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' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING RENT

Defendants submit this reply brief in support of their motion for partial summary judgment regarding unpaid rent. The reply will first address arguments made by Hamed regarding Yusuf's accounting claim and then turn to the arguments regarding United's rent claim.

I. The Accounting Claims Necessarily Embrace the Past Due Rent Claims.

A. Hamed's Reading of RUPA Section 75(c) Contravenes its Plain Language.

Hamed argues that this Court is not required to perform a Banks[1] analysis because such an analysis "needs to be done to determine the common law, not the law when there is a V.I. statute directly on point." Opposition at 16. In making this argument, Hamed simply avoids any

[1] Banks v. International Rental and Leasing Company, 55 V.I. 967 (V.I. 2011).

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discussion of the statutory language in RUPA section 75(c), which unequivocally authorizes the bringing by one partner against another of legal or equitable claims (including, specifically an accounting claim), but expressly provides that RUPA does not set forth any accrual rules or limitation periods for any such claim, and instead defers to local common or statutory law to provide those accrual rules and limitation periods. Because this RUPA section specifically defers to other local law regarding when any claim accrues, it is not accurate to say, as Hamed does, that "there is a V.I. statute [meaning RUPA] directly on point" regarding when an accounting claim accrues, and hence no need for this Court to perform a Banks analysis. Opposition at 16, n.16. Defendants' initial brief in support of this motion identified 29 jurisdictions that, before the promulgation of the first Uniform Partnership Act in 1914, adopted the common law rule that a partnership accounting claim accrues upon dissolution or wind-up of the partnership. Since these 29 cases precede adoption of the first Uniform Partnership Act, Hamed is also mistaken in suggesting that these common law cases are based on a "different, explicitly changed statute." Opposition at 16. They clearly cannot be based on the original Uniform Partnership Act because they were decided before that Act was even drafted.

Hamed continues to rely on the commentary to section 405 of the official draft of RUPA, which states that the right to an accounting upon dissolution does not revive a claim that would otherwise be barred by a statute of limitations. Hamed does not respond to the argument that the reference to a statute of limitations in this commentary can only mean a Virgin Islands statutory or common law rule regarding either the accrual of a claim or the period of the statute of limitations. Assuming this commentary should even be considered,[2] what it must mean, in light

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[2]It is well-settled that a Court should look to legislative history only when necessary to construe an ambiguous statute. See, e.g., Percival v. People, 2014 V.I. Supreme LEXIS 39, *11 (V.I. 2014) (court must first find statute to

of the statutory disavowal of any attempt to create any limitations and accrual rules, is that if other Virgin Islands common or statutory law provides that a partnership accounting claim accrues at a time earlier than dissolution, then waiting until dissolution to bring such a claim would not revive a claim that is time-barred.

The Minnesota Court of Appeals construed the (identical) counterpart to section 75(c) in its own RUPA in Smith v. Graner, 2010 Minn. App. Unp. LEXIS 717 (Minn. App. 2010) just as Defendants do. Significantly, Hamed tries to distinguish this case in his June 20, 2014 reply brief in this case, which he incorporates by reference and attached as Exhibit A construed to his Opposition (the "Reply Brief"), not on the grounds that the Minnesota Court erred in looking to the pre-1914 common law of that state to determine when a claim for a partnership accounting accrues. Instead, Hamed argued that Graner is distinguishable because it relied on a "decidedly non-uniform 1889 Minnesota common law case . . ." for the proposition that a cause of action for an accounting accrues on dissolution of the partnership. Reply Brief, p. 7, n.4. But as Defendants' initial brief made clear, that 1889 Minnesota Supreme Court case, Broderick v. Beaupre, 42 N.W. 83 (1889), is hardly "non-uniform." Rather, it follows the common law accrual rule that was adopted in 28 other states prior to 1914, and is cited for that proposition in the A.L.R. article referenced in both parties' briefs.

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be ambiguous before it "proceeds to examine the legislative history of a statute"). Here, the language of section 75(c) is not ambiguous, because by its plain terms it authorizes one partner to bring "legal or equitable claims," including "accounting" claims, against "another partner," and then requires a court to look to territorial law outside of RUPA to determine the accrual rules for any such claims. And even if section 75(c) were ambiguous on this point, as explained in Defendants' initial brief (at p. 20, n.13), none of the drafters' comments relied upon by Hamed was adopted by the Virgin Islands legislature when it enacted RUPA, and the comments do not appear in the Virgin Islands Code. As such, they cannot be regarded as legislative history that could aid in the construction of any supposed ambiguity in section 75(c). See Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 837 N.W. 2d 244, 254 (Mich. 2013) (holding that the official comments to the UCC "do not have the force of law," and reversing lower court for relying on them to alter the "plain language of the statute in question"). The official comments to the UCC, like the official comments to RUPA, are prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. See id. at 249, n. 10. Hamed does not respond to either of these arguments in his Opposition.

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Unlike Minnesota and 28 other states, there are no cases in the Virgin Islands that address the common law rule regarding an accrual of an accounting action, thus necessitating a Banks analysis. The majority rule, and apparently the universal rule at common law was that an action for a partnership accounting accrues upon dissolution, which means that the action for an accounting may examine the entire history of the partnership for purposes of reconciling partnership accounts (and may examine any tort or contract claims in that period). This is the soundest rule, because it discourages the bringing of lawsuits between partners during the existence of a partnership, and in that way promotes the stability of partnerships as business enterprises. Forcing one partner to sue another partner any time there is a breach of a contractual commitment, or risk losing that claim, would inevitably result in the termination of many partnerships. Few partnerships would be able to withstand the stresses and conflict that would attend the filing of a lawsuit by one partner against another.

As explained in Defendants' initial brief, Washington is another RUPA jurisdiction that continues to follow the rule that an accounting claim accrues upon dissolution. In Laue v. Estate of Elder, 25 P.3d 1032 (Wash. App. 2001) one partner, Laue, alleged that his co-partner, Elder "owed him money" for a dissolved partnership. Id. at 703. Laue filed suit, and pled an accounting claim, under which he sought a distribution of partnership profits, and also pled separate damage claims, including claims for violations of the Washington Consumer Protection Act and for breach of a loan agreement. Because the statute of limitations for an accounting claim in Washington is 3 years, and because the plaintiff had waited for more than three years

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after dissolution to serve his lawsuit, the Washington appellate court affirmed the lower court's dismissal of that claim on statute of limitations grounds.[3]

In his Reply Brief (at pages 6-7), Hamed ignores the key holding in Laue that an accounting claim accrues on dissolution. Instead, he claims that Laue is "inapposite" because the Court in that case ruled that the accounting claim, rather than the separate money damage claims, were brought too late. This is a distinction without a difference. The acts giving rise to the Consumer Protection Act and debt claims in Laue occurred at about the same time that the partnership was dissolved by Elder's exclusion of Laue from the business. Id. at 703. And it so happens that in Washington the statute of limitations for a Consumer Protection Act claim and a contract claim – 4 years and 6 years, respectively – is longer than the 3-year statute for an accounting claim.[4] The fact that the Washington court dismissed the partner's accounting claim on limitation grounds, and relied on different grounds to dismiss the partner's other claims, does not alter the fact that Laue, like Graner, is an appellate court in a RUPA jurisdiction that continues to apply the common law rule that an accounting claim accrues upon dissolution. Defendants submit that this is the rule that should be applied by this Court, in which case all rent claims must be considered timely.

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[3]Hamed "stands by what was said" in his Reply Brief, Opposition at 15, n.13, and does not even attempt to rebut Defendants' unpackaging (at pages 19-21 of their brief) of the district court's logical flaws and miscitation of authority in Baghdady v. Baghdady, 2008 U.S. Dist. LEXIS 83505 (D. Conn. 2008), the principal case relied upon by Hamed for his construction of section 75(c).

[4]See, e.g., Criss v. Criss, 2002 Wash. App. LEXIS 2220, *17 (Wash. App. 2002) (4-year statute of limitations for Consumer Protection Act claims); Newmark Limited Partnership v. Oles, Morrison & Rinker, 2002 Wash. App. LEXIS 671, *2 (Wash. App. 2002) (6-year breach of contract statute of limitations).

B. Even if Hamed's Limitations Defense Was Otherwise Valid, the Savings Clause in RUPA Would Preserve the January 1, 1994 to May 1, 1998 Rent Claims.

Even assuming arguendo that Hamed were right about the operation of section 75(c) of the V.I. RUPA, the savings clause in section 274 of RUPA would preserve a portion of the rent claim. Section 274, which is entitled "Savings clause," provides that "[t]his chapter does not affect an action or proceeding commenced or right accrued before this chapter takes effect." The "effective date" of RUPA was May 1, 1998, as shown under the heading "HISTORY" that appears in the V.I. Code, just prior to section 1 of RUPA. Thus, the savings clause provides that RUPA does not govern any right that accrued before May 1, 1998, which means that rights that accrued before that date can only be governed by the prior uniform partnership law, the Uniform Partnership Act ("UPA").

With respect to the claim for rent owed for the January 1, 1994-May 5, 2004 period, Hamed's position is that each claim for an annual rent payment accrued at the end of that year. Hamed makes this position clear in his discussion of certain statements allegedly made by Waleed Hamed in 2004, and whether they could toll the statute of limitations. He asserts that "the statute of limitations had already run as to some years (1994-1998) when these statements were allegedly made in 2004." Opposition at 10 (parentheses in original). Hamed's statement that, by 2004, the six-year statute had already run as to rent claims for 1994, 1995, 1996, 1997 and 1998, presupposes that each year's rent claim accrued at the end of the year. In other words, according to Hamed, the claim for 1994 rent accrued at the end of 1994 and thus should have been brought no later than 2000, the claim for 1995 rent accrued at the end of 1995 and should have been brought no later than 2001, and so on. If Hamed is correct that each of those rent claims for the January 1, 1994 to May 1998 period had accrued by May 1, 1998, the effective

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date of RUPA (and the date of repeal of UPA), then under the RUPA savings clause, those are "rights accrued before this chapter takes effect" and should be governed by UPA. Moreover, Hamed's Opposition and his earlier Reply Brief contends that had Yusuf's count seeking an accounting been brought when UPA was in effect, that accounting claim would have encompassed the claims for unpaid rent. (See especially Reply Brief at 3-4). Thus, under the logic of the positions taken by Hamed, at the very least the rent claim for January 1, 1994 – May 1, 1998 is preserved by RUPA's savings clause.

The purpose of a savings clause in a statute is to make a cause of action that has accrued before the effective date of a statute subject to the limitations rules in effect on the date of the accrual, and more generally to protect accrued rights from being extinguished by repeal of a statute. See Bonney v. The Upjohn Company, 243 N.W.2d 551, 553 (Mich. Ct. App. 1983) (construing similar savings clause to mean that a cause of action accruing before the effective date of the act is governed by the statute of limitations rules in effect on the date of accrual); Schultz v. Jibben, 513 N.W.2d 923, 925, n.2 (S.D. 1994) ("the specific purpose of savings clauses is to preserve preexisting rights, and on repeal of a statute a savings clause or general saving statute preserves rights and liabilities which have accrued under the act repealed"); Wieslander v. Iowa Department of Transportation, 596 N.W.2d 516 (Iowa 1999) (stating that "[t]he repeal of a statute destroys the effectiveness of the statute, and the repealed statute is never deemed to have existed," but noting that one exception to this rule is "the existence of a savings clause...limiting the effect of a repeal"); Beverly Hilton Hotel v. Workers' Compensation Appeals Board, 176 Cal. App. 4th 1597, 1608 (Cal. App. 2009) ("A savings clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost") (citations and internal marks omitted).

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Hamed acknowledges that the rule under the repealed uniform partnership act, UPA, is that any claims by one partner against another may be asserted as part of a suit for an accounting regardless of when the accounting claim is brought and regardless of whether there would be a time bar if those claims were brought separately. As such, the savings clause in RUPA would mean that the claims for rent in 1994, 1995, 1996, 1997 and part of 1998 (through May 1, 1998) are not time-barred. The annual rent claim for the primary space at the Plaza Extra-East store for those years is $386,724 (69,680 square feet multiplied by $5.55/square foot). See Exhibit 3 to Defendants' Motion, at ¶ 15. The partial year in 1998 represents 32.87% of that year (120 days divided by 365 days), and 32.87% of $386,724 is $127,116.17. The annual rent of $386,724 for the years 1994, 1995, 1996, and 1997, plus the partial year's rent of $127,116.17 comes to a total for the primary space of $1,674,012.17 that would be owed by virtue of the savings clause, assuming arguendo that Hamed's limitations defense were otherwise valid, which it is not. Adding in the unpaid rent for the smaller storage areas at the United Shopping Center (Bays 5 and 8) for that same time period brings the total amount of rent that would be owed by virtue of the savings clause to $1,877,077.25.[5]

[5]The annual Bay 5 rent is $12.00/sq. foot for a 3,125 square foot space, or $12,328.76 per year, for the four-year period May 1, 1994 to May 1, 1998, which comes to a total of $49,315.04. See Defendants' Brief at p. 12. The annual Bay 8 rent for the period May 1, 1994 to May 1, 1998 is $6.15/sq. foot for a 6,250 square foot space, for the same four-year period, or $38,437.50 per year, which comes to a total of $153,750. Hamed does not contest any of the square foot figures given for Bays 5 and 8. The sum of these two four-year rent totals is $203,065.08. While there is no effort to dispute that Bays 5 and 8 were occupied as set forth in Yusuf's declaration, in a desperate effort to create an issue of material fact out of whole cloth, Waleed Hamed asks this Court to believe that United made this space "available at no cost." See Declaration of Waleed Hamed attached as Exhibit 1 to Plaintiff's Response To Defendants' Rule 56.1 Statement of Facts and Counterstatement of Facts ("Plaintiff's Response") at ¶¶ 18-22. Defendants submit that this Court should decline this request to suspend reality.

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C. Hamed's Alternative Argument that the Rent Claim is Not Properly Part of an Accounting Claim is Meritless and Disregards Hamed's Fiduciary Duties to Yusuf.

Plaintiff also argues that even if Yusuf's accounting claim could go back to the inception of the partnership (or, more precisely to December 31, 1993, the date of the last full reconciliation of partnership accounts), the rent obligation is not properly part of an accounting because rent is not owed to Yusuf, but is instead owed to Yusuf's corporation, United. See Hamed's Opposition at 14. Hamed acknowledged that Yusuf has "a financial interest" in the claim for rent, but argues that this is an irrelevant happenstance, and that United should be treated for these purposes as if it were a third party with no connection whatever to Yusuf. See id. at 16.[6]

Hamed's argument is an elevation of form over substance. Hamed and Yusuf understood the reality that any rents paid to United would ultimately devolve to Yusuf as shareholder of United. Yusuf was thus in practical terms both a partner and a landlord. As such, one of the essential terms of the Yusuf-Hamed partnership, which they agreed upon from the start, is that the profits of the partnership were to be calculated after a deduction for rent and other expenses and then split 50-50. See Defendants' Brief at 4-5. Indeed, the fact that Yusuf was both partner and owner of the close corporation that rented land to Plaza Extra-East gives Hamed's duty to pay his 50% share of the rent a fiduciary dimension. It is axiomatic that a partner owes his co-partner a fiduciary duty, and that duty has been characterized as one of "utmost good faith, fairness, loyalty." Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (2d Cir. 1977) (quoting Crane and Bromberg, Law of Partnership, § 68 at 390). Since Hamed is benefitting as

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[6]It would be more accurate to say that the fact that Yusuf owns the land on which Plaza Extra-East is situated through a closely held corporation, rather than individually, is a happenstance that cannot alter Hamed's fiduciary duties to Yusuf.

partner from use of land owned by his co-partner's corporation, and knows that ultimately Yusuf will be injured by nonpayment of rent to United, then for Hamed to repudiate that obligation is to breach a fiduciary duty to Yusuf.

Hamed has made the existence of a partnership between him and Yusuf the centerpiece of this litigation. Having done that, and having gotten Yusuf to concede the existence of the partnership, he must accept all of the legal consequences of that relationship, and not just those that advance his monetary interests in this case. Hamed's fiduciary duties to Yusuf that flow from the existence of the partnership necessarily place restraints on Hamed's freedom of action that he would not have in a non-fiduciary context. Since Hamed agreed at the outset that partnership profits would be determined after deduction of rent, he cannot now avoid that obligation because Yusuf chose to hold his land in corporate name.

D. Alternatively, 5 V.I.C. §33, entitled "Actions on Accounts," Establishes that Any Claim on an Account is Not Time-Barred.

While the common law established a special accrual rule for accounting actions brought by one partner against another or against the partnership, there is a general Virgin Islands statute of limitations for claims on an open account under which any claims for an accounting by Yusuf (or, for that matter any claim for an accounting by United against the partnership) would likewise not be time-barred. Section 33 provides that:

> In an action to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side; but whenever a period of more than one year shall elapse between any of a series of items or demands, they are not to be deemed such an account.

Here, there is a partnership account consisting of "demands" – i.e., debits and credits made by Hamed and Yusuf -- and the annual rent accruals are just one of those demands or

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credits (there were also credits and debits arising from documented payments to both parties in the form of "receipts" for withdrawals of cash from store safes, or checks written to either party). Even focusing solely on rent, the annual rent accruals (and the agreement that each partner would be responsible for one half of the rent) are by definition not "more than one year" apart. As such, this qualifies as an open account under section 33. The last such item in the partnership account which Yusuf has proved in this summary judgment motion is rent for the period January 1, 2013 to December 31, 2013, which means under section 33 that Yusuf's cause of action for an accounting accrued on December 31, 2013 and cannot possibly be time-barred.

II. Even Assuming Arguendo that if United's Claim Cannot be Asserted by Way of an Accounting, United's Claim is Not Time-Barred.

Hamed's assertion at page 16 of his Opposition that "[i]f the landlord's claim is time-barred under the applicable statute of limitations, it is certainly not revived because a partner . . . decides to file an accounting" is wrong under the common law rule that this Court should follow as part of a Banks analysis. But even if the common law rule were otherwise, United's claim for past due rent is not time-barred for several reasons, none of which Hamed is able to refute.[7]

[7]Even though Hamed raised the statute of limitations defense in his answer to Defendants' counterclaim, and even though he has asked that this issue be resolved by a motion for summary judgment, Hamed simply asserts, without any citation to case law, that United's legal and factual contentions regarding why the statute of limitations is not a bar to this case were not properly pled in its counterclaim. Opposition at 6. Specifically, Hamed argues that United should have specifically pled in its counterclaim facts to rebut his limitations defense, including the oral agreements between Waleed Hamed and Yusuf to defer the payment of rent for 1994-2004 until the injunction in the criminal case was relaxed and the black book was returned. But a party "need not anticipate and attempt to plead around all potential defenses," and his or her complaint or counter-complaint "need not contain *any* information about defenses and may not be dismissed [on a Rule 12(b)(6) motion] for that omission." Xechem, Inc. v. Bristol-Myers, Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004). At any rate, Hamed did not file a 12(b)(6) motion on limitations grounds, and what is before the Court now are competing motions for summary judgment, each of which addresses the limitations defense. The purpose of a summary judgment motion is not to examine a complaint for supposed pleading deficiencies, but instead to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). One of several reasons the statute of limitations in inapplicable to United's rent claim is the equitable tolling doctrine, and that equitable doctrine requires review of evidence outside the pleadings. See Huynh v. Foster, 465 F.3d 992, 1004 (9th Cir. 2006). Hence, to resist a motion for summary judgment based on the statute of limitations, a party who relies on equitable tolling need only "alleg[e] acts that, taken as alleged, could persuade a court to activate the

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A. Waleed's Declaration is Not Competent to Rebut Yusuf's Testimony that Under the Partnership Agreement, Yusuf Determined the Timing of any Payment of Accrued Rent.

As discussed in Defendants' opening brief (at page 26), Yusuf's declaration and Hamed's deposition testimony established that under the partnership agreement, Yusuf was the partner charged with the responsibility of determining when accrued rent should be paid. In his declaration, Waleed attempts to create an issue of fact regarding that term of the partnership by suggesting that Yusuf did not have that responsibility. But since the uncontroverted facts are that Waleed's father, Hamed, formed the oral partnership agreement with Yusuf in the 1980's, Waleed is not competent to rebut any assertion about the terms of that partnership. In the same vein, Waleed points to the reconciliation performed, not by him, but by his brother, Mufeed, and Yusuf's son, Maher, at one store only (Plaza Extra-East) prior to the FBI raid on October 23, 2001.[8] But this was just a partial reconciliation, which tabulated Hamed and Yusuf receipts reflecting documented withdrawals from the Plaza Extra-East store, and at any rate Yusuf directed that this partial reconciliation be undertaken. Since Hamed's declaration on these points is not competent evidence, and since Yusuf determined that rent for the 1994-2004 period should be paid in 2013, after return of the black book, it follows that there is no genuine issue of material fact that the claim accrued in May 2013 when Hamed (through his counsel) repudiated it. As such, the statute of limitations defense cannot be a bar to this claim.

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doctrine of equitable tolling". Meyer v. Riegel Products Corporation, 720 F.2d 303, 308 (3d Cir. 1983). Yusuf has at the very least done that, and indeed has made a sufficient showing that the doctrine applies here, and that the limitations defense is meritless for other reasons as well.

[8]That reconciliation addressed only one of the three stores, and it did not consider all of the receipts that had been left in that one store safe by Hamed or Yusuf to reflect withdrawals of cash by either the Hameds or the Yusufs. For that reason, it was amended by Yusuf when certain additional receipts from that store's safe pertinent to that partial reconciliation were returned by the FBI. The only *full* reconciliation of partnership accounts was performed on December 31, 1993, as stated in Yusuf's declaration.

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B. Under the Part Payment Provision of 5 V.I.C. §39, the Statute Began Running Anew When Hamed Signed a Check Paying Rent Obligations that He Now Argues Are Time-Barred.

Hamed next claims that the oral agreements between Hamed and Yusuf could not extend the limitations period because of 5 V.I.C. § 39. Hamed quotes part of that section, but then uses ellipsis to leave out a critical portion:

> No acknowledgement 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. . . .

The ellipsis conceals the following caveat to this rule: "but this section shall not alter the effect of any payment of principal or interest." 5 V.I.C. § 39. Section 39 is drawn from the 1921 Territorial Codes and its language is similar to statutes in many states, especially older statutes. While there appear to be no Virgin Islands cases that construe this exception, cases in other jurisdictions with similar statutes have held that it means that any part payment of a debt that would otherwise be time-barred will cause the limitations period to run anew, even if unaccompanied by a written acknowledgement of the debt.[9]

In Renault v. L.N. Renault & Sons, Inc., 188 F.2d 317, 320 (3d Cir. 1951), the Third Circuit addressed a New Jersey statute of limitations provision which provided that a promise to

[9]Hamed also claims that while the alleged 2012 oral agreement between Hamed and Yusuf was raised in Defendants' June 6, 2014 Brief in Opposition to Hamed's Motion for Partial Summary Judgment Regarding Statute of Limitations Defense, the 2004 oral agreement to the same effect was not. See Opposition at 6, n.5. Hamed then engages in unfounded invective by suggesting that Yusuf "manufactur[ed]" the 2004 oral agreement for the purpose of rebutting arguments asserted in Hamed's Reply Brief in support of his Motion. In fact, the Declaration of Yusuf submitted with his June 6 brief clearly states, in paragraphs 3 and 4, that in 2002 or 2003, Yusuf began discussions with Waleed Hamed culminating in their agreement that 1) rent from May 2004 forward would be determined under a different formula; and 2) rent for the period ending in May 2004 could not be paid then, but would have to be paid after the Plaza Extra bank accounts were unfrozen and the black book was returned. See Exhibit A to Defendants' June 6, 2014 Brief, ¶4 ("As a result, I made a decision, and Waleed Hamed, on behalf of Mohammed Hamed, agreed, that there was no prospect for the payment of the rents owed for the 1994-2004 period."). Hamed's statement that these conversations were not addressed by Yusuf in his deposition, see Opposition at 6, n.6, is true, but irrelevant. Because Hamed's counsel chose not to ask Yusuf about his counterclaims when he took his deposition on April 2, 2014, Yusuf had no occasion to testify about those issues in that deposition.

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pay a debt barred by the statute of limitations must be in writing. Like section 39, the New Jersey statute also declared that it does not "lessen or alter the effect of any payment of principal or interest made by any person on the obligation in suit." Id. at 320 (internal quotation marks omitted). The Third Circuit explained that "[a] part payment is held to toll the statute of limitations on the theory that the law implies from partial payment a promise to pay the entire obligation." Id. at 320. See also Kadrmas, Lee & Jackson, P.C. v. Bolken, 508 N.W.2d 341, 345 (N.D. 1993) (where a part payment of a debt is "voluntary, free from uncertainty as to the identity of the debt, and...made and accepted as payment of a larger debt, under circumstances consistent with intent to pay the balance," the payment "will raise an implication of a new promise to pay the balance and set the statute of limitations running anew"); O'Malley v. Frazier, 49 P.3d 438, 444 (Kan. 2002) ("part payment of a debt is a voluntary acknowledgement which implies a new promise to pay the debt," and payment "accompanied by a statement to the person making it that he is liable for one-half of it, is sufficient acknowledgment of his liability to toll the statute as to him"). In a recent decision, Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 837 N.W.2d 244 (Mich. 2013), the Michigan Supreme Court, quoting from two much older decisions of that Court, summarized the part payment rule as follows:

> The statute does not prescribe what effect part payment of a demand shall have, but it is familiar law that it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed . . . A voluntary and unqualified payment subsequent to the bar [of the statute of limitations] is the best evidence that the debtor does not claim his legal rights, but, on the contrary, intends to waive them and to perform his moral obligation to pay the whole of the just debt.

Id. at 260-261 (bracket in original).

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Here, Hamed has admitted that in 2012, he caused the partnership to pay the sum of $5,408,006.74 for rent covering the period May 5, 2004 to December 31, 2011. See Declaration of Waleed Hamed, attached as Exhibit 1 to Plaintiff's Response, ¶ 10. Since Hamed now contends that "the statute of limitations bars all claims (including rent claims) that predate September 16, 2006," Opposition at 1, he is admitting that in 2012 he signed a check for payment of rent covering a period (May 5, 2004 to September 16, 2006) that he now regards as time-barred. Because the total rent paid for the period May 5, 2004 to December 31, 2011 period was $5,408,806.74, this means that Hamed authorized and made the payment of $1,671,862.16 to United for rent that he claims is barred by the statute of limitations.[10] In so doing, Hamed was causing the partnership to make a partial payment of the unpaid rent that had accrued since January 1, 1994. Under the part payment exception to the statute of limitations set forth in section 39, he was therefore renewing the partnership's obligation to pay all of the accrued but unpaid rent (i.e., rent for the period January 1, 1994 to May 4, 2004).

C. Alternatively, the Doctrine of Equitable Tolling Bars the Limitations Defense.

1. The Actively Misled Prong Does not Require Proof of Fraud, and is Readily Satisfied Here.

Even if Yusuf's right under the partnership agreement to determine when the rent payment should be made were a disputed issue, and even if part payment had not been made in 2012 for rent obligations that Hamed now says are time-barred, the doctrine of equitable tolling would apply, and it forecloses Hamed's limitations defense. Hamed argues that assuming he promised Yusuf in 2004 that the rent obligation for the second rent period would be paid after

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[10]This prorated amount was calculated by dividing the number of days in the allegedly time-barred period of May 5, 2004 to September 16, 2006 (864) by the number of days in the period May 5, 2004 to December 31, 2011 period (2,795), and then multiplying that figure (.3091) by $5,408,806.74.

the injunction was relaxed or lifted and the black book was returned – and then said, again, in 2012 that rent would be paid after the black book was returned – Yusuf's equitable tolling argument fails because such statements would not amount to active misleading. Of course, reassuring one's partner that a rent obligation would be paid, lulling him into doing nothing to collect it (even though he has authority under the partnership agreement to cause it to be paid at any time), and then afterwards asserting the statute of limitations as a bar to the obligation is to mislead your partner. If it has the effect of lulling or inducing the party with the claim into inaction, then under the common law that is sufficient. Contrary to Hamed's unsupported legal argument, it is not necessary that Yusuf show that Hamed engaged in fraud in the strict sense when he made his misrepresentations. See Connors v. Beth Energy Mines, Inc., 920 F.2d 205, 211 (3d Cir. 1990) (under the doctrine of equitable tolling, the "intent of the defendant" in making a statement that induced the plaintiff to do nothing to collect on his claim is "irrelevant," and that "it is the effect upon the plaintiff, not the intention of the defendant, that is pertinent") (citation and internal quotation marks omitted). See also Meyer v. Riegel Products Corporation, 720 F.2d 303, 308 (3d Cir. 1983) (rejecting argument that "only egregious acts of active deception" can toll the statute, and stating that any misrepresentation, whether "big" or "little," that has the effect of delaying action by the plaintiff, can toll the statute).

Moreover, because the partnership relation imposes on Hamed fiduciary duties to Yusuf, including duties to disclose information, the showing Yusuf must make to establish equitable tolling based on acts or omissions of Hamed is lesser than it would otherwise be. See Thorman v. America Seafoods Company, 421 F.3d 1090, 1096 (9th Cir. 2005) (holding that "passive concealment," with no fraud, is sufficient for a court to grant equitable tolling, where "defendant had a fiduciary duty to disclose information to the plaintiff"); Orbusneich Medical Co., Ltd. v.

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BVI v. Boston Scientific Corporation, 694 F.Supp. 2d 106, 115 (D. Mass. 2010) ("Where a fiduciary relationship exists, a failure to affirmatively and adequately disclose facts that would give rise to knowledge of the cause of action . . . toll[ed] the statute limitations.")

2. The FBI Affidavits Relied Upon by Hamed to Try to Defeat the Second Prong are Entitled to No Deference by this Court.

With respect to the second prong of the test for equitable tolling -- whether extraordinary circumstances prevent a party from filing a claim – Hamed dismisses what he calls the "beat-to-death claim that the FBI somehow prevented [United and Yusuf] 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." Opposition at 10. Hamed claims that he has done an "exhaustive analysis" in his Reply Brief showing that "Defendants had access to all relevant documents, as demonstrated by the relevant FBI affidavits as well as the opinion of Judge Dunston."[11] Opposition at 10-11 (citing to his Reply Brief at pp. 12-18). As Hamed would have this Court believe, the affidavits show that Defendants "had 'complete' and 'unfettered' access to all of the [FBI] records from all sources – and repeatedly and extensively exercised that access." See Hamed's Counterstatement of Facts at p. 6, ¶ 4(B). They make "clear that the criminal case did not 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)." Opposition at 11.

The so-called "exhaustive analysis" in Hamed's Reply Brief is grossly misleading and incomplete. It fails to mention that in the criminal case pending in the St. Croix division of the

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[11] Hamed recently filed a notice of supplemental authority attaching a September 2, 2014 decision of the Honorable Michael C. Dunston that dismisses United's remaining claims in the case on a motion for summary judgment. For the reasons discussed in more detailed below, a motion for reconsideration will be filed in that case, as it is clear that Judge Dunston was unaware that those affidavits were flatly contradicted by Waheed Hamed's own briefs filed in the criminal case, and was unaware that the Honorable Raymond L. Finch necessarily rejected those affidavits in issuing an order, which recognized that full access had not been given.

District Court, captioned United States of America v. Yusuf, et al., Criminal No. 2005-015 F/B (the "Criminal Case"), all of the Yusuf and Hamed defendants took a position precisely opposite to the position Hamed is now taking in this case in a motion they filed which claimed that the denial of access to and spoliation of documents was so severe as to warrant dismissal of the case. Moreover, Judge Raymond L. Finch, who presided over the Criminal Case, necessarily rejected the FBI affidavits when he issued an order on July 16, 2009 finding that access to documents had been limited by the FBI.

A brief recitation of the procedural history surrounding the filing of the FBI affidavits is helpful to understanding that the position Hamed is taking in this case flatly contradicts the position taken by his sons, Waleed and Waheed, in the Criminal Case, as well as the ruling of the Court in that case on the document access issue. On February 5, 2009, defendants in the Criminal Case filed their Motion for Specific Relief Due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence (Dkt. No. 1038), a copy of which is attached as **Exhibit 1**. Waleed and all the other defendants in the Criminal Case – asserted in the motion that the Government allowed "only limited supervised review of the evidence," and that from "2006 . . . until November of 2008, the Government denied the Defendants access to their documents despite numerous requests." See Exhibit 1 at ¶¶ 9, 13 and 18. They sought dismissal of the case on the grounds that the Government had so limited access to and impaired the integrity of documents as to deprive defendants of due process. The Government responded to the Motion on February 24, 2009 (Dkt. No. 1067). Defendants filed their reply to the Government's response on March 17, 2009 (Dkt. No. 1076). Then, on July 8, 2009, more than 3½ months later, and the day before a hearing on the motion, the Government filed its "Response to Defendants' Motion Reply Memorandum in Support of the Motion for Specific Relief" (Dkt.

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No. 1148), which attached as exhibits the FBI affidavits.[12] On July 9, 2009, a hearing on the motion was held before the Honorable Raymond L. Finch. On July 16, Judge Finch entered an order, attached as **Exhibit 2**, which specifically found the Government had provided the Defendants only "limited" access to their documents, thereby rejecting the "unfettered access" assertions in those affidavits:[13]

> The Government never provided the Defendants with a detailed inventory of the specific documents seized. **The Government has only permitted the Defendants limited review of the evidence under supervision which often involved oversight by government agents involved in investigating this case.**
>
> * * *
>
> Without a complete set of documents for unlimited review, the defense team cannot determine the extent of harm, if any, that the Government's rearrangement of the documents has caused. Accordingly, it is hereby
>
> **ORDERED** that the Government serve upon the defense team one duplicate set of documents seized from the Defendants, as well as all discoverable documents seized from third parties; that the duplicate set correspond to the present documents arrangement; and that Defendants have 60 days from the receipt of such documents to supplement their Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence. (Emphasis supplied in part).

On August 14, 2009, the Government filed a Motion to Reconsider Judge Finch's Order (Dkt. No. 1177) claiming that the Order was clearly erroneous or manifestly unjust and that, among other things, it imposed a burden of production on the Government that would cost "no

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[12]On that same day, July 8, counsel for Waleed Hamed filed a motion to strike the Government's unauthorized brief and affidavits that were served after the close of business and on the eve of the hearing (Dkt. No. 1149). That and all of the other documents from the Criminal Case cited in this discussion may be reviewed on the District Court's ECF docketing system.

[13]Hamed did not advise this Court of Judge Finch's order in his briefs which relied on the FBI affidavits. VISCR 211.3.3(a)(2) provides: "A lawyer shall not knowingly: (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

less than $125,000" and require 3 to 4 months to satisfy. On August 20, 2009, Defendants filed their Opposition to the Motion to Reconsider (Dkt. No. 1180). On September 14, 2009, Judge Finch entered an Order denying the Government's Motion to Reconsider (Dkt. No. 1212). Not long thereafter the Government entered plea negotiations with the defendants, which resulted in a plea agreement on February 26, 2010 that effectively mooted Judge Finch's order.

The true facts regarding what the Hameds represented to the District Court about document access in the Criminal Case, and how the Judge in that case ruled on that issue, show at the very least that the FBI affidavits are entitled to no deference whatsoever by the Court. Indeed, Defendants submit this Court should find that Hamed is judicially estopped from relying upon the FBI affidavits. As the Third Circuit Court of Appeals stated in Mintze v. American General Financial Services, Inc., 434 F.3d 222 (3d Cir. 2006):

> The doctrine of judicial estoppel prevents a party from asserting inconsistent claims in different legal proceedings. Judicial estoppel is an equitable doctrine, within the Court's discretion. The doctrine was designed to prevent parties from playing fast and loose with the courts.

Id. at 232 (internal quotations and citations omitted). Three requirements must ordinarily be satisfied before a court may properly apply the doctrine of judicial estoppel:

> First, the party to be estopped must have taken positions that are *irreconcilably inconsistent.* Second, judicial estoppel is unwarranted unless the party *changed his or her position in bad faith* – i.e., with intent to play fast and loose with the Court. Finally, a district court may not employ judicial estoppel unless it is tailored to address the harm identified and *no lesser sanction would adequately remedy the damage* done by the litigant's misconduct.

Krystal Cadillac Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d 314, 319-320 (3d Cir. 2003) (internal quotation marks omitted).

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In this case, there is no question that the two positions are irreconcilably inconsistent. Secondly, Hamed's intent to play fast and loose with the Court is evidenced by his intentional failure to tell this Court that the FBI affidavits directly contradict positions taken in a motion filed by Waheed and Waleed Hamed seeking dismissal of the Criminal Case because of the Government's deprivation of access to documents -- and his equally remarkable failure to advise this Court that Judge Finch entered an order which addressed the document access issue and necessarily rejected the very assertion of "unfettered access" set forth in those affidavits. Lastly, application of judicial estoppel to preclude any reliance by Hamed on those affidavits is exactly tailored to address the harm inflicted on this Court, and no lesser sanction would adequately remedy the damage done by Hamed's misconduct.

On the basis of the examination of the motion in the Criminal Case filed by the Yusuf and Hamed defendants and Judge Finch's order, it is abundantly clear that the FBI affidavits are entitled to no deference whatsoever by this Court. Rather, Judge Finch's order compels a finding by this Court that Defendants were deprived of full access to their documents. As such, Defendants have demonstrated that the second prong of the equitable tolling test has been met.

III. The Factual Assertions in Waleed Hamed's Declaration Should Not Preclude Entry of Partial Summary Judgment in favor of Defendants.

Waleed Hamed's declaration and Hamed's Response to Defendants' Statement of Facts make a number of false or implausible factual assertions in a strained attempt to create genuine issues of material fact regarding the amounts owed for rent. First, he claims that the black book[14] contains no information regarding the first rent payment made by the partnership on

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[14]In his Opposition, Hamed asserts that the black book was altered "before being produced by Defendants in discovery, as multiple pages were 'razored out' before it was produced." Opposition at 3. His implication that Defendants altered this document and that the missing pages relate to the timing or amount of rent paid on

December 31, 1993, by virtue of a setoff. Waleed Hamed Declaration, ¶6. In fact, Exhibit A to Waleed's declaration, taken from the black book, does reference that the reconciliation was made on December 31, 1993, and this necessarily includes the payment of rent. Moreover, Hamed has admitted in deposition that this settlement of their partnership account took place at approximately this time frame. See **Exhibit 3**, Hamed Dep. Transcript, pp. 48-53. Nothing Hamed has submitted, including Waleed's declaration, effectively disputes Yusuf's declaration that he agreed with Hamed that rent would be charged at the rate of $5.55 per square foot for Bay 1 and that a reconciliation of accounts occurred on December 31, 1993. See Yusuf's declaration dated August 12, 2014 at paragraphs 1 and 4. Waleed Hamed was not a party to the partnership agreement when it was formed between his father and Yusuf, and was not a party to the December 31, 1993 reconciliation of their partnership account. He is not competent to rebut Yusuf's assertions about the terms of their agreement and to rebut Yusuf's and Hamed's sworn statements about the reconciliation.[15]

Hamed's Opposition then indulges in sheer obfuscation when he asserts that "[a]s all rent owed by [Plaza Extra-East] before 2004 was paid, United's written statement of rent due in 2012

December 31, 1993 are both incorrect. The black book was continuously kept by Waleed Hamed at the Plaza Extra-East store for a number of years, up until the time it was seized by the FBI during the raid in October 2001. It was only when the black book was returned by the FBI many years later and found in a collection of returned documents by Yusuf's son that Yusuf learned for the first time that the pages were missing. Any alterations to the book could only have been made when the book was in Waleed's or the FBI's possession.

[15]Although Hamed's Response to the Statement of Facts disputes the paragraph 4 assertion in Defendants' Statement of Facts that rent was paid in the first rent period at the annual rate of $5.55 per square foot for the 33,750 square feet of space originally occupied by Plaza Extra-East, remarkably, Waleed Hamed's declaration addressing that same paragraph does not even mention the rent prior to 1994, perhaps because Waleed is in no position to dispute an agreement reached between Yusuf and his father, who did not submit a countervailing declaration. Moreover, neither the Response nor the declaration offers what Hamed claims is the correct price per square foot charged for rent in the first rent period or the period from 1994 to 2004. Without that information, Waleed's bare denials are entitled to no deference by the Court. Thus, insofar as Hamed is making these unsupported denials regarding the rent paid in the first period to buttress his claim that there was no agreement to pay $5.55 per square foot for the second rental period (1994 to 2004), they are entitled to no weight.

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. . .did not include any amounts owed prior to 2004." Opposition at 4. In Hamed's attorney's May 22, 2013 letter to Defendants' attorney that is attached to Defendants' brief (as Exhibit C to Yusuf's August 12, 2014 declaration), he states:

> **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.

What the letter was plainly saying is that there was no agreement at all to pay rent for the 1994 to 2004 period, and that none had been paid. The letter's denial of any agreement to pay rent was contradicted by Hamed in his deposition, who unequivocally acknowledged that if any rent payments had not been made, including rent from the period January 1, 1994 to May 4, 2004, it should be paid.[16] Hamed denied knowing whether rent had or had not been paid for that period.

In response to Hamed's admission, and in contravention of the May 22 letter claiming that there was never any agreement to pay rent for the second rent period from January 1, 1994 to May 4, 2004 (and hence that none was paid for that period), Hamed has now concocted a brand new claim that in fact rent was paid for the second period. Nowhere in his May 13, 2014 initial brief and in his June 20, 2014 Reply Brief in support of his motion for partial summary judgment on the rent claim, or in his September 16, 2013 response to United's motion to withdraw rent does Hamed even imply, let alone assert, that rent was already paid for the 1994-2004 period. The entire thrust of those three briefs (and the May 22, 2013 letter) was that, while

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[16]With respect to the rent obligation for 1994 to 2004, Hamed now says that all he really meant in the testimony quoted in Defendants' brief at pages 10-11 is nothing more than the tautology that if the partnership had an obligation to pay rent, it should do so. See Opposition at 7-8. A review of his testimony, which Hamed admits has been quoted properly in his Response to Defendants' Statement of Facts, shows without doubt that Hamed acknowledged that there was an obligation to pay rent for all periods, and further acknowledged that if rent had not been paid for the 1994 to 2004 period, it should be. His only uncertainty was whether the rent had in fact been paid for that period. Yusuf's August 12, 2014 declaration exhibits no such uncertainty.

rent has not been paid for the 1994-2004 period, the claim is unenforceable by reason of the statute of limitations.

Now, for the first time, Waleed states in a sworn declaration that rent was paid for the second rent period and that it "was paid in cash (so United would not have to report it as income) whenever United needed money without having to wait on any partnership accounting." Waleed Hamed Declaration, ¶ 8. The declaration offers no other details about these supposed rent payments, including the rental rate, who calculated it, where the cash was obtained and to whom and by whom it was transferred to discharge the rent obligation, and how Waleed has knowledge of any such transactions. Not surprisingly, Hamed has not produced a single document in discovery that supports his new claim that rent for this period has been paid. Because Waleed's new assertion is inconsistent with earlier positions taken in this case, is utterly bereft of any supporting factual details, and lacks any foundation to show how Waleed knows of the supposed payment, it is entitled to such little weight that it should not be relied upon as a ground for denying summary judgment.

Even if this Court somehow gave enough credence to Waleed Hamed's declaration claiming for the first time that the 1994-2004 rent for Bay 1 has been paid -- and also that no rent is owing for Bays 5 and 8 because "United made [those bays] available at not cost" -- to create an issue of fact concerning those rent claims, it is clear beyond peradventure that Hamed has failed in his desperate attempt to create an issue of fact regarding United's entitlement to be paid for the Current Rent from January 1, 2012 to date. That rent is based on the same percentage of sales formula that led to the payment (by check signed by Waleed) of $5,408,806.74 on February 7, 2012, covering the period from May 5, 2004 to December 31, 2011. The only issue of fact that Hamed strains to create regarding payment of the post-January 1, 2012 rent is that "these

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figures are incorrect as the wrong square footage was used to make the calculation. . .." Waleed Declaration at ¶17. Of course, that assertion is groundless because the square feet of space occupied by Plaza Extra - East has absolutely no relevance to rent calculations based on the percentage of sales formula used to calculate both the $5,408,806.74 payment and the undisputed rent that has accrued since then. See the rent calculations attached to Yusuf's August 12, 2014 Declaration as Exhibits 3A and 3F, which do not in any respect depend on the square footage of Plaza Extra – East.

For all of the foregoing reasons, Defendants respectfully request this Honorable Court to enter partial summary judgment in their favor and to provide such further relief as is just and proper.

Respectfully submitted,

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Dated: September 15, 2014 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2014, I caused the foregoing **Fathi Yusuf's and United Corporation's Reply Brief in Support of Motion for Partial Summary Judgment Regarding Rent** to be served upon the following via e-mail:

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

UNITED STATES OF AMERICA, and
GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiffs,

vs.

FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf

WALEED MOHAMMAD HAMED,
aka Wally Hamed

WAHEED MOHOMMAD HAMED,
aka Willie Hamed

MAHER FATHI YUSUF,
aka Mike Yusuf

NEJEH FATHI YUSUF and

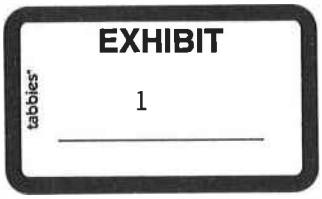
UNITED CORPORATION,
dba Plaza Extra

Defendants.

CRIMINAL NO. 2005-15F/B

DEFENDANTS' MOTION FOR SPECIFIC RELIEF DUE TO THE GOVERNMENT'S DESTRUCTION OF THE INTEGRITY, ORGANIZATION AND SOURCING OF MATERIAL EVIDENCE

THE DEFENDANTS, by and through their respective counsel, respectfully request that the Court enter an Order granting relief to the Defendants for harm caused by the government's willful and knowing destruction and alteration of the integrity, organization and sourcing of selected impeachment and exculpatory evidence. As a direct consequence of the Government's actions, the organization and control of certain material documents has been severely



compromised such that (1) Defendants can no longer establish the source and authenticity of the documents; (2) Defendants can no longer determine whether and to what extent any exculpatory or impeaching documents have been removed or destroyed; and (3) Defendants cannot trace or identify individuals who created such documents, had access to the documents, used the documents, or relied or should have relied on such documents. In short, the Government, through its knowing and deliberate actions of its Agents, has created a cloud of credibility on certain documents in this case, while those same Agents took deliberate actions to preserve and maintain the highest level of integrity and organization for documents it intended to use at trial.

THE DEFENDANTS request that the Court, in its discretion, (1) dismiss the Third Superseding Indictment in its entirety; (2) suppress all evidence seized and currently retained by the Government; (3) adopt appropriate evidentiary rulings as to the authenticity, sources, and weight of the subject documents; (4) adopt appropriate jury instructions explaining the Government's actions and detailing the appropriate factual and evidentiary inferences the jurors should make as a result of the government's actions; (5) order that the Government compensate the Defendants for all attorneys' and expert fees incurred as a result of the Government's actions; (6) order the Government to return the Defendants' documents and/or (7) grant any additional or alternative relief that the Court, in its discretion, deems appropriate.

IN SUPPORT THEREOF, the Defendants show unto the Court as follows:

I. Case Background and Chronology of the Government's Seizure and Retention of the Defendants' Property.

1. This matter is before the Court on a 78-count Third Superseding Indictment under which the Government charges Defendants with various tax-related offenses. Many of those offenses involve allegations of conspiracy and money laundering which require the Government to proffer evidence in the negative (for example, the Government seeks to

establish that the Defendants concealed information from other individuals and entities). The initial Indictment in this matter was handed down in September of 2003.

2. In coordinated raids on the six Defendants' various businesses and homes in October of 2001, the Government seized substantially all of the Defendants' business, financial and personal records. Since that date, the Government has retained hundreds of boxes of Defendants' property for use in this case.

3. In the course of its subsequent investigation and case development, the Government solicited and procured Defendants' documents from a variety of other third-party sources. Among the third parties from whom the Government solicited Defendants' documents are the Defendants' financial institutions, outside accounting firms, family members, and various foreign governments. All told, the Government procured more than five hundred banker boxes of the Defendants' documents from these and other sources. Many of the documents procured by the Government are originals.

4. The Government organized the voluminous documents and recorded their various sources by boxes numbered and bar coded to correspond with the various locations from which the Agents removed the documents. The specificity of the source description would vary, as the Government would describe sources as specific rooms or offices, file cabinets or desk drawers. The corresponding box numbers and bar codes were accompanied by a very general description of the documents contained therein. *The Government did not identify or log each specific documents seized.*

5. Since the raids of October 2001, the Government has returned some of the boxes of seized property to the Defendants, but the remaining *relevant* documents have been retained in the FBI offices in St. Thomas, USVI.

6. Upon information and belief, the Government began the process of bates numbering only certain documents within the boxes – documents it intended to use in its case in chief at trial. The bates numbering contained prefixes that were indexed to the numbers and bar codes on the boxes. However, the Government continued this project sporadically and eventually abandoned the effort due to lack of funding. Consequently, some of the Defendants' documents held by the Government are bates numbered, but a significant number are not.
7. To summarize, *all* of the documents the government intends to use at trial are bates numbered using the bar coded system and the vast number of remaining documents, likely having significant relevance to the defense, are not bates numbered.
8. The Government never provided the Defendants with a detailed inventory of the specific documents seized. Upon information and belief, such inventory does not exist. Consequently, given the large volume of records the Defendants maintained, the Defendants cannot identify the specific documents the Government seized in October of 2001.
9. The Government continues to hold Defendants' documentary evidence at the FBI offices on St. Thomas, permitting the Defendants only limited supervised review of the evidence.
10. During their initial review of the documents at the FBI offices in St. Thomas, the defense team prepared a general inventory of the groupings of documents held in the boxes, and scanned as many of the pertinent documents as possible.
11. In the seven years since the October 2001 raids, the Government has periodically returned boxes of documents to their owners that it deemed not pertinent to the subject

case. The Government identified and logged the boxes returned, and required the owners to sign a document acknowledging receipt of the documents. .

12. This protocol implies that the Government deemed the documents it chose to retain to be pertinent to the issues in the case. It also illustrates that the Government continually preserved and identified the documents by reference to the box numbers. It is in the context of such awareness that the Government Agents rearranged the documents among the boxes.

13. The defense team's last permitted visit to the FBI offices was in 2006. From that time until November of 2008, the Government denied the Defendants access to their documents despite numerous requests. In November of 2008, Government counsel agreed to allow the defense team to view the documents. The document review was scheduled for November 10, 12, 13 and 14, 2008.

II. Defense Team's Discovery of Spoliation

14. On the defense team's November 10, 2008 discovery visit to the St. Thomas FBI offices, FBI Special Agent Christine Zieba initially denied the team access to the records. According to Ms. Zieba, the defense must now submit a detailed list of specific documents they wished to view, and she would produce the specific documents for review. As the defense team would soon learn, case FBI Agent Thomas Petri and testifying IRS Agent Javier Bell traveled to the Virgin Islands from their United States Places of Duty to monitor the documents requested and observe the defense team's review of the documents.

15. Defense counsel Randall Andreozzi asked Ms. Zieba to explain why the defense team was suddenly being denied the access and ability to review and examine the Defendants' own documents in a manner that was inconsistent with the prior discovery visits.

16. Without explanation, Ms. Zieba advised that prior protocol would no longer be possible. She directed the defense team to leave and return on Wednesday, November 12, 2008, to discuss the matter with Department of Justice attorney Lori Hendrickson.

17. On November 12, 2008, the defense team returned to the FBI offices and was greeted by several Government representatives, including FBI case Agent Thomas Petri, IRS case Agent Javier Bell, and newly-assigned case Agent Christine Zieba. Department of Justice Counsel Lori Hendrickson was also in attendance. As the Court is aware, Agents Bell and Petri were involved in this case at the search warrant stage. They advised that they will also be working on the trial of the case.

18. Ms. Hendrickson explained that Agents Petri and Bell were detailed from their United States Places of Duty so that they could monitor the defense team's document review. She outlined new procedures that she would enforce for the Defendants' review of their own documents. As part of that procedure, the defense team would only be permitted to review one box at a time; only one person would be allowed to touch the documents; and the Government agents -- not defense counsel -- would decide which boxes the team would be permitted to review.

19. When the defense team demanded an explanation, Ms. Hendrickson stated that she implemented these new procedures to ensure the integrity of the documents as the Government maintained them.

20. With little alternative, the defense team agreed to proceed under this protocol so long as it proved feasible to an effective and efficient review of the documents. Defense counsel Randall Andreozzi stated, however, that the defense could not agree to allow Agents Petri and Bell, and Attorney Hendrickson, to monitor the team's review of the defendants' documents. As a compromise, the team agreed to limit the number of individuals who would review the documents at any one time. Ms. Hendrickson agreed to this stipulation.
21. The first box the Government provided for the defense team's review was FBI box number 131. Upon review of the contents of Box 131, the defense team immediately recognized that the current contents of the box did not match the general summary inventory the defense had prepared during its previous document reviews. Box 131 now contained groups of documents that were not identified in the defense's inventory of Box 131, including, *inter alia*, documents with the bates prefix 295. By reference to its summary index, the defense team confirmed that these documents were originally stored in Box 295.
22. Defense counsel Andreozzi asked Ms. Zieba why documents with bates prefixes 295 were contained in box 131.
23. It was then that Ms. Zieba informed the defense team that she had reorganized and rearranged the Defendants' documents by removing some documents from their original boxes and placing them in different boxes because the revised organization better suited her needs. She refused to explain the revised organizational method.
24. Mr. Andreozzi explained to Ms. Zieba that the FBI represented to the defense team during the initial document review sessions that the box numbers corresponded to the various sources from which the documents were seized or otherwise procured. Because

the FBI chose to bates number only some of the documents, the only way for the defense team to track the sources of the non-bates stamped documents even generally was by box number.

25. Mr. Andreozzi asked, "So if we were to look through Box 200, for example, and refer to our index, the contents of the box would not match?" Ms. Zieba confirmed that this was correct -- the documents would no longer match either the Defendants' index or the Government's original index. She explained, "I had no idea the defense relied on the order of these documents to particular boxes. I rearranged them how I was doing them and what made sense to me."

26. Mr. Andreozzi asked Ms. Zieba if, in light of this development, it would be possible to determine: (1) whether and to what extent documents were removed from the boxes; (2) whether and to what extent documents have been rearranged among the boxes; or (3) what sources the specific documents were procured from

27. Ms. Zieba refused to answer the questions. She repeated that she had no idea the defense or the FBI relied on the box numbers as the identifying factor in indexing and arranging the documents, or as a reference as to the sources of the documents. She stated that any other questions should be addressed to Attorney Hendrickson.

28. Attorney Hendrickson returned to the office with Agent Petri. Both were apprised of the issue.

29. Agent Petri at first responded by accusing the defense team of misplacing the documents in Box 131. He asserted that, during the defense team's initial review of the boxes, he and his colleagues would review the boxes after each examination to make sure that the defense team did not disturb the integrity of the FBI's organization of the documents.

Agent Petri claimed that on some occasions he found documents misplaced and had to replace them in correct order in the boxes. He stated, "This is why we have to have an agent watch you."

30. Mr. Andreozzi then posed the question: "If there was integrity to the order of the documents in their respective boxes, and Agent Zieba just informed us that she rearranged the documents and boxes, why will the FBI not provide us with the methodology for her reorganization?" Mr. Petri then turned and confronted Ms. Zieba: "You reorganized the boxes?!" At that point, Mr. Petri stated that he would not discuss the issue any further.

31. Mr. Andreozzi advised Attorney Hendrickson that, in order to evaluate the extent of the harm caused, the defense team would need to select and review specific boxes of documents, and could no longer rely on the Government's discretion in selecting the boxes for review. Attorney Hendrickson tentatively agreed to this, but asked that the group adjourn for lunch and return in the afternoon to continue its review.

32. On the afternoon of November 12, 2008, the defense team returned to the FBI offices to continue its review of boxes. The team noted the presence of Agents Bell and Petri. Ms. Zieba stated that the Agents would not observe the team's document review but would remain in the storage room where the boxes were maintained.

33. The team provided Ms. Zieba with a list of six numbered boxes to review. Ms. Zieba produced one box and two redwell folders. One redwell was labeled "161 formerly" and contained only approximately ten documents. The other was labeled "428" and contained only a few manila folders of documents. Mr. Andreozzi advised Ms. Zieba that the numbers 161 and 428 had been associated with actual boxes. He asked why she

now produced redwell folders and why one was labeled "161 formerly". Ms. Zieba would only repeat that the documents are no longer in their original order.

34. Ms. Zieba refused to produce three of the boxes requested. She stated that, pursuant to Attorney Hendrickson's instructions, "For today I will just keep pulling boxes randomly because I don't have them organized the way you have them organized."

35. The team requested access to the storage room to view the current manner in which the boxes were being maintained. Ms. Zieba refused access and directed all questions to Ms. Hendrickson.

36. Upon Ms. Hendrickson's return to the office, Mr. Andreozzi explained the afternoon's events and the defense team's concerns regarding the integrity of the documents. Ms. Hendrickson responded by stating, "What's done is done."

37. Mr. Andreozzi insisted that, in light of the circumstances, the team be allowed to review all of the boxes in numerical order to determine the extent of the harm. Ms. Hendrickson agreed, but asked that the defense team leave for the day to allow her to "prepare" the boxes for viewing. She stated that, if the team allowed the prosecution team to start working now, they could have the first fifty or so boxes "ready" for review by the next morning.

38. Mr. Andreozzi again expressed concern, and asked what Ms. Hendrickson meant by "prepare" the documents for review. Ms. Hendrickson refused to answer the question and asked again that the team leave for the day.

39. The next morning, November 13, 2008, Ms. Hendrickson advised Mr. Andreozzi that she had occasion to work with and review the documents until 8 p.m. the prior evening. She confirmed that the FBI Agents did in fact reorganize and remove documents from the

boxes since the defense team's last review of the documents. Ms. Hendrickson explained that, as best she can determine, the following occurred:

a. The Special Agents removed the documents *they intended to use at trial* and placed them in trial binders. They used the originals, and no copies were replaced in the original boxes.

b. The Special Agents returned some documents to the Defendants at various points in time. Ms. Hendrickson claims that some items and documents returned were pulled from boxes and returned to the defendants (rather than entire boxes being returned intact), but she cannot identify the specific items or documents returned.

c. As for the boxes of documents that the FBI retained and did not place into exhibit folders for trial, the Agents removed and reorganized the documents contained in those boxes in various ways, *without employing any method to track the original source of the documents.* For example, the Agents may have grouped all bank statements together so that they no longer maintained the statements in the original boxes based on their sources. As a result, neither the source nor the authenticity of the various documents can be determined. Nor can one determine whether or to what extent documents may have been removed from the boxes.

40. Ms. Hendrickson explained this was the best she could do under the circumstances, and repeated that, "What's done is done."

41. Thus, the Government knowingly and willfully reorganized the documents, but did so only after it meticulously identified and preserved the integrity and chain of custody of the specific documents they intend to rely on at trial.

42. The defense team continued to review the boxes in numerical order during the time remaining on November 13, and 14, 2008, to determine the extent of the damage caused by the Government's actions. Of the boxes the team was able to review during that time, the team continued to discover misplaced and missing documents.

43. The defense team returned to the FBI offices on January 26, 2009 and continued its document review through January 29, 2009. Agents Petri and Bell returned to St. Thomas from their United States Places of Duty to monitor the review with Agent Zieba.

44. Attorney Hendrickson was not present. In a telephone conversation with Randall Andreozzi, Mr. Andreozzi advised Ms. Hendrickson that the defense planned to continue to review the boxes in numerical order from where it left off in November. He asked Ms. Hendrickson whether the Government Agents had reorganized the documents since the defense team's last review. Ms. Hendrickson informed Mr. Andreozzi that the Government had not reorganized the documents since the defense team last reviewed them in November 2008. She refused to comment on whether the Agents did anything to affect the integrity of the boxes of documents the defense team had yet to review.

45. At various points during the course of the document review, Mr. Petri informed the defense team that they were misinformed if they believed the documents seized and maintained by the government belonged to the defendants. Mr. Petri stated that the documents belonged to the Government, and that he would do with them as he pleased. He informed the team that he and other Agents rearranged and removed documents from the boxes and that the Agents were within their rights to do so.

46. Mr. Petri also stated that he selected certain documents in the various boxes to be bates stamped based on whether the Government intended to use them at trial. This is how he determined which documents got bates stamped and which did not.

47. Mr. Andreozzi asked Mr. Petri whether he would return the documents that the Government did not intend to use at trial. Mr. Petri refused, stating that the remaining documents were nonetheless relevant to the case.

48. The team concluded its review of the integrity of the boxes on January 29, 2009, and continued to find that some boxes were entirely missing, some boxes were re-numbered, and numerous documents (most non-bates stamped) identified in the defense team's initial inventory were now missing from the boxes. The team also observed that several boxes now bore numbers that the Government previously identified as having been returned to the Defendants in 2006.

III. Consequences of the Government's Actions

49. The Government seized and then held the Defendants' documents for seven years. Before shuffling and rearranging the documents it held, the Government prepared its case for trial. The FBI Agents bates stamped the documents the Government intended to use to support its case. They carefully and meticulously removed each and every document the prosecutors identified for use at trial, encased each document in a plastic binding, organized it in an evidentiary file, and identified its source by inserting FBI evidence return documents as placeholders for the original documents in the source Exhibit boxes. Through this process, the Government endeavored to ensure the integrity, sourcing and authenticity of the documents, thereby protecting its ability to establish the admissibility and probative value of each document it intends to use at trial to support its case.

50. With respect to the remaining documents, instead of returning them to the Defendants, the Government kept them and willfully proceeded to reorganize and shuffle them. Because most of these documents are not bates stamped, they cannot be returned to their original boxes.

51. The Government could have returned these documents to the Defendants. In fact, the Government has returned some boxes of documents to the Defendants, presumably on the presumption that such documents were not pertinent to the case. Yet, the Government has affirmatively elected to retain the remaining documents and then to shuffle and reorganize them.

52. The Defendants and the Court may never know all of the documents that may have been lost or destroyed by the Government's conduct. However, some aspects of the harm caused can be articulated and evaluated with some specificity:

    a. The defense can no longer establish or contest the authenticity of the non-bates stamped documents.

    b. The defense can no longer establish or contest the source of the non-bates stamped documents.

    c. The Defendants have been completely deprived of their ability to cross-examine the government's witnesses at trial with respect to any of the non-bates stamped documents, thus seriously impairing their Sixth Amendment rights.

    d. Defendants can no longer establish or contest whether any particular individual had access to a particular non-bates stamped document, challenge a witnesses' knowledge of the contents of or existence of a particular document, or question their reliance on a particular documents. The resulting harm is infinite.

e. The Defendants can no longer establish or contest whether all documents pertinent to this case are accounted for. Therefore, admission of any single item of evidence may violate the rule of completeness.

f. Defendants can no longer determine whether certain documents may have been procured by the Government solely through improper means (*see,* for example, Defendants' motion regarding foreign bank records) or whether such documents may have been procured from other proper sources or means. Further, now that the source of the documents is undeterminable, the Defendants may lose the ability to invoke the protection of the attorney-client privilege with respect to privileged communications seized from their offices.

53. These issues represent only some of the potential harm caused by the Government's actions.

IV. Argument and Grounds for Relief

54. The events recited above illustrate that the Government intentionally seized possession of the Defendants' property and painstakingly preserved the integrity of select portions of that property that it intended to use at trial to support its case. Instead of returning the rest of the Defendants' property to them, it kept it, and then knowingly and willfully manipulated the organization of those documents. In this manner, the Government irreparably compromised the integrity of documents it knew to be relevant to the case but not favorable to its case in chief. Since most of these documents are not bates stamped, the damage caused by the Government cannot be remedied by any reasonably available means.

55. These actions are simply a continuation of the consistent and methodical bad faith exhibited by the Government throughout this case as illustrated to the Court in the various pending and resolved motions, all of which the Defendants incorporate herein by reference.

56. Government counsel and Agents acknowledge what has occurred, and respond only with the statement, "What's done is done."

57. As enumerated herein, the Government's actions severely impair the Defendants' ability to defend against the Indictment, thereby depriving the Defendants of their Constitutional right to due process of law.

58. In *United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257 (1997), the Court of Claims stressed the importance of preserving the integrity of documentary evidence:

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings – erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures – and our civil justice system suffers.... To guard against this, each party in litigation is solemnly bound to preserve potentially relevant evidence.

59. In criminal matters, the Government has a duty under the Due Process clause to preserve exculpatory evidence the admissibility and probative value of which cannot be replicated by other reasonably available means. *California v. Trombetta*, 467 U.S. 479 (1984)). If the Government, in bad faith, fails in this regard, it has violated the Defendant's constitutional due process rights. *Arizona v. Youngblood*, 488 U.S. 51 (1988). *See also*

Griffin v. Spratt, 969 F.2d 16 (3d Cir. 1992); *accord Brady v. Maryland*, 373 U.S. 83 (1963).

60. In civil cases, an independent duty to preserve evidence arises when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded. *See Joe Hand Promotions v. Sports Page Café*, 940 F. Supp. 102, 104 n13 (D.N.J. 1996); *see also Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D.Pa. 1994). It is well recognized that tax evasion cases are inherently civil in nature. The prosecution must prove willful violation of the civil statute before a defendant can be held criminally liable for tax evasion. *See Sansone v. United States* 380 U.S. 343 (1965). Consequently, the Government in such a case has the duty to follow *both the civil and criminal* standards of evidence preservation.

61. Federal courts have recognized that a constitutional mandate against suppression of evidence imposes a duty upon prosecutors to instruct agencies to *preserve* evidence. See, e.g., *United States v. Henriquez*, 731 F.2d 131, 137-38 (2d Cir. 1984):

> The government has long been on notice of its duty to preserve discoverable evidence and has been repeatedly warned of the jeopardy in which it places its prosecutions when it disregards this obligation.... Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the Government "can bear the heavy burden of demonstrating that no prejudice resulted to the defendant."

(citing and quoting, *inter alia, United States v. Grammatikos*, 633 F.2d 1013, 1019 (2d Cir. 1980)

62. In *United States v. Yevakpor*, 419 F. Supp. 2d 242 (N.D.N.Y. 2006), the District Court for the Northern District of New York held the Government's destruction of evidence must

be remedied by the exclusion of the evidence, and subsequently dismissed the case. The Court admonished the prosecutor for failing to meet its affirmative duty to preserve evidence.

63. The Government's duty "covers not only exculpatory material, but also information that could be used to impeach a key government witness." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (citing *Giglio v. United States*, 405 U.S. 150, 154, (1972)).

64. In the instant case, the Government seized the exculpatory evidence from the Defendants' possession. In doing so, the Government took on a duty to preserve the evidence in its custody. The question of whether shuffling and removing documents from the boxes would prejudice the Defendants was not within the Government's authority to evaluate. The seizure warrants merely gave the Government authority to retain temporary possession of the evidence. It surely did not shift title and did not authorize the destruction of the organization, integrity and sourcing of the evidence.

65. At a minimum the Government has a duty to follow its own procedures for preserving evidence. *C.f. California v. Trombetta*, 467 U.S. 479 (1984)) (holding no bad faith where the Government's actions were in accord with its normal practice and procedures). Such is not the case here.

66. The Internal Revenue Service's Criminal Investigation Manual sets forth the following procedure to employ in implementing search warrants:

I.R.M. 9.4.9.3.6 Post Operation Search Warrant Procedures

1. Following the execution of the search warrant, the special agent, pursuant to Fed. R. Crim. P. R 41, will return the search warrant, with an inventory of the items seized, to the issuing magistrate. This return must be done within 10-days of executing the search warrant.
2. The special agent (team leader) will also prepare the Post Enforcement Operation Summary Form, (Exhibit 9.4.9-3), for each search warrant

site, as soon as possible. This form is mandatory for all CI search warrants, not just tax, or tax-related search warrants.

3. Criminal Tax Counsel will be provided with a copy of the inventory to conduct a post search warrant inventory review for all search warrants obtained in Title 26 and tax-related Title 18 investigations. Criminal Tax Counsel will not conduct an inventory review for search warrants obtained in pure money laundering investigations.
4. A copy of the inventory will be given to the local AFC to ensure that required items are identified and properly inventoried on the Asset Forfeiture Tracking and Retrieval System (AFTRAK).

I.R.M. 9.4.9.3.6.1 Preserving the Chain of Custody

1. In order to preserve, in its original condition, all evidentiary material that may be offered into evidence, seized material such as records, recordings, videotapes, document, and other physical objects should be tracked so the custody and control of the evidence can be documented at all times....

67. The referenced Manual provisions admonish Special Agents to maintain the chain of custody and integrity of documents procured via search warrants. Agency policy mandates that Agents return seized items *as quickly as possible* and secure receipts for all returned items.

68. In the context of explaining the protocol for the defense team's review of the documents, the FBI Agents and prosecutor Hendrickson expressed their understanding of the importance of maintaining the organizational integrity of the documents seized.

69. The Agents never compiled an inventory of the specific items and documents seized in the October 2001 raid. Instead, they merely summarized documents they arranged in the various numbered boxes. They then destroyed the integrity of even this system by shuffling and rearranging documents.

70. Rather than promptly copying and returning the documents to the rightful owners, the Government deliberately held the property *for more than seven years*. It should have

returned the documents to the rightful owners as mandated by its internal protocol, but chose not to. It elected to retain the documents, and then proceeded to shuffle and rearrange them so as to destroy their integrity, organization and sourcing.

71. The Government Agents and Counsel selectively followed this protocol when it suited their purpose, and ignored it when it did not. This demonstrates the government knowingly and deliberately violated its duty to preserve the subject evidence

72. *During the November document review, the Government presented the boxes of documents to the defense team without revealing that the FBI Agents rearranged them. The FBI Agent did not reveal that she rearranged the documents until the team recognized the fact and confronted her with regard to the issue. Thus, had the defense team not discovered the problem, the Government would have led the defense to believe that the documents were never rearranged among the boxes. Since the box numbers tie to the source of the documents, the government would have misled the Defendants and the Court as to the sources of the rearranged documents. This is crucial since many of the government's allegations in this case involve concealment of information on the part of the Defendants.*

73. Specifically, the Government charges Defendants with conspiracy, money laundering, and mail fraud based on allegations that they deliberately concealed alleged financial activity and transactions from others. Notwithstanding any other harms, the Government's conduct now prevents the Defendants from effectively establishing the source of documents, the individuals who may have had access to them, and whether any such "concealment" ever occurred.

74. FBI Agents Zieba and Petri concede that they deliberately destroyed the organization of the seized documents because they were not ordered in a way that suited *their* needs. .Regardless of the Agents' purported motivation, sanctions are appropriate since the actions prejudiced the Defendants.

75. The source and authenticity of the particular documents are critical to defense of the case. Consequently, the Defendants are prejudiced by the Agents' deliberate actions. Accordingly, sanctions are warranted. *Accord Kronish v. United States*, 150 F3d 112, 126 (2d Cir. 1998); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favorite maxim of the law, *omina presumuntor contra spoliatorem.*'").

76. The appropriateness and extent of sanctions depends upon a case-by-case assessment of (1) the Government's culpability for the loss, (2) a realistic appraisal of its significance when viewed in light of its nature, (3) its bearing upon critical issues in the case, and (4) the strength of the Government's untainted proof. *United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980). The Second Circuit is not alone in applying a balancing test to determine appropriate sanctions. *See United States v. Doty*, 714 F.2d 761, 764 (8th Cir. 1983); *United States v. Baca*, 687 F.2d 1356, 1359 (10th Cir. 1982); *United States v. Traylor*, 656 F.2d 1326, 1334 (9th Cir. 1981); *United States v. Picariello*, 568 F.2d 222, 227 (1st Cir. 1978); *Lovern v. United States*, 689 F. Supp. 569, 585 (E.D.Va. 1988); *United States v. Beall*, 581 F.Supp. 1457, 1467 (D.Md. 1984).

77. Sanctions can range from exclusion or suppression of the subject matter, granting a new trial, or dismissal of the indictment or the direction of a judgment or acquittal. *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975). In *California v. Trombetta*,

467 U.S. 479, 487 (1984), the Court wrote, "But when evidence has been destroyed in violation of the Constitution, the Court must choose between barring further prosecution or suppress[ion]."

78. In *United States v. Heath*, 147 F.Supp. 877 (D. Haw. 1957), the defendant was indicted on charges of tax evasion. Defendant filed two motions requesting that he be allowed to inspect documentary evidence he had turned over to the Internal Revenue Service. While in the hands of the Internal Revenue Service, the documentary evidence had been lost or destroyed. In light of the fact that the documents were necessary to defend the case, the court granted defendant's motion to dismiss the indictment on due process grounds.

79. Considering the nature of the instant case and the vast number of documents at issue, the materiality of those documents is obvious. The Government infringes upon Defendants' due process rights through its willful failure to preserve or return those documents. Accordingly, severe sanctions are warranted.

WHEREFORE, Defendants respectfully request that the Court in its discretion:

(1) Dismiss the Third Superseding Indictment in its entirety;

(2) Suppress all evidence seized and currently retained by the Government;

(3) Adopt appropriate evidentiary rulings as to the authenticity, sources, and weight of the subject documents;

(4) Adopt appropriate curative jury instructions explaining the government's actions and detailing the appropriate factual and evidentiary inferences the jurors should make as a result of the government's actions;

(5) Order that the Government compensate the Defendants for all attorneys' and expert fees incurred as a result of the Government's actions;

(6) Order the government to return the Defendants' documents and/or

(7) Grant any additional or alternative relief that the Court, in its discretion, deems appropriate.

DATED: February 5, 2009

Respectfully submitted,

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

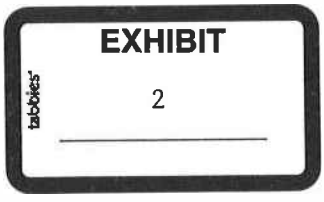
UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	)	CRIM NO. 2005-0015

ORDER

THIS MATTER comes before the Court on Defendants' Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence. A hearing was held on such motion on July 9, 2009.

In raids on the six Defendants' various businesses and homes in October of 2001, the Government seized Defendants' business, financial and personal records. Since that date, the Government has retained hundreds of boxes of such records for its use in this case. The Government also obtained additional documents from third-party sources.

The Government organized the voluminous documents and recorded their various sources by boxes numbered and bar coded to correspond with the various locations from which the Government had removed the documents. Rather than identify or log each specific document seized, the Government prepared an index with a general description of the documents contained



in each box.

Since 2001, the Government has returned some of the boxes of seized document. The remaining documents have been retained in the FBI offices in St. Thomas, Virgin Islands.

The Government used a bates numbering system for certain documents within certain boxes. The bates numbering contained prefixes that were indexed to the numbers and bar codes on the boxes. Many of Defendants' documents were not given bates number. However, all of the documents the Government intends to use at trial do have bates numbers.

The Government never provided the Defendants with a detailed inventory of the specific documents seized. The Government has only permitted the Defendants limited review of the evidence under supervision which often involves oversight by Government agents involved in investigating this case.

Several years ago the defense team prepared a general inventory of the groupings of documents and scanned pertinent documents. During their November 2008 document review, the defense team realized that the documents were not in the same order that they had been initially. The Government had reorganized and rearranged the Defendants' documents by removing some documents from the initial original boxes and placing them in different boxes to suit the Government's needs.

The new system of organization is not apparent to the Defendants. The Government has not provided Defendants with any means of tracing the unnumbered documents to the locations from which they were seized within their businesses and homes.

Without a complete set of documents for their unlimited review, the defense team cannot determine the extent of harm. if any, that the Government's rearrangement of the documents has

caused. Accordingly, it is hereby

ORDERED that the Government serve upon the defense team one duplicate set of documents seized from the Defendants, as well as all discoverable documents seized from third parties; that the duplicate set correspond to the present document arrangement; and that Defendants have 60 days from the receipt of such documents to supplement their Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence.

ENTER:

DATE: July 16, 2009

/s/
RAYMOND L. FINCH
SENIOR DISTRICT JUDGE

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

MOHAMMED HAMED by His Authorized Agent WALEED HAMED,	)	
Plaintiff/Counterclaim Defendant,	)	
vs.	)	Case No. SX-12-CV-370
	)	Volume 2
FATHI YUSUF and UNITED CORPORATION,	)	
Defendants/Counterclaimants,	)	
vs.	)	
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,	)	
Additional Counterclaim Defendants.	)	

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.
2132 Company Street, Suite 3
Christiansted, St. Croix U.S.V.I.
(340) 773-8161

EXHIBIT
tabbies
3

MR. HARTMANN: Object. Asked and answered. Argumentative.

A. Supposed to.

Q. (Mr. Hodges) Okay. Have you seen all the receipts that have been issued by members of your family and the Yusuf family over the years since 1986?

MR. HARTMANN: Object. Asked and answered.

THE INTERPRETER: No.

THE WITNESS: I don't see all what they ask for.

Q. (Mr. Hodges) Okay. So would it be fair to say, then, that periodically you -- your family, or you and Mr. Yusuf, would settle up and make sure everything was even?

THE INTERPRETER: Not once.

A. Open the book and talked with him, so Mr. Yusuf would know how much we --

MR. HARTMANN: In Arabic.

THE INTERPRETER: Not once did I -- did I approach Mr. Yusuf to -- to -- we have never sat to settle any accounts.

Q. (Mr. Hodges) Okay.

A. From the time we opened, until now.

Q. Not one time did, I believe you're testifying, not one time between 1986 and today, did you and Mr. Yusuf agree

that everything had been 50/50 split and you were even?

MR. HARTMANN: Object, mischaracterizes the testimony. Object, asked and answered.

THE INTERPRETER: Do me a favor and repeat the question, please.

Q. (Mr. Hodges) Not one time between 1986 and today did you or Mr. Yusuf agree that you were 50/50 split, and everything was even?

THE INTERPRETER: No.

A. (Speaking in Arabic.) He asked me --

MR. HARTMANN: Can we have an off-the-record one second?

THE INTERPRETER: Sorry.

MR. HARTMANN: We don't have to go off, actually.

A. (Speaking in Arabic).

THE INTERPRETER: If it's okay, I need to ask him, he said something in Arabic, "after we got burnt," and I just want clarification so I can understand the time frame.

MR. HODGES: Could we have the translation of what he just said first?

THE INTERPRETER: Sure. He said, After we got burnt, Mr. Yusuf asked me to give him an accounting of what we withdrew as a family after my daughters and sons got

married, and he said to me, I -- I purchased some olive trees, so Mr. Yusuf asked me for an accounting of those -- those withdrawals.

MR. HODGES: Okay. And you -- is that where it was left off?

THE INTERPRETER: Yes, I believe.

Q. (Mr. Hodges) So are you saying that after the store got burnt, do you remember when that was?

A. (Speaking in Arabic.) I can't remember.

THE INTERPRETER: He says, Yes, when the store was burnt, but I don't remember when.

Q. (Mr. Hodges) Okay. So I take it, then, that sometime after the store burnt, you agree that there was a settling up of accounts?

A. (Speaking in Arabic) in front of everybody. (Speaking in Arabic.) And how much, they had more.

THE INTERPRETER: Okay. Upon the settlement of the account, he showed Mr. Yusuf what his family withdrew, and Mr. Yusuf's response to him was, It -- it appears we have -- we have withdrawn more than you have as a family, so let's just -- he's -- and he's describing what Mr. Yusuf said, so let's just call it, in other words, settled. And these were his words.

Q. (Mr. Hodges) So do I understand your testimony correctly, Mr. Hamed, that you're saying that even though

Mr. Yusuf was on the short side --

THE INTERPRETER: No, it's the other way.

MR. HODGES: Oh, okay.

THE INTERPRETER: In other words --

MR. HODGES: Even though the Yusuf family had drawn less than the Hamed family --

THE INTERPRETER: I'm sorry.

MR. HARTMANN: No, no.

THE INTERPRETER: It's the other way.

MR. HODGES: Okay.

Q. (Mr. Hodges) Mr. Hamed, so I think what you're -- you're saying is that sometime after the fire in the store, you -- you came to an understanding with Mr. Yusuf that even though his family had drawn more money out of the partnership, that you were going to call it even anyway?

THE INTERPRETER: I told you, these were his words, and God's book is our witness.

A. That's what he told me.

THE INTERPRETER: That's what he says Mr. Yusuf told him.

Q. (Mr. Hodges) And did you agree to it?

A. (Speaking in Arabic). He's my brother-in-law. I trust him. And when I go home, vacation, on my vacation --

MR. HARTMANN: In Arabic.

THE INTERPRETER: He says, I -- I agreed to

it. I trusted him. I -- I -- I used to ask him to look over my sons when I would travel, if something should happen to me. Uh --

Q. (Mr. Hodges) Okay. Now, Mr. Hamed, do you, is it your testimony that you and your family never received any Plaza Extra funds that were not split 50/50?

THE INTERPRETER: There was no money other than what was in the store, and what we -- what we requested as withdrawals when we needed it.

Q. (Mr. Hodges) But what I'm -- I'm -- I'm asking you, sir, is to tell me, do you agree that it is your position that you never got any funds out of the partnership that either weren't agreed to by Mr. Yusuf or split 50/50?

MR. HARTMANN: Object as to form.

THE INTERPRETER: There was no agreement other than, when we needed money, we would make withdrawals. And when I purchased my home, I withdrew 40,000. There was a balance of 50,000 that I financed with the -- with the owner, which I paid monthly.

Q. (Mr. Hodges) But that's -- that doesn't answer my question, sir.

MR. HARTMANN: Wait, wait, wait.

Go ahead.

Q. (Mr. Hodges) The -- the question is, is it your testimony that neither you nor your family ever withdrew any