

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

HISHAM HAMED, on behalf of himself)
and derivatively, on behalf of **SIXTEEN**)
PLUS CORPORATION,)
))
Plaintiff,)
))
vs.)
))
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,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

DEFENDANTS ISAM YOUSUF AND JAMIL YOUSUF’S
OPPOSITION TO PLAINTIFF HISHAM HAMED’S MOTION TO CONSOLIDATE

The Defendants Isam Yousuf and Jamil Yousuf (incorrectly referred to in the caption as “Jamil Yousef”) (hereinafter collectively referred to as “Yousufs”), by and through their undersigned counsel, do not voluntarily appear in this matter, do not submit to the jurisdiction of the Court, and do not waive any objections to subject matter jurisdiction, personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted, or any other defense or objection which may be presented whether by pleading or motion in this action, hereby respectfully request the Court

deny plaintiff Hisham Hamed's ("hereinafter "Hamed"), individually and derivatively, on behalf of Sixteen Plus Corporation (hereinafter "16 Plus"), motion to consolidate three matters – the instant Hamed v. Yusuf/Yousufs Actions with previously consolidated 16 Plus v. Manal Yousef and Manal Yousef v. 16 Plus Actions. The Yousufs submit there is no valid basis upon which to consolidate the instant action with the two (2) other consolidated declaratory judgment/mortgage foreclosure actions.

There are different claims asserted by different plaintiffs against different defendants. The actions arise under different legal theories, with different defendants, different plaintiffs, and different legal claims. 16 Plus is the only party in common with all three actions. Hamed, the Yousufs, Manal Yousef, and even Fathi Yusuf are not named parties in all three (3) actions. While Hisham Hamed is a named plaintiff in Civil No. 650, he is not in the consolidated Civil Nos. 65 and 342. Neither Isam Yousuf nor Jamil Yousuf are named in the consolidated Civil Nos. 65 and 342. Although Manal Yousef is a named party in the consolidated Civil Nos. 65 and 342, she is not a party to Civil No. 650. The present action and the two (2) consolidated declaratory judgment/mortgage foreclosure actions concern different claims. The factual overlap between this case and the two (2) consolidated declaratory judgment/mortgage foreclosure actions is minimal. Despite Hamed/16 Plus' contention that the actions may involve some common facts, the mere presence of these purported common facts does not compel consolidation. Although Hamed/16 Plus allege some common facts, the already consolidated declaratory judgment action/mortgage foreclosure action and the present litigation involve different questions of fact and entirely different law. Due to the differences, consolidating this action with the already consolidated cases would not result in any judicial economy but rather

would be prejudicial and confuse the issues in these matters. The Yousufs submit the motion to consolidate should be denied.

I. Description Of The Three (3) Cases Sought To Be Consolidated

The actions sought to be consolidated are as follows:

- 1) ***Hisham Hamed, individually and derivatively on behalf of Sixteen Plus Corporation v. Fathi Yusuf, Isam Yousuf, and Jamil Yousuf, Civil No. 2016-SX-CV-650*** (“CICO conspiracy/tort action”).

The present action, 2016-SX-CV-650, is a derivative action brought by Hisham Hamed individually and derivatively on behalf of Sixteen Plus Corporation against Fathi Yusuf, Isam Yousuf, and Jamil Yousuf premised upon causes of action for CICO conspiracy to embezzle money, tort of outrage (that is, claim for intentional infliction of emotional distress), breach of fiduciary duties (Fathi Yusuf only), and usurping of corporate opportunity (Fathi Yusuf only). [See First Amended Verified Complaint dated December 23, 2016]. Although Hamed/16 Plus attaches the Complaint to Civil No. 650 as Exhibit 3, the Complaint was superseded by the First Amended Complaint.

- 2) Two (2) other consolidated actions for declaratory judgment/mortgage foreclosure (“**declaratory judgment/mortgage foreclosures actions**”):

- a) ***Sixteen Plus v. Manal Yousef, Civil No. 2016-SX-CV-65*** (“**declaratory judgment action**”).

Case 2016-SX-CV-65 is a declaratory judgment action brought by 16 Plus against Manal Yousef asserting that the mortgage debt is invalid for lack of consideration (the mortgage is “null, void and unenforceable for lack of consideration”). This is not a derivative action, as represented by Hamed/16 Plus [see Plaintiff's Motion to Consolidate at page 2 (“the initial derivative action case (#65)”)], because it is not prosecuted as a derivative action and does not

comply with requirements of V.I.R.Civ.P. Rule 23.1. Manal Yousef asserted a Compulsory Counterclaim that the Promissory Note and First Priority Mortgage pertaining to property known as Diamond Keturah are valid and enforceable.

b) ***Manal Yousef v. Sixteen Plus v. Manal Yousef and Fathi Yusuf, Civil No. 2017-SX-CV-342*** (“mortgage foreclosure action”).

Case 2017-SX-CV-342 is a mortgage foreclosure action by Manal Yousef against 16 Plus to foreclose on the mortgage. 16 Plus asserted a counterclaim and Third Party Complaint against Fathi Yusuf ostensibly alleging vague claims for tort and declaratory judgment to estop foreclosure on the mortgage.

The existence of a valid debt and right to foreclose on the mortgage prosecuted in the already consolidated declaratory judgment/mortgage foreclosure actions is separate of distinct from CICO conspiracy and tort claims in the present action.

II. The Cases Should Not Be Consolidated

a. The Standard

A common question of law or fact shared by all of the cases is a prerequisite for consolidation under Rule 42(a) of the Virgin Islands Rules of Civil Procedure. *Gerald v. R.J. Reynolds Tobacco Co.*, 2017 V.I. LEXIS 102, *5 (V.I. Super. Ct. July 10, 2017). The burden of proof rests with the moving party on a motion to consolidate. *Fahie v. Ferguson*, 2017 V.I. LEXIS 33, *2-*3 (V.I. Super. Ct. February 23, 2017). The decision to consolidate rests in the sound discretion of the district court. *Gerald v. R.J. Reynolds Tobacco Co.*, 2017 V.I. LEXIS 102, *4 (V.I. Super. Ct. July 10, 2017). However, the mere commonality of questions of law or fact is insufficient to warrant consolidation. In exercising its discretion the court should weigh the interests of judicial economy against the potential for new delays, inconvenience, expense,

confusion, or prejudice. *Gerald v. R.J. Reynolds Tobacco Co.*, 2017 V.I. LEXIS 102, *4 (V.I. Super. Ct. July 10, 2017).

b. Different Questions Of Law And Fact Arise From The Cases And Any Purported Common Question Of Law Or Fact Is Outweighed By The Disadvantages Of Consolidation

The CICO conspiracy/tort action and declaratory judgment/mortgage foreclosure actions involve separate and distinct claims and issues. Claims and issues for CICO conspiracy to embezzle money, tort of outrage (claim for intentional infliction of emotional distress), breach of fiduciary duties, and usurping of corporate opportunity are different from those relating to mortgage loan validity and mortgage foreclosure. The questions of law pertaining to CICO conspiracy/tort actions as compared to questions of law pertaining to declaratory judgment/mortgage foreclosure actions are so dissimilar that consolidation should be denied. The questions of facts in the CICO conspiracy/tort and declaratory judgment/mortgage foreclosure actions are different as well despite some potential overlap of facts.

As the basis for their motion to consolidate, Hamed/16 Plus state the three (3) cases involve "identical land, mortgage and transactions." [See Plaintiff's Motion to Consolidate at page 1.] While some facts and evidence may be similar, they are not the same. The CICO conspiracy/tort and declaratory judgment/mortgage foreclosure actions are governed by different statutory schemes or principles of law and legal considerations. Consequently, different facts will be emphasized relative to each matter. Moreover other than preliminarily indicating that the cases involve the "identical land, mortgage and transactions," Hamed/16 Plus do not delineate common questions of fact and/or specify common legal question or issue that warrant consolidation of these actions in the moving papers. Reassignment of the instant action (16-SX-

CV-650) and the two (2) consolidated declaratory judgment/mortgage foreclosure actions to one judge, Judge Jomo Meade, does not equate to a basis to consolidate the matters.

The actions involve different parties. 16 Plus is the only party common among the three (3) individual cases. The Yousufs and Hamed are not named-parties in the declaratory judgment/mortgage foreclosure actions. Manal Yousef is not a named-party in the CICO conspiracy/tort action.

Because the CICO conspiracy/tort and declaratory judgment/mortgage foreclosure actions concern different claims and issues involving different parties, the Yousufs submit judicial economy would not be realized from consolidation. Rather than streamlining the issues for trial, consolidation would lead to confusion of the issues and substantial prejudice. Fairness to the Yousufs must be emphasized over efficiency. The request for consolidation attempts to erroneously equate and artificially link the separate and distinct causes of action requiring an application of dissimilar statutes and principles of law at issue in the matters. Furthermore the consolidation of these actions may unduly delay or hinder a prompt resolution of this matter when the Yousufs' Motion to Dismiss Plaintiff's First Amended Complain remains pending as does defendant Fathi Yusuf's in the CICO conspiracy/tort action. Moreover Fathi Yusuf filed a motion to dismiss the third party complaint in the mortgage foreclosure action (Civil No. 342) that is currently pending.

WHEREFORE, based upon the foregoing, Defendants Isam Yousuf and Jamil Yousuf hereby request the Court deny Hamed/16 Plus' motion to consolidate the distinct cases and allow them to proceed on their own.

Respectfully Submitted,

DATED: January 25, 2019.

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CERTIFICATE OF SERVICE

I hereby certify this document complies with the page or word limitation set forth in V.I. R. Civ. P. 6-1(e) and that on this the 25th day of January, 2019, I caused an exact copy of the foregoing **"Defendants Isam Yousuf and Jamil Yousuf's Opposition to Plaintiff Hisham Hamed's Motion to Consolidate"** to be served electronically by e-mail, and by mailing same, postage pre-paid, to the following counsel of record:

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