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

MOHAMMAD HAMED by His Authorized Agent WALEED HAMED,	)	
	)	**CIVIL NO. SX-12-CV-370**
Plaintiff,	)	
v.	)	**ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF**
FATHI YUSUF and **UNITED CORPORATION**,	)	
Defendants.	)	**JURY TRIAL DEMANDED**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' "EMERGENCY" MOTION TO RECONSIDER THE PRELIMINARY BOND

The Defendants have filed three separate motions challenging the preliminary injunction issued in this case, one of which seeks reconsideration of the preliminary injunction order based solely on the bond required by this Court. This opposition memorandum addresses these "bond" issues. One preliminary comment is in order.

The defendants' argument that this Court is required to hold a separate hearing on the bond is without any legal support at all, as no such requirement exists under Rule 65, nor has *any* court ever held that such a requirement exists.[1] Indeed, the defendants did not seek to sever the bond issue from the other preliminary injunction issues.

[1] None of the cases cited by the defendants for this proposition held that a separate hearing **is required** before setting the bond, even though some courts decided to hold a separate hearing on the bond issue. *See, e.g., Deborah Heart and Lung Center v. Children of the World Foundation*, Ltd., 99 F. Supp. 2d 481, 495 (D.N.J. 2000); *EH Yacht, LLC v. Egg Harbor, LLC*, 84 F. Supp. 2d 556, 573 (D.N.J. 2000). Even the Seventh Circuit case the defendant relied upon so heavily, *Mead Johnson & Co. v. Abbott Labs.,* 201 F.3d 883 (7th Cir. 2000), does not say a separate hearing is required--it reversed the court below because it found the bond to be insufficient, not because a separate hearing was not held.

As the Third Circuit noted in *Hoxworth v. Blinder, Robinson & Co.,* 903 F. 2d 186 (3rd Cir. 1990), while Rule 65(c) requires a bond to be posted, "the amount of the bond is left to the discretion of the court." *Id.* at 210. The Court is free to consider the testimony and exhibits in setting that amount. Here there was significant testimony and evidence over two days of hearings as to the financials records and business operations of the Plaza Extra Supermarkets submitted by both parties.

After the hearing in this case, the Court then required the plaintiff to post a substantial bond before the preliminary injunction took effect pursuant to Rule 65(c). Thus, the setting of the bond in this case fully complied with the procedural requirements of Rule 65.

Thus, this Court can summarily reject the defendants' argument that a second "bond" hearing is required. Indeed, many of the cases cited by the defendants are easily distinguishable as they involve cases where no bond was set, so a remand was required to address the posting of a bond. *See, e.g., Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012)(court erred in not setting bond after converting TRO--where a bond had been set--to a preliminary injunction with no bond requirement); *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010)(court erred in not requiring bond just because defendant did not ask for one); *Hoxworth v. Blinder, Robinson & Co.,* 903 F. 2d at 210 (3rd Cir. 1990)(court erred in not requiring a bond).

Once this point is clarified, the motion for reconsideration boils down to two remaining factual arguments regarding the bond. First, did this Court err in allowing a portion of the escrowed profits to be used as additional security for the bond? Second, should the Court consider the additional evidence submitted with the defendants' motion

in setting the bond? Each will be addressed separately after a brief review of the applicable standard for such motions. [2]

I. Applicable Procedural Standard For Ruling On This Motion

District Court Local Rule 7.3 (Motions for Reconsideration), applicable in this Court pursuant to Superior Court Rule 7, provides:

> A party may file a motion asking the Court to reconsider its order or decision. . . .A motion to reconsider shall be based on:
>
> 1. intervening change in controlling law;
> 2. availability of new evidence, or;
> 3. the need to correct clear error or prevent manifest injustice.

Moreover, it is firmly established that "new evidence" must be something that was not available to the moving party prior to the filing of the motion for reconsideration. *See, e.g., Worldwide Flight Services v. Gov't of Virgin Islands,* 51 V.I. 105, 2009 WL 152316 at *3 (VI Supreme Ct. 2009)(motions for reconsideration are not for arguments that could have been raised before but which were not raised); *In re Hartlage,* 54 V.I. 449, 2010 WL 4961744 (VI Supreme Ct. 2010)(motions for reconsideration are not permitted to address evidence that was previously available). *See also, Doebler's Pennsylvania Hybrids, Inc. v. Doebler,* 2003 U.S. Dist. LEXIS 27098, at p. 4 (M.D. Pa. Oct. 15, 2003) (in a case cited by the defendants, the court held that only evidence that was not previously available could be considered in a motion for reconsideration).

II. The Escrowed Profits

In setting the bond, the Court stated in part:

---

[2] The defendants also argued that the bond should be placed in an interest bearing account. The funds in the Banco Popular Securities are already in such an account, but the plaintiff has no objection if the $25,000 deposit with the Clerk of Court is removed to an interest bearing account. Thus, this point is not contested.

> Plaintiff's interest in the "profits" accounts of the business now held at Banco Popular Securities shall serve as additional security to pay any costs and damages incurred by Defendants if found to have been wrongfully enjoined.

In this regard, it was established at the preliminary injunction hearing that all of the profits from the operations of the Plaza Extra Supermarkets since 2003 have been deposited into this Banco Popular account, where they remain. Those accounts now contain in excess of $43,000,000. *See* Court's Finding ¶ 37 at p. 11. *See also*, 1/25 Tr, p 41:5-25; p 42:1-18; PEx 26.

The defendants assert that the Court erred in allowing this account to be used as part of the bond, arguing that these are United's funds so they cannot be used as part of the bond. Presumably, the defendants are relying upon the "clear error" provisions of Rule 7.3 in making this argument.

Incredibly, the defendants make this argument even though **they still admit** on page 3 of their companion *Motion to Reconsider and Modify Preliminary Injunction to Terminate Employees Mufeed Hamed, Waleed Hamed and Wadda Charriez* (filed at the same time as this "bond" motion) that they previously agreed in arguments to this Court **that Mohammad Hamed is entitled to 50% of the profits of the operations of the Plaza Extra Supermarkets.** It is hardly error for this Court to rely upon such judicial admissions of a party in making a finding that the plaintiff is entitled to 50% of these escrowed profits.

Indeed, as this Court noted in its findings, the defendants have *repeatedly* admitted that one-half of these profits belong to Hamed. *See, e.g.*, Finding ¶ 15 at 5 (emphasis added):

> **Yusuf has admitted in this case** that he and Hamed "entered into an oral joint venture agreement" in 1986 by which Hamed provided a "loan" of $225,000 and a cash payment of $175,000 in exchange for which "Hamed

> [was] to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets" in addition to the "loan" repayment. **Yusuf states** that the parties' agreement provided for "a *50/50* split of the profits of the Plaza Extra Supermarket stores." *Pl. Ex. 2, p.3, 4.* Indeed, **Yusuf confirms** that "[t]here is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store .... **The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is.**" *Pl. Ex. 3, p.11.*

Even United's President, Maher Yusuf, conceded this fact. 1/25 Tr at p 214:2-11.

Thus, the multiple admissions made under oath by Yusuf and United, as well as the judicial admissions included in pleadings signed by their lawyers, that the plaintiff is entitled to 50% of these profits is an established fact--it is an uncontested admission by both defendants.

As such, this Court certainly did not err in finding that 50% of these funds belonged to the plaintiff. Moreover, the use of the plaintiff's 50% interest of this $43 million fund as part of the bond is certainly "erring on the high side" of what is needed to protect the defendants, as they have urged the Court to do, citing *Mead Johnson & Co. v. Abbott Labs., supra.*

Finally, it is certainly proper for the Court to use such funds as part of the bond. See, *e.g.*, *Scarcelli v. Gleichman*, No. 2:12–cv–72–GZS, 2012 WL 1430555, at *5 (D. Me. Apr. 25, 2012) ("the Court concludes that it need not require Plaintiff to post any additional security. In light of the escrow established by this injunction, the Court is satisfied that the escrowed amounts would pay any costs and damages should it later be determined that Defendant Gleichman was wrongfully enjoined or restrained by this Order."). Indeed, the defendants have not challenged this holding, as they only argued that the escrowed funds were United's funds, which is untrue as noted since it is conceded that 50% of the funds belong to the plaintiff.

Thus, the finding that half of these escrowed profits (totaling in excess of $43,000,000) could and does serve as half of the bond was not "clear error," so that this aspect of the defendants' motion should be denied.

III. The "New Evidence" Submitted By The Defendants

The defendants also argue that this Court should have considered hypothetical costs that the defendant may incur that were not previously submitted to the Court, including (1) salaries to three employees they want to fire, (2) rent allegedly due from 1994 through the current date, (3) legal fees that will be incurred in complying with the injunction and (4) the alleged loss of the company's "net equity."

Presumably the defendants are relying upon the "new evidence" section of Rule 7.3 in making this argument. However, these items are not "new" as this information was available at the time of the hearing. Thus, this Court can summarily reject these other items as not being proper matters to consider on a motion for reconsideration.

Moreover, none of these other items would have justified any increase in the bond even if they had been timely raised for the following reasons:

1. **Rent**-The defendants claim there is rent due United Corporation by Plaza Extra for the Sion Farm location. However, any rent allegedly owed United Corporation by Plaza Extra for the Sion Farm supermarket is not an asset of the partnership, so it is not a "cost' that is at risk of being lost by the partnership due to the preliminary injunction. Indeed, the preliminary injunction does not prohibit United Corporation from pursuing this debt.[3]

[3] If there is any question about whether United is prohibited from pursing such a claim now, it can be clarified by stipulation, just as the matter of the shopping center bank account was clarified by mutual action. See **Exhibit** 1. There are also multiple

2. **Net Equity**-While John Gaffney states that United has a "net equity" of $68,000,000, no one explains how this amount, which is nothing more than an accounting figure, will be "lost" to United if the preliminary injunction is found to have been entered improperly. Of course, if the injunction is found to have been entered improperly, **this accounting figure will be the unchanged**, which is clearly why even Mr. Gaffney did not suggest otherwise. In short, this is a "lawyer created" claim, created to try to inflate the bond requirement in this case, which has no factual basis or legal support.
3. **Legal Fees**-While the defendants assert that legal fees between $255,000 and $425,000 will have to be incurred in dealing with the criminal case and the 17 pending personal injury lawsuits against Plaza Extra, those costs outlined in the declaration of Nizar DeWood are nothing but speculation.[4] Indeed, no estimate of the time needed or the hourly fees is included in his declaration, so it is impossible to verify how such calculations were made. However, they are clearly inflated. For example, DeWood asserts that there will be a cost to obtain Hamed's consent to continue each personal injury lawsuit with current counsel in place, but those letters were sent by Hamed before this motion was even filed (at

---

problems with this rent claim, including a statute of limitations defense to amounts more than six years old, as well as a dispute as to the amount of the current rent due. See **Exhibit 2**. Indeed, the declaration by Mr. Gaffney as to amounts allegedly due before he was hired in September of 2012 (1/31 Tr at p 68) are beyond his personal knowledge, so his declaration should be stricken as to this point. However, these issues need not be addressed since this claim for rent is not relevant to the bond issue.

[4] It is the defendant's burden to prove the amount needed for a bond, which cannot be based on counsel's speculation. *See, AB Electrolux v. Bermil Indus. Corp.*, 481 F. Supp. 2d 325, 336-37 (S.D.N.Y. 2007) (The defendant has burden as to demonstrating a rational basis for the amount required for a bond and it **cannot be speculative**).

no cost to Plaza Extra). **See Group Exhibit 3**. Likewise, the preparation of any revisions of counsel's engagement and an alleged indemnification agreement will be the same for each case, so this would just be a one-time charge, not an expense that will re-occur in each case. In short, these estimated figures have no reasonable basis for the Court to realistically evaluate in setting the bond. Moreover, the bond as set includes the plaintiff' 50% interest in the escrowed profits in excess of $43,000,000, so even if this cost had been properly calculated, it is covered by this bond.

4. **Employee Wages-**As for the claim that the bond needs to be increased to address the alleged need to fire three employees, that argument likewise has no merit. First, as noted in the opposition to the companion motion addressing this issue, which is incorporated herein by reference, there is no merit to any such firings. Second, even if these employees were discharged, the partnership would still have to hire individuals to work these three key positions, so there is no "cost" that needs to be protected by the issuance of the preliminary injunction. Finally, the bond as set, which includes the plaintiff' 50% interest in the escrowed profits in excess of $43,000,000, certainly covers this potential cost.

Once these alleged "costs" are analyzed, it is clear they are nothing more than defense counsel crying "wolf" to try to get an unwarranted increase in the size of the bond. Thus, even if these figures had been timely raised, they would not have supported an increase in the bond as set.

In summary, once analyzed, the "evidence" submitted in support of the need for an increased bond must fail. It is untimely and, even if it had been timely raised, it is unsupported by any evidence that would warrant an increase in the bond. **Indeed, if**

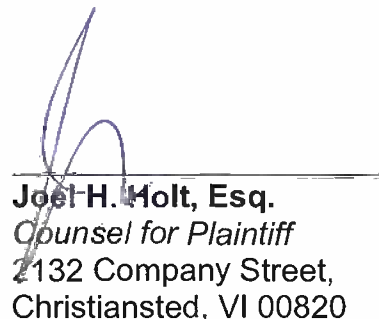
anything, the fact the defendants cannot come up with anything more than what they have now submitted to the Court demonstrates (1) that the bond as set by the Court is certainly reasonable and (2) if anything, the Court has erred on the "high side" of the bond needed to protect the defendants.

IV. Conclusion

This Court held a two-day hearing on the preliminary injunction. It then requested findings of fact and conclusions of law to be submitted. The defendants did not seek to sever the bond issue. Instead, their litigation strategy was to proceed as if they would prevail on the merits and ignore this issue. As such, they cannot now argue that they lacked an opportunity to address the bond issue.

In any event, for the reasons set forth herein, it is respectfully submitted that the Court did not err in setting the bond, so that the motion to reconsider the bond should be denied, except that the plaintiff has no objection to the bond being placed in an interest bearing account.

Dated: May 16, 2013



Joel H. Holt, Esq.
Counsel for Plaintiff
2132 Company Street,
Christiansted, VI 00820

Carl J. Hartmann III, Esq.
Co-Counsel for Plaintiff
5000 Est. Coakley Bay, L6
Christiansted, VI 00820

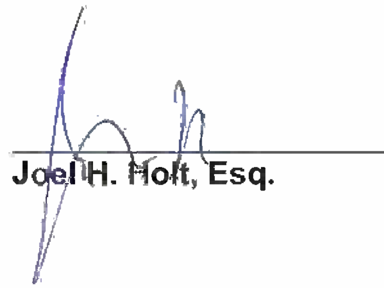
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2013, I served a copy of the foregoing Reply by hand on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

And by email (jdiruzzo@fuerstlaw.com) and mail to:

Joseph A. DiRuzzo, III
Christopher David
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131



Joel H. Holt, Esq.

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

MOHAMMED HAMED by his authorized agent WALEED HAMED,
Plaintiff,

v.

FATHI YUSUF and UNITED CORPORATON,
Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES;

JURY TRIAL DEMANDED

ORDER

THIS MATTER is before the Court on Defendant's Motion to Clarify the Court's Preliminary Injunction Order entered on April 25, 2013. Defendant's Motion is unopposed by Plaintiff; moreover, the parties have stipulated to the same. Thus, being fully advised in the premises it is specifically

ORDERED that Defendants' Motion is GRANTED.

ORDERED that Defendant United's Tenant Account No. 9xxx1923 in NOT subject to this Court's Preliminary Injunction Order, entered on April 25, 2013.

ORDERED that no signature shall be required from Plaintiff Hamed (or his authorized agent) for disbursement of any funds from Defendant United's Tenant Account No. 9xxx1923, only.

ORDERED that this Order be served on all parties FORTHWITH, and the Bank of Nova Scotia.

Dated: May 7, 2013

Judge of the Superior Court

ATTEST: VENETIA H. VELASQUEZ
Clerk of the Court
By: ______
Chief Deputy Clerk
5/8/13

EXHIBIT
1

CERTIFIED TO BE A TRUE COPY
This 8th day of May 20 13
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By ______ Court Clerk II

JOEL H. HOLT, ESQ. P.C.

2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820

Tele. (340) 773-8709
Fax (340) 773-8677
E-mail: holtvi@aol.com

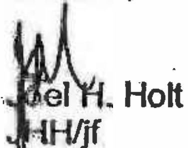
May 11, 2012

Fathi Yusuf
United Corporation
4C & 4D Sion Farm
St. Croix, USVI 00821

Dear Mr. Yusuf:

Wally Hamed received the Statement of Rent allegedly due for Plaza Extra dated May 4, 2012, signed by Najeh Yusuf on your behalf, a copy of which is attached. He has requested that I respond to it on behalf of his family. Mr. Hamed finds it difficult to believe that you think the store has agreed to pay such rent, as it has not. Indeed, it would be a dereliction of the manager's interest to ever agree to such rent. Your efforts to act unilaterally are not in the interest of the business or its owners, much less its creditors, customers and the community it serves. Such actions will not be recognized as valid. Please have your lawyer contact me if you have any questions.

Cordially,



Joel H. Holt
JHH/jf

cc: Nizar Dewood

UNITED CORPORATION
4C & 4D Sion Farm
St Croix, USVI 00821
Phone (340) 778-6240

May 4, 2012

Mohammad Abdul Qader Hamed
Plaza Extra Supermarket
4-C & 4-D Estate Sion Farm
Christiansted, VI 00821

Statement of Rent due for Plaza Extra – East as of May 1, 2012

Rent due for Plaza Extra – East, January 1, 2012 through April 1, 2012	Balance Due	$850,000.00
ADD: 1% interest on outstanding Balance		$ 8,500.00
	Amount Due	$858,500.00
May 2012 Rent currently due:		$250,000.00
	Total Balance due May 1, 2012	$1,108,500.00

Please forward a check immediately.

Sincerely,

Najeh Yusuf for Fathi Yusuf

CC: Wally Hamed

PLAZA EXTRA

PHONE: 809-778-6240
FAX: 809-778-1200

P.O. BOX 763, CHRISTIANSTED
ST. CROIX, U.S. VIRGIN ISLANDS 00821

Carl A. Beckstedt, III, Esq.
Beckstedt & Associates
5025 Anchor Way, Suite 2
Christiansted, VI 00820

May 8, 2013

Re: Plaza Extra Litigation

Sent via Email: carl@beckstedtlaw.com

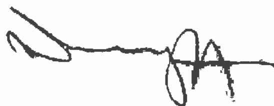
Dear Carl:

To follow up on the April 25, 2013 memorandum opinion and order entered by Judge Brady that was sent to you last week, this letter will confirm that the Hamed interests in Plaza Extra want you to continue as counsel in all litigation for the Plaza Extra Supermarkets that you are currently handling. Please keep me informed of all developments as you do in the normal course of business regarding these cases.

I want to assure you that any bills you present for such work will be approved by the Hameds promptly so payment can be made. Please note that if you are doing work for United Corporation or any member of the Yusuf family, you need to bill that separately to them. The Hamed make no claim as to corporate operation of the shopping plaza or the rentals therefrom. If you feel that Plaza Extra Supermarket should pay for any work for United or any member of the Yusuf family because it is arguably related to the supermarket business, just let me know and I will review it (and approve it if correct).

Please let me know if you have any questions. If there are any outstanding bills owed to you at the current time, please let me know and I will make sure they are promptly processed.

Yours,



Wally Hamed

From: Carl Hartmann <carl@carlhartmann.com>
To: Joseph DiRuzzo <JDiRuzzo@fuerstlaw.com>; dewoodlaw <dewoodlaw@gmail.com>
Cc: Joel Holt <holtvi@aol.com>; Kim Japinga <kim@japinga.com>
Subject: Letter to Attorney Dema and Attorney Beckstedt
Date: Wed, May 8, 2013 7:23 pm
Attachments: image.pdf (250K)

Attorney DiRuzzo and Attorney DeWood:

Appended is a letter from Willie Hamed to Attorney Dema and Attorney Beckstedt regarding ongoing legal matters.

No response has been received yet.

Please contact Joel Holt if you have any questions or we can be of further assistance.

Thank you,

Carl Hartmann

From: Carl Hartmann [mailto:carl@carlhartmann.com]
Sent: Wednesday, May 08, 2013 3:19 PM
To: 'Joseph DiRuzzo'; 'dewoodlaw@gmail.com'
Cc: 'Joel Holt'; 'Kim Japinga'
Subject: Letter to Attorney Beckstedt and his response

Attorney DiRuzzo and Attorney DeWood:

Appended are two letters. The first is from Wally Hamed (as his father's designee) to Attorney Beckstedt regarding ongoing legal matters.

The second is the response.

A similar letter is being sent by Willie Hamed – to include Attorney Dema – which I will provide as soon as we have a response as well.

As was the case with the stipulation regarding the tenant account, we are trying to cooperate in moving matters along.

John K. Dema, Esq.
LAW OFFICES OF JOHN K. DEMA, P.C.
1236 Strand Street, Suite 103
Christiansted, VI 00820-5008

Carl A. Beckstedt, III, Esq.
Beckstedt& Associates
5025 Anchor Way, Suite 2
Christiansted, VI 00820

Re: Plaza Extra St. Thomas/Tutu Park litigation

Sent via email:jdema@lojkd.com, carl@beckstedtlaw.com

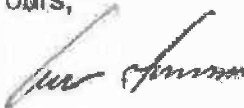
Dear Counsel:

To follow up on the memorandum opinion and order entered by Judge Brady that was sent to you last week, this letter will confirm that the Hamed interests in Plaza Extra want you to continue as counsel in all litigation for the Plaza Extra Supermarkets that you are currently handling. Please keep me informed of all developments as you do in the normal course of business regarding these cases.

I want to assure you that any bills you present for such work will be approved promptly so payment can be made. If you are doing work for any member of the Yusuf family, you need to bill that separately to them. If you feel that Plaza Extra Supermarket should pay for any work for any member of the Yusuf family because it is related to the supermarket business, just let me know and I will review it (and approve it if correct).

Please let me know if you have any questions. If there are any outstanding bills owed to you at the current time, please let me know and I will make sure they are promptly processed.

Yours,



Willie Hamed