**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

**MOHAMMAD HAMED by His Authorized )**

**Agent WALEED HAMED, )**

 **) CIVIL NO. SX-12-CV-370**

 **Plaintiff, )**

 **v. ) ACTION FOR DAMAGES**

**) INJUNCTIVE AND**

**FATHI YUSUF and UNITED CORPORATION, ) DECLARATORY RELIEF**

 **)**

**Defendants. ) JURY TRIAL DEMANDED**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ )**

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION TO PARTIALLY RECONSIDER/CLARIFY BOND ORDER**

Plaintiff hereby respectfully requests this Court to reconsider/clarify two aspects of its Bond Order entered on December 5, 2013, which the parties all received on December 10, 2013. See **Exhibit 1**.

First, Plaintiff seeks reconsideration of the portion of the Bond Order related to the $100,000 to cover the entry of a new plea in the criminal case. Second, whether the first request is granted or not, Plaintiff seeks permission to provide the bond in the form of unencumbered cash assets, real property and stock. Each request will be addressed separately for the sake of clarity.

1. **The Criminal Case**

In addressing Defendant’s claim that $100,000 needs to be posted to protect the expenses to be incurred in the criminal case, this Court stated in part as follows on p. 7 of its Bond Order:

However, Plaintiff does not dispute that such work (“the guilty plea would have to be amended and an indemnity would have to be sought for taxes and fines paid”) eventually needs to be performed by Defendants as a result of this Court’s Injunction.

However, it is respectfully noted that the guilty plea is **not** being amended, as noted in Exhibit 3 of Defendants’ November 15th Opposition To Motion To Reduce Bond. That pleading, which is a Joint Motion by the Government and the remaining criminal defendant, United Corporation, to proceed with sentencing on the Plea confirms that the Plea as entered is not being changed, requesting that sentencing proceed.

In fact, on page 12 of its November 15th Opposition To Motion To Reduce Bond, Defendants admitted that no motion was being filed to amend the plea, arguing instead that the requested amount should still be posted to cover its alleged indemnity claims for “taxes, fines and other penalties.”

In short, while Plaintiff should have addressed this point more clearly, the plea entered in the criminal case is not being changed, so expenses will not be incurred in the criminal case to change this plea because of this Court’s Injunction.

Likewise, the argument that indemnity has to be sought for fines and taxes paid was addressed by this Court in other parts of its Bond Order, where it noted that the Injunction does not bar Defendants from filing civil claims for damages in which fees incurred can be recovered if successful. Indeed, as noted on p. 8 of Plaintiff’s reply re the motion to reduce the bond, there is no viable cause of action for indemnity.[[1]](#footnote-2)

Thus, it is respectfully requested that the Bond Order be amended to reduce the bond amount by $100,000 as no fees are being incurred to change the plea in the criminal case.

1. **The Security to be Posted**

This Court’s Bond Order directed on p. 9 that Plaintiff post a bond of $1,200,000 with the Clerk (less a $25,000 credit for the current posted bond). Regardless of how this Court addresses the first issue above, it is respectfully requested that this Court reconsider/clarify its Order to allow Plaintiff to post this remaining bond by pledging cash assets and unencumbered real property.[[2]](#footnote-3)

In this regard, Plaintiff does not have $1,200,000 in cash on hand because of the criminal TRO. See **Exhibit 1**. However, while the plaintiff is trying to assemble some cash, the plaintiff proposes to post the following assets for the bond, which have a value well in excess of the required bond:

1. Cash to be deposited this month when annual bonus and accrued vacation is paid to four Hamed sons as Plaza Extra store managers-$244,000 (approximately $200,000 after taxes are deducted).[[3]](#footnote-4) See **Exhibit 2**.
2. Assignment of interest in funds escrowed with Carl Beckstedt for investment known as ByOrder Investments LLC, in which the cash value of Plaintiff’s interest is currently $223,200. This figure increases monthly at the rate of $4,960 per month for the next four years. See **Exhibit 2**.
3. Assignment of 50% interest in cash held by Plessen Enterprises, Inc., in which the cash value of Plaintiff’s interest is currently $123,500. This figure increases monthly at the rate of $18,000. See **Exhibit 2**.
4. Assignment of Plaintiff’s unencumbered real property at Plots 6F and 6H, Estate Carlton, where the Plaintiff resides, which has a value based on the tax assessment of $236,300. This value is most likely higher than this assessment, which will be supplied to this Court if an appraisal is requested. See **Exhibit 2**.
5. Assignment of Plaintiff’s unencumbered real property at Plots 100-E, 100-F and 100-G, Estate Princess, which has a value based on the tax assessment of $73,500. This value is most likely higher than this assessment, which will be supplied to this Court if an appraisal is requested. See **Exhibit 2**.
6. Assignment of Waleed Hamed’s unencumbered real property at Plot 6-C, Estate Carlton, consisting of 4 buildings with 8 apartments, which has a value based on the tax assessment of $326,200. This value is most likely higher than this assessment, which will be supplied to this Court if an appraisal is requested. See **Exhibit 2**.
7. Assignment of 50% unencumbered stock in Plessen Enterprises, Inc., which owns three unencumbered parcels of land on St. Croix, including the land where the Plaza West Supermarket is located (Plots 28 & 29 Plessen, 26 Diamond, and 39 & 5-B Diamond), as well as three unencumbered parcels of land in St. Thomas, one of which has a tenant that pays $36,000 monthly (6 & 9 Estate Thomas, 2 Rem. Charlotte Amalie and Charlotte-Amalie 2-4 New Quarter). Aerial photos of these six parcels are attached as well. This real property owned by Plessen Enterprises, Inc. is valued by the tax assessor as having a value of $9,701,200, so that the 50% equitable interest in this property is approximately $4,850,600, although the actual value is most likely higher, which will be supplied to this Court if an appraisal is requested. **Exhibit 2**.
8. Assignment of $802,966 receivable due Hamed from the Dorothea transaction, as discussed at the preliminary injunction hearing. See **Exhibit 2.[[4]](#footnote-5)**

It should be noted that counsel has requested lien searches for the real property identified above. See **Exhibit 1.** However, counsel will not receive those reports until next week, so a decision was made to file this motion and supplement it with these title reports when received.

Additionally, it should be noted that the Government and United have filed a joint motion in the criminal case to dissolve the TRO that encumbers United’s assets. **Exhibit 1**. Should that Joint Motion be granted, then Plaintiff can supplement or even replace this security with an assignment of those funds equal to the bond requirement set by this Court.

 The purpose of the bond, as noted in this Court’s Order, is to provide financial security for the Injunction in this case. It is respectfully submitted that the above collateral more than amply secures the bond set by this Court, whether reduced or not as requested in Section I of this motion.

1. **Conclusion**

For the reasons set forth herein, it is respectfully submitted that the bond be reduced to $1,100,000 (or further if the annual bonuses and accrued vacation pay will not be paid to the four Hamed managers as due). It also respectfully requested that Plaintiff be permitted to post a combination of cash assets and unencumbered real property.

As the injunction is to preserve the status quo until the issues in this case can be resolved, it is respectfully requested the relief sought be granted as it provides the security needed to protect the Defendants in the unlikely event they prevail in this case

**Dated:** December 13, 2013

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**CERTIFICATE OF SERVICE**

 I hereby certify that on this 13th day of December, 2013, I served a copy of the foregoing in compliance with the parties consent, pursuant to Fed. R. Civ. P. 5(b)(2)(E), to electronic service of all documents in this action on the following persons:

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1. As noted in footnote 8 of that motion: “If I pay your debts (taxes) with my money, I may have a claim for indemnity, but if I pay our partnership debts (taxes) with our partnership funds, I have no such claim.” As for fines and penalties, no law allows a criminal defendant to seek common law indemnity from someone else for those items. [↑](#footnote-ref-2)
2. Rule 65(c) uses the word “security” which this Court recognized when it allowed Plaintiff to use the escrowed profits as additional security. While the Supreme Court disallowed the use of these funds because the federal TRO encumbered these assets, it did not hold that the concept was otherwise improper. [↑](#footnote-ref-3)
3. The annual bonus of $50,000 and vacation pay of $11,000 (totaling $61,000) were both listed in ¶ 3 of the declaration of John Gaffney attached as Exhibit 1 to the May 9th motion to reconsider the bond (calculating total salary at $347,000). It should be noted that Fathi Yusuf has recently indicated that he will not agree to pay these annual payments. See Exhibit 2. That unilateral action violates the Injunction, as these bonuses and annual leave payments have been regularly paid for years, *and were fully approved and paid throughout the time the U.S. Marshall’s Office oversaw the accounting of the business*. As this Court’s Injunction Order stated:

ORDERED that the operations of the three Plaza Extra Supermarket stores shall continue as they have throughout the years prior to this commencement of this litigation . . . without unilateral action by either party, or representative(s), affecting the management, employees, methods, procedures and operations.

Moreover, if these payments are not made, then the bond should be reduced accordingly, as these figures were submitted by Defendants as part of the salaries ($347,000 figure listed in ¶ 3 of Gaffney declaration), which this Court used in calculating the bond for theses wages, as noted in the Bond Order at p.4. [↑](#footnote-ref-4)
4. This matter was addressed by the Court in Finding of Fact #33 as follows:

33. Waleed Hamed testified that Fathi Yusuf utilized Plaza Extra account funds to purchase and subsequently sell property in Estate Dorothea, St. Thomas, to which it was agreed that Hamed was entitled to 50% of net proceeds. Although **Yusuf’s handwritten accounting of sale proceeds confirms that Hamed is due $802,966, representing 50% of net proceeds (*Pl. Ex. 18* ), that payment has never been made to Hamed and the disposition of those sale proceeds is not known to Hamed.** *Tr.88:8–90:17, Jan. 25, 2013.* (Emphasis added). [↑](#footnote-ref-5)