

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

MOHAMMAD HAMED, by his  
Authorized Agent, WALEED HAMED,

Plaintiff

v.

FATHI YUSUF, UNITED CORPORATION,

Defendants.

CIVIL NO. SX-12-CV-370

**OBJECTIONS TO SUBPOENA  
SERVED ON PAMELA L. COLON, ESQ AND  
THE LAW OFFICES OF PAMELA LYNN COLON, LLC**

COMES NOW Pamela Lynn Colon, Esq., on her own behalf and on behalf of The Law Offices of Pamela Lynn Colon, LLC, and pursuant to Rule 45 of the Virgin Islands Superior Court Rules of Civil Procedure, hereby objects to the Subpoena served on her and her law firm in this matter on June 25, 2018. In support thereof Attorney Colon further states:

**RELEVANT FACTUAL BACKGROUND**

I, and my firm, represented Waheed Hamed, son of Plaintiff Mohammad Hamed and brother of Plaintiff's Authorized Agent, Waleed Hamed, in the criminal case entitled *United States of America, et. al., v. Yusuf, et. al.*, Case No. 2005-15 F/B (D.V.I.).

Neither I nor my firm are parties to this civil action.

The criminal case spanned more than twelve years. It charged financial crimes and was document intensive. The case was dismissed with prejudice as to my client, Waheed Hamed, and all other individual defendants on March 4, 2010. From that date

until the sentencing, the criminal case was pending only against the corporate defendant, United Corporation.

Neither I nor my firm represents Waheed Hamed at this time in any matter. However, I and firm had come into possession of and/or had access to tens of thousands, if not more, pages of documents related to the criminal case. The Government, alone, produced through discovery 600 banker boxes of documents it seized pursuant to executed search warrants. In addition, even more data was contained on my multitude of computers and other electronic devices. Of course, I investigated, created and received many more documents in connection with my representation of Waheed Hamed.

Waheed Hamed, I and my firm also became parties to a Joint Defense Agreement as part of tactical and strategic defense of the criminal case. That Joint Defense Agreement obligated me to certain confidences with regard to not only my client, but also all parties to the Joint Defense Agreement.

Nearly five and one-half years ago, on January 17, 2013, Defendants here issued and served a Subpoena on me and my firm. I, on behalf of myself and my firm, responded substantively to portions of that subpoena on January 24, 2013. I, on behalf of myself and my firm, objected to the remainder of the January 17, 2013 subpoena on January 24, 2013. Thereafter, Defendants in this case took no further action regarding the January 17, 2013 subpoena.

I was personally served with the instant subpoena on June 25, 2018 at approximately 3:30 pm. It appears to request much of the same documents requested by the first subpoena.

The response date and time is July 6, 2018 at 10:00 am. That gave me six business days to comply as July 3<sup>rd</sup> and July 4<sup>th</sup> were holidays. On its face, this is insufficient time under the Rule to comply. Additionally, after being displaced from my house for over five months due to the damage it sustained from Hurricane Maria, and the subsequent repairs, I was scheduled to move back in during the same time period between when the second subpoena was served and its return date. Under the totality of these circumstances, this not only amounts to insufficient notice, but it amounts to unreasonable and oppressive notice.

Moreover, the overwhelming vast majority of the documents, data and communications that I was ever in possession of regarding any of the defendants in the criminal case that would potentially be responsive to the Subpoena *Duces Tecum* served on me will fall within one of three categories. First, documents and data produced by the Government. These were produced to all of the criminal defendants including the defendants in the instant case and should be in their possession. Second, documents, data and communications directly related to my client, Waheed Hamed. These documents, other than those which were filed in the criminal case or shared with the Government, are subject to the attorney/client privilege and/or the work product protection, or both. Third, documents, data and communications associated with the Joint Defense Agreement. These items are not only subject to the attorney/client privilege and/or work product protection, they are also subject to the confidentiality I owe to all parties to the Joint Defense Agreement.

Furthermore, document associated with the joint defense have always been available and /or actually in the possession of the defendants in this case or their

criminal attorneys. They were originally stored on servers at the firm of Richardson, Patrick, Westbrook & Brickman, LLC. All defense counsel, including defense counsel for the defendants in the instant case, were given a device that continuously generated a passcode to access all of the documents related to the joint defense.

Finally, all documents, data and communications from Ronald J. Soluri, Sr. and his associates were received through the Joint Defense Agreement and the Kovel Letter relationship related to Mr. Soluri's assistance in the defense of the criminal case. Significantly, if a document related solely to an individual defendant and was not filed with the Court or the monitors, I would not receive it. Likewise, other parties to the Joint Defense Agreement would not receive documents, data and communications that related only to my client, Waheed Hamed. Indeed, these documents were password coded. I did not receive the password for documents related to other individual defendants and no one else received the password for documents related solely to Waheed Hamed.

At the time of my response and objections to the original subpoena I estimated that all three categories of documents, as well as items received from Mr. Soluri, were in excess of at least thousands of pages and some categories are tens of thousands of pages. As such, reviewing them, even in order to just produce a detailed privilege log, let alone producing them, would have taken hundreds of hours of my personal time.

I am a sole practitioner with only three full time employees. No one else in my firm is qualified to respond to the subpoena. To fully comply with either the original or the current Subpoena Duces Tecum would take months of only working on that

response. This would cripple my practice and cause great damage to my current clients as I have at least ten cases set for trial between now and the end of 2018.

Moreover, during the summer of 2015, more than 5 years after the criminal case was dismissed with prejudice against my client, my office began an archiving project that entailed all office files since the office was opened in 2003. Additional archiving was done during the summer of 2016. As a result, many documents from the criminal case being requested herein may no longer be in my possession.

Significantly, the lawyers and parties serving the Subpoena are aware of these facts. Despite this, nothing was done to reduce the scope, broadness or burden of the Subpoena.

Finally, I have been trying to contact Waheed Hamed to determine whether, after being given a reasonable opportunity to review the, he will waive any attorney/client privilege or work product protection as to such documents and communications. I have not been able to because, on information and belief, he is currently out of the country and without access to the means that I have to communicate with him. I do not know when he will return.

### **ARGUMENT**

#### **1. THE SUBPOENA IS UNDULY BURDESOME**

An attorney has a duty not to issue a subpoena that imposes an undue burden on the recipient of the subpoena. Specifically, an overbroad subpoena places an undue burden on the recipient. *See, Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 938 (7th Cir. 2004); *F.D.I.C. v. Garner*, 126 F.3d 1138; 1145-46 (9th Cir. 1997); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp.2d 606, 612 (E.D.Va. 2008).

Moreover, even acting in "good faith" is not sufficient. The attorney issuing the subpoena has an affirmative obligation to take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. See, *Liberty Mut. Ins. Co. v. Diamante*, 194 F.R.D.20, 23 (D.Mass.2000).

This duty is not taken lightly. Indeed, a court will impose an appropriate sanction including attorney fees and lost wages on a party or attorney who fails to comply with this obligation. The person subpoenaed will be protected from significant expense. See, *Alberts v.HCA Inc.*, 405 B.R.498, 502 (D.D.C. 2009); *Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 8 D.D.C. 2001); *Heidelberg Americans, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38 (1st Cir. 2003); *Klay v. All Defendants*, 425 F.3d 977, 984 (11th Cir. 2005); *McCabe v. Ernst & Young, LLP*, 221 F.R.D. 423 (D.N.J. 2004); and, *In re First American Corp.* 184 F.R.D. 234, 238 (S.D. N.Y. 1998).

Rule 45 permits a person subpoenaed to serve an objection within fourteen days after service. Subsection (c)(3)(A)(i) of the Rule requires that a subpoena recipient be provided a reasonable time to comply. Given that the rule permits fourteen days to file objections, a response time shorter than that is clearly unreasonable on its face. See, *Paul v. Stewart Enterprises, Inc.*, 2000 WL 1171120 (E.D. La. 2000).

Subsection (c)(3)(A)(iv) allows the subpoena to be quashed if it subjects a recipient who is not a party to an undue burden, whether due to it being overbroad and/or not allowing sufficient time for response. See, *Alberts, supra* and *Medical Components, Inc. v. Classic Medical Inc.*, 210 F.R.D. 175, 179 (M.D. N.C. 2002).

Here, the subpoenaed directed to me was issued on June 25, 2018 at approximate 3:30 pm with a return date of July 6, 2018 at 10:00 am. This is less than

14 days and two of the days between service and the return date were holidays and two more were weekend days. On its face, this is insufficient time under the Rule to comply. Under the totality of these circumstances, this not only amounts to insufficient notice, but it amounts to unreasonable and oppressive notice.

More importantly, it is the second subpoena served on me in this case. After filing my objections and motion to quash the first subpoena, defendants herein did nothing further and failed to put me on notice that they would be seeking enforcement of that subpoena or requesting the preservation of anything associated with the criminal case. As a consequence, the criminal case file was part of the office wide archiving project and much of it may no longer be available to me or my firm.

Moreover, given the personal knowledge of the parties and attorneys issuing the subpoena regarding the circumstances of my and my firm's representation of Waheed Hamed, one of the defendants in the criminal action entitled *United States of America, et. al., v. Yusuf, et. al*, Case No. 2005-15F/B (D.V.I.), it is unconscionable that they required me to comply with such stunningly overbroad, expansive and unlimited requests for documents to be produced in 6 business days, or even six months, without any compensation for my expenses, lost income and attorney's fees.

As these attorneys know, I represented Waheed Hamed for an extended period amounting to years in connection with a criminal matter in which he was indicted as a co-defendant with their clients in the civil matter under which they subpoenaed me. The criminal matter began in 2001 and was pending for nearly 13 years. I was at one point in time in possession of tens of thousands of pages of documents related to the criminal

case. In addition, even more data is contained on my multitude of computers and other electronic devices some of which I no longer have access to.

The discovery received from the Government by all defendants, including both of the defendants in this civil matter, consisted of 600 bankers boxes of seized documents, most of which would conceivably be classified as "financial" under demand number one of the subpoena. In addition, there were 1,422 documents filed in the criminal case in the District Court Pacer system alone. There were even more documents filed in the Third Circuit Court of Appeals.

Thus, it is reprehensible that I would be served a subpoena that would require my production of all documents that basically constitute the entire criminal file, especially since the defendants in the instant case already have or had access to these documents.

## **2. VAGUE AND AMBUGIOUS REQUESTS**

The subpoena demands are replete with vague and ambiguous terms.

## **3. PRIVILEGED MATTERS**

Subsection (c)(3)(A)(iii) compels the quashing of a subpoena when the demand "requires disclosure of privileged or other protected matter." Again, the documents that were and may still be in my possession are tens of thousands of pages, if not more, spanning approximately one decade. Many of these documents were produced as discovery by the Government in the criminal case and/or documents produced under the Joint Defense Agreement. The vast majority of the rest, specifically as they relate to my direct client, Waheed Hamed, are subject to either the attorney/client privilege or work product protection or both.



Moreover, I and my client were parties to a joint defense agreement. I am bound to keep the confidences of all of the parties of the joint defense agreement, whether or not they were my direct client. The overwhelming majority of the documentation, data and communications in the criminal case that were either not discovery or not directly related to my client, are covered by the privileges arising from the joint defense agreement and/or are work product under the joint defense agreement. This includes "all documents, data and communications" from Ronald J. Soluri, Sr. and those associated with him as he was hired under a Kovel letter to perform services in preparation of the defense of the criminal case that extended to all defendants who were parties to the joint defense agreement.

Further, demand numbers one through four request "drafts." Any drafts that I created in connection with this criminal matter are my work product.

Of course, I have not had sufficient time to review all of these documents in order to prepare a privilege log as to each document, or even to determine what documents I still possess. Indeed, that would be almost as time consuming and costly as producing all of the documents. This further demonstrates that the subpoena did not provide sufficient time for compliance, is unduly burdensome and compliance will be prohibitively expensive.

Additionally, even if I was able to produce a privilege log at this time, I would be requesting an in camera inspection of all documents by the Court to ensure that no privilege or other protection extending to any of the criminal defendants would be violated by my producing the items requested.

privilege or other protection extending to any of the criminal defendants would be violated by my producing the items requested.

As stated above, I have not been able to communicate with my former client as he is out of the country and therefore, I have not been able to obtain a waiver from him regarding any privileges or other protection. I also have not been able to be in contact with the other members of the joint defense agreement to determine whether they will assert any privilege to any materials that may still be in my possession.

For all of these reasons, the subpoena served on my on June 25, 2018 is in violation of Rule 45 of the Superior Court Rules of Civil Procedure.

RESPECTFULLY SUBMITTED

LAW OFFICES OF PAMELA LYNN COLON, LLC  
Attorney for Plaintiff

DATED:

7/5/18

By:



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Former attorney for Waheed Hamed

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of July, 2018, I caused a true and exact copy of the foregoing **OBJECTIONS TO SUBPOENA SERVED ON PAMELA L. COLON, ESQ. AND THE LAW OFFICES OF PAMELA LYNN COLON, LLC** to be served upon the following via the Case Anywhere docking system:

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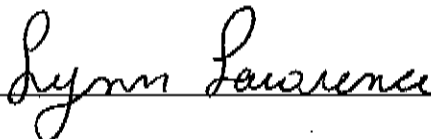
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