

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

<b>Waleed Hamed and KAC357, Inc.</b>	)	
	)	<b>CIVIL NO. SX-16-CV-429</b>
<b>Plaintiff,</b>	)	<b>ACTION FOR DAMAGES</b>
<b>vs.</b>	)	
	)	
<b>Bank of Nova Scotia, d/b/a</b>	)	<b><u>JURY TRIAL DEMANDED</u></b>
<b>Scotiabank, Fathi Yusuf, Maher Yusuf,</b>	)	
<b>Yusuf Yusuf and United Corporation</b>	)	
	)	
<b>Defendants,</b>	)	
	)	

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**DEFENDANTS, FATHI YUSUF, MAHER YUSUF, YUSUF YUSUF AND UNITED  
CORP.'S MOTION TO STAY DISCOVERY PENDING THE DISPOSITION OF THEIR  
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendants, Fathi Yusuf, Maher Yusuf, Yusuf Yusuf and United Corporation (collectively, the "Yusuf Defendants"), through undersigned counsel, hereby move to stay discovery until such time as the Court rules on their Motion to Dismiss Plaintiffs, Waleed Hamed and KAC357's First Amended Complaint ("Motion to Dismiss") and, in support, state as follows.

**I. INTRODUCTION & BACKGROUND FACTS**

Discovery is properly stayed as a fully briefed motion to dismiss all counts of Plaintiff's First Amended Complaint is currently pending before the Court.<sup>1</sup> 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, Plaintiffs will not suffer any harm if discovery is stayed until the Motions to Dismiss are adjudicated. Accordingly, the Court should properly exercise its "broad discretion" to stay discovery when dispositive motions are pending and do so in this case.

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<sup>1</sup> Defendant Bank of Nova Scotia ("BNS") also filed a Motion to Dismiss on March 6, 2017 and a Motion to Stay Discovery on July 5, 2017.

On March 9, 2017, the Yusuf Defendants timely filed their Motion to Dismiss all claims in Plaintiffs' First Amended Complaint—malicious prosecution, defamation, “trade disparagement,” the “prima facie tort of outrage,” violations of the Criminally Influenced and Corrupt Organizations Act (“CICO”) and a CICO conspiracy—on the grounds that Plaintiffs failed to state a single claim upon which relief can be granted. To wit, Plaintiffs' claim for malicious prosecution is properly dismissed on the grounds that: 1) the Yusuf Defendants did not procure a criminal proceeding against Wally Hamed; 2) the Yusuf Defendants had probable cause to report him the VIPD; and 3) the criminal proceedings did not terminate in a way which proved his innocence of the charges. Plaintiffs' claims for defamation should be dismissed because Plaintiffs: 1) claim certain absolutely privileged communications with the VIPD as the basis for the same; 2) claim certain true statements as the basis for the same; 3) have not plead them with the requisite specificity. Plaintiffs' claim for trade disparagement fails because a common law action for trade disparagement is not—and should not be—recognized in the Virgin Islands. Plaintiffs' claim for *prima facie* tort is properly dismissed as duplicative of Plaintiffs' other tort claims. Plaintiffs' claims for direct violations of CICO and CICO conspiracy claims are both properly dismissed on the grounds that Plaintiffs failed to: 1) allege what predicate criminal acts were allegedly perpetrated by each defendant; and 2) allege a pattern of criminal activity. Plaintiffs' CICO conspiracy claims should also be dismissed for failure to allege the requisite CICO conspiracy. Finally, as to United, Plaintiffs have failed to plead a single fact which, if true, could support a finding that any of the individual Yusuf Defendants were acting within the scope of their employment with United Corporation when they undertook the actions alleged in the First Amended Complaint.

In the Yusuf Defendants' view (as well as BNS' view), proceeding with discovery while comprehensive motions to dismiss are pending will result in potentially unnecessary additional expense to the parties and burdens on the resources of the Court. Accordingly, if those expenses and burdens can be avoided, it makes perfect sense to do so. However, on July 12, 2017, Plaintiffs filed a motion seeking entry of a scheduling order so discovery can commence. Thus, it is clear that Plaintiffs and Defendants have opposing positions with respect to the appropriateness of discovery at this juncture. The Yusuf Defendants (and BNS) believe it is wasteful because the First Amended Complaint may be dismissed, in its entirety—and because even in the event that the motions are denied or denied in part, Plaintiffs will not be unfairly prejudiced by having discovery commence thereafter. Plaintiffs are apparently willing to incur the significant expense of undertaking discovery which may prove to be entirely useless to them. 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. THE COURT SHOULD EXERCISE ITS BROAD DISCRETION TO STAY DISCOVERY PENDING A RULING ON DEFENDANTS' MOTION TO DISMISS**

Clearly, the Yusuf Defendants' Motion to Dismiss, once adjudicated by the Court, may completely resolve all the issues presented in this case against the Yusuf Defendants or substantially reduce the number of issues upon which discovery will be required.<sup>2</sup> 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

<sup>2</sup> The same holds true for BNS – resolution as to its Motion to Dismiss would resolve all or most of the issues which would necessitate discovery.

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”).

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”). 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 v. Mediq, Inc.*, 1995 WL 273678 at \*2 (E.D.Pa. 1995); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (the purpose of Rule 12(b)(6) is to “streamline[] litigation by dispensing with needless discovery and factfinding”); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (the idea that discovery should be permitted before deciding a motion to dismiss “is unsupported and defies common sense [because t]he purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery”).

The Court’s discretion to stay discovery while a motion to dismiss is pending exists because the pleading requirement set forth in *Twombly* and *Iqbal* serves two purposes: “to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense,” and “to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of ‘a largely groundless claim.’ ” *See Pace v. Swerdlow*, 519 F.3d 1067, 1076 (10th Cir. 2008) (Gorsuch, J., concurring) (quoting *Twombly*, 550 U.S. at 557). As the U.S. Supreme Court has explained in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), conclusory allegations without more cannot “unlock the doors of discovery” and when a “respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.” *Id.* at 678–79 and 686, respectively. Plainly, whether a plaintiff’s complaint is deficient under Virgin Islands Rule of Civil Procedure 8 is tested by a motion to dismiss pursuant to Virgin Islands Rule

of Civil Procedure 12(b)(6), like the dismissal motions filed by Defendants in this matter. Thus, *Twombly* and *Iqbal* counsel that discovery should not proceed in the absence of a court's determination that a complaint passes muster under Rule 8. *See id.*

As discussed above, in the Yusuf Defendants' Motion to Dismiss, they challenge the legal sufficiency of each and every one of Plaintiffs' claims. Courts are also 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<sup>3</sup> 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). 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”).

Moreover, as also noted above, a stay of discovery will not cause any prejudice to Plaintiffs. Obviously, if the Court were to deny, in whole or in part, the Yusuf Defendants' 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

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<sup>3</sup> Virgin Islands Rule of Civil Procedure 1 contains the same exhortation.

negligible, if any, harm associated with a brief delay in discovery. Accordingly, the Court should properly exercise its "broad discretion" to stay discovery when dispositive motions are pending and do so in this case.

**WHEREFORE**, on the basis of the foregoing, Defendants, Fathi Yusuf, Maher Yusuf, Yusuf Yusuf and United Corporation, respectfully request that the Court stay discovery in this matter until their Motion to Dismiss the First Amended Complaint has been ruled upon by the Court, and award them such other relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: July 14, 2017

By:



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of July, 2017, I served the foregoing, *DEFENDANTS, FATHI YUSUF, MAHER YUSUF, YUSUF YUSUF AND UNITED CORP.'S MOTION TO STAY DISCOVERY PENDING THE DISPOSITION OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT*, which complies with the page and word limitations set forth in Rule 6.1(e), via electronic mail addressed to:

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