

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

**MOHAMMAD HAMED**, by his )  
authorized agent **WALEED HAMED**, )

*Plaintiff/Counterclaim Defendant,* )

vs. )

**FATHI YUSUF** and )  
**UNITED CORPORATION**, )

*Defendants/Counterclaimants,* )

vs. )

**WALEED HAMED, WAHEED** )  
**HAMED, MUFEED HAMED,** )  
**HISHAM HAMED,** )  
and **PLESSEN ENTERPRISES, INC.,** )

*Counterclaim Defendants.* )

**CIVIL NO. SX-12-CV-370**

ACTION FOR DAMAGES,  
INJUNCTIVE RELIEF AND  
DECLARATORY RELIEF

JURY TRIAL DEMANDED

**MEMORANDUM IN SUPPORT OF  
COUNTERCLAIM DEFENDANT WAHEED HAMED'S  
MOTION TO DISMISS**

**I. Introduction - The 2013 St. Thomas Action Against Waheed Hamed**

Waheed ("Willie") Hamed moves to dismiss the First Amended Counterclaim, naming him as an additional counterclaim defendant, pursuant to the inherent power of the Superior Court to administer its docket. On March 5, 2013, counterclaimant United Corporation filed an action against Waheed Hamed in the Superior Court in St. Thomas. (Hereinafter the "St. Thomas Action.") Paragraph 1 of the Complaint in that St. Thomas Action asserted the following (see **Exhibit A**):

This is a civil action for damages (both compensatory and punitive) recoupment, conversion, accounting, constructive trust, breach of contract, and breach of various fiduciary duties against Defendant Waheed Hamed, an employee of Plaintiff United. **This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager** of the operations of the Plaza Extra Supermarket store in St. Thomas, V.I. as well as other locations. (Emphasis added.)

Thus, the St. Thomas Complaint is based on the same legal theories, relationship, and relief now being raised in this case -- damages and equitable trust for personal use of skimmed money received while a United/Plaza Extra Supermarkets manager.

In the St. Thomas Action, Waheed Hamed moved to dismiss the case on the basis of the Statute of Limitations. In response, that Court (Dunston, J.) entered a June 24, 2013 Memorandum and Order dismissing all portions of that action which included allegations of skimming from Plaza Extra, as those issues were touched on in the criminal case. See Memorandum and Order, **Exhibit B**. Judge Dunston then ordered United to file an Amended Complaint.

After the Amended Complaint was filed (see **Exhibit C**), the parties then conducted discovery under a stipulated scheduling order dated August 6, 2013. Both parties then served full discovery and responses. On February 5, 2014, Hamed filed a motion for summary judgment that would result in the disposition of the remaining claims based on inaccurate statements about notice made by United to the Court. See **Exhibit D**. On January 11, 2014 Judge Dunston scheduled briefing on this motion as follows:

Defendants having filed a Motion for Summary Judgment on February 5, 2014, it is ORDERED that by March 7, 2014, Plaintiff shall respond to the Motion, and Defendant may file a reply by March 21, 2014. . . .

## II. Facts - The First Amended Counterclaim Filed in this Case

The First Amended Counterclaim filed in this case makes very limited claims about Waheed Hamed. First, it correctly alleges in ¶ 8 that Waheed Hamed is the son of Mohammad Hamed. Second, the only other places where Waheed is even mentioned in this action is as one of the "Hamed Sons" receiving funds skimmed from Plaza Extra Supermarkets, in Counts 5 and 6:

### COUNT V RESTITUTION

154. Paragraphs 1 through 153 of this Counterclaim are realleged.

155. Hamed and his agents have obtained in excess of \$7 million of the Plaza Extra Stores' monies under such circumstances that in equity and good conscience they ought not retain **and the Hamed Sons participated and aided and abetted in this conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own personal benefit.**

156. Defendants are, therefore, entitled to restitution in the form of a constructive trust over any assets purchased with those funds; an equitable lien over such assets; and disgorgement of any profits made from the use of the Plaza Extra Stores' funds or assets purchased with the use of such funds. (Emphasis added.)

### COUNT VI

#### UNJUST ENRICHMENT

#### AND IMPOSITION OF A CONSTRUCTIVE TRUST

157. Paragraphs 1 through 156 of this Counterclaim are realleged.

158. Hamed and his agents have obtained in excess of \$7 million of the Plaza Extra Stores' monies under such circumstances that in equity and good conscience they ought not retain **and the Hamed Sons participated and aided and abetted in the conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own personal benefit.**

159. Defendants are entitled to the imposition of constructive trusts, equitable liens, and disgorgement of all profits in order to prevent Hamed and the Hamed Sons from being unjustly enriched by money ill-gotten from the Plaza Extra Stores. (Emphasis added.)

Thus, receipt of funds skimmed from Plaza Extra operation while a manager and using them "to purchase and improve properties for [his] own personal benefit" alleged here is the same allegation made against Waheed Hamed in the St. Thomas Action.

### III. Law and Argument

Hamed should be dismissed from this action pursuant to the inherent powers of this Court to administer its docket for the two following reasons:

1. This action has already been brought and partially adjudicated in St. Thomas -- some claims have already been adjudicated and the balance of the claims are already *sub judice* in a summary judgment motion.

2. Splitting of Causes of Action Prohibited: To the extent that there is any claim here that was not included in the St. Thomas Action, it should have been -- and failure to bring it there obviates taking a second bite of the apple here.

*1. This action has already been brought and partially adjudicated in St. Thomas -- some claims have already been adjudicated and the balance of the claims are already sub judice in a summary judgment motion.*

"[A]s part of its general power to administer its docket" a court "may stay or dismiss a suit that is duplicative of another [] court suit [in the same court]." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). It is, therefore, black letter law that plaintiffs have no right to maintain two actions arising out of similar actions "in the same court, against the same defendant at the same time." *Id.* at 139. In this regard, the St. Thomas Action states on the face of the Complaint that it is:

against Defendant Waheed Hamed **for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager** of the operations of the Plaza Extra Supermarket store. . . . (Emphasis added.)

Thus, the instant case should be dismissed and left to final disposition by Judge Dunston.

2. *Splitting of Causes of Action is Prohibited: To the extent that there is any claim here that was not included in the St. Thomas Action, it should have been -- and failure to bring it there obviates taking a second bite of the apple here.*

"Claim-splitting" is prohibited, and is analyzed like *res judicata*. See, e.g., *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions."). Like *res judicata*, the rule against splitting causes of action rests upon the principle that cases should not be tried piecemeal and that litigation should end once the rights of the parties have been heard by one court. However, a determination of improper claim-splitting *does not require final judgment*, unlike *res judicata*. *Katz v. Gerardi*, 655 F.3d 1212 (10th Cir. 2011).

Thus, all related claims that accrued together must be brought together, in the same action, or be lost. *Murphy v. Bancroft Constr. Co.*, 135 F. App'x 515, 519 2005 WL 1059249 (3d Cir. 2005).

The doctrine of claim preclusion is central to a court's objective of conclusive resolution of disputes and seeks to avoid the expense and vexation of multiple lawsuits while conserving judicial resources and fostering reliance on judicial action by minimizing the possibility of inconsistent decisions. *Equal Employment Opportunity Comm'n v. U.S. Steel Corp.*, 921 F.2d 489, 492 (3d Cir.1990) (quotation omitted). **More simply, its purpose is to avoid piecemeal litigation of claims arising from the same events.** *Churchill v. Star Enters.*, 183 F.3d 184, 194 (3d Cir.1999). Thus, where there is "no escaping from the fact that [a plaintiff] has relied on different legal theories to seek redress from the [same defendant] for a single course of wrongful conduct ... [by] splitting a cause of action," the doctrine of claim preclusion will prohibit the prosecution of the second lawsuit. *Id.* at 195.

See also *Benjamin v. Cleburne Truck & Body Sales, Inc.*, 424 F. Supp. 1294, 1299, fn. 15 (D.V.I. 1976) ("In accordance with the position taken by the American Law Institute in Restatement Second, the consortium claim must, where possible, be joined with the claim for bodily injury. See, Tent. draft No. 14, supra, n.7.")

Counterclaimants knew of all of the claims here at the time the St. Thomas Action was initiated. They had already been sued in this action. There are no new documents received after 2012 -- no new information about acts years before. This is similar to *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366, 371 (Ky. 2010). There plaintiff filed suit in Jefferson Circuit Court to recover for chronic wrist injuries that he claimed arose from his twenty-year employment in labor positions at CSX. Nearly two years later he brought a subsequent suit in Perry Circuit Court against CSX for additional injuries, which he also claimed arose from his years as a laborer for the company. The Kentucky Supreme Court stated that the rule against splitting causes of action “applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

## **VI. Conclusion**

The action against Waheed Hamed must be dismissed as claims related to "significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager" should be raised in the St. Thomas Action.

**RESPECTFULLY SUBMITTED,**

**Dated:** February 18, 2014



**Carl J. Hartmann III, Esq.** (Bar No. 48)  
*Counsel for Waheed Hamed*  
5000 Estate Coakley Bay, L-6  
Christiansted, VI 00820  
Telephone: (340) 719-8941  
Email: carl@carlhartmann.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of February, 2014, I served a copy of the foregoing Memorandum by email, as agreed by the parties, on:

**Joel H. Holt, Esq.**

*Counsel for Mohammad Hamed*  
Law Offices of Joel H. Holt  
2132 Company Street,  
Christiansted, VI 00820  
Email: holtvi@aol.com

**Nizar A. DeWood**

The DeWood Law Firm  
2006 Eastern Suburb, Suite 101  
Christiansted, VI 00820

**Gregory H. Hodges**

Law House, 10000 Frederiksberg Gade  
P.O. Box 756  
ST.Thomas, VI00802  
ghodges@dtflaw.com



**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS & ST. JOHN**

<b>UNITED CORPORATION</b>	)	CIV. NO. SX-13-CV-_____
	)	
Plaintiff	)	
	)	
VS.	)	ACTION FOR DAMAGES
	)	CIVIL ACTION
	)	
	)	JURY TRIAL DEMANDED
	)	
<b>WAHEED HAMED</b> (a/k/a Willy, Willy Hamed)	)	
	)	
Defendant	)	
_____	)	

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**COMPLAINT**

Plaintiff United Corporation, hereinafter ("United"), and by and through its undersigned counsel complains of Defendant Waheed Hamed, hereinafter ("Hamed") as follows:

**I. BACKGROUND**

1. This is a civil action for damages (both compensatory and punitive) recoupment, conversion, accounting, constructive trust, breach of contract, and breach of various fiduciary duties against Defendant Waheed Hamed, an employee of Plaintiff United. This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed's tenure as manager of the operations of the Plaza Extra Supermarket store in St. Thomas, V.I. as well as other locations. Further, this civil action names John Doe 1-10 as persons who have worked knowingly, and jointly with Waheed Hamed in the commission of each of the causes of action alleged herein.





## II. JURISDICTION, VENUE, & DEMAND FOR JURY TRIAL

2. This Court has personal jurisdiction, subject matter jurisdiction, and the amount in controversy is satisfied, pursuant to 4 VIC §76.
3. Venue is proper in the District of St. Thomas because the defendant is a resident of St. Thomas, Virgin Islands, and the facts underlying the causes of action arose in said District, pursuant to 4 VIC § 78.
4. A trial by jury is demanded pursuant to 4 VIC § 80.

## III. THE PARTIES

5. Plaintiff United Corporation is a duly organized Virgin Islands Corporation since January of 1979, and is authorized to conduct business in the Virgin Islands. Plaintiff is *sui juris*.
6. Plaintiff is owned completely in various shares by Fathi Yusuf, Fawzia Yusuf, Maher Yusuf, Nejah Yusuf, Zayed Yusuf, and Yusuf Yusuf, hereinafter collectively referred to as the "Yusuf Family".
7. Defendant Waheed Hamed is a natural person and is a resident of St. Thomas, U.S. Virgin Islands. At all times relevant to this action, Defendant Hamed has been an employee of Plaintiff United.
8. Defendants John Doe 1 to 10, upon information, are employees, family, friends, and agents of Defendant Hamed who have participated and/or assisted defendant Waheed Hamed with the defalcation, conversion, and concealment of substantial assets that are the sole property of Plaintiff United. John Doe 1 to 10 may be both natural persons and/or incorporated or unincorporated associations/entities. Each is *sui juris*.

#### IV. FACTS

9. In 1992, Plaintiff United hired Waheed Hamed as an employee, and assigned him managerial duties at the Plaza Extra supermarket located in Tutu Park, St. Thomas, U.S. Virgin Islands. Defendant Hamed managed and collected significant cash and other assets on behalf of Plaintiff United during the course of his employment.

10. In 2003, Plaintiff United, Fathi Yusuf, Maher Yusuf, and Defendant Waheed Hamed, and the Defendant's brother Waleed Hamed, among others, were indicted in the case of *U.S. v United Corporation*, case no. 15-cr-2005 (D.V.I.).

11. During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered *significant financial documents*, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2011 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct, financial affairs, or tax returns.

12. During a review and inventory of the documents and files delivered and returned by the U.S. Government to Plaintiff United, Plaintiff United reviewed documents comprising tax returns for Waheed Hamed, including but not limited to Defendant's tax returns for the years

13. With the exception of his salaried position with United Corporation, Defendant Waheed Hamed never had any other significant source of income from business operations, investments, etc., prior to or during his employment tenure with Plaintiff United.

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14. In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7<sup>th</sup>, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations.

15. Defendant Waheed Hamed owed absolute duty of loyalty and care to United Corporation to act in its best interest and not to usurp any of Plaintiff's assets and business opportunity that would otherwise inure to Plaintiff's benefit.

16. A further review of Defendant Waheed Hamed's tax returns, including Defendant's 1992 Tax Return, obtained from the United States Government also revealed that Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart.

17. Defendant Waheed Hamed was never permitted to acquire, engage, or manage any business that may compete with the operations of the Plaza Extra Stores. Defendant Hamed never disclosed to his employer that he was operating a separate wholesale grocery business called "5 Corner's Mini Mart."

18. Defendant Hamed's sole income in 1992 did not exceed \$35,000, and Defendant Hamed never had any other businesses or employment to produce additional revenue to purchase and sell grocery inventory to other retailers.

19. The scale and scope of the wholesale business as indicated in Defendant Hamed's tax returns demonstrates substantial inventory, upon information, belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business.

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20. To date, Defendant Waheed Hamed refuses to explain and account to Plaintiff United for any of the aforementioned funds, inventory, and the business opportunities Defendant Hamed diverted to his personal benefit.

## **V. CAUSES OF ACTION**

### **FIRST CAUSE OF ACTION BREACH OF FIDUCIARY DUTIES**

21. Plaintiff incorporates paragraphs 1 through 20 inclusive as if fully set forth verbatim herein.

22. As an agent and employee of Plaintiff United, a corporate entity, Defendant Waheed Hamed owes fiduciary duties to the entity. Included in the fiduciary duty is the duty of loyalty. Not only is it Defendant Waheed Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, he is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

23. Defendant Waheed Hamed has breached the following duties (the list of duties violated by Defendant Hamed, below is not intended to be an exhaustive or exclusive list):

- a. Duty of Loyalty
- b. Duty of good faith and candor;
- c. Duty to manage the day-to-day operations of Plaintiff United's Plaza Extra supermarket for the benefit of United;
- d. Duty of full disclosure of all matters affecting his employer Plaintiff United;
- e. Duty to refrain from self-dealing, and/or general prohibition against the fiduciary using his relationship to benefit his personal interest; and
- f. Duty to manage any funds, assets, and/or property belonging to Plaintiff United by virtue

of its operation of the Plaza Extra Supermarket stores in accordance with applicable laws.

### SECOND CAUSE OF ACTION CONSTRUCTIVE TRUST/RECOUPMENT

24. Plaintiff incorporates paragraphs 1 through 23 as if fully set forth verbatim herein.

25. As an agent and employee of Plaintiff United, Defendant Hamed owes numerous fiduciary duties to Plaintiff United and its shareholders. Not only is it Defendant Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, but Defendant Hamed also is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

26. Defendant Hamed has engaged in misappropriation of substantial and valuable assets of Plaintiff United causing substantial injury to Plaintiff United. As a result, Plaintiff United has sustained significant financial injury.

27. As such, a constructive trust should be imposed to gather and account for all assets misappropriated by Defendant Hamed that belongs to Plaintiff United.

### THIRD CAUSE OF ACTION CONVERSION

28. Plaintiff re-incorporates paragraphs 1 through inclusive as if fully set forth verbatim herein.

29. Defendant Waheed Hamed has knowingly converted substantial funds and assets belonging to Plaintiff United. Plaintiff never consented or agreed to Defendant Hamed's unauthorized use of its funds and assets. As such, Defendant Hamed is liable for conversion.

**FOURTH CAUSE OF ACTION  
BREACH OF CONTRACT**

30. Plaintiff incorporates paragraphs 1 through 37 inclusive as if fully set forth verbatim herein.

31. Defendant was an at-will employee of Plaintiff United.

32. As an at-will employee of Plaintiff United, Defendant Hamed had a contractual duty to act in good faith, and to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United.

33. Defendant Hamed has breached his contractual duties to Plaintiff United, causing Plaintiff substantial economic and financial harm. As a result, Defendant Hamed is liable to Plaintiff for breach of contract.

**SIXTH CAUSE OF ACTION  
ACCOUNTING**

34. Plaintiff incorporates paragraphs 1 through 33 inclusive as if fully set forth verbatim herein.

35. As agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as a manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders. Defendant Hamed was not permitted to place himself in a position where it would be for his own benefit to violate the duty.

36. Defendant Hamed has breached his employment contractual agreement with Plaintiff United by mismanaging, misappropriating, and converting funds, monies, and other valuables to his personal use. As a result, Plaintiff United has sustained substantial financial damages.

37. As such, Plaintiff United is entitled a full accounting of all monies, funds, and assets unlawfully appropriated by Defendant Hamed.

## VI. RELIEF REQUESTED

Wherefore, Plaintiff United Corporation, and its shareholders, respectfully pray for the following relief:

- a. Actual and compensatory damages to be determined at trial.
- b. Punitive damages for the intentional defalcation of funds and damages caused to Plaintiff United Corporation.
- c. A complete accounting and constructive trust of all funds, assets, opportunities, and other valuables converted and or misappropriated by Defendant Hamed.
- d. Costs of all professional fees that may be required for the audit and investigation of this matter.
- e. A return of all documents, including but not limited to electronically stored information, belonging to Plaintiff United in the possession (both actual and constructive) of Defendant Hamed.
- f. A Restraining Order precluding Defendant Hamed from:
  - i. Physically returning, or attempting to return, to any of the Plaza Extra supermarket stores;
  - ii. Accessing, or attempting to access, any bank accounts belonging to United Corporation for any purpose;
  - iii. Contacting, or attempting to contact, any employee of Plaintiff United concerning the operations and management of the Plaza Extra Supermarkets;


- iv. Preclude Defendant Waheed Hamed from contacting any business associates of Plaintiff United;
- v. Preclude Defendant Waheed Hamed from representing to third-parties that he is an employee of Plaza Extra;
- vi. Accessing, or attempting to access, any of Plaintiff United's, including but not limited to the Plaza Extra Supermarkets, books, records, and information regarding as to location or manner of storage;
- vii. Attorney's fees, court costs, and any other relief the court deems equitable.

Date: March 5, 2013

Respectfully Submitted,

DeWood Law Firm  
Counsel for Plaintiff United

By:

  
Nizar A. DeWood, Esq. (1177)  
200 Eastern Suburb, Suite 102  
Christiansted, V.I. 00820  
t. (340) 773-3444  
f. (888) 398-8428



# SUMMONS

(CIVIL ACTION - ORIGINAL)

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS & ST. JOHN

UNITED CORPORATION,

Plaintiff,

vs.

WAHEED HAMED,

(a/k/a Willy, Willy Hamed)

Defendant.

CIVIL NO. ST-13-CV- 101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

2013 MAR -5 PM 4:16

TO: **WAHEED HAMED**  
ADDRESS: **C/O PLAZA EXTRA - TUTU PARK**  
**St. Thomas, VI 00802**

**YOU ARE HEREBY SUMMONED** and required to file with the Clerk of this Court and serve upon:

Plaintiff's Attorney:  
**NIZAR A. DEWOOD, ESQ.**  
2006 Eastern Suburb, Ste. 101  
Christiansted, VI 00820  
T: (340) 773-3444  
F: (888) 398-8428

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Witness my hand and the seal of this Court this 5<sup>th</sup> day of March, 2013.

VENETIA H. VELASQUEZ, ESQ.  
Clerk of the Court

  
Nizar A. DeWood, Esquire  
Attorney for Plaintiff

  
BY DEPUTY CLERK

**SUPERIOR COURT OF THE VIRGIN ISLANDS**  
**DIVISION OF ST. THOMAS AND ST. JOHN**

<b>UNITED CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>CASE NO. ST-13-CV-101</b>
<b>WAHEED HAMED, a/k/a WILLY OR WILLIE</b>	)	
<b>HAMED</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**MEMORANDUM OPINION**

Pending before the Court is Defendant Waheed Hamed’s April 15, 2013, Motion for Judgment on the Pleadings.<sup>1</sup> For the following reasons, Defendant’s Motion will be granted in part and denied in part without prejudice.

**FACTUAL AND PROCEDURAL HISTORY**

Plaintiff United Corporation filed a Complaint on March 5, 2013, alleging that during Defendant Waheed Hamed’s employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets of Plaintiff in two separate instances. Specifically, Plaintiff alleges (1) that on October 7, 1995, Defendant converted Seventy thousand dollars (\$70,000.00) by conveying it to a third party through a certified check without Plaintiff’s approval; and (2) that in at least 1992 and for a following unknown period of time, Defendant operated a wholesale grocery business called “5 Corner’s Mini Mart,” converting Plaintiff’s inventory and personal property without Plaintiff’s knowledge.

<sup>1</sup> Plaintiff responded on May 1, 2013. Defendant replied on June 4, 2013.



## STANDARD

Pursuant to Fed. R. Civ. P. 12(c), made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, a party may move for judgment on the pleadings, “[a]fter the pleadings are closed – but early enough not to delay trial.”<sup>2</sup> The standard applied under Fed. R. Civ. P. 12(c) mirrors that of Fed. R. Civ. P. 12(b)(6),<sup>3</sup> under which a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff’s “failure to state a claim upon which relief can be granted.”<sup>4</sup> In considering the motion, the Court must first liberally construe the pleadings,<sup>5</sup> and “accept as true all well-pleaded allegations in the complaint” in favor of the plaintiff.<sup>6</sup> While “the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation.”<sup>7</sup> Second, once the legal and factual allegations have been distinguished, the Court must decide whether “the plaintiff

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<sup>2</sup> Fed. R. Civ. P. 12(c).

<sup>3</sup> See, e.g., *Sanders v. Gov't of the V.I.*, 2009 WL 649888, at \*2 (D.V.I. Mar. 9, 2009); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011). An essential difference between a motion under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) is that a motion under Fed. R. Civ. P. 12(b)(6) must be made before a responsive pleading is allowed, while Fed. R. Civ. P. 12(c) applies after a responsive pleading has been filed.

<sup>4</sup> Fed. R. Civ. P. 12(b)(6).

<sup>5</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

<sup>6</sup> *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) (“[I]n considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations in the complaint. . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a) . . . .”) (internal citations omitted).

<sup>7</sup> *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at \*1 (V.I. Super. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

pleads factual content that allows the court to draw the reasonable inference”<sup>8</sup> that the claim is plausible on its face.

Considering that a motion to for judgment on the pleadings challenges the sufficiency of the pleadings rather than disputed factual allegations, a Court will not generally grant a motion to dismiss based on either Fed. R. Civ. Pro. 12(c) or Fed. R. Civ. P. 12(b)(6) that solely asserts an affirmative defense.<sup>9</sup> However, a Court may consider such a motion to dismiss where “the relevant facts are . . . readily apparent on the face of the complaint.”<sup>10</sup> For instance, while “the expiration of the [s]tatute of [l]imitations often presents a question of fact [for the jury], where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law.”<sup>11</sup> When conducting such an analysis the Court primarily relies on the factual allegations plead in the Complaint, but may also consider “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint . . . .”<sup>12</sup> For instance, in *Burton v. First Bank of Puerto Rico*, the court considered the plaintiff’s

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<sup>8</sup> *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446).

<sup>9</sup> See, e.g., *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008) (“Where a court grants a Rule 12(b)(6) or Rule 12(c) motion based on an affirmative defense, the facts establishing that defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude.”)(internal quotations omitted)(citing *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir.2006)).

<sup>10</sup> *Burton v. First Bank of Puerto Rico*, 49 V.I. 16, 20 (V.I. Super. 2007)(applying the pre-*Twombly* standard to a Fed. R. Civ. P. 12(b)(6) motion); see *Charleswell v. Chase Manhattan Bank*, 45 V.I., 495, 506 (D.V.I, 2004).

<sup>11</sup> *Burton*, 49 V.I. at 20 (internal citations and quotations omitted) (citing *Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005)).

<sup>12</sup> *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001)); see generally *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). If other extrinsic evidence is considered, a court may convert the motion into Fed. R. Civ. P. 56 motion at its discretion. See generally STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK, at 470 (2012).

billing statements because they were “indisputably authentic documents” that were explicitly referred to in the complaint.<sup>13</sup>

## ANALYSIS

Defendant argues that Plaintiff’s Complaint should be dismissed because the statute of limitations period for Plaintiff’s claims for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) have expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is “based on a breach of a legal duty imposed by law that arises out of the performance of the contract” or otherwise carries a six (6) year statute of limitations if it is “based upon a breach of specific provisions in the contract.”<sup>14</sup> Pursuant to 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations.<sup>15</sup> Pursuant to 5 V.I.C. § 31(3)(A), a breach of contract claim carries a six (6) year statute of limitations.<sup>16</sup> While Plaintiff lists “accounting”<sup>17</sup> and “constructive trust or recoupment” as separate counts, they are equitable remedies, and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.<sup>18</sup>

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<sup>13</sup> 49 V.I. at 20.

<sup>14</sup> *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 79 (Terr. V.I. Apr. 21, 1997)

<sup>15</sup> *Id.* at 84 (“[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.”)

<sup>16</sup> *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).

<sup>17</sup> *Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I. 1997)(“ equitable accounting is a remedy of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiff’s property or entitlements. The plaintiff makes a prima facie case by showing a breach of fiduciary duty plus gross receipts resulting to the fiduciary, and the defendant must prove what deductions are appropriate to figure the net profit.”)(internal quotations and citations omitted)(quoting 1 Dan B. Dobbs, *Law Of Remedies* § 4.3(5), at 610 (2d ed.1993)).

<sup>18</sup> *See generally* 1A C.J.S. Accounting § 6 (“An accounting is essentially an equitable remedy, which arises from an obligation to account for the plaintiff’s money or property.”); 90 C.J.S. Trusts § 176

Plaintiff argues that, while the alleged acts of misconduct occurred as early as 1992 and in 1995, the statutory period was tolled because Plaintiff had no way of knowing of the misconduct until Plaintiff received certain documents in October 2011 that had been gathered pursuant to a 2003 federal criminal investigation in *U.S. v. United Corporation, et al.*

Ordinarily, “a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action” unless the statute of limitations has been tolled.<sup>19</sup> While Plaintiff’s reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant argues that Plaintiff’s argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable ‘discovery rule’ tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party’s conduct. The discovery rule is to be applied using an objective reasonable person standard.<sup>20</sup> (emphasis added)

On the other hand, equitable tolling may apply “where the defendant has actively misled the plaintiff,” as Plaintiff here alleges in the Complaint.<sup>21</sup> However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

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(“[Constructive trusts] are remedial in character and are classified as belonging to remedial rather than substantive law, and it is not itself a substantive right.”)(internal citations omitted).

<sup>19</sup> *Whitaker*, 36 V.I. at 81.

<sup>20</sup> *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at \*5 (Bankr. D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at \*3 (D.V.I 2002)) (internal citations and quotations omitted).

<sup>21</sup> *Id.* at \*6.

“that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim.”<sup>22</sup> (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an “objective reasonable person standard.”<sup>23</sup>

Applying the “reasonable diligence” standard of the discovery rule and doctrine of equitable tolling, the Court will discuss in turn the 1992 and 1995 allegations of wrongful conduct to determine whether recovery on the Complaint on its face, construed liberally in a light most favorable to Plaintiff, is barred on statute of limitations grounds.

**I. Claims relying on facts alleging Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995.**

Plaintiff’s Complaint alleges that

In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United’s knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7<sup>th</sup>, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff’s business operations.<sup>24</sup>

Further, in his response to Defendant’s Motion, Plaintiff argues that the “statute of limitations could not accrue and was tolled because Plaintiff could not have possibly known of Defendant’s misconduct until a federal investigation revealed this

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<sup>22</sup> *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

<sup>23</sup> *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) (“[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.”)(internal citations and quotations omitted).

<sup>24</sup> Complaint, ¶ 14.

misconduct.”<sup>25</sup> Defendant argues that the statute of limitations period was not tolled because under either the discovery rule or doctrine of equitable tolling Plaintiff failed to exercise “reasonable diligence” in reviewing the basic accounting records of the company before the records were seized by the government in *U.S. v. United Corporation, et al.*

The Court agrees with Defendant, albeit on different grounds. Specifically, the Complaint states that in 2003 Plaintiff United, along with Defendant and others, were indicted in “*U.S. v. United Corp., ST-15-CR-2005.*”<sup>26</sup> Upon a review of public records, it appears that Plaintiff is referring to *U.S. v. United Corporation, et al.*, Crim. No. 2003-147 in the District Court. The original indictment, issued and unsealed on September 18, 2003, in *U.S. v. United Corporation, et al.*, Crim. No. 2003-147, and any subsequent superseding indictments may be considered by the Court in its analysis to determine whether Plaintiff exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling because Plaintiff explicitly refers to that case on the face of the Complaint, and further, these indictments are indisputable public records.<sup>27</sup> The third superseding indictment, issued on September 9, 2004, charged Defendant Waheed Hamed, among others, with

purchas[ing] and direct[ing] and caus[ing] Plaza Extra employees and others to purchase cashier’s checks, traveler’s checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the case as legitimate-appearing financial instruments.<sup>28</sup>

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<sup>25</sup> Plaintiff’s Response in Opposition to Defendant’s Motion for Judgment on the Pleadings, May 1, 2013, at ¶ 7.

<sup>26</sup> Complaint, ¶ 14.

<sup>27</sup> *Barany-Snyder*, 539 F.3d at 332; See Fed. R. Evid 902.

<sup>28</sup> *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004, at ¶ 15.



While the third superseding indictment largely alleges that Defendant Waheed Hamed, among others, used cashier's checks and other methods to conceal illegal money transfers abroad, the third superseding indictment, although only containing allegations, would have *at least* put a reasonable person in Plaintiff's position,<sup>29</sup> as Defendant's employer, on notice<sup>30</sup> that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties, as alleged in Plaintiff's Complaint at Paragraph 15. Plaintiff does not contend any efforts were made after this point to review United's business and accounting records to investigate the government's allegations against Defendant.<sup>31</sup> Instead, the Complaint clearly states on its face that the discovery was only made in October 2011 upon a review of the government's records and documents. Thus, here, "the facts are so clear that reasonable minds cannot differ," on the face of the Complaint that the commencement period for the statute of limitations began *at least* by September 9, 2004.<sup>32</sup> As such, all claims relying on facts alleging

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<sup>29</sup> *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at \*6 (noting that while reasonable diligence is an objective test based on a reasonable person standard, the test is flexible to take into account certain situations and circumstances).

<sup>30</sup> *See Whitaker*, 36 V.I. at 81 ("the . . . crucial question in determining the accrual date for statute of limitations purposes is whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him.") (quoting *Zelevnik v. U.S.*, 770 F.2d 20, 23 (3d Cir. 1985)).

<sup>31</sup> *See, e.g., Zafarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 553 (E.D. Pa. 2010) ("Once a plaintiff becomes aware of an injury and who caused it, he is under a duty to investigate and promptly file his suit.") Plaintiff primary argument is that Plaintiff did not have access until October 2011 to many of the records, particularly Defendant's 1992 tax return, which lead to the discovery of Defendant's alleged misconduct. Here, Plaintiff, a corporation, has access to its own accounting and other record-keeping files, a review of which may have revealed Defendant's alleged misconduct. Even if the government had confiscated Plaintiff's business records, an objectively reasonable individual would have retained copies, particularly if an indictment was pending, and have inquired into the wrongdoing suggested by the September 9, 2004, third superseding indictment. Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendant's misconduct is without merit.

<sup>32</sup> As the Court relied on the third superseding indictment, the Court does not hold or address whether the original indictment may have also placed Plaintiff on notice of Defendant's alleged misconduct.

Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995, are barred on statute of limitations grounds. All of Plaintiff's claims carry a six (6) year statute of limitation or less, meaning the statutory period expired by *at least* September 9, 2010.

**II. Claims relying on facts alleging Defendant operated a wholesale grocery business called "5 Corner's Mini Mart" and converted Plaintiff's inventory and personal property without Plaintiff's knowledge in 1992 for an unknown period of time.**

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory . . . belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."<sup>33</sup> Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in *U.S. v. United Corporation, et al.*, were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.<sup>34</sup>

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<sup>33</sup> Complaint, ¶¶ 16-20.

<sup>34</sup> Plaintiff's Response in Opposition to Defendant's Motion for Judgment on the Pleadings, May 1, 2013, at ¶¶ 4, 7. Defendant argues that because Plaintiff fails to specifically reference the alleged 1992 misconduct in their response to Defendant's Motion that "[P]laintiff concedes the limitation issue as to the 1992 act." Defendant Hamed's Reply to Plaintiff's Opposition to the Motion for Judgment on the Pleadings, June 4, 2013, at 3. The Court agrees that Plaintiff's counsel failed to cite to any relevant authority in violation of Local Rule of Civil Procedure 11.1 which provides that, "[b]y signing a motion or supporting memorandum or brief, an attorney certifies to the Court that: (a) the applicable law in this jurisdiction has been cited, including authority for and against the position being advocated by counsel . . . ." The Court strongly cautions Plaintiff's counsel to cite to relevant authority and applicable legal standards in any future representations before this Court. However, the Court in its discretion, and in viewing the Complaint in a light most favorable to Plaintiff, has considered Plaintiff's general argument that Plaintiff had no way of discovering Defendant's alleged misconduct until October 2011 to both the alleged misconduct that occurred in 1992 and 1995.

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determine as a matter of law and is rather a question of material fact.<sup>35</sup> Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in *U.S. v. United*, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, here, Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which Plaintiff previously did not have access. As such, Defendant's motion is premature with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011.


For the foregoing reasons, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings. An Order consistent with this Opinion shall follow.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.  
Clerk of Court

by:

  
Lori Boynes-Tyson  
Court Clerk Supervisor

  
HON. MICHAEL C. DUNSTON  
JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS

<sup>35</sup> See, e.g. *In re Mushroom*, 383 F.3d at 338.

**SUPERIOR COURT OF THE VIRGIN ISLANDS**  
**DIVISION OF ST. THOMAS AND ST. JOHN**

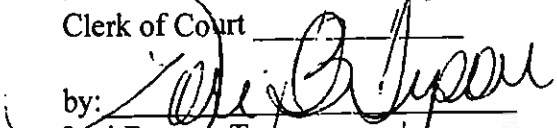
<b>UNITED CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>CASE NO. ST-13-CV-101</b>
<b>WAHEED HAMED, a/k/a WILLY OR WILLIE</b>	)	
<b>HAMED</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	


**ORDER**

The Court having issued a Memorandum Opinion on this date, it is  
ORDERED that Defendant's April 15, 2013, Motion for Judgment on the  
Pleadings is GRANTED in part and DENIED in part without prejudice; and it is  
ORDERED that the portion of Plaintiff's Complaint related to an alleged certified  
check for seventy-thousand dollars (\$70,000.00) is DISMISSED with prejudice; and it is  
ORDERED that Plaintiff submit an amended complaint by July 15, 2013,  
consistent with holding of the Memorandum Opinion; and it is  
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.  
Clerk of Court

by:   
Lori Boynes-Tyson  
Court Clerk Supervisor 6/25/2013

  
HON. MICHAEL C. DUNSTON  
JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**  
**DIVISION OF ST. THOMAS & ST. JOHN**

<b>UNITED CORPORATION</b>	)	CIV. NO. SX-13-CV-
	)	
Plaintiff	)	ACTION FOR DAMAGES
	)	<b>CIVIL ACTION</b>
VS.	)	
	)	<b>AMENDED COMPLAINT</b>
	)	
<b>WAHEED HAMED</b>	)	
<i>(a/k/a Willy, Willy Hamed)</i>	)	<b>JURY TRIAL DEMANDED</b>
	)	
Defendant	)	
_____	)	

**AMENDED COMPLAINT**

Plaintiff United Corporation, hereinafter (“United”), and by and through its undersigned counsel complains of Defendant Waheed Hamed, hereinafter (“Hamed”) as follows:

**I. BACKGROUND**

1. This is a civil action for damages (both compensatory and punitive) recoupment, conversion, accounting, constructive trust, breach of contract, and breach of various fiduciary duties against Defendant Waheed Hamed, an employee of Plaintiff United. This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed’s tenure as manager of the operations of the Plaza Extra Supermarket store in St. Thomas, V.I. as well as other locations. Further, this civil action names John Doe 1-10 as persons who have worked knowingly, and jointly with Waheed Hamed in the commission of each of the causes of action alleged herein.



## II. JURISDICTION, VENUE, & DEMAND FOR JURY TRIAL

2. This Court has personal jurisdiction, subject matter jurisdiction, and the amount in controversy is satisfied, pursuant to 4 VIC §76.

3. Venue is proper in the District of St. Thomas because the defendant is a resident of St. Thomas, Virgin Islands, and the facts underlying the causes of action arose in said District, pursuant to 4 VIC § 78.

4. A trial by jury is demanded pursuant to 4 VIC § 80.

## III. THE PARTIES

5. Plaintiff United Corporation is a duly organized Virgin Islands Corporation since January of 1979, and is authorized to conduct business in the Virgin Islands. Plaintiff is *sui juris*.

6. Plaintiff is owned completely in various shares by Fathi Yusuf, Fawzia Yusuf, Maher Yusuf, Nejeah Yusuf, Zayed Yusuf, and Yusuf, hereinafter collectively referred to as the “Yusuf Family”.

7. Defendant Waheed Hamed is a natural person and is a resident of St. Thomas, U.S. Virgin Islands. At all times relevant to this action, Defendant Hamed has been an employee of Plaintiff United.

8. Defendants John Doe 1 to 10, upon information, are employees, family, friends, and agents of Defendant Hamed who have participated and/or assisted defendant Waheed Hamed with the defalcation, conversion, and concealment of substantial assets that are the sole property of Plaintiff United. John Doe 1 to 10 may be both natural persons and/or incorporated or unincorporated associations/entities. Each is *sui juris*.

#### IV. FACTS

9. In 1992, Plaintiff United hired Waheed Hamed as an employee, and assigned him managerial duties at the Plaza Extra supermarket located in Tutu Park, St. Thomas, U.S. Virgin Islands. Defendant Hamed managed and collected significant cash and other assets on behalf of Plaintiff United during the course of his employment.

10. In 2003, Plaintiff United, Fathi Yusuf, Maher Yusuf, and Defendant Waheed Hamed, and the Defendant's brother Waleed Hamed, among others, were indicted in the case of *U.S. v United Corporation*, case no. 15-cr-2005 (D.V.I.).

11. During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered *significant financial documents*, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2010 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct, financial affairs, or tax returns.

12. During a review and inventory of the documents and files delivered and returned by the U.S. Government to Plaintiff United, Plaintiff United reviewed documents comprising tax returns for Waheed Hamed, including but not limited to Defendant's tax returns for the years

13. With the exception of his salaried position with United Corporation, Defendant Waheed Hamed never had any other significant source of income from business operations, investments, etc., prior to or during his employment tenure with Plaintiff United.

14. Defendant Waheed Hamed owed an absolute duty of loyalty and care to United Corporation to act in its best interest and not to usurp any of Plaintiff's assets and business opportunity that would otherwise inure to Plaintiff's benefit.
15. A further review of Defendant Waheed Hamed's tax returns, including Defendant's 1992 Tax Return, obtained from the United States Government also revealed that Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart.
16. Defendant Waheed Hamed was never permitted to acquire, engage, or manage any business that may compete with the operations of the Plaza Extra Stores. Defendant Hamed never disclosed to his employer that he was operating a separate wholesale grocery business called "5 Corner's Mini Mart."
17. Defendant Hamed's sole income in 1992 did not exceed \$35,000, and Defendant Hamed never had any other businesses or employment to produce additional revenue to purchase and sell grocery inventory to other retailers.
18. The scale and scope of the wholesale business as indicated in Defendant Hamed's tax returns demonstrates substantial inventory, upon information, belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business.
19. To date, Defendant Waheed Hamed refuses to explain and account to Plaintiff United for any of the aforementioned funds, inventory, and the business opportunities Defendant Hamed diverted to his personal benefit.



## **V. CAUSES OF ACTION**

### **FIRST CAUSE OF ACTION BREACH OF FIDUCIARY DUTIES**

20. Plaintiff incorporates paragraphs 1 through 20 inclusive as if fully set forth verbatim herein.

21. As an agent and employee of Plaintiff United, a corporate entity, Defendant Waheed Hamed owes fiduciary duties to the entity. Included in the fiduciary duty is the duty of loyalty. Not only is it Defendant Waheed Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, he is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

22. Defendant Waheed Hamed has breached the following duties (the list of duties violated by Defendant Hamed, below is not intended to be an exhaustive or exclusive list):

- a. Duty of Loyalty
- b. Duty of good faith and candor;
- c. Duty to manage the day-to-day operations of Plaintiff United's Plaza Extra supermarket for the benefit of United;
- d. Duty of full disclosure of all matters affecting his employer Plaintiff United;
- e. Duty to refrain from self-dealing, and/or general prohibition against the fiduciary using his relationship to benefit his personal interest; and
- f. Duty to manage any funds, assets, and/or property belonging to Plaintiff United by virtue of its operation of the Plaza Extra Supermarket stores in accordance with applicable laws.

### **SECOND CAUSE OF ACTION**

### **CONSTRUCTIVE TRUST/RECOUPMENT**

23. Plaintiff incorporates paragraphs 1 through 23 as if fully set forth verbatim herein.

24. As an agent and employee of Plaintiff United, Defendant Hamed owes numerous fiduciary duties to Plaintiff United and its shareholders. Not only is it Defendant Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, but Defendant Hamed also is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

25. Defendant Hamed has engaged in misappropriation of substantial and valuable assets of Plaintiff United causing substantial injury to Plaintiff United. As a result, Plaintiff United has sustained significant financial injury.

26. As such, a constructive trust should be imposed to gather and account for all assets misappropriated by Defendant Hamed that belongs to Plaintiff United.

### **THIRD CAUSE OF ACTION CONVERSION**

27. Plaintiff re-incorporates paragraphs 1 through inclusive as if fully set forth verbatim herein.

28. Defendant Waheed Hamed has knowingly converted substantial funds and assets belonging to Plaintiff United. Plaintiff never consented or agreed to Defendant Hamed's unauthorized use of its funds and assets. As such, Defendant Hamed is liable for conversion.

### **FOURTH CAUSE OF ACTION BREACH OF CONTRACT**

29. Plaintiff incorporates paragraphs 1 through 37 inclusive as if fully set forth verbatim herein.

30. Defendant was an at-will employee of Plaintiff United.

31. As an at-will employee of Plaintiff United, Defendant Hamed had a contractual duty to act in good faith, and to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United.

32. Defendant Hamed has breached his contractual duties to Plaintiff United, causing Plaintiff substantial economic and financial harm. As a result, Defendant Hamed is liable to Plaintiff for breach of contract.

### **SIXTH CAUSE OF ACTION ACCOUNTING**

33. Plaintiff incorporates paragraphs 1 through 33 inclusive as if fully set forth verbatim herein.

34. As agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as a manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders. Defendant Hamed was not permitted to place himself in a position where it would be for his own benefit to violate the duty.

35. Defendant Hamed has breached his employment contractual agreement with Plaintiff United by mismanaging, misappropriating, and converting funds, monies, and other valuables to his personal use. As a result, Plaintiff United has sustained substantial financial damages.

36. As such, Plaintiff United is entitled a full accounting of all monies, funds, and assets unlawfully appropriated by Defendant Hamed.

### **VI. RELIEF REQUESTED**

Wherefore, Plaintiff United Corporation, and its shareholders, respectfully pray for the following relief:

- a. Actual and compensatory damages to be determined at trial.
- b. Punitive damages for the intentional defalcation of funds and damages caused to Plaintiff United Corporation.
- c. A complete accounting and constructive trust of all funds, assets, opportunities, and other valuables converted and or misappropriated by Defendant Hamed.
- d. Costs of all professional fees that may be required for the audit and investigation of this matter.
- e. A return of all documents, including but not limited to electronically stored information, belonging to Plaintiff United in the possession (both actual and constructive) of Defendant Hamed.
- f. A Restraining Order precluding Defendant Hamed from:
  - i. Physically returning, or attempting to return, to any of the Plaza Extra supermarket stores;
  - ii. Accessing, or attempting to access, any bank accounts belonging to United Corporation for any purpose;
  - iii. Contacting, or attempting to contact, any employee of Plaintiff United concerning the operations and management of the Plaza Extra Supermarkets;
  - iv. Preclude Defendant Waheed Hamed from contacting any business associates of Plaintiff United;
  - v. Preclude Defendant Waheed Hamed from representing to third-parties that he is an employee of Plaza Extra;

- vi. Accessing, or attempting to access, any of Plaintiff United's, including but not limited to the Plaza Extra Supermarkets, books, records, and information regarding as to location or manner of storage;
- vii. Attorney's fees, court costs, and any other relief the court deems equitable.

Date: July 15, 2013

Respectfully Submitted,

DeWood Law Firm  
Counsel for Plaintiff United

By: /s/ Nizar DeWood  
Nizar A. DeWood, Esq. (1177)  
2006 Eastern Suburb, Suite 102  
Christiansted, V.I. 00820  
t. (340) 773-3444  
f. (888) 398-8428

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Amended Complaint was served on the Defendant via his counsel at the below address and date via EMAIL AND REGULAR CLASS MAIL.

Date: July 15, 2013

**Carl J. Hartmann, III**  
**5000 Estate Coakley Bay, L-6**  
**Christiansted, V.I. 00820**

/s/ Nizar DeWood  
Nizar A. DeWood, Esq.

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS/ST. JOHN

UNITED CORPORATION,

*Plaintiff,*

v.

WAHEED HAMED,  
(a/k/a Willy or Willie Hamed),

*Defendant.*

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**DEFENDANT HAMED'S  
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, Waheed Hamed, and moves this Court for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015, for the reasons set forth in the accompanying Memorandum of Law, to wit:

1. the time period for the bringing of an action based on an act in 1992 has long passed, and
2. there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this Court, it had full and complete access to all of the documents in possession of the U.S. Government for *many* years prior to the physical return of the documents in 2011.

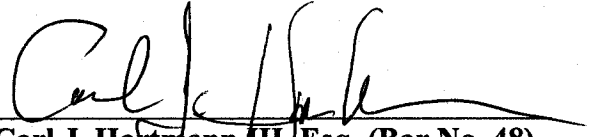
A Proposed Order is attached.



Motion  
Page 2

RESPECTFULLY SUBMITTED,

Dated: January 31, 2014

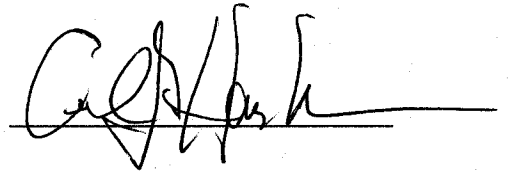


**Carl J. Hartmann III, Esq. (Bar No. 48)**  
*Counsel for the Defendant*  
5000 Estate Coakley Bay, L-6  
Christiansted, VI 00820  
(340) 719-8941  
carl@carlhartmann.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January April, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on :

**Nizar A. DeWood**  
The DeWood Law Firm  
2006 Eastern Suburb, Suite 101  
Christiansted, VI 00820



IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS/ST. JOHN

UNITED CORPORATION,

*Plaintiff,*

v.

WAHEED HAMED,  
(a/k/a Willy or Willie Hamed),

*Defendant.*

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**DEFENDANT HAMED'S MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT AS TO THE SOLE REMAINING CLAIM**

**I. Introduction**

Defendant, Waheed Hamed, hereby moves for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015.

**II. Procedural Posture**

The original *Complaint* (filed March 5, 2013) alleged claims arising out of two acts:

- (1) Defendant's issuance of a \$70,000 payment (dismissed), and
- (2) that Defendant covertly participated in a competing grocery store in 1992.

On June 24, 2013, the Court dismissed the first claim and ordered the *First Amended Complaint* to be filed, limited to the remaining wrongful act -- Defendant's alleged 1992 involvement in the 5-Corners Mini-Mart.



With regard to this remaining factual allegation, in its June 24, 2013 *Memorandum Order*, at 9-10, the Court found Defendant's motion to be "premature" and provisionally allowed this remaining claim as follows:

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory ... belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."<sup>33</sup> **Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in U.S. v. United Corporation, et al., were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.**<sup>34</sup>

\* \* \* \*

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determined as a matter of law and is rather a question of material fact.<sup>35</sup> Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in U.S. v. United, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, **here, Plaintiff contends** their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, **a document to which Plaintiff previously did not have access.** As such, ***Defendant's motion is premature*** with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011. **While there are many defenses to plaintiff's complaint, the most obvious one is statute of limitations**, which is properly raised by a Rule 12(c) motion. *See, 5C Wright and Miller, Federal Practice and Procedure (2004), §1367 at p. 211 (with cases cited in n.9).* (Emphasis added, text of footnotes omitted)

### III. Facts Relevant to this Motion

As discussed below, the time period for the bringing of an action based on an act in 1992 has long passed. Summary judgment based on the statute of limitations is appropriate here because there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this Court, it had full and complete access to all of the documents in possession of the U.S. Government for many years prior to the physical return of the documents in 2011. Moreover, there is no question that the document at issue (Defendant's 1992 tax return) was in that collection or that plaintiff took advantage of this access in that it repeatedly viewed the documents without restriction -- and repeatedly scanned and copied any documents it wished.

Defendant's tax document at issue here was seized by the FBI in its 2001-2003 collection of documents in the criminal case. (Plaintiff's tax returns, like all of the rest of the documents returned in 2011, bears the *sequential* Bates numbers of those collected documents. Because of this, there is no dispute that they were all in that collection in the government's possession.) United Corporation had full, unfettered access to all of these documents beginning in 2003, as detailed in the *Declaration* (dated July 8, 2009) of FBI Special Agent Thomas L. Petri, in *U.S.A. v. Fathi Yusuf Mohammed Yusuf et. al.*, Crim. No. 2005-015 (DE 1148-1):

7. In **2003**, subsequent to the return of the indictment, counsel for defendants was afforded **complete access** to seized evidence. Attorney Robert King, the attorney then representing defendants, reviewed the discovery at the FBI office on St. Thomas. **He and a team of approximately four or five individuals reviewed evidence for several weeks. They brought with them a copier and made many copies of documents.**

and

8. In **2004**, a different set of attorneys presently representing the defendants reviewed the evidence seized in the course of the execution of the search

warrants. By my estimation, document review team included up to ten people at any one time. The defense team spent several weeks reviewing the evidence. They had with them at least one copier and one scanner with which they made numerous copies and images of the evidence.

9. During the 2004 review, the defense team was afforded unfettered access to discovery. They were permitted to review *any* box of documents at *any* time, including evidence seized during the searches, foreign bank records, documents obtained either consensually or by grand jury subpoena, and FBI Forms 302. The defense team pulled numerous boxes at one time with many different people reviewing different documents from different boxes.

See **Exhibit 1** (Emphasis added.) This unfettered access for United continued over many years, as noted by FBI Special Agent Christine Zieba. She personally watched Plaintiff's counsel access and review these documents over many weeks on subsequent occasions, as set forth in her *Declaration* in the same case. See **Exhibit 2**.

3. I have been present at the review of documents conducted by counsel for defendants in the Yusuf matter.

4. The FBI office is comprised of two buildings, an upper building and a lower building. The two buildings are secured facilities. As part of their duties, the agents and support staff housed in the lower building possess classified and secret national security information.

5. The evidence obtained in the course of the investigation and prosecution of the defendants is stored in the lower building. The evidence is secured either in a locked storage room or in locked file cabinets in the secured work space.

6. By necessity, the defendants' document review has taken place at a long conference table in middle of the central work space. The desks of one agent and analyst are freely accessible from that central work space. The special agent and the analyst possess and utilize classified, secret, and grand jury information in their work spaces.

7. Given that FBI special agents and employees maintain classified, secret, and grand jury information in the lower building, it is not feasible to provide the defendants unfettered access to that space.

8. I memorialized my conversations with defense counsel as well as the events

8. I memorialized my conversations with defense counsel as well as the events that transpired during the document review from November 8, 2008 through January 29, 2009. Those memoranda are attached to this declaration and incorporated as if fully set forth herein.

9. A process was put in place in order to ensure that evidence was not lost, misplaced or destroyed during the review process by defense counsel. Defense counsel were allowed to review one box at a time, and were allowed to handle the documents.

Thus, it is undisputed that Plaintiff had full, unfettered access to the information it now claims gives rise to this cause of action *in 2003* and thereafter. There is no requirement that Defendant somehow prove Plaintiff looked at all of the documents to which it has such access. To the contrary, as discussed below, any exception is Plaintiff's burden.

#### IV. Law

##### *a. Summary Judgment*

As this Court is well-versed in the standard for summary judgment, defendant will not belabor the point. *See e.g. Machado v. Yacht Haven USVI, LLC*, 2012 WL 5894805, \*1 (V.I.Super. 2102) ("Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Rule 7 of the Rules of the Superior Court, provides that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, a court must "draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party." An issue is

"genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue.")

*b. Statutes of Limitations*

Plaintiff seeks relief for breach of fiduciary duty, constructive trust/recoupment, conversion, breach of contract, conversion and accounting. The statute of limitations has expired on all five of these counts. Chapter 3 of Title 5 of the Virgin Islands Code provides the statutes of limitations for all of these causes of action expire after 6 years or less pursuant to 5 V.I.C. §31 (e.g., 6 years for contract, 2 years for conversion, etc.) Clearly more than 6 years have passed since the dates of both the alleged wrongdoings in 1992 and the beginning of unfettered access to all relevant documents in 2003. The date of physical return in 2011 is irrelevant.

Likewise, regarding the equitable claims such as constructive trust/recoupment and accounting, 5 V.I.C. § 32(a) provides:

- (a) An action of an equitable nature shall only be commenced within the time limited to commence an action as provided in this chapter.

Thus, since none of the counts involve claims related to real property, the equitable claims are also time barred since they are over 6 years old without the need to decide whether a more specific statute of limitations applies.

*c. Exceptions to Statutes of Limitations*

The applicable law has been clearly set forth by this Court. At 5-6 of this Court's *Memorandum Opinion*, it observed the following regarding Plaintiff's burden here::

Ordinarily, "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.<sup>19</sup> While Plaintiff's reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant

argues that Plaintiffs argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.<sup>20[1]</sup> (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.<sup>212[1]</sup> However, similarly to the discovery rule, **for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."**<sup>22[3]</sup> (emphasis added). To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."<sup>23[4]</sup> (Emphasis added.)

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<sup>1</sup> 20 [Footnote in original] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at \*5 (D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at \*3 (D.V.I 2002)) (internal citations and quotations omitted).

<sup>2</sup> 21 [Footnote in original] *Id.* at \*6.

<sup>3</sup> 22 [Footnote in original] *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

<sup>4</sup> 23 [Footnote in original] *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ( "[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.")(internal citations and quotations omitted).

## V. Argument

There is no dispute that the factual basis for the five counts alleged in the *Amended Complaint* all occurred in 1992. Thus, they fall within and are time-barred by the applicable statutes of limitations. Plaintiff has the burden to show an exception to the statutes of limitations. To do so, United raised the lack of access to the documents. The Court allowed this sole factual issue to remain pending an examination of that access.

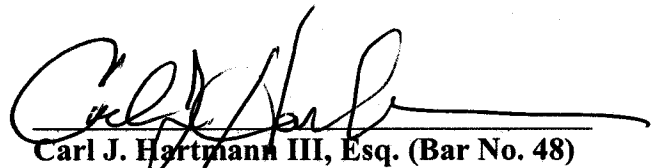
No material fact exists as to whether plaintiff either had "unfettered access" to the documents in 2003, or that such access has been thoroughly exercised since 2003. Thus, there is no set of facts under which Plaintiff can carry the burden of showing that lacked such access -- that it "could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." All Plaintiff or its counsel had to do was copy and/or read the documents. The fact that they were located outside of Plaintiff's physical premises or that Plaintiff (or its counsel) did not focus on the issues here at that time is irrelevant.

## VI. Conclusion

As such, summary judgment should be granted.

RESPECTFULLY SUBMITTED,

Dated: January 31, 2014



Carl J. Hartmann III, Esq. (Bar No. 48)

*Counsel for the Defendant*

5000 Estate Coakley Bay, L-6

Christiansted, VI 00820

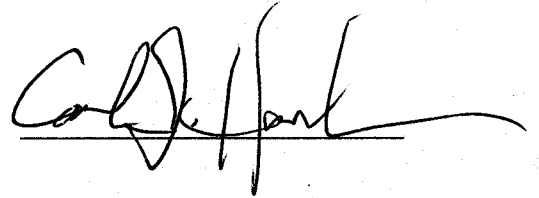
(340) 719-8941

carl@carlhartmann.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on:

**Nizar A. DeWood**  
The DeWood Law Firm  
2006 Eastern Suburb, Suite 101  
Christiansted, VI 00820

A handwritten signature in black ink, appearing to read "Nizar A. DeWood", is written over a horizontal line. The signature is stylized and cursive.



**DECLARATION OF SPECIAL AGENT THOMAS L. PETRI**



I, Thomas L. Petri, make this declaration in support of the Government's Response to Defendants' Reply Memorandum in Support of the Motion for Specific Relief.

- 1 I am employed as a Special Agent of the Federal Bureau of Investigation. I have served in that capacity for 20 years. I am assigned to the Miami Field Office.
- 2 I was assigned to the St. Thomas office of the Federal Bureau of Investigation from 2000 through 2006. While stationed on St. Thomas, I was the lead case agent of the investigation of United Corporation, Fathi Yusuf, Maher Yusuf, Negeh Yusuf, Waleed Hamed, Waheed Hamed, and Isam Yousuf.
- 3 In the course of that investigation, the government obtained and executed search warrants. Those searches were conducted at numerous locations throughout the islands, including the Plaza Extra stores and the homes of the defendants.
- 4 Evidence seized during the course of those searches was placed in boxes. Numbers were placed on the boxes to maintain an order.
- 5 The seized evidence, as well as evidence obtained either consensually or through grand jury subpoenas, was stored at the upper building of the FBI office in St. Thomas.
- 6 During the course of the investigation, FBI agents maintained control over the evidence. It was stored in a conference room in the office. No other materials but the documents pertinent to the investigation were stored in that room.
- 7 In 2003, subsequent to the return of the indictment, counsel for defendants was afforded complete access to seized evidence. Attorney Robert King, the attorney then representing defendants, reviewed the discovery at the FBI office on St. Thomas. He and a team of approximately four or five individuals reviewed evidence for several weeks. They brought with them a copier and made many copies of documents.
- 8 In 2004, a different set of attorneys presently representing the defendants reviewed the evidence seized in the course of the execution of the search warrants. By my estimation, document review team included up to ten people at any one time. The defense team spent several weeks reviewing the evidence. They had with them at least one copier and one scanner with which they made numerous copies and images of the evidence.
- 9 During the 2004 review, the defense team was afforded unfettered access to discovery. They were permitted to review any box of documents at any time, including evidence seized during the searches, foreign bank records, documents obtained either consensually or by grand jury subpoena, and FBI Forms 302. The defense team pulled numerous boxes at one time with many different people reviewing different documents from different

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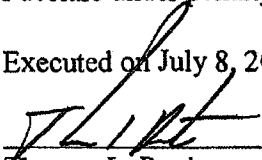
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boxes.

- 10 Immediately following the defense team's departure from the FBI premises, I had occasion to obtain documents from boxes that had been reviewed by the defense team. I discovered that documents that originally had been placed in one box had been placed in a different box. I returned the documents to their original boxes. I cannot be certain that I was able to identify each instance where documents had been misfiled by the defense team.
- 11 During the document review in January 2009, Randall Andreozzi requested to review all documents obtained via subpoena. I explained to him that I could not produce all evidence at once. That evidence comprises approximately 40 boxes. I asked him for a specific list of documents, or category of documents that he wished to review. He declined to identify the records that he wished to review and did not pursue the matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 8, 2009.

  
\_\_\_\_\_  
Thomas L. Petri

**Declaration of Special Agent Christine Zieba**



I, Christine Zieba, make this Declaration in support of the Government's Response to Defendants' Reply Memorandum in Support of the Motion for Specific Relief.

- 1 I am employed as a Special Agent of the Federal Bureau of Investigation. I have served in that capacity for approximately 5 years.
- 2 I am a case agent who is assigned to the St. Thomas office of the FBI. I have been assigned to assist the prosecution in United States v. Yusuf, 05-15 (D.V.I.).
- 3 I have been present at the review of documents conducted by counsel for defendants in the Yusuf matter.
- 4 The FBI office is comprised of two buildings, an upper building and a lower building. The two building are secured facilities. As part of their duties, the agents and support staff housed in the lower building possess classified and secret national security information.
- 5 The evidence obtained in the course of the investigation and prosecution of the defendants is stored in the lower building. The evidence is secured either in a locked storage room or in locked file cabinets in the secured work space.
- 6 By necessity, the defendants' document review has taken place at a long conference table in middle of the central work space. The desks of one agent and analyst are freely accessible from that central work space. The special agent and the analyst possess and utilize classified, secret, and grand jury information in their work spaces.
- 7 Given that FBI special agents and employees maintain classified, secret, and grand jury information in the lower building, it is not feasible to provide the defendants unfettered access to that space.
- 8 I memorialized my conversations with defense counsel as well as the events that transpired during the document review from November 8, 2008 through January 29, 2009. Those memoranda are attached to this declaration and incorporated as if fully set forth herein.
- 9 A process was put in place in order to ensure that evidence was not lost, misplaced or destroyed during the review process by defense counsel. Defense counsel were allowed to review one box at a time, and were allowed to handle the documents.
- 10 Despite this procedure, the defense team misplaced evidence. For example, the defense team reviewed a box of evidence and scanned documents contained within it. They then replaced the documents in the box and asked to review a different box of evidence.

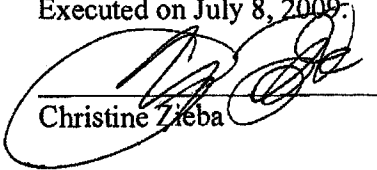
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Subsequent to the shelving of the original of the first box, it was discovered that the defense team had left a document on the scanner and had not returned it to the original box. The document was taken from one of the defense team and returned to the box from which it had been taken.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 8, 2009.

  
Christine Zieba