IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF and UNITED CORPORATION,

Appellants/Defendants,

v.

S. Ct. Civ. No. 2013-0040
Re: Super. Ct. Civ. Co. 370/2012 (STX)

MOHAMMAD HAMED by his
authorized agent WALEED HAMED,

Appellee/Plaintiff.
_____/

REPLY TO APPELLEE'S OPPOSITION TO APPELLANTS' *RENEWED* MOTION TO STAY PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

Appellants/Defendants Fathi Yusuf and United Corporation hereby file this reply to Appellee Mohammad Hamed's opposition to Appellants' renewed joint request for a temporary stay of the Superior Court's 4/25/13 Preliminary Injunction Order pending this interlocutory appeal.[1]

A. The Renewed Stay Motion Complies with VISCR Rule 8

Appellee, relying on VISCR Rule 8, first argues that Appellants' 6/24/13 *Renewed* Motion to Stay Preliminary Injunction Order Pending Expedited Appeal ("Renewed Stay Motion") "can be summarily denied due to [certain procedural] omissions," *i.e.*, that, according to Appellee, "Appellants did not submit any [] affidavits [in support of the motion under Rule 8(b),] . . . nor did they provide any information about security under Rule 8(c)." (Opp. at 2). The argument is misplaced, as Appellants' stay motion materially complies with Rule 8.

Rule 8(b) provides, in relevant part, that a motion seeking a stay of an order below shall "show the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits, other sworn statements or copies thereof, and

[1] Concurrent with the filing of this reply, Appellants filed their Reply Brief on the merits of this appeal and a separate motion to strike the 6/27/13 Declaration of Waleed Hamed. For the sake of brevity and mindful of the Court's time, Appellants have refrained herein from repeating their substantive injunction arguments and/or from responding to Appellee's opposition arguments that Appellants have addressed in their other papers, including their concurrent Reply Brief and motion to strike.

documentation demonstrating ownership, liens or other encumbrances, and availability of resources offered as security." VISCR 8(b). In Appellants' instant renewed motion for a stay pending appeal, Appellants "adopt[ed] and attach[ed] as 'Composite Exhibit A' . . . their [5/28/13] Motion to Stay (and [its] exhibits[])]." (Renewed Stay Motion at 1 n.1). Exhibit "D" to the 5/28/13 Motion to Stay in this Court is Appellants' 5/9/13 Emergency Motion for Reconsideration of Preliminary Injunction Order and for Stay of Same Pending Posting of Adequate Bond ("Emergency Bond Motion") (JA-1725) in the trial court below. Appellants, in their Emergency Bond Motion below, submitted two sworn declarations supporting the reasonable damage figures asserted therein: the 5/8/13 Declaration of John Gaffney (JA-1806), and the 5/8/13 Declaration of Nizar A. DeWood, Esq. (JA-1808), which declarations, again, Appellants adopted and filed in this Court in support of the instant motion, in compliance with Rule 8(c).[2]

Appellee's argument that Appellants "did [not] provide any information about security under Rule 8(c)" (Opp. at 2) is also inaccurate. Preliminarily, the requirement of submitting "documentation demonstrating . . . availability of resources offered as security" is found in Rule 8(b) – not, as Appellee argues, Rule 8(c). *See* VISCR Rule 8(b). More importantly, the undisputed record reflects that Appellant United Corporation holds approximately $40 million in a Popular Securities account in its name alone, *i.e.*, "United Corporation d/b/a Plaza Extra" (JA-1067). Those funds, among others, are the subject of a freeze order in the criminal action (JA-042 at ¶¶ 8-10), in which Appellants Fathi Yusuf and United Corporation d/b/a Plaza Extra (but not Appellee) were indicated for the same supermarket profits at issue in this action. Further, Appellant United Corporation's controller has averred that the corporation's net equity exceeds $68 million. (5/8/13

[2] Appellants' "Composite Exhibit A" to their Renewed Stay Motion comprises 829 pages (as .pdf file). Exhibit "D" thereto (Appellants' Emergency Bond Motion below) is found at page 671 of "Composite Exhibit A." The 5/8/13 Gaffney declaration is found at page 685; and the 5/8/13 DeWood declaration is found at page 688.

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Gaffney Decl. (JA-1807) at ¶ 10). Thus, in compliance with Rule 8(b), the present record contains ample documentation demonstrating Appellants' availability of resources to, if necessary, offer a security supporting a stay pending appeal should this Court require one.

B. The Record Also Reflects Ample Evidence of Irreparable Harm Absent a Stay

Appellee (boldly) asserts a similar evidentiary argument regarding the irreparable harm prong of the stay test – that "Appellants did not offer *any evidence* of any irreparable harm they would suffer if a stay is not issued. . . . As noted, they did not offer any affidavits that would assist this Court in finding that such harm will occur if the stay request is denied." (Opp. at 16 (Appellee's emphasis)). Again, as addressed in the preceding section regarding Appellants' compliance with VISCR Rule 8, Appellee's argument regarding the supposed lack of any evidence or affidavits regarding irreparable harm is misplaced and ignores the record.

As noted above, Appellants' Emergency Bond Motion below – together with the sworn declarations of John Gaffney and Attorney DeWood attached thereto, which motion and supporting affidavits were filed in support of the instant motion – squarely addresses the significant irreparable harm to Appellants that the trial court's extraordinary and drastic injunction order not only has threatened to produce but actually *has produced.* For example, the trial court's directive of "joint management" has judicially usurped the ultimate decision-making authority that Appellant Fathi Yusuf undisputedly exercised alone for decades. (*See* Emergency Bond Motion at 4 ¶ 9). The trial court's overhaul of the status quo likewise has threatened Appellant United Corporation's existence; has usurped its finances; and has materially impacted its obligations in various pending criminal and civil legal proceedings in which it is a party. (*Id.* at 4-5 ¶¶ 10-13). Appellants' out-of-pocket costs and potential damages as result of the instant injunction, and the irreparable harm it has engendered, exceed $80 million dollars. (*Id.* at 5-6 ¶¶ 14-19).

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Separately, the trial court did not "err on the high side" when setting the current bond amount of $25,000 and did not otherwise hold a full hearing on the bond requirement. *See, e.g., Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 887-88 (7th Cir. 2000). Appellants therefore are currently suffering irreparable harm based on the low bond and will continue to do so until this Court rules in the matter. *Id.* ("an error in [setting a bond too low] produces irreparable injury [to the enjoined parties], because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond").

Lastly, Appellee's related argument in this context that "Appellants also failed to offer *any* evidence that the issuance of the stay would not substantially injure Hamed" (Opp. at 16 (Appellee's emphasis)) is equally flawed. Appellee bases the argument on the conclusory claim that "[he] does face irreparable harm if the stay is removed as noted in the [6/27/13] declaration of [his son, Waleed Hamed]." (Opp. at 16). However, Appellee fails to discuss how his son's declaration supports any alleged irreparable harm to Appellee, if any, if a temporary stay is granted pending this expedited appeal; and fails to otherwise address Appellee's alleged such irreparable harm at all. In fact, his son's (Waleed Hamed's) declaration is perjurous, improper and highly prejudicial – and Appellants have moved to strike it from the record. Regardless, the declaration does not serve as a basis upon which to oppose the instant stay motion.

As previously addressed in Appellant's underlying 6/24/13 renewed stay motion (at pp. 11-12) and 5/28/13 motion (at pp. 18-19), the balance of equities weighs heavily in favor of granting a temporary stay of the trial court's injunction order pending appeal.

C. The Bond Issue Was Timely Raised Below

Appellee next argues, without citation to any authority, that the instant bond issue is untimely, because "Appellants did not seek to sever the bond issue from the other [preliminary

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injunction] issues prior to the [trial] court's ruling below, as [Appellants] raised this issue for the first time in their post-hearing 'bond' motion." (Opp. at 17 n.13). Appellee ignores the applicable law.

For example, in *Mead*, the Seventh Circuit Court of Appeals considered the same timeliness argument that Appellee raises here, *i.e.*, that Appellants "should have quantified [their bond] losses earlier, and the only earlier opportunity was at the preliminary injunction hearing." 201 F.3d at 887. In *rejecting* the argument, the court in *Mead* held:

> Nothing in the record suggests . . . that the [trial] judge alerted [defendant] Abbot to this requirement in advance of the hearing. A litigant naturally would suppose (in the absence of notice) that a hearing on a request for a preliminary injunction will be devoted to the merits of that request, rather than to fixing the amount of bond. . . . We trust that in the future the [trial] court will notify the parties of the ground rules and endeavor to set bonds at levels reflecting full consequences.

Id.

Similarly, in the present action, nothing in the record suggests that the trial court alerted Appellants to any requirement in advance of the preliminary injunction hearings to address the bond issue. As noted in *Mead*, Appellants thus "naturally" supposed (in the absence of notice) that the injunction hearings below "w[ould] be devoted to the merits of that request, rather than to fixing the amount of bond." *Id.* *See also Zambelli Fireworks Mfg. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (noting that Rule 65(c) "does not impose any obligation on the parties to seek a bond" at the initial preliminary injunction hearing; and that a "bond shall be issued *irrespective of any request by the parties*") (emphasis added). In sum, Appellants timely raised the bond issue below, as the trial court did not alert Appellants to this requirement in advance of the hearing, and did not otherwise fully address the issue. *See Mead*, 201 F.3d at 887; *Zambelli*, 592 F.3d at 426.

D. A Separate Bond Hearing Was and Is Appropriate

Appellants have cited numerous cases establishing the appropriateness of a separate bond hearing under the facts of this action; and establishing that the failure to conduct a proper bond

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analysis constitutes reversible error. (*See* Renewed Stay Motion at 14). Appellee, like the trial court, has effectively ignored those cases, including *H.I. Construction, LLC v. Bay Isles Assocs., LLLP*, 53 V.I. 206 (Terr. Ct. 2010), clarifying that a trial court "is *unable to impose a reasonable bond* as required as part of an order for injunctive relief" absent testimony on the Rule 65(c) considerations, including the enjoined party's financial ability. *Id.* at 223 (emphasis added).

Instead, buried in a footnote, Appellee attempts to distinguish the relevant authority by arguing in a single sentence that "the Third Circuit cases cited by the Appellants are easily distinguishable as they all involved cases where no bond was set, so a remand was required to address the posting of a bond." (Opp. at 18 n.14 (citing *Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012), *Zambelli Fireworks Mfg. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010), and *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 189 (3d Cir. 1990)). Appellee's such argument cuts it too fine.

If the Third Circuit in those cases found reversible error only because "no bond was set," as Appellee argues, then the appellate court could have remanded with the simple and sole instruction that the trial court *set a bond* – and, by Appellee's logic, a trial court could do so (as, indeed, the trial court did here) without conducting a separate bond hearing. Of course, the rulings in the foregoing Third Circuit cases (and the other cases that Appellants have cited on this issue) are not so limited. Rather, the cases focus not simply on the lack of a bond, but, more importantly, on the underlying purpose of setting a bond in the first place, *i.e.*, "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).

For example, in *Howmedica*, the trial court actually had set an initial bond of $800,000 to secure a temporary restraining order, but, for reasons it explained at the preliminary injunction hearing, the trial court then "declined to require the posting of a new bond at the . . . hearing." 461 Fed. Appx. at 198. Here, in contrast, the trial court never set an initial bond and never discussed the

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bond issues at the injunction hearing. Moreover, the Third Circuit in *Howmedica* did not instruct the trial court to simply set a bond on remand. Rather, the appellate court directed the trial court to first "consider[] what is necessary to protect [the enjoined party] in the event the injunction is later deemed unlawful." *Id.*

Again, by Appellee's logic, a trial court could do so without conducting a separate bond hearing. The Third Circuit expressly rejected that approach in *Howmedica*, requiring the trial court to set a bond "following a *full hearing* on the issue." *Id.* (emphasis added). *See also Zambelli*, 592 F.3d at 426 (noting that the "protection [of a bond] consists of a promise that the defendant will be reimbursed for losses suffered if it turns out that the [injunction] order was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation [a trial offers]"); *Hoxworth*, 903 F.2d at 189, 198-99 (concluding that a preliminary injunction "must be set aside" where, among other things, the trial court failed to "estimate the value of the assets encumbered by the injunction" and to "tailor [the injunction's] scope appropriately").

At bottom, the Superior Court committed reversible error when it failed to conduct a "full hearing" on the bond issue, including, at a minimum, on Appellants' losses suffered in the event of an erroneous injunction and on the value of Appellants' assets encumbered by the injunction. *Howmedica*, 461 Fed. Appx. at 198; *Zambelli*, 592 F.3d at 426; *Hoxworth*, 903 F.2d at 189, 198-99. Appellee's attempt to distinguish these Third Circuit cases is unavailing; and, separately, Appellee's have failed to even address Appellants' many other cases on the bond issue.[3]

[3] Appellee argues, alternatively, that "there was extensive testimony and evidence over two days of hearings regarding Plaza Extra's financial records and business operations" and that, according to Appellee, "the setting of a bond in this case fully complied with the procedural requirements of Rule 65(c)." (Opp. at 18). However, Appellee fails to cite any actual hearing transcript or evidence supporting this naked argument. Nor does the record reflect that, during the injunction hearing, the trial court considered (or heard) any evidence regarding Appellants' potential losses and out-of-pocket damages they would suffer in the event of an erroneous injunction. Indeed, the first time the trial court heard at any such evidence was via Appellants'

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E. Appellants Have Not "Admitted" Any Relief in This Action

In defending the trial court's incredible use of *Appellant United Corporation's* own "escrowed funds" to secure *Appellee Mohammad Hamed*'s injunction bond, Appellee insists on the factual and legal fiction that Appellants have "admitted" Appellee's alleged entitlement in this action to "50%" of the escrowed profits as an alleged "50/50" *de jure* partner with Appellant Fathi Yusuf. (Opp. at 19 (citing *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006)). Appellants – who have not filed any pleadings in this action yet – have admitted no such thing.

To the contrary, Appellants dispute that Appellee is entitled to any relief in this action, *i.e.*, Appellants dispute that Appellee is entitled to any legal or equitable relief under 26 V.I.C. § 75 based on Appellee alleged "partnership rights" under that statute, as alleged in Count I of the Complaint (JA-048 -49); and dispute that Appellee is entitled to any judicial declaration under 26 V.I.C. § 121(5), as alleged in Count II (JA-049).[4] Indeed, Appellants affirmatively deny the existence of any alleged *de jure* partnership between Fathi Yusuf and Mohammad Hamed, just as the Hameds themselves affirmatively denied the existence of any such partnership for decades when it suited them to do so, including in the related criminal action.

Similarly, as noted in Appellants' Opening Brief (at pp. 19-20) and in their Renewed Stay Motion (at pp. 16-17), Appellee's stale references to decades-old deposition testimony in a *different action*, in which Appellee was not a party, cannot be used as substantive proof of the matters asserted in *this action*. *See, e.g.*, 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (a court "cannot take judicial notice of truth of facts found in another case"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a

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Emergency Bond Motion below, which the trial court failed to consider on an emergency basis and denied in a perfunctory 2-page Order without any hearing or oral argument in the matter.

[4] Appellants likewise dispute that Appellee is entitled to any of the relief requested in the First Amended Complaint (JA-176). (*See* 11/5/12 Renewed Motion to Dismiss (JA-924)).

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different case for their truth") (collecting cases). Maher Yusuf also merely testified in this action about an ambiguous "agreement" as to "[o]nly profits," and about which he did not otherwise know any "details." ([JA-696] at 34:20-24; [JA-697] at 35:1). The "agreement" that Maher Yusuf referenced during the injunction hearings, and that Fathi Yusuf referenced decades ago, is clearly *different than* the partnership agreement alleged in this action.

Appellee's own case – *Berckeley* – dooms his position. Specifically, the "binding judicial admissions" in *Berckeley* were initially made in the same action in a pleading therein (a "complaint") and were "unequivocal[]." 455 F.3d at 211. Those factors do not apply here, as Appellants have not filed any pleadings in this action yet nor have they conceded, let alone "unequivocally" conceded, Appellee's entitlement to any relief in this action. At best, Fathi Yusuf merely "committed to a position at a particular point in time [more than 12 years ago]. It does not mean that [he] made a judicial admission that formally and finally decides an issue" in this action. *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991); *see also AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n. 9 (3d Cir. 2009) (noting that a jury must resolve these issues upon a full record).

Regardless, even if Fathi Yusuf's decades-old testimony in a separate action constituted judicial admissions in this action (which it does not), "it does not follow that [he] may not amend them. Th[e] [Third Circuit] and several of our sister courts have recognized that judicial admissions may be withdrawn by amendment." *West Run Student Housing Assocs., LLC v. Campus View JMU, LLC*, 712 F.3d 165, 171-72 (3d Cir. 2013) ("'withdrawn or superseded pleadings' do not constitute judicial admissions") (quoting *Giannone v. U.S. Steel Corp.*, 344 F.2d 544, 547 (3d Cir. 1956) and citing other cases); *see also Schomburg v. Dow Jones & Co.*, 504 Fed. Appx. 100, 103-05 (3d Cir. 2012) (same). The rule that a litigant may withdraw, supersede and/or amend a prior judicial admission applies

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"even when the proposed amendment flatly contradicts the initial allegation." *West Run*, 712 F.3d at 172 (citation omitted); *Schomburg*, 504 Fed. Appx. at 104 (citation omitted).

""This approach ensures that a particular claim will be decided on the merits rather than on technicalities."" *Schomburg*, 504 Fed. Appx. at 103 (quoting *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990)). In addition, any "inconsistency between [a litigant's] two allegations at most creates an issue of fact," *Schomburg*, 504 Fed. Appx. at 105-06, which issue of fact should be decided by the very jury that Appellee has demanded in this action.

Appellee's attempt to usurp the jury's resolution of the heart of this commercial dispute, *i.e.*, whether or not a partnership exists or ever existed, is factually unsupported and legally improper. This action should be decided on the merits, after a full trial, and not "on technicalities" relied upon by the trial court at the preliminary injunction stage on an incomplete record. Nor do these "technicalities" and alleged admissions serve as a proper basis for an injunction bond.

F. The "Escrowed Funds" Do Not Constitute "Additional Security"

With respect to the trial court's illusory "additional security," Appellee claims that "it was certainly proper for the court to use [Appellant United Corporation's] escrowed funds as part of a bond." (Opp. at 19 (relying on *Scarcelli v. Gleichman*, No. 2:12-cv-72, 2012 U.S. Dist. LEXIS 57776, at *13-14 (D. Me. Apr. 25, 2012)). Appellee claims also that "Appellants have not cited any cases to the contrary." Both claims are wrong.

Preliminarily, Appellants discussed – and distinguished – *Scarcelli* in their Renewed Stay Motion (at pp. 17-20). That case, like each of Appellee's preliminary injunction cases, if analyzed in a full context, in fact supports Appellants' position. Substantively, Appellee's argument in this context yet again ignores that injunction bonds are designed to protect incorrectly or wrongfully enjoined defendants, *i.e.*, Appellants here. Fed. R. Civ. P. 65(c). Because "the damages for an erroneous preliminary injunction cannot exceed the amount of the bond," those damages must be

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expressly included as a bond component, where, as here, the allegations in the complaint are in dispute. *Mead*, 201 F.3d at 888 (citation omitted); *cf. Scarcelli*, 2012 U.S. Dist. LEXIS 57776, at *1-2 (noting that the court there "deem[ed] all of the allegations in the [complaint] admitted for purpose of the pending [injunction motion] based on the defendant's [default]").

Accordingly, upon a finding of an erroneous preliminary injunction, the trial court's "additional security" would be *zero*, because the illusory security is not expressly included as a cash component of the present bond; and, because, if Appellants (or either of them) prevail, Appellee's interest in those funds based on any partnership claim in this action would be *zero*. The trial court therefore improperly used Appellants' respective monies to secure Appellee's injunction bond!

G. <u>The Present Bond is Legally Insufficient</u>

As a fall-back, Appellee incredibly asserts that "there is nothing before this Court to suggest $25,000 is insufficient by itself to protect Appellants if they were improperly enjoined, even without the escrowed profits being used." (Opp. at 20). Appellee asserts also that Appellants somehow "abandoned" the arguments in their "post-trial motion" for reconsideration of the bond issue. (*Id.*). These assertions are simply false.

First, as noted at the beginning of this reply, Appellants, in their Emergency Bond Motion below (JA-1792-1817), submitted two sworn declarations supporting the reasonable damage figures asserted therein: the May 8, 2013 Gaffney Declaration, and the May 8, 2013 DeWood Declaration, which declarations, again, Appellants adopted and filed in this Court in support of the instant motion, in compliance with Rule 8(c). Second, notwithstanding Appellee's careless labeling of the Emergency Bond Motion as a "post-trial motion" (Opp. at 20), the preliminary injunction hearings were not a "trial" and, therefore, Appellants' emergency motion to the trial court for reconsideration of the bond issue was not a "*post-trial*" motion. It was an entirely appropriate and timely motion affording the trial court an opportunity to comply with the mandates of Rule 65(c) and the

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overwhelming case law governing injunction bonds – and to correct its legally inadequate bond. Tellingly, Appellee, in his opposition to the emergency motion below, even conceded certain of the error that Appellants raised below. (*See* 5/16/13 Opp. (JA-1935) at 3 n.2 (conceding that any bond should be held in an interest bearing account)).

Appellee's assertion that Appellants "abandoned" the arguments in their Emergency Bond Motion is also false, as the relevant timeline demonstrates. (Opp. at 20). On May 9, 2013, among other motions filed below, Appellants' filed their Emergency Bond Motion (JA-1792) and a separate Emergency Motion to Stay Preliminary Injunction Order (JA-1818). Appellants then timely noticed this appeal on May 13, 2013 (JA-001). On May 16, 2013, Appellee filed his opposition (JA-1933) to the Emergency Bond Motion below. Appellants did not file a reply to that opposition based on the futility of doing so, as the trial court had failed to act on either of their "emergency" motions on an expedited basis and to otherwise demonstrate a balanced consideration of the preliminary injunction issues generally.[5]

Instead, on May 28, 2013, Appellants filed in this Court a motion to stay the injunction order pending appeal and a separate motion for an expedited review of the appeal. On May 31, 2013, this Court promptly ruled on those motions, denying Appellants' motion to stay *without prejudice* to renew the motion if the trial court denied their requested relief; and granting Appellants' request for an expedited review of the appeal. The trial court subsequently entered separate 2-page perfunctory Orders (both dated May 31, 2013) denying Appellants' 5/9/13 Emergency Bond Motion below and separate 5/9/13 Emergency Motion to Stay below. On June 24, 2013, Appellants then filed in this Court their Renewed Stay Motion. Accordingly, Appellants did not "abandon[]" the arguments in

[5] For example, the factual findings and legal conclusions in the trial court's Preliminary Injunction Order are gleaned, almost exclusively, from Appellee's proposed findings and conclusions, and the Order otherwise reflects little, if any, independent consideration of the issues.

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their 5/9/13 Emergency Bond Motion below, but, in fact, renewed them in this Court in their 6/24/13 Renewed Stay Motion.

The instant reply also constitutes Appellants' first meaningful reply to Appellee's arguments in his 5/16/13 Response below to Appellants' 5/9/13 Emergency Bond Motion. Specifically, Appellee now claims that he "explained in his [5/16/13] response why all of [Appellants'] perceived potential losses were illusory (JA 1938-41), such as the loss of 'net equity.'" (Opp. at 20). According to Appellee, his "responses to [Appellants' proffered losses] (JA 1938-1941) confirms that the bond set in this case is more than adequate." (Opp. at 20). In fact, Appellee's such responses simply underscore the gross *inadequacy* of the present meager bond.

Significantly, the Preliminary Injunction Order gives rise to an unprecedented corporate deadlock "affecting the management, employees, methods, procedures and operations" of the Plaza Extra stores based on the directives that (a) the Hameds and Yusufs now "jointly manag[e] each store" (JA-027) (b) "[n]o funds will be disbursed from [United Corporation's] supermarket operating accounts without the mutual consent of Hamed and Yusuf" (*id.*) and (c) "[a]ll checks from all Plaza Extra Supermarket operating accounts will require two signatures," one from each family (*id.*). In other words, for the first time in the alleged partnership's nearly 30-year existence, Appellee Mohammad Hamed (or "a designated representative of Hamed") can now effectively veto or block the tie-break authority that Fathi Yusuf previously held alone for three decades by withholding Appellee's "mutual consent" and/or check-cashing "signature." This judicially-imposed new regime threatens the continued operations of United Corporation d/b/a Plaza Extra, including the operations of the Plaza Extra supermarket stores – which realities Appellee has not denied or disputed in his opposition papers.

Further, "bonds must reflect full costs." *See Mead*, 201 F.3d at 888. "[F]ull costs" in this context includes all "out-of-pocket costs" occasioned by the injunction (*id.* at 887); potential losses

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of "market share as a result of the injunction" (*id.*); "costs complying with the injunction" (*Scanvec Amiable Ltd. v. Chang*, 80 Fed. Appx. 171, 175 (3d Cir. 2003)); and other "costs and damages sustained by any party found to have been wrongfully enjoined or restrained" (Fed. R. Civ. P. 65(c)). Appellants have provided coherent sworn testimony supporting the reasonableness of their injunction costs and damages; while Appellee, in sharp contrast, has offered the mere argument and representations of his counsel. As even Appellee's own case demonstrates, Appellee has not done enough.

i. Rent

Appellee's gripe that the rent owed to Appellant United Corporation "is not an asset . . . [or] 'cost' that is at risk of being lost by the partnership due to the preliminary injunction" (JA-1938) is improperly narrow, because, as noted, "bonds must reflect *full costs*" and not simply, as Appellee suggests, alleged non-partnership costs. Tellingly, Appellee does not deny that he owes rent to United Corporation. Rather, buried in a footnote, he merely disputes "the amount of the current rent" for which he is indebted. (JA-1938-1939 at n.3). Appellee also concedes that United Corporation will incur out-of-pocket costs to "pursu[e] this debt" (JA-1938), including, without limitation, legal costs to secure a "stipulation" from or a final judgment against the Hameds; and the economic opportunity cost of not having immediate access to the acknowledged debt.

Any bond in this action therefore should have reflected the foregoing *undisputed* costs, including the underlying rent owed, at a minimum. Moreover, Appellee's failure to reasonably contest Appellants' proposed loss figure for the unpaid rent owed to United Corporation, *i.e.*, $9,012,759.50, by proposing his own such actual figure, was sufficient grounds for the trial court to accept Appellants' sworn testimony on this bond component. *See, e.g., Christiana Indus. Inc. v. Empire Elecs., Inc.*, 443 F. Supp. 2d 870, 884 (E.D. Mich. 2006) (granting emergency motion for

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reconsideration to increase bond amount from $100,000 to $2.5 million where "Plaintiff d[id] not contest the amount presented by Defendant as its potential loss").

ii. Net Equity

Appellee likewise does not contest that United Corporation's net equity is $68,000,000, but wonders "how this amount . . . will be 'lost' to United if the preliminary injunction is found to have been entered improperly." (JA-1939). The answer is simple: the injunction, by imposing upon United Corporation d/b/a Plaza Extra a corporate deadlock regime that never existed before, has threatened the continued existence of the Plaza Extra supermarket operations. Appellee does not deny this. If that happens, and "if . . . [Appellee] lose[s] in the end," whenever that may be years down the road, United Corporation will have "swallow[ed] substantial losses as a result of the [trial] court's decision" to grant the injunction. *Mead*, 201 F.3d 888 ("Shifting back to the plaintiff the complete injury occasioned by the errors that sometimes occur when preliminary relief is issued after an abridged judicial inquiry will hold in check the incentive [plaintiffs] have to pursue [preliminary injunctive] relief").

In other words, the "complete injury occasioned" by the potential errors in this action includes United Corporation's net equity, which eventually will dissipate to zero upon the supermarkets' demise through the entry of a final judgment in this action, including any appeals. "An error in setting the bond too high thus is not serious," because United Corporation "still would have to prove its loss" at the end of this case to collect on the bond. *Mead*, 201 F.3d at 888. However, "an error in [setting the bond too low] produces irreparable injury [to United], because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Id.* (citation omitted).

Accordingly, the inclusion of United Corporation's net equity as a component of the bond amount is not "a 'lawyer created' claim," as Plaintiff naively suggests (JA-1939), it is a safeguard

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against the irreparable injury that exists where, as here, a Rule 65(c) bond is "manifestly unjust." *See Mead*, 201 F.3d at 888; *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, No. 3:06-CV-1105, 2011 U.S. Dist. LEXIS 119438, at *9-16 (M.D. Pa. Oct. 17, 2011) (holding it would be "manifestly unjust" to maintain a bond at below 100% "of the damages [the enjoined party] will purportedly suffer should the preliminary injunction be deemed erroneous").

iii. Legal Compliance Costs/Fees

Relying on *AB Electrolux v. Bermil Indus. Corp.*, 481 F. Supp. 2d 325 (S.D.N.Y. 2007), Appellee's only complaint with Appellants' legal costs bond component is his counsel's supposition that "those costs outlined in the [sworn] declaration of Nizar DeWood are nothing but speculation." (JA-1939). Ironically, Appellee himself offers "nothing but speculation" for that supposition.

In addition, *AB Electrolux* actually supports Appellants' arguments. Unlike here, the court in *AB Electrolux* heard direct argument on the Rule 65(c) bond issues *"at the [injunction] hearing."* 481 F. Supp. 2d at 337. This fact alone warrants reversal of the current bond. *Id.* The court in *AB Electrolux* also fixed the bond at approximately 12% (twelve percent) of the damages that the defendants' counsel in that case "represented at the hearing" *without* a supporting testimonial basis. *Id.* (fixing bond at $350,000 for potential "lost profits and potential lost sales" of at least $3,000,000). Here, the nominal bond represents approximately **00.03% (three one hundredths of one percent)** of the damages that Appellants Fathi Yusuf and United Corporation have represented to this Court *with* sworn testimony!

Separately, Appellee does not contest Appellants' legal compliance costs for the *criminal action*, limiting his complaints to the costs for the numerous *civil actions* in which United Corporation is a party. (JA-1939). Appellee thus concedes that, at a minimum, the bond must be increased to also include Appellants' legal compliance costs for the criminal action ($75,000-$100,000), as reasonably set forth in greater detail in Attorney DeWood's declaration (JA-1810 to -1811 at ¶ 9).

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Attorney DeWood also reasonably sets forth in detail Appellants' compliance costs for the civil actions, estimating those costs, "including the attorneys' fees necessarily related thereto, to be $15,000-$25,000 for *each* of the subject civil actions, *i.e.*, $255,000-$425,000." (JA-1811 at ¶ 10). Notwithstanding, Appellee incredibly claims that, because "no estimate of the time needed or the hourly fees is included in [Attorney DeWood's] declaration, [] it is *impossible* to verify how such calculations were made." (JA-1939 (emphasis added)). Yet, Appellee knows full well the hourly rate that he pays to his own attorneys. Virgin Islands courts also "have generally concluded that a reasonable hourly rate in this jurisdiction [includes] $300 per hour." *Anthony v. Abbott*, No. 1999-78, 2012 U.S. Dist. LEXIS 94323, at *7 (D.V.I. July 9, 2012) (citation omitted).

Thus, having the estimated compliance cost amount of $15,000-$25,000 per civil case, together with a reasonable hourly rate for attorneys' fees of $300 per hour (or whatever such actual rate Appellee pays his own attorneys), it is certainly possible – and, indeed, very easy – to calculate the "time needed," as Appellee asks, to verify Appellants' cost calculations – *i.e.*, a $25,000 lodestar divided by an attorney hourly rate of $300 yields a reasonable time needed of approximately 80 hours in legal compliance costs for each of the subject civil actions. Those hours are required, as a result of the injunction, to complete the following necessary legal tasks, at a minimum:

a. revise every existing engagement letter between United Corporation and its respective counsel to incorporate this Court's findings and conclusions of law in the Preliminary Injunction Order, including, but not limited to, Mohammad Hamed alleged interest in the Plaza Extra profits and liability for same;

b. draft, file and serve notices in each of the subject lawsuits notifying all parties of Mohammad Hamed's joint and several liability for any awards or orders in those lawsuits, including any damage claims against United Corporation d/b/a Plaza Extra; and

c. prepare and execute indemnification agreements in each of the subject lawsuits to be executed by Mohammad Hamed for indemnification of United Corporation d/b/a Plaza Extra's expenses, including attorneys' fees and adverse damages judgments, in the lawsuits.

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(DeWood Decl. (JA-1811) at ¶ 10).

Although Appellee supposes that certain of the calculations are "inflated" or "one-time charge[s]" (JA-1939), Appellee "offer[s] no [testimonial] basis for that supposition," such as his counsel's own sworn testimony regarding the subject compliance costs. *See AB Electrolux*, 481 F. Supp. 2d at 337 (requiring more in this context than mere "counsel represent[ation]") (cited by Appellee). Lastly, Waleed Hamed's 5/8/13 Letter (JA-1946), demands, under the guise of the trial court's injunction, that certain of United Corporation's current legal counsel in various of the subject civil actions "keep [Waleed Hamed] informed of all developments . . . regarding these cases" (*id.*), which task United's attorneys were never required to do – and never did – prior to the injunction. This unprecedented demand not only represents a clear departure from the status quo (in violation of the settled principles of equitable injunctive relief), but also generates significantly greater attorneys' fees and potential problems than any alleged savings afforded by "Hamed's consent to continue each personal injury lawsuit with current counsel in place" (JA-1939), which "consent," again, was never required before this Court's overhaul of the parties' prior operational regime.

iv. Employee Wages

Appellee's supposition regarding the so-called "employee wages" is deficient for the same reasons addressed above, including the lack of any sworn testimonial basis for the supposition. *See AB Electrolux*, 481 F. Supp. 2d at 337. Similarly, Appellee's assertion that "there is no merit to any such firings" (JA-1940) is also misplaced, as the supposed correctness or merits underlying an injunction are secondary to the Rule 65(c) bond considerations, which, as discussed above, is designed to protect the possibility of incorrectly or wrongfully enjoined defendants.

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Lastly, Appellee's naked claim that, "even if these employees were discharged, the [alleged] partnership would still have to hire individuals to work these [] key positions, so there is no 'cost' that needs to be protected" (JA-1940), is premised on faulty assumptions and/or contradicts the record evidence. Among other assumptions, the claim assumes that all of the employees at issue are "key" employees, as opposed to being non-essential or irreplaceable employees. However, the record evidence reflects that at least one such employee, Wadda Charriez, is neither "essential" nor "irreplaceable." (Jan. 31, 2013 Hr'g Tr. at 31:3-9 (JA-693) (testimony of Yusuf Yusuf), 91:11-12 (JA-753) (testimony of John Gaffney)). Further, the trial court heard no testimony whatsoever regarding the net operational impact, *if any*, upon the discharge of the subject employees (collectively or individually) from their present positions. For example, it is entirely reasonable – if Waleed Hamed were excused from his present operational duties, pending an investigation or other legal proceeding related to his alleged malfeasance as an employee – that another currently-employed Yusuf manager (or, for that matter, Hamed manager) could easily fill in for Waleed Hamed during his absence.

Because the injunction prevents that from happening unilaterally, and thus effectively requires United Corporation to pay significant earnings to Waleed Hamed (and every other Plaza Extra employee) irrespective of an employee's malfeasance, these employee earnings are a proper bond component if Appellants are "found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). *See also Stouder v. M&A Tech., Inc.*, No. 09-4113, 2010 U.S. Dist. LEXIS 85616, at *9 (D. Kan. Aug. 19, 2010) (including income, *i.e.*, base salary plus commissions, as bond component).

At bottom, Appellee's closing claim in their opposition below that defense counsel "are crying 'wolf' to try to get an unwarranted increase in the size of the bond" (JA-1940) highlights Appellee's fundamental confusion regarding Rule 65(c) bond determinations. Even if defense counsel were "crying wolf," which is not the case, "[a]n error in setting the bond too high [] is not serious," because Appellants "still would have to prove [their] loss" at the end of this case to collect

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on the bond. *Mead*, 201 F.3d at 888. However, "an error in [setting the bond *too low*] produces irreparable injury." *Id.* Appellants respectfully submit that the current $25,000 security, which was set without any direct testimony or evidence on the Rule 65(c) bond issues during the preliminary injunction hearings, and which represents three one hundredths of one percent (00.03%) of Defendants' reasonable damage figures, is *too low*.

Conclusion

Wherefore, Appellants respectfully renew their request that this Honorable Court enter an Order granting a temporary stay of the Superior Court's April 25, 2013 preliminary injunction pending this expedited appeal; and awarding any additional relief as is deemed proper.

Respectfully submitted,

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Dated: July 5, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on VISCEFS on July 5, 2013, and, pursuant to Rule 15(d), that the Clerk will electronically serve the foregoing on:

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