

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

HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

Plaintiff,)

vs.)

FATHI YUSUF, ISAM YOUSUF and)
JAMIL YOUSEF,)

Defendants,)

and)

SIXTEEN PLUS CORPORATION,)

a nominal defendant.)

Case No.: 2016-SX-CV-650

DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

**DEFENDANT FATHI YUSUF'S MOTION TO STAY DISCOVERY
PENDING THE DISPOSITION OF HIS MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, hereby moves to stay discovery until such time as the Court rules on his Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss") and, in support, states as follows.

I. INTRODUCTION & BACKGROUND FACTS

Discovery is properly stayed given that a fully briefed motion to dismiss all counts of Plaintiff's First Amended Complaint is currently pending before the Court. To move forward with discovery with respect to any, or all, of the counts when they may be dismissed is an utter waste of the parties' time and resources as well as the Court's, should it have to decide discovery disputes. Moreover, Plaintiff will not suffer any unfair prejudice if discovery is stayed until the

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Motion to Dismiss is adjudicated. Accordingly, the Court should properly exercise its “broad discretion” to stay discovery when a dispositive motion is pending and do so in this case.

On January 9, 2017, Mr. Yusuf timely filed his Motion to Dismiss on the grounds that all counts were: 1) barred by the statute of limitations; 2) were insufficiently pled; and 3) were also properly dismissed for failure to join a required party. After receipt of the Motion to Dismiss, Plaintiff withdrew three counts: 1) violation of 14 V.I.C. § 605(c) of the Criminally Influenced and Corrupt Organizations Act (“CICO”); 2) conversion; and 3) civil conspiracy. However, as more fully set for in the Motion to Dismiss and the reply in support of the same, all remaining counts—the two alleged CICO claims (one a conspiracy to violate 14 V.I.C. § 605(a)¹ and the other for violation 14 V.I.C. § 605(b)), breach of fiduciary duty, usurpation of corporate opportunity, and the “tort of outrage/*prima facie* tort”—are equally flawed. First, they are all barred outright by the statute of limitations and the limitations bar is disclosed on the face of the Complaint, which reveals that Plaintiff knew in 2005 that Sixteen Plus’s interests in the Property were impacted by the “sham mortgage” when Mr. Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold.

Additionally, Plaintiff has failed to plead actual facts—as opposed to conclusory allegations—sufficient to support his claims. For example, Plaintiff has failed to meet the burden to plead facts which, if true, show that Defendants objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise through the commission of two or more predicate criminal acts. Such facts are necessary to properly plead a CICO conspiracy. Plaintiff also fails to allege the necessary criminal enterprise—which enterprise

¹ It is also a violation of CICO to conspire to commit any of the three CICO violation set forth in 14 V.I.C. § 605(a), (b) or (c). *See* 14 V.I.C. § 605(d).

must have an existence separate and apart from the “pattern of criminal activity”—and further fails to allege facts which, if true, would establish the “pattern of criminal activity” needed to properly plead a CICO conspiracy.

In addition to the statute of limitations, Plaintiff's claim for breach of fiduciary duty should be dismissed on the grounds that Plaintiff failed plead actual facts, as opposed to boilerplate allegations, that if true make out a legally cognizable breach of a duty, or harm arising therefrom. Plaintiff's claim for usurpation of corporate opportunity is also properly dismissed for Plaintiff's failure to plead facts, as opposed to boilerplate allegations, which if taken as true establish a legally cognizable “corporate opportunity” that was usurped or harm arising from the alleged usurpation of the alleged “corporate opportunity.” The tort of outrage is properly dismissed as it is a claim for intentional infliction of emotional distress by another name. Sixteen Plus as a corporate entity cannot suffer or make a claim for emotional distress, and there are no allegations that Plaintiff, Hisham Hamed, suffered any emotional distress. To the extent that Plaintiff now claims that the “tort of outrage” is really a claim for “*prima facie* tort,” Defendants' alleged actions fit into existing and defined torts—evidenced by the fact Plaintiff has brought two other tort claims: breach of fiduciary duty and usurpation of corporate opportunity—and has not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations. Thus, Plaintiff's claim for *prima facie* tort is properly dismissed on this basis as well. Finally, Plaintiff's Complaint should also be dismissed, in its entirety, due to Plaintiff's failure to join Manal Yousef, the holder of the Note and First Priority Mortgage at issue herein, who is both a necessary and indispensable party to this action.

On January 20, 2017, Plaintiff filed an Opposition to the Motion to Dismiss. On the very same day, Plaintiff filed a Motion for Partial Summary Judgment on his breach of fiduciary duty

claim, Count III of the First Amended Complaint. On February 6, 2017, Mr. Yusuf timely replied in support of his Motion to Dismiss, which is now fully briefed.

On February 9, 2017, Mr. Yusuf filed an Opposition to the Motion for Partial Summary Judgment which argued principally that since Count III was subject to dismissal on limitations and other grounds, the motion for judgment in favor of Plaintiff on that claim was without merit.²

Unless and until this Court determines that Mr. Yusuf is wrong about Plaintiff's failure to state a claim as to Count III or any other Count in the Complaint, judicial economy and that of the

² Alternatively, Mr. Yusuf argued that even if Count III were not subject to dismissal on any of the bases articulated in his Motion to Dismiss, Hamed's dispositive motion was premature because discovery had not yet been conducted on that count, including discovery regarding Waleed Hamed's basis for signing a corporate resolution approving the mortgage, and signing the note and mortgage, and his basis for now apparently contending the loan and mortgage he approved were sham transactions. Count III alleges that Mr. Yusuf breached a fiduciary duty owed to Sixteen Plus Corporation by accepting a power of attorney given to him by the lender, Manal Yousef, regarding the alleged sham mortgage. Paragraphs 65 and 66 of the verified First Amended Complaint disclose that there are genuine issues of material fact regarding the validity of the mortgage and loan. In paragraph 65(a), Plaintiff references Mr. Yusuf's sworn interrogatory answer in other litigation stating that Manal Yousef did indeed loan the money, and in paragraph 66, he swears that this statement by Mr. Yousef is false. If, as Mr. Yusuf contends, the Manal Yousef loan is valid, Sixteen Plus owes Manal Yousef, at the bare minimum, the principal balance plus interest (minus several interest payments made by Waleed Hamed). As a matter of law, the giving of the power of attorney by Manal Yousef to Mr. Yusuf for a valid loan cannot breach any duties Mr. Yusuf has to Sixteen Plus. Powers of attorney are given for convenience. Manal Yousef lives in another country and there would be nothing improper about giving a power of attorney to an uncle she trusts for convenience, on the belief that he would not use it in any way inconsistent with her lawful interests and instructions. Moreover, if the Manal Yousef mortgage and loan is valid, any violations of fiduciary duties would be by Plaintiff and the other Hamed shareholders, and not by Mr. Yusuf. For in that case, Plaintiff and the Hamed shareholders would have breached fiduciary duties to the corporation and to Mr. Yusuf by filing two meritless lawsuits challenging the validity of the loan and mortgage. Finally, the First Amended Complaint does not allege that Mr. Yusuf has taken any action that alters the loan or mortgage instruments or changes the legal relations created by them. As such, the Complaint fails to allege any act specifically taken pursuant to the power of attorney that could even under the most strained view constitute a breach of duty to the corporation, let alone have caused harm to the lawful interests of the corporation. The loan and mortgage are precisely in the same form today as they were when recorded. For that additional reason, the fiduciary duty count is not cognizable as a matter of law.

parties favors staying discovery in this suit. As the Court surely knows, there are numerous cases pending in the Superior Court between the Hameds and Yusufs arising out disputes concerning their former or currently jointly held businesses. It is reasonable to assume that the Hamed and Yusuf families have each already incurred attorneys' fees in the seven figures in those cases. Moreover, as discussed in the prior brief submitted by Mr. Yusuf, there is already a case concerning the validity of the Manal Yousef mortgage pending before Judge Willocks. If potentially unnecessary additional expense to the parties—and burdens on the resources of the Court—can be avoided, it makes perfect sense for this Court to do so.

On February 10, 2017, the day after Mr. Yusuf filed his response to Plaintiff's motion for summary judgment as to Count III, Plaintiff sent a proposed scheduling order to counsel for Mr. Yusuf. This clearly demonstrates that Mr. Yusuf and Plaintiff have opposing positions with respect to the appropriateness of discovery at this juncture. Mr. Yusuf believes it is wasteful because the Complaint may be dismissed, in its entirety—and because even in the event that the motion is denied or denied in part, Plaintiff will not be unfairly prejudiced by having discovery commence thereafter. Plaintiff apparently is willing to take the risk of undertaking discovery that may prove to be entirely useless to him. As discussed below, the Court has broad discretion to stay discovery in order to promote the economies of the Court and the parties, and it should do so in this case.

II. THIS COURT SHOULD EXERCISE ITS BROAD DISCRETION TO STAY DISCOVERY PENDING A RULING ON YUSUF'S MOTION TO DISMISS.

Clearly, the Motion to Dismiss, once adjudicated by the Court, may completely resolve all the issues presented in this case or substantially reduce the number of issues upon which discovery will be required. A court "is given broad discretion to stay discovery pending decision

on a dispositive motion.” *Jackson v. Northern Telecom, Inc.*, 1990 WL 39311 at *1 (E.D.Pa. 1990); *see also*, *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976); *Allstate Life Ins. Co. v. Estate of Miller*, 2004 WL 141698 at *1 (S.D.Fla. 2004) (pursuant to Fed. R. Civ. P. 26(b)(2), a Court has “discretion to stay or limit discovery pending the resolution of dispositive motions”); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (“A trial court has broad discretion and inherent power to stay discovery”); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”). When a motion would resolve some or all of the issues in a particular case, “[t]he stay [of discovery] furthers the goal of efficiency for the court and litigants.” *Little v. Seattle*, 863 F.2d 681, 685 (9th Cir. 1988); *see also*, *Weisman v. Mediq, Inc.*, 1995 WL 273678 at *1 -2 (E.D.Pa.1995) (“[A] stay is proper where the likelihood that such motion may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay”).

In particular, a stay of discovery pending resolution of a motion to dismiss avoids unnecessary expense and costs. Accordingly, in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997), the Court emphasized many significant burdens associated with discovery:

Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys’ fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged.

Id. With these considerations in mind, the *Chudasama* court explained that “[i]f the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs.” *Id.* Accordingly, “[f]acial challenges to the legal sufficiency of a claim or defense . . . should, however, be resolved before discovery begins.” *Id.* at 1367. Where a pending dispositive motion “may dispose of the entire action and where discovery is not needed to rule on such motion, the balance generally favors granting a motion to stay.” *Weisman*, 1995 WL 273678 at *2; *see also, Masters v. Daniel Intern. Corp.*, 1990 WL 11037 at *2 (D.Kan. 1990) (“It is reasonable for a court to stay discovery until a decision on a dispositive motion where the case can be decided on the pending dispositive motion, where the facts sought through uncompleted discovery would not affect the resolution of the motion, and where discovery on all issues of the broad complaint would be wasteful and burdensome”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (discovery may be stayed to determine the dispositive issue of immunity of government officials).

As discussed above, in Mr. Yusuf's Motion to Dismiss, he challenges the legal sufficiency of each and every one of Plaintiff's claims—three of which Plaintiff withdrew after receiving the Motion to Dismiss—on the grounds that each and every count is: 1) barred by the statute of limitations; 2) insufficiently pled; and 3) properly dismissed for failure to join a required party (Manal Yousef).

Courts are justified in staying or limiting discovery when—as in this case—doing so would facilitate increased efficiency in resolving the case. Indeed, the U.S. Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 177 (1979), referred to the fact that “the discovery provisions,

like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, speedy, and inexpensive determination of every action.' . . . With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." *Id.* at 177 (emphasis in original); *see also, Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985).

Moreover, as noted above, a stay of discovery will not cause any prejudice to Plaintiff. Obviously, if the Court were to deny, in whole or in part, Mr. Yusuf's Motion to Dismiss, the Court could then enter an appropriate scheduling order allowing ample time for discovery. Thus, the substantial benefits of granting a stay greatly outweigh the negligible, if any, harm associated with a brief delay in discovery. Accordingly, the Court should properly exercise its "broad discretion" to stay discovery when a dispositive motion is pending and do so in this case.

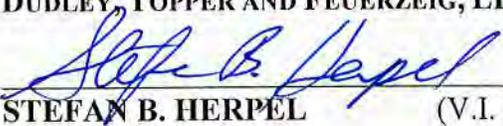
WHEREFORE, on the basis of the foregoing, Defendant, Fathi Yusuf, respectfully requests that the Court stay discovery in this matter until Mr. Yusuf's Motion to Dismiss the First Amended Complaint has been ruled upon by the Court, and award him such other relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: February 24, 2017

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2017, I served the foregoing **DEFENDANT FATHI YUSUF'S MOTION TO STAY DISCOVERY PENDING THE DISPOSITION OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** via e-mail addressed to:

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ORDER

The Court having read Defendant Fathi Yusuf's Motion to Stay Discovery Pending the Disposition of his Motion to Dismiss Plaintiff's First Amended Complaint (the "Motion"), and all briefs filed in support or opposition to the Motion, and being otherwise fully advised in the premises,

IT IS HERBY ORDERED that the Motion is **GRANTED**, and

IT IS FURTHER ORDERED that discovery in this case is stayed pending further Order of the Court.

DATED: _____, 2017

ROBERT A. MOLLOY
Judge of the Superior Court of the
Virgin Islands

A T T E S T:

Estrella H. George
Acting Clerk of the Court

By: _____
Deputy Clerk

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