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July 2, 2014

**Via Electronic Transmission**

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RE: Hamed v. Yusuf et al,  
Superior Court of the Virgin Islands,  
Division of St. Croix  
Civil No. SX-12-CV-370

Dear Carl and Mark,

This letter shall serve as my notice of a discovery dispute pursuant to FED. R. CIV. P. 37 and LRCi 37.1, made applicable to these proceedings by Super. Ct. R. 7, relating to your clients' responses ("Responses") to the First Requests for Production of Documents ("Requests for Production") served on each of the additional counterclaim defendants, Waleed Hamed ("Waleed"), Waheed Hamed ("Waheed"), Mufeed Hamed ("Mufeed"), and Hisham Hamed ("Hisham") (collectively the "Counterclaim Defendants") on May 23, 2014.

**A. Untimely responses constitute a waiver of objections.**

The Requests for Production were served electronically on May 23, 2014. Thirty (30) days are allowed for the responses per FED. R. CIV. P. 34. Under FED. R. CIV. P. 6(d), three (3) additional days are allowed for response times as to matters served electronically. The Responses to each of the Requests for Production were due on **Wednesday, June 25, 2014**. However, the Responses were not filed until **Thursday, June 26, 2014**.

The Responses were untimely and, therefore, any objections have been waived. "[W]hen a party fails to respond to discovery requests in the time specified by the Federal Rules of Civil

Carl Hartmann, III, Esq.

Mark W. Eckard, Esq.

July 2, 2014

Page 2

Procedure, the failure to respond will be considered a waiver by that party of any objections that they may have had.” Blue Anchor, Inc. v. Southern Seas Shipping Co., 1985 U.S. Dist. LEXIS 21003, 4-6 (E.D. Pa. Apr. 5, 1985). The District Court in Blue Anchor, held that discovery responses and objections filed after they were due constituted a waiver as to any objections to the discovery propounded. The Court found that “the passing of the thirty-day period without any objection being made or protective order being sought clearly must be considered a waiver by Blue Anchor...of any objections they might have had.” Id. Further, the Court held that “[r]egardless of the content of the discovery requests, Blue Anchor...have lost their opportunity to object.” Id. The Court explained that “[i]f discovery rules are to have ‘any effect or meaning, the failure to serve such objections within the time prescribed ... should be considered a waiver of such objections.” Id., citing Bohlin v. Brass Rail, Inc., 20 F.R.D. 224 (S.D. NY 1957). The parties had a duty to timely respond to discovery requests and “[i]f they had wished to object for any reasons, they had thirty days to do so.” Id. Further, the principal of waiver has been applied with particular regularity when objections relate solely to the relevance or burdensomeness of the discovery request. Jet Plastica Industries, Inc. v. Goodson Polymers, Inc., 1991 U.S. Dist. LEXIS 16472, 1-2 (E.D. Pa. Nov. 12, 1991).

As you are both well aware, your clients have objected to virtually all of the Requests for Production on various grounds and have completely failed to produce a single responsive document. As set forth above, all of the objections have been waived as they have not been timely made. In addition to being untimely, the Responses are incomplete, non-responsive, and fail to state valid objections. Accordingly, this is a demand for additional information to supplement the untimely Responses submitted by the Counterclaim Defendants within the next ten (10) days, as there is no ability to object since *all* objections have been waived. If you believe that supplementation is unwarranted, please contact me at your earliest convenience so that we can schedule a conference as required by LRCi 37.1. If we do not receive supplemented Responses or otherwise hear from you within the next ten (10) days, we will assume that you are unwilling to confer and will move to compel more complete responses.

#### **B. Conclusory and unsupported objections are insufficient.**

Even though all objections have been waived, the late-filed objections are conclusory and unsupported. Thus, the objections are insufficient, even if they had been timely filed. See, e.g., Pulsecard, Inc. v. Discover Card Servs., 1995 U.S. Dist. LEXIS 13111 at \*21-22 (D. Kan. 1995)(“The party opposing discovery cannot simply make conclusory allegations that the request is irrelevant, but must specifically show how each discovery request is irrelevant”). “Objections should be plain and specific enough so that the court can understand in what way the [discovery is] alleged to be objectionable.” Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 187 F.R.D. 528, 530 (E.D. Pa. 1999); *see also*, McLeod, Alexander, Powel & Appfel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (objections that requests were overly broad, burdensome, oppressive, and

Carl Hartmann, III, Esq.

Mark W. Eckard, Esq.

July 2, 2014

Page 3

irrelevant were insufficient to meet party's burden to explain why discovery requests were objectionable).

### **1. Objections that Requests for Production were Overbroad and Unduly Burdensome**

Of the 35 Requests for Production, each of your clients objected to 23 of the requests as "overly broad" and "unduly burdensome." As set forth above, such objections have been waived and, in any event, such cursory objections are insufficient. Hence, Yusuf requests that Responses to Requests to Produce 1-12, 14, 18-23, 25-26, 30-31, which were objected to as "overly broad" and "unduly burdensome" be provided as such objections, in particular, have been waived and are otherwise inadequate.

### **2. Objections as to Relevancy**

In addition, each of your clients objected to 25 of the requests as "not relevant," "irrelevant" or not "likely to lead to relevant evidence." As set forth above, such objections have been waived. Further, it is clear from the sheer number of "relevancy" objections (i.e. to over 70% of the requests) that it was purely a cursory or rote objection which is improper. Hence, without stating why such a request is not relevant, any objection (to the extent not deemed waived) must be specific and demonstrate why a particular request is not relevant or calculated to lead to relevant evidence. No such showing has been made. On the contrary, the issues in this case and, in particular, as to the Counterclaim Defendants relate to funds removed from the Plaza Extra Stores by the Counterclaim Defendants. The information sought in Requests for Production Numbers 1-12, 14, 16-22, 24-26, and 30-31, to which the relevancy objection was raised, relate to financial information of the Counterclaim Defendants and back-up information relating to their financial status - information which is directly relevant to all claims and defenses in this case. Hence, Yusuf requests that Responses to Requests to Produce 1-12, 14, 16-22, 24-26, and 30-31 be provided within ten (10) days as such objections have been waived and the information sought is relevant to the pending issues.

### **3. Objections that Requests for Production were overbroad as to time prior to 2006**

Another objection repeatedly raised, but likewise waived, was that no information prior to 2006 would be produced. Filing a motion for summary judgment does not stay discovery, even if the motion raises statute of limitations arguments. Moreover, as you are well aware, the Court has indicated that it is not inclined to rule on the numerous pending motions in the immediate future. Hence, contending that the parties are waiting for a ruling that you know is not imminent demonstrates bad faith and is not a legitimate basis for failing to respond. Hence, Yusuf requests that Responses to Requests for Production 1-12, 14-15, 19-26, 30-32, and 35, be

Carl Hartmann, III, Esq.

Mark W. Eckard, Esq.

July 2, 2014

Page 4

supplemented within ten (10) days as objections to such production have been waived and pending motions provide no basis to withhold the information.

#### **4. Objections as to Untimely Service of Requests For Production**

The objection that the service of the requests was untimely is, likewise, without merit. Service of the discovery was entirely proper given the Court's Fourth Amended Scheduling Order, which it drew up. Hence, there is absolutely no basis to contend that the Requests for Production, served within the time allowed for fact discovery, is improper and the objection is baseless. Therefore, Yusuf requests that Responses to Requests for Production 1-12, 14, 16-26, 29-33, and 35, be supplemented within ten (10) days as objections to such production have been waived and the discovery sought was clearly timely.

#### **5. Attorney-Client and Work Product Objections without a Privilege Log**

In addition, Yusuf objects to the bare assertion of the attorney-client privilege and/or work product doctrine in Responses 27, 28, and 32-35. Counterclaim Defendants must provide a privilege log or produce the documents at issue. See Smith v. V.I. Hous. Auth., 2008 U.S. Dist. LEXIS 107722 (D.V.I. Apr. 8, 2008) ("In the absence of a privilege log or a showing of the privilege as it relates to specific documents, the Court finds that Defendant has waived its objection"); Dade Eng'g Corp. v. Reese, 2006 U.S. Dist. LEXIS 32639 (D.V.I. Apr. 13, 2006) ("a party may not resist discovery based merely on a bare assertion that the challenged information is protected"). As the Counterclaim Defendants have waived and failed to properly assert any privilege and/or valid objections, they should supplement their Responses and produce all responsive documents within ten (10) days.

#### **6. Lack of Diligent Search and Oath**

As to Response 13 that "none [of the documents requested are] in Counterclaim Defendants' possession," this objection is insufficient. Even if the Counterclaim Defendants have stored the documents or otherwise transferred them to third parties, they must still produce responsive documents. "It is well established that 'control' under Fed. R. Civ. P. 34 is to be broadly construed so that a party may be obligated to produce documents requested even though it may not actually possess the documents. As long as the party has the legal right or ability to obtain the documents from another source on demand, that party is deemed to have 'control.'" Poole v. Textron, Inc., 192 F.R.D. 494, 501 (D. Md. 2000); *see also*, Camden Iron & Metal, Inc. v. Marubeni America Corp., 138 F.R.D. 438, 441 (D.N.J. 1991); Alexander v. FBI, 194 F.R.D. 299, 301 (D.D.C. 2000). Accordingly, if the Counterclaim Defendants can obtain the requested documents on demand, they must produce those documents.

Carl Hartmann, III, Esq.

Mark W. Eckard, Esq.

July 2, 2014

Page 5

If, after a reasonable search has been conducted, the Counterclaim Defendants cannot find responsive documents, then they must then provide Yusuf with a statement **under oath** that no responsive documents exist. See, e.g., 7 MOORE'S FEDERAL PRACTICE - Civil § 34.13 ("when a response to a production of documents is not a production or an objection, but an answer, the party must answer under oath. For example, when a party claims that all the requested documents have already been produced, it must state that fact under oath in response to the request"); Jensen v. Boston Ins. Co., 20 F.R.D. 619, 621 (D. Cal. 1957) ("If the documents sought are not in existence, it is incumbent upon the objecting party or parties to so state under oath and not by way of a general unverified allegation"); B & K Mech., Inc. v. Wiese, 2005 U.S. Dist. LEXIS 21005 at \*14 (D. Kan. Sept. 21, 2005) ("when the records at issue are, by their nature, of a type that would normally be kept in the business of the producing party, and within that party's control, then the court can presume that the records exist and are within the control of the party unless the party denies their existence under oath"); Vazquez-Fernandez v. Cambridge College, Inc., 269 F.R.D. 150, 154 (D.P.R. 2010) (same). The Counterclaim Defendants failed to comply with these provisions and thus, Yusuf requests that proper supplementation be made within ten (10) days.

#### **7. Money Laundering "Stipulation"**

Although not raised as a specific objection to individual Requests for Production, Carl has asserted in his third "General Objection" that Defendants have stipulated that no information can be sought which relates to alleged "money laundering" and, therefore, objected to any Requests for Production seeking financial information up to the date of the Third Indictment. There is no such stipulation and any objection based on this non-existent stipulation has been waived. Hence, to the extent that any Response is being withheld on the basis of this "objection," Yusuf hereby demands that such information be produced within ten (10) days.

#### **C. Mandatory Disclosures**

In addition to the discovery issues addressed above, as required by FED. R. CIV. P. 26(a)(1)(D), within thirty (30) days after being served or joined, new parties are required to submit their mandatory disclosures. Such disclosures would provide much of the information sought in the Requests for Production, including "a copy-or a description by category and location-of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses..." This is yet another reason that the objections raised are without merit and demonstrate bad faith as such information is required to be disclosed. Although we have raised this issue in pleadings with the Court, none of the Counterclaim Defendants have filed their mandatory disclosures. Therefore, we request these disclosures be made within the next ten (10) days as well. Yusuf's disclosures have already been made and supplemented as required and may be treated as his disclosures to the Counterclaim Defendants.

DUDLEY, TOPPER AND FEUERZEIG, LLP

Carl Hartmann, III, Esq.  
Mark W. Eckard, Esq.  
July 2, 2014  
Page 6

Finally, as set forth above, if we do not receive supplemented Responses or otherwise hear from you within the next ten (10) days, we will assume that you are unwilling to confer and will move to compel more complete responses.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charlotte K. Perrell', written in a cursive style.

Charlotte K. Perrell

cc: Fathi Yusuf  
Nizar DeWood, Esq.