

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

HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

Plaintiff,)

vs.)

FATHI YUSUF, ISAM YOUSUF and)
JAMIL YOUSEF,)

Defendants,)

and)

SIXTEEN PLUS CORPORATION,)

a nominal defendant.)

Case No.: 2016-SX-CV-650

DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION

JURY TRIAL DEMANDED

**DEFENDANT FATHI YUSUF’S REPLY IN SUPPORT OF
HIS MOTION TO STAY DISCOVERY PENDING THE DISPOSITION
OF HIS MOTION TO DISMISS PLAINTIFF’S FIRST AMENDED COMPLAINT
AND OPPOSITION TO PLAINTIFF’S MOTION FOR A SCHEDULING ORDER**

Defendant, Fathi Yusuf (“Mr. Yusuf”), through undersigned counsel, hereby replies in support of his Motion to Stay Discovery Pending the Disposition of His Motion to Dismiss Plaintiff’s First Amended Complaint (“Motion to Stay”) and opposes Plaintiff, Hisham Hamed’s Motion for Entry of a Scheduling Order and, in support, states 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 disputes concerning their former or currently jointly 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

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade

P.O. Box 756

St. Thomas, U.S. V.I. 00804-0756

(340) 774-4422

currently Plaintiff's second complaint in this matter ("First Amended Complaint") since he dropped his original woefully inadequate complaint after being served with Mr. Yusuf's Motion to Dismiss the 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 unsupported. In fact, three of those claims were so baseless—a Criminally Influenced and Corrupt Organizations Act ("CICO") claim, conversion and civil conspiracy—Plaintiff withdrew them after being served with Mr. Yusuf's motion to dismiss the First Amended Complaint. Now, after withdrawing his original complaint and three causes of action in his First Amended Complaint due to their frivolity, Plaintiff argues that the Court should not exercise its "broad discretion" to stay discovery until Mr. Yusuf'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 MR. YUSUF'S MOTION TO DISMISS

Plaintiff asserts that Federal Rule of Civil Procedure 12(b)(6) "does not provide for such a stay" and "motions to stay discovery should rarely be granted simply because a Rule 12(b)(6) motion has been filed." *See* Opposition to Motion to Stay Discovery at pp. 1 and 2, respectively ("Opposition").¹ Notably, Mr. Yusuf never claimed the terms of Rule 12(b)(6) provided for a stay. Instead, he set forth the unique circumstances of this case and cited multiple cases which establish that a stay is properly granted under the present circumstances. In contrast, Plaintiff

¹ Plaintiff also argues that because Mr. Yusuf summarized the meritorious arguments in his Motion to Dismiss Plaintiff's First Amended Complaint and reply in support thereof in his Motion to Stay Discovery that the Motion to Stay Discovery was somehow an "unauthorized sur reply." This argument is both specious and puzzling given that the Motion to Stay Discovery did not contain a single argument which had not already been put before the Court in the briefing on the Motion to Dismiss the First Amended Complaint.

cited one case for the unremarkable proposition that Rule 12(b)(6) does not provide for a stay—the sole case cited in the Opposition—and failed to cite any legal support for his position that a stay is not appropriate pending the adjudication of Mr. Yusuf's Motion to Dismiss Plaintiff's First Amended Complaint. Likewise, Plaintiff does not attach a declaration or affidavit explaining how he would suffer even a modicum of prejudice if this matter was briefly stayed—particularly since there is an ongoing case specifically involving the “sham mortgage.” Instead, Plaintiff merely alleges, notably without any legal support, that “any delay in moving a case forward is prejudicial.” Opposition, p. 3. When the unique facts and circumstances surrounding this matter are applied to the clear case law on this issue, it is plain that a stay is properly granted.

What Plaintiff ignores, 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 also 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 WL 39311 at *1 (E.D.Pa. 1990). This discretion exists because the pleading requirement set forth in *Twombly* and *Iqbal* serves two 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 (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 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 Mr. Yusuf in this matter. Thus, *Twombly* and *Iqbal* counsel that discovery should not proceed 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, 1368 (11th Cir. 1997), there are significant 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.

Id. 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 . . . 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 WL 273678 at *2 (E.D.Pa. 1995); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (the purpose of Rule 12(b)(6) is to “streamline[] litigation by dispensing with needless discovery and factfinding”); *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 F.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 increased efficiency in resolving the case. Indeed, the U.S. Supreme Court in *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 fully briefed motion to dismiss all counts of Plaintiff's First Amended Complaint is currently pending before the Court. To move forward with discovery with respect to any, or all, of the counts when they may be dismissed is an utter 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 adjudicated.

Apparently, 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 Mr. Yusuf and forcing him to spend unnecessary attorneys' fees. Plainly, 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.

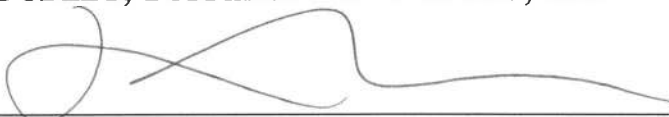
WHEREFORE, on the basis of the foregoing, Defendant, Fathi Yusuf, respectfully requests that the Court: 1) stay discovery in this matter until Mr. Yusuf's Motion to Dismiss the First Amended Complaint has been ruled upon by the Court; 2) deny Plaintiff, Hisham Hamed's Motion for Entry of a Scheduling Order; and 3) award Defendant such other relief as the Court deems just and proper.

Respectfully Submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: March 27, 2017

By:


STEFAN B. HERPEL (V.I. Bar #1019)
LISA MICHELLE KÖMIVES (V.I. Bar #1171)
Law House
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804-0756
Telephone: (340) 774-4422
Telefax: (340) 715-4400
sherpel@dtflaw.com
lkomives@dtflaw.com
Attorneys for Fathi Yusuf

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade

P.O. Box 756

St. Thomas, U.S. V.I. 00804-0756

(340) 774-4422

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2017, I served the foregoing *DEFENDANT FATHI YUSUF'S MOTION TO STAY DISCOVERY PENDING THE DISPOSITION OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND OPPOSTION TO PLAINTIFF'S MOTION FOR SCHEDULING ORDER* via e-mail addressed to:

Joel H. Holt, Esq.
Law Office of Joel H. Holt
2132 Company Street
Christiansted, USVI 00820
E-Mail: holtvi@aol.com

Kevin A. Rames, Esq.
K.A. Rames, P.C.
2111 Company Street, Suite 3
Christiansted, VI 00820
E-Mail: kevin.@rameslaw.com

James L. Hymes, III, Esq.
Law Offices of James L. Hymes, III, P.C.
P.O. Box 990
St. Thomas, VI 00804-0990
E-Mail: jim@hymeslawvi.com;
rauna@hymeslawvi.com

Michelle Barber

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade

P.O. Box 756

St. Thomas, U.S. V.I. 00804-0756

(340) 774-4422