



Concurrent with the filing of this Rule 56(d) Motion is a Declaration of Defendants' undersigned counsel, Joseph A. DiRuzzo.

**Relevant Background**

1. Plaintiffs initiated this action on or about September 17, 2012, the date of the Complaint.
2. Defendants timely removed the action. (D.V.I. Doc. # 1).<sup>1</sup>
3. On October 10, 2012, Defendants moved to dismiss the Complaint or, alternatively, to strike certain portions therein and for a more definite statement. (D.V.I. Doc. # 11).
4. On October 19, 2012, prior to a resolution of Defendants' motion to dismiss, Plaintiffs filed their First Amended Complaint (D.V.I. Doc. # 15), which added a third count to First Amended Complaint, and which is the operative pleading presently before the Court.
5. On November 5, 2012, Defendants moved to dismiss the First Amended Complaint or, alternatively, to strike certain portions therein and for a more definite statement. (D.V.I. Doc. ## 28 and 29).
6. Defendants' renewed motion to dismiss is pending.
7. The District Court remanded the action on November 16, 2012. (D.V.I. Doc. # 39).
8. On November 21, 2012, Defendants filed their Motion to Strike Self-Appointed Representative, requesting that, prior to resolving any other substantive motions, this Court strike Waleed Hamed as Mohammad Hamed's self-appointed representative or "authorized agent." (Nov. 21, 2012 Motion to Strike Self-Appointed Representative at 1).
9. Defendants' motion to strike is pending.

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<sup>1</sup> The citation in this Motion to any pleadings and papers filed in the District Court refers to docket entries in Case No. 1:12-cv-99, District Court of the Virgin Islands, Division of St. Croix, and is cited to herein with a "D.V.I. Doc. #" designation corresponding to such docket.

10. No aspect of the substantive discovery process, including depositions or written discovery requests, has been completed.— *or even started.*

11. Indeed, resolution of the motion to strike will have significant implications for the subsequent course of proceedings, including the nature and scope of discovery. (Motion to Strike Self-Appointed Representative at 4).

12. On November 12, 2012, when the action was still in the District Court, Plaintiffs moved for partial summary judgment regarding Count I of the First Amended Complaint. (D.V.I. Doc. # 36).

13. Count I is the primary relief requested in this action, as Plaintiffs seek summary judgment therein as to:

- (i) a judicial declaration regarding the existence of an alleged partnership between Mohammad Hamed and Fathi Yusuf;
- (ii) Mohammad Hamed's supposed entitlement, under 26 V.I.C. § 71(a), to 50% of the alleged partnership's profits, assets and receivables; and
- (iii) Mohammad Hamed's supposed entitlement, under 26 V.I.C. § 71(f), to "fully and equally participate" in the alleged partnership's operations.

(D.V.I. Doc. # 36 at 12).

14. However, there is a fundamental dispute between the parties as to whether Mohammed Hamed is a *bona fide* partner or a mere joint venturer who has no partnership rights whatsoever under the Virgin Islands Uniform Partnership Act or any other authority. (*See generally* Renewed Motion to Dismiss (D.V.I. Doc. # 29) (requesting, among other alternative relief, "a more definite statement as to the formation, scope and nature of the alleged partnership to enable Defendants to properly respond to" the First Amended Complaint)).

15. Plaintiffs' summary judgment motion therefore fails on the merits, because the parties dispute genuine issues of material fact, and any claims regarding the existence of an alleged "partnership" cannot be decided on the present record as a matter of law.

16. At best, the Motion is entirely premature and should be denied *without prejudice* until this Court has resolved Defendants' threshold motion to strike Mohammad Hamed's self-appointed representative or "authorized agent," among other pending substantive motions; and until Defendants otherwise have had a sufficient opportunity to conduct general discovery.

### **Memorandum of Law**

#### **A. Legal Standards**

While Rule 56(b) allows a party to move for summary judgment "at any time until 30 days after the close of all discovery" (Fed. R. Civ. P. 56(b)), "the prevailing rule in all circuits" is that, "[u]nder the Federal Rules of Civil Procedure, the parties must be afforded adequate time for general discovery before being required to respond to a motion for summary judgment." *See Metro. Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1336-67, and n.3 (Fed. Cir. 2008) (collecting cases). *See also Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007) ("well established that a court is obligated to give a party opposing summary judgment an adequate opportunity to obtain discovery") (citation and internal quotation omitted); *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (concluding that "incomplete state of discovery *alone* should have precluded summary judgment on the merits") (emphasis added); *Bethea v. Merchants Commercial Bank*, Civil Action No. 11-51, 2011 U.S. Dist. LEXIS 118570, at \*4-5 (D.V.I. Oct. 13, 2011) (finding motion for summary judgment prior to discovery to be "premature" and denying motion "without prejudice to refile after discovery has concluded").

“[D]iscovery digs subsurface and may unearth facts that tend to support the contrary conclusion” to any conclusion asserted in a summary judgment motion. *Doe*, 480 F.3d at 259 (vacating grant of summary judgment motion where parties opposing summary judgment “were not given an opportunity to marshal facts in aid of their argument”). For this reason, Rule 56(d), formally Rule 56(f), provides that:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). “[C]ourts usually grant properly filed Rule 56(f) motions ‘as a matter of course.’” *See St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994) (finding that trial court acted “prematurely” in considering merits of summary judgment motion “while significant discovery was yet to be had”).

**B. Defendants' Instant Rule 56(d) Motion Should Be Granted**

“When, as here, there has been no adequate initial opportunity for discovery, a strict showing of necessity and diligence that is otherwise required for a Rule 56(f) request for additional discovery does not apply.” *Metro. Life Ins.*, 527 F.3d at 1337 (citation omitted). Defendants therefore need not show what specific discovery they would require in order to be able to adequately respond to Plaintiffs' Motion for Partial Summary Judgment.

Indeed, given the early posture of this action, including that:

- (i) Defendants' Motion to Strike Self-Appointed Representative remains pending;

- (ii) Defendants' Renewed Motion to Dismiss remains pending and, thus, Defendants have not filed an Answer to the Amended Complaint and have not filed any Affirmative Defenses;
- (iii) the parties have not provided Initial Disclosures;
- (iv) the parties have not taken any substantive discovery; and
- (v) no depositions have been taken,

Defendants are not yet in a position to present all material and undisputed facts in response to Plaintiffs' Motion for Partial Summary Judgment. Further, because this action is in its infancy, there have been no substantive rulings and no substantive discovery has been taken, Defendants' instant Rule 56(d) Motion should be granted without the need of any "strict showing of necessity and diligence that is otherwise required." *Metro. Life Ins.*, 527 F.3d at 1337.

Regardless, Defendants in their motion to dismiss, motion to strike and other papers identify numerous examples of necessary discovery that remains to be taken. For example, Plaintiffs' central claim in this action, and in their Motion for Partial Summary Judgment, is that an alleged "partnership" exists between Mohammad Hamed and Fathi Yusuf. (D.V.I. Doc. # 36 at 12). The United States Supreme Court has long held in this context that:

When the existence of an alleged partnership arrangement is challenged . . . , the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their agreement, considered as a whole, and by their conduct in execution of its provisions.

*Comm'r v. Tower*, 327 U.S. 280, 286-87 (1946). Defendants cannot reasonably be expected to respond to Plaintiffs' claims in their summary judgment motion without first being permitted to conduct

discovery regarding the “intention” of Mohammad Hamed vis-à-vis the alleged partnership, which “is a question of fact, to be determined from testimony.” *Tower*, 327 U.S. at 286-87.

Concurrent with the filing of this Rule 56(d) Motion, Defendants therefore have served Mohammad Hamed with a deposition notice to discover the very “intention” and “testimony” contemplated by the United States Supreme Court in *Tower* and its progeny. (See also Defendants' Renewed Motion to Dismiss (D.V.I. Doc. # 29) at 21-23 (identifying other areas of necessary testimony from Plaintiffs central to their claims regarding an alleged partnership)). Defendants also have noticed the depositions of other members of the Hamed family, who, as Mohammad Hamed alleges, may have “act[ed] as [Mohammad Hamed's] authorized agent from time to time.” (Comparison Doc. (D.V.I. Doc. # 17) at ¶ 2).

**C. Alternatively, Defendants Should Be Given Reasonable Notice and An Opportunity to Respond on the Merits**

“[W]hatever its decision, it is ‘improper’ for a [trial] court to rule on summary judgment without first ruling on a pending Rule 56(f) motion.” *Doe*, 480 F.3d at 257 (citing *St. Surin*, 21 F.3d at 1315). A trial court thus should resolve a Rule 56(d) first request “before proceeding to the merits of [a] summary judgment motion and then, if it decide[s] to deny the request,” give the party opposing summary judgment “reasonable notice and an opportunity to respond on the merits to the motion for summary judgment.” See *St. Surin*, 21 F.3d at 1315 (noting also that a “court should be wary before granting summary judgment without conducting a hearing”) (citing cases).

Hence, in the event that this Court does not grant the instant Rule 56(d) Motion, Defendants respectfully request an enlargement of time of fourteen (14) days within which to respond to Plaintiff's Motion for Partial Summary Judgment after the Court has ruled on the instant Motion. The alternative enlargement of time is requested simply to afford Defendants, and their

undersigned counsel, sufficient notice and opportunity to file a substantive response in opposition. *See, e.g., St. Surin*, 21 F.3d at 1315 (trial “court abused its discretion when it granted summary judgment without giving [the non-movant] notice and an opportunity to file a response” on the merits).

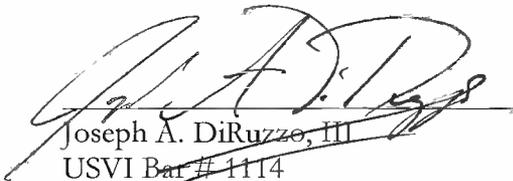
The enlargement also is made in good faith and not for any dilatory tactic. Rather, Defendants assert that good cause exists pursuant to the authority cited in this Motion, as well as Local Rule 7.1(e)(1) of the Local Rules of Civil Procedure of the District Court of the Virgin Islands, for the requested enlargement of time. Defendants intend to oppose Plaintiffs' Motion for Summary Judgment and plan to file their own summary judgment motion once discovery is complete. At bottom, however, Defendants do not believe that there is sufficient information or evidence available to reasonably respond to Plaintiffs' Motion for Partial Summary Judgment at this early stage.

### Conclusion

For the foregoing reasons, Defendants respectfully request that the Court enter an Order denying Plaintiffs' Motion for Partial Summary Judgment *without prejudice* as the motion was filed prematurely; and allowing the parties, including Defendants, sufficient opportunity to conduct discovery and to prepare a response in opposition to any summary judgment motion upon re-filing. Alternatively, in the event the Court does not grant the instant Rule 56(d) Motion, Defendants respectfully request that the Court enter an Order granting Defendants an enlargement of time of fourteen (14) days within which to respond to Plaintiffs' Motion for Partial Summary Judgment; and awarding such other relief as is deemed just and appropriate.

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Respectfully submitted,



Joseph A. DiRuzzo, III

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Dated: December 20, 2012

#### CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2012, a true and accurate copy of the foregoing was forwarded via USPS and email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, [holtvi@aol.com](mailto:holtvi@aol.com); and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, [carl@carlhartmann.com](mailto:carl@carlhartmann.com).



Joseph A. DiRuzzo, III

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

MOHAMMAD HAMED, by his	)	
authorized agent, WALEED HAMED,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>CIVIL NO. SX-12-CV-370</b>
	)	
FATHI YUSUF and UNITED CORPORATION,	)	
	)	
Defendants.	)	
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**DECLARATION OF JOSEPH A. DiRUZZO**

I, Joseph A. DiRuzzo, declare as follows:

1. I am a member in good standing with The Florida Bar and the Virgin Islands Bar Association, and am employed as an associate at the firm of Fuerst Ittleman David & Joseph, PL (“FIDJ”), which represents Defendants Fathi Yusuf and United Corporation in the captioned action.

2. I am one of the attorneys at FIDJ who assists with Defendants’ representation in this action, and I am familiar with the pleadings, papers and other communications in the action.

3. The statements made in this declaration are based upon my personal knowledge.

4. To date, based on the papers filed in this Court prior to removal and in the District Court prior to remand, the following substantive motions are briefed and remain pending:

- a. Plaintiffs’ Motion for a Temporary Restraining Order and/or a Preliminary Injunction, and accompanying Memorandum, both dated September 18, 2012 (collectively, the “TRO Motion”);
- b. Defendants’ Motion to Proceed on the TRO Motion as a Motion for Preliminary Injunction dated September 28, 2012;
- c. Defendants’ Motion to Strike or, Alternatively, for Leave to File Sur-Reply dated November 2, 2012 (D.V.I. Doc. # 23);

- d. Defendants' Renewed Motion to Dismiss and accompanying Memorandum, both dated November 5, 2012 (D.V.I. Doc. ## 28 and 29, respectively);
- e. Plaintiffs' Motion and Memorandum for Order to Show Cause dated November 6, 2012 (D.V.I. Doc. # 31);
- f. Plaintiffs' Motion for Partial Summary Judgment dated November 11, 2012 (D.V.I. Doc. # 34); and
- g. Defendants' Motion to Strike Self-Appointed Representative dated November 21, 2012, which, among other relief, respectfully requests the Court to resolve the motion to strike prior to any other substantive motions.

5. No aspect of the substantive discovery process, including depositions or written discovery requests, has been completed.

6. Further, no party has provided its Initial Disclosures yet, as no status or case management conference has been scheduled yet.

7. In addition, Defendants believe that a resolution of their motion to strike will have significant implications for the subsequent course of proceedings, including the nature and scope of discovery, given Plaintiff Mohammad Hamed's stated desire to prosecute this action by and through a self-appointed representative, *i.e.*, "his authorized agent Waleed Hamed," his son, and Mohammad Hamed's attribution of the allegations in the action to certain unnamed additional "authorized agents" acting "from time to time." (Comparison Document (D.V.I. Doc. # 17) at ¶ 2).

8. There is also a fundamental dispute between the parties as to whether Mohammed Hamed is a *bona fide* partner or a mere joint venturer who has no partnership rights whatsoever under the Virgin Islands Uniform Partnership Act or any other authority. (*See generally* Renewed Motion to Dismiss (D.V.I. Doc. # 29)).

9. Specifically, with respect to Plaintiffs' Motion for Partial Summary Judgment, Defendants believe that there is insufficient information or evidence available to reasonably respond

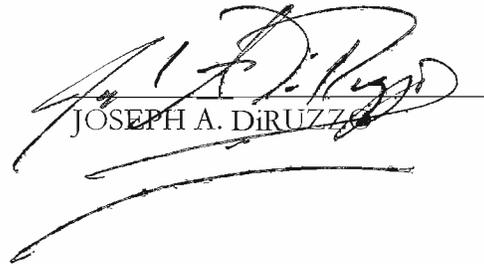
to the summary judgment motion at this time.

10. Defendants previously had been hesitant, for purposes of judicial economy, to engage in costly and potentially unnecessary discovery pending a resolution of the substantive motions identified above.

11. However, given the current posture of the action, and Defendants' good faith desire to proceed in due course to a resolution on the merits, Defendants, concurrent with the filing of their Rule 56(d) Motion, have served Notices of Deposition to the following individuals: Mohammad Hamed; Waleed Hamed; Waheed Hamed; Hisham Hamed; and Mufeed Hamed.

12. The foregoing individuals have been noticed for oral examination in the Virgin Islands subject to continuance or adjournment from time to time or place to place until completed starting on January 22, 2013, through January 25, 2013, respectively.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on December 20, 2012.

  
JOSEPH A. DIRUZZO