## IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his	) Case No.1:12-cv-99
authorized agent, WALEED HAMED,	)
Plaintiffs,	)
v.	)
FATHI YUSUF and UNITED CORPORATION,	)
Defendants.	) ) )

## DEFENDANTS' MOTION TO STRIKE OR, ALTERNATIVELY, FOR LEAVE TO FILE SUR-REPLY

**COMES NOW** Defendants Fathi Yusuf and United Corporation (collectively, "Defendants"), pursuant to Rule 7.1(a) of the Local Rules of Civil Procedure of the District Court of the Virgin Islands, respectfully move to strike the declaration of Waleed Hamed (Doc. # 18-5), which improperly raises arguments for the first time in a reply brief, and strike all portions of the Plaintiffs' reply brief that reference or rely on the offending declaration or, in the alternative, move for leave to file a sur-reply. In support of this motion, Defendants state the following:

- 1. On September 28, 2012, before removal, Plaintiffs Mohammad Hamed and Waleed Hamed filed their motion for a temporary restraining order (TRO) and/or preliminary injunction (Doc. # 1-4).
- 2. Concurrent with the filing of the TRO motion, the Plaintiffs filed a memorandum of law which included the respective affidavits of Mohammad Hamed and Waleed Hamed.
- 3. On October 10, 2012, the Defendants filed their response in opposition to the Plaintiffs' TRO motion (Doc. # 12).

4. On October 22, 2012, the Plaintiffs filed their reply to the Defendants' opposition to the TRO motion (Doc. # 18). Included in the Plaintiffs' reply was a declaration of Waleed Hamed

(Doc. # 18-5) that was also executed on October 22<sup>nd</sup> (the "W. Hamed Decl.").

5. The entire declaration is premised on and supports arguments that are raised for the

first time in a reply brief.

6. For example, Waleed Hamed attests for the first time to the purchases of specific

"businesses and real property" and other alleged acts involving "the profits from the Plaza Extra

supermarkets," including the alleged "withdrawal" of those profits. W. Hamed Decl. at ¶¶ 2-6.

7. Those specific arguments are not raised in the underlying TRO motion – or even

the complaint on which the TRO motion is based.

8. It is well settled that, "[a]s a general matter, the courts [...] will not consider

arguments raised [...] for the first time in a reply brief. [Courts] follow this rule so that [parties] are

not prejudiced by the lack of an opportunity to respond to issues raised for the first time in [a...]

reply brief." United States v. Boggi, 74 F.3d 470, 478 (3d Cir. 1996) (internal quotations and citations

omitted).

9. Indeed, absent leave, Local Rule 7.1(a) only permits a motion, a response in

opposition, and a reply.

10. In the present action, because the Plaintiffs' reply brief (Doc. # 18) raises arguments

for the first time, the Defendants have been "prejudiced by the lack of an opportunity to respond

to" to those issues. Boggi, 74 F.3d at 478.

11. Specifically, in their reply, the Plaintiffs state that they have "filed an amended

complaint as permitted by Rule 15, but the facts essential to the Rule 65 request remain unchanged."

Reply at p. 2.

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12. However, at footnote 8 of the same reply brief, they then state: "The defendants

also argue that the plaintiff failed to provide a factual basis for his claim that the parties used the

profits from the Plaza Extra supermarkets to buy other assets on a 50/50 basis. To address this point,

the amended complaint lists some of these purchases, which are substantial. Attached hereto is a declaration

from Wally Hamed that confirms the 50/50 investment of these partnership profits. See Exhibit 5."

Id. at p. 8 n.8 (emphasis added).

13. Obviously these portions of the Plaintiffs' reply are in conflict. On one hand the

Plaintiffs aver that the facts essential to a Rule 65 analysis "remain unchanged," but on the other

hand the Plaintiffs reference and rely on a newly drafted and executed declaration that is used to

buttress the allegations in a newly drafted amended complaint (Doc. # 15) filed on October 19, 2012

– after the TRO motion (Doc. # 1-4) and after the Defendants' response (Doc. # 12) thereto.

14. Moreover, as noted above, the entire declaration raises arguments for the first time

that were not raised in the underlying TRO motion.

15. For this reason alone, the Court should strike the entire declaration and all portions

of the Plaintiffs' reply brief that reference or rely on the offending declaration.

16. Alternatively, if the Court is inclined to allow the Plaintiffs to raise arguments for the

first time in their reply, the Defendants respectfully request the opportunity to respond to those new

arguments through a sur-reply of no more than 20 pages, the same page length of the Plaintiffs'

reply, together with any counter-declarations/affidavits that the Defendants might file in support of

the sur-reply.

WHEREFORE, Defendants Fathi Yusuf and United Corporation respectfully request that

this Court enter an order striking the October 22<sup>nd</sup> declaration and all portions of the Plaintiffs' reply

brief that reference or rely on the offending declaration; or, in the alternative, granting them leave to

file a sur-reply brief of no more than 20 pages, together with any counter-declarations/affidavits;

and granting any further relief that the Court deems just and appropriate. A proposed such Order is attached hereto.

Respectfully submitted,

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Dated Nov. 2, 2012

## **CERTIFICATE OF SERVICE**

I hereby certify that, on Nov. 2, 2012, a true and accurate copy of the foregoing document was served via USPS and email to the following:

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