

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 YOUSEF**

Defendants,

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant.

Case No.: 2016-SX-CV-650

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

JURY TRIAL DEMANDED

PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR RULE 11 SANCTIONS

The Plaintiff seeks Rule 11 sanctions against Stefan Hernal and Lisa Komives because of a pleading they filed in this case in opposition to Plaintiff's motion for partial summary judgment **as to Count III** of the First Amended Complaint ("FAC"). A copy of that response is attached here again as **Exhibit 1**.

Their opposition to the instant Rule 11 motion falls **far short** of providing any justification for their conduct, as it simply is a long-winded argument **with no declarations submitted to explain counsel's conduct** or support their assertions.

Two preliminary comments are in order. First, while the initial motion also sought Rule 11 sanctions against their client, Fathi Yusuf, the Rule 11 motion as to him is withdrawn, as *his counsel who signed **Exhibit 1, including the attached declaration, now admits she never spoke to him about this case.***

Second, while counsel argue that Herpal cannot be held liable for any Rule 11 sanction as he did not sign the pleading, he allowed his name to be put on the signature block of **Exhibit 1**, thus approving its contents. Indeed, if he truly had no involvement in the filing of that pleading, *he should have submitted a declaration* to that effect.¹

I. The Response to the Rule 11 Motion fails to explain counsels' conduct.

Defense counsel concedes that Rule 11 authorizes this Court to enter sanctions.

The Plaintiff's Rule 11 motion relies upon these relevant parts of Rule 11(b):

(b) Representations to the Court. By presenting to the court a pleading . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, **formed after an inquiry reasonable under the circumstances:**

(1) it is not being presented for any improper purpose, such as to harass, cause **unnecessary delay, or needlessly increase the cost of litigation;**

. . .

(4) the denials of factual contentions are warranted on the evidence or, **if specifically so identified, are reasonably based on belief or a lack of information.** (Emphasis added).

These sections require a reasonable inquiry into the facts before filing a pleading and prohibit a filing interposed for the purpose of delay. A violation of either subsection (b)(1) or (b)(4) triggers the sanction provisions of this rule.

With this standard in mind, the **only** facts relevant to the partial Rule 56 motion involving Count III of the FAC are as follows:

- Sixteen Plus is a Virgin Islands corporation, of which Yusuf is still currently an officer and director-**this is a public record for which no discovery is needed.**²

¹ Perhaps the Court should ask to see the firm's billing records to see if Komives truly acted alone. If not, blaming an associate to protect the firm's partners is outrageous.

² As he remains an officer and director, the cause of action accrues again every day, so that the statute of limitations has not yet run, making this defense frivolous.

- Sixteen Plus owns real property on St. Croix that has a mortgage recorded against it in favor of Manal Yousef—**these recorded documents are public records as well, for which no discovery is needed.**
- The Power of Attorney gives Yusuf the authority to release the Manal Yousef mortgage, without exposing Yusuf to any liability as she indemnified him for all acts done pursuant to the POA, **which document is attached to the FAC, so no discovery is needed as to that document either.**

The Rule 56 opposition memorandum (**Exhibit 1**) did not address these three issues in the opposition memorandum or the attached declaration.

While the initial Rule 11 motion pointed all of this out, the response to that motion failed to address this simple point. For example, counsel avers on page 9 of the opposition memorandum that **she did “a reasonable investigation”** before filing the response to the Rule 56 Motion. However, where is a declaration to support this assertion? While counsel claims she read the sham mortgage and note, where is the declaration saying defense counsel then even spoke to their client, Fathi Yusuf, about these documents in order to determine if he had any facts to suggest they were valid?³

By way of another example, where is the declaration to support the averment on page 9 that Manal Yousef gave Fathi Yusuf the Power of Attorney “for convenience” based upon her “belief that he would not use it in any way inconsistent with her lawful interests and instructions”?⁴

³ Had defense counsel done so, they would have learned that their own client, Fathi Yusuf, had all the information Komives claimed she needed to respond (i.e., how the sham mortgage was created; what the Hameds knew about it; how the POA was obtained and used; where the original POA is located; and who prepared the tax returns Yusuf signed).

⁴ Indeed, the POA gave Yusuf unfettered discretion to do whatever he wanted without owing any further duty to Manal Yousef at all, completely negating counsel’s unverified arguments.

Indeed, while the validity of the mortgage is not relevant to the pending summary judgment motion, as Yusuf can release it whether or not it is valid, counsel avers that discovery is needed to find out how the sham mortgage was created. Again, counsel's arguments about that issue would hold some merit *if they simply attached an affidavit from Yusuf saying the mortgage was not funded by laundered funds from the Plaza partnership*, as alleged in the verified FAC. Of course, that glaring omission confirms that counsel knows the mortgage is a sham.

In short, counsel needs to submit evidence, not just an unverified argument, to support such "factual" assertions in responding to the Rule 11 motion. Instead, counsel cites a plethora of activity in this case (and in other related cases), but counsel again failed to explain their improper conduct by identifying a single fact for which discovery was needed in order to address the Rule 56 motion as to Count III of the FAC.

Defense counsel are all inching perilously close to becoming a party to the fraud Yusuf is attempting to perpetrate against his own corporation and this Court. Imposing Rule 11 sanctions now is probably in defense counsel's best interests to put them on notice that such conduct is serious and will not be tolerated.

II. Conclusion

In summary, the opposition to the Rule 11 motion certainly does not explain or justify counsel's conduct in failing to fully investigate this matter before filing a response to the partial Rule 56 Motion as to Count III, leaving only one conclusion—that response (**Exhibit 1**) was filed to unduly delay these proceedings, which it has not in fact done. As such, Rule 11 sanctions are warranted here against both Herpal and Komives.

Dated: April 10 , 2017



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CERTIFICATE OF SERVICE

I hereby certify that this document complies with the page limitation set forth in Rule 6-1(e), and was served this 10th day of April, 2017, by mail and email on:

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Exhibit 1

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

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DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

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**DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, pursuant to Federal Rule of Civil Procedure 56(d)¹, hereby opposes Plaintiff, Hisham Hamed's Motion for Partial Summary Judgment on his claim for breach of fiduciary duty as wholly premature given that: 1) a Motion to Dismiss Plaintiff's claim for breach of fiduciary duty is pending; and 2) no discovery has been conducted. In support, Mr. Yusuf states as follows.

1. On January 9, 2017, Mr. Yusuf timely filed a Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss") on the grounds that all counts were: 1) barred by the statute of limitations; 2) were insufficiently pled; and 3) were also properly dismissed for failure to join a required party.

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¹ In *Rivera-Mercado v. General Motors Corp.*, 51 V.I. 307 (V.I. 2009), the Supreme Court of the Virgin Islands confirmed Federal Rule of Civil Procedure 56(f), the precursor to Rule 56(d), applies to practice in the Superior Court of the Virgin Islands.



2. On January 20, 2017, Plaintiff filed an Opposition to the Motion to Dismiss.

3. On the very same day, Plaintiff filed a Motion for Partial Summary Judgment on his breach of fiduciary duty claim.

4. On February 6, 2017, Mr. Yusuf timely replied in support of his Motion to Dismiss.

5. Accordingly, the Motion to Dismiss is fully briefed and ripe for adjudication.

6. As a practical matter, providing a substantive response to a Motion for Summary Judgment when there is a pending Motion to Dismiss the same claim on which summary judgment is being sought is plainly a waste of resources.

7. Moreover, the parties have not conducted a Rule 26(f) conference, submitted a Rule 26(f) Report or proposed Scheduling Order to the Court, or engaged in any discovery.

8. As the Third Circuit has explained in *Doe v. Abington Friends School*, 480 F.3d 252, (3d Cir. 2007):

It is well established that a court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record. *See* FED.R.CIV.P. 56(c) (instructing that summary judgment be decided on the basis of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any") . . . In this vein, the [U.S.] Supreme Court has explained that "[a]ny potential problem with . . . premature [summary judgment] motions can be adequately dealt with under Rule 56(f)." Therefore, if the non-moving party believes that additional discovery is necessary, the proper course is to file a motion pursuant to Rule 56(f). District courts usually grant properly filed Rule 56(f) motions as a matter of course. . . . If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion.

Id. at 257 (some internal cites and quotations omitted); *see also* *Bethea v. Merchants Commercial Bank*, Civil Case No. 11-51, 2011 WL 4861873, at * 2 (D.V.I. Oct. 13, 2011) ("Plaintiff herein has had no opportunity to conduct discovery [.]. . . I find MCB's motion for

summary judgment prior to discovery to be premature. Accordingly, I deny MCB's motion for summary judgment without prejudice to refile after discovery has concluded.").

9. Pursuant to the requirements of Federal Rule of Civil Procedure 56(d), counsel for Mr. Yusuf is submitting a declaration herewith which sets forth the information in possession of the movant and third parties which is necessary to challenge what are actually the highly disputed "facts" proffered in support of the Motion for Summary Judgment. *See Exhibit 1.*

10. Therefore, in the absence of any discovery, the facts necessary to oppose the Motion for Summary Judgment are not fully available to Mr. Yusuf, and the Court may properly defer consideration of the same until discovery is complete. *See Federal Rule of Civil Procedure 56(d).*


11. A proposed order is being submitted herewith for the Court's consideration.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: February 9, 2017

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2017, I served the foregoing
*DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT* via e-mail addressed to:

Joel H. Holt, Esq.
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Michelle Barber

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DECLARATION

I, **LISA MICHELLE KÖMIVES**, pursuant to Superior Court Rule of Procedure 18, do declare and state as follows:

1. I am an attorney licensed to practice in the U.S. Virgin Islands.
2. I am Of Counsel at Dudley, Topper and Feuerzeig, LLP, the law firm representing Defendant, Fathi Yusuf ("Mr. Yusuf"), in the above-captioned matter and am personally involved with the defense of the case.
3. I make this declaration from my personal knowledge and could competently testify to the facts set forth herein.
4. Discovery on multiple issues is necessary in order to mount an opposition to Plaintiff's Motion for Partial Summary Judgment ("Motion") on his breach of fiduciary duty claim.
5. For example, discovery is needed concerning whether the allegedly "sham mortgage," was in fact a sham, which of the Hameds were aware of the allegedly "sham

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mortgage,” which of the Hameds consented to the “sham mortgage,” communications the Hameds have had with third parties about the “sham mortgage,” *etc.*

6. Discovery is also needed with respect to the 2010 power of attorney executed by Manal Yousef, who procured it, who has the original, what uses, if any, to which it has been put, *etc.*

7. Discovery is necessary concerning Sixteen Plus’s tax returns, the information provided to the preparer, by whom it was provided, amendments thereto, *etc.*

8. Notably, Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint. Many “facts” which Hisham “verified” are outside of his personal knowledge and further represent “conclusory allegations” which are properly tested in the discovery process if the claim is not dismissed by the Court.

9. Therefore, it is plain that information crucial for Mr. Yusuf to properly defend against the Motion is needed from both the Hameds and, potentially, third parties.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: February 9, 2017


LISA MICHELLE KOMIVES