**UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION**

**UNITED STATES OF AMERICA )**

**)**

**) No. 3:10-00260**

1. **) JUDGE HAYNES**

**)**

**YASSIN YUSUF**

**SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY AND DNA SAMPLE (D.E. # 1460)**

Comes now the Defendant Yassin Yusuf, through counsel, and submits this second supplemental memorandum in support of his motion to compel discovery and DNA sample.

* 1. Defendant Yusuf’s request for a DNA buccal saliva swab from Ibraham Mohamed Hassan is for the sole and limited purpose of establishing his paternity of Jane Doe Two and Defendant Yusuf agrees that the sample cannot be used for any other purpose;
	2. Defendant Yusuf maintains that his 6th Amendment to the United States Constitution right entitles him to have such a paternity test under the particular facts before the Court:
	3. Paternity tests are routinely granted in state courts across America every day. In Tennessee such test are governed by Tenn. Code Ann. Section 24-7-112 (a copy of which is attached to this memorandum). Most states have similar such statutes. This code section requires the court “to order the parties to submit to genetic tests to determine the child’s parentage upon the request of any party if the request is supported by affidavit of the party making the request…” The burden of proof standard of a party seeking a paternity test is not probable cause but one of “reasonable possibility of the requisite sexual contact between the parties or a reasonable possibility of the nonexistence of

sexual contact between the parties.” Tenn. Code Ann. Section 24-7-112 (a) (1) (A) (i) and (ii). Given the fact that Jane Doe Two mother is married to Mr. Hassan, there is no issue sexual contact between them.

* 1. The statute also allows the Court to Order a paternity test even without a reasonable possibility if it finds it would be equitable to have such a test. Tenn. Code Ann. Section 24-7-112 (C) (2) states,”During any other civil or criminal proceeding in which the question of parentage arises, upon the motion of either party or upon the court’s own motion, the court shall at such times as it deems equitable order all necessary parties to submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage.” If ever there was a case that equity demands such a test, this case is it. The paternity test can prove not only that Mr. Hassan is the biological father but that: Jane Doe Two and her mother have lied as to her September 10, 1994 date of birth; They both lied as to their true identities; The mother has committed immigration fraud; They both have committed perjury; They both along with Mr. Hassan have given a false statements to a official; and the list goes on and on. This test will reveal a treasure trove of relevant facts in this case. Clearly, given all that can be proven from such test, equity demands as well as the 6th Amendment demands that such a test be Ordered by this Honorable Court.

Respectfully submitted,

\_s/ David I. Komisar David I. Komisar, BPR#9207 Attorney for Yassin Yusuf

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**Certificate of Service**

I hereby certify that in the 6th day of March 2012, a true and correct copy of the foregoing Motion sent via the CM/ECF system to Assistant U. S. Attorneys Van S. Vincent and Blanche B. Cook, 110 9th Avenue South, Suite A-961, Nashville, Tennessee 37201.

\_/S/ David I. Komisar David I. Komisar

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# TENNESSEE COMPILATION OF SELECTED LAWS ON CHILDREN, YOUTH AND FAMILIES, 2011 EDITION

TENNESSEE CODE ANNOTATED

Title 24 Evidence And Witnesses Chapter 7 Admissibility of Evidence

24-7-112. Tests to determine parentage - Admissibility in evidence - Costs.

1. (1) (A) In any contested paternity case, unless the individual is found to have good cause under§ 454(29) of the Social Security Act (42 U.S.C. § 654(29)), the court, or the department of human

sr nices in Title IV-D child support cases, shall order the parties and the child to submit to genetic tests to detennine the child's parentage upon the request of any party if the request is supported by an affidavit of the party making the request:

1. and such affidavit: Alleges paternity, and sets forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or
2. Denies paternity, and sets forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties;
3. and such affidavit: Denies paternity.
4. In addition, upon the court's own motion, at such times as it dee equitable, or by administrative order by the department of human services in Title IV-D child support cases, tests and comparisons pursuant to this section shall be ordered; or
5. In any case, except terminations of parental rights or adoptions under HHt;-l' (> or Htk}'Z, in which the paternity of a child is at issue and the question of parentage arises, and an agreed order or divorce decree bas been entered finding that an individual is not the parent of the child, the finding shall not be entitled to preclusive effect unless the finding was based upon scientific tests to detennine parentage which excluded the individual from parentage of the child in question.
6. During any other civil or criminal proceeding in which the question of parentage arises, upon the motion of either party oron the court's own motion, the court shall at such time as it dee equitable order all necessary parties to submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage.
7. In any civil or criminal proceedings pursuant to this section, the tests ordered shall be conducted by an accredited laboratory. In the case of genetic tests, and at such time as the secretary of health and human services designates accreditation entities which acknowledge the reliability of types of genetic tests used in the establishment of paternity, such genetic tests shall be of the type which are generally acknowledged as reliable by accreditation entities designated by the secretary, and the genetic tests shall be performed by a laboratory approved by such a designated accreditation entity.
8. The results of such tests and comparisons which are ordered pursuant to this section, including the statistical likelihood of the alleged parent's parentage, if available, may be admitted into evidence as provided in subsection (b).
9. Upon receiving the results of the tests and comparisons conducted pursuant to subsection (a), the court shall proceed as follows:
	1. (A) Either party may request an additional parentage test upon the advanced pa\_yme nt of the costs of the additional parentage test. If the additional tests are requested by the department of human services, its contractors or any state agency, the costs of such additional tests shall be paid for upon being billed for such by the testing agent and may be recovered by those entities in any parentage proceeding from the person established as parent of the child
10. (i) If the results of the first test exclude paternity and the second test also exclude paternity, or, if the initial test results are negative on the issue of paternity establishment and no second test is requested, this shall be conclusive evidence of non-paternity and the action shall be dismissed
11. If the results of the first test establish paternity and the second test fil!.l:lin establishes a positive statistical probability of parentage as described in subdivision (b)(2)(B) or(C), the positive test results with the greater positive probability of parentage shall be definitive for purposes of the application of the appropriate evidentiary standards relative to the presumptions and the defenses available in subdivision (b)(2).
12. If the results of the second test are different from the first test in their outcome relative to the exclusion or establishment of paternity, the court, or the department in appropriate cases, may order a third test, or the court may make a determination between the accuracy of the previous t\\O (2) tests for purposes of determining paternity.
13. The results of any tests which may exclude a person as the father shall not preclude the initiation of a new paternity action involving another putative father or by a putative father against a mother to establish his paternity.
	1. (A) In any proceeding where the paternity of an individual is at issue, the written report of blood, genetic, or DNA test results by the testing agent concerning the paternity is admissible without the need for any foundation testimony or other proof of the authenticity or accuracy of the test unless a

written objection is filed with the court and served upon all parties thirty (30) days prior to the date of the hearing. For purposes of this section, service shall be deemed made upon the date of mailing.

(B) A rebuttable presumption of the paternity of an individual is established by blood, genetic, or DNA testing shomng a statistical probability of paternity of that individual at ninety-five percent (95%) or greater. In such event, the case shall be tried before the court without a jwy regarding the issue of paternity without the evidentiary limitations of subdivision (b)(2)(Q.

(Q When the results of blood, genetic or DNA tests show a statistical probability that a man is the father of the child in question by a statistical probability of ninety-nine (99%) or greater, the putative father may only attempt to rebut his paternity of the child by filing a motion with the tribunal and

e\_s ta blishing upon clear and convincing evidence one (1) or more of only the following circumstances:

1. The putative father had undergone a medical sterili7.ation procedure prior to the probable period of conception, or other medical evidence demonstrates that he w.ts medically incapable of conceiving a child during the probable period of conception;
2. That the putative father had no access to the child's mother during the probable period of conception;
3. That the putative father has, or bad, an identical tmn who had sexual relations with the child's mother during the probable period of conception; or
4. The putative father presents evidence in the form of an affidavit that another man has engaged in sexual relations with the mother of the child in question during the period of probable conception. In this case, the court shall order genetic testing of that other man in confonnity with this section. The results of that genetic test must indicate that the other man bas a statistical probability of paternity of ninety-five (95%) or greater to establish an effective defense pursuant to this subdivision.
5. (i) If, after test results showing a statistical probability of ninety-nine (99%) or greater, the putative father is able to show by clear and convincing evidence to the court that one (1) of the enumerated defenses in subdivision (b)(2)(C) is present, the matter shall be set for trial before the court without a jwy.

(ii) If the putative father does not raise one (1) of the enumerated defenses in subdivision (b)(2)(Q or does not establish by clear and convincing evidence that one (1) of the enumerated defenses in subdivision (b)(2)(q is present after test results shomng a statistical probability of paternity of ninety-nine (99%) or greater, the court shall, upon motion by the other party, establish that individual

as the father of the child in question, and shall order child support as required by the provisions of litk 6, chapter S.

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1. An affidavit documenting the chain of custody of any specimen used in any test pursuant to this section is admissible to establish the chain of custody.
	1. All costs relative to the tests and comparisons under this section shall be paid initially by the party requesting such tests with the final allocation of costs aw.titing the outcome of the proceedings, at which time the court shall determine the proper allocation of costs. Costs for initial tests requested by

the department of human seivices or its contractors or any other state agency shall be paid by those entities with the costs to be recovered in any parentage proceeding from the person established as parent of the child

Acts 1957, ch. 30, § 1; T.C.A., § 24-716; Acts 1983, ch. 459, § 1; 1991, ch. 268, § 1; 1994, ch. 988, §§

2-4; 1997, ch. 551, §§ 43, 44; 2000, ch. 922, § 1.

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