

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

NOTICE OF FILING DOCUMENTS IN THE OTHER DIVISION

I. Caption of case including proper division:

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN**

FATHIU YUSUF and)	
UNITED CORPORATION,)	Case No.: ST-17-CV-384
)	
Plaintiffs,)	ACTION TO SET ASIDE
)	FRAUDULENT TRANSFERS
v.)	
)	
THE ESTATE OF MOHAMMAD A. HAMED, THE)	
MOHAMMAD A. HAMED LIVING TRUST, and)	
WALEED HAMED, as Executor of the Estate of)	
Mohammed A. Hamed and SUCESSOR TRUSTE OF)	
THE MOHAMMAD A. HAMED LIVING TRUST,)	
)	
Defendants.)	
)	

II. <u>Description of Document(s):</u>	<u>No. of Pages:</u>	<u>Document No.:</u> <small>(Clerk's Office only)</small>
<u>Defendants' Response in Opposition to Plaintiffs' Motion to Amend Complaint</u>	13	<hr style="width: 100%;"/>

III. Certification of mailing or delivery to each of the following:

<u>Name of Attorney(s):</u>	<u>Type of Service</u>	<u>Date E-mailed</u>
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Dated: April 3, 2018



Signature of Counsel

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Plaintiffs,)	ACTION TO SET ASIDE
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THE ESTATE OF MOHAMMAD A. HAMED,)	
THE MOHAMMAD A. HAMED LIVING TRUST,)	
And WALEED HAMED, AS EXECUTOR OF)	
THE ESTATE OF MOHAMMAD A. HAMED and)	
SUCCESSOR TRUSTEE OF THE)	
MOHAMMAD A. HAMED LIVING TRUST,)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE IN OPPOSITION TO
PLAINTIFFS’ MOTION TO AMEND COMPLAINT**

The above-captioned defendants (collectively, “Defendants”), file this Response in Opposition (this “Opposition”) to Plaintiffs’ Motion to Amend Complaint (the “Motion”) and, in opposition to the Motion, state as follows:

I. INTRODUCTION

Amendment of the Complaint¹ is futile. The Proposed Amendment does not correct the fatal infirmities of the Original Complaint. A settlor’s transfer of assets to a revocable (“living”) trust is not a “transfer” under the VIUFTA. Because the settlor retains the power to revoke the trust and other broad powers over trust assets and administration, trust’s assets remain available to satisfy lawful claims of the settlor’s creditors – before and after the settlor’s death. Therefore, there is no “transfer” when a settlor conveys assets to a revocable (“living”) trust.

¹ Capitalized terms not defined in this introductory section have the meanings ascribed thereto below.

The Proposed Amendment is also futile because it is a blatant attempt to forum shop for a receiver – a request which has *twice* been denied in the Division of St. Croix, by Judge Brady. Finally, Plaintiffs do not state anything in the Proposed Amendment to support their claim for a receiver other than a single conclusory – and entirely unsupported – allegation that repeats language of the VIUFTA verbatim. Because amendment of the Complaint would be futile, the Motion must be denied.

One additional comment is in order. Yusuf is not really worried about any debts being paid to him, as the Hameds have never failed to make any payments due Yusuf. Indeed, the only known claims against Mohammad Hamed involve the current partnership liquidation accounting between these two former partners, which is in the process of being completed now before Judge Brady. See **Exhibit 1**. That liquidation proceeding has over \$8 million in escrow to be disbursed after the cross claims of the partners are resolved, with Yusuf's two main claims that pre-date 2007 and "extra rent" of \$6,000,000 already having been rejected by the Master. What Yusuf is really trying to do is to disrupt the current 50/50 balance between the Yusufs and the Hameds on three corporations jointly owned by them, which joint ownership currently operates as a natural injunction, as no funds can be disbursed or assets sold (or encumbered) absent the consent of all parties. See **Exhibit 1**.

II. PROCEDURAL HISTORY

On or about August 24, 2017, Plaintiffs filed their original complaint (the "Complaint").

On November 17, 2017, Defendants filed their Joint Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted Pursuant to V.I.R.Civ.P. 12(b)(6) (the "Motion to Dismiss"). Together with a thorough Banks analysis and a wealth of citations to case law and treatises, Defendants argue as follows in their Motion to Dismiss:

A settlor's transfer of assets to a revocable ("living") trust is not a "transfer" under the Virgin Islands fraudulent transfer statute. Because the settlor retains the power to revoke the trust and other broad powers over trust assets and administration, trust's assets remain available to satisfy lawful claims of the settlor's creditors and, therefore, there is no "transfer" when a settlor conveys assets to a revocable ("living") trust.

When Mohammad A. Hamed ("Mr. Hamed") transferred certain of his assets to the Trust, he did not "*dispose of*" or "*part with*" such assets because he retained the absolute power to revoke the Trust and other broad powers of control over Trust assets and administration. Because he did not "dispose of" or "part with" his assets when he transferred them to the Trust, there was no "transfer" as defined in 28 V.I.C. § 171(12). And, without a "transfer" as defined in the Virgin Islands uniform fraudulent transfer statute, there is no "fraudulent transfer. This Action must be dismissed for failure to state a claim upon which relief can be granted.

See Motion to Dismiss at pp. 1-2.

Also on November 17, 2017, Defendants filed their Motion to Transfer Venue. In their Motion to Transfer Venue, Plaintiffs show that nothing about the above-captioned civil action (this "Action") has anything whatsoever to do with the Division of St. Thomas. Defendants argue that "[t]he only persons or entity which this venue favors is Plaintiffs' law firm . . . as it is the only person or entity in any way involved in this Action located on or with legal residence on the island of St. Thomas." See Motion to Transfer Venue at p. 2.

On January 8, 2018, Plaintiffs filed their Response in Opposition to the Motion to Dismiss. In their opposition, Plaintiffs did not respond to Defendant's thoroughly cited Banks analysis or other in-depth legal discussion set forth in the Motion to Dismiss. Instead, Plaintiffs simply – and oddly – argue that because "the Complaint cannot be dismissed based on the law of other jurisdictions or the Restatement." See Opposition to motion to Dismiss at p. 3. Plaintiffs state that Banks stands for the proposition that the Superior Court cannot dismiss an action

without an applicable Virgin Islands statute or on-point decision from the Virgin Islands Supreme Court.

Also on January 8, 2012, Plaintiffs filed their Response in Opposition to the Motion to Transfer Venue. Unlike their anemic almost non-existent opposition to the Motion to Dismiss, Plaintiffs thoroughly cite law from the District Court and otherwise strenuously fight for the perceived right to keep this Action in the Division of St. Thomas.

On January 29, 2018, Defendants filed their Reply in Further Support of the Motion to Dismiss. Plaintiffs note therein that Plaintiff's opposition to the Motion to Dismiss "did not argue or even substantively address the fundamental legal premise on which the Motion is based." See Reply in Further Support of Motion to Dismiss at p. 2. Plaintiff argue as follows in their Reply:

Rather than oppose Plaintiff's legal argument, the Opposition merely (i) restates the allegations of the Complaint; (ii) states that the Virgin Islands has returned to pure notice pleading under the new V.I.R.Civ.P. 8 (a point which was already well discussed in the Motion); and (iii) states an off-the-wall argument concerning the meaning of [Banks]. Having failed to oppose Defendants' legal argument set forth in the Motion, Plaintiffs have conceded the Motion. This Action must be dismissed.

See Id. at pp. 2-3.

Also on January 29, 2018, Defendants filed their Reply in Further Support of the Motion to Transfer Venue. Defendants argue as follows in their Reply:

The first sentence of 4 V.I.C. § 78(a) states as follows:
"[a]ll civil actions shall be initiated in the judicial division where the defendant resides or where the cause of action arose or where the defendant may be served with process." 4 V.I.C. § 78(a) (emphasis added).

Here, in this case, 4 V.I.C. § 78(a) cannot be interpreted so as to allow this Action to proceed in the Division of St. Thomas &

St. John – without rendering the first sentence of 4 V.I.C. § 78(a) superfluous. [citations omitted]

See Reply in Further Support of Motion to Transfer Venue at p. 2.

On March 15, 2018, Plaintiffs filed their Motion to Amend the Complaint. The Proposed Amendment makes very few changes to the Complaint. Plaintiffs propose to add a request for a receiver and add an allegation that “[t]he Trust documents appoint Waleed as Successor Trustee to Hamed and allows the Successor Trustee to immediately distribute all of the Trust’s corpus upon Hamed’s death.” See Proposed Amendment at ¶¶ 21, 46 and 50. Plaintiffs also propose to add a count for declaratory judgment that “assets transferred to a revocable trust, whether or not subsequently conveyed, are available to satisfy creditors both before and after the transferor’s death.” See Motion to Amend at p. 4.

The Proposed Amendment does not make any changes whatsoever to address the dispositive infirmities of the (original) Complaint: namely, that the Complaint fails to state a cause of Action because a settlor’s transfer of assets to a revocable (“living”) trust is not a “transfer” under the Virgin Islands Uniform Fraudulent Transfer Act (the “VIUFTA”).

This is Plaintiff’s third attempt in the Superior Court to obtain a receiver in the Yusuf’s litigation war against the Hamed family. Two previous attempts for a receiver were denied by Superior Court Judges in the Division of St. Croix. See July 22, 2014 Memorandum Opinion of Honorable Douglas A. Brady in Hamed v. Yusuf, Case No. SX-12-CV-370; see also August 5, 2016 Order re Plessen Bank Account and Receiver, entered by Honorable Douglas A. Brady, Case No. SX-12-CV-370.

III. LEGAL ARGUMENT

“The Superior Court is not required to allow an amendment when an amendment would be futile.” Sekou v. Moorhead, 2016 WL 9454134, at *4 (V.I. Super. Ct. June 10, 2016) (denying leave to amend and citing St. Croix, Ltd. v. Shell Oil Co., 60 V.I. 468, 478 n. 4 (V.I. 2014)); see also Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P., 2017 WL 2210642, at *2 (V.I. Super. Ct. May 19, 2017) (discussing V.I.R.Civ.P. 15(a)(2) and stating, “A motion to amend may be denied for . . . futility of the amendment.”).

An amendment to a complaint is futile “if the complaint, as amended, would fail to state a claim upon which relief could be granted.” Brathwaite v. H.D.V.I. Holding Co., Inc., 2017 WL 2295123, at *3 (V.I. Super. Ct. May 24, 2017) (citing James-St. Jules, 2015 WL 13187393 (citing Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 175 (3d Cir. 2010))).

A. The Proposed Amendment is Futile Because Plaintiffs Have Not Made Any Changes to Correct the Dispositive Infirmities of the Original Complaint: *Mohammad Hamed’s Transfers to his Living Trust Were not “Transfers” Under the VIUFTA.*

There is no new information presented in the Proposed Amendment. Plaintiffs attempt to make much of the fact that they now possess a complete copy of the Hamed Trust and the fact that the Hamed Trust allows the Successor Trustee to distribute assets upon the death of Mohammad Hamed. From this simple fact, Plaintiffs jump to the hysterical conclusion that Mohammad Hamed’s assets “are in grave and imminent danger of being dissipated by the Successor Trustee.” First, as discussed below, nothing could be further from the truth. More importantly, however, this information is not new. This information was provided to the Court and Plaintiffs upon the filing of Defendant’s Motion to Dismiss.

Defendants incorporate herein their arguments set forth in their Motion to Dismiss concerning the nature of transfers to a revocable (“living”) trust vis-à-vis the VIUFTA. As stated in the Motion to Dismiss, such transfers are *not* “transfers” under the VIUFTA because a settlor’s transfer to a revocable trust is *not* a “transfer” within the meaning of 28 V.I.C. § 171(12) – because the assets of a revocable trust remain subject to the claims of the settlor’s creditors. See, e.g. 632 Partners, LLC v. Hunter, 348 P.3d 169, 2014 WL 5363965, at *3 (Montana October 21, 2014).

Having done nothing to address this fatal flaw of the Original Complaint, the Proposed Amendment would be futile. The Motion must be denied.

B. The Motion Must Be Denied Because Plaintiffs Do Not State a Claim for a Receiver Upon Which Relief Can Be Granted.

“The appointment of a receiver ‘like an injunction, is an extraordinary remedy, and should never be made except in cases of necessity, and upon a clear and satisfactory showing that the emergency exists’ Agdallah v. Abdel-Rahman, 2015 WL 5440341, at *6 (V.I. Super. Ct. September 8, 2015) (citing People of the Virgin Islands v. Alkhatib, 2010 WL 1552060 (V.I. Super. Ct. 2010) (in turn, citing Zinke-Smith, Inc. v. Marlowe, 8 V.I. 240 (D.V.I. 1971)). As stated by the District Court in Zinke-Smith:

The power of appointing receivers is one which the courts have said should be sparingly exercised, and with great caution and circumspection. Ford v. Taylor, 137 F.149, 150 (9th Cir. 1905). The passage of time has in no way diminished the soundness nor the vitality of the foregoing principles and absent a showing that the property of the defendant corporation is in grave and imminent danger of dissipation, the granting of this extraordinary relief could not be justified. Gordon v. Washington, 295 U.S. 30 (1935); Ford v. Taylor, 137 F. at 150; Mintzner v. Arthur L. Wright & Co., 263 F.2d 823 (3d Cir. 1959).

Zinke-Smith v. Marlowe, 8 V.I. at 242.

The Proposed Amendment does nothing more than regurgitate the well-known “grave and imminent danger of dissipation” standard for appointment of a receiver. See Proposed Amendment at ¶ 50. Other than to redundantly repeat that the Hamed Trust allows the Successor Trustee to transfer assets upon the death of Mohammad Hamed, the Proposed Amendment says ***nothing*** about why the assets of the Hamed Trust are allegedly in “grave and imminent danger of being dissipated.”

On a motion to dismiss pursuant to V.I.R.Civ.P. 12(b)(6), Plaintiffs' bare conclusory allegation regarding “grave and imminent danger of dissipation” is “not entitled to the assumption of truth.” Carter v. University of the Virgin Islands, 2017 WL 3380533, at *1 (V.I. Super. Ct. July 31, 2017) (quoting Joseph v. Bureau of Corrections, 54 V.I. 644, 649-50 (V.I. 2011)). Because Plaintiff does not state any allegations to support a claim for a receiver upon which the requested relief can be granted, the Proposed Amendment is futile. Plaintiffs' Motion to Amend must be denied.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, Defendants respectfully request that the Court enter an order (i) denying the Motion to Amend; (ii) dismissing this Action, with prejudice; (iii) awarding to Defendants their costs incurred in connection with this Action, including attorneys' fees; and (iv) granting to Defendants such other and further relief as is just and proper. Indeed, if anything, the request for a Receiver further explains why Defendants' motion to transfer to St. Croix should be granted, as this tactic is simply an attempt to try to take control of the companies currently owned 50/50 by the Hamed/Yusuf families, which has been the subject of years of litigation already in the Superior Court Division of St. Croix.

Respectfully submitted,

HAMMECKARD, LLP

Dated: April 3, 2018

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Counsel to Defendants

CERTIFICATE OF SERVICE

I certify that on April 3, 2018, I caused a copy of the foregoing document to be served via email to Gregory H. Hodges, Esquire; Stefan B. Herpel, Esquire; and Charlotte K. Perrell, Esquire, at ghodges@dtflaw.com, sherpel@dtflaw.com, and cperrell@dtflaw.com. I further certify that the foregoing document complies with the page or word limitation set forth in V.I.R.Civ.P. 6-1(e).



Exhibit 1

unencumbered, with a monthly income of approximately \$100,000 per month and over \$1.6million currently in its bank account;¹

b. 50% of the shares (500 shares) of Peters Farm, Inc., which owns over 100 acres of property on St. Croix as well as over 100 acres of land on St. Thomas, all unencumbered;²

c. 10% of the shares in Sixteen Plus, Inc., which owns over 100 acres of prime beach front property on the south shore of St. Croix. The property does have a mortgage recorded against it in favor of Fathi Yusuf's niece, which is the subject of several lawsuits pending on St. Croix, including one alleging that the mortgage is invalid;³ and

d. his personal residence in which my mother is residing, along with several small real estate holdings of land on St. Croix.

7. The only claims for debt asserted against my father by Fathi Yusuf involve the current accounting being done in the liquidation of the Plaza Extra partnership pending before Judge Brady in Hamed v. Yusuf and United Corporation, Case No. SX-12-CV-370 (Division of St. Croix). My father has multiple claims that have been asserted against Fathi Yusuf as well. The assets have been liquidated, as the current Plaza Stores have been distributed and are no longer

¹ The balance of the shares are owned by other Hamed Family Members and Yusuf Family Members. Thus, the underlying property cannot be sold or encumbered without the agreement of the Yusufs. **Moreover, the cash in the bank account cannot be disbursed unless all of the shareholders agree to disburse the funds.**

² The balance of the shares are owned by other Hamed Family Members and Yusuf Family Members. Thus, the underlying property cannot be sold or encumbered without the agreement of the Yusufs.

³ The balance of the shares are owned by other Hamed Family Members and Yusuf Family Members. Thus, the underlying property cannot be sold or encumbered without the agreement of the Yusufs.

owned by the partnership. There is currently a court controlled bank account of \$8 million to cover the allocation of the remaining claims, which is being overseen by the Special Master, Honorable Edgar Ross. To date, two of the largest claims against my father have been rejected already, while my father's largest claims have not yet been resolved.

I declare under penalty of perjury that the foregoing is true and correct, executed on this _____ day of April, 2018.



Waleed Hamed