

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

**FATHI YUSUF’S OPPOSITION TO HISHAM HAMED’S THIRD MOTION TO
COMPEL AS TO FATHI YUSUF’S FIFTH AMENDMENT ASSERTIONS
IN DISCOVERY OR, IN THE ALTERNATIVE, TO PRECLUDE TESTIMONY**

INTRODUCTION

In this derivative action, Hisham Hamed, on behalf of Sixteen Plus Corporation, seeks to invalidate a mortgage given by Sixteen Plus Corporation to Manal Yousef in 1997. Hisham Hamed alleges that funds from the Hamed/Yusuf partnership were given to defendants, who are relatives of Fathi Yusuf living in St. Martin, and then sent back to the Virgin Islands disguised as a loan from Manal Yousef to the corporation. Hamed further alleges that the mortgage given to Manal Yousef as collateral for that loan is unenforceable because she did not actually loan her own money to Sixteen Plus.

The interrogatories at issue in this motion seek voluminous and detailed information regarding the laundering of partnership money from 1996 to 2001. United Corporation, Fathi Yusuf, Mike Yusuf, Wally Hamed, Waheed Hamed, and Isam Yousuf were charged with tax evasion in a September 2003 federal indictment relating to those tax years. *See Exhibit A—Indictment.* United pled guilty to a single count in the indictment and paid \$10,000,000 in restitution. The charges against Mike Yusuf, Wally Hamed and Waheed Hamed were dismissed, and the charges against Isam Yousuf were never pursued.

Because the interrogatories went well beyond the narrow issues relating to the validity of the 1997 loan and mortgage, and sought information relating to illegal laundering of money over a six-year time period, Yusuf and his counsel were naturally cautious about answering the interrogatories. In addition to standard objections such as overbreadth, Yusuf asserted the Fifth Amendment privilege against self-incrimination in his objections. Notwithstanding the assertion of the Fifth Amendment privilege, Yusuf provided “subject to the objections” answers to some of the interrogatories. Yusuf does contest the operative allegations of this case that \$4,000,000 in partnership funds were provided to Isam Yousuf in St. Martin, and that these funds were the source of the loan to Sixteen Plus that was secured by the mortgage given by Sixteen Plus to Manal Yousuf. Yusuf’s position has always been that the \$4,000,000 loan to Sixteen Plus was a genuine loan by Manal Yousef of money that her father Mohamad Hamdan had given her as a gift (what in American law would be called a “gift inter vivos”). He will further testify that partnership earnings sent to St. Martin to be deposited into his account, Waleed Hamed’s account, the Hamdan Diamond Account and any other accounts in St. Martin were sent there temporarily, with the objective of ultimately transferring them to accounts held in Jordan, in the Middle East. He will

testify that there was no tax-avoidance scheme that involved sending millions in partnership money to St. Martin with the intent of repatriating it back to the Virgin Islands.

Yusuf's "subject to answers" that have already been provided in response to several of the interrogatories encompass this scope of testimony, and are sufficient. The attempt to obtain a comprehensive and detailed accounting of money laundering activities in the 1996 to 2001 time frame are far afield of the issues in this case. Those interrogatories are improper not only on Fifth Amendment privilege grounds but also on overbreadth and relevance grounds. The Motion to Compel should be denied in its entirety.

ARGUMENT

The standard for a court to overrule the assertion of the privilege against self-incrimination is very difficult to meet. The Court may do so only if it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) *cannot possibly* have such tendency to incriminate." *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (emphasis in original) (citation and internal marks omitted). This is the test used when a party in a civil case seeks to override the assertion of the privilege by another party or a witness, in response to discovery requests. *See Convertino v. United States DOJ*, 795 F.3d 587, 592 (6th Cir. 2015) (affirming district court's denial of motion to compel under *Hoffman* test); *DS-Concept Trade Inv. LLC v. Atalanta Corp.*, 2021 WL 5203578, *1-2 (D.N.J. Nov. 9, 2021) (affirming Magistrate-Judge's denial of a motion to compel under *Hoffman* standard); *Hydrocarbon Trading & Transp. Co. v. Am. Int'l Airways, Inc.*, 1987 WL 13384, *1-2 (E.D. Pa. July 1, 1987) (denying motion to compel under *Hoffman* test).

The trial court must apply the *Hoffman* test from the facts as well as from its "personal perception of the peculiarities of the case." *Hoffman v. United States*, *supra*, 341 U.S. at 487. "If

[the trial court] decides that no threat of self-incrimination is evident, the defendant then bears the burden of showing the danger of incrimination.” *Baker v. Limber*, 647 F.2d 912, 917 (9th Cir. 1981) (citation omitted). So contrary to Hamed’s statement that Yusuf has the burden to show that his reliance on the Fifth Amendment is justified (Hamed’s Motion to Compel at p. 19), *Hoffman* and the federal circuit and district cases that have applied it make clear that Yusuf would only assume that burden if the Court determines that it is “perfectly clear, from a careful consideration of all the circumstances in the case, that [he] is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate.”

Here, the Fifth Amendment privilege was asserted out of an abundance of caution in responses to very broad discovery requests seeking detailed information about money laundering spanning the years 1996 to 2001. Yusuf proceeded to answer some of the interrogatories with “subject to” answers. As to those interrogatories for which “subject to” answers have been provided, what is really at issue is not the availability of the Fifth Amendment protection against self-incrimination but instead the sufficiency of Yusuf’s “subject to” answers. With respect to other interrogatories for which “subject to” answers were not given, they are not only objectionable on Fifth Amendment privilege grounds, but also on overbreadth and relevance grounds. They go far beyond the central issue in this case, which is the allegation that the \$4,000,000 in loan money from Manal Yousef to Sixteen Plus was not her money, but was instead partnership money that was provided to her in advance of the loan. Yusuf will proceed to discuss the interrogatories at issue in this motion to compel.

Interrogatory 1.

Interrogatory 1 seeks an accounting of all Plaza Extra supermarket revenues deposited or laundered into St. Martin during the years 1996 to 2001. Yusuf objected on the grounds of

overbreadth because the loan installments were “made in February and September 1997,” and he also invoked the Fifth Amendment privilege. But he proceeded to answer notwithstanding those objections by limiting his response to the period in 1996 and 1997 preceding the February 1997 loan disbursement of \$2,000,000 and the September 1997 loan disbursement of \$2,000,000. His response stated, as to that period:

Sixteen Plus did not receive Plaza Extra funds relating to the loan installments and thus did not have a role in the movement of any Plaza Extra funds. Plaza Extra did not have sufficient funds to purchase the Diamond Kathura[h] property at the purchase price of \$4.5 million and thus, would need to borrow for the purchase.

See Hamed’s Third Motion to Compel, at p. 12 (quoting interrogatory and response). That is a sufficient answer to this interrogatory.

Interrogatory 2.

Interrogatory 2 seeks an accounting of all Plaza Extra supermarket revenues deposited or laundered from St. Martin to the Virgin Islands during the years 1996 to 2001. Yusuf made the same objections in response to this interrogatory as Interrogatory 1, and gave the same “subject to” answer. The gist of that answer is Yusuf’s denial that the loan proceeds of \$4,000,000 consisted of Plaza Extra revenues that were sent to St. Martin and then returned to Sixteen Plus under the guise of a loan. *See* Hamed’s Third Motion to Compel, at p. 12 (quoting interrogatory and response). That is a sufficient answer to this interrogatory.

Interrogatory 3.

Interrogatory 3 seeks an accounting of all Plaza Extra supermarket revenues deposited or laundered from St. Martin to Jordan during the years 1996 to 2001. Yusuf made the same objections in response to this interrogatory as Interrogatory 1, and gave the same “subject to” answer. *See* Hamed’s Third Motion to Compel, at p. 12 (quoting interrogatory and response). That is a sufficient answer to this interrogatory.

Interrogatory 24.

This interrogatory asks Yusuf to comprehensively “detail all facts” supporting his assertion of the Fifth Amendment in response to interrogatories 1, 2 and 3, including but not limited to “dates, persons, places, times, acts and documents.” Yusuf interposed a number of objections to this interrogatory, including work product protection, the attorney client privilege, and the Fifth Amendment privilege against self-incrimination. *See* Hamed’s Third Motion to Compel, at pp. 13-14 (quoting interrogatory and response). Since Yusuf’s “subject to” answers are sufficient, this interrogatory is irrelevant and overbroad, and cannot lead to the admissibility of relevant evidence. But even if the Court somehow concluded that the above answers were not sufficient, the U.S. Supreme Court held in *Hoffman* that a witness cannot be required to prove the hazard involved in answering question for which he or she has invoked the Fifth Amendment privilege. To do so, the High Court said, would compel him or her “to surrender the very protection which the privilege is designed to guarantee.”

Interrogatories 6 and 7.

These interrogatories ask Yusuf to provide intricate details of all acts he has committed for which he received immunity from prosecution under the plea agreement in the criminal case. *See*

Hamed's Motion to Compel at pp. 14-15 (quoting from interrogatories 6 and 7 and Yusuf's responses). These are the equivalent of an interrogatory which asks a party "to describe in detail all criminal acts the party committed but for which he or she was never criminally charged." Interrogatories 6 and 7 are absurd in their overbreadth, overreach and irrelevance and go well beyond the issues in this case regarding the legitimacy of the \$4,000,000 loan to Sixteen Plus by Manal Yousef and the enforceability of the mortgage given to her as collateral for that loan. The motion to compel should be denied as to these interrogatories not only on Fifth Amendment privilege grounds, but also because they are overbroad and not reasonably calculated to lead to discovery of relevant evidence.

Interrogatory 8.

This interrogatory essentially asks whether any partnership monies that went to St. Martin or Jordan were repatriated to the Virgin Islands, Puerto Rico or the mainland U.S.. See Hamed's Motion to Compel at pp. 15-16 (quoting from interrogatory 8 and Yusuf's response). As Yusuf makes clear in his "subject to" answer to interrogatories 1, 2 and 3, none of the \$4,000,000 in loan money was comprised of Plaza Extra funds that had been moved to St. Martin or Jordan. The purpose of sending money to St. Martin was not to return it to the Virgin Islands, but instead to get it to the Middle East. Insofar as the interrogatory goes beyond that, it is overbroad, not reasonably calculated to lead to the discovery of relevant evidence, and violative of the Fifth Amendment privilege. There is nothing in the indictment about repatriation of supermarket revenues from St. Martin to Puerto Rico, the Virgin Islands or the mainland U.S. As such, it is not "perfectly clear, from a careful consideration of all the circumstances in the case, that...the answer(s) cannot possibly have such tendency to incriminate." The Fifth Amendment was properly invoked and the motion to compel an answer should be denied as to this interrogatory.

Interrogatories 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

These eleven interrogatories are follow-ups to interrogatories 6 and 7, and seek an enormous amount of additional detail regarding the matters inquired of in those two interrogatories. *See* Hamed's Motion to Compel at pp. 16-19 (quoting from interrogatories 9-19, and Yusuf's response to each). Since interrogatories 6 and 7 are absurdly overbroad and not calculated to lead to relevant evidence regarding the central allegations of the Complaint – i.e., that \$4,000,000 in loans made by Manal Yousuf to Sixteen Plus were actually comprised by partnership monies and hence that the mortgage given to her by the corporation should be invalidated – it follows *a fortiori* that these follow-up interrogatories are likewise improper, with the exception of Interrogatory No. 15. The motion to compel answers to these ten interrogatories should, therefore, also be denied.

Specifically, as to Interrogatory No. 15, it seeks information relating to interest payments made and is sufficiently narrow insofar as it just asks about the three interest payments. Further, Yusuf has already answered interrogatories on this issue to the best of his knowledge and recollection. *See* **Exhibits B** – Yusuf's Responses to 2nd Interrogatories, #17, **Exhibit C** – Yusuf's Responses to 4th Interrogatories, #25, **Exhibit D** – Yusuf's Responses to First Interrogatories (342 Case), #2, **Exhibit E** – Yusuf's Responses to 1st Interrogatories, #4.

CONCLUSION AND RELIEF REQUESTED

Rather than propound interrogatories narrow tailored to the allegations of the Complaint that the \$4,000,000 loan from Manal Yousuf to Sixteen Plus in 1997 was in reality partnership monies that has been provided to her, and that the mortgage given to her is therefore unenforceable because not backed by genuine consideration, Hamed chose to propound interrogatories seeking a plethora of detailed information about money laundering activities occurring over a six-year

period. It is self-evident from even a cursory examination of these interrogatories that the Court cannot conclude that it is “perfectly clear, from a careful consideration of all the circumstances in the case, that [Yusuf] is mistaken [in his reliance on the Fifth Amendment], and that the answer(s) cannot possibly have such tendency to incriminate.” In addition, the interrogatories are impermissibly overbroad and not reasonably calculated to lead to the discovery of relevant evidence. Yusuf has provided “subject to” answer to some of these interrogatories that amount to a denial of the allegations of the Complaint that the \$4,000,000 loan to Sixteen Plus in 1997 consisted of partnership monies that had been given to Manal Yousef. There is nothing about his objections to answering interrogatories seeking a multitude of details about all instances of money laundering from 1996 to 2001 that would justify preclusion of his testimony rebutting the allegations of the Complaint. Hamed’s motion to compel and in the alternative to preclude testimony should be denied.

Respectfully Submitted,

DUDLEY NEWMAN FEUERZEIG LLP

DATED: February 17, 2023

By: /s/Charlotte K. Perrell

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CERTIFICATE OF SERVICE

It is hereby certified that on the 17th day of February, 2023, the foregoing **FATHI YUSUF'S OPPOSITION TO HISHAM HAMED'S THIRD MOTION TO COMPEL AS TO FATHI YUSUF'S FIFTH AMENDMENT ASSERTIONS IN DISCOVERY OR, IN THE ALTERNATIVE, TO PRECLUDE TESTIMONY**, which complies with the page and word limitations set forth in Rule 6-1(e), with the Clerk of the Court with the electronic filing system, and served same upon opposing counsel by means of the electronic case filing system addressed to:

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