

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

MOHAMMAD HAMED, by his ) authorized agent WALEED HAMED, )  Plaintiff/Counterclaim Defendant, )  vs. ) <b>FATHI YUSUF and UNITED CORPORATION,</b> )  Defendants/Counterclaimants, )  vs. ) <b>WALEED HAMED, WAHEED HAMED,</b> ) <b>MUFEEED HAMED, HISHAM HAMED, and</b> ) <b>PLESSEN ENTERPRISES,</b> )  Additional Counterclaim Defendants.) ) ) )	CIVIL NO. SX-12-CV-370  ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF      <b>JURY TRIAL DEMANDED</b>
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**FATHI YUSUF'S AND UNITED'S BRIEF IN OPPOSITION TO MOTION TO FILE A  
SUR-REPLY RE: DEFENDANTS' RULE 56 MOTION RE: RENT**

In his motion to file a sur-reply in further opposition to Defendants' August 12 motion for summary judgment regarding rent, Mohammed Hamed ("Hamed") identifies three issues discussed in Defendants' opposition that he claims require additional briefing. Hamed's summary of the arguments he would make in a sur-reply demonstrate that no additional briefing is necessary.

First, Hamed claims that he cannot be judicially estopped in this case from making arguments that are "irreconcilably inconsistent" with those that Waleed Hamed made in the criminal case because he, Hamed, was not a party to the criminal case. This assertion is based on an overly narrow view of the doctrine of judicial estoppel that has been uniformly rejected by the courts. "The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party (or by one in privity with that party) in a previous proceeding." 18 James Wm. Moore et al., Moore's Federal Practice § 134.30

(3d ed. 2014) (emphasis added). Because Waleed Hamed admits that he is the “authorized agent” of Hamed and has captioned the case to reflect that agency relationship, he and Hamed are clearly in privity with one another. As such, the fact that Hamed was not named in the criminal proceeding does not give either of them the right to take positions in this case that are flatly inconsistent with positions that Waleed took in the criminal case. See also Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 996 (9th Cir. 2012) (“It is well-established that a ‘non-party may be bound by a judgment if one of the parties to the earlier suit is so closely aligned with the non-party’s interests as to be its virtual representative.’ Because the doctrine of judicial estoppel is intended to protect the courts, we are particularly mindful that the ‘[i]dentity of parties is not a mere matter of form, but of substance.”); Maitland v. University of Minnesota, 43 F.3d 357, 364 (8th Cir. 1994) (“Under [judicial estoppel], the party who is to be estopped, or one in privity with that party, must have asserted a fact or claim . . . that a court relied on.”); Mathison v. Berkebile, 988 F. Supp. 2d 1091, 1103 (D.S.D. Dec. 20, 2013) (“Judicial estoppel applies to one in privity to a party who has asserted a fact or claim relied on or that a court adjudicated.”); Lia v. Saporito, 909 F. Supp. 2d 149, 175 (E.D.N.Y. 2012) (“[Judicial estoppel] applies not only against the actual parties to a prior litigation, but also against a party that is in privity to a party in the prior litigation.”); Capsopoulos on Behalf of Capsopoulos v. Chater, 1996 U.S. Dist. LEXIS 18330, p. \*9 (N.D. Ill. Dec. 4, 1996) (“[T]he Court finds that a rigid rule requiring the estopped party to be the identical party as in the earlier proceeding would unnecessarily diminish the protective function of the doctrine of judicial estoppel. Where judicial estoppel would otherwise apply, a court may apply judicial estoppel

where the party in the later proceeding is not identical to the party in the earlier proceeding so long as the two parties are in privity.”).<sup>1</sup>

Next, Hamed argues that Judge Finch’s July 16, 2009 ruling is irrelevant to the issue of whether the parties had access to the black book because his ruling states that the defendants in the criminal case had access to documents from the time of the indictment in September 2003 to some time in 2004, and were only denied access for the period thereafter. This argument fails for a number of reasons. First, Judge Finch’s order nowhere states that the “unfettered access” allegations in the FBI agent’s affidavit were true for the limited period from September 2003 through all of 2004, even if untrue for the period thereafter. Indeed, Judge Finch specifically found that “[t]he Government never provided the Defendants with a detailed inventory of the specific documents seized,” and that failure itself amounts to a deprivation of access. See Exhibit 2 to Yusuf’s and United’s September 15, 2014 Reply Brief. Moreover, Judge Finch ordered a copy of all documents in the Government’s possession produced to the defendants, at the Government’s expense, and not just those that had been rearranged. The deprivation of access was so severe that the only way to make up for it was to direct the FBI to provide copies of every single page of the hundreds of thousands of documents in its possession. In addition, even assuming arguendo that Yusuf and United had access to documents, including the 1992 tax return of Waleed, from September 2003 through all of 2004, the fact that access was denied for

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<sup>1</sup>The Third Circuit, unlike several other federal circuits, does not require that the court in the first proceeding have actually accepted the factual or legal argument that contravenes an argument made in the later proceeding. Instead, whether the party or somebody in privity with it benefitted from the attempt to play “fast and loose” with the courts is just one factor in determining whether the party acted in bad faith, which is a requirement in the Third Circuit for application of judicial estoppel. See, e.g., Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 324 (3d Cir. 2003). Here, since Judge Finch adopted the bulk of the arguments made in the prior proceeding by Waleed and the other defendants, judicial estoppel would apply regardless of which federal circuit test for judicial estoppel is invoked.

six or more years thereafter would surely be sufficient to meet the extraordinary circumstances prong of the test for equitable tolling.<sup>2</sup>

Next, Hamed argues that because the black book does not specifically identify rent entries between 1986 and 1992, it cannot show that the rent obligation was included in the reconciliation that took place on December 31, 1993. Hamed made this very same argument at page 3 of his August 25 opposition to Defendants' summary judgment motion regarding rent, and Defendants addressed it in their September 15 reply brief at pages 22-23. There is no dispute in this case that rent was paid to United for the period ending on December 31, 1993 (and hence no claim for any rent preceding that date). As stated in Defendants' reply, the relevance of the black book is that it shows the date of reconciliation of partnership accounts (December 31, 1993). Fathi Yusuf stated by declaration that at the time he discussed the accrued rent with Waleed Hamed (acting on behalf of his father), neither of them remembered the date the first rent payment had been paid through (December 31, 1993), and hence when the second rent payment began accruing (January 1, 1994). The black book, which was in the FBI's possession, had that information. Hamed has not identified anything "new" in Defendants' reply that would warrant additional briefing on this point.

Hamed's motion for leave to file a sur-reply should accordingly be denied.

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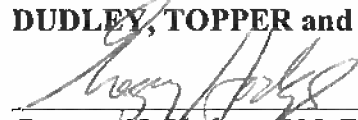
<sup>2</sup>The criminal proceeding and the access issues are relevant to the extraordinary circumstances prong of the equitable tolling test. But that is just one of three prongs in the disjunctive test for tolling. A party seeking to invoke equitable tolling can rely on any one of those three prongs to qualify for equitable tolling. Defendants qualify for two of those prongs. See Defendants' August 12, 2014 brief in support of motion for partial summary judgment regarding rent, at p. 27.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of October, 2014, I caused the foregoing **Fathi Yusuf's And United's Brief In Opposition To Motion To File A Sur-Reply Re: Defendants' Rule 56 Motion Re: Rent** to be served upon the following via e-mail:

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