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

WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff/Counterclaim Defendant, v. **FATHI YUSUF** and **UNITED CORPORATION**, Defendants/Counterclaimants, v. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED**, and **PLESSEN ENTERPRISES, INC.**, Additional Counterclaim Defendants.	**CIVIL NO. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION**, Defendant.	**Consolidated With** **CIVIL NO. SX-14-CV-287** **ACTION FOR DAMAGES AND DECLARATORY JUDGMENT**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **FATHI YUSUF**, Defendant.	**CIVIL NO. SX-14-CV-278** **ACTION FOR DEBT AND CONVERSION**

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DEFENDANTS' SUR REPLY IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL FOR THE HAMEDS

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation (collectively, "Defendants"), through their undersigned counsel, respectfully submit this sur-reply in further

support of their Motion to Disqualify Counsel for the Hameds and for Discovery Related to Additional Potential Basis for Disqualification, as authorized by this Court's Order of February 16, 2018.

I. INTRODUCTION

It is clear from the declaration of Robin Selia, Esq. ("Attorney Selia") that she personally and substantially participated in the above-captioned case as a law clerk. It strains credulity that Attorney Seila's presence at a meeting between Judge Douglas Brady ("Judge Brady") and Master Edgar Ross ("Master Ross") where Judge Brady discussed the case with Master Ross, did not provide Attorney Seila with insight into Judge Brady's factual and legal impressions of the case. In fact, one would have trouble identifying a circumstance in which a clerk was more likely to be exposed to a judge's factual and legal impressions of case than that judge's conversations with the master who is also working on the case.

Therefore, as explained previously, Attorney Holt's continued representation of the Hameds in this matter in light of Attorney Seila's employment by Attorney Holt gives rise to issues critical to the profession, the judicial system, and this case. The principles underlying disqualification of counsel include: 1) avoiding the appearance of impropriety; 2) safeguarding the integrity of court proceedings; and 3) eliminating the threat that litigation is tainted. From her declaration, it is clear that Attorney Selia personally and substantially participated in the above captioned case during her clerkship. It is also clear that because of the level and types of involvement she had with the case, Attorney Seila gained information about Judge Brady's factual and legal impressions of this case during her clerkship. This information is indisputably valuable to the Hameds—and the Yusufs—and now Attorney Selia is employed by the Hameds' counsel as a junior associate in a two-attorney office. This situation creates a significant appearance of

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impropriety, an imperiling of the integrity of the proceedings in this Court and, most importantly, a substantial threat that the case will be tainted. Under the facts at issue, Attorney Holt's firm is properly disqualified from representing the Hameds in this matter, due to the lack of efficacy of an ethics screen in a two-person law firm, the appearance of impropriety created by the continued representation, and the risk of tainting the litigation through inadvertent disclosure(s).

II. MEMORANDUM OF LAW

A. Attorney Selia Personally and Substantially Participated in the Above-Captioned Case While She Was Employed as a Law Clerk.

Law clerks are not merely the judge's errand runners. *In re Asbestos School Litigation*, Civ. Case No. 83-0268, 1989 WL 19395, at * 2 (E.D. Pa. March 1, 1989) (recusing itself from the case due to law clerk's continued participation in the matter after accepting employment with the lawyers for a party). "They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision." *Id.* "Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit or his most intimate family members may be." *Id.* A law clerk, by virtue of her position, is obviously privy to the judge's thoughts in a way that the parties cannot be. *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251, 256 (5th Cir. 1978).

Unlike other players in the judicial arena who are adjuncts of the Court, such as magistrates and bankruptcy judges, and who exercise authority in their own right, a law clerk is essentially an extension of her judge. *Bishop v. Albertson's Inc.* 806 F. Supp. 897, 899 (E.D. Wash. 1992). When the adversarial process breaks down, it is the law clerk who assists the Court in defining issues and locating authorities, which have eluded counsel. *Id.* at 900. "If the law clerk is fortunate and the judge wise, the clerk will also be utilized as a sounding board and devil's advocate in the decision-making process." *Id.* Issues are developed, alternative analyses are framed, and

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dispositions proposed. *Id.* "A law clerk knows for the most part what her judge knows: how motions will be decided, what findings will be entered, and how much in damages will be awarded and they know these things well before the litigants do[.]" *Id.*

Personal and substantial involvement with a case is where the lawyer's involvement was of significance to the matter, or sufficient to create a reasonable appearance of such significance. *Babineaux v. Foster*, Civ. Case No. 04-1679, 2005 WL 711604, at *5 (E.D. La. March 21, 2005) (discussing what constitutes personal and substantial participation in a matter for purposes of determining whether a former government lawyer would be disqualified from current representation); *see also U.S. v. Martin*, 39 F. Supp.2d 1333, 1334 (D. Utah 1999) (same quoting 5 C.F.R. § 2637.201(d)); *Kelly v. Brown*, 9 Vet.App. 37, 39 (Ct. Vet. App. 1996) (same quoting 5 C.F.R. § 2637.201(d)). Personal and substantial involvement can be created through "decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." *Babineaux*, 2005 WL 711604, at *5 (addressing rules for former government lawyers now in private practice); *Martin*, 39 F. Supp.2d at 1334 (same); *Kelly*, 9 Vet.App. at 39 (same). Although this regulation—5 C.F.R. § 2637.201(d)—addresses government lawyers who, during their tenure, would have been working on investigations or representing the government in litigation, which may be different activities than a law clerk typically performs, it is helpful in analyzing what constitutes personal and substantial participation in a case by a law clerk.

In the instant case, Attorney Selia was one of only two law clerks working on this complicated, consolidated matter. It is clear from Attorney Seila's declaration that during her tenure that she personally and substantially participated in the case or, at the very least, her involvement created a reasonable appearance of such significance. Per her declaration, Attorney Selia: 1) summarized the large number of outstanding motions for Judge Brady, which means she

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read and analyzed each one and provided her interpretation of the issues (Seila Declaration, ¶¶ 5-6); 2) attended the most substantive evidentiary hearing in the matter to date (*id.* ¶ 10); 3) did research on outstanding legal issues (*id.* ¶ 11); and 4) attended a meeting between Judge Brady and Master Ross the purpose of which was for Judge Brady to discuss the matter with Master Ross (*id.* ¶ 8). It would have been nothing short of incredible for Judge Brady not to have revealed, at the very least, some of his thoughts on the matter in the meeting with Judge Ross. Moreover, reviewing her declaration as a whole, it is clear that Attorney Seila's level of involvement in this case was both personal and substantial, not merely ministerial. *See e.g. Keyhani v. Chance*, 1988 WL 109100, at * 2 (E.D. Pa. Oct. 18, 1988) (holding that a law clerk who took notes at a scheduling conference had only "ministerial" involvement in the case).

Further, to the extent that the Court does not believe that Attorney Seila's had personal and substantial involvement in the instant case after reviewing her declaration, Defendants respectfully request that the Court allow them to engage in discovery in order to obtain more detail about Attorney Seila's involvement. For example: 1) how detailed were the summaries of the individual motions she prepared; 2) what responsibilities did law clerk Sean Bailey have on the case; 3) how long was the meeting with Master Ross; 4) what was the purpose of the meeting and what topics were discussed; 5) did Judge Brady ever discuss the case with Attorney Seila and/or Attorney Bailey, *etc.*

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B. Joel H. Holt, Esq. Must Be Disqualified from Representing the Hameds Given that Attorney Holt's Associate, Attorney P. Seila, Could Not Represent Those Parties, Effective Screening Cannot Be Implemented in a Two Person Firm, and the Required Written Notice Was Not Provided.

1. Screening Cannot be Effective in a Two Person Firm, the Appearance of Impropriety is Too Great, and There is an Actual Threat that the Litigation Will be Tainted by Inadvertent Disclosure.

It is undisputable that Attorney Seila personally and substantially participated in the above captioned case during her clerkship and gained information that is highly valuable to the parties in this case. It is also undisputable that Attorney Seila may not represent the Hameds in this matter and her conflict is imputed to Attorney Holt unless he can rebut the imputation of the conflict with a successful and timely ethical screen, and he provided the parties and the Court with timely written notice. Because Attorney Holt and Attorney Seila work together in a two-lawyer firm, where Attorney Seila is a junior associate, no ethical screen can be effective and even if it could, the appearance of impropriety is too great to allow the representation to continue. *See Mitchell v. Metropolitan Life Ins. Co.*, Case No. 01 CIV. 2112, 2002 WL 441194, at *10 (S.D.N.Y. March 21, 2002) (disqualifying law firm, explaining "In this case, the screening measures put in place by [the law firm of] Lieff Cabraser do not suffice to avoid disqualification. . . . Although Fleishman personally is not involved in prosecuting this action, she works in the 12–lawyer New York office of a relatively small firm. Two of the attorneys in the New York office are assigned to this case, and Fleishman is working directly with one of them on another significant class action suit. Given that Fleishman works in close proximity to attorneys responsible for this action, and regularly interacts with at least one of them, there exists a continuing danger that Fleishman may inadvertently transmit information[.]").

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Moreover, in *Yaretsky v. Blum*, 525 F.Supp. 24 (S.D.N.Y. 1981), the screening methods employed by the law firm included isolating the attorney with the direct conflict from conversations and communications involving the matter and locking up all files generated by the case. *Id.* at 30. However, the *Yaretsky* court found that despite the lawyer's "unimpeached good character" and the "screening efforts undertaken" by the firm, the firm must be disqualified. *Id.* The court explained its rationale:

> In the instant case, the law firm involved has less than thirty lawyers in its New York office. Moreover, Mr. Gassel is employed in the firm's health law section, which is also the section of the firm charged with handling this case. In other words, the relatively small group of professional colleagues with whom Mr. Gassel interacts on a daily basis are also the group of people who must screen their activities from Mr. Gassel, and who must, in turn, be screened from Mr. Gassel's disclosure, however inadvertent, of confidential information[.] This court is very skeptical about the efficacy of any screening procedures given this situation.

Id. The *Yaretsky* court also persuasively addressed the issue of the appearance of impropriety as it relates to the public's confidence in the legal profession.

> As this court reads the applicable law of the Second Circuit, the appearance of impropriety . . . standing alone, [would not] be sufficient to require disqualification. Clearly, this position is motivated by solicitude for a party's right to choose his own counsel, and an appreciation of the dislocation caused by disqualifying counsel once an action has begun. **However, these considerations must be balanced with "the need to maintain the highest standards of the profession." These standards take on practical importance in preserving the public's confidence in the legal profession.** This court would be hard pressed to explain to a lay person how it was in fact proper for a lawyer who was substantially involved with the prosecution of a lawsuit to switch sides in the middle of the action. The appearance of impropriety is incontrovertible on the instant facts, and serves as an important additional reason for disqualification of [the law firm of] EBB&G.

Id. (emphasis supplied) (internal citations omitted).

Indeed, like the *Yaretsky* court, this Court would be "hard pressed" to explain to a lay person how it was in fact proper for Attorney Holt to continue to represent the Hameds after hiring a law clerk who obtained valuable information concerning the case during her clerkship, given the

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unmistakable appearance of a significant disadvantage to Defendants—and a significant advantage to the Hameds—created thereby. As in *Yaretsky*, the appearance of impropriety is incontrovertible on the instant facts and serves as an important additional reason for disqualification of Attorney Holt's firm. *See also Van Jackson v. Check 'N Go of IL, Inc.*, 114 F. Supp. 2d 731, 734 (N.D. Il 2000) (disqualifying small law firm, stating, "The small size of the firm also weighs heavily against an effective screen. . . . In such a small firm [four attorneys], it is questionable whether a screen can ever work. . . . . In addition to the danger of tainting the underlying trial, [the law firm of] K&D's continuing representation of the defendants creates the type of unacceptable appearance of professional impropriety condemned in . . . the Code of Professional Responsibility. **[W]here public confidence in the Bar would be undermined even an appearance of impropriety requires prompt remedial action by the court.**") (emphasis supplied) (internal cite and quotation marks omitted).

Accordingly, as Attorney Seila was personally and substantially involved with the above-captioned case as a law clerk, Attorney Holt's firm is properly disqualified from representing the Hameds in this matter, due to the lack of efficacy of an ethics screen in a two-person law firm, the failure to provide timely notice, the appearance of impropriety created by the continued representation, and the risk of tainting the litigation through inadvertent disclosure(s).

WHEREFORE, on the basis of the foregoing, Defendants respectfully request that the Court disqualify Attorney Holt from representing the Hameds in this matter as well as awarding Defendants such further relief as the Court deems just and proper.

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Respectfully submitted,

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DATED: March 5, 2018 By: _____

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CERTIFICATE OF SERVICE

It is hereby certified that on this 5th day of March, 2018, I served a true and correct copy of the foregoing **Defendants' Sur-Reply in Support of Motion To Disqualify Counsel For The Hameds**, which complies with the page and word limitations set forth in Rule 6-1(e), via e-mail addressed to:

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