

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

HISHAM HAMED , individually, and)	
Derivatively, on behalf of SIXTEEN)	
PLUS CORPORATION ,)	CIVIL NO. SX-16-CV-650
)	
Plaintiff,)	DERIVATIVE SHAREHOLDER
)	SUIT, ACTION FOR DAMAGES
vs.)	AND CICO RELIEF
)	
FATHI YUSUF, ISAM YOUSUF and)	JURY TRIAL DEMANDED
JAMIL YOUSEF ,)	
)	
Defendants.)	
)	
and)	
)	
SIXTEEN PLUS CORPORATION ,)	
)	
a nominal Defendant,)	
)	

DEFENDANTS ISAM YOUSUF’S AND JAMIL YOUSUF’S
REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY
PENDING THE DISPOSITION OF THEIR MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED COMPLAINT

Defendants, Isam Yousuf (“Isam”) and Jamil Yousuf, incorrectly identified as Jamil Yousef (“Jamil”), by and through their undersigned counsel, and without waiving any objections to subject matter jurisdiction, personal jurisdiction, service of process, improper venue, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted, or any other defense or objection which may be presented whether by pleading or motion in this action, including those set forth in his Motion to Dismiss Plaintiff’s

First Amended Complaint, hereby submits their reply in support of their motion to stay discovery until such time as the Court rules on their Motion to Dismiss Plaintiff Hisham Hamed's First Amended Complaint ("Motion to Dismiss") and, in support, state as follows.

I. INTRODUCTION

As the Court is aware, there are numerous cases – approximately ten (10) – pending in the Superior Court between the Hameds and Yusufs arising out of disputes concerning their former or currently held businesses. Specifically, as noted in prior filings in this matter, there is already a case concerning the validity of the Manal Yousef mortgage at issue herein, brought by the Hameds, pending before Judge Harold W.H. Willocks. Moreover, the operative pleading is currently plaintiff's second complaint in this matter ("First Amended Complaint") since he dropped his original woefully insufficient complaint after being served with defendant Fathi Yusuf's Motion to Dismiss same. Plaintiff's First Amended Complaint merely added new conclusory allegations and attempted to assert several new claims, all of which were also factually and legally groundless. In fact, three of those claims were so unfounded – a Criminally Influenced and Corrupt Organizations Act ("CICO") claim, conversion and civil conspiracy – plaintiff withdrew the counts as to defendant Fathi Yusuf after being served with defendant Fathi Yusuf's motion to dismiss the First Amended Complaint. The Court recently deemed filed Isam's and Jamil's motion to dismiss first amended complaint, and they await plaintiff's response. Now, after withdrawing his original complaint and three causes of actions in his First Amended Complaint against defendant Fathi Yusuf due to their frivolity, plaintiff argues that the Court should not exercise its "broad discretion" to stay discovery until Isam's and Jamil's motion to dismiss plaintiff's first amended complaint has been decided.

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

Plaintiff asserts that Rule 12(b)(6) “does not provide for such a stay” and “motions to stay discovery should be rarely granted simply because a Rule 12(B)(6)[sic] motion has been filed.” *See* Reply to Motion of Defendats[sic] Isam Yousuf and Jamil Yousuf to Stay Discovery (“Reply”) at page 1 and 2 respectively. Notably, Isam and Jamil never claimed the terms of Rule 12(b)(6) provided for a stay. Rather they set forth the particulars of this case and cited various cases that establish a stay is properly granted under the present circumstances. In contrast, plaintiff cited one case for the unremarkable proposition that Rule 12(b)(6) does not provide for a stay – the sole case cited in the Reply – and failed to cite any legal support for his position that a stay is not appropriate pending the adjudication of Isam and Jamil’s motion to dismiss plaintiff’s first amended complaint. Similarly, plaintiff does not attach a declaration or affidavit explaining how he would suffer even scant prejudice if this matter was briefly stayed – particularly since there is a pending matter specifically involving the alleged “sham mortgage.” Rather plaintiff merely alleges, notably without any legal support, that “[a]ny delay in moving a case forward is prejudicial.” *See* Reply at page 3. When the unique facts and circumstances surrounding this matter are applied to the clear case law on this issue, it is apparent that a stay is properly granted.

What plaintiff disregards, and in doing so inappropriately urges this Court to do the same, is the undisputable fact that the Court’s adjudication of the motion to dismiss may completely resolve all the issues presented in this case, or substantially reduce the number of issues upon which discovery will be required. What plaintiff further ignores is this Court “is given broad

discretion to stay discovery pending decision on a dispositive motion.” *See e.g. Jackson v. Northern Telecom, Inc.*, 1990 U.S. Dist. LEXIS 3572, *1, 1990 WL 39311 at *1 (E.D.Pa. March 30, 1990). This discretion exists because the pleading requirement set forth in *Twombly* and *Iqbal* serves dual 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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (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 556 U.S. 678-79 and 686 respectively. Plainly, whether a plaintiff’s complaint is deficient under Rule 8 is tested by a motion to dismiss pursuant to Rule 12(b)(6), like the one filed by Isam and Jamil in this case. Thus *Twombly* and *Iqbal* instruct that discovery should not progress in the absence of a court’s determination that a complaint passes muster under Rule 8. *See id.*

Specifically, a stay of discovery pending resolution of a motion to dismiss avoids unnecessary expense and costs. As the Eleventh Circuit Court of Appeals explained in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), there are substantial 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.

Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1368 (11th Cir. 1997). 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.* Therefore, “[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, 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 v. Mediq, Inc.*, 1995 U.S. Dist. LEXIS 5900, *5, 1995 WL 273678, *2 (E.D.Pa. May 3, 1995); *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338, 348 (1989) (the purpose of Rule 12(b)(6) is to “streamline[] litigation by dispensing with needless discovery and factfinding”); and *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 [Fed. R. Civ. P.] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.”).

Courts are also justified in staying or limiting discovery when – as in this case – doing so would facilitate augmented efficiency in resolving the case. Indeed, the U.S. Supreme Court *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.

III. CONCLUSION

Discovery is properly stayed given a motion to dismiss all counts of plaintiff's first amended complaint against Isam and Jamil is currently pending before the Court. To proceed with discovery with respect to any, or all, of the counts when they may be dismissed is a resounding 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 prejudice if discovery is stayed until the motion to dismiss is finally adjudicated.

Evidently plaintiff is willing to risk undertaking discovery – and incurring the expense of the same – which may prove to be entirely useless to him. By taking this position, plaintiff demonstrates his true motives for attempting to take discovery while a comprehensive motion to dismiss is pending: harassing Isam and Jamil and forcing them to spend unnecessary attorney's fees. Clearly 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. 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, in light of the foregoing, Defendants Isam Yousuf and Jamil Yousuf respectfully request that this Court stay discovery in this matter until the motion of Isam and Jamil to dismiss the first amended complaint has been finally ruled upon by the Court. Defendants further pray that the order contains such other relief as this Court deems just and proper.

Respectfully Submitted,

DATED: July 13, 2017.

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CERTIFICATE OF SERVICE

I hereby certify this document complies with the page or word limitation set forth in V.I. R. Civ. P. 6-1(e) and that on this the 13th day of July, 2017, I caused an exact copy of the foregoing *“Defendant Isam Yousuf’s and Jamil Yousuf’s Reply in Support of Motion of To Stay Discovery Pending The Disposition Of Their Motion To Dismiss Plaintiff’s First Amended Complaint”* to be served electronically by e-mail, and by mailing same, postage pre-paid, to the following counsel of record:

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