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

MOHAMMAD HAMED, by his authorized Agent WALEED HAMED, Plaintiffs, V. FATHI YUSUF and UNITED CORPORATION, Defendants.	Case No.: SX-12-CV-370 ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF JURY TRIAL DEMANDED

EMERGENCY MOTION TO EXTEND SCHEDULING ORDER DEADLINES

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned attorneys, respectfully submit this Emergency Motion to Extend Scheduling Order Deadlines ("Emergency Motion") and in support, Defendants state as follows:

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The current status of this case presents a procedural conundrum, which now presents an urgent situation. On the one hand, it is in the earliest of stages. An answer has not yet been filed (nor is one required) because Defendants have moved, *inter alia*, to dismiss the case[1]. The Court has not yet ruled on Defendants' Renewed Motion to Dismiss. On the other hand, the case has already progressed through an interlocutory appeal, the Defendants have been required to engage in limited discovery so as to respond to Plaintiff's Motion for Partial Summary Judgment and then to submit a Scheduling Order, even though their dispositive motion, which may eliminate the need for any discovery, remains pending. The most immediate deadline is for all factual discovery to be completed on or before December 15, 2013, which deadline, among others, is creating the need for the Court's resolution on an emergency basis.

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[1] Defendants have filed a number of preliminary motions, to wit: a) Renewed Motion to Dismiss, b) Motion for More Definite Statement, and, c) Motion to Strike Exhibits "B" Through "D" of the Amended Complaint. These motions are referred to collectively as Defendants' "Renewed Motion to Dismiss."

Defendants previously brought this procedural quandary to the attention of the Court in an effort to expedite a decision and avoid the current situation. On July 16, 2013, Defendants filed their Motion for Expedited Resolution of Their Pending Motion to Dismiss (the "Motion for Expedited Resolution"). Therein, the Defendants chronicled the procedural history of the case to demonstrate why discovery should not have commenced prior to a ruling on their Renewed Motion to Dismiss, to wit:

1. Plaintiff filed this action on or about September 17, 2012.

2. Defendants timely removed the action on October 4, 2012. (D.V.I. Doc. # 1).

3. On October 10, 2012, Defendants moved to dismiss the Complaint or, alternatively, to strike certain portions thereof and for a more definite statement. (D.V.I. Doc. # 11).

4. Plaintiff moved to remand on October 11, 2012. (D.V.I. Doc. # 13).

5. On October 19, 2012, prior to a resolution of Defendants' motion to dismiss, Plaintiff filed his First Amended Complaint (D.V.I. Doc. #15), which added a third count to the First Amended Complaint.

6. On November 5, 2012, Defendants moved to dismiss the First Amended Complaint [the Renewed Motion to Dismiss]. (D.V.I. Doc. #28).

7. Plaintiff filed his opposition thereto on November 12, 2012. (D.V.I. Doc. # 33).

8. The District Court remanded the action on November 16, 2012. (D.V.I. Doc. # 39).

9. Defendants filed their Reply to Plaintiff's Opposition on December 13, 2012.

10. On December 18, 2012, the District Court advised the parties...that a '[c]complete file' of the proceedings in the District Court had been 'forwarded to [the] Superior Court.'

11. Defendants' fully briefed Renewed Motion to Dismiss therefore [was] pending in the Superior Court for approximately seven months (or 211 days), as of the filing of [Defendants' Motion for Expedited Resolution].

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> 12. This Court subsequently entered an Order dated July 9, 2013, regarding Plaintiff's Motion for Partial Summary Judgment (D.V.I. Doc. #36), directing "Defendants [to] complete the necessary discovery [to enable them to respond to Plaintiff's Motion for Partial Summary Judgment] and to respond to [same] no later than September 16, 2013...and directing 'Counsel for all Parties [to] confer pursuant to Fed. R. Civ. P. 26(f) and...submit a written report on or before August 16, 2013, outlining the proposed discovery plan developed by the Parties." (7/9/13 Order).

See Motion for Expedited Resolution, p. 1-2. Defendants then explained "[t]his Court's resolution of the pending Renewed Motion to Dismiss necessarily impacts the scope of any discovery in this action." Id. at 2-3. Defendants recognized that if this Court granted the Renewed Motion to Dismiss in its entirety, then "discovery would be unnecessary." Id. at 3. Likewise, if the Court granted any part of the motion, including the Motion for a More Definite Statement, any such partial grant would impact the open factual issues related to Plaintiff's partial summary judgment motion. Hence, Defendants expressed to the Court their concern that "any ruling by this Court on the pending motion to dismiss will materially impact the scope of discovery" and that the parties are not able to meaningfully "confer" as to a proposed discovery plan, until the scope of discovery is clarified. Id. Hence, in the interest of judicial economy, Defendants requested an expedited ruling as to the pending Renewed Motion to Dismiss which, at that time, had been pending for seven (7) months.

Unfortunately, no ruling was forthcoming. As a result, on August 5, 2013, so as to comply with the Court's Order, the parties submitted a Rule 26(f) discovery plan (the "Original Scheduling Order"). The Original Scheduling Order provides, *inter alia*, that all factual discovery, including written discovery and fact witness depositions is to be completed by December 15, 2013. However, the Original Scheduling Order was submitted with the understanding that various "open items" remained which would impact the deadlines selected and that modifications may be necessary. One such open item was Defendants' Renewed

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Motion to Dismiss, which still remains pending[2]. While the Renewed Motion to Dismiss is pending, Defendants have no obligation to file a responsive pleading, accordingly, no answer and/or counterclaim has been filed. In the event that the Renewed Motion to Dismiss is denied, Defendants anticipate filing a multi-count counterclaim that joins a number of additional counterclaim defendants as parties to this case.

Nonetheless, the parties have pursued discovery by, among other things, exchanging written discovery including their Rule 26 initial disclosures. As the nature of the claims involves decades of records, the documents exchanged thus far have been extraordinarily voluminous. Defendants produced in excess of 100,000 pages of documents and the index alone for Defendants' production is 881 pages long. Plaintiff has similarly produced voluminous documents. Plaintiff propounded written discovery on August 5, 2013, which was answered by Defendants on September 19, 2013. Defendants propounded their written discovery on November 15, 2013. Further, certain tax records and tax return filings, which are essential to the pursuit of the claims and potential defenses, were not complete or had not been amended at the time the Original Scheduling Order was submitted - a fact acknowledged by all parties involved. However, now those returns either have been filed recently or are in the final stages of preparation and should be available shortly. Production of those tax documents has been requested by Defendants. Moreover, certain financial documents have been secured by the Department of Justice pursuant to the criminal action which are relevant to the issues in this case. Such documents will be available following a sentencing hearing which is expected to take place in the near future. See Joint Motion to Request Scheduling of Sentencing Hearing attached as **Exhibit 1**. At this time, however, these documents are not yet available.

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[2] As the Renewed Motion to Dismiss was filed on November 5, 2012, it has now been pending for over a year.

Hence, the parties submitted the Original Scheduling Order with the clear understanding that modifications may be necessary given the early stages of the litigation, the discovery would be extensive and that a decision, or the absence of decision on the Renewed Motion to Dismiss may require later adaptations to the discovery schedule. Hence, the dates selected were the best approximation as to appropriate deadlines taking these factors into consideration. Further, Defendants anticipated that a decision on the Renewed Motion to Dismiss would be forthcoming as it already had been pending for seven (7) months when the Original Scheduling Order was put into place. Now, as the end of the factual discovery period is approaching, the same issues remain open which require modifications to the Original Scheduling Order just as the parties anticipated may be necessary so as to insure that all the parties (Plaintiff and Defendants and any parties to be added) are afforded the opportunity for full and complete discovery. Defendants have filed this Emergency Motion because of the immediate need to modify the eminent deadlines for discovery.

II. ARGUMENT

A discovery schedule "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).[3] A stay or, at the very least, an extension of the discovery period is often permitted following the filing of a Rule 12(b)(6) motion. See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987)(finding that it is "sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery"); Tucker v. Union of Needletrades, Industrial and Textile Employees, 407 F.3d 784, 787-88 (6th Cir. 2005)(noting that the "very purpose" of Rule 12(b)(6) is to permit challenges to the legal sufficiency of a complaint without

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[3] Fed. R. Civ. P. 16(b)(4) applies to these proceedings pursuant to Super. Ct. R. 7.

subjecting the party to discovery); Mitchell v. McNeil, 487 F.3d 374, 379 (6th Cir. 2007)(holding that because plaintiffs failed to state a cognizable claim, there was no error in denying discovery). Further, if a party has no claim, then there would be no entitlement to discovery. See First Commercial Trust Co. N.A. v. Colt's Mfg. Co., Inc., 77 F.3d 1081, 1083 (8th Cir. 1996)(noting that litigants have no entitlement to discovery in the absence of a plausible legal theory).

Defendants also moved for a more definite statement under Fed. R. Civ. P. 12(e) on the grounds that the Amended Complaint impermissibly and vaguely defines the existence of an alleged oral partnership. Because the pleading is so vague or unclear, a meaningful response cannot be prepared. Both the Court and the litigants are entitled to know, at the pleadings stage, who is being sued, for what and why. McHenry v. Renne, 84 F.3d 1172, 1179-80 (9th Cir. 1996)(holding that "confusing complaints...impose unfair burdens on the litigants...Defendants are then put at risk that...plaintiffs will surprise them with something new at trial which they reasonably did not understand to be the case at all...the judge wastes half a day in chambers preparing 'the short and plain statement'...this leads to discovery disputes and lengthy trials, prejudicing litigants").

Under the newly adopted Differentiated Case Management Plan (the "DCM"), the Superior Court has expressed that it is a "formal policy of the Court" to make efforts to adhere to certain timeframes for the orderly, "efficient, productive case flow" so as produce "quality results." While the DCM is not controlling in this case as this matter was pending prior to its implementation, it "may be applied to all cases pending in the Court for comparison purposes." Id. Under the DCM, this case would likely be considered a "Civil Track 2-Standard Civil Action" matter in which a "motions hearing" would be held within 360 days from the date suit

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was initiated. Id. at p. 11. Also under the DCM, preliminary dispositive motions (in certain circumstances) are to be disposed of within 120 days of their filing. Id. Although the Court can vary the deadlines depending upon the specific circumstances, the timeframes provide guidance and are useful for comparison purposes. Further, pursuant to the DCM, emergency motions such as this one would require resolution by the Court within ten (10) days.

Defendants submit that good cause is shown for a modification of the Original Scheduling Order which will benefit all of the parties, accommodate the pending dispositive motions, allow for the extensive discovery that is needed and provide a more orderly process for the resolution of this litigation which involves multiple parties and numerous claims.

A. Resolution is Needed on the Renewed Motion to Dismiss And is Good Cause to Extend the Scheduling Order Deadlines.

As set forth above, Defendants' Renewed Motion to Dismiss impacts the discovery process. If the Court grants the Renewed Motion in its entirety, then no discovery is necessary. Defendants would not be required to undertake any further discovery in this matter nor incur additional time and expense associated with addressing this suit. Without a resolution of the Renewed Motion to Dismiss, Defendants are not required to file their answer and/or counterclaims. As a result, continuing with the litigation as if it were on a normal track, while the Defendants have not filed an answer or counterclaim, results in disjointed litigation[4]. Witnesses could be deposed but could only address the claims that are pending. No information can be discovered as to the defenses or possible counterclaims, as they have not yet been filed. Hence, the witnesses would be subjected to multiple depositions increasing costs and wasting time and resources.

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[4] The DCM recognized this result and imposed either a 120 deadline for the disposition of a motion to dismiss or required a motion hearing to be held within 360 days of the filing of the suit. Here, Defendants' Renewed Motion to Dismiss is well in excess of the 120 day deadline from the filing of the motion and also well past the 360 day deadline from the filing of the suit.

Appropriately, Defendants are not required to file any response (or incur any further costs) until it is determined that the Plaintiff has articulated a claim upon which relief can be granted. The situation is not unique. Rather, courts often stay discovery until such a ruling is made. Tucker v. Union of Needletrades, Industrial and Textile Employees, 407 F.3d 784, 787-88 (6th Cir. 2005). Defendants have attempted to request the Court's ruling in this regard and avoid this predicament. However, until such a ruling is made, the conundrum will continue.

B. Ruling as to the Motion for a More Definite Statement is Also Needed and is Also Good Cause to Extend the Scheduling Order Deadlines.

Likewise, in the event that the Renewed Motion to Dismiss is denied, a ruling on Defendants' Motion for a More Definite Statement is also necessary. Without such a ruling, the scope of the claims remains uncertain. In turn, this means that the scope of discovery is uncertain. Hence, such a ruling is needed for the orderly and proper progression of the litigation and thus, until such a ruling is made, discovery must be extended.

C. The Current Deadlines Do Not Account for the Extensive Discovery Needed and Immediate Modification is Necessary.

While much has been produced[5] (despite the current procedural posture), much remains to be completed. Tax records including the prior and newly filed returns, banking records, business records, corporate filings, property records and other documents dating back to 1986, which tend either to substantiate or disprove the existence of an oral partnership as well as the terms thereof, must be produced and reviewed. Certain records secured by the Department of Justice pursuant to the criminal action relating to the tax issues will be available following a sentencing hearing which has not yet occurred but which is expected to occur soon. As such records are not yet available, additional time will be needed to secure those documents and absorb them. Also, it is anticipated that records from third-party banks, many of which are not

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[5] Hundreds of thousands of pages of documents have been produced by both sides.

located within the United States, will be necessary to properly trace funds and account for the transactions between the parties. Moreover, valuations as to the assets of the alleged "partnership" must be secured, tested and cross-examined. Further, multiple witnesses must be deposed as to the various claims. A number of members of both the Hamed and Yusuf families possess substantive information as to the matters and facts at issue in this case. They each must be deposed. Expert witnesses and accounting and financial professionals will need to be deposed as well. To date, not one deposition has taken place and the deadline for completing fact discovery is December 15, 2013. In fact, Plaintiff just submitted a draft Notice of Taking 30(b)(6) Deposition requesting those persons most knowledgeable as to a wide range of topics for a deposition or depositions to occur during the week of December 9, 2013. It is clear that Plaintiff was simply attempting to "squeeze" depositions in prior to the existing deadline. Moreover, depositions will be needed of the Plaintiff as well as his "authorized agent," Waleed Hamed, and other members of the Hamed family, which discovery cannot practically occur in the time remaining for fact discovery. Hence, there is an urgent need for a resolution of these issues.

This discovery is needed just for *Plaintiff's* claims and does not even account for what will be necessary as to the defenses that will be raised by Defendants and any counterclaims that Defendants may pursue in the event the Renewed Motion to Dismiss is denied including any claims as to new parties added to the suit. Hence, while this is *Defendants'* Motion, an extension of the discovery period equally benefits both the current parties as well as the parties to be added in the event the Renewed Motion to Dismiss is denied. It would be impossible for Plaintiff to adequately discover evidence to defend against affirmative defenses and counterclaims that have not yet been filed. Likewise, to the extent additional parties are added to the litigation, they will

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necessarily require additional time for discovery. Clearly, additional discovery will be allowed as to such claims and additional parties. If left in its current posture, the case will result in multiple discovery periods for the various parties, commencing and ending at different periods and resulting in duplication of work and resources.

These reasons provide good cause for the extension of the current deadlines. Hence, a single discovery period to commence and end at a date certain *after* the "open" procedural and pleading issues are resolved would insure an orderly and expeditious resolution of this matter.

D. Defendants Have Conferred with Counsel for Hamed

Defendants have conferred with counsel for Hamed regarding this proposed extension and the parties undertook efforts to arrive at a stipulated extension of the Original Scheduling Order deadlines as it was recognized that the current schedule was unrealistic. While the parties worked to reach an agreement regarding an appropriate extension, they ultimately were unable to agree upon the extended deadlines. The undersigned hereby certifies that counsel for the parties met and conferred in an effort to agree upon a stipulated modification to the Original Scheduling Order but, despite their good faith efforts to reach an agreement, they were unable to do so.

III. CONCLUSION

The interests of judicial economy are best served by having one comprehensive discovery period for the litigation. With the current factual discovery deadline ending on December 15, 2013, a speedy resolution is needed. Although dispositive motions do not automatically suspend discovery, the parties have pursued discovery in this case, but with a watchful eye upon the potential ruling on Defendants' Renewed Motion to Dismiss. Costly discovery, which may prove wholly unnecessary if the Renewed Motion to Dismiss is granted, warns against full scale discovery efforts which may ultimately be a waste of time. This is the very reason that discovery

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is often stayed or suspended pending the outcome of an initial dispositive motion. Likewise, a ruling on Defendants' Motion for More Definite Statement would properly define the scope of the claims and, thus, the discovery. Additional claims in the form of counterclaims and those made against parties yet to be added are further reasons that discovery should be extended. Even as to the claims which currently exist, much discovery remains to be completed and cannot practically be completed within the current time allotted. The extension is not sought for purposes of delay but rather to preserve the orderly flow of the litigation. Such an extension benefits *all* parties and does not operate to unduly prejudice one side. However, the looming deadlines now require the Court's urgent attention. Hence, all of these reasons demonstrate good cause shown to extend the discovery period in this case pending resolution of the Renewed Motion to Dismiss. A proposed Amended Scheduling Order setting for suggested deadlines is submitted herewith for the Court's consideration.

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Dated: November 27, 2013 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2013, I caused the foregoing Motion To Extend Scheduling Order Deadlines to be served upon the following via e-mail:

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

UNITED STATES OF AMERICA, and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff, v. UNITED CORPORATION d/b/a Plaza Extra, Defendant.	CRIMINAL NO. 2005-015

JOINT MOTION TO REQUEST SCHEDULING OF SENTENCING HEARING

The government and counsel for United Corporation (United) have conferred and jointly file this motion to respectfully request the Court schedule the sentencing hearing for United Corporation's guilty plea.

At the end of the hearing on July 16, 2013, the Court informed the parties that because the Plea Agreement is binding on the Court, two issues needed to be resolved in order for the Court to proceed with sentencing in this case. First, the monitor should be in place. Kaufman, Rossin & Co., an accounting firm based in Miami, Florida, has been retained as the monitor. An engagement letter dated August 15, 2013 has been signed, a retainer has been paid, and United has agreed to bear all costs associated with the monitoring engagement during the one-year term of probation as contemplated by the Plea Agreement.

The second issue raised by the Court required all tax returns to be filed and all taxes owed to be paid prior to sentencing. Specifically, Waleed Hamed and Waheed Hamed must file individual income tax returns and pay all taxes owed in full prior to sentencing. (See Hearing TR. at 163-167). Since this case was initially indicted in September, 2003, and the Court was only recently assigned,

it may be helpful to provide some background regarding the tax loss issue as it has evolved during the litigation of this case.

I. Status of Case Prior to Negotiation of Plea Agreement

The undersigned counsel for the United States has been assigned to this case since February, 2007. During 2007, 2008, and 2009, the parties were litigating virtually every aspect of the case. In December, 2009, the parties jointly requested the assistance of Magistrate Judge Geoffrey W. Barnard to mediate a resolution to the criminal case. That motion was granted by Senior District Judge Raymond L. Finch on December 31, 2009 (Doc. No. 1234). The parties individually submitted mediation statements to Judge Barnard. On January 27, 2010, prior to meeting with the parties individually, Judge Barnard asked the parties to summarize their positions in open court regarding the taxes due for the years 1996 through 2001. The defendants said they were prepared to write a check for $4.9 million, estimating unpaid gross receipts taxes at $1.9 million and unpaid corporate and individual income taxes at $3 million. The government's total estimate for unpaid gross receipts taxes and corporate and individual income taxes was $23 million.

With Judge Barnard's continued guidance throughout the mediation, and with the participation of representatives from the Virgin Islands Bureau of Internal Revenue (VIBIR) and the government of the Virgin Islands, the parties negotiated the terms for a guilty plea by United Corporation.

II. Plea Agreement

On February 26, 2010, United Corporation, through its president Maher Yusuf, pleaded guilty to Count Sixty of the Third Superseding Indictment, willfully making and subscribing a 2001 U.S. Corporation Income Tax Return (Form 1120S), in violation of Title 33, Virgin Islands Code,

Section 1525(2). (Doc. Nos. 1247, 1248). The government agreed to dismiss the charges as to all individual defendants in exchange for United, the individual defendants and the shareholders of United all agreeing to file appropriate tax returns and pay taxes owed to the VIBIR prior to the expiration of United's agreed-upon term of one year of probation. The two-page Exhibit 1 to the Plea Agreement set forth the position of each party as to the amount of gross receipts taxes, corporate income taxes, and individual income taxes due to the VIBIR for the years 1996, 1997, 1998, 1999, 2000, and 2001 - the years at issue in the criminal case as charged in the Indictment. The table below briefly summarizes the position of each party (rounded to nearest dollar)[1]:

Tax year(s)	Type of tax	Government estimate	Defendant estimate
1996 - 2001	Gross Receipts	$2,857,874	$1,904,022
1996 - 1998	Corporate income	$8,568,711	$915,334
1999	Individual income	$3,219,568	$0
2000	Individual income	$4,487,610	$0
2001	Individual income	$4,756,904	$0
TOTAL		**$23,890,667**	**$2,819,356**

Given the fact the parties were so far apart in their estimates of the taxes owed, Section III.A.3. of the Plea Agreement set forth a procedure for the restitution to be determined by the Court. (Doc. No. 1248 at 4-5).

During the period March through August, 2010, the parties and representatives from the VIBIR met on several occasions and exchanged correspondence regarding the basis for their

[1] For 1996, 1997, and 1998, United Corporation was a C corporation, requiring it to pay corporate income taxes. In 1999, United Corporation became an S Corporation for tax purposes, which meant that all income for Plaza Extra operations was reported, and all taxes were paid, by the individual shareholders of United on their individual income tax returns.

respective positions. By a letter dated August 20, 2010, the government rescinded all prior offers to mediate the tax loss after the defendants took the position that not only were no additional taxes owed, but Mr. Fathi Yusuf was owed a refund of $209,401 for 1999, $167,802 for 2000, and $479,362 for 2001. On August 26, 2010, the parties filed a joint motion requesting an evidentiary hearing regarding the defense assertion that a statute of limitations precluded the payment of restitution for any year other than 2001, the year for which United admitted committing tax fraud through its guilty plea.

On September 3, 2010, the government filed its Motion for Ruling Regarding Statute of Limitations (Doc. No. 1280). The government argued the Plea Agreement clearly stated that restitution was to be paid for each year 1996, 1997, 1998, 1999, 2000, and 2001, and the assertion of a civil statute of limitations was a potential breach of the Plea Agreement. The government further argued that payment of restitution for all years was critical to its agreement to dismiss all pending charges against individual defendants. The government's evidence of fraud was similar for every year, so the only way the VIBIR would be made whole for the fraud committed by United was for 100% of the shareholders to pay income taxes on 100% of the unreported income for 1996 through 2001, not their proposal to pay only 32.5% of the unreported income for 2001 (Mr. Fathi Yusuf's share). Moreover, in its Reply to Defendants' Surreply (Doc. No. 1291), the government emphasized that is was very unusual for the VIBIR to agree to be limited in its civil collection activity as part of a criminal tax case, and that it was "disingenuous for the defendant to insist that the VIBIR be prohibited from collecting any other taxes due for the years 1996, 1997, 1998, 1999, 2000, and 2001, and then proclaim that it will only pay taxes for 2001." (Id. at 6).

On December 14, 2010, an evidentiary hearing was held before Judge Barnard. The government presented testimony and documentary evidence to support its position that the evidence of tax fraud committed in 2001 was identical to the evidence of fraud in 1996 through 2000. After the hearing Judge Barnard met with the parties separately to facilitate additional mediation. As a result of the mediation conducted by Judge Barnard, the parties entered into the Plea Agreement-Addendum which was filed with the Court on February 7, 2011. (Doc. Nos. 1303, 1304). The terms of the Plea Agreement-Addendum required United to pay $10 million to the VIBIR for settlement of all corporate and individual taxes owed for the years 1996 through 2001, to pay a $5,000 fine and to pay a $1 million substantial monetary penalty. On July 19, 2011, United entered into a closing agreement with the VIBIR regarding the individual and corporate taxes owed for years 1996 through 2001. United paid the VIBIR $10 million in full payment of these taxes.

The parties and representatives of the VIBIR continued to meet to try to resolve the tax issues for the years 2002 through 2008, as contemplated by Section XI. of the Plea Agreement. The parties were unsuccessful. On February 4, 2013, the government filed its Request for Additional Mediation. (Doc. No. 1323). Following numerous pleadings filed by all parties, the request was ultimately granted and additional mediation took place with Judge Barnard on June 19-20, 2013. Prior to the mediation session, United and the Yusuf shareholders filed their outstanding income tax returns for 2002 through 2010 with the VIBIR. Counsel for Waleed Hamed and Waheed Hamed previously informed representatives of the VIBIR that they were close to finishing their individual income tax returns for 2002 through 2010 and would be filing them soon. As reflected in the Plea Agreement-Second Addendum filed on June 24, 2013, a payment of $6,586,132 was remitted to the VIBIR (Doc. No. 1373).

On August 30, 2013, United Corporation tendered two official checks to the Clerk of Court in St. Croix: a $5,000 payment for the statutory fine and a $1 million payment for the substantial monetary penalty. Since the guilty plea was entered in February, 2010, a total of $16.5 million has been remitted to the VIBIR for payment of gross receipts taxes, corporate income taxes, and individual income taxes. When added to the recent payments, United and its shareholders have paid all sums required by the Plea Agreement. Based on the extensive litigation over all financial issues while the case was pending, the government drafted the Plea Agreement with multiple safeguards to allow it to continue to force United, its shareholders, and the individual defendants to pay their tax liabilities during the term of United's probation. The government never expected, under any scenario, to have the luxury of not needing to request the Court's intervention to enforce payment obligations during the one-year term of probation. To now be in the position of only having approximately $300,000 individual income taxes of the Hameds unpaid prior to sentencing, or 0.018% of the total $16.5 million, is a testament to the skillful mediation by Judge Barnard.

III. Discussion of the Tax Loss Issue at the July 16, 2013 Hearing

Mohammed Hamed, who was not charged in the criminal case, is the father of Waleed Hamed and Waheed Hamed. In September, 2012, Waleed Hamed, acting as the authorized agent for his father, filed a lawsuit in the Superior Court of the Virgin Islands against Fathi Yusuf and United Corporation regarding the ownership and control of the Plaza Supermarket stores.

In February, 2010, when the Plea Agreement was negotiated, signed by all individual defendants and shareholders of United Corporation, and entered in court, no one raised the issue of the ownership or control of United. (Plea Agreement, Doc. No. 1248).

In January and February, 2011, when the Plea Agreement-Addendum was negotiated, signed by all individual defendants and Warren Cole, attorney for the unindicted shareholders of United Corporation, and filed with the Court, no one raised the issue of the ownership or control of United. (Plea Agreement-Addendum, Doc. No. 1304).

In July, 2011, when the Closing Agreement was drafted between United Corporation and the VIBIR and signed by the shareholders of United, and a check for $10 million was remitted to the VIBIR in full payment of all gross receipts taxes, corporate taxes, and individual income taxes of Waleed Hamed, Waheed Hamed, and the Yusuf shareholders of United Corporation, for the years 1996, 1997, 1998, 1999, 2000, and 2001, no one raised the issue of the ownership or control of United.

The filing of the civil lawsuit in September, 2012, brought an abrupt end to the joint defense agreement between the Yusufs and the Hameds which had existed for many years. At the hearing on July 16, 2013, the Hameds argued that United was obligated to pay their individual income tax liabilities for the years 2002 through 2010. This extraordinary demand is akin to an arsonist torching a building for insurance money and then complaining when the insurance company does not pay the claim due to arson. The government of the United States, the government of the Virgin Islands, and the taxpaying citizens of the VIBIR are in a much better financial position today than even the most optimistic observer would have believed possible when the corporate guilty plea was entered in February, 2010. The Court should allow the sentencing of United to take place, and allow the VIBIR, through its civil process, to ensure Waleed Hamed and Waheed Hamed file all required income tax returns and pay all income taxes due.

IV. Other remaining issues

The parties were further instructed to raise any other outstanding issues with the Court prior to scheduling the sentencing hearing. (TR. at 171). Issues previously raised with Magistrate Judge Barnard during mediation, such as the procedure to transfer documents from the criminal case to the independent records custodian, may be supervised by Judge Barnard or the Court during the term of probation. The parties are unaware of any other issues which need to be resolved prior to the sentencing hearing.

V. Conclusion

For the reasons outlined above, and as discussed during the July 16, 2013 hearing, the government and counsel for United respectfully request the Court schedule the sentencing to take place as soon as possible on a date convenient to the Court and to the parties.

Respectfully Submitted,

Dated: November 13, 2013

s/Lori A. Hendrickson
Lori A. Hendrickson
Trial Attorney
United States Department of Justice, Tax Division

Dated: November 13, 2013

s/Joseph A. DiRuzzo, III [by LAH with permission]
Joseph A. DiRuzzo, III
Attorney for defendant United Corporation

CERTIFICATE OF SERVICE

I, Lori A. Hendrickson, certify that on November 13, 2013, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

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