

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

MANAL MOHAMMAD YOUSEF,
Plaintiff

v.

SIXTEEN PLUS CORPORATION,
Defendant.

and

SIXTEEN PLUS CORPORATION,
Counter-Plaintiff

v.

MANAL MOHAMMAD YOUSEF,
Counter-Defendant,

and

SIXTEEN PLUS CORPORATION,
Third-Party Plaintiff

v.

FATHI YUSUF,
Third-Party Defendant,

CIVIL NO. SX-2017-CV-00342

**ACTION FOR DEBT AND
FORECLOSURE**

**COUNTERCLAIM FOR
DAMAGES**

THIRD PARTY ACTION

JURY TRIAL DEMANDED

Consolidated With

CIVIL NO. SX-2016-CV-00065

**ACTION FOR
DECLARATORY JUDGMENT,
CICO and FIDUCIARY DUTY**

COUNTERCLAIM

JURY TRIAL DEMANDED

SIXTEEN PLUS CORPORATION,
Plaintiff,

v.

MANAL MOHAMMAD YOUSEF,
Defendant.,

and

MANAL MOHAMMAD YOUSEF,
Counter-Plaintiff.,

v.

SIXTEEN PLUS CORPORATION,
Counter-Defendant.

**SIXTEEN PLUS CORPORATION'S
MOTION TO AMEND ITS TWO ANSWERS
TO ADD ONE SENTENCE TO CLARIFY AN AFFIRMATIVE DEFENSE**

COMES NOW Sixteen Plus Corporation, through undersigned counsel, and moves the Court, pursuant to V.I. R. CIV. P. 15(a)(2), to allow it to amend its two answers in the original, pre-consolidation 65 and 342 actions--to clarify his affirmative defense of "in pari delicto".

Before consolidation by Judge Willocks on December 16, 2019, Sixteen Plus had filed answers in both the 65 and 342 cases containing the affirmative defenses of "unclean hands" and "in pari delicto." An issue has arisen as to whether the wording adequately conveys both defenses. In 65, the June 7, 2017 answer to Manal's Amended Counterclaim recited:

7. Defendant is barred from the relief sought in the Amended Counterclaim because the sham note and mortgage referred to in the Amended Counterclaim are unenforceable because the sham note and mortgage were procured as part of and in furtherance of a fraudulent criminal conspiracy in which Defendant was an active participant.

And in 342, the October 12, 2017 answer and counterclaim to Manal's Complaint recited:

8. The Plaintiff's Complaint and attached Note and Mortgage are unenforceable due to the illegality of the transaction.

The issue arises concerning the difference between "unenforceable" and "barred" versus "should decline to hear" which more adequately reflects the doctrine of "in pari delicto".

Thus, Sixteen Plus asks to amend each of these (7 & 8) to add the following sentence.

In the alternative, the Court *should decline to hear* the substance of these matters as there was an overarching series of coupled illegal activities in which all knowingly and intentionally participated.

Sixteen Plus attaches, as **Exhibit B**, Hisham Hamed's *Motion to Amend* in the 650 action for the legal and factual bases of this request and incorporates those facts and arguments here.

Finally, as this adds one sentence, no revised answers and redlines are attached.

A proposed order is attached as **Exhibit A**.

Counsel for Sixteen Plus Corporation

Dated: January 1, 2023

/s/ Carl J. Hartmann III

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CERTIFICATE OF SERVICE

I hereby certify that, discounting captions, headings, signatures, quotations from authority and recitation of the opposing party's own text, this document complies with the page and word limitations set forth in Rule 6-1(e) and that on **January 1, 2023**, I served a copy of the foregoing by email and the Court's E-File system, as agreed by the parties, to:

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Courtesy copy to Kevin Rames, Esq.

/s/ Carl J. Hartmann III

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



MANAL MOHAMMAD YOUSEF,
Plaintiff
v.
SIXTEEN PLUS CORPORATION,
Defendant.

and
SIXTEEN PLUS CORPORATION,
Counter-Plaintiff
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MANAL MOHAMMAD YOUSEF,
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and
SIXTEEN PLUS CORPORATION,
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FATHI YUSUF,
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CIVIL NO. SX-2017-CV-00342

**ACTION FOR DEBT AND
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**COUNTERCLAIM FOR
DAMAGES**

THIRD PARTY ACTION

JURY TRIAL DEMANDED

Consolidated With

SIXTEEN PLUS CORPORATION,
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Counter-Defendant.

CIVIL NO. SX-2016-CV-00065

**ACTION FOR
DECLARATORY JUDGMENT,
CICO and FIDUCIARY DUTY**

COUNTERCLAIM

JURY TRIAL DEMANDED

ORDER

THIS MATTER having come on before the Court on Sixteen Plus Corporation's motion pursuant to V.I. R. CIV. P. 15(a)(2), to allow it to amend its two answers in the original, pre-consolidation 65 and 342 actions, and the Court being fully informed in the premises:

IT IS HEREBY ORDERED that:

1. The Sixteen Plus June 7, 2017 Answer to Manal's Amended Counterclaim, affirmative defense paragraph 7, in 65 is amended as follows:

7. Defendant is barred from the relief sought in the Amended Counterclaim because the sham note and mortgage referred to in the Amended Counterclaim are unenforceable because the sham note and mortgage were procured as part of and in furtherance of a fraudulent criminal conspiracy in which Defendant was an active participant. In the alternative, the Court *should decline to hear the substance of these matters as there was an overarching series of coupled illegal activities in which all knowingly and intentionally participated.*

2. The Sixteen Plus October 12, 2017 Answer and Counterclaim to Manal's Complaint in 342 is amended as follows:

8. The Plaintiff's Complaint and attached Note and Mortgage are unenforceable due to the illegality of the transaction. In the alternative, the Court *should decline to hear the substance of these matters as there was an overarching series of coupled illegal activities in which all knowingly and intentionally participated.*

It is **SO ORDERED**.

Dated: _____, 2023

ATTEST: TAMARA CHARLES,
the Court

Douglas A. Brady
Judge of the Superior Court Clerk of

By: Court Clerk Supervisor

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



HISHAM HAMED, individually,
and derivatively on behalf of
SIXTEEN PLUS CORPORATION,

Plaintiff,

v.

FATHI YUSUF, ISAM YOUSUF and
JAMIL YOUSUF,

Defendants,

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant.

Case No.: SX-2016-CV-00650

**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES
AND CICO RELIEF**

JURY TRIAL DEMANDED

**HISHAM HAMED'S
MOTION TO AMEND HIS *FIRST AMENDED COMPLAINT*
TO JOIN MANAL YOUSEF AS A DEFENDANT**

I. Introduction

Plaintiff Hisham Hamed moves the Court, pursuant to V.I. R. CIV. P. 15(a)(2), to allow him to amend his *First Amended Complaint* ("FAC") dated December 23, 2016, to join Manal Yousef as a defendant. As discussed below, while Hamed originally believed that Manal was a knowing and active participant in the original acts that led to the creation of the sham note and mortgage at issue (1995-2003)—he also felt that thereafter she was a straw-man and dupe who was not involved in the later conspiracy at issue. As the creation of those documents is not part of the instant complaint she was not named. However, following initial discovery in this action, Hamed now believes he can prove that she is, and has been, fully participatory with the defendants in the present conspiracy.

As an explanation of why this was not determined previously, Hamed notes that this action has been effectively stalled since 2017 due to a number of procedural

issues discussed below. No answers have been filed yet, and no depositions have been taken or are presently noticed. However, after discovery re-started this summer, Hamed's view changed significantly. The discovery responses of the other defendants here, and further investigation by counsel have resulted in Hamed ascertaining significant proof that she has been an active, fully participatory co-conspirator in the alleged CICO conspiracy.

While Rule 15(a) of the Virgin Islands Rules of Civil Procedure provides that the Court should freely give leave to amend when justice so requires, appropriate justifications for deviating from that norm include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Davis v. UHP Projects, Inc.*, 74 V.I. 525, 536-37 (2021) *citing Basic Services, Inc. v. Gov't of the V.I.*, 71 V.I. 652, 667 (V.I. 2019) (*quoting Reynolds v. Rohn*, 70 V.I. 887, 899-900, 2019 VI 8 (V.I. 2019)). Thus, Hamed will address each of these factors.

Before proceeding, Hamed again notes that none of the primary defendants have yet answered. This is restated because the reason for their non-filing is very important. It is because they have all submitted motions to dismiss predicated on the absolute *need to have Manal joined as a party here*, described below. Thus, Hamed expects no oppositions will be filed. Moreover, the time for depositions has just been enlarged.¹ Finally, there is a pending, fully briefed motion to consolidate this action with the two companion actions described below.

¹ As set forth below, (1) Manal is an active litigant in the two companion cases, one of which she brought, (2) she has USVI counsel who also represents two of her family members who are defendants here—and who, therefore, has been copied on, and is fully informed as to these proceedings, (3) she has not deposed witnesses yet, (4) nor has she yet been deposed herself—and (5) although not a U.S. citizen, she is fully subject to the jurisdiction of this Court.

II. Procedural Posture of the Three “Diamond Keturah” Actions

A number of cases have been filed regarding the note and mortgage relating to the 1997 purchase of the “Diamond Keturah” property by Sixteen Plus—and the present efforts of members of Fathi Yusuf’s family to wrest that property from Sixteen Plus and the Hameds. Three of those actions remain active² and are relevant.

First, on February 12, 2016, Sixteen Plus Corporation filed a declaratory judgment action against Manal Yousef, Fathi Yusuf’s niece. *Sixteen Plus v. Manal Yousef*, SX-2016-CV-00065 (“65 action”). Though Manal was the defendant (sued for declaratory judgment as to the invalidity of the note and mortgage) she countersued, also for a declaratory judgment, alleging:

6. The First Priority Mortgage is valid and enforceable pursuant to the terms and conditions set forth therein, and the plaintiff/counter-defendant is contractually obligated to fulfill all of the terms and conditions of the Promissory Note and First Priority Mortgage and to make the payments due in accordance to the terms and conditions to which it agreed to be legally bound and obligated.

WHEREFORE, the defendant/counter-claimant respectfully requests this Court enter an order declaring the Promissory Note and First Priority Mortgage executed by the plaintiff/counter-defendant valid and fully enforceable, together with interest due and owing and further awarding the defendant/counter-claimant her costs including an award of attorney's fees, for being required to defend the Complaint and to bring this counterclaim.

² The additional cases are no longer relevant to these three remaining actions. For example, on July 27, 2015, Fathi Yusuf filed ST-2015-CV-000344, an action against Sixteen Plus Corporation....Mohammad A. Hamed, Waleed M. Hamed, Waheed M. Hamed, Mufeed M. Hamed, and Hisham M. Hamed. That action sought:

3. An order dissolving...Sixteen Plus and directing the windup of the corporation[]; [and]

4. An order appointing a receiver for...Sixteen Plus to sell the real estate holdings of both corporations. . . .

Hamed believes that 2015 action was intended to force the issue of the note and mortgage in St. Thomas, and led to the remaining cases—but was dismissed without prejudice on the joint motion of the parties on November 15, 2016.

On June 7, 2017, Sixteen Plus answered Manal's amended counterclaim, asserting several affirmative defenses including, at 2, failure of consideration and "*in pari delicto*":

1. The sham note and mortgage referred to in the Amended Counterclaim are unenforceable because there was no consideration paid or otherwise given by Defendant in exchange for the sham note and/or mortgage.

* * * *

7. Defendant is barred from the relief sought in the Amended Counterclaim because the sham note and mortgage referred to in the Amended Counterclaim are unenforceable because the sham note and mortgage were procured *as part of and in furtherance of a fraudulent criminal conspiracy in which Defendant was an active participant*. (Emphasis added.)

Second, on October 31, 2016, Hisham Hamed filed the instant action individually and derivatively, on behalf of Sixteen Plus Corporation, against Fathi Yusuf, his nephew (Isam) and Isam's son (Jamil)—as well as nominal defendant Sixteen Plus. *Hisham Hamed v. Fathi Yusuf et al.*, SX-2016-CV-00650 ("650 Action"). Hamed alleged that Fathi and his family members were engaged in a CICO conspiracy to use the sham note and mortgage to fraudulently obtain half of the Diamond Keturah property belonging to Sixteen Plus—in derogation of Fathi's fiduciary duties to Sixteen Plus and its shareholders as a director and officer.

As noted above, the primary defendants³ have not yet answered. Rather, on December 5, 2016, Fathi Yusuf filed a motion to dismiss which is pending—based in part on the Hamed's failure to join his niece (Manal) as a defendant here. On June 14, 2017, Isam (Manal's brother) and Jamil (Isam's son) filed a 48-page memorandum in support of a motion to dismiss based on a number of issues, including "[the FAC] fails to join an indispensable party, namely, Mana! Yousef." Nominal defendant Sixteen

³ Hamed uses the term "primary defendants" to mean Fathi, Isam and Jamil—as Sixteen Plus is a nominal defendant in the derivative action. Moreover, to avoid confusion, Hamed uses the first names for those three related defendants rather than their last names because, although they are all family, they use different spellings of the last name: Fathi YUSUF, Manal YOUSEF and Isam/Jamil YOUSUF.

Plus, through independent counsel, filed an answer essentially stating the requisite neutrality.

Third, on September 31, 2017, Manal filed an action on the same note and mortgage—again alleging an identical breach as she alleged in the counterclaim to the 65 action. *Manal Yousef v. Sixteen Plus*, SX-2017-CV-00342 (“342 Action”). However, as she had sought only declaratory relief in 65, in 342 she sought foreclosure and a deficiency judgment. Sixteen Plus answered and filed a counterclaim, as well as a third-party action against Fathi Yusuf.

On December 16, 2018, Judge Willocks consolidated the 65 and 342 cases, and assigned them to Judge Meade. Thereafter, all three cases fell down a hole of no one person's making, as follows:

- A. Having been assigned the two consolidated companion cases 65 and 342, Judge Meade, *sua sponte*, attempted to refer those two cases to the Complex Litigation Division.
- B. Less than 3 weeks later, Hamed filed his brief in support—and suggested that this (650) case be included.
- C. Less than 3 weeks later, both Manal and the defendants here filed oppositions.
- D. On March 16, 2020, Judge Malloy denied the motion, stating:

It might be just, efficient, and cost-effective to reassign all the cases to the same judge. But only the Sixteen Plus Cases were referred to this Court to determine whether they are complex. And for that reason, the Court concludes that transferring fewer than all the cases to the Complex Litigation Division would not be "the most just, efficient, and cost-effective for the Court, counsel, and the parties."
- E. That, of course, is exactly when COVID struck. And it was not until July 27, 2022, that the parties jointly filed their *Joint Report and Motion for Scheduling Order*.
- F. Since then, the parties have proceeded with surprising alacrity.

III. Facts

As set forth in *Hamed's Second Motion to Compel: As to Banking Records of Isam Yusuf*,⁴ there are two starkly different factual views here. At page 6,

Hamed will seek to argue that the central factual issue in this series of cases is starkly black and white: Whose funds were really provided to Sixteen Plus? Did Manal Yousef's father deposit \$4.5 million into Isam Yusuf's BFC accounts over a seven-year period as he alleges, or was the money in those accounts simply skimmed funds put there by Wally and Fathi over a very short period from April 1996, onwards? In other words, were Manal's funds loaned to Sixteen Plus to buy the subject land, or were only Hamed's and Yusuf's funds being deposited and transferred to Sixteen Plus to buy the land? If these were not Manal's funds, there was "fraud, coercion or other nefarious inducement into the [mortgage] contract." *Celestin v. LLP Mortg., Ltd.*, No. 2007-014, 2007 VI Supreme LEXIS 6, at *5 (Nov. 9, 2007)(citing *Restatement (Third) of Property (Mortgages)* §§ 1.1 and 1.2.)⁷[⁵] The V.I. Supreme Court having adopted it, Hamed will contend that *Restatement 3d of Property: Mortgages*, § 1.2, is clear—that where sham notes and the associated mortgages arise without any real value having been provided by the putative loaning party (i.e., undertaken without actual funding for some other purpose.* * * *At trial, Hamed will seek to prove that the two \$2 million tranches of funds transmitted by Isam Yusuf to Sixteen Plus were solely monies belonging to the Hamed and Yusuf families: "The sole purpose of the mortgage [from Manal was] to. . ." change the apparent owner of the funds and to "establish a lien priority superior to the claims of possible future creditors." *Id.* But Isam Yusuf will counter that this was a real loan—that these were separate, unrelated funds coincidentally in his same 1995 Isam BFC accounts—funds his father (Mohammad) had deposited into Isam's accounts slowly, in smaller deposits over a long period—as a gift to Manal Yousef. These are two radically different stories.

Another critical "fact" is that the defendants have stated that Manal *should be* joined. As stated above, none of the primary defendants have answered here—filing motions to dismiss instead. In Fathi's January 9, 2017 motion to dismiss the FAC, he states the following, at 26:

⁴ Filed November 23, 2022.

⁵[Footnote in the original.] 7. Hamed contends in this action that Fathi's family members, including his niece, Manal Yousef, planned these documents to eventually take the Hamed half. . . .Despite the various spellings, Mohammad Yusuf, who also goes by the last name Hamdan, is Fathi Yusuf's brother. Isam Yusuf and Manal Yousef are Mohammad's children. Thus, Fathi is their uncle. Defendant Jamil Yusuf is the brother of Manal, the son of Mohammad and the nephew of Fathi.

it is clear Manal Yousef has an interest relating to the subject of the action-her First Priority Mortgage on the Property which Plaintiff seeks to have invalidated-and, plainly, disposing of the action in her absence may, as a practical matter, impair or impede her ability to protect the interest. Therefore, Manal Yousef is a necessary party and should be joined.

Isam and Jamil expressed the *identical* thought on the subject in their June 14, 2017, 48-page memorandum in support of their motion to dismiss, at 45-46:

it is clear Manal Yousef has an interest relating to the subject of the action-her First Priority Mortgage on the Property which plaintiff seeks to have invalidated-and, plainly, disposing of the action in her absence may, as a practical matter, impairs or impedes her ability to protect the interest. Therefore, Manal Yousef is a necessary party and should be joined.

This coincidental commonality of thought completely supports this amendment.

IV. Applicable Law

Rule 15(a)(2) provides:

(a) Amendments Before Trial.

* * * *

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent⁶ or the court's leave. The court should freely give leave when justice so requires.

Despite the provision in the Rule that “[t]he court should freely give leave when justice so requires,” amendments are within the sound discretion of the Superior Court⁷—and, as a result, the Superior Court may deny a request to amend so long as it articulates a sound justification—a “justifying reason”. See *Reynolds v. Rohn*, 70 V.I. 887, 899-900 (2019 V.I. Supreme LEXIS 15 (V.I. 2019)); see also *Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 534 (V.I. 2012). The V.I. Supreme Court has addressed

⁶ Hamed has simultaneously sought consent from the other parties and will withdraw this motion if it is granted.

⁷ The V.I. Supreme Court has observed that it “ordinarily reviews the denial of a motion to amend an answer or other pleading only for abuse of discretion. *Harvey v. Christopher*, 55 V.I. 565, 577 (V.I. 2011). However, review is plenary when the Superior Court exercises its discretion based on the interpretation of application of a legal precept. *Corriette v. Morales*, 50 V.I. 202, 205 (V.I. 2008).” *Stiles v. Yob*, 65 V.I. 234, 239 (2016).

the meaning of the phrases “should freely give leave” and “sound justification” in two recent decisions. In 2019, it affirmed the denial of a motion to amend for futility. *Basic Servs., Inc. v. Gov't of the V.I.*, 71 V.I. 652, 667 (2019)(“the Superior Court's futility justification was sound.”) More recently, in 2021, the Court addressed the denial of a proposed amendment due to the movant's alleged delay in bringing the motion—reversing the lower court regarding a fourteen-year delay—after an extensive analysis. *Davis v. UHP Projects, Inc.*, 74 V.I. 525, 537-38 (2021):

the Superior Court determined “that an amendment would require additional discovery because the lack of prior legal notice of the negligence claim means [that UHP Projects] may not have utilized the discovery process to its full potential,” and further noted that “the Motion comes one year after the Court decided to disregard the ill-formed negligence claim.” (J.A. 35.)

We conclude that the Superior Court abused its discretion when it denied the motion to amend. This Court has characterized prejudice to the opposing party or the trial court as “the most important factor in determining whether leave to amend should be freely given,” and has expressly held that “**passage of time, without more, does not require that a motion to amend a complaint be denied.**” *Toussaint*, 67 V.I. at 949-50;⁸ see also *Stouffer v. Commonwealth*, 127 Pa. Commw. 610, 562 A.2d 922, 923 (1989) (“[A] trial court's refusal to allow amendment solely on the basis of unreasonable delay and nothing more is an abuse of discretion.”).

[12-14] ¶20 While the Superior Court determined that UHP Projects lacked prior notice of the claim, this is belied by the fact that UHP Projects briefed the equipment issue on the merits as part of its summary judgment briefing and has not asserted any *particularized* prejudice that it would suffer if the amendment were permitted. Importantly, the prejudice cannot simply be that UHP Projects may lose the case on the merits if the amended pleading is allowed; rather, “**[t]o constitute prejudice, the amendment must compromise [the defendant's] ability to present [its] case.**” *Philadelphia v. Spencer*, 139 Pa. Commw. 574, 591 A.2d 5, 7 (1991). Although the litigation had already been pending for approximately 14 years at the time the motion had been filed, Davis clearly believed that this claim had been pled in the original complaint at the start of the litigation and did not know that it was not until the Superior Court issued its October 28, 2015 opinion holding otherwise. And while the Superior Court placed significant weight on the fact that Davis did not file the motion to amend until nearly a year after the Superior Court issued its October 28, 2015 opinion, Rule 15 permits

⁸ In *Toussaint v. Stewart*, 67 V.I. 931, 947 (2017), the Court quotes the U.S. Supreme Court for the further proposition that: “In keeping with the intent and spirit of the rules of the Superior Court governing pleadings and amendments, decisions on the merits are favored, and dismissal of claims “on the basis of such mere technicalities” are to be avoided. *Foman*, 371 U.S. at 181.”

an amendment at any time — even during trial — and as noted above, unreasonable delay, without more, is not sufficient grounds to deny leave to amend. See *Toussaint*, 67 V.I. at 949-50; *Stouffer*, 562 A.2d at 923. **Moreover, though the litigation had been pending for 14 years, the parties remained engaged in motion practice and other pre-trial matters at the time the motion had been filed, with trial not imminent.** See *Selcke v. Bove*, 258 Ill. App. 3d 932, 629 N.E.2d 747, 752, 196 Ill. Dec. 202 (1994); *Leslie v. Hymes*, 60 A.D.2d 564, 400 N.Y.S.2d 350, 351 (1977). Significantly, the fact that the **Superior Court did not rule on the motion to amend until nearly three years after it was filed** — a period in which discovery could have occurred had the motion been granted in a timely manner — demonstrates that permitting the amendment would not have unnecessarily prolonged the proceeding. Therefore, we also reverse this aspect of the judgment under the September 6, 2019 opinion, and direct the Superior Court on remand to permit the amendment. (Emphasis added.)

V. Argument

A. Davis factor 1 — undue delay

As was the case in *Davis*, the two motions to dismiss were timely filed in January and June of 2017—and were fully briefed thereafter. Because there was no decision, the defendants did not file answers. Because the case was transferred and subject to several procedural issues discovery was almost completely delayed until 2022. Thus, the cases did not get back onto the rails until the unprompted filing of that Joint Report on July 22nd of this year. Thus, the entirety of the current litigation of this case has taken place in less than five months!

As was the case in *Davis*, trial is not imminent. At 74 V.I. 538, that Court noted “though the litigation had been pending for 14 years, the parties remained engaged in motion practice and other pre-trial matters at the time the motion had been filed, with trial not imminent.” The same is true here.

As was the case in *Davis*, “[t]o constitute prejudice, the amendment must compromise [the defendant's] ability to present [its] case.” That is absolutely not the case here. As noted above in the footnote, Manal is not prejudiced and the primary defendants are actually on records as being *enthusiastic* about her being joined.

B. Davis Factor 2 — bad faith or dilatory motive on the part of the movant

There has been no bad faith in Hamed's actions or prosecution of this action. To the contrary, it was Hamed's counsel that contacted the other parties to suggest the filing of the Report and moving the case along. All delays were caused by procedural matters not caused by any party, and COVID. The docket reflects that Hamed has always responded to filings in a rapid and timely manner and has sought to move the case to the best of his ability under difficult circumstances.

C. Davis factor 3 — repeated failure to cure deficiencies
by amendments previously allowed

The complaint in this action was amended once within the permissive time period allowed by part (a) of the Rule, primarily to add the conversion and civil conspiracy counts. In addition, Hamed voluntarily withdrew those two additional counts after initial briefings revealed them to be duplicative. No other amendments have been sought to cure deficiencies.

D. Davis factor 4 — undue prejudice to the opposing party
by virtue of allowance of the amendment

In *Toussaint* the V.I. Supreme Court stated that the "trial court's reliance on Toussaint's delay in seeking leave to amend and Stewart's supposed lack of opportunity to respond as justification for striking Toussaint's amended answer and counterclaim was an abuse of discretion." There, as here, the movant was already involved in and fully informed as to the issues presented, albeit in the same case. Because no depositions have begun here, "it is difficult to conclude that allowing the amendment would [] even remotely disrupt[] the trial court's procedure. . . ." *Id.* at 949. Moreover, because of the existing, extensive involvement of Manal's counsel with Jamil and Isam, the amended allegations are factually similar and not a surprise nor are they prejudicial.

E. Davis factor 5 — Futility

The futility discussed in *Basic Servs.* was legal impossibility because of the controlling law.⁹ There simply was no legal theory by which the movant could prevail, thus the motion was legally futile. No such futility exists with regard to Manal here. As all of the opposing parties here have stated, Manal is central to the legal issues which have been joined. Any insufficiency in the legal theories will be tested elsewhere, in the pending motions to dismiss.

VI. Conclusion

Based on the liberal text of the Rule, the early stage of the proceedings, the prior statements of all of the defendants that Manal should be a party here and the commonality of the related defendants and their counsel, this appears to be a perfect situation for amendment.

The proposed *Second Amended Complaint* is attached as **Exhibit A**,¹⁰ and the redline of that document is attached as **Exhibit B**. A proposed order is attached as **Exhibit C**.

⁹ The Court stated “[b]ecause unjust enrichment [*i.e. quantum meruit*] is an equitable remedy, it — like all equitable remedies — is inappropriate where a legal remedy is available.”). Thus, the Superior Court's futility justification was sound. *Id.* at 71 V.I. 652, 667 (2019).

¹⁰ Letter designations are used for exhibits here to differentiate them from exhibits to the FAC.

Counsel for Hisham Hamed

Dated: December 18, 2022



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CERTIFICATE OF SERVICE

I hereby certify that this document complies with the page and word limitations set forth in Rule 6-1(e) and that on **December 18, 2022**, I served a copy of the foregoing by email and the Court's E-File system, as agreed by the parties, to:

James Hymes III, Esq.

Counsel for Defendants Isam and Jamil Yousuf

LAW OFFICES OF JAMES L.

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