

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

**CLIFFORD A. JOSEPH, Individually and as  
Member of HEALTHQUEST, LLC, d/b/a VIRGIN  
ISLANDS KIDNEY CENTER and the CARIBBEAN  
KIDNEY CENTER**

**Plaintiff,**

**v.**

**WALTER H. GARDINER and HEALTHQUEST,  
LLC , d/b/a VIRGIN ISLANDS KIDNEY CENTER  
and the CARIBBEAN KIDNEY CENTER**

**Defendant.**

**SX-11-CV-16**

**ACTION FOR DAMAGES**

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on Defendant Walter H. Gardiner's (hereinafter "Defendant" or "Gardiner") Motion to Dismiss filed on February 13, 2012. Plaintiff Clifford A. Joseph (hereinafter "Plaintiff" or "Joseph") filed his opposition on March 6, 2012. A Motion for Ruling was filed on May 28, 2013. For the following reasons, the Court will deny Defendant's Motion.

**FACTS AND PROCEDURAL HISTORY**

On or about December 19, 2004, Plaintiff entered into a Membership Interest Purchase Agreement (hereinafter "Agreement") with Defendant in Defendant's capacity as Manager of Healthquest, LLC (hereinafter "Healthquest" or "the Company"). Healthquest is a Virgin Islands Limited Liability Company. Pursuant to the Agreement, Gardiner, who owned all of the membership interest of Healthquest at the time, sold Joseph a ten percent (10%) interest in

Healthquest. Gardiner and Joseph are the only shareholders of Healthquest. The operations of Healthquest and the relations among its members and Manager are governed by an Operating Agreement dated December 1, 2004.

Joseph alleges that according to the Agreement, between 2004 and 2008 he provided both cash and services to the Company. Plaintiff also alleges that his contributions to the Company were not recorded properly and that he was not compensated for his services or given any distributions from profits. Plaintiff alleges that his efforts to obtain an accounting and information for tax preparation purposes from Gardiner were futile.

On January 14, 2011, Plaintiff filed a Verified Complaint for a derivative suit pursuant to Federal Rule of Civil Procedure 23.1 requesting declaratory relief and alleging breach and conversion. In the instant matter, Defendant requests that the Court dismiss this action for failure meet the particularity requirements for a pleading under Rule 23.1. The issue before the Court is whether Plaintiff's Verified Complaint satisfies the demand requirement for filing a derivative action pursuant to Rule 23.1.

## **DISCUSSION**

A shareholder derivative suit permits an individual shareholder to bring suit to enforce a corporate cause of action against officers, directors, and third parties.<sup>1</sup> Derivative suits are governed by the Federal Rule of Civil Procedure 23.1.<sup>2</sup> Before a derivative suit can commence, the plaintiff must allege that he "was a shareholder or member at the time of the transaction complained of" and must "state with particularity any effort by the plaintiff to obtain the desired

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<sup>1</sup> *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) (quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970) (internal quotation marks omitted)).

<sup>2</sup> The Federal Rules of Civil Procedure are made applicable to the Superior Court through Superior Court Rule 7

action from the directors or comparable authority and, if necessary, from the shareholders or members; and the reasons for not obtaining the action or not making the effort.”<sup>3</sup> In a derivative lawsuit, the shareholder must make a demand on the board of directors of the corporation to take action to correct the wrongdoing, or allege the reasons for the plaintiff’s failure for not making the effort.<sup>4</sup> The demand requirement ensures that the directors have an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.<sup>5</sup>

In the matter *sub judice*, Defendant argues that Plaintiff has not met the demand requirement or this derivative suit. Def.’s Mot. to Dismiss 1. Upon careful review of the record, the Court finds that Plaintiff has satisfied the demand requirement. Verified Compl. ¶¶ 5-14, 35-41. Plaintiff and Defendant are the only Members of Healthquest, LLC. Plaintiff is a Member with a ten percent interest in Healthquest, LLC. Defendant is a Managing Member who controls the remaining interest. The details of this arrangement are memorialized in the Membership Interest Purchase Agreement. Pl.’s Opp’n to Def.’s Mot. to Dismiss, Exhibit 1. Plaintiff stated that he was a member at the time of the alleged transactions. Verified Compl. ¶¶ 5-15, 17-19. Plaintiff also described with particularity his alleged unsuccessful efforts to obtain the desired action from Defendant, the Managing Member. Verified Compl. ¶¶ 20-41.

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<sup>3</sup> Fed.R.Civ.P. 23.1(b)

<sup>4</sup> *Garber v. Lego*, 11 F.3d 1197, 1201 (3d Cir. 1993).

<sup>5</sup> *Kamen*, 500 U.S. at 96 (internal quotation marks omitted)( The Court has noted the “demand requirement” of Rule 23.1 relates to the “adequacy of the shareholder representative’s pleadings,” and does not itself necessarily require demand).

## CONCLUSION

The Court finds that Plaintiff has satisfied the demand requirement pursuant to Rule 23.1. For the reasons stated above, Defendant's Motion to Dismiss will be denied. The Court will issue an Order consistent with this Opinion.

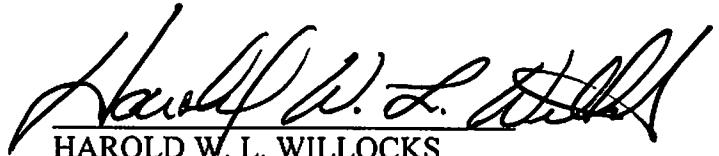
Dated: 4-7-15

ATTEST:

Estrella George  
Acting Clerk of the Court

By:   
Deputy Clerk

Dated: 4/10/15

  
HAROLD W. L. WILLOCKS  
Administrative Judge of the Superior Court

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**ORDER**

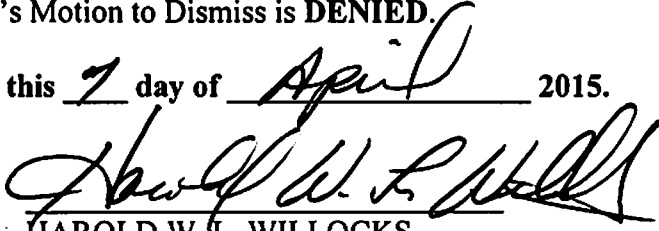
**THIS MATTER** is before the Court on Defendant Walter H. Gardiner's (hereinafter "Defendant" or "Gardiner") Motion to Dismiss filed on February 13, 2012. In accordance with the Memorandum Opinion of even date, it is hereby:

**ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

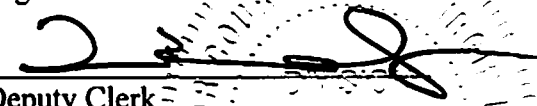
**DONE** and so **ORDERED** this 7 day of April 2015.

**ATTEST:**

Estrella George  
Acting Clerk of the Court

  
HAROLD W. L. WILLOCKS

Administrative Judge of the Superior Court

By:   
Deputy Clerk

Dated: 4/10/15