

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

UNITED CORPORATION,	)	
	)	Case No. SX-13-CV-0003
Plaintiff,	)	
	)	Action for Damages, Injunctive Relief
v.	)	and Declaratory Relief
	)	
WALEED HAMED,	)	
	)	
Defendant.	)	

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**DEFENDANT WALEED HAMED’S OPPOSITION TO UNITED CORPORATION’S  
MOTION TO SUBSTITUTE FATHI YUSUF**

Waleed Hamed (“Mr. Hamed”), by and through his undersigned counsel, files this Opposition to the Motion to Substitute Fathi Yusuf (the “Motion”) filed by the above-captioned plaintiff, United Corporation (“United”) and, in opposition to the Motion, states as follows:

United has moved to substitute Fahti Yusuf as the real party in interest in this case pursuant to Rule 17(a)(3) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), which provides in part:

*(3) Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, ***a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.***

See Fed.R.Civ.P. 17(a)(3) (emphasis added).

The Motion was not timely filed within “a reasonable time” and should be denied for three separate, independent reasons, each of which will be discussed separately for the sake of clarity.

**I. The Motion Was not Timely Filed.**

First, there is a pending summary judgment motion which has just completed briefing before the Court.<sup>1</sup> On the verge of losing this dispositive motion, United now seeks to avoid that judgment by trying to “skip forward” past the loss of that motion. Thus a Rule 17(a)(3) motion to substitute is improper and untimely at this time.

Based on the *Committee Notes* to the Rule, courts have made it clear that in addition to the reasonable amount of time requirement embedded in the Rule in the abstract, as a test of reasonableness, “a plaintiff must have a reasonable basis for naming the wrong party to be entitled to ratification, joinder, or substitution.” Magallon v. Livingston, 453 F.3d 268, 273 (5th Cir. 2006) (citing Wieburg v. GTE Sw., Inc., 272 F.3d 302, 308 (5<sup>th</sup> Cir. 2001). The mistake must be “understandable,” arising out of difficulty in determining under whose name to prosecute the action. Wieburg, 272 F.3d at 308.

Hamed's first formal, filed objection was first made in 2013 – three years ago. **Indeed, United filed a Motion to Withdraw this claim, acknowledging this fact.** Now, several years later, United seeks to substitute Yusuf as a party, clearly in an effort to avoid summary judgment and dismissal. Thus, “a reasonable time” has long passed.

A court clearly should refuse substitution where there was no reasonable basis for the naming of an incorrect party. See generally 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1555, at 415 (2d ed.1990). Here the naming was clearly **NOT** a mistake, it was a specific tactical decision. In other words, United, knowing fully the arguments, elected not to move to substitute Yusuf for **YEARS**. It is now too late to force a

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<sup>1</sup> The motion for summary judgment was filed on March 23, 2016 and has been fully briefed. The Opposition was filed on May 22, 2016, with the reply on May 11, 2016.

defendant, an innocent witness in larger proceeding, to start this litigation all over again after three years of litigation.

**II. Yusuf's Claim is Already Pending Elsewhere.**

Fathi Yusuf, as an individual, already filed suit on these **exact, identical claims**. **The exact, same claims with Fathi Yusuf as the plaintiff are already currently pending in the Case No. SX-12-CV-370** (the "Main Action"). To allow this substitution would be to create two identical actions. (United recognizes this in the form of its March 17, 2016 Motion to Consolidate.)

In this regard, the exact claims made here (that Mr. Hamed converted these identical Plaza Extra assets from Plaza Extra at a time in the 1990's when United or Fathi Yusuf claimed Yusuf owned the stores) is pending in the Main Action. There, Yusuf and United's January 13, 2014, *Amended Counterclaim* avers, at ¶¶ 102-114, the **identical** facts based on the same documents as to Mr. Hamed (See **EXHIBIT 1**, attached hereto):

IV. The Criminal Case Reveals That Hamed And Waleed Converted Monies from the Plaza Extra Stores.

102. In September of 2010, Yusuf received a partial copy of the FBI file, records, and documents, electronically reproduced and stored on a hard drive. The hard drive contained thousands of documents including bank statements and copies of cancelled checks. The documents were organized under the names of various individuals in the Hamed and Yusuf families. In other words, whatever the FBI found for any specific person, they would scan and organize the documents under that person's name.

103. Upon review of these documents, Defendants discovered defalcation and conversion of substantial assets including cash from United by Hamed and Waleed.

104. During a search of the documents and files delivered by the U.S. Government, United reviewed documents comprising tax returns for Waleed. An examination of Waleed's tax returns revealed the following significant assets:

- a. Tax Year 1992 (Stocks & Investments) \$ 408,572.00
- b. Tax Year 1993 (Stocks & Investments) \$7,587,483.00

105. The detailed stock acquisitions, which were listed meticulously by date of acquisition, price and number of shares purchased, could only have been acquired by Waleed through either a) his unlawful access to monies and other properties belonging to United since Waleed never held any other employment since 1986, other than his employment with United, or, b) his misappropriation of monies which were "partnership" funds for which Waleed may be individually liable, or for which Hamed may be liable in the event that Waleed was acting as Hamed's authorized agent when removing such funds.

106. Upon information and belief, Hamed knew of or directed Waleed's misconduct and personally benefited from his agent's defalcation and conversion of millions of dollars from United.

Moreover, relying on those identical facts, an identical cause of action to the one here was raised there – seeking the identical relief. See Exhibit 1 at ¶¶ 147-150.

### COUNT III - CONVERSION

147. Paragraphs 1 through 146 of this Counterclaim are re-alleged.

148. Hamed and Waleed, acting individually and as agent for Hamed, have unlawfully defalcated and converted to their own benefit and gain substantial funds belonging to Defendants.

149. Defendants never authorized these funds to be appropriated to the personal use of Hamed or Waleed.

150. Hamed and Waleed are therefore liable to Defendants for all funds converted for their personal gain and benefit in an amount to be determined after a full accounting is completed.

Thus, because Fathi Yusuf is the only remaining defendant-counterclaimant there (United having been dropped as to the Plaza Extra stores as both have admitted that United has no interest

and Fathi Yusuf is the only party in interest) **these claims are fully and completely being litigated there**. To allow Fathi Yusuf to substitute here would simply create a duplicate proceeding on identical claims involving identical parties.

**III. There is Already a Pending Motion To Withdraw filed by United.**

Finally, **United has already filed, and there is currently pending in this case, a United Motion to Withdraw Action without Prejudice**. Mr. Hamed opposed this on September 17, 2014 seeking fees due to the duplicative and tactical basis of these “scorched-earth” suits – and the ONLY reason this action continues is that United seeks to avoid the attorney fees remanded there. That motion should therefore be addressed before this one as well, which would moot this motion.

**IV. Conclusion.**

The motions before the Court should be decided in the order filed:

1. United's own motion to dismiss.
2. If that motion is denied, then Mr. Hamed's Motion for summary judgment should be addressed.
3. If both motions are denied, then the instant motion should be addressed.

If the foregoing order is followed, it will be clear that this case should be dismissed and, pursuant to the opposition to **United's own dismissal request**, fees allowed. Failing that, summary judgment should be granted. Finally, in the event that the Court reaches this motion, it should be denied as it creates a wholly duplicative action with identical parties, claims and requested relief. At that time, the Court should recognize this case for what it is – part of an effort to multiply litigation and oppress the opposing parties through Yusuf's bad faith use of litigation as a weapon of scorched-earth tactics. No action could more clearly highlight Yusuf's vexatious multiplicity of litigation than the instant one.

The Motion must be denied.

WHEREFORE, for the reasons set forth above, Mr. Hamed respectfully requests that the Court enter an order denying the Motion and grant to Mr. Hamed such other and further relief as is just and proper.

Respectfully submitted,

**HAMMECKARD, LLP**

By: 

Dated: July 20, 2016

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Direct Dial: (340) 514-2690  
Email: meckard@hammeckard.com

Counsel to Waleed Hamed

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of July, 2016, I served a copy of the foregoing in compliance with the parties' consent to electronic service of all documents in this Action, pursuant to Fed. R. Civ. P. 5(b)(2)(E), on: Nizar A. DeWood, Esquire ([dewoodlaw@gmail.com](mailto:dewoodlaw@gmail.com)); Gregory H. Hodges, Esquire ([ghodges@dtflaw.com](mailto:ghodges@dtflaw.com)); Joel H. Holt, Esquire ([holtvi@aol.com](mailto:holtvi@aol.com)); Carl Hartmann, Esquire ([carl@carlhartmann.com](mailto:carl@carlhartmann.com)); and Jeffrey B.C. Moorhead, Esquire ([jeffreymlaw@yahoo.com](mailto:jeffreymlaw@yahoo.com)).



# EXHIBIT 1

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

**MOHAMMAD HAMED**, by his  
authorized agent **WALEED HAMED**,

Plaintiff/Counterclaim Defendant,

vs.

**FATHI YUSUF and UNITED CORPORATION**,

Defendants/Counterclaimants,

vs.

**WALEED HAMED, WAHEED HAMED,  
MUFEEED HAMED, HISHAM HAMED, and  
PLESSEN ENTERPRISES, INC.**,

Additional Counterclaim Defendants.

) CIVIL NO. SX-12-CV-370  
)  
) ACTION FOR DAMAGES,  
) INJUNCTIVE RELIEF  
) AND DECLARATORY RELIEF  
)  
) **JURY TRIAL DEMANDED**

SUPERIOR COURT  
 OF THE VIRGIN ISLANDS  
 ST. CROIX, VI  
 14 JAN 13 P 3:07

**FIRST AMENDED  
COUNTERCLAIM**

Pursuant to Fed. R. Civ. P. 13 and Super. Ct. R. 34, for their First Amended Counterclaim (“Counterclaim”) against Plaintiff Mohammad Hamed (“Plaintiff” or “Hamed”) and the Additional Counterclaim Defendants named below, Defendants United Corporation d/b/a Plaza Extra (“United”) and Fathi Yusuf (“Yusuf”) (collectively, the “Defendants”) allege as follows:

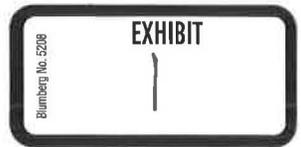
**JURISDICTION**

1. This Court has subject matter jurisdiction pursuant to V.I. Code Ann. tit. 4, § 76(a). Venue is proper pursuant to V.I. Code Ann. tit. 4, §78(a).

**PARTIES**

2. Yusuf, a citizen and resident of St. Croix, U.S. Virgin Islands, owns 36% of the outstanding stock of United and is the registered agent, treasurer and secretary of United.

3. United is a U.S. Virgin Islands corporation, which was organized on January 15, 1979 and is currently in good standing. The owners and officers of United are and always have been Yusuf and his direct family members.



97. During this extended period of time, Hamed never sought to intervene in the criminal case to assert that he is a partner of United or Yusuf, or that he has any interest in the Plaza Extra Stores.

98. On March 19, 2010, the parties' defense attorneys, working pursuant to the joint defense agreement, negotiated a plea agreement. The terms of the plea agreement called for the dismissal of all criminal counts against the individual defendants in exchange for United pleading guilty to one count of tax evasion, and the payment of substantial taxes and penalties.

99. At no time, did Hamed's purported agent, Waleed, or his co-defendant, Waheed, raise the issue of a partnership as alleged in the Complaint.

100. In addition, the plea agreement called for the parties to file accurate U.S. Federal Tax Returns and Gross Receipt Returns with the Virgin Islands Bureau of Internal Revenue and the U.S. Internal Revenue Service. Nothing in the plea agreement required the filing of any partnership returns because no partnership existed as acknowledged by the attorneys of Waleed and Waheed.

101. Neither Waleed nor Waheed ever indicated to the U.S. Justice Department that the business arrangement between Hamed and United or Yusuf was anything other than an employment relationship. As such, until the filing of this action, no record existed of any purported "partnership" between Hamed and Yusuf.

**IV. The Criminal Case Reveals That Hamed And Waleed Converted Monies from the Plaza Extra Stores.**

102. In September of 2010, Yusuf received a partial copy of the FBI file, records, and documents, electronically reproduced and stored on a hard drive. The hard drive contained thousands of documents including bank statements and copies of cancelled checks. The documents were organized under the names of various individuals in the Hamed and Yusuf

families. In other words, whatever the FBI found for any specific person, they would scan and organize the documents under that person's name.

103. Upon review of these documents, Defendants discovered defalcation and conversion of substantial assets including cash from United by Hamed and Waleed.

104. During a search of the documents and files delivered by the U.S. Government, United reviewed documents comprising tax returns for Waleed. An examination of Waleed's tax returns revealed the following significant assets:

- a. Tax Year 1992 (Stocks & Investments) .....\$ 408,572.00
- b. Tax Year 1993 (Stocks & Investments) .....\$7,587,483.00

105. The detailed stock acquisitions, which were listed meticulously by date of acquisition, price and number of shares purchased, could only have been acquired by Waleed through either a) his unlawful access to monies and other properties belonging to United since Waleed never held any other employment since 1986, other than his employment with United, or, b) his misappropriation of monies which were "partnership" funds for which Waleed may be individually liable, or for which Hamed may be liable in the event that Waleed was acting as Hamed's authorized agent when removing such funds.

106. Upon information and belief, Hamed knew of or directed Waleed's misconduct and personally benefited from his agent's defalcation and conversion of millions of dollars from United.

107. For example, Waleed and Hamed misappropriated funds, which Yusuf and Hamed had agreed to send to a charity in West Bank, Palestine. The money was designated for the building of a concrete batch plant (the "Plant") in an impoverished area to provide the poor with employment opportunities.

108. In 1996, Waleed, as a managerial employee of United, was an authorized co-signatory with Yusuf on various bank accounts in St. Martin and custodian of an account in Waleed's name.

109. Yusuf authorized Waleed to send \$1 million to Hamed in the West Bank as a charitable donation on behalf of United. Hamed was required to disperse the money to two local managers that were hired to set up the Plant, which was eventually formed and employed about 38 of the poor in the community.

110. Eventually, Yusuf met in the West Bank with the two managers of the Plant, which was supposed to have been purchased with the \$1 million that was sent to Hamed through his agent, Waleed.

111. Yusuf inquired of the managers regarding the operations of the Plant. Yusuf was advised that they were losing sales because they had no money to buy a pump.

112. Yusuf was informed that they did not receive \$1 million dollars, but had received only \$662,000.00 from Hamed.

113. In fact, bank records revealed that Hamed had actually received \$2 million dollars, instead of the \$1 million dollars authorized by Yusuf.

114. Upon review of the records received from the U.S. Government, it was revealed that Hamed or Waleed had pocketed \$1,338,000 of the \$2 million dollars transferred to Hamed by his son, Waleed, and only \$662,000 was actually distributed to the charitable project.

**V. The Current Controversy Has Resulted in Deadlock and Inability to Operate Plessen.**

115. The current controversy between the Hamed and Yusuf families has negatively impacted the ability of Plessen to function and operate.

116. The stalemate between the Yusuf and Hamed families has resulted in deadlock as to the operations of Plessen.

decisions and actions taken in and for the Plaza Extra Stores, and that United has ownership of all assets held in United accounts or in United's name.

144. United is further entitled to a declaratory judgment that it has the power and authority to account for its net profits, taking into account any yet unpaid expenses, including past due rents. To the extent that Yusuf orally agreed to provide Hamed with a return on his investment in an amount equal to 50% of the net profits of the Plaza Extra Stores, which are owned and operated by United, then such net profits must net out all unpaid rent and all competing claims for recoupment and setoff.

**COUNT II**  
**DECLARATORY RELIEF**

145. Paragraphs 1 through 144 of this Counterclaim are realleged.

146. In the event that the Alleged Partnership is determined to exist, there exists an actual controversy between Hamed and Yusuf as to the terms of the Alleged Partnership, its duration, their respective rights, interests, and obligations concerning the Plaza Extra Stores and the disposition of the assets and liabilities of these stores. This Court should resolve the controversy by entering an appropriate declaratory judgment.

**COUNT III**  
**CONVERSION**

147. Paragraphs 1 through 146 of this Counterclaim are realleged.

148. Hamed and Waleed, acting individually and as agent for Hamed, have unlawfully defalcated and converted to their own benefit and gain substantial funds belonging to Defendants.

149. Defendants never authorized these funds to be appropriated to the personal use of Hamed or Waleed.

150. Hamed and Waleed are therefore liable to Defendants for all funds converted for their personal gain and benefit in an amount to be determined after a full accounting is completed.

#### COUNT IV ACCOUNTING

151. Paragraphs 1 through 150 of this Counterclaim are realleged.

152. In the event that the Alleged Partnership is determined to exist, then Hamed owes a fiduciary duty of loyalty and care to the Alleged Partnership and to Yusuf as his partner. These fiduciary duties obligate Hamed to, among other things, account to Yusuf for all funds generated by the Plaza Extra Stores taken for his or his families' personal use without Yusuf's knowledge or consent.

153. Despite repeated demands therefore, Hamed has failed and refused to account to Yusuf for all assets of the Plaza Extra Stores taken or converted by Hamed or his agents. Accordingly, Yusuf is entitled to a full accounting of all funds taken or converted by Hamed and his agents from the assets and revenues generated by the Plaza Extra Stores.

#### COUNT V RESTITUTION

154. Paragraphs 1 through 153 of this Counterclaim are realleged.

155. Hamed and his agents have obtained in excess of \$7 million of the Plaza Extra Stores' monies under such circumstances that in equity and good conscience they ought not retain and the Hamed Sons participated and aided and abetted in this conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own personal benefit.

156. Defendants are, therefore, entitled to restitution in the form of a constructive trust over any assets purchased with those funds; an equitable lien over such assets; and disgorgement

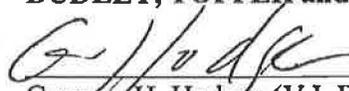
- v. appointing a Receiver to dissolve and wind down the affairs of any joint venture/partnership determined to exist between Hamed and Yusuf and to dissolve and liquidate Plessen;
- vi. a judgment for all rent found due and owing for the premises occupied by Plaza Extra-East and ordering immediate restitution of such premises to United;
- vii. a judgment for all taxes, interest and penalties paid by United that should have been paid by Hamed together with interest from the date of payment as well as all fees and costs associated with any tax returns or amendments that must be prepared and filed regarding such payment;
- viii. a judgment against Hamed in favor of Yusuf for Hamed's portion of all debts, liabilities and obligations of the Alleged Partnership, past and present;
- ix. awarding Defendants their reasonable attorneys' fees and costs in defending against the Complaint and prosecuting this Counterclaim; and
- x. providing such other and further relief as the Court deems just and proper.

Pursuant to Fed. R. Civ. P. 38(b), Defendants demand a trial by jury of all issues triable by right to a jury.

**DUDLEY, TOPPER and FEUERZEIG, LLP**

Dated: January 13<sup>th</sup>, 2014

By:



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