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

HISHAM HAMED, individually**,** and derivatively on behalf of **SIXTEEN PLUS CORPORATION,** *Plaintiff,* v. **FATHI YUSUF, ISAM YOUSUF** and **JAMIL YOUSUF,** *Defendants,* and **SIXTEEN PLUS CORPORATION,** *a nominal Defendant.*	**Case No.: SX-2016-CV-00650** **DERIVATIVE SHAREHOLDER SUIT, ACTION FOR DAMAGES AND CICO RELIEF** **JURY TRIAL DEMANDED**

HISHAM HAMED'S REPLY TO ISAM YOUSUF'S OPPOSITION TO HAMED'S SECOND MOTION TO COMPEL: AS TO BANK ACCOUNT DOCUMENTS IN THE CONTROL OF ISAM YOUSUF

I. Introduction

Isam Yousuf's ("Isam's")[1] December 22, 2022 opposition fails to respond to most of the factual and legal points raised in Hamed's November 23, 2022 *Second Motion to Compel* ("Motion"). However, Isam does raise five points—four being unsupported assertions of fact, and the fifth being an attempt to interpose a legal argument that the affirmative defense of *unclean hands* somehow relieves him from having to respond to discovery at this stage of the proceedings. Thus, this reply is divided into three parts:

(1) a response to the four factual points raised in Isam's opposition [Section II],

(2) a discussion of Isam's fifth point, his assertion at law that the affirmative defense of "unclean hands" applies at this stage, and that it blocks Hamed from taking this discovery. Hamed also addresses the broader issue Isam's contention raises—comparing unclean hands to the reciprocal assertion of "*in pari delicto*" [Section III], and

(3) a discussion of the points in Hamed's motion which remain unaddressed—and the effect of Isam's failure to respond [Section IV].

II. Hamed's Responses to Isam's Four *Factual* Assertions

Isam raises five points—presented here, verbatim, directly from his opposition:

1. At pages 1-2: "The business in question is no longer in operation and has not been for more than twenty (20) years, which explains why production of the records is not possible. . . ."

[1] Hamed uses the first names of the defendants here because, despite their all being family, their names cause confusion: Fathi Yusuf, Manal Yousef, and Isam/Jamil Yousuf.

2. At 2: "[W]hy would it be necessary to look at the commercial bank records of [Island Appliances, which is] no longer in business [and] which. . .did not *generate* the money which is an issue in this case. [Hamed and Sixteen Plus have] the records and, therefore, they do not need an order from this Court to compel a meaningless search of bank records in St. Maarten."

3. At 3: "[Hamed and Sixteen Plus seek] to permit the police and prosecutors in St. Maarten to conduct this undertaking or to in any way be involved in a document production in a civil lawsuit. See **Exhibit A**, attached. This request continues to be made despite denials that Sixteen Plus Corporation and its representatives and attorneys are threatening criminal prosecution as a means of advancing the issues in this litigation, which is a patently unethical means of prosecuting a lawsuit."

4. At 3-4: "Five years ago Isam Yousuf made his own requests to the bank for copies of records relevant to the issues in this litigation. He was eventually notified that the bank has no such records in its possession, and as a consequence he is unwilling, and should not be compelled, to execute an authorization for others to search for records which do not exist."

5. At 2: [addressed in *Section III* below]: "[Sixteen Plus'] principals fraudulently, criminally, and illegally skimmed money from the Plaza Extra Supermarkets in St. Croix to avoid the payment of taxes. . . . It is alleged that these same fruits of an illegal criminal enterprise were in fact used to purchase the Diamond Keturah property, and that the Note and Mortgage given to Manal Yousef by the Sixteen Plus Corporation is a sham and therefore null and void.. . . .The Sixteen Plus Corporation and its representatives and attorneys are seeking to benefit from the past criminal activity of the Corporation and its principals which would make a mockery of the doctrine of unclean hands."

A. Isam's 1st point, at 1-2, that "the business in question is no longer in operation and has not been for more than twenty (20) years, which explains why production of the records is not possible."

As noted in the Motion, Isam has refused to provide any information about Island Appliances, its ownership, its documents, or its finances. *See* Motion at footnote 4.[2]

> See p. 2 of the November 7, 2022 Hymes letter discussed herein. Exhibit 1. ("A description of the rate of pay of Isam, and his percentage of stock ownership in Island Appliances will not be provided as this information is totally irrelevant to any litigation.")

[2] The interrogatory that Isam refused to answer would have exposed all of the particulars of Island Appliance's structure, ownership, and records maintenance--facts he now attempts to deploy here without any documentary support. It sought the following:

> *Interrogatory 3:* Please describe in detail all that you know about BFC island Appliance, including but not limited to its location, years of operation, ownership, location of its bank accounts, your relationship to it and its one of its owners/operators as well as the name and address of all of its other owners/operators.

Plaintiff's First Request for Interrogatories to Defendant Isam Yousuf, original Exhibit 2 to the Motion, at page 6.

And, at footnote 2:

> 'Access to the financial records of Island Appliances and my clients will not be granted,' and '[y]ou have asked for a description of all foreign bank accounts in his [Isam's] name during the period 1995 to 2000. Once again, this is irrelevant to any issue related to this case and will not be provided.'

While refusing discovery responses about Island Appliances and alleging irrelevance as the basis for that refusal, Isam now pivots to use those exact 'entity details' in his opposition. More disappointing is that even now Isam attaches no *declaration* in support of these 'facts'. Nor does he attach *exhibits* in support. Instead, he presents bare testimony by counsel. Finally, his position is a *non sequitur*. As shown in the Motion: (1) Island Appliances was simply a ***trade name*** listed on Isam's ***personal*** bank accounts—those he used to transfer the funds in question to Sixteen Plus.[3] (2) All of the account opening documents were Isam's personal papers, none were corporate documents of Island Appliances. (3) Two French investigations confirmed this information from bank records. Thus, Isam's refusal to answer the discovery questions about *his own*, personal accounts is improper. There isn't a single document, record, or declaration as to:

1. Whether Island Appliances is actually a distinct entity, separate from Isam's use of the name.[4]
2. If it is an entity, what sort it is—corporation, limited partnership, etc.; along with the shareholders, limited partners, etc., and their ownership percentages.[5]
3. What documents suggest this was an entity account rather than what all of the account opening documents show, that it was opened as a personal account.
4. If it is *not* a distinct legal entity (i.e., is a sole proprietorship or a simple partnership), the principals, and what their levels of participation might be.
5. How long it was in business, when and how it ended, where its records may be—and the identity of the custodian of its records.

Entities are often defunct by the time of litigation. It is unclear why Island Appliances being so would obviate a letter seeking either Isam's or Island's statements.

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[3] In the Motion, this was shown by Exhibit 8, *St. Martin Judicial Police Report*, dated May 14, 2003. There it is described as a tradename only. No corporate involvement other than tradename is described—there are no corporate or other entity documents referenced.

[4] If it was an entity, there should be some sort of governmental records. The same is true with regard to level of participation of other, involved individuals.

[5] For example, did Fathi have an interest in the business? Did Manal? Did Isam and Manal's father, Fathi's brother, Mohammad Yusuf (aka Hamdan)?

B. Isam's 2nd point, at 2—asking why it would be necessary [for Hamed] to look at the commercial bank records of [Island Appliance's which is] no longer in business, which. . .did not generate the money which is an issue in this case. They [Hamed and Sixteen Plus] have the records [of where the funds really did come from] and, therefore, they do not need an order from this Court to compel a meaningless search of bank records in St. Maarten.

First, Rule 33(a)(2) is quite clear. Isam and his counsel do not have the power to determine "why it would be necessary" for Hamed to seek this information. It states:

> (2) Scope. An interrogatory may relate to *any matter that may be inquired into under Rule 26(b)*. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact. . . .

The referenced portion of Rule 26(b) provides:

> (b) Discovery Scope and Limits. (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding *any* nonprivileged matter that is *relevant to any party's claim or defense. Information within this scope of discovery need not be admissible in evidence to be discoverable*. (Emphasis added,)

Second, the fact that Island Appliances did not "generate" the funds in these accounts is pretty much the main point here. *Island Appliances absolutely did not generate the money, and there is not a single shred of documentary evidence that Manal's and Isam's father (Mohammad Yusuf) generated or deposited the money either . . . .and yet*. . . .and yet, all of the money sent to Sixteen Plus in 1997 somehow came from this Isam Yousuf personal Bank account. Hamed does not allege *any* Island Appliance 'generated' funds—rather, that every cent was deposited by Wally and Fathi.

Third, it would be remarkably useful to the Court to see exactly who *did* "generate" the funds and deposit them in these accounts, and *when* they were deposited—which would be reflected in the very bank statements (with deposit slips) being sought.

C. Isam's 3rd point, at 3, that [Hamed and Sixteen Plus seek] to permit the police and prosecutors in St. Maarten [sic.] to conduct this undertaking or to in any way be involved in a document production in a civil lawsuit. See Ex. A, attached. This request continues to be made despite denials that Sixteen Plus Corporation and its representatives and attorneys are threatening criminal prosecution as a means of advancing the issues [here], which is a patently unethical means of prosecuting a lawsuit.

Isam submits, as his *Exhibit A,* a letter to Atty. Hymes, dated 12/6/2022, which is just one small portion of a back-and-forth *settlement negotiation*. It is presented and discussed completely out of context. However, because Isam's counsel has exposed this settlement discussion, Hamed will address the facts, with supporting exhibits.

Before *this* negotiation was started by Manal and Isam's counsel, he had tried to avoid responding to discovery by raising this same red-herring—the specter of an ethics complaint. Hamed addressed that at some length; stating he was not intimidated and would move to compel. *See* **Exhibit 11,** email to Atty. Hymes, dated 10/5/2022. Thereafter Isam's counsel initiated the settlement discussions he complains of here. **Exhibit 12**, 12/1/2022 email from Atty. Hymes. He offered to settle the issue of access to avoid the motion, but again tried to avoid access to an *identical* copy of Isam's bank records that BFC had provided to the police—which Isam has the right to demand under French FOIA laws.[6] When Isam's counsel continued to demur, Hamed's counsel then sent an extensive response reassuring him that Hamed wanted no police records or investigative reports—only access to the police copy of those *identical* BFC bank records being sought from BFC—in the event BFC did not retain them. (**Exhibit 13,** 12/6/2022 letter.) Hartmann expressly stated why criminal issues on St. Martin related to Isam's own 1996-2004 bank statements would be *long* stale—and reaffirmed Hamed's *written representations* to this Court, confirming a total lack of interest in a criminal prosecution, As can also be seen, Hamed was *suggesting a letter jointly authored by Atty. Hymes*.

[6] *Law on Free Access to Administrative Documents* (Law No. 78-753 of 17 July 1978) (Loi N° 78-753 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal) as expanded by the applicable *European Union General Data Protection Regulation.*

RE: Basis for Request to STM Police and Prosecutor

Jim:

This letter is in response to your letter of today, December 6, 2022. I write to try to assuage your concerns and give you guarantees that neither the Hameds (nor counsel) have ANY interest in any criminal proceedings.

Perhaps the draft of the proposed order is unclear—I have changed the language to be more so. Hamed has no interest in police and prosecutorial records regarding Isam. The sole target of the proposed order is a known, well-defined collection of **Isam's own banking records for the period from 1996 to 2004**—to the extent that the police and/or prosecutor have those records, **as already supplied to them from BFC**.

Thus, I have changed the operative language to make this clear.

In 2001-2004 several investigations were done on STM into the records of Isam and Island Appliance: (1) by the French Banking Commission, (2) by the St. Martin Judicial Police Branch, (3) and by the US DOJ/FBI. As part of that investigation (as attached to and shown in the motion at Exhibit 7, 8, 9 and 10) *a set of Isam's banking records up to that date were provided to the police and prosecutor*. Exhibit 9 is the subpoena from the police/prosecutor to the bank, BFC. Exhibit 10 (July 3, 2002) is the BFC letter confirming that Isam's and Island Appliances documents were collected, copied and sent to the police prosecutor. Exhibit 8 is the (May 14, 2003) Police report on that investigation relating their findings.

All that Hamed is asking Isam to do is obtain permissions to seek item #2—Isam's own BFC back account records for 1996-2004 that have already been collected and sent. No police records, period. We ask for a letter of permission because all three (BFC, the police and the prosecutor) are expressly known to have *that specific set of documents*—because of what BFC said in its letter—that they had been collected and sent.

Hamed is not seeking any other records, information, or actions. And **the letter will be specific as to what it seeks—*you and I will jointly draft it*.** Moreover, these matters are LONG, LONG over on STM. These are acts in 1996-2004 which have been fully investigated there. Time limits for any prosecution have long passed. There is no criminal jeopardy there for those old records.

I note that nobody, from here or our St. Martin's counsel's office has had any contact or communications with BFC, the police or the prosecutor on these matters. All of the referenced documents are from either Fathi Yusuf's counsel in discovery, the FBI (back in the 2000's) or the DOJ (same). Nor have the Hameds or any of their counsel had any contact or communications with USVI police, US law enforcement, the DOJ, or any other entity with regard to criminal matters. As was recently stated in Hamed's *Third Motion to Compel as to the 5th Amendment*:

1. Hamed is NOT hostile to Yusuf taking the Fifth if he wishes—or Isam, Jamil or Manal. That motion did not seek to stop assertion of the right.
2. **And, at page 4, Hamed asserts "He [Fathi] has been informed that Hamed does not know of, nor will he seek any such prosecution against Fathi for these matters."**

Certainly, such a representation would not be made falsely to a Court, and if, after stating this, Hamed was found to have attempted any such activity, it would be suicidal with regard to Judge Brady, . . .

For Isam to present a small part of this settlement discussion, out of context, as a foil for suggesting it is indicative of a greater threat or acts in any way "patently unethical" is misleading. He seeks to obscure the obvious. The case law set out in the Motion is clear as can be—if Isam has the *right to demand* his own banking documents, he has 'control' and must do so regardless of what entity is holding them, including STM's police.

Finally, it is important to note that if Isam has any realistic fear of STM criminal prosecution due to this routine discovery on STM, refusing to properly respond is not the answer. He can always do what Fathi did—assert his Fifth Amendment rights under the US Constitution and place the matter before *this* Court. He is a US citizen; this is a US court. As stated repeatedly in the letter above, Hamed cannot fathom how any STM document request for 25-year-old personal bank statements for a solely USVI case involves any STM criminal action. But if Isam does, he can file a motion for a protective order. What he cannot do is unilaterally refuse to respond properly to discovery requests.

D. Isam's 4th point, at 3-4, that "five years ago Isam Yousuf made his own requests to the bank for copies of records relevant to the issues in this litigation. He was eventually notified that the bank has no such records in its possession, and as a consequence he is unwilling, and should not be compelled, to execute an authorization for others to search for records which do not exist."

Hamed is certain that if any proof of this request or BFC's response existed, it would have been an exhibit to Isam's opposition*. Hamed does not doubt that Isam told his counsel this as a fact.* But counsel has conveyed many such unsupported, undocumented *facts* from Isam that turned out to be erroneous. Hamed is equally sure if it were true that this request was made, Isam would have submitted a declaration. Hamed is equally certain that the existence of such an important request would have been raised in the *many* prior exchanges on this exact topic, and yet it appears here, fortuitously, for the first time. But it could well be treacherous for Isam to affirm such allegations under oath and then have BFC produce the documents—or for BFC to be able to confirm that such a request never existed.

For all of the reasons also set forth in section II(A) above, this argument must also be rejected. There is no support, no information on the alleged entity, no exhibit, no declaration, and it is irrelevant to the ability of Hamed to seek discovery responses

III. Isam's 5th Point: His Attempt to Muddy the Waters: "Unclean Hands" versus "In Pari Delicto"

Instead of addressing Hamed's motion, Isam largely substitutes the suggestion that because he alleges that principals of Sixteen Plus (Fathi and Wally) had unclean hands in 1996-2004, he should be free of any discovery responsibilities in this case. He ignores the 95% of the facts (as to his and Manal's extensive wrongdoing) alleged in the actual complaint—in an effort to seek unilateral discovery sanctions against just Hamed. He does so under the rubric of the affirmative defense of *unclean hands*—which is not applicable at this stage[7] and is certainly ***not yet*** applicable in any manner that would block discovery. He has, however, raised the issue and Hamed must, therefore, respond.

What Isam is confusing in his opposition are "unclean hands" and "in pari delicto." Unclean hands is a *unilateral* affirmative defense based in equity. If, as alleged in the complaint—which still controls at this point—ALL of the parties have unclean hands, both here and in the companion foreclosure action (consolidated 342/65),[8] then the Court is presented with bilateral (or more accurately, multilateral) wrongdoing. One factual issue for the future is not, therefore, whether *just one of the alleged wrongdoers should be*

[7] "The Supreme Court of the Virgin Islands has stated . . .an affirmative defense involving issues of fact, [which] typically cannot be decided on the pleadings alone." *Fahie v. Bank of Nova Scotia*, No. ST-16-CV-646, 2019 V.I. LEXIS 34, at *7-8 (Super. Ct. Mar. 19, 2019) *see also Decatur Ventures, Ltd. Liab. Co. v. Stapleton Ventures, Inc*., No. 1:04-cv-0562-JDT-WTL, 2006 U.S. Dist. LEXIS 55512, at *1 (S.D. Ind. Aug. 8, 2006)(The court would only apply an affirmative defense such as the doctrine of in pari delicto in the future if the facts demonstrated that the applicants bore at least substantially equal or mutual responsibility for the violations they sought to redress.)

[8] Hamed is cognizant that an affirmative defense cannot be asserted by him here, where he is the plaintiff. However, it is clear that whether the companion (65/342) foreclosure case is consolidated 'officially; or not—the foreclosure is the *sine qua non* of many matters here. *In pari delicto* is, therefore, also pervasive here as an understanding of the relations of these various parties. Thus, Isam's raising of the issue of relative wrongdoing forces Hamed to join the issue here, in this context.

singled out and denied basic discovery responses[9]—but rather: Should they ***all*** be affected in some manner by this revelation? Although Hamed shows that this isn't yet the time to apply the doctrine, as not enough facts are of record—he responds, nonetheless.

Indeed, Hamed has, himself, also given notice of the issue of relative and mutual wrongdoing in both the companion foreclosure action and here.[10] He has also raised the

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[9] As to the instant discovery inquires, there is certainly sufficient evidence already to satisfy the low-bar of the Rule 26 standard set forth above—enough to allow the requested discovery into whether Isam was and is *also* a wrongdoer. There is also sufficient basis to allow inquiry into how he, and his refusal to disclose his bank account information, are a central part of the present CICO fraud and conspiracy.

[10] Foremost, Hisham Hamed is not alleged to have participated in any act or wrongdoing with regard to this case or the companion foreclosure. The clean hands doctrine does not apply to him in his individual capacity. (He was in school when the 1996-1997 acts occurred.) Moreover, this is notice pleading. The complaint alleges Isam is clearly the pivotal person in the STM portion of these activities, and he would thus be hard pressed to suggest that Hamed failed to give notice here of his involvement with all of the defendants in multiple criminal acts, a conspiracy, and wrongful acts in multiple countries. For Isam to raise the involvement of ***just*** Sixteen Plus and ignore the actions of Isam, Manal, Fathi, Jamil, Yussrah Yusuf and others is disappointing. What Isam is actually arguing is: because Sixteen Plus did wrong in 1996-2003, Manal, Isam and Fathi should (a) avoid discovery now, and (b) get a default award of what Fathi says is $30 million worth of real estate. This is legally incorrect and sadly lacks a certain moral equivalency.

Moreover, the Hameds and Yusufs paid the back taxes and a million dollar fine on their funds—but Manal admits she and Isam never paid any taxes on more than a million dollars and they have repeatedly sworn to what Hamed will show are blatant falsehoods in the present. Fathi has taken the Fifth, and Isam is a superstar in two French investigations where the investigators documented $8 million flowing in and out of these very accounts in a single day. He lied in his discovery responses about his massive Amman, Jordan account. He lied about what accounts he has and where they are. Hardly a good record as a basis for name-calling in preliminary discovery motions. Both the goose and the gander will have their day in court when it comes to finger-pointing and allegations of wrongdoing—but that day will not arrive if Isam continues to delay by avoiding BASIC discovery based on just a small part of the story favorable to him.

Similarly, in the 65/342 action, Sixteen Plus answered that counterclaim, asserting several affirmative defenses, including *in pari delicto*:

> 7. Defendant is barred from the relief sought in the Amended Counterclaim because the sham note and mortgage referred to in the Amended wrongful Counterclaim are *unenforceable because the sham note and mortgage were procured as part of and in furtherance of a fraudulent criminal conspiracy in which Defendant was an active participant*. (Emphasis added.)

Nor is there any question of the statute of limitations somehow barring such an affirmative defense—thus limiting the period subject to discovery, as affirmative defenses are not subject to statutes of limitations. *Responsible Person of Musicland Holding Corp. v. Best Buy Co. (In re Musicland Holding Corp.),* Nos. 06-10064 (SMB), 08-1023, 2010 Bankr. LEXIS 3194, at *10 (Bankr. S.D.N.Y. Sep. 16, 2010) *see also Federated Life Ins. Co. v.*

doctrine of *in pari delicto*, which has been recognized in almost all jurisdictions and provides that a party may not assert a position against another if the party complaining bears fault for the claim. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 354 (3d Cir. 2001). In 1985, the U.S. Supreme Court applied it, stating: "The entire phrase *in pari delicto potior est conditio defendantis* translates literally to mean, "[i]n a case of equal or mutual fault. . .the position of the [defending] party. . .is the better one" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (*citing Black' s Law Dictionary* 711. (5th ed. 1979)). As an equitable doctrine, *in pari delicto* applies to prevent culpable parties[11] from benefitting from their wrongdoings, *Official Comm. at* 437 F.3d 1145, 1152, and to ensure that courts do not "lend their good offices to mediating disputes among wrongdoers." *Bateman* at 306.

In the Virgin Islands

The effect of *relative degrees of wrongdoing m*ust be viewed under USVI law. In the USVI the doctrine of "in pari delicto" has been discussed infrequently, mostly in passing. *See Preiss v. Severe*, D.C. Civil No. 1985/278, 1986 U.S. Dist. LEXIS 17779, at *1 (D.V.I. Nov. 13, 1986)("seller did not raise…in pari delicto as an affirmative defense

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Walker, CIVIL ACTION NO. 96-3387, 1997 U.S. Dist. LEXIS 566, at *30 n.7 (E.D. Pa. Jan. 17, 1997)("affirmative defenses are not barred because affirmative defenses are not subject to any statute of limitations, *even if they are based on the same facts and theories as a time-barred counterclaim.)*(emphasis added), *see also Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n,* No. 14-CIV-62610-Bloom/Valle, 2016 U.S. Dist. LEXIS 4732, at *67 (S.D. Fla. Jan. 13, 2016)("A district court should not grant summary judgment where genuine issues of material fact exist about an affirmative defense." *Bryant v. Rich*, 530 F.3d 1368, 1380 (11th Cir. 2008) (*citing* Fed. R. Civ. P. 56(c)) (further citations omitted); *Singleton v. Dep't of Corr.*, 277 F. App'x 921, 923 (11th Cir. 2008) ("Summary judgment is not appropriate where a genuine issue of material fact exists about an affirmative defense.")

[11] Applying the doctrine in a RICO setting, the court in *Bergeron v. Perrilloux*, No. 08-4380, 2009 U.S. Dist. LEXIS 68926, at *9 (E.D. La. Aug. 6, 2009) noted:

> Plaintiffs actively participated in the wrongdoing they now ask a remedy from; plaintiffs are co-conspirators. With regard to the policy goals of RICO, precluded use of *in pari delicto* in this case would do a disservice to the goals of RICO. *Even a minor aged 17 can be held accountable for their illegal activity*, including conspiring to commit a federal offense. See *United States v. DeLeon*, 768 F.2d 629 (5th Cir. 1985). (Emphasis added.)

to the counterclaim and also did not raise the defense at trial or on appeal. Therefore, the court held that the defense had been waived by the seller.") *see also Willie v. Amerada Hess Corp.*, 66 V.I. 23, 45 (Super. Ct. 2017)(referred to in a discussion of the liability of joint tortfeasors.) It has never been examined by our Supreme Court—much less as to sham contracts or tax schemes. Thus, a *Banks* analysis is necessary.

Survey of Jurisdictions for Majority Rule

A survey of all jurisdictions shows that this is an almost universally accepted doctrine.[12] A LEXIS search of the phrase returns over seven thousand decisions. A review of the leading cases shows they are surprisingly uniform. *In pari delicto* is what one of those courts calls a "well-recognized defense" and another refers to as "clearly valid affirmative defense under state law." Moreover, this is very old, well-established law. In Connecticut, the doctrine has been applied for donkey years. In *Flanagan v. M.J.C.C. Realty L.P. (In re Flanagan),* 348 B.R. 81, 89 (Bankr. D. Conn. 2006) the court cites decisions from 1881 and 1917 to illustrate that this is well-settled law,[13] stating:

> The *in pari delicto* doctrine is a well-recognized defense under Connecticut law. The doctrine provides that actions brought on illegal or corrupt bargains cannot prevail if the parties are *in pari delicto, i.e.* where the plaintiff is a significant participant in the wrongdoing, bearing at least equal responsibility for the violations he seeks to redress. See, e.g., Greenberg v. Evening Post Association, 91 Conn. 371, 375, 99 A. 1037 (1917). **"The real objection is not to one man's unclean hands but to the whole**

[12] In *Willie v. Amerada Hess Corp*., 66 V.I. 23, 45 (Super. Ct. 2017), the Superior Court here acknowledged the doctrine of '*in pari delicto potior est conditio defendentis*.' But that court also stated, under a "*But see"* signal, a seemingly contrary holding from Maine*, Roberts v. Am. Chain & Cable Co.*, 259 A.2d 43, 50 (Me. 1969). However, that Maine case does not stand for the proposition that Maine does not accept the defense. Rather, that case deals with the intersection of the doctrine and a specific state statute dealing with workers' compensation. Such statutory collisions with the doctrine, also found in some joint tortfeasor and apportionment tort cases is not applicable here, as this is not an administrative claimant or joint contribution situation.

[13] Equally hoary precedent can be found from Vermont in 1914, where one party's claim that the writing in question was a valid mortgage could not be sustained. The court held the alleged mortgage holder could not invoke the doctrine of estoppel, *having procured a sham mortgage, with* a *guilty intention equal to, if not greater than that of the landowners*. *Vt. Accident Ins. Co. v. Fletcher*, 87 Vt. 394, 395, 89 A. 480, 481 (1914). *See also* 1900 Maryland law ("Atkinson himself and all persons claiming under him are prevented by law from setting up the fraud and lack of consideration for the mortgage, by virtue of being in pari delicto. . .) *Econ. Sav. Bank v. Gordon*, 90 Md. 486, 498 (1900).

> **enterprise. The court does not want to touch an unlawful transaction with a ten-foot pole. It always refuses to help carry it out, and it often refuses to pick up the pieces after the enterprise has fallen apart. Courts were set up to enforce the law, not to enforce violations of law."** Zappone v. Zappone, 1993 Conn. Super. LEXIS 597, 8 Conn. L. Rptr. 449, 1993 WL 73674, *5 (Conn. Super. 1993). When the parties are involved in an illegal transaction, the court will leave the parties where it finds them. Funk v. Gallivan, 49 Conn. 124 (1881). The following language of Funk is particularly apropos under the facts that necessarily underlie the Alter Ego Claim, if asserted under Code Section 541: "In such cases the defense of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff. Upon this principle[,] possession acquired … will often avail the parties holding it as a sufficient title … the transaction takes effect from the disability of the parties to assert any right to the contrary. The court does not give it effect, but simply refuses to aid to undo what the parties have already done." Id., at 129. (Emphasis added.)

This holding captures the essence of the doctrine seen in all of the decisions, that this doctrine is not applicable where one party does wrong, as that is frequently the case in litigation—but rather **where the essential nature of the "enterprise" at issue involves all of the participants in *mutually* corrupt undertakings**.[14] It would be hard to think of a situation more ripe for this doctrine than the combination of this case and the companion foreclosure. Two close families are involved—parents and children, immediate families, and second-degree relatives—in a large-scale operation to evade taxes and launder funds. The families are 50/50 owners of the vehicle used, Sixteen Plus, and the putative mortgage holder is a niece whose affairs are totally run by the nephew in charge of the STM portion of the operation. This is a nephew who was indicted, whose accounts saw $8 million per day moving through the same accounts involved in the Sixteen Plus transfer—and to whose address the statements for all five of the STM laundering accounts were sent.

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[14] *See, e.g., Wal-Mart Stores, Inc. v. Crist*, 855 F.2d 1326, 1335-35 (8th Cir. Aug. 26, 1988) ("**'The general rule with respect to illegal contracts is that neither courts of law nor of equity will interpose to grant relief to the parties**, **if they have been equally cognizant of the illegality**.' The level of culpability of the parties was best put, we think, by the district court when it said, **'there is more than enough fault to go around in this case**.' Accordingly, we find that the district court should have found the parties in pari delicto and to grant relief of any sort.") (Emphasis added.)

Moreover, *the application of the doctrine here would not reward or favor either side*.[15] The refusal of this Court to participate would not end up with one or the other of the families in control of the land—it would leave them in a deadlock—with the property still subject to Manal's mortgage, but with no way to resolve the situation without *mutual* agreement. The Court would, in the very truest meaning of the phrase, "leave the parties to their own solutions." They could then solve the problem by immediate settlement, or, for the time being, leave it deadlocked with a 50/50 ownership. Nor could the Hameds and Yusufs end the dispute without Manal's lifting of the lien of the mortgage—making her a fully involved participant in any solution.

Like the state courts, the federal courts routinely apply the doctrine. *See George v. NCAA*, 623 F.3d 1135, 1138 (7th Cir. 2010) where the Court certified a legal issue, applying the doctrine:

> If the plaintiffs' allegations describe an unlawful lottery, do plaintiffs' allegations show that their claims are subject to an *in pari delicto* defense as described in *Lesher*, 496 N.E.2d at 790 n.1, and *Swain v. Bussell*, 10 Ind. 331, 10 Ind. 438, 442 (1858)?

In *Claybrook v. Broad & Cassel, P.A. (In re Scott Acquisition Corp.*), 364 B.R. 562, 573 (Bankr. D. Del. 2007), the court surveys six circuit courts to note that all six circuit courts have approved the doctrine in the bankruptcy context as well, and no other circuit has ever found to the contrary,

> While this Court is sympathetic to the notion that it is not good policy to bar innocent trustees and reward guilty third parties under the *in pari delicto* doctrine, **the six circuit courts decisions noted above (pp. 18-19, supra), with no circuit court decisions to the contrary, make it clear that there is no basis in the Bankruptcy Code for negating what is a clearly valid affirmative defense under state law.** Two recent bankruptcy court decisions unequivocally reaffirm that case law: In re ms55, Inc., 338 B.R. at 893 n.4 (Negating the *in pari delicto* defense in

[15] *In pari delicto* is a common-law affirmative defense mandating that the courts will not intercede to resolve a dispute between two wrongdoers. The *in pari delicto* "doctrine is based on the policy that 'courts should not lend their good offices to mediating disputes among wrongdoers' and 'denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.'" *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C*., 711 F.3d 68, 83 (2d Cir. 2013) (*quoting Bateman at* 472 U.S. 299, 306.)

> bankruptcy cases "is a prescription for judges, in pursuit of equity, to create the bankruptcy law where none exists. . . . Whether subjecting the bankruptcy trustee to an *in pari delicto* defense is good policy or bad, it is good bankruptcy law."); Alberts v. Tuft (In re Greater Southeast Cmty. Hosp. Corp.), 353 B.R. 324, 364 (Bankr. D.D.C. 2006) ("This court will not turn a blind eye to the laws actually written by Congress out of misguided fealty to the imagined policies informing it."). (Emphasis added.)

Similarly, in *Kalisch v. Maple Trade Fin. Corp. (In re Kalisch)*, 2009 U.S. Dist. LEXIS 81805, at *2 (S.D.N.Y. Sep. 3, 2009) the court affirmed the decision of the Bankruptcy Court following a three-day trial in which both sides asserted countervailing views of the doctrine. And in *Fox v. Picard (In re Madoff)*, 848 F. Supp. 2d 469, 476-77 (S.D.N.Y. 2012) a party argued that the Bankruptcy Court exceeded its jurisdiction by striking the fifth issue from their statement of issues on appeal. The issue that the Bankruptcy Court struck was "[w]hether the Bankruptcy Court erred by not determining that the trustee . . . was barred by the doctrine of in pari delecto [sic] from pursuing the claims asserted by the Appellants in their complaints in Florida federal court . . . ." The striking order was vacated on procedural bases, and the application of the doctrine was allowed.

Minority view

There really is no minority view in this context. There are occasions when the doctrine is subject to its own exceptions (as discussed below) or where it comes into conflict with state workers' compensation or other administrative policies (as in the Maine case above.) In tort actions, it has also been obviated by rules applicable to contribution or indemnification among joint tortfeasors as against an innocent third party. But those decisions do not apply where, as here, the issue is a contract or other instrument created as part of the mutual, criminal tax scheme. In fact, it is particularly applicable to tax avoidance schemes—regarding which there are many decisions. An excellent example is *Coudert v. Hokin*, No. 12-CV-0110 (ALC), 2017 U.S. Dist. LEXIS 227044, at *12-14 (S.D.N.Y. Aug. 23, 2017) where the court considered just such a scheme:

> Plaintiff argues that Defendant's counterclaim is unenforceable as a matter of law because the claim relies on void loan instruments. Pl's Br. at 14-19. According to Plaintiff, **the loan instruments that Defendant submitted were only executed by the parties to avoid tax liability which**

> **implicates the doctrine of *in pari delicto.*** *Id.* Defendant responds that the loan instruments are fully executed documents not susceptible to parol evidence, therefore the Court should disregard any allegations of a tax evasion scheme. Def's Br. at 11-14. "New York's parol evidence rule provides that evidence outside the four corners of the document is admissible to modify or contradict a written agreement only if a court finds an ambiguity in the contract." *Kamdem-Ouaffo v. Pepsico, Inc.*, No. 14-CV-227, 2015 U.S. Dist. LEXIS 28497, 2015 WL 1011816, at *9 (S.D.N.Y. Mar. 9, 2015) (citation and internal quotation marks omitted). **"Nevertheless, parol evidence may be offered to show that a writing, although purporting to be a contract, is, in fact, no contract at all."** *Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 340, 839 N.Y.S.2d 493 (1st Dep't 2007) (citations and internal quotation marks omitted). New York Courts have permitted parol evidence **to determine whether the writing is in fact a contract or tax evasion scheme where the parties to the initial loan transaction are identical litigants before the Court, the beneficiary of the tax scheme has not disappeared, and there is no third party whose interests are involved.** *Greenleaf v. Lachman*, 216 A.D.2d 65, 66, 628 N.Y.S.2d 268 (1st Dep't 1995). *See Polygram*, 42 A.D.3d at 340 (1st Dep't 2007) (denying summary judgment because questions of fact existed as to whether note was a "sham transaction"); *Dayan v. Yurkowski*, 238 A.D.2d 541, 541, 656 N.Y.S.2d 689 (2d Dep't 1997) ("parol evidence offered by defendant may be considered to show that note, while valid on its face, was never intended to take effect"); *Belknap v. Dean Witter & Co., Inc.*, 92 A.D.2d 515, 517, 460 N.Y.S.2d 1005 (1st Dep't 1983) (an incomplete contract falls within one of the limited exceptions to the parol evidence rule). The intent of the parties in issuing the notes is an issue for the trier of fact and parol evidence would be admissible at trial to show whether the parties intended the loan instrument to be a binding debt. If the trier of fact finds that the promissory notes were executed for the purpose of avoiding tax liability it would implicate the doctrine of *in pari delicto. Cohen v. Cohen*, 34 Misc.3d 1207[A], 2012 NY Slip Op 50012[U], 943 N.Y.S.2d 790 (Sup. Ct. Suffolk County 2012). (Emphasis added.)

Counsel can find <u>*no*</u> decisions in which <u>*any*</u> court ever refused to apply the doctrine where "the trier of fact [could] find[] that the promissory notes were executed for the purpose of avoiding tax liability." *Id*.

Exceptions to the Doctrine

Although *Banks* does not require an analysis of exceptions to a rule under consideration, it would be less than forthcoming to avoid mention of the exceptions.

> *In pari delicto*, "Latin for 'in equal fault,' . . . is a general rule that courts 'will not extend aid to either of the parties to a criminal act or listen to their complaints against each other but will leave them where their own act has placed them.'" "The general rule of in pari delicto, however, does not apply in certain discrete circumstances. For example, if . . . the parties are not considered to be in truly equal fault." This *in pari delicto* exception is further supported by Williston, which states that "illegal bargains may be enforced, at least to some extent, under certain circumstances . . .

> . Accordingly, there are exceptions to the general rule that an executed transfer cannot be set aside . . . ." One such exception applies when "parties not *in pari delicto*." As such, under the doctrine of *in pari delicto*, a court may return consideration paid toward an illegal contract when the parties are not equally at fault.

Geronta Funding v. Brighthouse Life Ins. Co., No. 380, 2021, 2022 Del. LEXIS 257, at *32 (Aug. 25, 2022). Thus, it would be accurate to say that even if parties are *in pari delicto* because it is an equitable doctrine, and even if the illegal bargain will not be enforced, a party that has provided ***actual*** funds ***may*** be allowed to recover them. That would be an almost automatic consequence in this action. Here and in the related cases, the Hameds and Sixteen Plus will seek to show that none of Manal's funds went to Sixteen Plus—all of the funds sent to Sixteen Plus were skimmed and placed in Isam's account by Wally and Fathi. But if, as that question is examined, it can be affirmatively and clearly shown by the defendants that some small amount of Manal's or Isam's funds were coincidentally included, that amount could be returned.

It does not apply in most antitrust actions and "the *in pari delicto* doctrine bars claims against co-conspirators for negligence" as opposed to their intentional acts. *Kirschner v. Large S'holders (In re Tribune Co. Fraudulent Conveyance Litig.),* 10 F.4th 147, 168 (2d Cir. 2021)(New York and Illinois.) These exceptions are not applicable here.

Agents

Manal Yousef claims that almost all of her acts were undertaken by her brother Isam Yousuf as her agent. Thus, her agent, acting for her, was one of the central co-conspirators with regard to the note and mortgage. A bit should, therefore, be said here about agency and imputing the acts of agents *in pari delicto*. In every jurisdiction to have considered the issue, the acts of an agent are imputed to the principal UNLESS that agent is acting adversely to the principal's interests. This is referred to as the 'adverse interest exception' to liability for a principal under the in pari delicto doctrine. *See, e.g., Claybrook v. Broad & Cassel, P.A. (In re Scott Acquisition Corp.)*, 364 B.R. 562, 568 (Bankr. D. Del. 2007)(Delaware bankruptcy, under Florida law.)

> the acts of an agent are imputable to the principal when the agent is acting on behalf of the principal rather than in furtherance of the agent's own interests. See Gee, 625 So.2d at 2. Therefore, an in pari delicto defense that applies to an agent may impute to the agent's principal. Id.
>
> However, under the *adverse interest exception to the in pari delicto defense*, the wrongful acts of an agent are not imputed to the agent's principal when the agent's actions are adverse to the principal's interests. Id. at 2-3; Wight v. BankAmerica Corp., 219 F.3d 79, 87 (2d Cir. 2000). This exception is only applicable when the agent is acting entirely adverse to the principal, and the principal is in no way benefitting from the agent's actions. Beck, 144 F.3d at 736. . . .(Emphasis added.)

See also, Liquidating Tr. of App Fuels Creditors Tr. v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC), Nos. 09-10343, 11-1041, 2012 Bankr. LEXIS 4291, at *11 (Bankr. E.D. Ky. Sep. 14, 2012)("if the agent was acting adversely to the interests of its principal, then the agent's bad acts are not imputed to the principal." If an adverse interest exception is present, the *in pari delicto* defense will not lie.) Absolutely nothing suggests Isam was acting against Manal's interests, but, again, that is an issue of fact for later.

The best rule for the USVI

Clearly the doctrine must be recognized. It is vastly accepted; and (excusing the pun) it is the equitable thing to do here—and it removes the Court from the illegal bargain. *In pari delicto* is as close to black letter law as any equitable doctrine can be nowadays.

IV. Points in Hamed's motion which remain unaddressed—and the effect of Isam's failure to respond

For the most part, Isam ignores the content of Hamed's motion. Thus, Isam does not address the following factual and legal assertions:

A. At page 1:

i. Isam Yousuf is an American citizen.

ii. The records at issue are *solely* his own banking statements and records for accounts *titled only in his name*, including those at the Banque Francaise Commerciale ("BFC") on the island of St. Martin (French).

iii. These accounts are central to this action.

B. At page 2:

i. The accounts were the source of the alleged loan from Isam's sister, Manal.

ii. Isam repeatedly references these accounts and relies on assertions about the source of funds in his bank accounts in his defense.

iii. Isam, through counsel, has expressly refused to identify all his accounts.

C. At page 3:

i. Isam has refused to provide documents in response to Interrogatory 1.

ii. Counsel stated Isam would not provide: "A description of the rate of pay of Isam, and his percentage of stock ownership in Island Appliances"

D. At pages 4-7

i. Isam will not "list all financial accounts. . .that are fully or partially in [his] name in any corporation, partnership, or business association in which [he] owns more than 5% interest, or as to which [he is] a beneficiary-- from January 11, 1995 through December 31, 2000.

ii. Other documents (all provided to Attorney Hymes as part of the negotiations to identify the accounts and obtain statements) show Isam Yousuf had ***many*** more accounts which he did not disclose. He had the two 1995 BFC accounts mentioned. It is also clear from those documents that he had a major account in Amman[16] through which he transferred millions.

iii. On November 7, 2022, Attorney Hymes refused either identification of Isam's accounts or provision of his bank statements. Exhibit 1. Hymes stated, at 2-3: "Access to the financial records of Island Appliances and my clients will not be granted." In addition, he refused to even identify any foreign accounts held by Isam during that period: "You have asked for a Hamed 2nd Motion to Compel to Isam Yousuf Page 6 description of all foreign bank accounts in his name during the period 1995 to 2000.

iv. The central factual issue in this series of cases is starkly black and white: Whose funds were really provided to Sixteen Plus? Did Manal Yousef's father deposit $4.5 million into Isam Yousuf's BFC accounts over a seven-year period as he alleges, or was the money in those accounts simply skimmed funds put there by Wally and Fathi over a very short period from April 1996, onwards? In other words, were Manal's funds loaned to Sixteen Plus to buy the subject land, or were only Hamed's and Yusuf's funds being deposited and transferred to Sixteen Plus to buy the land?

v. The V.I. Supreme Court having adopted it. . .Restatement 3d of Property: Mortgages, § 1.2, is clear—that where sham notes and the associated mortgages arise without any real value having been provided by the putative loaning party (i.e., undertaken without actual funding for some other purpose than a real loan) they are, obviously, unenforceable.

E. At. Page 8-10:

i. Hamed already has extensive investigative proof to support his belief that the Isam accounts will identically track the other three STM BFC laundering accounts—as described in two separate French investigations. (The parties not only have the details of the French investigations, but also some

[16] Exhibit 8 to the Motion, at page 3 of 11, describes a document in these Isam Yousuf banking records. It discloses Isam's Cairo Amman Bank account number and SWIFT code, also listing (yet another) undisclosed residential address for Isam, in Amman.

> -a copy of a transfer order dated March 11, 2002 in an amount of $25,000 (USD) from account No. 40606354190 from Island Appliances **in favor of ISAM YOUSUF residing on Garden Street, Amman, Jordan (account No. 0250317114200 drawn on the Cairo Amman Bank (Jordan), swift code: CAAB JO AM).** (Emphasis added.)

of the corresponding bank statements of those other 3 laundering accounts opened in 1996 "c/o Isam Yousuf", addressed to "Island Appliances".)

ii. Prior to April 1995, the Isam accounts will show no total of funds anywhere even near $1 million, much less $4.5 million. There will certainly be no pre-1995 large amounts in the two 1995 Isam accounts from which the subject loan was actually made. Then sudden, unattributed cash deposits.

iii. Just before the first, February 1997, $2 million 'loan' was needed to purchase the Diamond Keturah land on St. Croix, the French Banking Commission was able to track the same 1995 Isam account transferring the loan funds as receiving $1.5 million of large, unattributed cash deposits in "10 consecutive deposits" by Isam to Isam. [Original] Exhibit 7, chart on page 11. This was just days before the first $2 million transfer to Sixteen Plus out of that same 1995 Isam account.

iv. The St. Martin Judicial Police were able to obtain the Isam BFC account statements, and found that on one day, $8 million flowed into and then out of one of the same two accounts used for the Sixteen Plus transfers.

F. At pages 11-end

In the balance of his opposition, Isam does not address (1) the applicable rules, (2) any of the legal arguments set forth, or (3) the case law regarding "control" of the documents at issue. He (4) does not contest that he has received the two French investigations (5) or what they demonstrate. He (6) does not dispute the statements in those investigations that he had ***many*** bank accounts he has not disclosed here, (7) that he had a major, undisclosed account in Amman, Jordan, and an address there he has not disclosed either, (8) that he was a signor on the Hamdan Diamond account, (8) that $8 million went into and out of one of these accounts in one day—or (9) anything else.

This may be a good strategy, considering the weight of the facts and law; to fling vitriol and gyrate wildly about to avoid the facts and law. Nonetheless, Hamed asks the Court to deem these points conceded for this Motion—particularly as to Isam's lack of any discussion or argument refuting his legal "control" of his own bank statements.

V. Conclusion

Isam's assertion of a unilateral version of "unclean hands" without reference to the degree of fault of the other parties is both inapplicable and vastly premature. It should, therefore, be ignored for the time being. When the time comes and there is sufficient evidence from discovery to find facts, unclean hands will have to be weighed against the plenary judicial response of *in pari delicto*. But discovery must proceed.

Isam has failed to respond to most of the factual and legal issues in the Motion—thus the Motion should be deemed conceded

The Motion should be granted.

Counsel for Hisham Hamed

Dated: December 26, 2022

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CERTIFICATE OF SERVICE

I hereby certify that, discounting captions, headings, signatures, quotations from authority and recitation of the opposing party's own text, this document complies with the page and word limitations set forth in Rule 6-1(e) and that on **December 26, 2022**, I served a copy of the foregoing by email and the Court's E-File system, as agreed by the parties, to:

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/s/ Carl J. Hartmann

EXHIBIT 11

From: Carl Hartmann
To: "Jim Hymes"; "Rauna Stevenson"
Cc: "Kim Japinga"; "Joel Holt"; "Charlotte Perrell"; Stefan Herpel; "Pamela Bayless"
Subject: Additional Rule 37 items from 2nd req to Admit and existing Rule 37 Request as to earlier Manal Responses in 65/342
Date: Wednesday, October 5, 2022 8:47:00 PM

Jim:

I would like to get a date and time to discuss the topics set forth in my Rule 37 notice of Tuesday, September 20, 2022 at 5:15 PM (which appears below in this email.) I am also providing you with two additional topics regarding today's responses to 2nd req to admit. Finally, I am waiting for a date and time as to the Isam/Jamil responses, but feel that because of the volume of issues, Manal's should be dealt with separately.)

Additional Manal Topics:

1. RFA 16

> Request to Admit 16
> Admit or Deny that you have been informed that you are or may be a person of interest, a target, or indicted in a pending or potential criminal matter.
> Response:
> DENY that anyone has informed her that she may be a person of interest, a target, or indicted in a pending or potential matter except from this request to admit which, if it is threatening a crime, is an impermissible form of discovery, criminal in and of itself, and an unethical form of discovery to be conducted by the attorneys in this jurisdiction.

Hamed's position:

This is an unacceptable response as it incorrectly applies the applicable rule and is unresponsive to the question asked. Your client is alleged to be actively, presently participating in the ongoing use of a sham note and mortgage to obtain funds. One of the other defendants alleged to be participating with her has invoked the 5th Amendment. By doing so he asserts that he has been indicted, targeted, made a person of interest, is under investigation *or reasonably fears criminal action* against him arising out of the prosecution of this note and mortgage. It is within ALL ethical boundaries to inquire as to whether your client will or may also assert any reasonably possible defense such as taking the 5th. As you know, if I ask whether she intends to take the 5th, she can reply that she has not made up her mind. But she cannot refuse to answer this request -- a factual question about what she knows or perceives when answering. Whether she knows something or reasonably fears it is a factual inquiry leading analysis and response to a defense. Thus, inquiry into the *factual predicates of such a potential defense is NOT* presenting, participating in presenting, or threaten *to present criminal charges* (2) *solely* to obtain an advantage in a civil matter.

I have not brought or threatened to bring criminal charges—in fact, the only ones who brought criminal charges against another party in these related matters involved a Yusuf criminal charge against Hamed. As I have told Atty. Perrell, we do not foresee any criminal reference or complaint coming from Hamed in this matter, as that would grossly interfere with the civil action and further delay a case that has been efficiently delayed long enough already—but I also need to be very clear as to what is being claimed by Mr. Yusuf regarding the 5tth Amendment and whether there is some pending action or whether this is a fear, and if so—what that fear involves--since he is fully transactionally immunized up to the date of the plea agreement. So, first, a discovery question as to the factual predicate of a very realistic constitutional defense is not in any way threatening or participating in the *presentation of criminal charges*. Second, even if your client apprehends this, the discovery has a reasonable and factually necessary inquiry into an already asserted defense at its base. Thus, it is certainly not *solely* for such a purpose.

You can continue with this meritless assertion by not supplementing and Judge Brady will then be asked to compel a response. And, might I add, that if Manal later asserts the 5th, we will seek sanctions for the obvious, dilatory and wanton evasion of Rule 26 in this present non-response. That is a topic for a Rule 37 conference discussion.

2. RFAs 19-22

Request to Admit 22
Admit or Deny that at the time you are answering this request if you had the appropriate visa, you are not prevented from physically attending a trial in this matter in the USVI by any legal or other type of impediment.
Response:
ADMIT, but DENIES that she has been issued an appropriate visa to travel despite having made a request to do so, and for the reasons set forth in her Responses to Request to Admit Nos. 19, 20, and 21, above.

Hamed's Position:

While the Department of Homeland Security (DHS) announced on April 21, 2022 that it was temporarily extend the temporary Title 19 requirements and continue to require non-U.S. travelers entering the United States via land ports of entry and ferry terminals at the U.S.-Mexico and U.S.-Canada borders to be fully vaccinated against COVID-19 and provide related proof of vaccination upon request—this is not expected to continue after the first of the year in 2023. One cannot respond "Admit, but Denies….". However, I understand her intent.. Thus, I will agree to revise the questions to read "Unless she is prevented from entry into the US or the Territory due to COVIS restrictions……" If she will then answer we can save time and that avoid that portion of the Rule 37 conference.

Carl

ps. I'd like to add that I have never, in 42 years of practice, advised a client to file a

criminal complaint or make a reference to a prosecutorial body—although several adverse parties have been referred (sua sponte by the judge) for criminal contempt in civil cases where I was counsel. Nor have I filed or been the subject of disciplinary proceedings. I understand the practice is changing these days….but your assertion is disappointing.

CARL J. HARTMANN III
EMAIL: CARL@HARTMANN.ATTORNEY
TELEPHONE: (616) 416-0956
WEBSITE : WWW.HARTMANN.ATTORNEY

From: Carl Hartmann <carl@carlhartmann.com>
Sent: Tuesday, September 20, 2022 5:15 PM
To: 'Rauna Stevenson' <rauna@hymeslawvi.com>; 'Jim Hymes' <jim@hymeslawvi.com>
Cc: 'Charlotte Perrell' <Cperrell@dnfvi.com>; sherpel@dnfvi.com; pbayless@dnfvi.com; 'Joel Holt' <holtvi@aol.com>; Kim Japinga <kim@japinga.com>
Subject: Rule 37 Request as to 2nd and 3rd Interrogatory Responses in 65/342

Jim:

Pursuant to Rule 37, I would like to schedule a conference to discuss the following—in addition to the items discussed in my prior email.

Interrogatories #2

Interrogatory 17:
Describe in detail the full response to Interrogatory #9, unless you had no such accounts, none were in your name or no such accounts existed where you were a beneficiary -- for the stated time period. If there were no such accounts, state, as agreed "I had, had in my name or was the beneficiary of no such accounts for that time period."

RESPONSE:
A copy of my Power of Attorney to Jamal has been produced, as have copies of my passports. I have no documents relating to my receipt of funds from Sixteen Plus. My brother gave me cash from time to time as I needed it.

Hamed Position: This is unresponsive. It seeks any accounts in her name or as to which she is/was a beneficiary. I want to know where and on what account numbers I need to get local subpoenae for. Account name, institution and account number – and years open. If her response is "from 1995 to the present I have had no bank or other accounts and was the beneficiary of none—that is false…as she was a beneficiary on those of at least ISam or Island Appliances. If here response is I was a beneficiary of accounts held by ISAM and had none of my own, then she has to make reasonable inquiry of Isam to get them.

Interrogatory 19:

EXHIBIT
12

From: Rauna Stevenson <rauna@hymeslawvi.com>
Sent: Thursday, December 1, 2022 12:00 PM
To: Carl Hartmann; Carl@hartmann.attorney; Joel Holt
Cc: Jim Hymes
Subject: FW: Sixteen Plus v. Manal Yousuf; MMY v. Sixteen Plus // Bank records
Attachments: 2022-12-01_Hymes to Hartmann re bank records - MMY-v-16Plus - Foreclosure.pdf

[redacted]

From: raunastevenson@gmail.com <raunastevenson@gmail.com>
Sent: Thursday, December 1, 2022 12:54 PM
To: Carl Hartmann <carl@carlhartmann.com>; Carl@hartmann.attorney
Cc: Jim Hymes <jim@hymeslawvi.com>; Joel Holt <holtvi@aol.com>
Subject: Sixteen Plus v. Manal Yousuf; MMY v. Sixteen Plus // Bank records

Dear Attorney Hartmann: I have attached for your reference and file a signed, scanned copy of the following letter:

December 1, 2022

PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

Carl J. Hartmann, III, Esq.
carl@carlhartmann.com
carl@hartmann.attorney

Re: ***Sixteen Plus v. Manal Yousuf***
SCVI/STX Civil No. SX-16-CV-65

MMY v. Sixteen Plus
SCVI/STX Civil No. SX-17-CV-342

Dear Attorney Hartmann:

[redacted]

In the interim, I can advise you that my clients are willing to provide you with access to the records of the Island Appliances accounts at BFC Bank on the French side of St. Maarten. This offer is made with the hope that this will resolve the Motion to Compel and move the case along.

Please provide me with your thoughts and advice in these regards.

Sincerely yours,

JLH:rs

cc: Joel H. Holt, Esq.
holtvi@aol.com

c:\YOUSUF\HAMED\2022-12-01 hartmann

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EXHIBIT
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ADMITTED: USVI & DC

December 6, 2022

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RE: Basis for Request to STM Police and Prosecutor

Jim:

This letter is in response to your letter of today, December 6, 2022. I write to try to assuage your concerns and give you guarantees that neither the Hameds (nor counsel) have ANY interest in any criminal proceedings.

Perhaps the draft of the proposed order is unclear—I have changed the language to be more so. Hamed has no interest in police and prosecutorial records regarding Isam. The sole target of the proposed order is a Known, well-defined collection of **Isam's own banking records for the period from 1996 to 2004**—to the extent that the police and/or prosecutor have those records, as already supplied to them from BFC.

Thus, I have changed the operative language to make this clear.

In 2001-2004 several investigations were done on STM into the records of Isam and Island Appliance: (1) by the French Banking Commission, (2) by the St. Martin Judicial Police Branch, (3) and by the US DOJ/FBI. As part of that investigation (as attached to and shown in the motion at Exhibit 7, 8, 9 and 10) *a set of Isam's banking records up to that date were provided to the police and prosecutor*. Exhibit 9 is the subpoena from the police/prosecutor to the bank, BFC. Exhibit 10 (July 3, 2002) is the BFC letter confirming that Isam's and Island Appliances documents were collected, copied and sent to the police prosecutor. Exhibit 8 is the (May 14, 2003) Police report on that investigation relating their findings.

All that Hamed is asking Isam to do is obtain permissions to seek item #2—Isam's own BFC back account records for 1996-2004 that have already been collected and sent. No police records, period. We ask for a letter of permission because all three (BFC, the police and the prosecutor) are expressly known to have *that specific set of documents*—because of what BFC said in its letter—that they had been collected and sent.

Hamed is not seeking any other records, information or actions. And the letter will be specific as to what it seeks—*you and I will jointly draft it*. Moreover, these matters are LONG, LONG over on STM. These are acts in 1996-2004 which have been fully investigated there. Time limits for any prosecution have long passed. There is no criminal jeopardy there for those old records.

I note that nobody, from here or our St, Martin's counsel's office has had any contact or communications with BFC, the police or the prosecutor on these matters. All of the referenced documents are from either Fathi Yusuf's counsel in discovery, the FBI (back in he 2000's or the DOJ (same). Nor have the Hameds or any of their counsel had any contact or communications with USVI police, US law enforcement, the DOJ or any other entity with regard to criminal matters. As was recently stated in Hamed's *Third Motion to Compel as to the 5th Amendment*:

1. Hamed is NOT hostile to Yusuf taking the Fifth if he wishes—or Isam, Jamil or Manal. That motion did not seek to stop assertion of the right.
2. And, at page 4, Hamed asserts "He [Fathi] has been informed that Hamed **does not** know of, **nor will he seek** any such prosecution against Fathi for these matters."

Certainly such a representation would not be made falsely to a Court, and if, after stating this, Hamed was found to have attempted any such activity, it would be suicidal with regard to Judge Brady,

Finally, I note that the stipulation *is contained* in the proposed order—there are two signature lines we would execute before proffering it to Judge Brady for entry. If you wish to have a separate document, we will willingly execute it.

Thank you,

Carl J. Hartmann III