**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

**MOHAMMAD HAMED**, by his )

authorized agent WALEED HAMED, )

)

*Plaintiff/Counterclaim Defendant*, )

)

vs. ) **CIVIL NO. SX-12-CV-370**

)

**FATHI YUSUF** and )

**UNITED CORPORATION**, ) ACTION FOR DAMAGES, ) INJUNCTIVE RELIEF AND

) DECLARATORY RELIEF

*Defendants/Counterclaimants*, )

)

vs. ) JURY TRIAL DEMANDED

)

**WALEED HAMED, WAHEED** )

**HAMED, MUFEED HAMED,** )

**HISHAM HAMED,** )

and **PLESSEN ENTERPRISES, INC.**, )

)

*Counterclaim Defendants*. )

)

**MEMORANDUM IN SUPPORT OF**

**COUNTERCLAIM DEFENDANT WAHEED HAMED'S**

**MOTION TO DISMISS**

**I. Introduction - The 2013 St. Thomas Action Against Waheed Hamed**

Waheed ("Willie") Hamed moves to dismiss the First Amended Counterclaim, naming him as an additional counterclaim defendant, pursuant to the inherent power of the Superior Court to administer its docket. On March 5, 2013, counterclaimant United Corporation filed an action against Waheed Hamed in the Superior Court in St. Thomas. (Hereinafter the "St. Thomas Action.") Paragraph 1 of the Complaint in that St. Thomas Action asserted the following (*see* **Exhibit A**):

This is a civil action for damages (both compensatory and punitive) recoupment, conversion, accounting, constructive trust, breach of contract, and breach of various fiduciary duties against Defendant Waheed Hamed, an employee of Plaintiff United. **This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager** of the operations of the Plaza Extra Supermarket store in St. Thomas, V.I. as well as other locations. (Emphasis added.)

Thus, the St. Thomas Complaint is based on the same legal theories, relationship, and relief now being raised in this case -- damages and equitable trust for personal use of skimmed money received while a United/Plaza Extra Supermarkets manager.

In the St. Thomas Action, Waheed Hamed moved to dismiss the case on the basis of the Statute of Limitations. In response, that Court (Dunston, J.) entered a June 24, 2013 Memorandum and Order dismissing all portions of that action which included allegations of skimming from Plaza Extra, as those issues were touched on in the criminal case. *See* Memorandum and Order, **Exhibit B**. Judge Dunston then ordered United to file an Amended Complaint.

After the Amended Complaint was filed (see **Exhibit C)**, the parties then conducted discovery under a *stipulated* scheduling order dated August 6, 2013. Both parties then served full discovery and responses. On February 5, 2014, Hamed filed a motion for summary judgment that would result in the disposition of the remaining claims based on inaccurate statements about notice made by United to the Court. *See* **Exhibit D**. On January 11, 2014 Judge Dunston scheduled briefing on this motion as follows:

Defendants having filed a Motion for Summary Judgment on February 5, 2014, it is ORDERED that by March 7, 2014, Plaintiff shall respond to the Motion, and Defendant may file a reply by March 21, 2014. . . .

**II. Facts - The First Amended Counterclaim Filed in this Case**

The First Amended Counterclaim filed in this case makes very limited claims about Waheed Hamed. First, it correctly alleges in ¶ 8 that Waheed Hamed is the son of Mohammad Hamed. Second, the only other places where Waheed is even *mentioned in this action* is as one of the "Hamed Sons" receiving funds skimmed from Plaza Extra Supermarkets, in Counts 5 and 6:

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 of any profits made from the use of the Plaza Extra Stores' funds or assets purchased with the use of such funds. (Emphasis added.)

COUNT VI

UNJUST ENRICHMENT

AND IMPOSITION OF A CONSTRUCTIVE TRUST

157. Paragraphs 1 through 156 of this Counterclaim are realleged.

158. 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 the 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.**

159. Defendants are entitled to the imposition of constructive trusts, equitable liens, and disgorgement of all profits in order to prevent Hamed and the Hamed Sons from being unjustly enriched by money ill-gotten from the Plaza Extra Stores. (Emphasis added.)

Thus, receipt of funds skimmed from Plaza Extra operation while a manager and using them "to purchase and improve properties for [his] own personal benefit" alleged here is the same allegation made against Waheed Hamed in the St. Thomas Action.

**III. Law and Argument**

Hamed should be dismissed from this action pursuant to the inherent powers of this Court to administer its docket for the two following reasons:

1. This action has already been brought and partially adjudicated in St. Thomas -- some claims have already been adjudicated and the balance of the claims are already *sub judice* in a summary judgment motion.

2. Splitting of Causes of Action Prohibited: To the extent that there is any claim here that was not included in the St. Thomas Action, it should have been -- and failure to bring it there obviates taking a second bite of the apple here.

*1. This action has already been brought and partially adjudicated in St. Thomas -- some claims have already been adjudicated and the balance of the claims are already sub judice in a summary judgment motion.*

"[A]s part of its general power to administer its docket" a court "may stay or dismiss a suit that is duplicative of another [] court suit [in the same court]." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). It is, therefore, black letter law that plaintiffs have no right to maintain two actions arising out of similar actions "in the same court, against the same defendant at the same time." *Id.* at 139*.* In this regard, the St. Thomas Action states on the face of the Complaint that it is:

against Defendant Waheed Hamed **for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager** of the operations of the Plaza Extra Supermarket store. . . . (Emphasis added.)

Thus, the instant case should be dismissed and left to final disposition by Judge Dunston.

*2. Splitting of Causes of Action is Prohibited: To the extent that there is any claim here that was not included in the St. Thomas Action, it should have been -- and failure to bring it there obviates taking a second bite of the apple here.*

"Claim-splitting" is prohibited, and is analyzed like *res judicata*. *See, e.g.,**Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions."). Like *res judicata*, the rule against splitting causes of action rests upon the principle that cases should not be tried piecemeal and that litigation should end once the rights of the parties have been heard by one court. However, a determination of improper claim-splitting *does not require final judgment*, unlike *res judicata*. *Katz v. Gerardi,* 655 F.3d 1212 (10th Cir. 2011).

Thus, all related claims that accrued together must be brought together, in the same action, or be lost. *Murphy v. Bancroft Constr. Co.*, 135 F. App'x 515, 519 2005 WL 1059249 (3d Cir. 2005).

The doctrine of claim preclusion is central to a court's objective of conclusive resolution of disputes and seeks to avoid the expense and vexation of multiple lawsuits while conserving judicial resources and fostering reliance on judicial action by minimizing the possibility of inconsistent decisions. *Equal Employment Opportunity Comm'n v. U.S. Steel Corp.,* 921 F.2d 489, 492 (3d Cir.1990) (quotation omitted). **More simply, its purpose is to avoid piecemeal litigation of claims arising from the same events.** *Churchill v. Star Enters.,* 183 F.3d 184, 194 (3d Cir.1999). Thus, where there is “no escaping from the fact that [a plaintiff] has relied on different legal theories to seek redress from the [same defendant] for a single course of wrongful conduct ... [by] splitting a cause of action,” the doctrine of claim preclusion will prohibit the prosecution of the second lawsuit. *Id.* at 195.

*See also Benjamin v. Cleburne Truck & Body Sales, Inc.*, 424 F. Supp. 1294, 1299, fn. 15 (D.V.I. 1976) ("In accordance with the position taken by the American Law Institute in Restatement Second, the consortium claim must, where possible, be joined with the claim for bodily injury. See, Tent. draft No. 14, supra, n.7.")

Counterclaimants knew of all of the claims here at the time the St. Thomas Action was initiated. They had already been sued in this action. There are no new documents received after 2012 -- no new information about acts years before. This is similar to *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366, 371 (Ky. 2010). There plaintiff filed suit in Jefferson Circuit Court to recover for chronic wrist injuries that he claimed arose from his twenty-year employment in labor positions at CSX. Nearly two years later he brought a subsequent suit in Perry Circuit Court against CSX for additional injuries, which he also claimed arose from his years as a laborer for the company. The Kentucky Supreme Court stated that the rule against splitting causes of action “applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

**VI. Conclusion**

The action against Waheed Hamed must be dismissed as claims related to "significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager" should be raised in the St. Thomas Action.

**RESPECTFULLY SUBMITTED,**

**Dated:** February 18, 2014

**A**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of February, 2014, I served a copy of the foregoing Memorandum by email, as agreed by the parties, on:

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