

**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 PLESSER ENTERPRISES, INC.,)

Counterclaim Defendants.)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
 INJUNCTIVE RELIEF AND
 DECLARATORY RELIEF

JURY TRIAL DEMANDED

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FIRST
 AMENDED COUNTERCLAIM AS TO WALEED HAMED**

Waleed (“Wally”) Hamed files this Memorandum of Law in support of his Motion to Dismiss First Amended Counterclaim Pursuant to the inherent power of the Superior Court to administer its docket (the “Motion”) and, in support of the Motion, pursuant to LRCi 7.1, Waleed Hamed states as follows:

I. FACTUAL BACKGROUND

A. The 2013 St. Croix Action

On January 8, 2013, counterclaimant United Corporation filed an action against Waleed Hamed in the Superior Court in St. Croix (the “2013 St. Croix Action”). Paragraph 1 of the

Complaint in that 2013 St. Croix 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 Hamed, an employee and former agent of Plaintiff United. **This complaint includes causes of action against Defendant 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 Sion Farm, St. Croix, as well as other locations. (emphasis added)**

Thus, the 2013 St. Croix Action is based on the same legal theories, relationship, and relief now being raised in this case -- damages and equitable trust for personal use of allegedly skimmed money received while a United/Plaza Extra Supermarkets manager.

In the 2013 St. Croix Action, Waleed Hamed moved to dismiss the case on the basis of the applicable statute of limitations. An opposition and reply (6/4/2013) were filed. On September 27, 2013, the Court entered a stipulated scheduling order. The parties have almost completed discovery under that stipulated scheduling order.

B. The First Amended Counterclaim Filed in this Case

The First Amended Counterclaim filed in this case makes claims about Waleed Hamed for exactly what was described in the 2013 St. Croix Action: “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. . . .”

III. LEGAL DISCUSSION

The First Amended Counterclaim must be dismissed as to Waleed Hamed pursuant to the inherent powers of this Court to administer its docket for the two following reasons:

1. This action has already been brought is already *sub judice* in a motion before another Judge of this Court.
2. Splitting of Causes of Action Prohibited: To the extent that there is any claim here that was not included in the 2013 St. Croix Action, it should have been -- and failure to bring it there obviates taking a second bite of the apple here.

A. This Action Has Already Been Brought and is Already *Sub Judice*.

“[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 2013 St. Croix 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.)

B. *Splitting of Causes of Action is Prohibited: To the extent that there is any claim here that was not included in the 2013 St. Coix Action, it should have been -- and failure to bring it there precludes the counterclaimants from taking a second bite of the apple in this action.*

“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. In Murphy v. Bancroft Constr. Co., the Third Circuit stated as follows:

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.

Murphy v. Bancroft Constr. Co., 135 F. App'x 515, 519 2005 WL 1059249 (3d Cir. 2005); 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.")

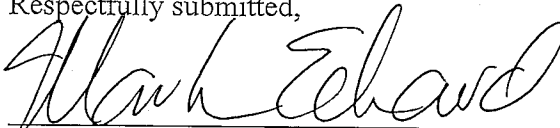
Counterclaimants knew of all of the claims here at the time the 2013 St. Croix Action was initiated. They had already been sued in this action. There are no new documents received after that time -- no new information about acts years before. This is similar to Coomer v. CSX Transportation, Inc., 319 S.W.3d 366, 371 (Ky. 2010). In Coomer, the 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.”

III. CONCLUSION

The First Amended Counterclaim must be dismissed as to Waleed Hamed because claims related to “funds belonging to Plaintiff United, arising out of Waleed Hamed’s tenure as manager” should be raised in the 2013 St. Croix Action.

Respectfully submitted,

By: 

Dated: February 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2014, I served a copy of the foregoing Memorandum by email, as agreed by the parties, on:

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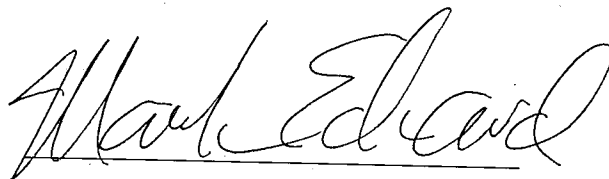
A handwritten signature in cursive script, appearing to read "Mark Edward", is written over a horizontal line.

EXHIBIT A

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX



UNITED CORPORATION,)	CIVIL NO. SX-13-CV- <u>3</u>
)	
)	
Plaintiff)	CIVIL ACTION
)	
Vs.)	ACTION FOR DAMAGES, ACCOUNTING,
)	BREACH OF CONTRACT, & EQUITABLE
WALEED HAMED)	RELIEF
(a/k/a Wally, Wally Hamed))	
)	COMPLAINT
)	
JOHN DOE (1-10))	
)	
Defendants)	JURY TRIAL DEMANDED
_____)	

Plaintiff United Corporation, hereinafter ("United"), and by and through its undersigned counsel complains of Defendant Waheed Hamed, hereinafter ("Hamed") as follows:

I. BACKGROUND

1. 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 Hamed, an employee and former agent of Plaintiff United. This complaint includes causes of action against Defendant 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 Sion Farm, St. Croix, as well as other locations. Further, this civil action names John Doe 1-10 as persons who have worked knowingly, and jointly with Waleed Hamed in the commission of each of the causes of action alleged herein.

II. JURISDICTION, VENUE, & DEMAND FOR JURY TRIAL

2. This Court has personal jurisdiction, subject matter jurisdiction, and the amount in controversy is satisfied, pursuant to 4 VIC §76.
3. Venue is proper in the District of St. Croix because all of the parties are residents of the District of St. Croix, U.S. Virgin Islands, and the cause(s) of action arose in said District, pursuant to 4 VIC § 78.
4. A trial by jury is demanded pursuant to 4 VIC § 80.

III. THE PARTIES

5. Plaintiff United Corporation is a duly organized Virgin Islands Corporation since January of 1979, and is authorized to conduct business in the Virgin Islands. Plaintiff is *sui juris*.
6. Plaintiff is owned completely in various shares by Fathi Yusuf, Fawzia Yusuf, Maher Yusuf, Nejeih Yusuf, Zayed Yusuf, and Yusuf Yusuf, hereinafter collectively referred to as the "Yusuf Family".
7. Defendant Waleed Hamed is a natural person and is a resident of the U.S. Virgin Islands. Defendant Hamed is *sui juris*. At all times relevant to this action, Defendant Hamed has been an employee and agent of Plaintiff United.
8. Defendants John Doe 1 to 10, upon information, are employees, family, friends, and agents of Defendant Hamed who have participated and/or assisted defendant Waleed Hamed with the defalcation, conversion, and concealment of substantial assets that are the sole property of Plaintiff United. John Does 1 to 10 are natural persons and are each *sui juris*.

IV. FACTS

9. Plaintiff United was organized and authorized to conduct business in the U.S. Virgin Islands on January 15th, 1979 by its then shareholders Fathi Yusuf and his family. Plaintiff United has always been owned wholly in various percentage shares by the various members of the Yusuf family.

10. The Corporate officers of Plaintiff United have always been members of the Yusuf family.

11. Sometime in 1986, Plaintiff United, through its shareholder and then President, Fathi Yusuf, entered into an oral agreement, whereby Plaintiff United and Defendant Hamed's father, Mohammed Hamed, agreed to operate a grocery store business.

12. As a result of this oral agreement, Plaintiff United agreed to rent a portion of its real property, United Shopping Plaza, to this supermarket joint venture.

13. United Shopping Plaza is located on the Island of St. Croix, U.S. Virgin Islands.

14. In 1986, the joint venture resulted in the first supermarket store being opened. United began using the trade name "Plaza Extra" and the first supermarket in this joint venture was named Plaza Extra Supermarket. Since 1986, two additional stores opened in the U.S. Virgin Islands; the second in Tutu Park, St. Thomas; the third in Grove Place, St. Croix.

15. In 1986, Plaintiff United hired Waleed Hamed as an employee, and assigned him managerial duties at the Plaza Extra supermarket located in Sion Farm, St. Croix, U.S. Virgin Islands. Defendant Hamed managed and collected significant cash and other assets on behalf of Plaintiff United during the course of his employment.

16. In 2003, Plaintiff United, its shareholders Fathi Yusuf, Maher Yusuf, and Defendant Hamed, and the Defendant's brother Waheed Hamed were indicted in the case of *U.S. v United Corporation*, case no. 15-cr-2005 (D.V.I.).

17. During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered significant financial documents, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2011 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct.

Defendant's Acquisition of Substantial Securities through Defalcation of Plaintiff's Assets

18. During a search of the documents and files delivered by the U.S. Government, Plaintiff United reviewed documents comprising tax returns for Defendant Hamed. An examination of Defendant Hamed'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

19. The detailed stock acquisitions, which were listed meticulously by date of acquisition, price and number of shares purchased, could only have been acquired by Defendant Hamed through his unlawful access to monies and other properties belonging to Plaintiff United. Defendant Hamed never held any other employment since 1986, other than through his employment with Plaintiff United.

20. Defendant Hamed also never had any other significant source of income, business operations, investments, etc., prior to or during his employment tenure with Plaintiff United.

21. The income tax returns for the years 1992 and 1993 reflect substantial assets that upon information and belief derived from the unlawful conversion and unauthorized access to funds and monies belonging to Plaintiff United. Plaintiff United never provided Defendant Hamed remuneration of more than \$35,000 for a yearly salary.

22. In 1993, Defendant Hamed's personal income tax return showed a loss of \$394,382.00. Plaintiff United, through its Treasurer, inquired of Defendant Hamed where he obtained the money in 1992 to sustain a personal loss of \$394,000 in his equity portfolio.

23. Defendant Hamed replied that the significant stocks listed in the schedules attached to his joint tax return was that of "Hamdan Diamond" – an unrelated corporation - that the Certified Public Accountant that had prepared Defendant Hamed's 1993 income tax return had made a "mistake" and that Defendant Hamed "would get to the bottom of it."

24. To date, Defendant Hamed has offered no evidence of the "mistake" he claimed was attributed to the Certified Public Accountant.

25. Further, upon information, such losses were unlikely to be a "mistake" because Defendant Hamed "carried forward" those losses on his personal income tax returns through 1999.

26. An examination of Defendant Hamed's personal tax returns revealed that Defendant Hamed's stock purchases between 1991 and 1996 totaled more than \$7 Million.

27. In October of 2011, a review of the U.S. Government records and files further revealed the following defalcation of funds:

- a. Loans totaling \$430,500.00, approved by Defendant Hamed, presumably repaid to Defendant Hamed.
- b. Payments made with respect to the construction of Defendant Hamed's home amounting to \$481,000.00.

c. Six checks totaling \$135,000, drawn on the operating account of Plaintiff United's Plaza Extra supermarket, and made payable to "Waleed Hamed" personally.

28. To this date, Defendant Hamed refuses to explain and account for any of the aforementioned funds.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION BREACH OF FIDUCIARY DUTIES

29. Plaintiff incorporates paragraphs 1 through 28 inclusive as if fully set forth verbatim herein.

30. As an agent and employee of Plaintiff United, a corporate entity, Defendant Hamed owes fiduciary duties to the entity. Included in the fiduciary duty is the duty of loyalty. Not only is it Defendant Waleed Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, he is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

31. Defendant Waleed Hamed has breached the following duties (the list of duties violated by Defendant Hamed, below is not intended to be an exhaustive or exclusive list):

- a. Duty of Loyalty
- b. Duty of good faith and candor;
- c. Duty to manage the day-to-day operations of Plaintiff United's Plaza Extra supermarket for the benefit of United;
- d. Duty of full disclosure of all matters affecting his employer Plaintiff United;

- e. Duty to refrain from self-dealing, and/or general prohibition against the fiduciary using his relationship to benefit his personal interest; and
- f. Duty to manage any funds, assets, and/or property belonging to Plaintiff United by virtue of its operation of the Plaza Extra Supermarket stores in accordance with applicable laws.

**SECOND CAUSE OF ACTION
CONSTRUCTIVE TRUST/RECOUPMENT**

32. Plaintiff incorporates paragraphs 1 through 31 as if fully set forth verbatim herein.
33. As an agent and employee of Plaintiff United, Defendant Hamed owes numerous fiduciary duties to Plaintiff United and its shareholders. Not only is it Defendant Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, but Defendant Hamed also is not permitted to place himself in a position where it would be for his own benefit to violate the duty.
34. Defendant Hamed has engaged in systemic misappropriation of substantial and valuable assets of Plaintiff United causing substantial injury to Plaintiff United. As a result, Plaintiff United has sustained significant financial injury.
35. As such, a constructive trust should be imposed to gather and account for all assets misappropriated by Defendant Hamed that belongs to Plaintiff United.

**THIRD CAUSE OF ACTION
CONVERSION**

36. Plaintiff re-incorporates paragraphs 1 through 35 inclusive as if fully set forth verbatim herein.

37. Defendant Waleed Hamed has knowingly converted substantial funds and assets belonging to Plaintiff United. Plaintiff never consented or agreed to Defendant Hamed's unauthorized use of its funds and assets. As such, Defendant Hamed is liable for conversion.

**FOURTH CAUSE OF ACTION
BREACH OF CONTRACT**

38. Plaintiff incorporates paragraphs 1 through 37 inclusive as if fully set forth verbatim herein.

39. Defendant was an at-will employee of Plaintiff United.

40. As an at-will employee of Plaintiff United, Defendant Hamed had a contractual duty to act in good faith, and to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United.

41. Defendant Hamed has breached his contractual duties to Plaintiff United, causing Plaintiff substantial economic and financial harm. As a result, Defendant Hamed is liable to Plaintiff for breach of contract.

**SIXTH CAUSE OF ACTION
ACCOUNTING**

42. Plaintiff incorporates paragraphs 1 through 41 inclusive as if fully set forth verbatim herein.

43. As agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as a manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders. Defendant Hamed was not permitted to place himself in a position where it would be for his own benefit to violate the duty.

44. Defendant Hamed has breached his employment contractual agreement with Plaintiff United by mismanaging, misappropriating, and converting funds, monies, and other valuables to his personal use. As a result, Plaintiff United has sustained substantial financial damages.

45. As such, Plaintiff United is entitled a full accounting of all monies, funds, and assets unlawfully appropriated by Defendant Hamed.

VI. RELIEF REQUESTED

Wherefore, Plaintiff United Corporation, and its shareholders, respectfully pray for the following relief:

- a. Actual and compensatory damages to be determined at trial.
- b. Punitive damages for the intentional defalcation of funds and damages caused to Plaintiff United Corporation.
- c. A complete accounting and constructive trust of all funds, assets, opportunities, and other valuables converted and or misappropriated by Defendant Hamed.
- d. Costs of all professional fees that may be required for the audit and investigation of this matter.
- e. A return of all documents, including but not limited to electronically stored information, belonging to Plaintiff United in the possession (both actual and constructive) of Defendant Hamed.
- f. A Restraining Order precluding Defendant Hamed from:
 - i. Physically returning, or attempting to return, to any of the Plaza Extra supermarket stores;

- ii. Accessing, or attempting to access, any bank accounts belonging to United Corporation for any purpose;
- iii. Contacting, or attempting to contact, any employee of Plaintiff United concerning the operations and management of the Plaza Extra Supermarkets;
- iv. Preclude Defendant Hamed from contacting any business associates of Plaintiff United;
- v. Preclude Defendant Hamed from representing to third-parties that he is an employee of Plaza Extra;
- vi. Accessing, or attempting to access, any of Plaintiff United's, including but not limited to the Plaza Extra Supermarkets, books, records, and information regarding as to location or manner of storage;
- vii. Attorneys fees, court costs, and any other relief the court deems equitable.


Date: January 8, 2013

1/8/13
\$75.00
J

Respectfully Submitted,

DeWood Law Firm
Counsel for Plaintiff United

By:


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