction motions is plainly misguided.

More importantly, Plaintiffs confuse the hearing requirements under Rule 65 of the Federal Rules of Civil Procedure. Specifically, a trial court "[i]s not required to hold a [Rule 65] hearing before *denying* [injunctive] relief." *Dennie v. Abramson Enters., Inc.*, 124 F. Supp. 2d 928, 931 (Dist. V.I. 2000) (noting that "[p]reliminary injunctions are denied without a hearing . . . when the written evidence shows the lack of a right to relief so clearly that receiving further evidence would be manifestly pointless") (citing C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2949 at 478-79 (1973)). Here, Defendants agree that the requested injunctive relief can and should be *denied* without a hearing, as the written evidence clearly shows that an injunction is not warranted.

However, if this Court is willing to entertain Plaintiffs' request for injunctive relief, then, "[o]f course, notice and a hearing are required before a preliminary injunction may be *granted*." *Id.* at 931 n.4 (citing Fed. R. Civ. P. 65(a)(1)) (original emphasis). Significantly, the requirement that a hearing be held before an injunction may be *granted* applies only to "a preliminary injunction" under Rule 65(a). *Id.* Where, as in this action, the movant also seeks a temporary restraining order ("TRO"), Rule 65(b) governs and provides that, if certain specific conditions are met, "[t]he court may issue a [TRO] without written or oral notice to the adverse party or its attorney" and without an initial hearing. Fed. R. Civ. P. 65(b)(1); *cf.* Fed. R. Civ. P. 65(b)(3) and (4) (addressing the procedures for a hearing *after* the grant of a TRO).

Here, Defendants have moved to proceed on Plaintiffs' TRO motion as a request for a preliminary injunction under Rule 65(a) – and not for a temporary restraining order under Rule 65(b). (*See* Doc. # 1-9). The motion to proceed is pending. However, because Plaintiffs "still seek[] a TRO" (Doc. # 18 at 1 n.1), and because a TRO may be granted without notice or oral argument under Rule 65(b), a hearing prior to the entry of any such order is not guaranteed. To the extent Plaintiffs argue otherwise in their opposition, they are wrong. Moreover, Defendants' motion to

strike the offending declaration is independent of any Rule 65 hearing in the matter – and is not, as suggested, a "delaying tactic."

B. The Offending Declaration Raises New Issues in a Reply Brief

Plaintiffs also claim that the offending declaration "does not contain any 'new' issues." (Opp. at 1). Yet, this claim flatly contradicts Plaintiffs' prior concession that, to "address" numerous deficiencies in the original complaint, they filed a newly drafted *amended* complaint, which, among other new allegations, "lists" for the first time certain specific purchases allegedly made on a "50/50 basis" from the supermarket profits – and then filed a newly drafted declaration from Waleed Hamed purporting to "confirm[]" those alleged "50/50 investment[s]." (Reply to Opp. to Motion for TRO and/or Preliminary Injunction (Doc. # 18) at 8 n.8). Significantly, Plaintiffs filed the amended complaint (Doc. # 15) on October 19, 2012 – *after* the TRO motion (Doc. # 1-4) dated September 18, 2012, and *after* Defendants' response (Doc. # 12) thereto dated October 10, 2012.

Consequently, while Waleed Hamed's declaration "lists" and addresses for the first time in Plaintiff's reply brief factual issues regarding, for example, "Peter's Farm Investment Corporation," "Sixteen Plus Corporation," "Plessen Enterprises, Inc." and "Y and S Corporation" (Doc. # 18-5 at 2-3), Defendants clearly have had no prior opportunity to respond to those specific factual issues – and thus have been prejudiced by Plaintiffs' sneaky tactics. *Cf. United States v. Boggi*, 74 F.3d 470, 478 (3d Cir. 1996) ("As a general matter, the courts […] will not consider arguments raised […] for the first time in a reply brief. [Courts] follow this rule so that [parties] are not prejudiced by the lack of an opportunity to respond to issues raised for the first time in [a…] reply brief.") (internal quotations and citations omitted).

C. **Conclusion**

For the reasons set forth in Defendant's motion and herein, the Court should strike the entire Declaration of Waleed Hamed (Doc. # 18-5) and all portions of Plaintiffs' reply brief that

reference or rely on the offending declaration. Alternatively, if the Court is inclined to allow Plaintiffs to raise arguments for the first time in their reply, Defendants pray for the opportunity to respond to those new arguments through a sur-reply of no more than 20 pages, the same page length of Plaintiffs' reply, together with any counter-declarations/affidavits that Defendants might file in support of the sur-reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of a Notice of Electronic Filing generated by CM/ECF to: *Joel H. Holt, Esq.*, 2132 Company St. Suite 2, Christiansted VI 00820; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820.

/s/ Joseph A. DiRuzzo, III
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