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,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS IV, XI, AND XII REGARDING RENT

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned attorneys, respectfully move this Court, pursuant to Fed. R. Civ. P. 56 and LRCi 56.1, made applicable to this Court by Super. Ct. R. 7, to enter partial summary judgment on Counts IV, XI, and XII of their counterclaim regarding rent. In support of this motion, Defendants respectfully refer this Court to the accompanying Brief, Statement of Undisputed Material Facts, and proposed Order. Defendants request oral argument, pursuant to LRCi 7.1(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2014, I caused the foregoing **Defendants' Motion For Partial Summary Judgment On Counts IV, XI, and XII Regarding Rent** to be served upon the following via e-mail:

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS IV, XI, AND XII REGARDING RENT

INTRODUCTION

Defendants/Counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants") bring this motion for partial summary judgment on the claims for undisputed past due rent of certain premises at its shopping center known as United Shopping Plaza. These claims include rent for the primary space occupied by the Plaza Extra supermarket (Plaza Extra-East) at the United Shopping Plaza in St. Croix, which is known as "Bay 1," and two other smaller spaces (Bays 5 and 8) at the shopping center being used to warehouse Plaza Extra-East inventory. Since its opening in April 1986, and in an effort to support the development of the business, Plaza Extra-East has paid rent to United in multi-year blocks in amounts totaling several million dollars per payment. Mohammad Hamed ("Hamed") agreed with Yusuf at the formation

their business association[1] that they would pay rent to United for use of its premises, and that any reconciliation of partnership accounts (and distribution of profits) would have to be made after deducting rent, among other expenses. Indeed, Hamed and his son, Waleed, have recognized in testimony that the fact that profits of the partnership were to be determined after a deduction for rent was one of the partnership's characteristics. Hamed further agreed to the arrangement whereby, to support the growth of the supermarket business, rent would accrue for a number of years at a pre-determined rate, and then be paid at a time when the business could afford the expense.

There has been only one reconciliation of partnership accounts since the partnership was formed, and that occurred at the end of 1993. Hamed's portion of the rent payment due at that time was made by means of a credit against amounts that Yusuf owed Hamed for advances Yusuf had taken in the preceding years. Hamed does not contest the time period or amount of that rent payment or of another rent payment in the amount of $5,408.806.74 that covered more than eight years of rent (2004-2011), which was made in February 2012, just seven months before he brought this lawsuit. But he is now contending that, as part of the final windup of the partnership and reconciliation of the partners' accounts - and distribution of assets of the partnership – the partnership should not have to make a rent payment for another period during which Plaza Extra-East occupied the premises of United (1994-2004) in the amount of $4,595,070.36, which could not be paid when the $5,408,806.74 payment was made. Despite acknowledging in his deposition taken some 18 months after this case was filed that any unpaid rent for that period should be

[1] Defendants have conceded that this business association is a partnership in legal terms, and refer to it variously as an agreement, association or partnership in this brief

charged to the partnership, Hamed now maintains that this undisputed rent obligation is unenforceable because it is barred by the statute of limitations.

Hamed makes this claim knowing that, under the admitted terms of the parties' oral partnership agreement, whenever it came time to distribute profits of the partnership, they would be distributed net of the rent expense to United. Hamed's agent, his son Waleed, also knows that it was not possible for the partnership to have that kind of a reconciliation during most of the period following the commencement of the 2003 federal criminal proceedings against United, two of Hamed's sons, Yusuf, and two of his sons, because all partnership accounts were frozen. Waleed Hamed also knows that because business records needed to make the rent calculation and settle the partners' accounts had been seized by the Government in a 2001 raid, it was impossible to calculate the amount of rent to be paid, and reconcile the accounts, until those records were returned, something that is still in progress. Moreover, the unrebutted evidence is that, during discussions between Hamed's son, Waleed, and Yusuf in 2002 or 2003, and again in 2012, Waleed agreed on behalf of his father that the rent owed for the 1994-2004 period should continue to accrue and that collection of it should be deferred until the amount due could be calculated and paid.

The rent claims are asserted as United's claims for breach of contract counts in the counterclaim in counts XI and XII, and are also embraced by Yusuf's equitable claim for an accounting in Count IV of the counterclaim. These are separate and independent grounds for relief. United is entitled to partial summary judgment on the unpaid rent claims pursuant to its breach of contract counts, and Yusuf is entitled to partial summary judgment on the accounting claims. Because the legal analysis for the two sets of claims is different, including the explanation of why Hamed's limitations defense is without merit, they will be addressed separately in this brief. This brief will first summarize the terms of the agreement between Hamed and Yusuf regarding

calculation of profits, and then summarize the amount of rent to be charged to the partnership in order to determine what should be distributed to each partner in the windup. It will then address Yusuf's right to partial summary judgment on the rent claims as part of his accounting claim, before turning to United's right to partial summary judgment on its contract claims.

STATEMENT OF FACTS

The rent and accounting claims and the salient facts underlying them can be summarized as follows:

A. The Landlord: United owns the real estate (United Shopping Plaza), which houses Plaza Extra-East, the supermarket located at Estate Sion Farm, St. Croix.

B. The Tenant: Yusuf and Hamed agreed to carry on a supermarket business (the "Plaza Extra Stores") that eventually grew into three locations, including the first of the three stores, Plaza Extra-East, which opened at the United Shopping Plaza in April 1986. From the outset, Plaza Extra-East has paid rent to United for the space it occupies at the United Shopping Plaza. Hamed testified:

> Q: ...the United Corporation is the – is the company that you've been paying rent to for many years, is that correct?
>
> A: Yes, since we started.

See **Exhibit 1,** Deposition of Hamed, dated March 31, 2014, Vol. I, p. 86.[2]

Indeed, Hamed's son and self-described "authorized agent," Waleed, acknowledged that the payment of rent to United was one of the defining characteristics of the business arrangement. At the preliminary injunction hearing in this matter, Waleed testified as follows:

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[2] Exhibit 1 will contain all cited pages from the transcript of Hamed's deposition on March 31, 2014 ("Vol. I") and April 1, 2014 ("Vol. II").

> Q: What were the terms of this agreement? You said it was 50/50?
>
> A: Yes.
>
> Q: What else?
>
> A: That the Plaza Extra-East store will pay rent to United Corporation, the United Shopping Plaza.
>
> Q: Just so we're clear, what you're saying is the grocery store operations will pay rent to United Corporation as the landlord for the actual dirt, you know, of Plaza Extra Sion Farm?
>
> A: For the Plaza Extra east store.

See **Exhibit 2**, testimony of Waleed Hamed on January 25, 2013, p. 98.

Hamed and Yusuf also agreed from the outset that, in order to enable the grocery store business to grow, the rent owed to United would be allowed to accrue for some number of years before being paid as part of a reconciliation of Hamed's and Yusuf's accounts. **See Exhibit** 3, Declaration of Yusuf at ¶¶ 2-3. Hamed and Yusuf frequently took advances of money (specifically, cash generated from grocery stores sales that was held in safes in the stores) and accrued rent would be paid in periodic reconciliations of accounts that would be held whenever the business could afford to pay the rent.

When Hamed and Yusuf formed their business agreement, the Plaza Extra-East store in St. Croix was under construction. In a few years, they embarked on a plan to open a second grocery store in St. Thomas (the store known as Plaza Extra-Tutu Park, which began operating in October 1993). And several years after the opening of Plaza Extra-Tutu Park, they made plans to open another grocery store in St. Croix (the store known as Plaza Extra-West, which started operating in 2000). Allowing rent to accrue for years, especially between 1994 to 2002, when the parties were planning to construct and make-ready the Plaza Extra – West store to begin operating in November 2000, rather than paying it on a monthly or even yearly basis, was very beneficial to

the supermarket business, because it afforded the funds required to cover the substantial capital and operating expenses that were incurred in opening and running three stores in economic conditions that were extremely challenging. See id. at ¶ 3. Yusuf was the person charged with determining when a reconciliation of accounts would be made and the rent obligation discharged.[3] See id. at 1-2.

C. **Rent – the Early Years:** As Hamed acknowledged in his deposition testimony, from the beginning in 1986 he and Yusuf agreed that the annual rent for Plaza Extra-East would be calculated on a price per square foot basis. See Exhibit 1, Vol. II, p. 106. The agreed-upon rental rate was $5.55 per square foot per year, and that rate multiplied by the 33,750 square feet of space originally occupied by Plaza Extra-East came to $187,312.50 per year. See Exhibit 3, ¶ 1.[4] This was a below-market rate. Id. at ¶ 5. The rent that accrued at this annual rate from 1986 through December 31, 1993 was paid to United at the end of 1993 (the "first rent payment"). The first rent payment was made by way of a reconciliation of accounts in which amounts Yusuf owed Hamed for advances taken from supermarket funds were credited against the rent payment. The

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[3]Hamed further acknowledged that Yusuf knew what is owed and Yusuf was the one who calculated the rent due based on an agreed-upon formula:

> Q. So if he [Yusuf] –if he –if he told you how much you owe, would you disagree with him?
>
> ...
>
> A. Yes, he [Yusuf] know exactly.
>
> Q. He [Yusuf] knows exactly how much is owed?
>
> A. Yeah, how much we owe him.

See Exhibit 1, Vol. I, p. 94.

[4] The declaration attached to this brief as Exhibit 3 consolidates and amplifies to some degree two previous declarations of Yusuf filed in this matter dated September 9, 2013 and June 6, 2014.

end date of the period covered by the first rent payment (i.e., December 31, 1993) was reflected in a book kept in the store safe at Plaza Extra-East that was known as the "black book." Id. at ¶¶ 4, 8. After Plaza Extra-East burned down in 1992, and before it reopened in May of 1994, Yusuf agreed with Hamed, through his son Waleed, to leave the same per square foot rent rate in place for the ten years following the re-opening of the store, after which time the rent formula would be adjusted upward to something closer to a market rate. Id. at ¶ 5.

In late 2002 or early 2003, Waleed Hamed, on behalf of his father, and Yusuf agreed to a change in rent formula to be implemented on May 5, 2004, the date on which they had previously agreed that the old rent formula would be replaced. Specifically, Yusuf and Waleed agreed that effective May 5, 2004, rent would be calculated as a percentage-of-sales identical in percentage terms to what Plaza Extra-Tutu Park was paying to its landlord at the Tutu Park Mall. In other words, for each year, the payments made by Plaza Extra –Tutu Park to its landlord for the year would be divided by the store's adjusted gross sales for that year to yield a figure representing that store's payments to the Tutu Park landlord as a percentage of sales for the year. That annual percentage would then be multiplied by actual sales for the corresponding year at Plaza Extra-East to determine the amount of rent owed to United. Id. at ¶ 7.

In 2004, at about the time the new rent formula became effective, Yusuf and Waleed Hamed, on behalf of his father, discussed payment of the rent that had accrued at the $5.55 per square foot rate since the first rent payment. They agreed that having a reconciliation and paying the accrued rent at that time would not be possible, for two reasons. First, in October 2001, the FBI had raided the Plaza Extra Stores, taking with them substantially all of the financial and accounting records of the Plaza Extra Stores and United. Id. at ¶ 8. Then, two years later, in September 2003, the federal government indicted United, Yusuf, two of Yusuf's sons, and two of

Hamed's sons on income tax evasion charges, and the operating accounts of the Plaza Extra Stores and United were immediately frozen pursuant to a federal injunction. Consequently, until the injunction was relaxed and the stores' records returned, payment of the accrued rent was not possible. Id. Moreover, the black book, which reflected the December 31, 1993 end date of the prior period for which rent had been paid, and a comprehensive book showing advances of supermarket funds to Yusuf and Hamed, had both been seized. As a result, records needed to determine the date the next rent payment began accruing (January 1, 1994), and to make a full reconciliation of the accounts of Hamed and Yusuf, was no longer in their possession. They had been seized by federal agents in the 2001 raid. The black book was not returned until years later and the ledger has still not been returned.[5]

In the absence of the black book, neither Waleed Hamed nor Yusuf remembered whether the first rent payment had been paid in 1992, 1993 or 1994, let alone the debits and credits between Hamed and Yusuf in the subsequent years following the year in which the rent had been paid. At an annual rate of hundreds of thousands a year, guessing the start date incorrectly by even a few months would result in a substantial underpayment or overpayment of rent. Yusuf did not want to charge either more or less than what was due, and therefore made the decision, to which Waleed Hamed (on behalf of Hamed) agreed, that the payment of rent that had accrued since the first rent payment was made would have to await the unfreezing of the bank accounts and the return of the black book. Id. at ¶¶ 8 and 9.

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[5]In addition, it was not in Hamed's interest (or that of his sons) to do anything that would tend to show that he was in partnership with Yusuf, and the criminal defense lawyers so advised Yusuf. See Exhibit 3, ¶ 8.

By early 2012, the injunction in the criminal case has been relaxed sufficiently so that it was no longer a bar to payment of rent that had accrued since the first rent payment was made in 1993. But the federal government still had not returned the black book and the larger ledger book, which meant that full reconciliation of partnership accounts could not be made. The start date for the second rent period was not known, and neither were the amounts of advances taken by Hamed and his sons, and Yusuf and his sons. Waleed Hamed and Yusuf met in early 2012, and they agreed that rent beginning on May 5, 2004 and going forward could be determined, even without consulting the black book, because Waleed Hamed and Yusuf had previously agreed that the percentage-of-sales rent formula would become effective on that date. Yusuf and Waleed Hamed agreed that the rent for that period should be paid, even if a full reconciliation of accounts, going back to the date of the first reconciliation, could not be made. They also agreed, as they had before, that rent that had accrued from the first rent payment up to May 4, 2004 would have to be deferred until the black book was returned. Id. at ¶ 10.

Using the percentage of sales formula that he and Waleed had agreed would become effective on May 5, 2004, Yusuf calculated the amount of rent due for the period May 5, 2004 to December 31, 2011 to be $5,408,806.74. He presented the rent bill to Waleed Hamed for that sum and period, and Waleed, on behalf of his father, agreed that it should be paid to United. Payment in the amount of $5,408,806.74 was then made by means of a check signed by Waleed Hamed and by Yusuf's son, and there is **no dispute** that it covered unpaid rent for that nearly 8-year period. Id. at ¶ 7; see also **Exhibit 3A.**

The "black book" was finally retrieved about a year after the $5,408,806.74 rent payment was made, and from it Yusuf was able to determine that the first rent payment was paid through December 31, 1993, and hence that the rent for the second period began accruing on January 1,

1994. Using the annual rent calculation of $5.55 per square foot and the square footage of the rebuilt Plaza Extra-East store (69,680 square feet), Defendants (by their counsel) and after this litigation was commenced, made demand on Hamed for rent for that period, by letter dated May 17, 2013. Id. at ¶ 11; see also **Exhibit 3B**.

E. What is Due: As to Bay 1, the primary space being rented from United, the rent can be divided into four periods, two of which have been paid (1986-1993 and 2004-2011) and two of which remain unpaid (1994-2004 and 2012-present). See Exhibit 3 at ¶ 14 and **Exhibit 3G**, Chronology of Rents. Specifically, the 1994-2004 rent for Bay 1 based upon the price-per-square-foot calculation is due, and the rent from January 1, 2012 to date based upon the percentage-of-sales formula is due. Rent is also due for two other smaller "bays" that were used to warehouse merchandise before it made it to the grocery store shelves for the specific periods and rates shown below.

1. Bay 1 – Primary Space

a) January 1, 1994 – May 4, 2004 ("Past Due Rent"):

The Past Due Rent for Bay 1 (69,680 square feet) at the annual rate of $5.55 per/square foot, for the 10 years and 124 days, is $3,999,679.73. See Exhibit 3 at ¶ 15. Hamed admitted in deposition that if this rent payment has not yet been made,[6] then it should be:

> Q. ...if rent has not been paid on the – the square footage basis that you agreed with Mr. Yusuf for the period between January 1, 1994 and May 4, 2004, would you agree with me that that rent should be paid to United.
>
> ...

[6]While Hamed suggested in deposition that he did not know if this rent payment had been made, it is undisputed that it has not been made.

> A. He says that he's not denying the rent, and that Mr. Yusuf is the one who used to, in other words, determine the – the rental rate, and he's the one who would collect the rent.[7]

See Exhibit 1, Vol. II, p. 107. Later, when asked, "[I]f rent was not paid from January 1, 1994 through May 4, 2004, would you agree that rent should be paid," Hamed responded unequivocally, saying "It should be paid." Id. at Vol. II, p. 117. When asked if rent for that period should be paid "[r]egardless of how long it took to make a demand for payment," Hamed stated that Yusuf determined when rent was collected from the partnership, and he reiterated that if the rent for that period had not been paid it should be, as he had "never objected" to its payment:

> He says, If it hasn't been paid, it should be paid. And he's never – he's never objected to it being paid. Mr. Yusuf is the one who used to decided whether to collect rent or not collect rent.

Id. at Vol. II, p. 118.

b) **January 1, 2012 to the present ("Current Rent"):**

There is no dispute that rent for Bay 1 is also due from January 1, 2012 to date at least in the amount based on the percentage-of-sales formula that was used to write the joint check for the preceding 8 year period.[8] See Exhibit 3 at ¶7 and 17. The adjusted rent paid by Plaza Extra-Tutu Park for 2012, 2013 and 2014 to present was divided by sales of that store for each of those years to determine a percentage. That percentage was then multiplied by the Plaza Extra–East sales for each year. For 2012, the undisputed rent due is $702,908.00. See Exhibit 3 at ¶ 18. For 2013, the

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[7] An interpreter at the deposition translated Hamed's answers from Arabic to English, which is why some of Hamed's answers are prefaced with the third person expression "he says."

[8] Hamed's Response to United's Motion to Withdraw Rent filed on September 16, 2013 states on page 1 that "it is undisputed that United is the landlord and Plaza Extra is the tenant at the Sion Farm location, for which rent is due since January of 2012."

undisputed rent due is $654,190.09. See Exhibit 3 at ¶ 19. For the period of January 1, 2014 through August 30, 2014, the undisputed rent due is $452,366.03. See Exhibit 3 at ¶ 20. The total uncontroverted Current Rent is therefore $1,809,464.12. Id. See also **Exhibit 3F.**[9]

2. Bays 5 and 8 – Additional Periodic Space

a) May 1, 1994 through July 31, 2001 for Bay 5 ("Bay 5 Rent"):

The Bay 5 Rent is calculated by multiplying the square feet actually occupied (3,125) by $12.00 by 7.25 years. The total due for Bay 5 Rent is $271,875.00. See Exhibit 3 at ¶ 22.

b) May 1, 1994 through September 30, 2002 for Bay 8 ("First Bay 8 Rent"):

The First Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 by 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63. Id. at ¶ 23.

c) April 1, 2008 through May 30, 2013 for Bay 8 ("Second Bay 8 Rent"):

The Second Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 by 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75. Id. at ¶ 24.

The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38. Id. at ¶ 25.

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[9]In addition to rents owed for the period January 1, 2012 under the same percentage-of-sales formula used to calculate rent for the May 5, 2004 to December 31, 2011 period, United contends that additional amounts are owed over and above the agreed-upon rate. Since those additional amounts are disputed by Hamed, United and Yusuf believe it is appropriate to litigate those claims at trial, rather than as part of this motion for partial summary judgment. They reserve the right to seek those additional amounts at the trial of this case.

The total undisputed and unpaid rent for all the space occupied by Plaza Extra – East from January 1, 1994 through August 30, 2014 is $6,603,122.23 excluding the "disputed" increased rent from January 1, 2012 through the present. Id. at ¶ 26.

ARGUMENT

I. Yusuf is Entitled to Partial Summary Judgment as to the Rent Obligation under his Accounting Claim in Count IV.

In Count IV of the counterclaim, Yusuf seeks an equitable accounting of the partnership. Because the agreement between Hamed and Yusuf provided that profits would be determined after deducting the accrued rent, Count IV requires that all of the unpaid rent be deducted from accrued revenues of the partnership before distribution. Section 177(b) of the Virgin Islands Revised Uniform Partnership Act ("RUPA"), V.I. Code Ann. tit. 26, § 1, et seq., entitled "Settlement of accounts and contributions among partners," describes the remedy of an accounting to which all partners are entitled upon dissolution or winding up of the partnership:

> Each partner is entitled to a settlement of *all* partnership accounts upon winding up of the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under section 46 of this chapter.

26 V.I.C. § 177(b) (emphasis added).

As discussed above, under the oral partnership agreement between Hamed and Yusuf, it was agreed that profits of the partnership to be paid in equal amounts to the partners were to be determined after deducting for rent, among other expenses. Yusuf was the partner charged with determining when those reconciliations would be undertaken, and under their agreement there was

no time limit within which he had to ask for and conduct a reconciliation. The only reconciliation of the partnership account that has been undertaken to date occurred at the end of 1993. By the assertion of the equitable accounting claim in his counterclaim, Yusuf is asking this Court to order a final reconciliation of the partnership account, which will necessarily require payment of accrued rent before any distributions to the partners.

In May 2013, Hamed (through his counsel) began asserting for the first time that rent for the 1994-2004 period could not be paid because the claim was stale and hence unenforceable. But since the partnership agreement provided that partnership profits had to be determined on the basis of a deduction for accrued rent, and also that the reconciliation of the partnership account could occur whenever Yusuf decided to make it, the argument is a complete red herring. The final reconciliation and division of profits has not yet taken place, and the claim that profits should be determined without taking into account the accrued rent for the 1994-2004 period was made after this litigation was brought. Logically, the claim that profits must be determined net of accrued rent could not have accrued until Hamed, in May 2013, anticipatorily repudiated his obligation under the partnership agreement to have profit determined after deducting accrued rent.

A. Even Assuming Arguendo that the Partnership Agreement Did Not Give Yusuf Complete Discretion to Determine When a Reconciliation of Partnership Accounts Would be Made, the Claim for Unpaid Rent Embraced in Count IV Would Not be Stale.

The common law rule regarding accrual of accounting claims is that they accrue on dissolution or wind-up of the partnership. This common law rule was established many years ago and it found nearly universal acceptance in the states, long before the drafting of the first Uniform Partnership Act in 1914. See, e.g., Annot., When Statute of Limitations Commences to Run on Right of Partnership Accounting, 44 A.L.R.4th 678 §§ 3, 6, and 9 (1986 and Supp. 2014)

(collecting common law cases in more than 26 jurisdictions, dating from 1854 to 1914, which hold that "as a general matter, a statute of limitations will not commence to run on a cause of action for an accounting of partnership affairs before the dissolution of the partnership in question"). Accordingly, even if the partnership agreement here did not confer upon Yusuf the authority to determine when to conduct a reconciliation (and make a concomitant payment of rent), as long as his claim for an accounting was brought within six years of the date of dissolution of the partnership, the claim will be timely. And as long as it is timely brought, an "action for an accounting examines the entire period of the partnership," from its inception to dissolution. See Sriraman v. Patel, 761 F. Supp. 2d 7, 41 (E.D. N.Y. 2011) (citation and internal quotation marks omitted); see also 2 Alan R. Bromberg and Larry E. Ribstein, *Partnership,* § 6.08(a) (1994) (In an action for an accounting, "the court (or more commonly, an auditor, master, or referee subject to court review) conducts a comprehensive investigation of the transactions of the partnership and the partners, adjudicates their relative rights, and enters a money judgment for or against each partner according to the balance struck").[10]

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[10]As the Court in Sriraman noted, under the "equity practice in [New York and] most other common law jurisdictions, an action for an accounting is a two-step process." Sriraman, supra, 761 F. Supp. 2d at 22. The first step is to "establish the right to an accounting," id. at 22, and it is "axiomatic" that such a right exists in the case of a partnership that has been dissolved. See id. at 22. "Once a plaintiff establishes that he has a right to an accounting, the second step is for the Court to 'true-up' the partners' individual accounts to make sure that each has been allocated his fair share of partnership distributions, 'fair share' referring to the allocation agreed between the partners or required by law." Id. at 23. Further, "[i]n making this determination, the Court can consider clerical errors in allocations to the individual accounts; breach of any partnership agreement or of fiduciary duty or fraud committed by one partner against another; diversion or non-contribution of assets that should be within the partnership; or any other matters necessary to restore the individual accounts to the levels established by the partners' agreement or the law." Id. at 23-24. The Court in Sriraman also made it clear that "[t]he mere fact that a plaintiff-partner might have brought an action at law for breach of contract, or an action at law or in equity for breach of fiduciary duty, at some point prior to the dissolution of the partnership, does not

Here, of course, while dissolution of the partnership was sought in Count VIII of Defendants' counterclaim, the Court has never formally ordered dissolution. Although Defendants have argued that the dissolution may have occurred in 1996 (when Hamed retired and returned to Jordan), or in March of 2012, or at the latest on April 7, 2014, when Defendants filed their memorandum in support of their Motion To Appoint Master For Judicial Supervision Of Partnership Winding Up Or, In The Alternative, To Appoint Receiver To Wind Up Partnership ("Defendants' Memorandum"), see Defendants' Memorandum at 4, Hamed is now judicially estopped from asserting that the dissolution occurred any earlier than April 30, 2014. In his Response to Defendants' Memorandum at p. 2, Hamed declares that "the infirmities of Yusuf's attempted notice of dissolution are now moot, as Mohammed Hamed, likewise has given notice that *he* is dissolving the partnership. See **Exhibit 1.**" (Emphasis in original). Of course, Exhibit 1 to Hamed's response was his "Notice of Dissolution of Partnership" dated April 30, 2014. As such, far from the statute of limitations having expired on any claim for an accounting in Count VIII of the Counterclaim, it has only just begun to run.

B. Hamed's Argument that the Common Law Accrual Rule for Accounting Claims Has Been Abrogated by the Virgin Islands RUPA is Meritless.

Hamed argued in his reply to his May 13, 2014 statute of limitations motion that section 75(c) of RUPA alters the longstanding common law rule regarding accrual of accounting claims, but that argument is based on a reading of that section that contravenes its plain words, and that has been rejected by at least two appellate decisions in states that have adopted RUPA. Section 75(b) provides that "[a] partner may maintain an action against the partnership or another partner

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'accelerate' the accrual date for bringing his cause of action for an accounting claim that arose when the partnership went into dissolution." Id. at 39.

for legal or equitable relief, with or without [also seeking] an accounting as to partnership business. . ." Section 75(c) then makes clear that RUPA itself does not provide a statute of limitations or an accrual rule for any of the various causes of action that a partner may bring, including an accounting, and that one must look to other law within the jurisdiction to resolve those issues:

> The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by [the other] law.

Thus, by its plain terms, contrary to Hamed's claim, RUPA does not itself provide any statute of limitations or accrual rule for an action seeking an accounting. Hamed's construction of section 75(c) is that it abrogates the common law rule that an action for an accounting accrues upon dissolution. But that construction has been expressly or implicitly rejected by the appellate courts of two states which have adopted RUPA – the Minnesota Court of Appeals and the Washington Court of Appeals.

In Smith v. Graner, 2010 Minn. App. Unp. LEXIS 717 (Minn. App. 2010), the estate of one partner, Smith, brought an action for breach of fiduciary duty, breach of contract and for dissolution and winding up of a partnership formed by Smith and Graner. On appeal from an adverse judgment, Graner argued that Smith's claim, which arose out of alleged acts occurring in 1993, was time-barred under a six-year catch-all statute of limitations. The Minnesota Court of Appeals quoted (in its entirety) section 323A.0405(c) of their Uniform Partnership Act, which is identical to section 75(c) of the Virgin Islands Act set forth above. See id. at p. *14. On the basis of that statutory language, the Court stated, "Thus, to determine when [Smith's] claim regarding the 1993 adjustment of partnership capital accounts accrued and what statute of limitations applied to the claim, we must look beyond the Act." Id. at p. *14. The Court of Appeals agreed with Graner that the Minnesota catch-all 6-year statute of limitations applied. Noting, however, that

the catch-all statute did not "address when an action [for an accounting] accrues," the Court looked to the common law of Minnesota to determine the applicable accrual rule. Id. at p. *14.

The Minnesota Court of Appeals, citing to the same ALR article mentioned earlier in this brief, then stated, "[A]s a general matter, a statute of limitations will not commence to run on a cause of action for an accounting of partnership affairs before the dissolution of the partnership in question." The Court then cited to an 1889 Minnesota Supreme Court case which applied this rule in a case in which a partner sought to recover a deficiency in annual profits owed to him for the years 1881 to 1887, and the defendant partner argued that the claim as to 1881 was time-barred under the six-year statute of limitations, because suit was not brought until 1888. In that case, Broderick v. Beaupre, 42 N.W. 83, 83-84 (1889), which is referenced in the ALR article, the Minnesota Supreme Court rejected the statute of limitations argument as "utterly untenable," because the statute of limitations on an accounting claim "did not begin to run . . . before the dissolution of the firm by [the suing partner's] retirement in November, 1887." Relying on the language of the Minnesota RUPA section that is codified as section 75(c) of the VI RUPA, along with the common law rule that an action for an accounting accrues upon dissolution, the Minnesota Court of Appeals rejected Graner's argument that Smith's claim for breach of fiduciary duty embraced within that accounting claim was time-barred, and it affirmed the lower court's ruling in favor of Smith on that claim.[11]

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[11]The Minnesota Court of Appeals also noted that this result was "consistent with Minn. Stat. § 323A.0807(b)(2008), which states that "[e]ach partner is entitled to a settlement of all partnership accounts *upon winding up the partnership business*." (emphasis in original). That RUPA provision in the Minnesota Act is codified in the above-quoted section 177 of the Virgin Islands Act. Section 177 of RUPA thus offers another reason for holding that any accounting claim brought at or before dissolution is necessarily timely, and will entitle the partner to a settlement of "all" partnership accounts from inception.

A 2001 case from the state of Washington, which adopted RUPA in 1998,[12] also continues to apply the common law rule that an action for an accounting accrues upon dissolution of a partnership. See Laue v. Estate of Elder, 25 P.3d 1032 (Wash. App. 2001) (holding that "a cause of action for an accounting accrues at dissolution" and that "the statutory period does not begin to run until dissolution..."). In that case, a partner, Laue, claimed that the estate of his former co-partner "owe[d] him money" for a partnership that was effectively dissolved some four years before he served the summons and complaint on his co-partner. Id. at 703. The Washington Court of Appeals first acknowledged the rule that "[a]fter dissolution, a partner generally cannot bring a suit at law against a former copartner regarding partnership liabilities without first bringing an action to account for and settle the partner's affairs." Id. at 710-711. The Court then held that because "[a] cause of action for an accounting accrues at dissolution," id. at 711, and such actions are governed by "a three-year statute of limitation," id. at 711, Laue's claim for money damages in the form of a partnership distribution was untimely because served more than three years after dissolution.

Hamed is unable to cite a single state appellate decision upholding his construction of RUPA. Instead, he cites a federal district court case from Connecticut, Baghdady v. Baghdady, 2008 U.S. Dist. LEXIS 83505, p. *14 (D. Conn. 2008), which held that the RUPA provision that appears in the VI Code as section 75(c) "abolish[es] the common law rule that all claims during a partnership could be brought only on an action for an accounting during the dissolution and winding-up process." Baghdady suffers from a number of infirmities. First, Baghdady is incorrect

[12] See http://partnerships.uslegal.com/partnership/state-laws-governing-partnerships/ showing which states have adopted RUPA and when they have done so.

in suggesting that the common law rule barred the assertion of any claims by one partner against another (or against the partnership) prior to dissolution; in fact, it only barred a claim for an accounting prior to dissolution. Under the uniform partnership act that preceded RUPA, a partner could at his election opt to bring contract and tort claims against a co-partner before dissolution. See Sriraman v. Patel, 761 F. Supp. 2d 7, 39 (E.D. N.Y. 2011) (acknowledging that such actions could be brought before dissolution, but stating that this fact did not accelerate the accrual date of a claim for an accounting). Second, Baghdady never discusses the old common law accrual rule for accounting actions, let alone explains how that rule can be displaced by a RUPA provision which unambiguously requires litigants to look to other common law or statutory law of their state to determine when an accounting claim accrues.[13]

Baghdady also relies on a Delaware trial court decision in in Fike v. Ruger, 754 A.2d 254, 264 (Del. Ch. 1999), and misleadingly indicates that it was affirmed by the Delaware Supreme Court, without pointing out that the affirmance was on other grounds. The Supreme Court of Delaware specifically stated that it would not "address the Court of Chancery's determination that

[13]Hamed's June 20 reply on his statute of limitations motion also relies on the statement in the official commentary to RUPA that "[t]he effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them . . .." See Hamed's 6/20/14 Reply Brief in Support of Statute of Limitations Motion, p. 4. But this statement, read in conjunction with the text of section 405(c), which unambiguously provides that RUPA does not establish a statute of limitations or accrual rule for accounting (or any other) claims, can only mean that parties will "risk losing their claims" if "other law" of the jurisdiction provides that a cause of action for an accounting accrues before dissolution. As discussed in more detail below, the common law rule that this Court should adopt for the Virgin Islands under a Banks analysis is that accounting claims accrue on dissolution or other termination of a partnership. In any event, even if section 75(c) of the VI Act had an ambiguity that required a resort to legislative history for resolution, none of the commentary to RUPA was adopted by the Virgin Islands legislature when it enacted that statute. As such, the commentary quoted by Hamed does not rise to the level of legislative history that could aid in the interpretation of section 75(c).

Plaintiff's claim is barred by the statute of limitations," and instead affirmed that Court's decision on an alternative ground – laches – that the lower court never addressed. Fike v. Ruger, 752 A.2d 112, 114 (Del. 2000). The fact that the Supreme Court of Delaware affirmed on the basis of a fact-specific doctrine like laches that was not even addressed by the trial court, rather than on the basis of the lower court's construction of RUPA as abrogating the common law rule for accrual of an accounting claim (the same construction urged here by Hamed), suggests strongly that Delaware's high court was not convinced by the lower court's reading of RUPA.[14] Moreover, generally speaking, when a lower court decision is affirmed on different grounds by an appellate court, the lower court decision loses whatever precedential status it once had, and the appellate opinion becomes binding on the lower courts only on the actual grounds for affirmance. See Negron v. Caleb Brett U.S.A., 212 F.3d 666, 670 (5th Cir. 2000) (noting that because it "affirmed [a district court decision] on other grounds," its decision is not an endorsement of the lower court's analysis); see also Dow Chemical v. United States Environmental Protection Agency, 832 F.2d 319, 323 (5th Cir. 1987) (where an appeals court affirms on other grounds, the ground relied upon by the district court ceases to be binding). Trial court decisions are generally not even binding on other trial courts in the same jurisdiction, and in this circumstance the Delaware chancery court decision in

[14]In addition, the Delaware Supreme Court may have been influenced by the fact that traditionally courts apply the equitable doctrine of laches, rather than the statute of limitations, to determine whether an equitable claim was filed too late – and a claim for an accounting is an equitable claim. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392, 395-96 (1946) ("[t]raditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief"). "Laches, as an equitable doctrine, differs from the statute of limitations in that it offers the courts more flexibility, eschewing mechanical rules." Waddell v. Small Tube Prods., Inc., 799 F.2d 69, 79 (3d Cir. 1986).

Fike should not be regarded by this Court as persuasive authority for construing section 75(c) in the Virgin Islands Act.

Defendants have been unable to find any cases that discuss the Virgin Islands common law rule governing when an action for an accounting of a partnership accrues for statute of limitations purposes. But under a Banks analysis, the Superior Court is empowered to decide what the common law of the Virgin Islands is, based on what the majority rule is and what the soundest rule is. See Banks v. International Rental and Leasing Company, 55 V.I. 967, 974-980 (V.I. 2011); see also Gov't of the V.I. v. Connor, 2014 V.I. Supreme LEXIS 17 (V.I. Fe 24, 2014). The majority rule at common law, and the common law rule apparently adopted by all state courts that addressed the issue, was that a claim for an accounting accrues upon dissolution of a partnership. It is a sound rule because it enables a court to "true-up" or reconcile each partner's individual accounts in accordance with their agreements and avoids the injustice that would result from not enforcing those agreements.

To be sure, as the Delaware Supreme Court held in the Fike case, the equitable doctrine of laches is still potentially available to a partner who is sued in equity for an accounting if he or she can show that he will be unfairly prejudiced by his or her co-partner's delay in bringing the claim. Here, although Hamed has pled laches as an affirmative defense to Defendants' counterclaims, he cannot show that he will be prejudiced unfairly by any alleged late assertion of Defendants' claims for rent or any fraud claims, and has not made that argument. Indeed, as discussed extensively above, the claim for rent is a straightforward claim, the validity of which has been acknowledged by Hamed in his prior depositions in this case, and the obligation to determine profits by deducting accrued rent is a key component of the terms of the partnership.

Hamed also argues in his June 20 reply brief on his limitations motion that the old common law rule was not a common law rule at all, but was instead a statutory rule first created by the original version of the Uniform Partnership Act ("UPA"), which was drafted in 1914 and adopted by a number of states in the ensuing decades. Id. at 3. The ALR article cited above shows Hamed to be mistaken. As discussed above, the article cites cases from 26 states decided prior to 1914 (and as far back as 1854) which apply the apparently universal common law rule that a cause of action for an accounting accrues upon dissolution or wind-up or similar termination of partnership affairs. See Annot., When Statute of Limitations Commences to Run on Right of Partnership Accounting, 44 A.L.R.4th 678, §§ 3, 6, and 9 (1986 and Supp. 2014) (citing numerous pre-1914 cases for this proposition). Cases from three other states cited in the article were decided shortly after 1914, but a review of those cases shows that they rely on other pre-1914 cases articulating the common law rule, and not on the UPA. See Williams v. Walker, 229 SW 28 (Ark. 1921), Ristine v. Ruml, 197 NW 27 (Iowa 1924); Carson v. Crossman, 225 P. 947 (Okla. 1924). As such, the article shows that the accrual rules for an accounting claim were part of the common law of 29 states prior to the adoption of the original UPA, and it identifies no other state in that time period that adopted the accrual rule urged by Hamed. In the absence of any common law cases in the Virgin Islands that address this limitations issue, under a Banks analysis this Court should determine that the common law rule here is that claims for an accounting accrue on dissolution. Consistent with that accrual rule, Yusuf's request for an accounting was timely asserted, and it would necessarily embrace the claims for unpaid rent in the amounts described above.

II. Hamed's Admissions and Yusuf's Declaration Testimony Entitle United To Judgment For Its Rent Claims in Counts XI and XII.

Yusuf and Hamed both agree that rent is due to United for the space that has been occupied by Plaza Extra-East from that store's inception. The percentage of sales rental rate for all periods since May 5, 2004 is not in dispute, as Hamed paid the rent for the 2004-2011 period at that rate. The $5.55 per square foot rate for the period January 1, 1994 to May 4, 2004 is likewise not in dispute, because the payment for the preceding period was made at that rate, and Hamed has never rebutted Yusuf's June 6, 2014 declaration, which asserts that Waleed and Yusuf specifically agreed that the payment of rent for that period would be deferred.[15] When asked specifically about the 1994-2004 rent, Hamed confirmed that he was "not denying the rent" for that period, that he "never objected" to its payment, and testified two times, without any qualification, that it "should be paid if it hasn't been paid." See Exhibit 1, Vol. II, pp. 107, 118; see also id. p. 117 (acknowledging that if rent was not paid for that period, then "it should be paid"). Notwithstanding Hamed's professed uncertainty about whether rent had been paid for the 1994-2004 period, the undisputed facts are that it was not paid.

No factual issues remain for determination regarding United's right to recover under Counts XI and XII. No new information is necessary to render judgment. Nor are there any legal arguments that preclude judgment in United's favor in the amounts set forth in Yusuf's declaration.

A. Hamed's Statute of Limitations Defense to Counts XI and XII is Without Merit.

[15]Moreover, as discussed above, the parties' agreement to allow annual rent to United to accrue for a period of years before it was paid clearly benefited the partnership by providing funds to grow the business from one to three stores, and allowing the business to survive not one, but three catastrophic events, Hurricanes Hugo and Marilyn, and the fire at Plaza Extra-East in 1992.

Hamed is now arguing that the claim for the 1994-2004 rent is time-barred – i.e., that a lawsuit to recover such rent apparently should have been brought by May 2010,[16] and that United waited too long to assert the claim for that rent in its December 2013 counterclaim filed in this case.[17] There are no genuine issues of material fact to support this defense. The claim for rent did not accrue until 2013, during the pendency of this litigation, when Hamed for the first time (in a letter written by his counsel to United's counsel) repudiated the obligation and took the position that it was unenforceable. And even if by tortured logic the claim could be treated as having accrued in 2004, the doctrine of equitable tolling would stop the running of the statute of limitations on the contract claims in Counts XI and XII until shortly before Hamed filed his complaint in this case, and the limitations defense would fail for that additional reason.

1. The Contract Claims for Unpaid Rent Did Not Accrue Until 2013.

It is well-settled that a claim for breach of contract accrues at the time of breach, or non-performance when performance is due. See, e.g., Peck v. Donovan, 2012 U.S. App. LEXIS 25281, p. *9 (3d Cir. 2012). The claim for breach of the lease agreement between the partnership and United could not have arisen until Yusuf, as United's representative, made demand for the rent on May 17, 2013 and Hamed (through his counsel) responded on May 22, 2013 by saying, for the first time, that the rent obligation was unenforceable. See **Exhibit 3C**, which responds to Exhibit

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[16]While Hamed has not yet identified the accrual date for the 1994-2004 rent claim, and hence the date he would contend a lawsuit should have been brought on that claim, his position presumably is that the claim accrued in May 2004, and that a lawsuit should have been brought by May 2010 under the six-year statute.

[17]As noted above, that argument was first made in a May 22, 2013 letter from his counsel to Defendants' counsel, and it is the subject of Hamed's May 13, 2014 motion for partial summary judgment on the limitations issue that was filed in this case.

3B. As discussed above, under the oral partnership agreement, Yusuf had the sole authority to determine when a reconciliation of partnership accounts would take place, and thus when the partnership had to pay United accrued annual rent. In 2003, with Hamed's concurrence, Yusuf deferred payment of that obligation, and then in 2013 he bound the partnership to pay United for the accrued rent. See Exhibit 3 at ¶¶ 8-10. Hamed acknowledges that under their partnership agreement Yusuf was in charge of all operations of the partnership, including determination of when to pay accrued rent. As Hamed testified, "he's the one who would collect the rent" and decide "whether to collect rent" at any point in time during its accrual. See Exhibit 1, Vol. II, p.107 and 118. See also Exhibit 3 at ¶ 1. Since Yusuf bound the partnership to pay the 1994-2004 rent in 2013, pursuant to authority vested in him by the oral partnership agreement, the claim for that rent could only have accrued when Hamed's counsel advised United's counsel for the first time in May 2013 that he regarded the claim as unenforceable.[18]

And even assuming arguendo that there were disputed issues of fact regarding Yusuf's exclusive authority to determine when reconciliation of the partners' accounts would be made, the claim would still have accrued in 2013 by reason of Waleed's agreement with Yusuf (first in 2003, then in 2012) that the rent owed for the 1994-2004 period would be paid to United later, after the lifting of the injunction in the criminal case and the return of the black book. United had no basis

[18]Moreover, a claim does not accrue until it can be pursued in court (which would require a determination of damages). Thus, even if Hamed had repudiated the rent obligation in 2004, and United had filed suit before the records were returned, the case would have been thrown out on the basis of the parties' mutual acknowledgment (or the incontestable fact) that the damages could not be determined without the records. As such, the claim did not accrue until the records were available.

for suing for the unpaid rent in 2004 because both partners agreed with United that payment of the rent would be deferred. In short, there simply was no breach until May 2013.

2. The Doctrine of Equitable Tolling Applies to Toll the Statute of Limitations as to the Contract Claims.

Even if this Court were somehow to determine that the claim for unpaid rent in the breach of contract counts accrued in 2010, the doctrine of equitable tolling would clearly toll the statute of limitations in this case and render the claims for past due rent in Counts XI and XII timely. In Podobnik v. U.S. Postal Serv., 409 F.3d 584 (3d Cir. 2005), the Third Circuit Court of Appeals concluded:

> There are three principal situations in which equitable tolling is appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action, and that deception causes non-compliance with an applicable limitations provision; (2) where the plaintiff in some extraordinary way has been prevented from asserting his rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Id. at 591 (citations omitted).

Here, circumstances demonstrating equitable tolling exist under situations (1) and (2). Hamed, through his authorized agent, Waleed Hamed, actively misled Yusuf by agreeing that rent for the period would be deferred because of the criminal case. As a result of these discussions, United had no reason whatsoever to bring suit on its rent claim in 2004. As such, the time for pursuing such claims was tolled until United was on notice that Hamed was renouncing a rent obligation he had recognized since the partnership was formed. That notice was first received from counsel for Hamed in a letter dated May 22, 2013. See Exhibit 3C. And even if Waleed had not misled Yusuf, United was prevented from collecting the rent in 2004 (and for years later) by virtue of the federal injunction which froze the accounts that could be used to pay the rent, making

collection impossible. The fact that the black book was seized and not returned until years later also made it impossible for either Hamed or Yusuf or United to know the amount of the rent payment. These extraordinary circumstances created by the bringing of the federal criminal case further demonstrate that any limitations period for assertion of the rent claim for 1994-2004 would be tolled at least until 2011. As such, there could be no time bar to assertion of United's counterclaim for rent for that period.

III. United Is Entitled To Recover Prejudgment Interest On The Unpaid Rent.

Although United did not charge any interest on the past due rent over the decade it accrued and while it could not be paid because of the criminal injunction and the absence of the "black book," it is entitled to recover prejudgment interest at 9% per annum, as provided by V.I. Code Ann. tit. 11, § 951(a)(4), from the date it demanded payment – May 17, 2013. See Exhibit 3B. "As a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which is legally due. Awarding judgment interest is intended to serve as least two purposes: to compensate prevailing parties for the true costs of money damages incurred, and, where liability and the amount of damages are fairly certain, to promote settlement and deter attempts to benefit from the inherent delays of litigation. Thus prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." Skretvedt v. E.I. Dupont de Nemours, 372 F.3d 193, 208 (3d Cir. 2004) (quotation marks and citation omitted); see also, Booker v. Taylor Milk Co., 64 F.3d 860, 868 (3d Cir. 1995) ("To fulfill this make–whole purpose, prejudgment interest should be given in response to considerations of fairness and denied when its

exaction would be unequitable.") (internal quotation marks and citation omitted); Elbrecht v. Carambola Partners, LLC, 2010 U.S. Dist. LEXIS 72158, * 19 (D.V.I. July 16, 2010) (same).

Here, there are no exceptional or unusual circumstances that would make it unfair for United to recover prejudgment interest. To the contrary, it would be entirely unfair to United if the partnership is allowed to have the uncompensated use of United's money after it made a demand for payment more than a year ago. It is certainly not inequitable for the partnership to be required to pay interest at the legal rate (9%) on the $3,999,679.73 from May 17, 2013 until entry of judgment. Likewise, it is only fair to require the partnership to pay prejudgment interest on the Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent from May 17, 2013.

Since Hamed conceded almost one year ago that the current rent is due and owing, see note 7, supra, it would be particularly unfair for United not to recover prejudgment interest on this unpaid rent. United submits that the interest should begin to accrue on the first day of the month following the month that the rent was not paid. In other words, the rent for January 2012 would begin to accrue interest on February 1, 2012 and continue accruing interest until entry of judgment.

CONCLUSION AND RELIEF REQUESTED

United respectfully submits that partial summary judgment should be entered in its favor on its breach of contract counts in its counterclaim (Counts XI and XII) for the undisputed portion of the unpaid rent in the amount of $6,603,122.23. Yusuf also asks this Court for partial summary judgment on his accounting claim (Count IV), by declaring that in making the final reconciliation of partnership accounts and determining what must be distributed to each partner, $6,603,122.23 should be deducted from partnership profits. Hamed and Yusuf should be ordered to pay those amounts from partnership accounts in accordance with the procedures set forth in the April 25, 2013 preliminary injunction.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August 12, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2014, I caused the foregoing **United Corporation, Inc.'s Brief in Support of Motion For Summary Judgment On Its Claims For Rent** to be served upon the following via e-mail:

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

MOHAMMED 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.,

Additional Counterclaim Defendants.

Case No. SX-12-CV-370
Volume I

THE VIDEOTAPED ORAL DEPOSITION OF MOHAMMAD HAMED

was taken on the 31st day of March, 2014, at the Law Offices of Adam Hoover, 2006 Eastern Suburb, Christiansted, St. Croix, U.S. Virgin Islands, between the hours of 10:05 a.m. and 2:03 p.m. pursuant to Notice and Federal Rules of Civil Procedure.

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COLLOQUY

E-X-A-M-I-N-A-T-I-O-N

E-X-H-I-B-I-T-S

EXHIBIT
tabbies
1

Read the first sentence to him, and ask him if he agrees with it.

MR. DEWOOD: Okay.

MR. HARTMANN: Okay. Then go to the second question.

MR. DEWOOD: Sure. (Speaking in Arabic.)

Okay. I'm going to read to you the first sentence (speaking in Arabic).

In short, (speaking in Arabic).

MR. HARTMANN: Is that true?

THE WITNESS: Yeah.

MR. HARTMANN: Okay. He said yes. Go to the second sentence.

MR. DEWOOD: I did not end my oversight of major partnership issues. Just the daily operations. (Speaking in Arabic).

A. That's good.

MR. DEWOOD: He agrees.

MR. HARTMANN: Is that true?

THE WITNESS: Yeah.

MR. HARTMANN: Yes. Okay. Now the third sentence.

MR. DEWOOD: For instance, I was still consulted on the opening of the St. Thomas and West stores, as well as the rent issues surrounding East. (Speaking in

Arabic.)

MR. HARTMANN: Is that true?

THE WITNESS: Yeah.

MR. HARTMANN: Okay. That's true. Okay.

Q. (Mr. Hodges) All right. So then you under -- you were involved in the decisions with respect to the payment of rent, is that right?

A. Rent to who?

Q. The supermarket did not pay rent?

A. We pay rent. We talk, since we open, we talk about it, and he, Mr. Yusuf the one, he put the rent. Up from that time, we don't pay no rent. Still, we owe. We owe Mr. Yusuf, the owner for the Plaza Extra, half of the -- I don't pay for half. Still we owe him some more.

Q. So I think what you're saying is you agree that the partnership owes rent to United Corporation, is that right?

A. Yeah, and to Mr. Yusuf, yes.

Q. Well, Mr. -- the United Corporation is the -- is the company that you've been paying rent to for many years, is that correct?

A. Yes, since we started.

Q. Okay. So rent would be one of the expenses that the supermarket paid in order to get net profits, is that right?

MR. HARTMANN: Yes.

A. We pay for the supermarket, rent for the supermarket for monthly. We already give him 4 million-something half couple months ago for the when he ask, we do pay him that.

Q. (Mr. Hodges) Okay. So what --

A. Yeah, we pay him that.

Q. The answer to my question --

A. We pay him that, and then still we owe him some more.

Q. Okay. You -- you paid him some money a couple months ago, you say, and you acknowledge that the partnership still owes United rent?

A. Yeah. My own don't finish --

Q. Okay.

A. -- my rent one time.

Q. How much rent do you agree that the partnership owes United?

A. I don't know. He don't agree they have a between -- and ask him St. Thomas, and we told him it's as to St. Thomas, we pay rent for St. Thomas own.

Q. Okay.

A. And we still, we don't pay, I believe.

Q. What about insurance? Was the partnership required to -- to obtain and pay for insurance for the

building that it occupied under the -- the rental agreement with United Corporation?

A. I believe the -- the -- the insurance for Plaza Extra, not with United Corporation.

Q. But United --

A. And Plaza Extra owns it.

Q. Right. So United -- excuse me -- Plaza Extra paid, was required by your agreement, to pay insurance to cover the -- the -- the building that it was occupying, is that right?

MR. HARTMANN: Object. Asked and answered.

A. Well, I don't know.

Q. (Mr. Hodges) You -- you -- you never -- you never --

A. I never know.

Q. -- you never understood that part of the deal with United Corporation --

A. No, I never know.

Q. Okay.

MR. HARTMANN: You keep saying "the deal with United Corporation." He doesn't know of any deal with United Corporation.

MR. HODGES: Are you testifying again, Carl?

MR. HARTMANN: No. I'm just trying to help you through this thing.

MR. HODGES: Ask him the question.
MR. HARTMANN: Wait one second. Wait one second.
(Discussion held off the record.)
MR. HARTMANN: And ask it in Arabic first, if you would, and just ask me if it's correct.
MR. DEWOOD: Let me get the right word.
MR. HARTMANN: Okay.
MR. DEWOOD: (Speaking in Arabic.)
Has there been agreement --
A. (Through Mr. DeWood:) There is no agreement --
Since we opened.
MR. HARTMANN: Translate that.
A. (Through Mr. DeWood:) There is no agreement whatsoever since we opened. (Speaking in Arabic.)
We didn't agreed. He was the one who put the rent amount. We did not.
MR. HARTMANN: Okay. Go ahead.
A. We start, we stay longer, we don't pay rent. Till couple months ago, they pay him out of the loan. Exactly the number, I don't know. A million four or more. Two, three, four. We still, we owe him of rent.
Q. (Mr. Hodges) Do you know how much you owe?
A. No.
Q. Millions of dollars?

A. Not even a dollar or fifty cents.
Q. That's all that you owe?
A. I don't know how much I owe him.
Q. So if he -- if he -- if he told you how much you owe, would you disagree with him?
MR. HARTMANN: Object. Asked and answered. He said he doesn't know.
A. Yes, he know exactly.
Q. (Mr. Hodges) He knows exactly how much is owed?
A. Yeah, how much we owe him.
Q. And you don't disagree with him about the amount owed, do you?
MR. HARTMANN: Objection. Asked and answered. Objection to form.
A. I agree with him it's that the rest of it, everybody know he used to pay me like $200 allotment. This year he is going to pay 250. If we agree or not, we pay 250. If they ask 500, if they know we can't pay you 500. I know too much. Give me number. If I put it in my mind, I'll work with it.
Q. (Mr. Hodges) Your role in the partnership was to be responsible for receiving, is that right?
A. Huh?
Q. Is that right?
A. What's that?

Q. Your -- your -- under your agreement with Mr. Yusuf, --
A. Uh-huh.
Q. -- you were responsible for the warehouse.
A. Yeah.
Q. That's right?
A. Uh-huh.
Q. And what was his responsibilities?
A. In the office.
Q. And when you say "in the office," what do you mean by that?
A. He's in charge for the office. He's in the one who say yes or no. Buy paper, buy money, buy everything.
Q. Okay. Now --
A. Hiring, firing.
Q. Did there come a time that you retired from the -- your warehouse supervision, and -- and went back to Jordan?
A. Yeah, I going temporary and I come back.
Q. Well, in -- when was that, in 1996?
A. I don't know exactly.
Q. Well, you -- you -- you retired, did you not? You retired and went back to Jordan.
MR. HARTMANN: Object. Asked and answered.
A. Yeah.
Q. (Mr. Hodges) Okay. Why did you retire?

A. Why?
Q. Why?
A. Because I getted 79 years.
Q. You were 79 years?
A. I'm going to start with 80.
Q. Not in 1996, you weren't 79, were you?
A. Yeah, mon, now I'm past 79.
Q. Okay. In 19 --
A. I start to 80. What you want me, to work with you?
Q. If you'll work till 90, that will be okay.
A. No, I don't work.
Q. Okay.
A. Why you working with that? What's that question?
Q. When you retired in 1996, you would agree with me that you no longer had any day-to-day involvement in the operations of the partnership, is that right?
MR. HARTMANN: Object. Mischaracterizes the prior testimony.
Q. (Mr. Hodges) Is that right?
A. Is that's right? What's that, when I told you right? What's that?
Q. What is right? I don't want --
A. Well, isn't you tell me, it's right? How I tell you right, --

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

MOHAMMED 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.,

Additional Counterclaim Defendants.

Case No. SX-12-CV-370
Volume 2

THE VIDEOTAPED ORAL DEPOSITION OF MOHAMMAD HAMED

was taken on the 1st day of April, 2014, at the Law Offices of Adam Hoover, 2006 Eastern Suburb, Christiansted, St. Croix, U.S. Virgin Islands, between the hours of 9:12 a.m. and 5:13 p.m. pursuant to Notice and Federal Rules of Civil Procedure.

Reported by:

Cheryl L. Haase
Registered Professional Reporter
Caribbean Scribes, Inc.
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Also Present:

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Hatim Yusuf, Interpreter
Kim Japinga
Waleed Hamed
Hisham Hamed
Mufeed Hamed
Maher Yusuf
Fathi Yusuf

INDEX

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E-X-H-I-B-I-T-S

funds were ever used to purchase property in Jordan in your name only?

MR. HARTMANN: Object as to form.

A. What I know, I never. No, I have -- no. (Speaking in Arabic.)

THE INTERPRETER: He's -- he's not -- in his name alone, no, he's not aware of that.

He's saying Mr. Yusuf is the only one who's purchased in his name only.

Q. (Mr. Hodges) And what property is that?

A. It's land. I don't know. I never see, and I don't know where. (Speaking in Arabic.)

THE INTERPRETER: He does not know.

Q. (Mr. Hodges) So it's -- it's -- it's your testimony that land wasn't purchased in your name only that Mr. Yusuf knew about?

MR. HARTMANN: Object as to form.

THE INTERPRETER: He swears on the Quran that he has -- he does not have anything in his name alone.

Q. (Mr. Hodges) That was purchased with partnership funds?

THE INTERPRETER: Yes.

Q. (Mr. Hodges) Okay. Would you agree with me, Mr. Hamed, that Plaza Extra paid rent to United Corporation for occupying the Plaza East premises from the beginning

until December 1993?

THE INTERPRETER: From the beginning?

MR. HODGES: '86, 1986.

THE INTERPRETER: Okay.

Yes.

Q. (Mr. Hodges) Okay. And that rental was based on a price per square foot that you agreed upon with Mr. Yusuf, is that correct?

THE INTERPRETER: Yes.

Q. (Mr. Hodges) Okay. And isn't it true that no rent has been paid to United since January 1, 1994 through May 4, 2004?

MR. HARTMANN: Object as to form.

A. I don't know. (Speaking in Arabic.)

THE INTERPRETER: He says, I don't know.

Q. (Mr. Hodges) You're not aware of any dispute regarding United's entitlement to rent for the ten years from January 1, 1994 to May 4, 19 -- excuse me -- 2004?

THE INTERPRETER: I am not aware, except recently I've learned that my son has told me that Mr. Fathi Yusuf is demanding rent of $250,000 per month, and this is of recent.

Q. (Mr. Hodges) Okay. Well, I'm -- I'm talking about the price per square foot monthly rent for the period between January 1, 1994 through May 4, 2004 that was agreed

upon with you.

THE INTERPRETER: In the beginning, yes, but not recent -- recently.

Q. (Mr. Hodges) I understand. But if -- if rent has not been paid on the -- the square footage basis that you agreed on with Mr. Yusuf for the period between January 1, 1994 and May 4, 2004, would you agree with me that that rent should be paid to United?

MR. HARTMANN: Object. Calls for a legal conclusion.

A. Couple months ago, they --

THE INTERPRETER: Wait. Arabic.

A. I'm sorry.

THE INTERPRETER: He says he's not denying the rent, and Mr. Yusuf is the one who used to, in other words, determine the -- the rental rate, and he's the one who would collect the rent.

Q. (Mr. Hodges) But you understand that you and your son have refused to allow United to draw the funds necessary to pay the rent from January 1, 1994 to May 4, 2004, correct?

THE INTERPRETER: What about the four-and-a-half million that was paid to him?

Q. (Mr. Hodges) That's not my question.

THE INTERPRETER: Maybe --

A. (Speaking in Arabic). When the rent, the one couple months -- couple years back.

Q. (Mr. Hodges) Do you know what period that payment --

A. I don't know.

MR. HODGES: Can I -- go ahead.

THE INTERPRETER: Yeah, he's saying that -- that was paid, and he mentioned an amount of four-and-a-half million prior to that. But he's indicating that that was paid.

Q. (Mr. Hodges) So it's your position that that five -- do you recall how much was paid?

A. Exactly number, no.

THE INTERPRETER: Exactly, no.

Q. (Mr. Hodges) Does the -- does the figure of $5.4 million strike any memory chord?

A. I don't know, it's four or five.

THE INTERPRETER: I do not remember the exact amount, whether it was four or five.

Q. (Mr. Hodges) Okay. And do you -- do you know what period of time that payment covered?

A. No.

Q. So if it -- if it was agreed with your son, Waleed Hamed, that that $5.4 million payment only covered the period between May 4, 2004 and December 31, 2011, you

answered. Calls for a legal conclusion.
A. I don't know. (Speaking in Arabic.) I don't see it. I don't look at it.
Q. (Mr. Hodges) Your answer -- your answer is, you don't know?
A. I don't know. I don't check it. I don't see it.
Q. Okay.
A. Because I hear from my son, he say, we pay Mr. Yusuf the rent for the one that's past.
Q. Did -- did -- did your son tell you that rent had been paid for the period --
A. We pay, yeah.
Q. Wait a minute.
A. That's what he told me.
Q. Did your son tell you that rent had been paid by Plaza Extra for the period from January 1, 1994 through May 4, 2004?
MR. HARTMANN: Object. Asked and answered.
THE INTERPRETER: He did not tell me things. He told me we paid such and such.
Q. (Mr. Hodges) If -- if it -- if it -- if rent was not paid from January 1, 1994 through May 4, 2004, would you agree that rent should be paid?
MR. HARTMANN: Object. Asked and answered.
THE INTERPRETER: It should be paid.

Q. (Mr. Hodges) Okay. Regardless of how long it took to make a demand for payment?
MR. HARTMANN: Object. Calls for a legal conclusion.
THE INTERPRETER: He says, If it hasn't been paid, it should be paid. And he's never -- he's never objected to it being paid. Mr. Yusuf is the one who used to decide whether to collect rent or not collect rent.
Q. (Mr. Hodges) Okay. Has your son given you any reason for not paying the rent for the period from January 1, 1994 through May 4, 2004?
MR. HARTMANN: Object. Mischaracterizes prior evidence. Object to form, calls for speculation. Object. Assumes facts not in evidence.
Go ahead.
THE INTERPRETER: He did not tell me.
Q. (Mr. Hodges) But you would agree with me, sir, that it would not be fair to occupy somebody's property without paying rent?
MR. HARTMANN: Object. Asked and answered. Calls for speculation.
THE INTERPRETER: We do not have anything, any location, but the supermarket. They pay half, and we pay half.
MR. HODGES: My question is, would, in his

mind, would it be fair for the -- the supermarket to occupy the premises at Plaza Extra East for more than ten years without paying the rent that was agreed upon with Mr. Yusuf?
MR. HARTMANN: Object. Calls for speculation. Object to form. Asked and answered.
THE INTERPRETER: The first response is no. In other words, it's not fair, but this was controlled by Mr. Yusuf. I never objected to the payments of rent. I -- I -- (shrugs shoulders). In other words, he did not object and he understood that Mr. Yusuf could -- could charge for the rent and collect the rent.
MR. HODGES: Okay.
THE INTERPRETER: This is tougher than I thought.
MR. HARTMANN: Excuse me. Could we go off the record? Could we go off the record?
A. (Speaking in Arabic.)
(Discussion held off the record.)
THE VIDEOGRAPHER: Going off the record at 2:03.
(Respite.)
THE VIDEOGRAPHER: Going back on record at 2:05.
Q. (Mr. Hodges) Mr. Hamed, did there come a time that Mr. Yusuf gave notice to you that he wanted the -- the

premises back at Plaza Extra East, or United wanted the premises back?
MR. HARTMANN: Are you going to introduce 5?
MR. HODGES: I'm considering it.
THE INTERPRETER: All right.
MR. HODGES: What did he say?
THE INTERPRETER: His response is, Get back what location? There's only one store.
Q. (Mr. Hodges) Well, there's -- there's three stores that Plaza Extra owns, isn't that correct?
THE INTERPRETER: No.
Q. (Mr. Hodges) Who owns --
THE INTERPRETER: It's -- it's only one store with a warehouse and showroom.
Q. (Mr. Hodges) So you don't claim any partnership interest in the business that's run at Plaza Extra Tutu Park, or Plaza Extra West?
THE INTERPRETER: Yeah, I'm -- I'm a partner in the three.
Q. (Mr. Hodges) Okay. So there's three stores, and my question is, isn't it true that United Corporation gave you notice that it wanted the premises back that Plaza Extra East occupies in September of 2010?
THE INTERPRETER: September 2000 --
MR. HODGES: During the month of

September 2010?

THE INTERPRETER: How can -- how can he get it back when it belongs to both of us?

A. We have partner. We don't have no (inaudible) partner.

THE INTERPRETER: Arabic.

We are both partners in it. How can he get it back?

Q. (Mr. Hodges) The premises that Plaza Extra Supermarket occupies at Plaza Extra East are owned by United Corporation.

Do you agree with that, Mr. Hamed?

THE INTERPRETER: He says, It -- it's owned both by Fathi Yusuf and Mohammad Hamed, the land and the building.

He's referring to the supermarket.

MR. HODGES: He's saying that the land and the building is owned by --

A. Plaza Extra. And it still, I'm alive, Mr. Yusuf buy it from the guy, he's a Crucian, he was senator, Puerto Rican. They buy land from the --

THE REPORTER: Do it in Arabic, please.

THE INTERPRETER: It's -- he's -- his response is confusing. I mean, I -- I can't --

Q. (Mr. Hodges) Are you confusing Plaza West with

Plaza East, Mr. Hamed?

A. Yeah, Fathi Yusuf, his own. I don't have nothing to do with the property.

MR. HODGES: Okay.

THE INTERPRETER: Okay.

Q. (Mr. Hodges) And that's why Plaza East always paid rent.

A. No.

THE INTERPRETER: I mean, he's going back to say, The land --

MR. FATHI YUSUF: Can I say one word?

MR. HODGES: NO.

MR. FATHI YUSUF: Can you identify the Sion Farm --

MR. HODGES: No, no. No, no.

THE INTERPRETER: Your lawyer. Your lawyer.

Q. (Mr. Hodges) Okay. The Plaza store that is at Sion Farm St. Croix, that is the one that is owned by Mr. Yusuf's corporation, United, isn't that correct? It's the land and the building.

A. Yeah, yeah.

THE INTERPRETER: No. He says no.

A. Yeah.

MR. DEWOOD: I thought he said yes.

THE INTERPRETER: Yes?

Okay. I heard "la," which means no.

He's saying, Yes, it is.

Q. (Mr. Hodges) Okay. So you agree with me, I just want to.

THE INTERPRETER: He says, I'm not denying what he owns. I -- I -- I -- I will never deny that. I just want my rights.

MR. HODGES: Okay.

Q. (Mr. Hodges) The rent that Plaza East or Sion Farm paid to United over the years is because United owns that property, not Plaza East, isn't that right?

THE INTERPRETER: Yes.

Q. (Mr. Hodges) Okay. Now, if -- do you know whether rent has been paid by Plaza East to United since December 31, 2012?

A. No.

THE INTERPRETER: No.

Q. (Mr. Hodges) If rent has not been paid by Plaza Extra East since December 31, 2011, would you agree that that's not right?

MR. HARTMANN: Object as to form. Object to calling for a legal conclusion.

THE INTERPRETER: If we owe it, then it should be paid.

Q. (Mr. Hodges) You would agree with me, it's not

fair to occupy somebody's property as a tenant without paying rent?

MR. HARTMANN: Object. It's calling for a legal conclusion. Object as to form.

THE INTERPRETER: I've -- I've already responded yes.

Q. (Mr. Hodges) Okay.

A. How many times do you want I repeat it?

Q. Now, you testified earlier that you were in charge of the warehouse at -- at Plaza East, right?

THE INTERPRETER: He said, I was in charge of the receiving at the warehouse.

He told me -- and I understand it to refer to Mr. Fathi Yusuf -- He told me I should control this area, guard this -- this receiving area, and I will guard the front, the office.

Q. (Mr. Hodges) Okay. And when you retired in 1996, Mr. Hamed, were -- were those responsibilities of yours turned over to your son Wally?

MR. HARTMANN: Object. Mischaracterizes previous testimony.

A. I give him power of attorney for that.

THE INTERPRETER: He says, Yes, I gave him power of attorney for that.

A. He is my place.

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED By His Authorized Agent WALEED HAMED, Plaintiff, vs. FATHI YUSUF and UNITED CORPORATION, Defendants.	CIVIL No. SX-12-CV-370 ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF JURY TRIAL DEMANDED

CERTIFIED TRANSCRIPT

The Hearing in the above-entitled action was heard before the HONORABLE DOUGLAS A. BRADY, JUDGE, in Courtroom No. 211, Kingshill, St. Croix, on Friday, January, 25th, 2013, at approximately 10:30 a.m.

SUZANNE A. OTWAY-MILLER
REGISTERED PROFESSIONAL REPORTER
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I N D E X

WITNESSES

FOR THE PLAINTIFFS

A It's a 50/50 partnership to the supermarket.
Q Be specific, when you say the supermarket what are you referring to?
A When they got together to form this partnership it was to open the Plaza Extra east store.
Q So you're talking about -- This partnership you're talking between Fathi Yusuf and your father in respect to the Plaza Extra grocery store operations, correct?
A Yes, sir.
Q What were the terms of this agreement? You said it was 50/50?
A Yes.
Q What else?
A That the Plaza Extra east store will pay rent to United Corporation, the United Shopping Plaza.
Q Just so we're clear, what you're saying is the grocery store operations will pay rent to United Corporation as the landlord for the actual dirt, you know, of Plaza Extra Sion Farm?
A For the Plaza Extra east store.
Q What else were the terms?
A It's -- really those are the terms as I understand.
Q Just so we're perfectly clear, you're testimony

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,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

DECLARATION OF FATHI YUSUF

I, Fathi Yusuf, pursuant to 28 U.S.C. §1746 and Super. Ct. R. 18, declare under the penalty of perjury, that:

1. Mohammad Hamed ("Hamed") and I agreed to carry on a supermarket business (the "Plaza Extra Stores") that eventually grew into three locations, including the first of three stores, Plaza Extra-East, which opened in April 1986. Plaza Extra-East was and is located in United Plaza Shopping Center owned by United Corporation ("United"), of which I am the principal shareholder. Under the business agreement between Hamed and me that I now describe as a partnership, profits would be divided 50-50 after deduction for rent owed to United, among other expenses. Under our business agreement, we also agreed that rent would accrue until such time as I decided that our business accounts should be reconciled. The reconciliation of business accounts would not only involve payment of accrued rent, but also advances that each of us had taken by withdrawing money from the store safe(s). Under our agreement, I was the person

responsible for making all decisions regarding when the reconciliation would take place and hence when the rent would be paid. Hamed and I agreed at the outset that the rent would be calculated at a rate of $5.55 per square foot for what is referred to as Bay 1, the primary space comprising the Plaza Extra-East store, which originally covered 33,750 square feet

2. Our decision to allow rent to accrue for some number of years before paying it was intended to enable the business to retain capital needed to grow the business.

3. This method of allowing rent to accrue for a number of years before being paid was important for the growth of the supermarket business for a number of reasons. First, at the time of the formation of the business agreement, the initial store, Plaza Extra-East, in St. Croix, was still in development. We thereafter made plans to open a second supermarket in St. Thomas (the store now known as Plaza Extra-Tutu Park), and it opened in October 1993. Later, we made plans to open a third grocery store in St. Croix (the store now known as Plaza Extra-West), and it opened in 2000. Construction began in 1998 and finished in 2000. Keeping money in the business for multi-year periods, rather than paying rent to United in monthly or even annual rent payments, ensured that the business would have the capital to establish and grow the stores in very challenging economic conditions.

4. For reasons discussed in more detail below, there has been only one reconciliation of accounts since our business agreement was formed, and it occurred at the end of 1993. The rent payment due from 1986 through December 31, 1993 was paid by means of a setoff on an account that reflected credits and debits made between Hamed and me. Specifically, Hamed's one-half portion of the rent was paid by means of a setoff against amounts I owed him by virtue of some large withdrawals I had made in preceding years.

5. In 1992, the Plaza Extra-East store burned down. As with all tenants in the United Shopping Plaza, the insurance policy on Bay 1 was paid to the property-owner, United. United decided to expand Bay 1 by purchasing an adjacent acre of land for $250,000. I used $100,000 of my personal funds and the balance was paid with insurance proceeds United received as the insured under a policy of insurance, which is required of all tenants of United Shopping Plaza. At that time, I agreed with Hamed, through his son, Waleed, to continue operating the Plaza Extra – East supermarket in Bay 1 of United Shopping Plaza. I further agreed to keep the rent at the much lower-than market rate of $5.55 per square foot for a ten-year period. Specifically, I told Hamed that we would keep that rate in place for the ten years following the date the rebuilt store opened for business.

6. The Plaza Extra-East store was reopened in May 1994. The Plaza Extra-Tutu Park store had just opened in October 1993. Around the time that the Plaza Extra-East store reopened, I was arranging a Scotiabank loan to United for approximately $5,000,000 for the benefit of the partnership. The loan was guaranteed by my wife and me, and it was secured by our home on St. Croix and by United's shopping center in St. Croix. Because money was short, Hamed and I agreed not to have the rent withdrawn, and to simply continue to accrue rent until such time as I made a demand.

7. Some time in 2002 or 2003, I began discussions with Waleed Hamed regarding how the rent would be calculated for Plaza Extra-East after the expiration of the ten-year period during which the $5.55/square foot rent formula was in place. During those discussions, we recognized, as before, that the prior rent was far below fair market value, and the decision was made to set the rent based on a percentage of sales formula using the yearly sales of Plaza Extra-Tutu Park. Total payments made to that store's landlord, Tutu Park, Ltd., for a given year were to

be divided by sales for the same year at that store to determine a percentage, and that percentage was then applied to the sales at Plaza Extra-East to determine the rent to be paid by Plaza Extra-East to United for that year. There is no dispute concerning the formula for calculating the rent for Plaza Extra-East from May 2004 forward, since rent based upon that agreed formula was paid via a check signed by Waleed Hamed on February 7, 2012 in the amount of $5,408,806.74, covering the period from May 5, 2004 to December 31, 2011. A calculation of the rent based on this formula and a copy of the check in the amount of $5,408,806.74 is attached as **Exhibit A**.

8. Between 1994 and 2004, we discussed the rent issues on several occasions. We both agreed to continue accruing the rent because of the need for more capital for the then new St. Thomas store, and for the construction of the Plaza Extra – West store between 1998 and 2000. Between 2002 and 2003, I discussed with Hamed the new rental rate for the Plaza Extra – East store beginning May 5th, 2004. Also, in 2004, at about the time the new agreed-upon rent formula became effective, Waleed Hamed, acting on behalf of his father, and I discussed payment of the rent that had accrued since May 1994 at the $5.55 per square foot rate. At the time, we were then embroiled in the criminal case, and all of the Plaza Extra accounts were frozen by an injunction. As a result, I made a decision and Waleed Hamed, on behalf of Hamed, agreed, that there was no prospect for the payment of the rent owed for the period since the last payment of rent and that payment of that rent would continue to be deferred. In addition, even if the ability to collect the rent had not been not blocked by the injunction, I was unable to calculate the rent for the second rental period and to do a full reconciliation of the partnership accounts, as I did not have the book of accounting entries called the "black book," and also did not have the comprehensive, larger ledger showing advances against the partnership that Hamed and I had taken by means of withdrawals from store safes. The FBI had seized substantially all of the financial and accounting

records of the Plaza Extra Stores, including these items, when it conducted its raid on the stores in October 2001. Among other things, the black book reflected the exact date of the last rent payment, information I needed to accurately determine when the rent for the second period had begun accruing. And the larger ledger reflected the debits and credits between the two partners (for the funds taken by them and members of their families from the store safes in the form of advances against partners' accounts). I had no recollection (and neither did Hamed) of exactly what dates the rent for the preceding period had covered, and indeed was not sure whether it ended in 1992, 1993 or 1994. We therefore needed to consult the black book to determine the start date for the subsequent rental period, which in turn would affect the amount of rent that had accrued since the last payment. Waleed Hamed and I agreed that rent would be allowed to continue to accrue until it was possible to calculate the amount of rent due and make the payment. Another consideration that counseled in favor of letting the rent continue to accrue, rather than paying it, is that our criminal defense lawyers did not want us to take any actions that supported the existence of a partnership as the owner of the Plaza Extra Stores.

9. In the latter part of 2011 and early 2012, the injunction in the District Court criminal proceeding had been relaxed sufficiently to permit a payment for rent that had accrued to that date from the date of the last payment. However, the original problem regarding the absence of the records to accurately calculate the rent for the period ending in 2004, and to conduct a full reconciliation of the rents from the date of the last reconciliation, remained unresolved because of the absence of the black book and the ledger. Neither of these items had been returned. I did not want to either understate or overstate the rent amount, but wanted the dollar amount of rent to be exactly correct. By contrast, we did not need the black book to pay the rent covering the period

from May 5, 2004 to December 31, 2011, as we knew that the new rent rate was in effect for that time period.

10. In early 2012, I discussed with Waleed Hamed the payment of accrued rent, and we agreed that the May 5, 2004 to December 31, 2011 portion of the accrued rent should be paid, while the potion preceding that would be deferred. Waleed acknowledged that we could not pay all of the rent that had accrued from the date of last payment in 1993 to May 5, 2004, as we still had not recovered the black book to determine the exact starting point for that period, and there also were insufficient funds in the operating account to pay the rent due for the ten year period of January 1, 1994 to May 5, 2004. During that conversation in 2012, Waleed Hamed agreed that rent was owed for that period, and agreed that it would be paid once the black book was recovered and a proper calculation could be made, and when sufficient funds are available. Shortly after that discussion, the rent for the period May 5, 2004 to December 31, 2011 in the amount of $5,408,806.74 was paid by a check signed by Waleed. See Exhibit A. The reason why the rent for the May 5, 2004 to December 31st, 2011 paid was paid before the rent for the January 1994 to May 5, 2004 period was that information regarding the exact starting date for that prior period was not available, while the period of May 5, 2004 to December 31, 2011 was certain as to start and end dates.

11. My son, Yusuf, found the black book in early 2013, among a large number of documents that were returned to us by the FBI. After receipt of the black book, at my instruction, the attorney for United and me sent a letter dated May 17, 2013 to Hamed's attorney requesting payment of the past due rent, as we then were able to properly calculate the dollar amount. See letter attached as **Exhibit B**. This letter contained errors in the amount of the outstanding unpaid rent that are corrected by the calculations set forth in this declaration. On May 22, 2013, counsel

for Hamed wrote a letter to my and United's counsel in which he advised that his client was now taking the position that because of the statute of limitations, profits did not have to be determined by deducting the unpaid rent for the 1994 to 2004 period. See letter attached as **Exhibit C**. Until receipt of this letter, nobody on the Hamed side had ever challenged or otherwise disputed this rental obligation or the terms of our partnership agreement that required rent to be deducted in order to determine profits.

12. I received a partial copy of the FBI file, records, and documents electronically produced and stored on a hard drive in approximately mid-2010. When these documents were initially returned, I had no reason to suspect any wrongdoing by Hamed, Waleed Hamed or any other members of the Hamed family. Later in 2010, as I reviewed these documents, I discovered certain documents that led me to believe that Hamed and his son, Waleed, may have taken monies without my knowledge. In 2012, I discovered the tax returns for Waleed Hamed for various years, which reflected more than $7,500,000 in stocks and securities owned by Waleed Hamed. I knew Waleed's salary as a Plaza Extra store manager, and knew that he had no other employment or source of income. I believed there was no way he could have legitimately accumulated that much wealth, but for having taken money from the partnership without telling me or making a record of it.

13. As to the primary space occupied by the Plaza Extra-East store, Bay 1, rent is due for two basic periods: a) 1994 – 2004, and b) 2012 through the present. Additional rent is due for limited periods when Plaza Extra-East used additional space for extra storage and staging of inventory.

14. The rent as to Bay 1 can be divided into four periods, two of which have been paid and two of which remain unpaid: 1) 1986 through December 1993 was paid as of December 31, 1993;

2) January 1, 1994 through May 4, 2004 has *not* been paid; 3) May 5, 2004 through December 31, 2011 was paid as of February 7, 2012; and 4) January 1, 2012 to date has *not* been paid.

15. The rent for Bay 1 from January 1, 1994 to May 4, 2004 ("Past Due Rent") is due and owing. The Past Due Rent is $3,999,679.73.

16. The rent for Bay 1 from January 1, 2012 to the present is due and owing. Although beginning in 2004 rent for Bay 1 was calculated on the basis of percentage of sales formula discussed above, once the disputes between the parties intensified, United sent a termination notice and requested the premises to be vacated. When Hamed refused to vacate despite receiving more than 1 year's notice to vacate, United provided written notice of rent increases. Beginning on January 1, 2012 through March 31, 2012, rent was increased to $200,000.00 per month plus 1% per month interest on the unpaid balance. Copies of the three Notice Letters from United are attached as **Exhibit D.** Beginning on April 1, 2012, rent was further increased to $250,000.00 per month plus 1% per month interest on the unpaid balance. See Exhibit D. The total amount of the increased rent from January 1, 2012 through August 30, 2014 is $9,155,371.52, as set forth in the latest notice letter. See **Exhibit E.**

17. While United claims the authority to require payment of the increased rent as set forth in the preceding paragraph, there is no dispute that rent is due from January 1, 2012 to date at least in the amount based on the same percentage of sales formula used to calculate the rent payment covering the period May 5, 2004 to December 31, 2011 that was made on February 7, 2012. Although United reserves its right to pursue its claims for the increased rent as to Bay 1 at trial, it is seeking summary judgment only for the undisputed rent calculated according to the same formula used for the previous payment of rent on February 7, 2012 of $5,408,806.74, which is the

formula used at Plaza Extra – Tutu Park. See **Exhibit F,** which are the rent calculations that I prepared. See Exhibit F.

18. For 2012, the undisputed rent due is $702,908. See Exhibit F, p.1.

19. For 2013, the undisputed rent due is $654,190.09. See Exhibit F, p. 2.

20. For the period from January 1, 2014 through August 30, 2014, the undisputed rent due is $452,366.03. This amount was calculated by adding the rent for 2012 and 2013 and dividing that sum by 24 months in order to determine an average monthly rent, which is then multiplied by 8, representing the eight months from January through August 30, 2014 ($702,908 + 654,190.09 = $1,357,098.09 ÷ 24 = $56,545.75 x 8 = $452,366.03). The total undisputed Current Rent is the sum of $702,908, $654,190.09 and $452,366.03, which is $1,809,464.12.

21. At periodic points in time, additional space was used by Plaza Extra-East for extra storage and staging of inventory. United has made demand for the rent covering the additional space actually occupied by Plaza Extra-East, but no payment has been received to date.

22. For the period from May 1, 1994 through July 31, 2001, Plaza Extra-East has occupied and owes rent for Bay 5 ("Bay 5 Rent"). The Bay 5 Rent is calculated by multiplying the square feet actually occupied (3,125) by $12.00 for 7.25 years. The total due for Bay 5 Rent is $271,875.00.

23. For the period from May 1, 1994 through September 30, 2002, Plaza Extra-East has occupied and owes rent for Bay 8 ("First Bay 8 Rent"). The First Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 for 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63.

24. For the period from April 1, 2008 through May 30, 2013, Plaza Extra-East has occupied and owes rent for Bay 8 ("Second Bay 8 Rent"). The Second Bay 8 Rent is calculated by

multiplying the square feet actually occupied (6,250) by $6.15 for 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75.

25. The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38.

26. The total outstanding, unpaid rent for all the space used by Plaza Extra-East from January 1, 1994 through August 30, 2014 is $6,603,122.23, excluding the "disputed" increased rent from January 1, 2012 through the present. **Exhibit G** is a Chronology of Rents, which accurately reflects the history of the rents that were paid and remain unpaid.

Dated: August 12, 2014

Fathi Yusuf

United Corporation dba Plaza Extra

Tutu Park Store Sales:

1-1-2004 to 12-31-2004	32,323,902.88	
Less: 1-1-2004 to 5-4-2004	-10,849,029.02	
Sales 5-5-2004 to 12-31-2004	21,474,873.86	
Tutu Park Store:		
Paid Rent, Water, & Property Tax	263,577.53	
Paid 1.5% Overage	71,914.23	
5-5-2004 to 12-31-2004	335,491.76	
1-1-2005 to 12-31-2005	515,361.54	
1-1-2006 to 12-31-2006	590,533.60	
1-1-2007 to 4-1-2007	255,699.33	
4-2-2007 to 12-3-2007	468,689.55	
1-3-2008 to 12-5-2008	540,180.12	
1-5-2009 to 12-10-2009	529,799.66	
1-6-2010 to 12-3-2010	527,565.40	
1-1-2011 to 12-31-2011	541,175.61	
Rent, etc. 5-5-2004 to 12-31-2011	4,304,496.57	
Parking Lot Cleaning	126,000.00	
Total Amount Paid	4,430,496.57	a
Tutu Park Store Sales:		
5-5-2004 to 12-31-2011	261,474,323.91	
Portion of Sales - Rented building	217,895,269.93	b
Portion of Sales - Area built by Plaza	43,579,053.98	
Total Paid as a % of Sales (Rented Bldg.)	= a/b	2.03331470 73%
Sion Farm Sales:		
Sion Farm Sales 5-5-2004 to 12-31-2011	273,884,222.70	
Less: R/X	-7,874,897.13	
	266,009,325.57	
Calculated Rent as a % of Sales Sion Farm	$ **5,408,806.74**	

EXHIBIT

A

64866

UNITED CORPORATION D/B/A PLAZA EXTRA
UNITED SHOPPING PLAZA

Check Number: 64866
Check Date: Feb 7, 2012

Check Amount: $5,408,806.74

Item to be Paid - Description	Discount Taken	Amount Paid
Rent - Sion farm		5,408,806.74

64866

BANCO POPULAR DE PUERTO RICO
101-657/215

UNITED CORPORATION D/B/A
PLAZA EXTRA
4C & 4D ESTATE SION FARM
CHRISTIANSTED, VI 00821
(340) 778-6240 (340) 719-1870

DATE
Feb 7, 2012

AMOUNT
$ ***$5,408,806.74

Five Million Four Hundred Eight Thousand Eight Hundred Six and 74/100 Dollars

PAY TO THE ORDER OF:
UNITED SHOPPING PLAZA
P.O. BOX 763 C'STED
ST.C ROIX, VI 00821

VOID AFTER 90 DAYS

AUTHORIZED SIGNATURE

Memo: PLAZA EXTRA (SION FARM) RENT

⑈064866⑈ ⑆021606674⑆ 191⑈14830⑈

Details on Back. Security Features Included.

DEWOOD LAW FIRM
2006 Eastern Suburb Suite 101
Christiansted, V.I. 00820
Admitted NY, NJ, MD, & VI
T. 340.773.3444
F. 888.398.8428
info@dewood-law.com

BY: FIRST CLASS MAIL & EMAIL ONLY

May 17, 2013

Joel Holt, Esq.
2132 Company Street
Christiansted, VI 00820

Re: Rent Due – Plaza Extra – East Operations

Dear Attorney Holt,

On behalf of United Corporation, the following is a notice of the value of rents due as follows:

Rent due for Plaza Extra – East Bay No. 1 January 1, 1994 through April 4, 2004 69,680 SQ. FT. at $5.55	10 years and 95 days	Balance Due	$3,967,894.19
Bay No. 5 May 1, 1994 through October 31, 2001 3,125 SQ. FT. at $12.00	6 years and 184 days	Balance Due	$243,904.00
Bay No. 8 April 1, 2008 through May 30, 2013 6,250 SQ. FT. at $12.00	5 years and one month	Balance Due	$381,250.00
		Total Amount Due	$4,593,048.19

These amounts are undisputed, and have been outstanding for a very long time - before 2012. This amount does not reflect the rent increase requested and noticed to Mohammed Hamed since January 1, 2012. We reserve our client's right for the additional rents due and owing based on the rent increase after January 1, 2012. Kindly review the amount with your client, and advise when a check can be issued. Thank you.

Sincerely,

Nizar A. DeWood, Esq.

EXHIBIT
tabbies
B

FY 004004

JOEL H. HOLT, ESQ. P.C.

2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820

Tele. *(340) 773-8709*
Fax *(340) 773-8677*
E-mail: *holtvi@aol.com*

May 22, 2013

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

By Email and Mail

Re: Plaza Extra

Dear Attorney DeWood:

In response to your letter dated May 17, 2013, regarding "Rent Due" for Bay Nos. 1, 5 and 8, my clients have authorized me to respond as follows:

1. **Bay No. 1**-The rent claimed is for the time period between 1994 and 2004. There was never any understanding that rent would be paid for this time period, much less at that rate. In any event, this inflated claim is clearly barred by the statute of limitations.

2. **Bay No. 5**-The rent claimed for the time period between 1994 and 2001 is for vacant space was used without charge until a tenant could be located. Thus, there was never any agreement to pay rent for this space either. In fact, the rate your client is attempting to charge is grossly inflated as well. In any event, this claim is also barred by the statute of limitations.

3. **Bay No. 8**-The rent claimed for this Bay was never agreed to, as the items stored there were removed from a space in a trailer where everything was just fine. Moreover, no one would agree to pay the amount you claim is due for warehouse storage, The fact that this amount is even being sought confirms that Fathi Yusuf should no longer be a partner in the Plaza Extra supermarkets, as it is a breach of the duty of good faith and fair dealing (that every partner owes the partnership) when you try to extort money from your own business. In any event, these items will be removed from Bay 8 to the second floor of the store since your client now wants to charge rent for this space.

EXHIBIT
C

Ever since your clients lost the preliminary injunction hearing, they have done everything they can to undermine the partnership. Your clients' belated claim for inflated amounts of back rent (that were never agreed to) is just another example of your clients' continued efforts to try to undermine the Court's Order.

Yours,

Joel H. Holt

UNITED CORPORATION
4C & 4D Sion Farm
St Croix, USVI 00821
Phone (340) 778-6240

January 12, 2012

Mr. Mohamed Hamed,

During the month of September 2009, I had a discussion with your son Wally, and within two days I repeat the same request while you were present that United Corporation would like to have its location back. Unfortunately, up to now, I have not seen that you give up the keys.

Therefore as of January 1, 2012 the rent will be $200,000.00 per month, only for the coming three months. If you do not give up the keys before the three months, it will be $250,000.00 per month until further notice.

Sincerely,

Fathi Yusuf

EXHIBIT
D

FY 004000

UNITED CORPORATION
4C & 4D Sion Farm
St Croix, USVI 00821
Phone (340) 778-6240

January 13, 2012

Mr. Mohamed Hamed,

Based on my father's phone call this morning, yesterday's letter (Jan 12, 2012) should read as follows; "During the month of September 2010 (not 2009)... I had a discussion with your son Wally, and within two days I repeat the same request while you were present that United Corporation would like to have its location back. Unfortunately, up to now, I have not seen that you give up the keys".

"Therefore as of January 1, 2012 the rent will be $200,000.00 per month, only for the coming three months. If you do not give up the keys before the three months, it will be $250,000.00 per month until further notice".

I am sorry for the error, he was hurrying to catch a plane.

Sincerely,

Najeh Yusuf
for Fathi Yusuf

CC: Wally Hamed

United Corporation
4-C & 4-D Estate Sion Farm
P.O. Box 763
Christiansted, VI 00820

Date: January 19, 2012

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mohammad Abdul Qader Hamed
Plaza Extra Supermarket
4-C & 4-D Estate Sion Farm
Christiansted, V.I. 00820

Re: - NOTICE & CONFIRMATION OF INCREASED RENT FOR PLAZA EXTRA – SION FARM – FOR THE PERIOD OF JANUARY 1, 2012 THROUGH JUNE 30, 2012.

- NOTICE OF LEASE TERMINATION FOR PLAZA EXTRA – SION FARM AS OF JUNE 30TH, 2012.

Dear Mr. Hamed,

This notice is to confirm the increased rent for the above referenced premises. As you will know, I have given both you and your son Waleed Hamed oral notice in September 2010 to vacate the premises. At that time, I have advised you that the rent will increase to Two Hundred Thousand Dollars ($200,000.00) per month for each of the first three months of January, February, and March, 2012. Thereafter, the rent shall increase to Two Hundred & Fifty Thousand Dollars ($250,000.00) each month commencing April 1, 2012 through June 30th, 2012. The last date for this lease is June 30th, 2012. There will be no additional extensions of tenancy to Plaza Extra – Sion Farm.

An orderly inspection will be done to evaluate the condition of the premises. Kindly, advise as to when you are available to conduct an inspection, and to inventory all fixtures and improvements that will remain on the premises. Should you have any concerns regarding this notice, or any other matters concerning this lease, please ensure that same be made in writing.

and delivered by way of certified mail, return receipt requested to the address above. Thank you for your prompt attention in this matter.

Sincerely,

United Corporation

By: _____

Fathi Yusuf, CEO

UNITED CORPORATION
4C & 4D Sion Farm
St. Croix, USVI 00821
Phone (340) 778-6240

August 1, 2014

Fathi Yusuf
Mohammad Abdul Qader Hamed
Plaza Extra Supermarket
4-C & 4-D Estate Sion Farm
Christiansted, VI 00821

Statement of Rent due for Plaza Extra – East as of August 1, 2014

Rent due for Plaza Extra – East January 1, 2012 through July 31, 2014	Balance Due	$8,817,199.52
1% interest on outstanding Balance		$ 88,172.00
	Amount Due	$8,905,371.52
August 2014 rent currently due:		$250,000.00
Total Balance due august 1, 2014		**$9,155,371.52**

Please forward a check immediately.

Sincerely,

Maher Yusuf

EXHIBIT
E

UNITED CORPORATION

PLAZA EXTRA

U.S. VIRGIN ISLANDS

PHONE 340-719-1870 FAX: 340-719-1874

Plaza Extra TuTu Park Mall Sales From 01-01-2012 To 12-31-2012	31,075,735.56	
Less 10,000 SQ.FT Build Area by Plaza	(5,157,798.43)	
Leased Area Of 50,250 SQ.FT.	**25,917,937.13**	**A**
Total Amount Paid to TuTu Park	495,877.27	
Parking Lot Cleaning	18,000.00	
Total Cost Of Rent & Parking	**513,877.27**	**B**
B/A Rent	**1.982708992%**	**C**
Plaza East Sales	35,931,601.41	
Pharmacy Rent 3,000 Monthly	36,000.00	
Total Sales & Rent	35,967,601.41	
Less Pharmacy Sales	(515,701.87)	
Net Sales Plaza East In 2012	**35,451,899.54**	**D**
Rent Due IN 2012 :		
D X C	**702,908.00**	

EXHIBIT

F

UNITED CORPORATION
PLAZA EXTRA
U. S. VIRGIN ISLANDS
PHONE: [illegible] FAX: [illegible]

Plaza Extra TuTu Park Mall Sales From 01-01-2013 To 12-31-2013	30,383,544.66	
Less 10,000 SQ.FT Build Area by Plaza	(5,042,911.98)	
Leased Area Of 50,250 SQ.FT.	25,340,632.68	A
Total Amount Paid to TuTu Park	462,673.60	
Parking Lot Cleaning	18,000.00	
Total Cost Of Rent & Parking	480,673.60	B
B/A Rent	1.896849246%	C
Plaza East Sales	34,938,818.47	
Pharmacy Rent 3,000 Monthly	36,000.00	
Total Sales & Rent	34,974,818.47	
Less Pharmacy Sales	(486,569.56)	
Net Sales Plaza East in 2013	34,488,248.91	D
Rent Due IN 2013 :		
D X C	654,190.09	

CHRONOLOGY OF RENTS

Timeline	Bay 1	Bay 5	Bay 8
1986	Paid as of December 31, 1993	Not Utilized	Not Utilized
1987	Paid as of December 31, 1993	"	"
1988	Paid as of December 31, 1993	"	"
1989	Paid as of December 31, 1993	"	"
1990	Paid as of December 31, 1993	"	"
1991	Paid as of December 31, 1993	"	"
1992	Paid as of December 31, 1993	"	"
1993	Paid as of December 31, 1993	"	"
1994	Unpaid - Due	Beginning May 1, 1994 - Unpaid - Due	Beginning May 1, 1994 - Unpaid - Due
1995	Unpaid - Due	Unpaid - Due	Unpaid - Due
1996	Unpaid - Due	Unpaid - Due	Unpaid - Due
1997	Unpaid - Due	Unpaid - Due	Unpaid - Due
1998	Unpaid – Due	Unpaid - Due	Unpaid - Due
1999	Unpaid – Due	Unpaid - Due	Unpaid - Due
2000	Unpaid – Due	Unpaid - Due	Unpaid - Due
2001	Unpaid – Due	Thru July 31, 2001 Unpaid – Due [Balance Due for this period: $271,875.00]	Unpaid - Due
2002	Unpaid – Due	Not Utilized	Thru Sept. 30, 2002 Unpaid – Due [Balance Due for this period: $323,515.63]
2003	Unpaid – Due	"	"
Jan. 1, 2004- May 4, 2004	Unpaid – Due [Balance Due for this period: $3,999,679.73]	"	"
May 4, 2004- Dec. 31, 2004	Paid as of February 7, 2012	"	"
2005	Paid as of February 7, 2012	"	"
2006	Paid as of February 7, 2012	"	"
2007	Paid as of February 7, 2012	"	"
2008	Paid as of February 7, 2012	"	Beginning April 1, 2008- Unpaid - Due
2009	Paid as of February 7, 2012	"	Unpaid - Due
2010	Paid as of February 7, 2012	"	Unpaid - Due
2011	Paid as of February 7, 2012	"	Unpaid - Due
2012	Unpaid – Due*	"	Unpaid – Due
2013	Unpaid – Due*	"	Thru May 30, 2013 Unpaid – Due [Balance Due for this period: $198,593.44]
January 1, 2014 – Present	Unpaid – Due* [Balance Due for this period (excluding increased rent): $1,696,362.61]	"	"
Subtotal:	$5,696,042.34	$271,875.00	$522,109.38
TOTAL DUE:	**Bay 1, 5 and 8: $6,490,026.72**		

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,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

UNITED CORPORATION'S AND FATHI YUSUF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant/counterclaimant United Corporation ("United") and Fathi Yusuf ("Yusuf"), through their undersigned attorneys, respectfully submit their Statement of Undisputed Material Facts, pursuant to LRCi 56.1(a)(1).

1.

United owns the real estate (the "United Shopping Plaza"), which houses the supermarket located at Estate Sion Farm, St. Croix ("Plaza Extra-East"). See Answer of Plaintiff/Counterclaim Defendant Mohammad Hamed ("Hamed") to First Amended Counterclaim at ¶ 4.

Yusuf and Hamed agreed to carry on a supermarket business (the "Plaza Extra Stores") that eventually grew into three locations, including the first of the three stores, Plaza Extra-East, which opened at the United Shopping Plaza in April 1986. See **Exhibit 3**, declaration of Fathi Yusuf, at ¶ 1.

3.

From the outset, Plaza Extra-East has paid rent to United for the space it used at the United Shopping Plaza. Hamed testified:

> Q: ...the United Corporation is the – is the company that you've been paying rent to for many years, is that correct?
>
> A: Yes, since we started.

See **Exhibit 1,** deposition of Hamed, dated March 31, 2014, p. 86. [1] See also **Exhibit 2,** testimony of Waleed Hamed on January 25, 2013, p. 98.

4.

As Hamed acknowledged in his deposition testimony, from the beginning in 1986 he and Yusuf agreed that the annual rent for Plaza Extra-East would be calculated on a price per square foot basis. See Exhibit 1, Vol. II, p. 106. The agreed-upon rental rate was $5.55 per square foot per year, and that rate multiplied by the 33,750 square feet of space originally occupied by Plaza Extra-East came to $187,312.50 per year. See Exhibit 3 at ¶1. This was a below-market rate. Id. at ¶ 5.

5.

[1] Exhibit 1 will contain all cited pages from the transcript of Hamed's deposition on March 31, 2014 ("Vol. I") and April 1, 2014 ("Vol. II").

When Hamed and Yusuf entered their business agreement, the Plaza Extra-East store in St. Croix was under construction. They later made plans to open a second grocery store in St. Thomas (the store known as Plaza Extra-Tutu Park, which began operating in October 1993). Thereafter, they made plans to open a third grocery store in St. Croix (the store now known as Plaza Extra-West, which started operating in 2000). Allowing rent to accrue for years, rather than paying it on a monthly or even yearly basis, was very beneficial to the supermarket business because it afforded the funds required to cover the substantial capital and operating expenses that were incurred in opening and running three stores in economic conditions that were extremely challenging. See id. at ¶ 3. Yusuf was the person charged with determining when a reconciliation of accounts would be made and the rent obligation discharged.[2] See id. at ¶ 1-3.

6.

The rent that accrued at this annual rate from 1986 through December 31, 1993 was paid to United at the end of 1993 (the "first rent payment"). The first rent payment was made by way of a reconciliation of accounts, in which amounts Yusuf owed Hamed for advances taken from supermarket funds were credited against the rent payment. The end date of the period covered by

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[2]Hamed further acknowledged that Yusuf knew what is owed and Yusuf was the one who calculated the rent due based on an agreed-upon formula:

> Q. So if he [Yusuf] –if he –if he told you how much you owe, would you disagree with him?
>
> ...
>
> A. Yes, he [Yusuf] know exactly.
>
> Q. He [Yusuf] knows exactly how much is owed?
>
> A. Yeah, how much we owe him.

See Exhibit 1, Vol. I, p. 94.

the first rent payment (i.e., December 31, 1993) was reflected in a book kept in the store safe at Plaza Extra-East that was known as the "black book." Id. at ¶¶ 4, 8. After Plaza Extra-East burned down in 1992, and before it reopened in May of 1994, Yusuf agreed with Hamed, through his son Waleed, to leave the same per square foot rent rate in place for the ten years following the re-opening of the store, after which time the rent formula would be adjusted upward to something closer to a market rate. Id. at ¶ 5.

7.

In late 2002 or early 2003, Waleed Hamed, on behalf of his father, and Yusuf agreed to a change in rent formula to be implemented on May 5, 2004, the date on which they had previously agreed that the old rent formula would be replaced. Specifically, Yusuf and Waleed agreed that effective May 5, 2004, rent would be calculated as a percentage-of-sales identical in percentage terms to what Plaza Extra-Tutu Park was paying to its landlord at the Tutu Park Mall. In other words, for each year, the payments made by Plaza Extra –Tutu Park to its landlord for the year would be divided by the store's adjusted gross sales for that year to yield a figure representing that store's payments to the Tutu Park landlord as a percentage of sales for the year. That annual percentage would then be multiplied by actual sales for the corresponding year at Plaza Extra-East to determine the amount of rent owed to United. Id. at ¶ 7.

8.

In 2004, at about the time the new rent formula became effective, Yusuf and Waleed Hamed, on behalf of his father, discussed payment of the rent that had accrued at the $5.55 per square foot rate since the first rent payment. They agreed that having a reconciliation and paying the accrued rent at that time would not be possible, for two reasons. First, in October 2001, the FBI had raided the Plaza Extra Stores, taking with them substantially all of the financial and

accounting records of the Plaza Extra Stores and United. Id. at ¶ 8. Then, two years later, in September 2003, the federal government indicted United, Yusuf, two of Yusuf's sons, and two of Hamed's sons on income tax evasion charges, and the operating accounts of the Plaza Extra Stores and United were immediately frozen pursuant to a federal injunction. Consequently, until the injunction was relaxed and the stores' records returned, payment of the accrued rent was not possible. Id. Moreover, the black book, which reflected the December 31, 1993 end date of the prior period for which rent had been paid, and a comprehensive ledger book showing advances of supermarket funds to Yusuf and Hamed, had both been seized. As a result, records needed to determine the date the next rent payment began accruing (January 1, 1994), and to make a full reconciliation of the accounts of Hamed and Yusuf, was no longer in their possession. They had been seized by federal agents in the 2001 raid. The black book was not returned until years later and the ledger has still not been returned.[3] Id. at ¶ 8.

9.

In the absence of the black book, neither Waleed Hamed nor Yusuf remembered whether the first rent payment had been paid in 1992, 1993 or 1994, let alone the debits and credits between Hamed and Yusuf in the subsequent years following the year in which the rent had been paid. At an annual rate of hundreds of thousands a year, guessing the start date incorrectly by even a few months would result in a substantial underpayment or overpayment of rent. Yusuf did not want to charge either more or less than what was due, and therefore made the decision, to which Waleed Hamed (on behalf of Hamed) agreed, that the payment of rent that had accrued since the first rent

[3]In addition, it was not in Hamed's interest (or that of his sons) to do anything that would tend to show that he was in partnership with Yusuf, and the criminal defense lawyers so advised Yusuf. See Exhibit 3, ¶ 8.

payment was made would have to await the unfreezing of the bank accounts and the return of the black book. Id. at ¶ 8 and 9.

10.

By early 2012, the injunction in the criminal case has been relaxed sufficiently so that it was no longer a bar to payment of rent that had accrued since the first rent payment was made in 1993. But the federal government still had not returned the black book and the larger ledger book, which meant that full reconciliation of partnership accounts could not be made. The start date for the second rent period was not known, and neither were the amounts of advances taken by Hamed and his sons, and Yusuf and his sons. Waleed Hamed and Yusuf met in early 2012, and they agreed that rent beginning on May 5, 2004 and going forward could be determined, even without consulting the black book, because Waleed Hamed and Yusuf had previously agreed that the percentage-of-sales rent formula would become effective on that date. Yusuf and Waleed Hamed agreed that the rent for that period should be paid, even if a full reconciliation of accounts, going back to the date of the first reconciliation, could not be made. They also agreed, as they had before, that rent that had accrued from the first rent payment up to May 4, 2004 would have to be deferred until the black book was returned. Id. at ¶ 10.

11.

Using the percentage of sales formula that he and Waleed had agreed would become effective on May 5, 2004, Yusuf calculated the amount of rent due for the period May 5, 2004 to December 31, 2011 to be $5,408,806.74. He presented the rent bill to Waleed Hamed for that sum and period, and Waleed, on behalf of his father, agreed that it should be paid to United in the amount of $5,408,806.74 by means of a check signed by Waleed Hamed and by Yusuf's son, and

there is **no dispute** that it covered unpaid rent for that nearly 8-year period. Id. at ¶ 7; see also **Exhibit 3A**.

12.

The "black book" was finally retrieved about a year after the $5,408,806.74 rent payment was made, and from it Yusuf was able to determine that the first rent payment was paid through December 31, 1993, and hence that the rent for the second period began accruing on January 1, 1994. Using the annual rent calculation of $5.55 per square foot and the square footage of the rebuilt Plaza Extra-East store (69,680 square feet), Defendants (by their counsel) and after this litigation was commenced, made demand on Hamed for rent for that period, by letter dated May 17, 2013. Id. at ¶ 11; see also **Exhibit 3B**.

13.

The rent as to Bay 1 can be divided into four periods, two of which have been paid (1986-1993 and 2004-2011) and two of which remain unpaid (1994-2004 and 2012-present). See Exhibit 3 at ¶ 14 and **Exhibit 3G**, Chronology of Rents.

14.

The unpaid rent for Bay 1 (69,680 square feet) calculated since 1986 at the annual rate of $5.55 per/square foot, for the 10 years and 124 days is $3,999,679.73 for the period January 1, 1994 through May 4, 2004 (the "Past Due Rent"). See Exhibit 3 at ¶ 15.

15.

Hamed admitted in deposition that if this rent payment has not yet been made,[4] then it should be made:

[4]While Hamed suggested in deposition that he did not know if this rent payment had been made, but it is undisputed that it has not been made.

> Q. ...if rent has not been paid on the – the square footage basis that you agreed with Mr. Yusuf for the period between January 1, 1994 and May 4, 2004, would you agree with me that that rent should be paid to United.
>
> ...
>
> A. He says that he's not denying the rent, and that Mr. Yusuf is the one who used to, in other words, determine the – the rental rate, and he's the one who would collect the rent.[5]

See Exhibit 1, Vol. II, p. 107. Later, when asked, "[I]f rent was not paid from January 1, 1994 through May 4, 2004, would you agree that rent should be paid," Hamed responded unequivocally, saying "It should be paid." Id. at Vol. II, p. 117. When asked if rent for that period should be paid "[r]egardless of how long it took to make a demand for payment," Hamed stated that Yusuf determined when rent was collected from the partnership, and he reiterated that if the rent for that period had not been paid it should be, as he had "never objected" to its payment:

> He says, If it hasn't been paid, it should be paid. And he's never – he's never objected to it being paid. Mr. Yusuf is the one who used to decided whether to collect rent or not collect rent.

Id. at Vol. II, p. 118.

16.

Rent is due from January 1, 2012 to date at least in the amount based on the percentage-of-sales formula that was used to write the joint check for the preceding 8-year period paid on February 7, 2012. See Exhibit 3 at ¶ 7 and 17.

[5]An interpreter at the deposition translated Mr. Hamed's answers from Arabic to English, which is why some of Mr. Hamed's answers are prefaced with the third person expression "he says."

17.

The adjusted rent paid by Plaza Extra-Tutu Park for 2012, 2013 and 2014 to present was divided by sales of that store for each of those years to determine a percentage. That percentage was then multiplied by the Plaza Extra –East sales for each year. For 2012, the undisputed rent due is $702,908.00. Id. at ¶ 18. For 2013, the undisputed rent due is $654,190.09. Id. at ¶ 19. For the period of January 1, 2014 through August 30, 2014, the undisputed rent due is $452,366.03. Id. at ¶ 20. The total undisputed rent for Bay 1 for the period January 1, 2012 through August 30, 2014 is $1,809,464.12 (the "Current Rent"). Id; see also **Exhibit 3F** and 3G.

18.

At periodic points in time, additional space was used by Plaza Extra-East for extra storage and staging of inventory. See Exhibit 3 at ¶21.

19.

From May 1, 1994 through July 31, 2001, Plaza Extra-East occupied Bay 5 consisting of 3215 square feet. The rent due for such occupancy ("Bay 5 Rent") is calculated by multiplying the square feet actually occupied (3,125) by $12.00 by 7.25 years. The total due for Bay 5 Rent is $271,875.00. Id. at ¶ 22.

20.

From May 1, 1994 through September 30, 2002, Plaza Extra-East occupied Bay 8 consisting of 6,250 square feet. The rent due for such occupancy ("First Bay 8 Rent") is calculated by multiplying the square feet actually occupied (6,250) by $6.15 by 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63. Id. at ¶ 23.

21.

From April 1, 2008 through May 30, 2013, Plaza Extra-East occupied Bay 8 consisting of 6,250 square feet. The rent due for such occupancy ("Second Bay 8 Rent") is calculated by multiplying the square feet actually occupied (6,250) by $6.15 by 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75. Id. at ¶ 24.

22.

The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38. Id. at ¶ 25.

23.

The total outstanding unpaid rent for all the space used by Plaza Extra – East from January 1, 1994 through August 30, 2014 is $6,603,122.23, excluding the "disputed" increased rent from January 1, 2012 through the present. Id. at ¶ 26.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August 12, 2014 By: _____

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Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2014, I caused the foregoing **UNITED CORPORATION'S MOTION FOR SUMMARY JUDGMENT UPON ITS CLAIMS FOR RENT AS TO THE PLAZA EXTRA – EAST LOCATION** to be served upon the following via e-mail:

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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,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS MATTER is before the Court on the Motion of defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") for Partial Summary Judgment On Counts IV, XI, and XII Regarding Rent (the "Motion"). The Court having read the briefs of the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED that the Motion is GRANTED, as follows:

1. There is no genuine issue of material fact that United is entitled to past due rent from the acknowledged partnership between Yusuf and Mohammad Hamed ("Hamed") for the use of United's property by the Plaza Extra supermarket located at Estate Sion Farm, St. Croix, under Counts XI and XII of the counterclaim, in the amount of $6,603,122.23. Accordingly, partial summary judgment is hereby entered in favor of United in the amount of $6,603,122.23

plus prejudgment interest at nine (9%) per centum per annum, as provided at V.I. Code Ann. tit. 11, § 951(a)(4), from May 17, 2013 and from the first day of the month following any month that has not been paid with respect to all Current Rent, as described in such Brief, until the date of this Judgment. Thereafter, interest shall accrue at the judgment rate of four (4%) per cent per annum.

2. Yusuf is granted partial summary judgment as to his accounting claim (Claim IV), and the Court rules that any final distribution to the partners should occur only after the rent expense of $6,603,122.23 is deducted to determine partnership profits.

3. Hamed and Yusuf are both directed to effectuate payment to United of $6,603,122.23 from the partnership accounts in accordance with the procedures set forth in this Court's April 25, 2013 Preliminary Injunction.

4. This Order does not address and is without prejudice to United's claims for increased rent beginning January 1, 2012 and thereafter, which amounts will be addressed by the Court as part of a separate motion or by trial.

Dated: August , 2014

_____
Douglas A. Brady
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By:_____
Court Clerk Supervisor
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