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

**DIVISION OF ST. CROIX**

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| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, | **Case No.: SX-2012-CV-370** |
| *Plaintiff/Counterclaim Defendant*, |  |
|  vs.**FATHI YUSUF** and **UNITED CORPORATION** | **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** |
|  |  |
| *Defendants and Counterclaimants*. vs. **WALEED HAMED, WAHEED** **HAMED, MUFEED HAMED, HISHAM HAMED,** **and PLESSEN ENTERPRISES, INC.**,  *Counterclaim Defendants*, | JURY TRIAL DEMANDED |
|  | Consolidated with |
| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,* vs.  | **Case No.: SX-2014-CV-287** |
| **UNITED CORPORATION,** *Defendant.* |  |
| *­­­­­­*­­**WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff*  vs.  **FATHI YUSUF**, *Defendant.* | Consolidated with**Case No.: SX-2014-CV-278** |
| *­­­­­­*­­**FATHI YUSUF**, *Plaintiff*, vs. **MOHAMMAD A. HAMED TRUST***, et al,* *Defendants.* | Consolidated with**Case No.: ST-17-CV-384** |
|  |  |

**MOTION FOR A DETERMINATION OF 'NO-PRIVILEGE' OR TO COMPEL WAIVER OR PRESUMPTION AS TO HAMED'S SECOND MOTION REGARDING CLAIM H-3:**

**YUSUF'S PAYMENTS TO THE FUERST LAW FIRM FROM PARTNERSHIP FUNDS**

**I. Introduction**

 Hamed has raised as one of his RUPA section 72(a) claims, designated as H-3, fees paid to Yusuf's law firm from Partnership funds for non-Partnership work during the period from September 19, 2012, to April 30, 2013. Pursuant to the Special Master's Order of May 8, 2018, Hamed is required to determine and distinguish between three factual issues—and discovery as to them must be completed before June 1, 2018.

 1. Identify fees paid for from the Partnership account for civil litigation *work done solely in this action*, *Hamed v. Yusuf* (370) (denoted as such in the Fuerst Firm's[[1]](#footnote-1) invoices) from 9/18/2012 to 4/30/2013. In other words, Yusuf's use of his partner's money to pay his own defense lawyers to defend Yusuf for the attempted theft of 1/2 of the Partnership from Hamed.

 2. Identify fees paid for from the Partnership account for work denoted in the Fuerst Firm's invoices as being for the criminal action after the end of the JDA.

 3. Identify fees paid for from the Partnership account for work done on what the Fuerst Firm denotes as "tax matters" which Yusuf has repeatedly stated (and testified in Court) were not for the benefit of Hamed.

 Hamed has determined that there is a way to do exactly what the Special Master directed. As described in detail below, in each billing period relevant to this motion, the Fuerst Firm's invoices are broken out by individual ‘*matters*.’ In the invoices set out below, Fuerst's 'Matter 2012-3' is titled "*Hamed v. United Litigation*.”[[2]](#footnote-2) For example, the invoices for 'Matter 2012-3' will be shown to relate *solely* to work done for Yusuf's defense in this SX-2012-CV-370 civil litigation. Unfortunately, Hamed does not have, and cannot obtain the deposition testimony and documents *duces tecum* from prior counsel necessary to proving these points -- because of assertions of attorney-client privilege regarding these depositions by the deponents, and the non-responsiveness of Yusuf/United.

**II. Procedural Posture**

 The parties have previously briefed H-3 and those briefs prompted the Special Master's Order of May 8, 2018. That Order correctly noted that Hamed's claims motion had: (1) mixed-up the Fuerst Firm's invoices for several sub-matters, and (2) also confused alleged *Joint Defense Agreement* ("JDA") criminal fees and post-JDA criminal fees with Yusuf's civil defense fees in this case. The Special Master directed that these various types of Fuerst Firm fees be investigated to determine the requisite detail in discovery, and then distinguish between the matters in his re-filing. Thus, the original H-3 motion was properly dismissed without prejudice.

 Thereafter, Hamed filed discovery requests and deposition notices. He also filed a related discovery motion seeking guidance as to the depositions of Attorneys Christopher David and Joseph DiRuzzo[[3]](#footnote-3) of the Fuerst Firm, as to which the Master demurred for now.

 The May 8th Order required that all discovery be "completed" by June 1, 2018. As set forth below, Hamed has diligently attempted to do so, and immediately propounded all written discovery.[[4]](#footnote-4) But, he is unable to proceed with depositions because of his inability to obtain a waiver of Yusuf/United's attorney-client privilege as to the Fuerst Firm's invoices, testimony and the underlying documents for the relevant period. Thus, with regard to the depositions of Dudley Topper, Feuerzeig (“DTF”), the Fuerst Firm, Joseph DiRuzzo and Christopher David, Hamed seeks a determination that (1) no privilege exists as to the subject testimony and documents, (2) Yusuf/United must be directed to waive that privilege, or (3) they must be warned that refusal to provide the information sought will result in a presumption against them as to this claim.

**III. Facts**

 ***A. Hamed's efforts to obtain the testimony***

 In earlier discovery, Hamed was provided with some of the Fuerst Firm's invoices—redacted invoices for about half of the work done that is at issue here. Invoices for the other half of the period and all supporting documents have not been supplied. Nor is it clear that this is a complete set with regard to the dates provided. Thus, the claim allocation specificity required by the Special Master's Order, is impossible to obtain without: (1) the remaining invoices, and (2) the underlying documents and testimony backing up those invoices.

 To arrange the necessary *duces tecum* deposition on the out-of-state deponents, Hamed's counsel first emailed and called Attorney Christopher David, a partner in the Fuerst Firm and an attorney that appeared in this case. **Exhibit 2**. He responded that he cannot provide necessary materials absent a waiver of attorney-client privilege by Yusuf/United. **Exhibit 3**. As those exhibits demonstrate, counsel for Yusuf/United were copied contemporaneously on all of this correspondence so they could see the issues and respond to the Fuerst Firm's perception of the need for waiver.[[5]](#footnote-5) Similarly, Attorney DiRuzzo responded in an email joining in the Fuerst position, copied to DTF. **Exhibit 4**.

 Subsequent requests were also sent directly to counsel for Yusuf/United—for a waiver as to Fuerst's testimony and to obtain invoices and other documents. **Exhibit 5**. Attempts to follow up on May 22nd, and May 23rd, with just one week remaining, have been completely ignored. **Exhibit 6**.

Thus, as Hamed wishes to file a more detailed version of the motion attached hereto, in part, as **Exhibit 7**; at the moment that draft motion requires the rest of the Fuerst invoices. In addition, for Hamed to add his challenges and arguments, he requires the documents that underlie those charges—and the testimony of the counsel involved, the only persons with direct knowledge. This is a half-million dollar claim—and it will be significantly larger once interest is added. Hamed will not abandon it, *and he cannot get this information in any other manner*.

 Hamed has hired Florida counsel to prosecute subpoenas in Florida, despite the fact that Attorney DiRuzzo is a member of the VI Bar. **Exhibit 8**. Although those could be served now, it is a useless gesture where the primary deponents have all indicated that privilege will be asserted—wasting those funds and requiring an entire, second, effort. *Id*.

 ***B. Fee for work solely in this action (as denoted in the Fuerst Firm's invoices)***

 This litigation began on August 20, 2012, when Fathi and Mike Yusuf unilaterally stated that Hamed was not a partner in the three Plaza Extra Supermarkets and took $2,784,706.25 from a Partnership account, transferring it to the *United Tenant Account,* an account where the Hameds had neither oversight nor access. This was the main issue in Hamed's September 17, 2012 complaint here—and a central issue during the early portion of this case.

 With the Fuerst Firm as counsel, Yusuf removed the action to VI District Court, but it was quickly remanded. Soon thereafter, because Yusuf then called the police to the store, alleged criminal trespass and demanded the police remove the Hameds from the stores or he would "shut them down"—Judge Brady granted a full, evidentiary TRO hearing which stretched to two days, on January 25th and 31st, 2013.

 What is critical here is that during this period, while the Fuerst Firm assisted Yusuf in seizing control of the Plaza Extra accounts and excluding Hamed from the ability to see what was being spent[[6]](#footnote-6), **they also collaborated on a way to use Partnership funds to pay, *inter alia*, the Florida-based Fuerst firm hundreds of thousands of dollars in Partnership funds** for (1) Yusuf's *Motion to Dismiss* Hamed's complaint, (2) his attempt to remove this case to Federal Court (which that court denied and remanded[[7]](#footnote-7)) and (3) the extensive TRO proceedings against Hamed. This taking of what were clearly Partnership funds to pay these lawyers to defend this case is pure theft, about which Hamed objected on ethical grounds. **Exhibit 9**. This conflict was particularly evident in tax filings which Yusuf did solely for his own benefit. **Exhibit 10**.

 On April 25, 2013, this Court ruled for Hamed on the matter. Judge Brady stated the following at paragraph 38 of that Order: "Funds from supermarket accounts have also been utilized unilaterally by Yusuf, without agreement of Harmed, to pay legal fees of defendants. . . ." *Id*. at 11, para. 38.[[8]](#footnote-8)

 Thus, while a total of $504,591.03 was paid to the Fuerst Firm from the Partnership accounts during the period from September 19, 2012 to April 30, 2013, it has been *understandably* unclear to Hamed what amounts of this were paid for which work. However, those amounts can be determined by a review of the Fuerst Firm's recently received invoices which explicitly denote each "matter." **Exhibit 11** is a November 6, 2012, "summary" coversheet for the 3 different "matter" invoices. In it, the Fuerst Firm differentiates charges for (1) this case (referred to **Matter 2012-3** Hamed v. Yusuf Civil Case), (2) **Matter** **2012-1**-Tax Litigation, and **Matter** **2012-2** United Corp STX [Criminal].

 The attached invoice for work from 9/19/2012 to 11/6/2012 pertaining to just this case is captioned: ***Matter Reference: YUSUF, FATHI, 2012-3 Hamed v. United Litigation***. Attached as **Exhibit 12**. That invoice reflects that for just the period from September 19, 2012[[9]](#footnote-9) to November 6th of 2012, the amount spent solely on defending *this civil action* was $108,388.97. As an example, work set forth in the invoice for which the Partnership paid (*i.e*. for which Hamed paid one-half) included:



This was a charge for post-reman work done for Fathi Yusuf *against Hamed* by an attorney not admitted in the VI, identified as "FM" (Frank Massabki), where Attorneys DeWood and DiRuzzo apparently worked with that unadmitted attorney on the motion to dismiss and TRO in this VI case. Put another way, Yusuf now refuses to repay the Partnership fees where he made Hamed pay half of $5,775 used to attack Hamed by employing an unadmitted attorney and made Hamed pay an *additional amount* for VI counsel's *assisting* Attorney Massabki in this effort—which additional amount was charged separately.[[10]](#footnote-10)

 Another example of this is the following January 8, 2013 entry:



This is another Partnership payment for another attorney not admitted in the VI, "MSF" (the name partner, Mitchell S. Fuerst[[11]](#footnote-11)) as to post-remand discovery motions in VI Superior Court.[[12]](#footnote-12)

 Thus, $108,388.97 plus interest from the date of the check, at the statutory interest rate of 9%, is due from Yusuf to the partnership *for just this one invoice*. The other attached "2012-3" invoices reflect similar charges for later periods, solely in the *Hamed v. Yusuf* matter. Exhibits 16 and 17 are missing because Hamed cannot yet supply them.

 **Exhibit 13** is the invoice dated January 4, 2013, in the amount of $21,903.16

 **Exhibit 14** is the invoice dated January 16, 2013, in the amount of $57,991.80.[[13]](#footnote-13)

 **Exhibit 15** is the invoice dated March 4, 2013, in the amount of $68,211.88.

 **MISSING** **Exhibit 16** is the invoice dated April \_\_\_, 2013, in the amount of $\_\_\_\_.

 **MISSING Exhibit 17** is not attached here, it is the invoice dated May \_\_\_, 2013, in the amount of $\_\_\_\_. Thus, the total unreimbursed amount due for fees in this section is $\_\_\_\_\_\_\_\_\_. In other words, this amount cannot be calculated or placed before the Court without the depositions at issue—due to the missing invoices and supporting testimony/documents.

***C. Work for "tax matters" Yusuf testified and stated did not apply to Hamed***

 Not only did Yusuf repeatedly state in letters to tax authorities. See **Exhibit 18**, the

June 29, 2014 letter from Fathi Yusuf’s attorney, Joseph DiRuzzo, to VI BIR:

This is a material breach of the agreement that was reached in the mediation conducted before Judge Barnard. The Parties to the mediation explicitly agreed that the $6.5M tendered **was to satisfy *only* the Yusuf family members' tax liabilities for the years 2002 - 2010 and *not for any tax liability of Mohammad Hamed* (and by extension any of the Hamed family members).** We made clear that this term was non-negotiable.

*Id*. at p. HAMD594356 (emphasis added.) Attorney DiRuzzo went on to state:

In order to cure the breach we demand (i) that the VIBIR retract the June 20th letters issued to Mohammad Hamed (and confirm in writing its withdrawal to us) and (ii) that the VIBIR issue us a letter confirming that the $6.5M paid was used to satisfy **only the tax liabilities of the Yusuf family members (as shareholders of United Corporation**, as an Subchapter S-Corp under the Internal Revenue Code) and not to satisfy any tax liability of Mohammad Hamed or any other taxpayer (including but not limited to other Hamed family members).

 If the VIBIR does not cure this breach immediately we will seek to recoup the $6.5M that was tendered as it was obtained either (i) by mutual mistake, (ii) in bad faith, or (iii) by fraud. *Id*. (Emphasis added.\_

The position that Yusuf was doing tax work only for himself was highlighted in the testimony of DOJ's counsel before Judge Lewis:

[p. 123] The fact that the United won't pay for the Hameds, that is a separate issue. In February of 2011, yes, they paid for everyone's. *Now, in June, July of 2013, United does not agree to pay*, but the Hameds, as taxpayers, are legally obligated to report income and pay taxes. . . .

Nor does Hamed know what other communications too place while the Partnership was paying.  **MISSING** **Group Exhibit 19**. The "tax" invoices for Fuerst Firm matter 2012-1 are not attached as **MISSING** **Group Exhibit 20**. Thus, the amount due is $\_\_\_\_\_\_\_ plus 9% statutory interest from the date they were each paid. Also unknowable now.

 **D*. Work for "criminal" issues after the end of the JDA***

 There is no dispute that the JDA and any obligation for the Partnership to pay Yusuf's criminal fees ended on September 19, 2012. That was two days after Hamed sued Yusuf for denying Hamed was a partner and trying to steal his 50%. Yusuf has refused to pay Hamed's legal and accounting fees for the post-JDA period on the same basis. The "criminal" invoices for Fuerst Firm matter 2012-13 are attached as **MISSING Group Exhibit 21**. The amount due is $\_\_\_\_\_\_\_ plus 9% statutory interest from the date they were each paid. In other words, this amount is undefinable without the documents and testimony.

**IV. Applicable Law**

 There is no dispute that all of the work at issue was paid for by the Partnership. To the extent that the Partnership has been charged for the work and Yusuf asserts that it was valid Partnership work, the Partnership, not Yusuf was the client. Yusuf was a partner at all relevant times. Thus, there would be no privilege issue.

 Moreover, the burden of establishing attorney-client privilege in all its elements rests upon the person asserting it, the existence of the privilege is to be determined by the courts, not the party asserting the privilege; and even if an arguable privilege exists, it can be obviated in several ways.

 *1. There has been waiver by Yusuf's partial production*

 The newly adopted VI Rules of Evidence[[14]](#footnote-14) provide:

*Rule 502. Attorney–Client Privilege and Work Product; Limitations on Waiver*

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege, or work-product protection, as provided in 5 V.I.C. § 852, V.I. Rule of Evidence 503, and V.I. Rule of Civil Procedure 26(b)(3).

 (a) Waiver of privilege by voluntary disclosure. As provided in 5 V.I.C. § 861, a person upon whom a Virgin Islands statute confers a privilege against disclosure waives the privilege if the person or a predecessor of the person, while holder of the privilege, voluntarily discloses or consents to **disclosure of any significant part of the privileged matter**. This section does not apply if the disclosure itself is privileged.

Yusuf/United has already disclosed the invoices from September 19, 2012 through the invoice for May 6, 2013. Thus, even if Yusuf/United were the holder of the privilege, they voluntarily disclosed a significant part of the privileged matter. This allows their selected material to be of record and for them to argue about it, but keeps the remaining portion of those materials out of sight and unavailable to Hamed. *See e.g.*, *Gov't Guar. Fund of Republic of Finland v. Hyatt Corp.*, 38 V.I. 227, 240, 1997 WL 793291 (D.V.I. 1997):

The Court of Appeals has set similar precedent. In *Glenmede Trust Co. v. Thompson,* 56 F.3d 476 (3d Cir.1995), the Court dealt with the scope of waiver in which petitioners submitted an opinion letter of the law firm acting for the Glenmede Trust.

There is an inherent risk in permitting the party asserting a defense of its reliance on advice of counsel to define the parameters of the waiver of the attorney-client privilege as to that advice. **That party should not be permitted to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness**. (Emphasis added.)

*Id.* at 486.

The Court of Appeals upheld the District Court insomuch as it determined that the petitioner “waived the attorney-client privilege as to **all** communication, both written and oral, to or from counsel as to the **entire** transaction.” *Id.* (Emphasis added).

 *2. The has been waiver by the disclosure to a third party*

 There is no question that disclosure of the allegedly privileged materials to a third party effects waiver -- *even if that party is in a confidential relationship or agrees not to further disclose the information*. *In re Prosser*, No. 3:06-BK-30009 (JFK), 2010 WL 2245012, at \*1 (Bankr. D.V.I. May 14, 2010):

“[U]nder traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.”

Here, there is no dispute that the invoices *were provided to the Partnership for payment*. The Partnership is a definitely a third-party. See also *Addie v. Kjaer*, No. CIV. 2004-135, 2008 WL 5632261, at \*3 (D.V.I. Jan. 10, 2008):

The voluntary disclosure by a client of a privileged communication waives the privilege as to other such communications relating to the same subject matter made both prior to and after the occurrence of the waiver. *Murray v. Gemplus International, S. A.,* 217 F.R.D. 362, 367 (E.D.Pa.2003) (disclosure of privilege documents to portray a positive image in negotiations waives the privilege with regard to all privileged documents generated for the negotiations); *Emejota Engineering Corporation v. Kent Polymers, Inc.* (1985 U.S. Dist. Lexis 13415)\*8,\*9 (attorney-client privilege waive as to all communications relating to the Confidential Information Agreement which was the subject matter of counsel's disclosed opinion letter); *Sicpa North America, Inc. v. Donaldson Enterprises, Inc.,* 179 N.J.Super. 56,64, 430 A.2d 262, 266 (Law Div.1981)(waiver of privilege found for privileged report prepared for settlement negotiations was exchanged with adversary).

In this same vein, it should also be noted that there is a Partnership Agreement.

 *3. Most importantly, Yusuf/United's defense here puts the information at issue*

 The attorney-client privilege is waived when the privilege holder asserts a claim or defense that put his attorney's materials or work product in issue in the litigation. In In *Addie v. Kjaer*, at \*2, the court stated:

The attorney-client privilege may be waived under various circumstances. For example, the attorney-client privilege may be waived when the privilege holder asserts a claim or defense that put his attorney's advice in issue in the litigation. *Rhone-Poulenc Rorer, Inc. v. Armour Pharmaceutical Company,* 32 F.3d 851, 863 (3rd Cir.1994). The advice of counsel is placed in issue where the client asserts a claim or defense, **and attempts to prove the claim or defense by disclosing or *describing* an attorney client communication**. *Rhone* at 863 (citing *North River Insurance Company v. Philadelphia Reinsurance Corporation,* 797 F.Supp. 363, 370 (D.N.J.1992)). Finding a waiver of the attorney-client privilege when the client puts the attorney's advice in issue is consistent with the essential elements of the privilege. *Rhone* at 863. (Emphasis added.)

Here, the allegedly privileged material was raised as a defense in the Yusuf/United briefs that led to the Master's Order of May 8th. These billings and the underlying documents are the sole issue addressed by both defendants and the Special Master. Their defense is predicated solely on the factual assertion that despite the Partnership having paid for the work in these bills, the *work done* must be differentiated. In *Galt Capital, LLP v. Seykota*, No. CIV. 2002-63, 2004 WL 298400, at \*2 (D.V.I. Feb. 9, 2004), this was given even a finer edge -- applying it to the communications and documents that accompanied the work:

Implicit in this definition is the recognition that the attorney-client privilege may be waived under certain circumstances. The Third Circuit Court of Appeals has acknowledged that “a party can waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation.” *Rohne-Poulenc,* 32 F.3d at 863; *see also Gov't Guar. Fund of the Republic of Finland v. Hyatt Corp.,* 177 F.R.D. 226, 38 V.I. 227 (D.V.I.1997). Advice of counsel “is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner.” *Rohne-Poulenc,* 32 F.3d at 863. Rather, the client must take “the affirmative step in the litigation to place the advice of the attorney in issue.” Id. (Emphasis added.)

I find that Seykota took such affirmative steps **when he asserted his mutual and unilateral mistake counterclaims. These counterclaims necessarily place Seykota's *communications* with Machtinger at issue** because, as Seykota acknowledges in his opposition brief, Machtinger was acting as Seykota's representative in negotiating and concluding the separation agreement.1 **Without questioning Machtinger about the content of his discussions with Seykota, Galt and Tizes cannot verify whether Machtinger accurately represented Seykota's intentions in drafting the separation agreement, and, ultimately whether there was indeed a mistake.** In *Government Guaranty Fund,* I ruled that the defendant could not rely on an attorney's declaration to support its opposition to the plaintiffs' motion for partial summary judgment **and then deny the plaintiffs access to the attorney on grounds of the attorney-client privilege**. 177 F.R.D. at 341-42; 38 V.I. at 238. Similarly, Seykota cannot use his attorney to negotiate a separation agreement on his behalf and willingly sign that agreement, **later claim he did not understand its terms, then interpose the attorney-client privilege to shield from discovery his discussions with and instructions to Machtinger**. In sum, because Galt and Tizes cannot defend Seykota's allegations of unilateral or mutual mistake without questioning Machtinger, **I find that Seykota has placed his communications with Machtinger at issue in this litigation and, consequently, that he has waived the attorney-client privilege on his communications with Machtinger.** (Emphasis added.)

Yusuf and United have placed "what the work was done for" or more to the point, "who was the client" and "what matter the advice was being given for", squarely at issue. Both they and the Special MAster have noted that there is only one way to tell -- the documents and testimony that will demonstrate this. See also *Gov't Guar. Fund of Republic of Finland v. Hyatt Corp.*, 38 V.I. 227, 238, 1997 WL 793291 (D.V.I. 1997):

Hyatt cannot use the privilege to shield from discovery those matters related to the subjects dealt with in its affidavit.

The attorney-client privilege is waived for **any relevant communication** if the client asserts as a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct.

*Livingstone v. North Belle Vernon Borough,* 91 F.3d 515, 537 (3d Cir.1996) (citing Restatement of the Law Governing Lawyers § 130(1) (Final Draft No. 1, 1996)). (Emphasis added.)

In their briefs, Defendants have asserted this defense in such a manner that only their counsel's testimony can clear this up -- as the documents alone lack both foundation and the right to cross-examine. The Special Master has stated that such a differentiation of work versus claims is not only necessary, but dispositive.

 *4. The privilege is being used to shield torts or criminal acts*

 It is black-letter law that where it is alleged that a criminal act or civil wrong was done privilege can be negated. See generally *State v. Boatwright*, 54 Kan. App. 2d 433, 434, 401 P.3d 657, 659, 2017 WL 3198210 (2017) ("the attorney-client privilege does not extend to a communication in which the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort.)

 If United and Yusuf took Partnership funds to pay non-Partnership fees, that is both a crime and a tort.

 *5. Refusal to provide the materials*

 Finally, to the extent that privilege is asserted under these conditions, the Special Master can warn Yusuf/United, that a presumption will be invoked if the invoices and supporting evidence is withheld under privilege.

**IV. Argument**

 Hamed paid these invoices as a 50% Partner. He cannot prosecute his claims without the invoices and underlying documents and testimony.

**V. Conclusion**

 Under the Court's Order of May 8, 2018, regarding specificity of claims for which the Fuerst Firm was paid by the Partnership, Hamed cannot prosecute his claims without the invoices and underlying documents and testimony.

**Dated:** May 23, 2018 A  **Carl J. Hartmann III, Esq.**

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**CERTIFICATE OF SERVICE**

 I hereby certify that on this 23rd day of May, 2018, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

**Hon. Edgar Ross** (w/ 2 Mailed Copies)

Special Master

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**CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)**

This document complies with the page or word limitation set forth in Rule 6-1(e).

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1. *Fuerst Ittleman David & Joseph PL,* a Florida law firm(the "Fuerst Firm" or the "Firm"). [↑](#footnote-ref-1)
2. For each billing period, the Firm also issued separate sub-invoices for the "tax" and "criminal" matters. Matters 2012-1 and 2012-2 respectively. [↑](#footnote-ref-2)
3. Attorney DiRuzzo has since left the Firm, thus his deposition will be taken separately. [↑](#footnote-ref-3)
4. Immediately, on the day after the Special Master's Order, May 9, 2018, Hamed served an interrogatory, a request for admissions, two requests for the production of documents and three deposition notices -- including one to DTF's document custodian. **Group Exhibit 1**. [↑](#footnote-ref-4)
5. Hamed does not agree that such a privilege exists. based on the opinions/orders of the V.I. Superior Court (Brady, J.) that (1) Hamed was, at the time of that work, a partner in the Plaza Extra Partnership (aka Hamed-Yusuf Partnership) and (2) that the funds paid were paid from what has been determined to be a Partnership account[.](http://www.federal-litigation.com/_01%20Hamed%20Docket%20Entries/2013-04-25%20%20Westlaw%20Publication%20of%20Decision%20and%20Order.pdf) However, he understands the caution of Florida counsel in dealing with Defendants and their present counsel. [↑](#footnote-ref-5)
6. See Judge Brady's April 25, 2019 decision at page 11. *Hamed v. Yusuf*, 58 V.I. 117, 2013 WL 1846506 (V.I. Super. April 25, 2013) ("Hamed v. Yusuf Civil Case").

38. **Funds from supermarket account**s have also been utilized **unilaterally** by Yusuf, without agreement of Hamed, **to pay legal fees of defendants** relative to this action and the Criminal Action, in excess of $145,000 to the dates of the evidentiary hearing. Tr. 76:5–82:9, Jan. 25, 2013; Pl. Ex. 15, 16.5 (Emphasis added.)

His Footnote 5 at the end of paragraph 38 also mentions "Exhibit 30" which he describes as "two checks in the total sum of more than $220,000 in payment to defense counsel in this action, **dated January 21, 2013 and February 13, 2013**, drawn on a supermarket account by Defendants without Plaintiffs’ consent." As can be seen from the exhibits here, all of the amounts in those invoices are for post-JDA work, and thus not chargeable to the Partnership. [↑](#footnote-ref-6)
7. *Hamed v. Yusuf*, Civ. No. 1:12–cv–00099, 2012 WL 5830709 (D.V.I. Nov. 16, 2012) ("Defendants' arguments are unpersuasive. The matter will be remanded to the Superior Court. . . .") [↑](#footnote-ref-7)
8. This finding was based on two days of evidentiary hearings where this issue and the attached checks were argued before the Court. [↑](#footnote-ref-8)
9. The end date of the JDA. [↑](#footnote-ref-9)
10. Hamed notes that DTF was not co-counsel whenthis was going on up to April 2013, although he has not received the billings for the period when the two firms were co-counsel. [↑](#footnote-ref-10)
11. Attorney Fuerst, while still the lead named partner in the Firm, is deceased. [↑](#footnote-ref-11)
12. A review of the exhibits will demonstrate that there were many, many such instances.

 [↑](#footnote-ref-12)
13. Also listed in the invoices are charges by another apparently unadmitted Florida attorney, Michael B. Kornhauser. [↑](#footnote-ref-13)
14. See *In re Adoption of Virgin Islands Rules of Evidence*, No. 2017-002, 2017 WL 1293843, at \*8–9 (V.I. Apr. 3, 2017) [↑](#footnote-ref-14)