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 INJUCTIVE RELIEF JURY TRIAL DEMANDED

REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

As an initial point, Plaintiff is correct that this motion is properly brought pursuant to Fed.R.Civ.P. 12(c) rather than 12(b)(6).[1] Otherwise the opposition lacks merit for the following reasons.

ARGUMENT

I. The Opposition Now Admits the Complaint is not Verified

Plaintiff admits that 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**. (Emphasis added.)

[1] Should the Court desire, Defendant will withdraw and re-file the same motion pursuant to 12(c).

> I declare under penalty of perjury pursuant to 28 U.S.C. section l 746, that the foregoing is true and correct.

Plaintiff does not dispute that this 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)"**.

Plaintiff admits that 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."

Plaintiff suggests that despite the specific wording provided by the statute that all averment be made under penalty of perjury (NOT information and belief) Defendant's motion is hyper-technical or can be remedied by a corrective affidavit. The distinction

between attesting to something on "information and belief" and swearing to a fact under penalty of perjury is significant! *Defendant does not believe Plaintiff can so attest to the averments of this Complaint.* If plaintiff can -- it should. Problem solved.

It is simple for counsel to write scandalous things in complaints and protect their clients from the effects of such averments by buffering the verification. This is a specific statute with a specific requirement that facts be attested to under penalty of perjury to address this exact practice. *Plaintiff did not submit such a corrective affidavit, although it could have with the opposition*. Defendant does not object to any such filing and so stipulate here. If plaintiff does not submit such a correction before the Court decides this matter, the Complaint should 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"

Plaintiff quibbles about the distinction of meaning between "an" and "any." But under Rule 23.1, Plaintiff was required to state in the Complaint any efforts "to obtain the desired action from the directors or comparable authority." Plaintiff does not dispute that he made no such efforts.

III. Nor does the Complaint "(B) state with particularity" any VALID "reasons for not obtaining the action or not making the effort" discussed in II above

Paragraphs 31-36 admit that no demand or request was made. Plaintiff then goes on to again 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.**

Thus, 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. However, this is exactly why this Rule exists -- to prevent strike suits based on absolutely no effort to resolve at the corporate level.

In support of his argument, plaintiff cites several cases for the proposition that " [u]nder such conditions courts have routinely excused a demand" because "[a] father's *natural predisposition to protect his child is objectively sufficient to create a reasonable doubt as to whether Mohammad Hamed would seek to protect his son by deadlocking the board and making demand futile*." *Id*. at 10.

Defendant can find no decision that stands for the proposition that a father must submit an affidavit stating that his natural disposition to protect his son on a corporate board before demand must be made. This would basically suspend the rule with regard to all small, family-oriented business entities. Thus, plaintiff argues for a **rule of law** that such a "predisposition" always means that if there are a father and son on a board, demand is excused. Defendant can find no decision which support that rule either. To the contrary, the plaintiff cites cases which, oddly, hold the direct opposite, despite the fact that Yusuf states:

> Under such conditions courts have routinely excused a demand. *See, e.g., Shaev v. Saper,* 320 F.3d 373, 378 (3d Cir. 2003)(Delaware law, a demand on a board of directors is excused where half of the members of an even numbered board are alleged to be interested or lack independence); *Beneville v.York,* 769 A.2d 80, 86 (DeL Ch. 2000) (As a doctrinal matter, it thus makes little sense to find that demand is refused in an evenly divided situation); *Weiss v. Sunasco, Inc.,* 316 F.Supp. 1197 (E.D. Pa. 1970)(where a majority interest is held by directors named as defendants in action, no demand of shareholders need be made since it would obviously be futile) 3; *Walden v. Elrod,* 72 F.R.D. 5 (W.D. Okla. 1976)(In a situation where a derivative suit is brought against the majority of the directors of a corporation for willful or negligent breach of their fiduciary duties, a demand on directors or shareholders as a prerequisite to the bringing of a suit is generally excused).

Id at. 9. Nothing could be further from the truth. In *Shaev v Saper*, 320 F3d 373, 377, 2003 WL 369669 (3d Cir 2003) the Third Circuit warns:

> The threshold question we must decide is the validity of the defendants' challenge to the plaintiff's right to sue in behalf of the Company without first having made a demand upon its Board of Directors to take appropriate action for relief. In a derivative lawsuit, **the shareholder must make a demand on the board of directors of the corporation to take action to correct the wrongdoing, or allege the reasons for the plaintiff's failure for not making the effort.** *See* Fed. R. Civ. Proc. 23.1.
>
> **The demand requirement ensures exhaustion of intra-corporate remedies, thereby possibly avoiding litigation in the first place. Additionally, it gives the corporation an opportunity to pursue claims that the Board believes are meritorious and seek dismissal of the others.** (Emphasis added.)

That Court went on to hold that this was being decided under strict *Delaware* state law that explicitly and uniquely provides "a demand on a board of directors is excused where half of the members of an even numbered board are alleged to be interested or lack independence. *Shaev at* 320 F3d 373, 378, 2003 WL 369669. The USVI does not have any such law. Moreover, the *Shaev* decision cites the next case cited by Plaintiff -- *Beneville v. York, decided under the same law* and similarly inapposite.

The next two cases cited, *Weiss* and *Walden*, provide even more support for defendant. *Weiss* is a 1970 class action case where the quoted section is in pure dicta citing another case altogether (an unrelated 1965 decision) and the court specifically states "[t]he present action falls into neither of these categories." *Id*. at 316 F.Supp. 1197, 1206. *Walden* is a 1976 decision that starts out with the following on failure to correctly verify a derivative action:

> Rule 23.1, Federal Rules of Civil Procedure, requires that the Complaint in a stockholders' derivative action be verified. . . .**The failure to verify a Complaint in stockholders' derivative action has been held to be a fatal defect.** *Marcus v. Textile Banking Company*, 38 F.R.D. 185 (S.D.N.Y.1965) citing Vol. 2 *Barron & Holtzoff, Federal Practice And Procedure*, 571. **A District Court has the inherent power to dismiss the Complaint in a derivative action where the Plaintiff has failed to comply with verification.** *Surowitz v. Hilton Hotels Corporation*, 342 F.2d 596 at 608 (Seventh Cit. 1965) reversed on other grounds 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807;[1] *Meeker v. Rizley*, 324 F.2d 269 (Tenth Cir. 1963). (Emphasis added.)

Id. at 72 F.R.D. 5, 12, 23 Fed R Serv 2d 165 (WD Okla 1976). It goes on to state that demand is excused if the majority of the directors *themselves* were negligent or "*subject to the control* of the alleged wrongdoers."

> In a situation where a derivative suit **is brought against the majority of the directors of a corporation for willful or negligent breach of their fiduciary duties** a demand as a prerequisite to the bringing of a suit is almost always excused. *Jannes v. Microwave Communications, Inc., supra*. Similarly the demand is excused where **the board of directors is subject to the *control* of the alleged wrongdoers** and is hostile to the Plaintiff's claim. *Schreiber v. Jacobs*, 121 F.Supp. 610 (E.D.Mich.1953); *Liboff v. Wolfson*, 437 F.2d 121 (Fifth Cir. 1971); *Papilsky v. Berndt*, 59 F.R.D. 95 (S.D.N.Y.1973).

Walden v Elrod, 72 FRD 5, 13, 23 Fed R Serv 2d 165 (WD Okla 1976). Mohammad Hamed did not withdraw any funds -- thus he committed no willful or negligent breach.

In fact, there is no allegation that he did anything wrong. So we are back to the completely unfounded "new" rule of law Plaintiff suggests -- that solely because Mohammad Hamed is the father of Wally Hamed, as a *matter of law* he is "under the control" of Wally Hamed. As stated in the moving papers there is no indication of this, and there are several indications this is not the case.

The truth of the matter is that both Fathi Yusuf and Mohammad Hamed have testified in other actions before this Court that Hamed allowed Yusuf to make decisions on matters such as his son's pay free from any prejudice. *See, e.g.,* **Exhibit 4** to the original motion, Mohammed Hamed's Testimony from Preliminary Injunction Hearing at p. 201.

> Q Okay. After a while did you get the supermarket open?
> A After the work in the supermarket.
> Q Okay.
> A And Mr. Yusuf tell me, you is my partner, not your son. Your sons are employees, the two, 4.65 an hour, and like any employees. **I tell him I'm not saying nothing, you is my partner. Whatever you say I agree with you.** (Emphasis added.).

Yusuf admits he didn't even attempt to contact Mohammad Hamed.

So this Court is asked to make a hard, new rule of law based on Yusuf's general observation of human nature 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 not the law, nor should it be. If the legislature here (or the Court) wished to have laws like these in Delaware, they know how to do so. There is no damage here in making members of small business entities make demand before filing strike suits

rather than rushing into court. The instant cause of action is not lost by dismissal of the instant complaint and the corporation is not prejudiced in any way. Again, it is the cost of a stamp and a two or three weeks of correspondence to determine what the parties wish to do before invoking the long, expensive engine of the courts. Certainly it may not work because of familial relationships, but the drafters of this Rule clearly intended an attempt to be made. With the Yusuf's "half" of the amount already in escrow, the Yusuf risk nothing be basic compliance with the law !

INSERT SIGNATURE BLOCK

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of October, 2013, I served a copy of the foregoing answer by hand on:

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And by mail and email on:

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