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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, *Plaintiff/Counterclaim Defendant*, vs. **FATHI YUSUF** and **UNITED CORPORATION**, *Defendants/Counterclaimants*, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED,** and **PLESSEN ENTERPRISES, INC.**, *Counterclaim Defendants.*	**CIVIL NO. SX-12-CV-370** ACTION FOR DAMAGES INJUNCTIVE RELIEF AND DECLARATORY RELIEF JURY TRIAL DEMANDED

PLAINTIFF'S OPPOSITION
TO DEFENDANTS' PARTIAL RULE 56 MOTION RE RENT

Both Defendants have moved for partial summary judgment on Counts IV, XI and XII of their counterclaim regarding the rent they claim is due them from Plaintiff. Plaintiff hereby opposes that motion. Several preliminary comments are order.

First, Defendant Fathi Yusuf is not a proper party to make this motion. Rent is something paid by a tenant to a landlord, which is United Corporation in this case. Indeed, if rent is due, Hamed's partner (Fathi Yusuf) would be responsible for 50% of it.

Second, Defendants' motion is really just a sur-reply to Plaintiff's May 13, 2014, partial Rule 56 motion asserting that the statute of limitations bars all claims (including rent claims) that predate September 16, 2006. **Thus, Plaintiff's Rule 56 motion should be decided before or in conjunction with this motion.**

Third, the instant motion is also repetitive of "Defendant United's Motion To Withdraw Rent" filed on September 9, 2013, which is rendered moot by this motion.[1] Accordingly, Plaintiff's counsel has suggested to Defendants that they withdraw that pleading. Otherwise, this Court should deny it as moot in light of this new motion.

Fourth, Plaintiff has filed a response to Defendants' Rule 56.1 Statement of Facts ("DSOF") as well as his own Counter-Statement of Facts ("PSOF"). Rather than repeat the facts at the outset of this memorandum, as Defendants did in their motion, this opposition will address the pertinent facts as needed in response to the specific claims for rent as discussed herein.[2]

Finally, to the extent any rent claims survive the statute of limitations defense, it is respectfully submitted that there are factual issues in dispute regarding the amount of rent owed, so summary judgment is not appropriate.

With these comments in mind, Plaintiff will now respond to the issues raised in Defendants' motion, breaking the response into the different "Bays" and time periods as Defendants did.

I. Bay 1- the location of the Sion Farm Plaza Extra Store

Defendants submitted a rambling, verbose memorandum regarding the history of rent payments and accruals involving the Sion Farm Plaza Extra Store owned by the Hamed/Yusuf partnership. Once the rhetoric is reduced to the actual facts, it is clear that the Rule 56 motion for rent must be denied because (1) the statute of limitations

[1] Yusuf did not join in that "Rent" motion, demonstrating that Defendants are fully aware that Yusuf, personally, has no claim for rent.

[2] The references to Exhibits by number in this memorandum are to Exhibits attached to the Plaintiff's Counter Statement of Facts ("PSOF").

bars all rent claims for this store prior to September 16, 2006, and (2) there are factual issues in dispute as to all rent claims not barred by this defense. For the sake of clarity, the rent claims will be broken into two time periods, as was done by Defendants.

A. Alleged Past Due Rent For The 1994 to 2004 Time Period

Defendants' summary judgment motion for rent allegedly due between 1994 and 2004 can be denied for two reasons, which will be discussed separately.

1. There are factual issues in dispute regarding this claim.

At the outset, Plaintiff believes this claim is time-barred, but even if it were not, there are numerous facts in dispute regarding this claim. To support its claim that rent is owed between 1994 and 2004, United makes certain allegations that are easily disputed as follows:

1. Defendants claim rent was last paid in December of 1993 when the parties last did an accounting between them for the Plaza Sion Farm Store based upon a "black book" Defendants supposedly "found" recently. This "fact" is disputed for several reasons, as follows:

    - The referenced "black book" was not submitted to this Court, and was altered before being produced by Defendants in discovery, as multiple pages were "razored" out before it was produced. See **Exhibit 1** attached to PSOF. Thus, while Defendants claim the "black book" helped determine the amount due, that altered document cannot be used to determine any final calculations.

    - While Defendants did not submit the portion from the "black book" they are relying upon for their assertion that rent was last paid in 1993, that page (attached as Exhibit A to **Exhibit 1**) makes no mention of dates of payment or computation of rent, nor is rent mentioned *anywhere* in the black book for any time period **after** the Plaza Extra Sion Farm was open. See **Exhibit 1**.

    - While Defendants' themselves claim the last accounting between the partners for the Plaza Sion Farm store *was in 1993*, that is untrue. Indeed, Defendants admitted in the Rule 30(b)(6) deposition of United that a reconciliation of the accounting for the Plaza Sion Farm Store was

done in 2001. See **Exhibit 2** attached to PSOF. Indeed, as noted in that deposition, the records were then destroyed by Defendants after the accounting was done, so there are no records for this last accounting for the Plaza Extra Sion Farm store.

- In fact, rent was paid in cash (so United would not have to report it as income) during this time period whenever United needed money without having to wait on any partnership accounting, so there is no rent owed for this time period. See **Exhibit 1**.

- As all rent owed by Plaza Sion Farm to United before 2004 was paid, United's written statement of rent due in 2012 (Exhibit C to **Exhibit 1**) did not include any amounts owed prior to 2004. See **Exhibit 1**.

- While United asserts that rent was charged at the rate of $5.55 per sq. ft. for the 1994-2004 time period, this rate was not agreed to as asserted by United (see **Exhibit 1**), so the amount of rent now claimed by United is also disputed.

While these facts alone are sufficient to defeat summary judgment, even Defendants' admit that additional documents are needed to determine what amount might be due, stating on page 8 of their memorandum (emphasis added):

> 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.**

Thus, even if the rent claim for the 1994-2004 time period was not barred by the applicable statute of limitations, there are factual issues in dispute regarding this claim.

2. The 1994-2004 rent claim is time-barred

While the payment of rent for this time period (and any balance due) is disputed, it is respectfully submitted that the Court should dispose of this entire claim for the time period between 1994 and 2004 by granting Plaintiff's motion to strike all monetary

claims prior to September 16, 2006.[3] Rather than repeat this entire argument as raised in Plaintiff's own Rule 56 motion, Plaintiff will briefly address United's two statute of limitations arguments.[4]

First, United asserts on pp. 25-27 that the statute of limitations on all rent claims did not begin to accrue until its May 17, 2013, demand for rent was rejected on May 22, 2013. Second, they argue on pp. 27-28 that the defense is barred by the equitable doctrine of tolling. Each will be addressed in the order raised.

a) The accrual of the rent claim

In support of their argument that United's claim for rent did not accrue until May 22, 2013, Defendants direct the Court to *Peck v Donovan,* 2012 WL 6131055 (3rd Cir. Dec. 11, 2012). *Peck*, however, does not help United. To the contrary, it holds that the "statute begins to run as soon as the debt is due and unpaid." *Id.* at *3. In *Peck*, an attorney sought costs from his client, which were "due at the conclusion of litigation." Thus, a suit filed seven years later was time barred even though the attorney was not told his costs would not be paid until a year after the litigation was concluded. This is black letter law -- the statute begins to run when the payment is due, not when a demand for payment is rejected.

Recognizing that rent is owed when due and that the statute of limitations begins when payment is not made, United resorts to a series of arguments based on "new"

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[3] This date is established by the fact that it is six years before this case (in which this counterclaim for rent is pending) was filed, as noted in Plaintiff's May 13, 2014 partial summary judgment motion, citing an opinion written by then Superior Court Judge Cabret, *James v. Antilles Gas Co.*, 2000 WL 1349233 (V.I. Super. 2000).

[4] This Court has Plaintiff's June 20th reply brief, which argument is incorporated herein by reference. See **Exhibit A** attached hereto (specifically pages 9-18).

allegations of oral agreements in "2004" as well as in "2012" between Yusuf and Waleed Hamed, where it was allegedly agreed that the amount of rent owed for the 1994-2004 time period would be determined at some later date.[5] However, these recently created assertions of oral agreements can be summarily rejected, as neither Count XI nor Count XII contains *any* allegations of such oral agreements. Since no such allegations exist in the Amended Counterclaim, United's new contractual assertions do not revive these time-barred claims for the pre-2006 rent for the Plaza Extra Sion Farm store.[6]

Moreover, not only does Plaintiff deny any such oral agreements were ever made (see **Exhibit 1**), such oral agreements would definitely *not* extend the statute of limitations, as 5 V.I.C. § 39 (Acknowledgment or promise) is a specialized enactment of the statute of frauds aimed at *exactly* this sort of manufactured oral promise -- expressly requiring **such new promises on matured debts to be in writing and signed**:

> No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby....

In short, these new claims of oral agreements, which were not pled, would not extend the statute of limitations even if they had been raised. Thus, this desperate, last-second

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[5] United had just recently raised this alleged 2012 oral agreement, but it had never previously raised the alleged "2004" oral agreement, clearly manufacturing these new facts after reading Plaintiff's reply attached hereto as **Exhibit A** (see pp. 9-10), which explains why the alleged 2012 oral agreement is meaningless. As will be discussed, the same is true of the alleged "2004" oral agreement.

[6] Aside from not being alleged in the Amended Counterclaim, these new "oral agreements" were not mentioned in United's prior, very detailed "Rent Motion," nor have they ever appeared in any prior discovery response, pleading or testimony.

attempt to circumvent the statute of limitations is without merit.

Recognizing the problem with these alleged oral agreements, United then argues that the statute of limitations defense has somehow been waived by Plaintiff's deposition testimony, suggesting that Plaintiff cannot even raise this defense because Yusuf was in charge of rent payments. However, the well-settled law again does not help United. In *Abramsen v Bedminister,* Civ. No. 700/200, 2002 WL 1974065, at *7 (Terr. V.I. Aug. 13, 2002)(emphasis added), while sitting as a Superior Court Judge, Justice Swan held:

> The law requires knowledge of the right to be waived and a clear intent to waive *that right*.

In reaching this conclusion, Judge Swan cited *United States on Behalf of Small Business Administration v. Richardson,* 889 F.2d 37 at 40 (3rd Cir.1989) for the proposition that (*Id.* at *5 (emphasis added)) :

> Statutes of limitation are a vital and integral component of the legal system. *To establish a waiver* ***of a statute of limitations*** *requires clear and specific language*.

In following other cases, *Abramsen* held (*Id.* at *3 (emphasis added)):

> Crucially, the defense of the statute of limitations may be waived if there is a clear, unequivocal and decisive act of the party showing *such purpose*.

With this standard in mind, the argument that Mohammad Hamed somehow "waived" the statute of limitations defense is not supported by the deposition excerpts submitted to this Court.

Those excerpts show that *Hamed first stated that he had no personal knowledge about any such 1994-2004 rent being owed.* Hamed was then asked a series of hypothetical questions premised on the proposition that "if" such a rent obligation

existed, what he thought should happen. A review of those excerpts reveals that he states no personal knowledge of any such amounts owed, much less that there is a "clear, unequivocal and decisive act" to waive the statute of limitations rights on any amounts due that were time-barred. *See* Defendants' Exhibit 1 at pp. 86:5-87:22, 107:4-17, 117:15-119:11. In fact, *Hamed clearly stated that he did not know whether the rent for this time period was owed, nor was he even aware that this issue was a dispute now.* See **Exhibit 1** (with this deposition excerpt (p. 106) attached to it as Exhibit D).

Thus, the statute of limitations began to run when the rent was due, so that any claim for rent between 1994 and 2004 is time barred. Likewise, United failed to plead the oral agreements it now claims exist (which Plaintiff disputes). Even if pled, that would not be sufficient to extend the statute of limitations due to 5 V.I.C. §39. Indeed, United has failed to meet its burden of showing that there was "*clear and specific language*" of any waiver, nor did they show that there was an "*unequivocal and decisive act*" to do so, as required under *Abramsen*.

The statute of limitations, as codified in the V.I. Code, is designed to specifically protect a party against such undocumented, stale claims, based on a party's verbal claims that the statute of limitations was waived. As such, United's attempt to circumvent the statute of limitations defense fails to save this 1994-2004 rent claim.

b) Tolling of the statute of limitations

Defendants then argue that the application of the doctrine of equitable tolling set forth in *Podobnik v. U.S. Postal Serv.,* 409 F. 3d 584 (3rd Cir. 2005) tolls the six year statute of limitations in this case, as (1) it was misled into not filing this claim and (2) it

was prevented from filing this claim. As the Third Circuit noted in *Pobodnik* at the outset in its discussion of this doctrine:

> The doctrine of equitable tolling stops a statute of limitations period from running after a claim has accrued, *id.*, **but should be applied "sparingly."** Appellant bears the burden of proving that the equitable tolling doctrine applies here. *Id.* at 591 (citations omitted)(emphasis added).

As the Court noted later in its opinion:

> We have previously noted that "running throughout the equitable estoppel cases is the obligation of the plaintiff to exercise due diligence to preserve his or her claim." *Robinson v. Dalton,* 107 F.3d 1018, 1023 (3d Cir.1997)

With this strict standard in mind, Plaintiff will address Defendants' two arguments regarding this issue.

Defendants **first** argue that the first principle in *Podobnik*—**actively misleading a party**—is met because Waleed Hamed allegedly made certain oral statements, which supposedly caused them to not file a suit for rent in 2004. At the outset, it cannot be overlooked that Yusuf's declaration about this alleged conversation in "2004" is made for the first time, as it was never raised in the Amended Counterclaim, any other pleading, any motion[7] or in any discovery response. Indeed, 5 V.I.C. § 39 was adopted by our Legislature to specifically avoid such belated assertions, requiring all such statements to be in writing and signed so as to prevent a party from circumventing the statute of limitations based solely on his word about an alleged conversation over ten years ago!

[7] This alleged conversation in "2004" is not mentioned in United's pleadings related to its very specific September 9, 2013 motion for rent, even though Plaintiff raised the statute of limitations.

Thus, based on the applicable standards and the public policy imbedded in 5 V.I.C. § 39, it is respectfully submitted that an allegation that there was some alleged undocumented conversation ten years ago deferring the amount of rent owed for the 1994-2004 period because Yusuf did not know exactly when the last rent payment was allegedly made in the early 1990's does not rise to "active misleading" as set forth in *Podobnik*. Yusuf does not claim he was misled about the existence of the obligation itself. Indeed, Yusuf did not aver that the statements were intended to mislead him when made.[8] Thus, the facts as asserted by Defendants do not meet the required strict standard for invoking this doctrine for a claim filed well after the statute of limitations had expired.

Defendants then argue that the **second** principal of *Pobodnik* applies—**extraordinary circumstances** that **prevent** a party from filing a claim. However, Defendants only argue in passing (in one sentence) that the "extraordinary circumstances created by the bringing of the federal criminal case" also justifies the application of the tolling doctrine set forth in *Pobodnik*. Presumably Defendants are referring to the beat-to-death claim that the FBI somehow prevented them from having access to documents so they could determine when the last rent payment was made in order to do this rent calculation for 1994-2004. The Plaintiff did an exhaustive analysis of this issue in his reply to his own summary judgment motion, explaining why Defendants had access to all relevant document, as demonstrated by the relevant FBI

[8] Indeed, the statute of limitations had already run as to some years (1994-1998) when these statements were allegedly made in "2004".

affidavits as well as the opinion of Judge Dunston. See **Exhibit A** attached (at pp. 12-18). Those arguments are incorporated herein by reference.

As can be seen from those documents (attached again as **Exhibits 3, 4 and 5** to PSOF), it is clear that the criminal case did not **prevent** United from filing this claim, much less prevent United from having access to documents so it could allegedly determine when rent was last paid (in order to know how much more rent was due).

Thus, Defendants have failed to come forward with sufficient evidence to invoke the doctrine of equitable tolling as set forth in *Pobodnik*.

B. Alleged Current Rent Due (2012-2014)

Yusuf (on behalf of United) states in paragraph 20 (Defendants' Exhibit 3) that the rent due on "Bay 1" for the 2012 to 2014 time period is $1,809,464.12 based on calculations contained in Defendants' Exhibit F. That figure is disputed for two reasons.

First, United affirmatively states in DSOF #16 that it asserts a claim for $250,000 per month in back rent as set forth in the rent notices it has sent each month for the 2012-2014 time period. Plaintiff denies this amount is due (See **Exhibit 1**), which United acknowledges is disputed in footnote 9 of its memorandum. Thus, despite United's assertion that the amount owed for rent for the 2012-2014 period is "undisputed," United contradicts itself by then asserting that a much larger, disputed amount is *really due* for the same time period, putting **the entire amount of rent due for this time period in dispute**. Thus, summary judgment should also be denied on this claim.

Second, the rent under the lease is based on the square footage of the Sion Farm store. United's calculations are based on the square footage of Bay 1 as 69,680

sq. ft., as noted on page 10 (line 2) of its memorandum. However, Plaintiff has calculated this figure to be 67,498 sq. ft., which places the calculation submitted by United into dispute as well.[9] See **Exhibit 1**. Thus, while rent is owed by the partnership (not Hamed), there is a dispute as to the amount due.

In summary, the Plaza Extra Supermarket partnership does not dispute that it owes some amount of rent to United for the Sion Farm store for the time period starting in January of 2012. Indeed, Hamed (on behalf of the partnership) has tried to amicably resolve this issue so the partnership can pay the "real" rent. However, United's own arguments as to the **grossly excessive** amount actually due render the amount of the rent due for the period still in dispute. Likewise, there is still a discrepancy as to the store's square footage that is part of the rent calculations, which is in dispute as well. Thus, summary judgment as to this claim for rent starting in 2012 should also be denied.

II. Bays #5 and #8

While Defendants assert that Plaza Sion Farm also occupied Bays #5 and #8 from time to time so that rent is due, that assertion is flatly denied. See **Exhibit 1**. While materials owned by Plaza Extra Sion Farm may have been placed in those Bays from time to time when they were not rented to third parties by United, at best such use was only "periodic" as conceded by United.[10] Moreover, at no time was it ever agreed

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[9] Plaintiff raised this same point on pp. 4-5 of his September 16, 2013, opposition to United's Motion For Rent, which Defendants simply ignore.

[10] United concedes in PSOF #18 that such use was "periodic" and not continuous, as does Yusuf's supporting declaration (Defendants' Exhibit 3).

that Plaza Sion Farm would pay rent for those Bays, as Plaza Sion Farm would not have placed materials in these unused Bays if it had known rent was expected.[11] See **Exhibit 1.** Indeed, United never suggested to Hamed that it expected such rent to be paid until the demand for rent was unexpectedly received **for the first time** on May 17, 2013.[12] See **Exhibit 1.** In short, Hamed denies he ever agreed that any rent would be paid to United for the casual and periodic use of these Bays, which United was not otherwise using, much less the inflated amount now being demanded. See **Exhibit 1**. Thus, it is specifically disputed that any such rent is due or owing for these two Bays, warranting a denial of summary judgment claim for rent on these two Bays.

Moreover, as any claim for such rent prior to September 18, 2006 is barred by the applicable statute of limitations, all claims for rent for these two Bays that predate September 18, 2006, should be stricken based on Plaintiff's Rule 56 motion regarding this defense. Indeed, unlike its claim for rent for Bay 1 (the Plaza Sion Farm Store), Defendants do not assert any alleged agreement existed to pay such rent, much less that promises to do so were ever made, further undermining its argument that the statute of limitations was somehow waived. In any event, Plaintiff's arguments

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[11] Even United does not claim in PSOF 18-23 that there was any agreement that rent would be paid for this temporary use of this space, much less any agreement as to the amount of any such rent. Yusuf's supporting declaration (Defendants' Exhibit 3) also omits any assertion that there ever was an agreement to pay any rent for the periodic use of these two Bays or an agreement as to the amount of rent.

[12] United does not claim it ever made a prior demand for rent for the "periodic" use of these Bays, nor does Yusuf's declaration make any such averment either. In fact, United did not assert such rent was due for Bays 5 and 8 when it filed its September 9, 2013, motion for rent. When that demand was made, Plaintiff immediately told United that such rent was never agreed to, the amount claimed was "grossly inflated" for warehouse space and was barred by the statute of limitations. See **Exhibit C** attached to United's motion.

regarding the statute of limitations bar as to any claims filed before September 18, 2006, raised in section I. B. of this memorandum are incorporated herein by reference, as all such pre-2006 claims for rent for Bays 5 and 8 are time barred, even if there had been an agreement to pay rent.

Therefore, the summary judgment motion as to the rent for Bays 5 and 8 must be denied. It is further requested that this Court bar any claims for rent prior to September 18, 2006 for these two Bays as well.

III. Yusuf's "Accounting" Claim

One additional issue needs to be addressed regarding Defendants' "rent" claim. Even though no rent is owed Yusuf (as rent is paid to the landlord, United), Yusuf spends a great deal of time arguing that the rent should be litigated and paid as part of his "accounting" claim with Hamed. That argument fails for several reasons. First, as noted, rent is not due to Yusuf—he is not the landlord.

Second, once United's claim for rent is determined on its own direct claims for rent, that figure must be paid by the *Hamed/Yusuf partnership*, who is the tenant. Thus, analyzing this calculation as part of any "accounting" claim is not proper or necessary.

One has to wonder why Yusuf even raises this point, trying to make the rent claim part of his accounting claim. The answer is simple—Defendants know that most of *United's rent claim is barred by the statute of limitations*, so they are trying to "get it in through the back door" by asserting it is part of Yusuf's accounting claim.

While there is no reason to address the accounting issue as (1) the amount of rent owed by the partnership will be determined based on the landlord's (United) claim for rent and (2) rent is not "due" to Yusuf as a partner, Yusuf's claims for rent in the

accounting issue would still be time-barred as to any rent claims accruing before September 18, 2006, **as an accounting claim between partners cannot revive an otherwise time barred claim of a third party, such as a landlord.**

In this regard, this issue was specifically addressed in Plaintiff's partial summary judgment motion on the statute of limitations defense, which will briefly be summarized here again, as the issue is easy to understand when raised in the context of Yusuf seeking rent.[13] While Yusuf tries to convince this Court that RUPA, as codified in Title 26, did not change the method for a post dissolution accounting, the language in the revised statute is clear, as 26 V.I.C. §75(c) expressly states in relevant part:

> (c) . . . . A right to an accounting upon a dissolution and winding up **does not revive** a claim barred by law. (Emphasis added).

Defendants' argument that this statute states otherwise is not only contrary to its precise language, it is contrary to the official NCCUSL *Commentary* to Section 405(c) [now codified in the VI at 26 V.I.C. §75] which states (see excerpt attached as **Exhibit B**): [14]

> 4. Section 405(c) replaces UPA Section 43 and provides that other (i.e., non-partnership) law *governs the accrual of a cause of action for which subsection (b) provides a remedy*. The statute of limitations on such claims is also governed by other law, and *claims barred by a statute of limitations* ***are not revived*** *by reason of the partner's right to an*

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[13] This Court has Plaintiff's June 20th reply brief, so the full argument is incorporated herein by reference. See **Exhibit A** (specifically pages 3-8). Indeed, Defendants' entire argument from pp. 16-23 of their Rule 56 memorandum is nothing more than a sur-reply to Plaintiff's arguments. Notwithstanding Defendants' arguments, Plaintiff stands by what was said in his reply memorandum, which addresses and distinguishes each case cited in Defendants' Rule 56 memorandum, so they need not be repeated here again.

[14] The *National Conference of Commissioners on Uniform State Laws* ("NCCUSL") maintains a copy of the uniform version of the RUPA with the Official Commentary at *www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf.* The specific sections referenced herein are attached as **Exhibit B.**

> *accounting upon dissolution*, as they were under the UPA. **The effect of those rules is to *compel* partners to litigate their claims during the life of the partnership** or risk losing them. . . .(Emphasis added).

Thus, an accounting of rent owed a third party landlord is governed by the statute of limitations governing the collection of rent by the landlord. **If the landlord's claim is time-barred under the applicable statute of limitations, it is certainly not revived just because a partner (who happens to have just a financial interest in the time-barred landlord's claim) decides to file an accounting.** Period. End of story.

While Yusuf persists in referring back to the common law as well as to cases from jurisdictions that have not adopted RUPA, like New York,[15] those arguments are a waste of this Court's time, as 26 V.I.C. §75(c) now governs this issue.[16] Common law cases based on a different, *explicitly changed* statute, are totally inapplicable. Thus, if the landlord's claim for rent is time barred, it is not revived by the filing of an accounting by a one partner of a partnership, which is the Landlord's tenant.

IV. Prejudgment Interest

Finally, Defendants argue that they are entitled to prejudgment interest on their rent claim, citing 11 V.I.C. § 951(a)(4). However, it is respectfully submitted that this request is premature as (1) no amount has yet been determined to be due, (2) the amount of rent due is disputed so interest should not accrue until the amount of rent, if

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[15] **Exhibit B** contains the index of jurisdictions that have adopted RUPA. The fact that New York has not adopted RUPA distinguishes the holding in *Sriraman v. Shashikant Patel*, 761 F.Supp. 2d 7 (E.D.N.Y. 2011) cited by Defendants on p.15 of their *Memorandum*, as it is not based on the RUPA either.

[16] Defendants' argument that this Court needs to do a *Banks* analysis is equally misplaced as that analysis needs to be done to determine the common law, not the law when there is a V.I. statute is directly on point.

any, is determined to be due and (3) interest would only run from the date the sum certain was determined to be due. *See, e.g., Roman v. Sullivan,* 20 V.I. 434, 438 (Terr. Ct. 1984) (prejudgment interest only permitted where amount due is easily ascertainable). Additionally, prejudgment interest is based on "considerations of fairness." *See, e.g., Thabault v. Chait,* 541 F. 3d 512, 534 (3rd Cir. 2008). In this case, the amount of rent due, if any, for each time period is contested, so until that amount is determined, consideration of whether to award prejudgment interest is premature.

V. Conclusion

For the reasons set forth herein, it is respectfully submitted that Defendants' motion should be denied, as there are factual issues in dispute as to all claims for rent, as noted. Additionally, it is respectfully submitted that all claims for rent that pre-date September 18, 2006, be stricken pursuant to the applicable six-year statute of limitations.

Dated: August 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2014, I served a copy of the foregoing by email, as agreed by the parties, on:

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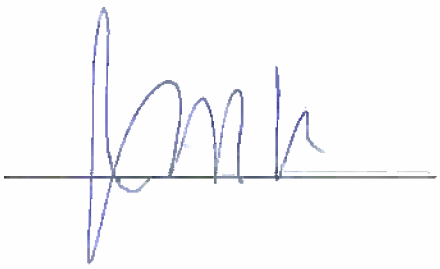

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,	)	
Plaintiff/Counterclaim Defendant,	)	
vs.	)	**CIVIL NO. SX-12-CV-370**
FATHI YUSUF and **UNITED CORPORATION**,	)	
Defendants/Counterclaimants,	)	
vs.	)	ACTION FOR DAMAGES INJUNCTIVE RELIEF AND DECLARATORY RELIEF
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and **PLESSEN ENTERPRISES, INC.**,	)	JURY TRIAL DEMANDED
Counterclaim Defendants.	)	

PLAINTIFF HAMED'S REPLY RE HIS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE STATUTE OF LIMITATIONS

Plaintiff has moved pursuant to Fed. R. Civ. P. 56 to bar all monetary damage claims that pre-date September 16, 2006, based on the applicable statute of limitations. This motion is relevant now, as it will eliminate the tremendous cost and time delays that will otherwise be encountered in sorting out these claims. Before responding to Defendants' arguments, several preliminary comments are in order.

First, Defendants argue that Plaintiff's summary judgment motion is procedurally defective because there was no Rule 56.1 *Statement of Facts* filed with the motion. However, the motion identifies specific counts in the Amended Counterclaim and then seeks to bar any pre-September 16, 2006 damage claims raised by those counts as a

matter of law. Thus, no such Rule 56.1 Statement is needed, since the Plaintiff need only show that the applicable law bars these damage claims before the burden switches to the Defendants to show otherwise. *See, e.g., Abramsen v. Bedminster*, 45 V.I. 3, No. 700/200, 2002 WL 1974065, at *6 (Terr. V.I. Aug. 13, 2002) (Swan, J.) (Once it is established that the limitations period has run, "the burden of proof to show that the statute of limitations should not be invoked rests with plaintiff).[1]

Second, as Defendants correctly point out, Plaintiff's motion does not attempt to bar any of the non-monetary Counts: Counts I and II (declaratory judgment), Count VIII (partnership dissolution), Count IX (dissolution of Plessen) and Count X (appointment of a receiver). This motion addresses only the pre-2006 counterclaim "damage/accounting" averments, such as United's rent claims from 1994 to 2004 and reconciliations of alleged partnership claims that supposedly occurred in the late 1990's.[2]

Finally, Defendants' *Opposition* lists the counts in the First Amended Counterclaim on page 3. This listing is helpful, as it clarifies a point Plaintiff overlooked,

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[1] As noted in *Desir v. Hovensa*, L.L.C., No. 2007/97, 2012 WL 762122 *1 (D.V.I. Mar. 7, 2012), once a party submits sufficient information to support entry of summary judgment on an issue, the opposing party then must produce competent evidence to defeat summary judgment:

> Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324. Summary judgment must therefore be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (citation omitted).

[2] Plaintiff believes all of these alleged pre-2006 claims are frivolous. For example, in ¶¶104-105 of the Amended Counterclaim, Defendants allege that Waleed (Wally) Hamed must have taken money from the stores simply because his *1992* and *1993* tax returns reflect *assets* above his salary.

there is no fraud claim alleged in the First Amended Counterclaim. Thus, this Court need not consider the statute of limitations regarding fraud or the application of 5 V.I.C. §32(c) to such claims.

With these comments in mind, Plaintiff will now address the three separate legal issues that remain—accounting, rent and tolling. For the reasons set forth herein, it is respectfully submitted that the relief sought should be granted, barring pre-2006 monetary damage claims being asserted in this case.

I. Count IV-The "Accounting" Claims

The issue presented as to the accounting claims is whether the *Revised Uniform Partnership Act* ("RUPA", as codified in Title 26) bars "claims" based on matters that occurred prior to 2006--a pure question of law. While there is one unpublished post-RUPA case that *appears* on its face to have been decided the other way (cited by Defendants), this turns out not to be the case, and it is respectfully submitted that the proper view is the one stated by the drafters of Section 405 of RUPA (now codified in 26 V.I.C. §75(c)), that the statute of limitations on monetary damage claims begins to run when they occur, and are not "revived" by an accounting when the partnership is dissolved.

Defendants cite an A.L.R. 4th article that provides the correct formulation of the *prior* law -- the *UPA* as it was before the RUPA was enacted. Then, matters between the partners could only be litigated at the time of accounting, and so that is when the statute of limitations began to run. However, the old UPA was *expressly and*

intentionally changed when it was revised to become the RUPA.[3] Thus, when this provision was revised, the authors *specifically* noted that the entire point of the revision was to compel partners to litigate their claims during the life of the partnership or risk losing them. The official NCCUSL *Commentary* to Section 405(c) [now codified in the VI at 26 V.I.C. §75] states:

> 4. Section 405(c) replaces UPA Section 43 and provides that other (i.e., non-partnership) law *governs the accrual of a cause of action for which subsection (b) provides a remedy*. The statute of limitations on such claims is also governed by other law, and *claims barred by a statute of limitations* ***are not revived*** *by reason of the partner's right to an accounting upon dissolution*, as they were under the UPA. **The effect of those rules is to *compel* partners to litigate their claims during the life of the partnership** or risk losing them. . . .(Emphasis added).

See **Exhibit 1 attached**. In short, under that older version, a cause of action between partners *could not be brought sounding in partnership* until there was an accounting. Under the new law, partners can sue each other at any time regardless of requesting an accounting, and any claims not timely filed are barred by the statute of limitations. The Legislature enacted 26 V.I.C. §75(c) 1998 – which expressly states in relevant part:

> (c) . . . . A right to an accounting upon a dissolution and winding up **does not revive** a claim barred by law. (Emphasis added).

If the old UPA and new RUPA are not confused, there is no dispute. The new statutory language (as explained by the official commentary) is clear: Claims not asserted before the applicable statute of limitations are not revived by the post-dissolution accounting.

The language of the V.I. statute was adopted verbatim from §405 of RUPA, which other states have also adopted. Since RUPA was enacted, several states have

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[3] The *National Conference of Commissioners on Uniform State Laws* ("NCCUSL") maintains a copy of the uniform version of the RUPA with the Official Commentary at *www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf.* The specific sections referenced herein are attached as **Exhibit 1.**

addressed this exact issue. In *Fike v. Ruger,* 754 A.2d 254, 264 (Del.Ch.1999), *aff'd* 752 A.2d 112 (Del. 2000) the Delaware Chancery Court held:

> Thus, **it is clear under RUPA that a right of action arising during the life of a partnership is not revived merely because a dissolution occurs and a separate right to an accounting on dissolution arises.** (Emphasis added).

While Defendants argue that the Delaware Chancery Court (in *Fike*) "got it wrong"---and that *Fike* is *not the law in Delaware*---they are incorrect.[4] *Fike* is still good law, and is still controlling in Delaware long after the appeal discussed by Defendants. In fact, *Fike* was followed in Delaware by the Chancery Court several years later, in 2005, *on this identical issue* -- in *Ruggerio v. Estate of Poppiti*, No. Civ.A. 18961-NC, 2005 WL 517967, at *4 (Del. Ch. Feb. 23, 2005) (money damages raised in post-RUPA accounting *are* subject to the statute of limitations which begins to run when the damage occurred). *Ruggerio* held:

> **Where the relief sought from an accounting is merely the recovery of money, the case is analogous to an action for monetary damages. In such cases, the court applies the equivalent statute of limitations by analogy**. The statute of limitations for a breach of fiduciary duty is three years. In addition, **"[a] right to an accounting ... does not revive a claim barred by law**. (footnotes omitted)(**citing *Fike v. Ruger,*** 754 A.2d 254, 264 (Del. Ch.1999) (quoting the *Revised Uniform Partnership Act* § 405(c) (1996) to interpret 6 *Del. C.* §§ 1521-22).

Id. (emphasis added). In *Fike*, the court went through a full and careful analysis of the revision of RUPA Section 405(c) (called "DUPL" in Delaware) and at 754 A.2d 254 held:

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[4] With all due deference to Defendants' wisdom as to Delaware law, the Delaware Chancery Court -- and particularly then Vice-Chancellor Lamb -- do not get Delaware Corporation Law that *wrong*. The Delaware Supreme Court *absolutely did not reverse the Fike court on this issue*, as Defendants attempt to suggest.

> **[P]laintiffs seek to avoid the statute of limitations or laches defense by characterizing their claims as ones for a settlement of partnership accounts upon dissolution**. . . . At common law, the general rule was that actions for accounting should be brought post-dissolution.

Id. at 262-63 (footnotes and citations omitted)(emphasis added). The court then explained why this old rule was changed by RUPA:

> Because the common law rule placed partners in the predicament of either causing a dissolution to resolve disputes or continuing the partnership despite a cloud of conflict and uncertainty hanging over it, the drafters of the Uniform Partnership Act ("UPA") included Section 22, specifically authorizing accounting actions **prior to dissolution.**

Id. at 262-63. Once this concept changed, allowing suits between partners, the court then noted:

> It would seem a natural development that, **once such actions were permitted, *they should be regarded as "accruing" for purposes of statutes of limitations at the time of their occurrence,* even in the context of partnerships subject to dissolution by a partner's withdrawal. That position was not universally adopted by courts interpreting the UPA, but it has now been codified in § 405(c) of the Revised Uniform Partnership Act ("RUPA"),** which states that "[t]he 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 law."*

Id. at 263-64 (first emphasis added). As the court concluded:

> *Thus, it is clear under RUPA that a right of action arising during the life of a partnership* ***is not revived merely because a dissolution occurs and a separate right to an accounting on dissolution arises.***

Id. at 264 (emphasis added). As noted in Plaintiff's moving papers, the same result was reached in *Baghdady v. Baghdady*, 2008 WL 4630487 (D. Conn. Oct. 17, 2008).

Defendants attempt to support their alternative interpretation with cases from other RUPA jurisdictions that are inapposite such as *Laue v. Estate of Elder*, 25 P.3d

1032, 1038, 2001 WL 647833 (2001).[5] Their discussion of that case is almost exactly backwards from what the decision actually held. The Court banned the claim because it was barred by the statute of limitations where the *accounting itself* (not a money damages claim within the accounting) was not sought until more than three years after dissolution -- a totally different matter. *Id.* at 1038, stating in part:

> Laue's final cause of action, added in his amended complaint, alleges that he is entitled to a partnership distribution by virtue of his partnership with Elder. . . .But even if his amended complaint was not properly dismissed on procedural grounds, **we nevertheless conclude Laue's claim for a partnership distribution fails because it is barred by the statute of limitations**. . . .
>
> The statutory period does not begin to run until dissolution or the exclusion of the complaining partner from participating in the affairs of the partnership. In this case the evidence establishes that Elder excluded Laue from Top Kat Auto Sales no later than March, 1994. Thus, **Laue's right to an action for accounting and distribution of partnership assets is barred unless commenced by March, 1997**. (citations omitted) (emphasis added).

In their analysis, Defendants cite a 1980's-era (pre-RUPA) A.L.R. 4th article and argue that a *Banks/Conner* analysis supports their view -- asserting that the article cites over 20 jurisdictions that have adopted Defendants' view. That claim falls apart once the article is digested, as all of the cases cited predate the enactment of RUPA except for 8 cases listed in an updated *Supplement.*[6]

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[5] Similarly, Defendants rely on *Smith v. Graner,* 2010 Minn. App. Unpublished. LEXIS 717 (Minn. App. 2010). It is an unreported Minnesota case which has never been cited, followed or even discussed subsequently. It is based on a decidedly non-uniform 1889 Minnesota common law case that relies completely on the pre-RUPA formulation.

[6] The A.L.R. 4th article lists these cases in Section 3 as well as in the *Supplement* to that section. It can be provided if requested.

Of those eight post-RUPA dated cases listed in the *Supplement*, six of the cited decisions were from non-RUPA jurisdictions (New York and Massachusetts), and relied on provisions of the old UPA that have been explicitly changed in the RUPA.[7] Of the two remaining cases, *La Canada Hills Ltd. P'ship v. Kite*, 217 Ariz. 126, 171 P.3d 195, 512 Ariz. Adv. Rep. 8, 2007 WL 2584777 (Ct. App. 2007) was not decided based on RUPA, as Arizona has an unique limitations statute that specifies the partnership limitations do not run until "cessation of dealings." In *Boulle v. Boulle*, 160 S.W.3d 167, 174, 2005 WL 435102 (Tex. App. 2005) the court ruled on an entirely different basis -- noting that although the statute of limitations is a question of law for determination by the court, the matters were not sufficiently before the court to allow it to decide the issue. Thus, all eight post-RUPA cases cited in the A.L.R. 4th article are easily distinguishable.

More importantly, the language in 25 V.I.C. §75(c) is clear, in full harmony with the drafter's comments and all supporting decisions that specifically address this new RUPA language. Thus, common law based on the old, expressly changed law would mean nothing in any case. As such, summary judgment is warranted as to this legal question, barring monetary accounting and third-party claims that pre-date 2006 in this case.[8]

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[7] **Exhibit 2** contains the index of jurisdictions that have adopted RUPA. The fact that New York has not adopted RUPA (See **Exhibit 1) also** distinguishes the holding in *Sriraman v. Shashikant Patel*, 761 F.Supp. 2d 7 (E.D.N.Y. 2011) cited by Defendants on p. 5 of their *Opposition*, as it is not based on the RUPA either.

[8] This result works both ways, as eliminating these claims also benefits Yusuf, does not deny that he lost in excess of $18 million in 'options trading' using Plaza Extra funds after being told to stop trading by Plaintiff in the 1990's. See **Exhibit 2** at pp. 217-218. Under the old UPA, this claim was not ripe until dissolution, but is now barred by RUPA.

II. Count XI and Count XII-The 1994-2004 Rent Claim

Defendants do not dispute the fact that United's third-party claim for rent prior to September 16, 2006, asserted in Counts XI and XII, would normally be time barred. Those counts seek rent *inter alia* for the time period between 1994 and 2004.

Instead, Defendants now argue these pre-2006 claims survive this statute of limitations cut-off because (1) Plaintiff's son entered into a previously unmentioned oral agreement in 2012 to pay this pre-2006 rent and (2) Plaintiff somehow "waived" this statute of limitations defense in his deposition testimony by supposedly agreeing that Yusuf always determined the amount of rent (as Counts XI and XII are claims asserted against him). Each argument will be addressed separately.

A. The Alleged 2012 Oral Agreement Re The 1994-2004 Rent

As for the alleged, *new* 2012 oral agreement, this Court can summarily reject this argument, as neither Count XI nor Count XII contains *any* allegations of such an oral agreement or contract. Since no such allegation exists in the Amended Counterclaim, this argument does not revive these time-barred claims for pre-2006 rent.[9]

Moreover, even if Defendants try to add this new claim by again amending the Amended Counterclaim, such an oral agreement would still be barred under 5 V.I.C. § 39 (Acknowledgment or promise), which expressly requires that such new promises MUST be in writing and signed:

> No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter,

[9] Aside from not being alleged in the complaint, this new "oral agreement" has never been mentioned anywhere. It was not mentioned in Defendants' specific "Rent Motion" filed in this case that set forth all such claims. Nor has it ever appeared in any prior discovery response, pleading or testimony. It is created now out of whole cloth.

> unless the same is contained in some writing, signed by the party to be charged thereby....

In any event, the new claim that there was an oral agreement was not pled, so this new argument attempting to circumvent the statute of limitations is without merit.

B. Plaintiff's Deposition Testimony

Defendants then argue that the statute of limitations defense has somehow been waived by Plaintiff's deposition testimony, suggesting that Plaintiff cannot even raise this defense because Yusuf was in charge of rent payments.[10] However, the law again does not help the Defendants. In *Abramsen at* *7, while sitting as a Superior Court Judge, Justice Swan held:

> The law requires knowledge of the right to be waived and a clear intent to waive *that right*. (Emphasis added).

In reaching this conclusion, Judge Swan cited *United States on Behalf of Small Business Administration v. Richardson,* 889 F.2d 37 at 40 (3rd Cir.1989) for the proposition that:

> Statutes of limitation are a vital and integral component of the legal system. *To establish a waiver* ***of a statute of limitations*** *requires clear and specific language*.

Id. at *5 (emphasis added). In following other cases, *Abramsen* held:

> Crucially, the defense of the statute of limitations may be waived if there is a clear, unequivocal and decisive act of the party showing *such purpose*.

Id. at *3 (emphasis added).

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[10] Defendants appear to be arguing that they can sue Plaintiff for rent and then admit he owes it without him being able to defend the claim! If correct, why stop at the new rent assessment of $250,000 per month and just set the rent at $1,000,000 per month? It is consistent with Yusuf suing Plessen and serving himself without telling anyone else, then arguing that Plessen is in default and strenuously objecting when Plessen retains a lawyer to defend the claim. Thankfully, the Plaintiff can himself defend against these claims, including raising the statute of limitations defense.

With this standard in mind, the argument that Mohammad Hamed somehow "waived" the statute of limitations defense is not supported by the deposition excerpts submitted to this Court. In this regard, those excerpts show that *Hamed first stated that he had no personal knowledge about any such 1994-2004 rent being owed.* Hamed was then asked a series of hypothetical questions premised on the proposition that "if" such a rent obligation existed, what he thought should happen. A review of those excerpts reveals that he states no personal knowledge of any such amounts owed (because Yusuf handled those payments), much less that there is a "clear, unequivocal and decisive act" to waive the statute of limitations rights on any amounts due that were time-barred. *See* Defendants' Exhibit E at pp. 86:5-87:22, 107:4-17, 117:15-119:11.[11]

In short, Defendants have failed to meet their burden of showing that there was "*clear and specific language*" of any waiver, nor did they show that there was an "*unequivocal and decisive act*" to do so, as required under *Abramsen*.

C. Summary Re 1994-2004 Rent Claim

While Defendants have submitted two creative arguments to try to get around the fact that United's pre-2006 rent claim is not time-barred, both arguments fail. One relies on a newly created "oral agreement" that was not pled or ever mentioned, which would be barred by 5 V.I.C. §39 in any event. The other one fails because Defendants did not produce any waiver to justify their assertion that the statute of limitations bar on the pre-2006 rent was waived.

[11] Indeed, Defendants failed to attach the critical testimony where Hamed clearly stated that he did not know whether the rent for this time period was owed, nor was he even aware that this issue was a dispute now. See **Exhibit 3** attached at p. 106.

III. Tolling and the Discovery Rule

Defendants do not disagree that the remaining monetary damage accounting claims are all governed by a six-year statute of limitations. However, after identifying these counts on page 12 of their memorandum,[12] Defendants argue on the next page that the "discovery rule" extends the time to file these claims, asserting that their recent *physical receipt* of records the FBI seized in 2002 tolled the running of the statute of limitations as to these damage claims.[13] However, this argument also fails once the applicable law and facts are analyzed.

Regarding the tolling of a statute of limitations in the Virgin Islands, the VI Supreme Court held in *Santiago v. Virgin Islands Housing Authority, et al.*, 57 V.I. 256, 2012 WL 3191360, at *7 (V.I. 2012) (citations omitted) as follows:

> The discovery rule tolls the statute of limitations when, despite the exercise of due diligence, the injury or its cause is not immediately evident to the victim. Under the discovery rule, the focus is not on "the plaintiff's actual knowledge, but rather 'whether the knowledge was known, or through the exercise of diligence, knowable to [the] plaintiff'." "To demonstrate reasonable diligence, a plaintiff must establish[ ] that he pursued the cause of his injury with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others."

The Virgin Islands Appellate Division reached the same conclusion in *Bluebeard's Castle, Inc., v. Hodge,* 51 V.I. 672, 2009 WL 891896 at *5 (D.V.I. App. Div. 2009):

> The discovery rule "operates to prevent the relevant statute of limitations, here the two year statute of limitations, from beginning to run." *Id. at 985.*

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[12] These include Count III (Conversion), Count V (Restitution), Count VI (Unjust Enrichment and Imposition of a Constructive Trust), Count VII (Breach of Fiduciary Duty), Count XIII (Civil Conspiracy) and Count XIV (Indemnity and Contribution), which Defendants concede are governed by the six-year statute of limitations.

[13] Even if true, the wrongful acts alleged against Waleed Hamed that occurred in 1992 and 1993 in ¶¶104-105 of the Amended Complaint would still be time barred.

> "Under the rule, the statute of limitations will start to run at the time that two conditions are satisfied: (1) when the plaintiff knew or should have known that he had suffered a harm and (2) when the plaintiff knew or should have known the cause of his injury...." *Id.* **"[B]oth of these determinations are made using an, objective, reasonable person standard."** (Emphasis added).

With this law in mind regarding the "discovery rule," it is respectfully submitted the Defendants have failed to make any *threshold* showing to defeat summary judgment as to the statute of limitations bar.

To make this inquiry somewhat easier, the precise facts argued by Defendants here regarding these same documents seized by the FBI in 2002 have already been addressed by Judge Dunston in *United Corp. v. Hamed*, No. ST-13-CV-101, 2013 WL 3724921 (V.I.Super. June 24, 2013). In that case, in response to a motion for partial summary judgment on this limitations issue, Judge Dunston precluded any claims which were known of or could have been reasonably foreseen based on the criminal charges and indictments, first noting:

> The original indictment, issued and unsealed on September 18, 2003, in *U.S. v. United Corporation, et al.,* Crim. No. 2003–147, and any subsequent superseding indictments may be considered by the Court in its analysis to determine whether Plaintiff exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling because Plaintiff explicitly refers to that case on the face of the Complaint, and further, these indictments are indisputable public records. The third superseding indictment, issued on September 9, 2004, charged Defendant Waheed Hamed, among others, with
>
> > purchas[ing] and direct[ing] and caus[ing] Plaza Extra employees and others to purchase cashier's checks, traveler's checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the case as legitimate-appearing financial instruments.

Id. at *4. Judge Dunston then found that the third superseding indictment should

have put a reasonable person on notice of any such problems:

> While the third superseding indictment largely alleges that Defendant Waheed Hamed, among others, used cashier's checks and other methods to conceal illegal money transfers abroad, **the third superseding Indictment, although only containing allegations, would have *at least* put a reasonable person in Plaintiff's position, as Defendant's employer, on notice that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties, as alleged in Plaintiff's Complaint at Paragraph 15. Plaintiff does not contend any efforts were made after this point to review United's business and accounting records to investigate the government's allegations against Defendant. Instead, the Complaint clearly states on its face that the discovery was only made in October 2011 upon a review of the government's records and documents.**

Id. (emphasis added). After making this observation, Judge Dunston then held:

> Thus, here, "the facts are so clear that reasonable minds cannot differ," on the face of the Complaint that the commencement period for the statute of limitations began *at least* by September 9, 2004. As such, all claims relying on facts alleging Defendant converted Seventy thousand dollars ($70,000.00) via a certified check to a third party on October 7, 1995, are barred on statute of limitations grounds. **All of Plaintiff's claims carry a six (6) year statute of limitation or less, meaning the statutory period expired by *at least* September 9, 2010.**

Id. (emphasis added). This analysis applies to the multiple claims in ¶¶106-114 of the Amended Counterclaim, that somehow Plaintiff improperly converted funds sent by check or wire transfer, as those claims are clearly time barred for the same reasons set forth in Judge Dunston's analysis of a $70,000 check allegedly misappropriated in 1995.[14]

Judge Dunston did allow United to proceed with discovery on one other claim—a claim that Waheed (Willie) Hamed had violated some duty to United in 1992. However,

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[14] While no longer relevant, it should be noted that the third party (a school in Florida) which received this $70,000 check said they received it from Yusuf Yusuf, Fathi's son, not Waheed Hamed. See **Exhibit 4.**

the motion for partial summary judgment was subsequently renewed after some discovery took place. As is the case here, United argued it still needed more time to do more discovery, making the exact *same argument it is making in this case regarding the exact same FBI documents identified by Defendants here*—the so-called 'newly' produced FBI documents. In addressing this issue, the Court took into account two explicit 2009 FBI affidavits stating that all such documents had been fully available to Defendants for many years, beginning in 2003 and had been thoroughly reviewed by them on multiple occasions. **Exhibit 4.** The Court then ordered United to produce a counter-affidavit by May 12th to refute these two FBI affidavits, ordering as follows **(Exhibit 4)**:

> it is ORDERED that Plaintiff SUPPLEMENT, by May 12, 2014, its Response in Opposition with **proof by affidavit from the United States Attorney's Office that it no longer has access to review documents held by the federal government, as opposed to the facts set forth in Special Agent Thomas L. Petri's July 08, 2009, Declaration**. . . (emphasis added).

United failed to produce any such affidavit. See **Exhibit 5**.

Just like Judge Dunston, this Court need only look at the 2004 third superseding indictment (**Exhibit 4**) to immediately understand why any reasonable person involved with the operations of three Plaza Extra Supermarkets would make further inquiry into the propriety of money allegedly taken from business operations upon its issuance. Certainly this 2004 indictment puts the "objective, reasonable" Fathi Yusuf on notice by 2004 that he should have exercised due diligence then to ascertain what conversion of funds had occurred. Since both United and Yusuf received this indictment as criminal defendants, they were on notice by this date that they should investigate for conversion of assets as alleged in the indictment involving financial improprieties in the

supermarket operations. Moreover, as Yusuf has asserted throughout this litigation, he was in charge of the office and the accounting, so he was aware of everything.

Defendants have the identical burden here as they did before Judge Dunston. A review of the two FBI affidavits executed on July 8, 2009 (Special Agents Christine Ziemba and Thomas Petri) confirms that United and the individual criminal defendants, including Fathi Yusuf, had "complete" and "unfettered" access to all of the records from all sources -- and repeatedly and extensively exercised that access. See **Exhibit 4.** Petrie swore that:

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

and

> 8. In **2004**, a different set of attorneys presently representing the defendants reviewed the evidence seized in the course of the execution of the search warrants. **By my estimation, document review team included up to ten people at any one time. The defense team spent several weeks reviewing the evidence. They had with them at least one copier and one scanner with which they made numerous copies and images of the evidence.**
>
> **9. During the 2004 review, the defense team was afforded unfettered access to discovery. They were permitted to review *any* box of documents at *any* time, including evidence seized during the searches,** foreign bank records, documents obtained either consensually or by grand jury subpoena, and FBI Forms 302. The defense team pulled numerous boxes at one time with many different people reviewing different documents from different boxes.

See **Exhibit 4** (emphasis added). This unfettered access for United continued after that, as noted by FBI Special Agent Christine Zieba. She personally

watched Plaintiff's counsel access and review these documents over many weeks on subsequent occasions. *See* **Exhibit 4** (emphasis added).

> 3. **I have been present at the review of documents conducted by counsel for defendants in the Yusuf matter.**
>
> 4. The FBI office is comprised of two buildings, an upper building and a lower building. The two building are secured facilities. As part of their duties, the agents and support staff housed in the lower building possess classified and secret national security information.
>
> 5. The evidence obtained in the course of the investigation and prosecution of the defendants is stored in the lower building. The evidence is secured either in a locked storage room or in locked file cabinets in the secured work space.
>
> 6. By necessity, the defendants' document review has taken place at a long conference table in middle of the central work space. The desks of one agent and analyst are freely accessible from that central work space. The special agent and the analyst possess and utilize classified, secret, and grand jury information in their work spaces.
>
> 7. Given that FBI special agents and employees maintain classified, secret, and grand jury information in the lower building, it is not feasible to provide the defendants unfettered access to that space.
>
> 8. I memorialized my conversations with defense counsel as well as the events that transpired during the document review from November 8, 2008 through January 29, 2009. Those memoranda are attached to this declaration and incorporated as if fully set forth herein.
>
> 9. A process was put in place in order to ensure that evidence was not lost, misplaced or destroyed during the review process by defense counsel. Defense counsel were allowed to review one box at a time, and were allowed to handle the documents.

As such, applying the "discovery rule" as set forth by the Supreme Court and the Appellate Division, it is clear that the conclusion reached by Judge Dunston should be reached here as well—Defendants were on notice at least by 2004 that widespread malfeasance was allegedly occurring. They repeatedly and extensively exercised complete, unfettered access to all of the records collected by the FBI by 2004, which it

now claims are supposedly needed to determine if such malfeasance occurred. Accordingly, their claims are barred pursuant to the six-year statute of limitations.

IV. Count XIII-Civil Conspiracy

One final point needs to be addressed. Defendants assert in footnote 2 of their *Opposition* that Count XIII alleging a civil conspiracy is a continuing tort so the statute of limitations is not applicable. That assertion is incorrect. As the V.I. Supreme Court held in *Anthony, V. Firstbank Virgin Islands,* 58 V.I. 224, 2013 WL 211707, at *3 (V.I. 2013) (emphasis added):

> Normally, the time frame for any statute of limitations begins when the cause of action accrues. Accrual takes place on the "occurrence of the essential facts that give rise to that cause of action." However, under the "continuing violations" doctrine, "'when a [claim] involves continuing or repeated conduct, **the limitations period does not begin to run until the date of the last injury or when the [wrongful] conduct ceased'.**"

However, the Supreme Court went on to further define what a plaintiff must show:

> **The plaintiff must make a threshold showing that his claim involved "'continual unlawful acts, not continual ill effects from an original violation'"** before a court will consider whether the equitable doctrine is available.

Id. (emphasis added). In this regard, Count XIII contains an opening statement in ¶185 incorporating all prior allegations. It then (at ¶186) avers a civil conspiracy (whatever that is in this context) between Plaintiff and his sons aiding and abetting each other in performing certain "wrongful acts." However, the only wrongful acts alleged in the entire Amended Complaint are in ¶¶102-114, **which all took place prior to 2006, as there was a federal monitor in place after that time.**

Thus, as these acts all took place before 2006, without any allegation that they continued, they are time barred by the applicable statute of limitations, requiring dismissal.

V. Summary

Proper dismissal of the untimely claims will save countless hours and expense. These pre-2006 monetary damage accounting and third-party claims must be excluded pursuant to the applicable statute of limitations.[15]

For the reasons set forth herein, it is respectfully submitted that the relief sought should be granted, with an order entered barring all damage claims that pre-date September 16, 2006, as being time barred pursuant to the statute of limitations applicable to these claims. By addressing this issue now, the remaining discovery in this case can be streamlined so it can proceed to trial as scheduled without further delays.

Dated: June 20, 2014

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[15] The Amended Counterclaim also fails to identify any *specific* pre-2006 "accounting" or "conversion" claims (as opposed to specificity in United's rent claim). Plaintiff has sought this information in discovery to no avail. The answer why any specific information is not forthcoming is simple—Defendants cannot detail any such claims, but are instead hoping to manufacture them in an expensive fishing expedition going through the hundreds of boxes of these same documents from the government. Of course, as Fathi Yusuf admits, he was always in control of the company's business records and accounting, so he knows he is manufacturing these offsets.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2014, I served a copy of the foregoing Reply by email, as agreed by the parties, on:

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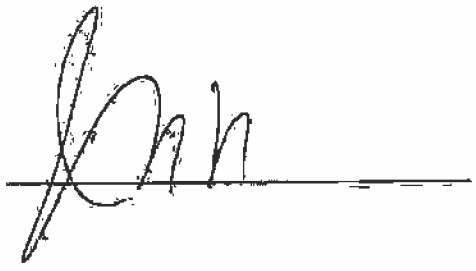

Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership Act

Enactments Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

Text of Act and Comments

http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf at § 405 (pp. 72-73)

SECTION 405. ACTIONS BY PARTNERSHIP AND PARTNERS.

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

(1) enforce the partner's rights under the partnership agreement;

(2) enforce the partner's rights under this [Act], including:

(i) the partner's rights under Sections 401, 403, or 404;

(ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 701 or enforce any other right under [Article] 6 or 7; or

(iii) the partner's right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under [Article] 8; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) 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 law.

Comment

1. Section 405(a) is new and reflects the entity theory of partnership. It provides that the partnership itself may maintain an action against a partner for any breach of the partnership agreement or for the violation of any duty owed to the partnership, such as a breach of fiduciary duty.

EXHIBIT B

Rainberg No. 5208

2. Section 405(b) is the successor to UPA Section 22, but with significant changes. At common law, an accounting was generally not available before dissolution. That was modified by UPA Section 22 which specifies certain circumstances in which an accounting action is available without requiring a partner to dissolve the partnership. Section 405(b) goes far beyond the UPA rule. It provides that, during the term of the partnership, partners may maintain a variety of legal or equitable actions, including an action for an accounting, as well as a final action for an accounting upon dissolution and winding up. It reflects a new policy choice that partners should have access to the courts during the term of the partnership to resolve claims against the partnership and the other partners, leaving broad judicial discretion to fashion appropriate remedies.

Under RUPA, an accounting is not a prerequisite to the availability of the other remedies a partner may have against the partnership or the other partners. That change reflects the increased willingness courts have shown to grant relief without the requirement of an accounting, in derogation of the so-called "exclusivity rule." *See, e.g., Farney v. Hauser*, 109 Kan. 75, 79, 198 Pac. 178, 180 (1921) ("[For] all practical purposes a partnership may be considered as a business entity"); *Auld v. Estridge*, 86 Misc. 2d 895, 901, 382 N.Y.S.2d 897, 901 (1976) ("No purpose of justice is served by delaying the resolution here on empty procedural grounds").

Under subsection (b), a partner may bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business. That eliminates the present procedural barriers to suits between partners filed independently of an accounting action. In addition to a formal account, the court may grant any other appropriate legal or equitable remedy. Since general partners are not passive investors like limited partners, RUPA does not authorize derivative actions, as does RULPA Section 1001. Subsection (b)(3) makes it clear that a partner may recover against the partnership and the other partners for personal injuries or damage to the property of the partner caused by another partner. *See, e.g., Duffy v. Piazza Construction Co.*, 815 P.2d 267 (Wash. App. 1991); *Smith v. Hensley*, 354 S.W.2d 744 (Ky. App.). One partner's negligence is not imputed to bar another partner's action. *See, e.g., Reeves v. Harmon*, 475 P.2d 400 (Okla. 1970); *Eagle Star Ins. Co. v. Bean*, 134 F.2d 755 (9th Cir. 1943) (fire insurance company not subrogated to claim against partners who negligently caused fire that damaged partnership property).

3. Generally, partners may limit or contract away their Section 405 remedies. They may not, however, eliminate entirely the remedies for breach of those duties that are mandatory under Section 103(b). See Comment 1 to Section 103.

4. Section 405(c) replaces UPA Section 43 and provides that other (i.e., non-partnership) law governs the accrual of a cause of action for which subsection (b) provides a remedy. The statute of limitations on such claims is also governed by other law, and claims barred by a statute of limitations are not revived by reason

of the partner's right to an accounting upon dissolution, as they were under the UPA. The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them. Because an accounting is an equitable proceeding, it may also be barred by laches where there is an undue delay in bringing the action. Under general law, the limitations periods may be tolled by a partner's fraud.

5. UPA Section 39 grants ancillary remedies to a person who rescinds his participation in a partnership because it was fraudulently induced, including the right to a lien on surplus partnership property for the amount of that person's interest in the partnership. RUPA has no counterpart provision to UPA Section 39, and leaves it to the general law of rescission to determine the rights of a person fraudulently induced to invest in a partnership. See Section 104(a).