

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

**YUSUF YUSUF, derivatively on behalf of  
PLESSEN ENTERPRISES, INC.,**

*Plaintiff,*

**v.**

**WALEED HAMED, WAHEED HAMED,  
MUFEED HAMED, HISHAM HAMED  
and FIVE-H HOLDINGS, INC.,**

*Defendants,*

and

**PLESSEN ENTERPRISES, INC.,**

*Nominal Defendant.*

**Case No. SX-13-CV-120**

CIVIL ACTION FOR DAMAGES  
AND INJUNCTIVE RELIEF

**JURY TRIAL DEMANDED**

**MOTION TO DISMISS**

Defendant, Waleed Hamed, hereby moves to dismiss the complaint for failing to comply with Rule 23.1. The basis of the motion is more fully set forth in the memorandum being filed in support of this motion, which is incorporated herein by reference. For the reasons set forth herein, it is respectfully submitted that the relief sought be granted. A proposed order is being filed with this motion as well.

**THE LAW OFFICES OF MARK W. ECKARD, P.C.**

Dated: September 3, 2013

By:



Mark W. Eckard, Esquire  
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Counsel to Waleed Hamed

**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2013, I served a copy of the foregoing answer via email, pursuant to the agreement of the parties, on:

Nizar A. DeWood  
**dewoodlaw@gmail.com**  
The DeWood Law Firm  
2006 Eastern Suburb, Suite 101  
Christiansted, VI 00820

And by mail and email on:

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



Mark Edward

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**ORDER**

**This matter is before the** Court on Waleed Hamed's motion to dismiss pursuant to Rule 23.1. Upon consideration of the matters before the Court, the motion is **GRANTED** and the complaint is hereby **DISMISSED**.

Dated: \_\_\_\_\_, 2013

\_\_\_\_\_  
Judge, Superior Court

Attest: VENETIA VELAZQUEZ  
Clerk of Court

\_\_\_\_\_  
By: Deputy Clerk

Dist. Nizar DeWood, Esq.  
Joseph DiRuzzo, Esq.  
Mark Eckard, Esq.

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendant, Waleed Hamed, files this Memorandum of Law in support of its Motion to Dismiss the Complaint (the "Motion") and, in support of the Motion, states as follows:

In the complaint filed in this case, it is alleged that on or about March 27, 2013, Wally Hamed, as a director, removed certain funds from a bank account of Plessen Enterprises, Inc. Complaint at ¶ 28. In order to seek recoupment of such funds, the plaintiffs are required to comply with Rule 23.1 of the Federal Rules of Civil Procedure, (applicable to this Court), which states:

**RULE 23.1. DERIVATIVE ACTIONS**

(a) PREREQUISITES. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the

interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

**(b) PLEADING REQUIREMENTS. The complaint must be verified and must:**

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

**(3) state with particularity:**

**(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and**

**(B) the reasons for not obtaining the action or not making the effort.**

(c) SETTLEMENT, DISMISSAL, AND COMPROMISE. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

The Complaint must be dismissed for failure to comply with Rule 23.1 for the following reasons:

1. The Complaint is not properly verified.

2. The Plaintiff did not:

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

3. There are no damages to the Plaintiff as its funds are in a Court account. Each issue will be addressed separately.

**I. The Complaint is not Verified**

Verification of complaint in shareholder derivative action serves important purpose of ensuring that plaintiff or some other person has investigated charges and found them to have substance. . . . *Smachlo v. Birkelo*, 576 F.Supp. 1439 (D.C.Del.1983). However, submitted with the Complaint is a statement by Yusuf Yusuf to the effect that:

VERIFICATION

. . . the facts [in the Complaint] are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury pursuant to 28 U.S.C. section 1746, that the foregoing is true and correct.

This obviously is not a verification pursuant to 28 U.S.C. § 1746, which requires:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person **which is subscribed by him, as true under penalty of perjury, and dated**, in substantially the following form:

(1) If executed without the United States: **“I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.** Executed on (date). (Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”.

See 28 U.S.C. § 1746.

The "Verification" in the instant complaint does not swear that the foregoing COMPLAINT "is true and correct" as required by Rule 23.1. Instead, it swears to the truth of a statement that "the facts [in the Complaint] are true and correct to the best of my knowledge, information and belief." *This is nothing* more than a statement "upon information and belief" that swears to a LACK of the ability to swear the facts in the Complaint are true and correct! Thus, the verification is not proper and the complaint must be dismissed.

**II. The Complaint does not "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members"**

Under Rule 23.1, before filing suit, the shareholder was required to not only to make an "effort" "to obtain the desired action from the directors or comparable authority" but to also state that effort in the Complaint. Plaintiff did neither.

Defendants stood ready to deposit the funds in a neutral account to protect them from a similar looting and diversion to places unknown. After the suit was wrongfully brought, defendants in fact deposited the Yusuf half of the funds immediately to a Court account, as noted by the Court file. Thus, it is clear that if a demand had been made as required by Rule 23.1, this case would have been moot. Thus, the complaint must be dismissed for failing to comply with the requirement as well.

**III. The Complaint does not "state with particularity" (B) any VALID "reasons for not obtaining the action or not making the effort" discussed in II above.**

At paragraph 25 of the Complaint, Yusuf states that on March 27, 2013, he personally paid the Plessen taxes due with "his personal credit card." He recites no corporate determination, minutes or resolution that would direct or allow him to do so. The Complaint does not recite AS A FACT that the corporate taxes were not paid. Thus, there was no damage with regard to the

company -- only that Yusuf was allegedly unable to secure reimbursement.<sup>1</sup>

Paragraphs 31-36 first admit that no demand or request was made. They then go on to state that such a request would have been futile because the person who removed the funds (Wally Hamed) was one of the stockholders and directors and "obviously"

32. As noted, as of the time of the filing of this complaint the Plessen Board comprise [sic.] the following directors: Mohammad Hamed, Defendant Waleed Hamed, Fathi Yusuf; and Maher Yusuf.

33. Mohammad Hamed, who is Defendant Waleed Hamed's father is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

Conclusory allegations of a stockholder that demand on corporation to institute action would be futile because the board was dominated by those whose conduct was subject matter of complaint fails to comply with the Rule 23.1 requirement that plaintiff present verified allegations of fact to justify an allegation of futility of demand. *Abrams v. Mayflower Investors, Inc.*, 62 F.R.D. 361 (N.D.Ill.1974).<sup>2</sup> Moreover, plaintiff argues for a rule of law that when a son and father are on a board of a company, the father is, as a matter of law, "incapable of making an independent and disinterested decision" pursuant to Rule 23.1. This is exactly why this Rule exists -- to prevent strike suits based on absolutely no effort to resolve at the corporate level. As such, the complaint must be dismissed for this reason as well.

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<sup>1</sup> Another entity who is not a party to this case actually paid the taxes, not the plaintiff Yusuf, but this fact is irrelevant as clearly Plessen did not suffer a loss.

<sup>2</sup> Similarly in verifications for summary judgment a court should "decline to consider those aspects of a supporting affidavit that do not appear to be based on personal knowledge or are otherwise inadmissible." *Credico v. New York State Bd. of Elections*, 10 CV 4555 RJD, 2013 WL 3990784 (E.D.N.Y. Aug. 5, 2013) (citing *Doe v. Nat'l Bd. of Podiatric Med. Examiners*, No. 03 CV 4034, 2004 WL 912599, at \*4 (S.D.N.Y. Apr. 29, 2004) and *United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir.1995)).



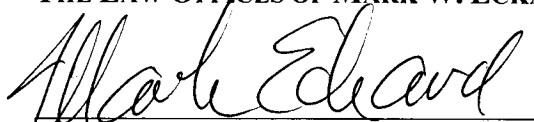
**IV. Conclusion**

For the reasons set forth herein, it is respectfully submitted that this complaint should be dismissed.

**THE LAW OFFICES OF MARK W. ECKARD, P.C.**

Dated: September 3, 2013

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