

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

NOTICE OF FILING DOCUMENTS IN THE OTHER DIVISION

I. Caption of case including proper division:

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. Fathi Yusuf, et al. - Case No. SX-12-CV-370

Consolidated with:

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. United Corporation - Case No. SX-14-CV-287

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. Fathi Yusuf Case No. SX-14-CV-278

II.

Description of Document(s):	No. of Pages	Document No. (Clerk's office only)
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Proposed Order	2	

III. Certification of mailing or delivery to each of the following:

<u>Name of Attorney</u>	<u>Type of Service</u> Faxed/Mail Hand Delivery/E-Mail	<u>Date Mailed</u>
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The Honorable Edgar D. Ross	E-Mail	August 11, 2017

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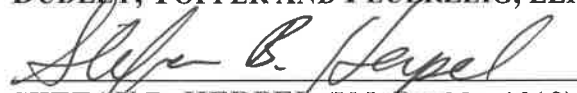
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DATED: August 11, 2017

By:

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

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)

Plaintiff/Counterclaim Defendant,)

v.)

FATHI YUSUF and **UNITED CORPORATION**,)

Defendants/Counterclaimants,)

v.)

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

Additional Counterclaim Defendants.)

CIVIL NO. SX-12-CV-370

**ACTION FOR INJUNCTIVE
RELIEF, DECLARATORY
JUDGMENT, AND
PARTNERSHIP DISSOLUTION,
WIND UP, AND ACCOUNTING**

Consolidated With

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)

Plaintiff,)

v.)

UNITED CORPORATION,)

Defendant.)

CIVIL NO. SX-14-CV-287

**ACTION FOR DAMAGES AND
DECLARATORY JUDGMENT**

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)

Plaintiff,)

v.)

FATHI YUSUF,)

Defendant.)

CIVIL NO. SX-14-CV-278

**ACTION FOR DEBT AND
CONVERSION**

**FATHI YUSUF'S MOTION TO CERTIFY QUESTIONS IN ORDER LIMITING
PERIOD OF ACCOUNTING CLAIM FOR IMMEDIATE REVIEW**

Pursuant to V.I. Code Ann. tit. 4, §33(c), Fathi Yusuf ("Yusuf") respectfully files his Motion to Certify Questions in Order Limiting Period of Accounting Claim for Immediate Review (the "Motion"). Specifically, Yusuf requests that this Court certify for appellate review

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certain issues arising from its July 21, 2017 Memorandum Opinion and Order Re: Limitations On Accounting (the “Opinion and Order”), in the event that this Court denies Yusuf’s Motion for Reconsideration of that Opinion and Order, which is being filed concurrently with this Motion.

The Court’s Opinion and Order granted partial summary judgment for Plaintiff by excluding from Yusuf’s accounting claim all transactions occurring between the date of last reconciliation, which was January 1, 1994, and September 17, 2006, which is six years before the date Plaintiff filed his Complaint. Yusuf respectfully requests that this Court certify for review the following questions relating to that Opinion and Order:

1) Whether the Superior Court erred in deciding a motion for partial summary judgment on a ground not raised by Plaintiff (i.e., laches), without giving advance notice to Yusuf that it was considering whether to grant partial judgment on that issue to Plaintiff, and without first providing an opportunity for Yusuf to brief that issue and provide affidavit evidence opposing entry of partial judgment on that ground;

2) Whether the Superior Court erred in deciding a motion for partial summary judgment after allowing and then relying in part on testimony given at the March 6 hearing, including purported expert testimony by Mr. Lawrence Shoenbach and his Opinion Letter, notwithstanding that the Court did not qualify Mr. Shoenbach as an expert witness under Virgin Islands Rule of Evidence 702, and that Mr. Shoenbach admitted he is not an expert in accounting;

3) Whether the Superior Court erred in concluding that Yusuf’s accounting claim was barred in part by the doctrine of laches, even though the Court recognized that it was brought within the statute of limitations, and even though the evidence showed no inexcusable delay by Yusuf in asserting his accounting claim, and no prejudice to Plaintiff from asserting the claim on December 23, 2013, rather than some earlier date;

4) Whether the Superior Court erred by relying on factors that, as a legal matter, have no relevance to the doctrine of laches including, but not limited to, its conclusion that BDO could not prepare a sound partnership reconciliation in this case because of: 1) the absence of evidence of gross revenues for the business of the partnership; 2) evidence that, after performing a partial reconciliation in 2001 by tabulating Hamed and Yusuf safe receipts from the Plaza Extra-East store, the receipts that had been used in the tabulation were destroyed; and 3) the Court’s conclusions about incomplete records of partnership withdrawals of partnership money;

5) Even assuming *arguendo* that the Court’s conclusion described in question 4 above is relevant to a laches analysis, whether the Court’s underlying conclusion and the findings regarding delay and prejudice were erroneous, foreclosed by the Supreme Court’s decision in *United Corp. v. Hamed*, 64 V.I. 297, 310 (V.I. 2016), and contrary

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to the evidence, including the BDO Report (and supporting documents), Mr. Yusuf's previously filed declarations in this case, and the declaration of BDO's Mr. Scherrer submitted by Yusuf as part of his Motion for Reconsideration; and

6) Whether the Court's limitation of the transactions to be reviewed by the Master as part of the accounting process to those post-dating September 17, 2006 (as opposed to those post-dating January 1, 1994, the undisputed last date of partnership reconciliation) was arbitrary and unsupported by any case law and hence improper.

Yusuf submits that the two prerequisites for certification under section 33(c) have been met. The Motion for Reconsideration, filed at the same time as this Motion and incorporated herewith, establishes why the Court's Opinion and Order as a whole – along with the six questions set forth above – involve a controlling question of law as to which, at the very least, there is substantial ground for difference of opinion.

In addition, Yusuf believes that an immediate appeal from the Order may materially advance the ultimate determination of this litigation. This Court has made clear that the next step in the Wind Up process is for discovery to commence so that additional information in support of the parties' respective partnership claims can be presented to the Master to assist him in resolving those claims. Under the Wind Up Plan adopted by this Court, after the Master makes a report and recommendation resolving claims made by each partner, this Court will review it for final determination. Allowing that entire time-consuming process to be completed on the basis of the Court's limitation of the accounting claim, to be followed afterwards by Yusuf's appeal of the Opinion and Order limiting the claim, would be exceedingly wasteful of judicial resources and the parties' resources. It would be far more economical to have the Supreme Court decide now – i.e., before discovery commences, before the Master renders a preliminary decision on the parties' claims, and before this Court reviews and make its final determination on those claims – whether Yusuf's accounting claim may look back only to September 17, 2006, or whether it may look back to January 1, 1994. Appeals of rulings certified for appeal by the Virgin Islands

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Supreme Court are handled by that Court on an expedited basis,¹ which means that these proceedings will only be interrupted for a short time by appellate review.


For all of the foregoing reasons, in the event this Honorable Court denies Yusuf's (concurrently filed) Motion for Reconsideration of Ruling Limiting Period of Accounting Claim, Yusuf respectfully requests this Honorable Court to grant his Motion to Certify, and that it certify for immediate appellate review that Ruling and the above issues raised by it. A proposed order is attached.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: August 11, 2017

By:



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¹The Supreme Court's alacrity in resolving questions certified for review is well illustrated by the recently decided case, *Edward v. GEC, LLC*, 2017 WL 3269049 (V.I. 2017). The electronic docket for that appeal shows that the Superior Court entered an order certifying several questions for review on February 15, 2017. The Petition for Permission to Appeal was filed in the Supreme Court on February 23 and granted the next day. On March 28, the Supreme Court entered an expedited briefing schedule requiring the filing of Appellant's opening brief by April 10, Appellee's brief by April 18, and Appellant's reply brief by April 25, 2017. Oral argument was held on May 16, and the Supreme Court issued its opinion deciding the appeal on August 1, 2017.

CERTIFICATE OF SERVICE

It is hereby certified that on this 11th day of August, 2017, I served a true and correct copy of the foregoing **FATHI YUSUF'S MOTION TO CERTIFY QUESTIONS IN ORDER LIMITING PERIOD OF ACCOUNTING CLAIM FOR IMMEDIATE REVIEW**, which complies with the page and word limitations set forth in Rule 6-1(e), via email and First Class U.S. Mail, postage prepaid, addressed to:

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

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)

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FATHI YUSUF and UNITED CORPORATION,)

Defendants/Counterclaimants,)

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WALEED HAMED, WAHEED HAMED,)
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CIVIL NO. SX-12-CV-370

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**ACTION FOR DAMAGES AND
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Plaintiff,)

v.)

FATHI YUSUF,)

Defendant.)

CIVIL NO. SX-14-CV-278

**ACTION FOR DEBT AND
CONVERSION**

ORDER

The Court having read Fathi Yusuf's Motion to Certify Questions in Order Limiting Period of Accounting Claim for Immediate Review (the "Motion"), and being otherwise fully advised in the premises, it is hereby

ORDERED that the Motion is **GRANTED**; and it is further

ORDERED that the Court is of the opinion that its July 21, 2017 Memorandum Opinion and Order Re Limitations on Accounting (the “Order and Opinion”), including the specific issues delineated below, involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this interlocutory order may materially advance the ultimate termination of this litigation, including the resolution of all claims submitted to the Master by the Partners as part of their respective accounting claims; and it is further

ORDERED that the following issues presented by the Order and Opinion are certified for immediate appellate review by the Virgin Islands Supreme Court:

- 1) Whether the Superior Court erred in deciding a motion for partial summary judgment on a ground not raised by Plaintiff (i.e., laches), without giving advance notice to Yusuf that it was considering whether to grant partial judgment on that issue to Plaintiff, and without first providing an opportunity for Yusuf to brief that issue and provide affidavit evidence opposing entry of partial judgment on that ground;
- 2) Whether the Superior Court erred in deciding a motion for partial summary judgment after allowing and then relying in part on testimony given at the March 6 hearing, including purported expert testimony by Mr. Lawrence Shoenbach and his Opinion Letter, notwithstanding that the Court did not qualify Mr. Shoenbach as an expert witness under Virgin Islands Rule of Evidence 702, and that Mr. Shoenbach admitted he is not an expert in accounting;
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evidence that, after performing a partial reconciliation in 2001 by tabulating Hamed and Yusuf safe receipts from the Plaza Extra-East store, the receipts that had been used in the tabulation were destroyed; and 3) the Court's conclusions about incomplete records of partnership withdrawals of partnership money;

5) Even assuming *arguendo* that the Court's conclusion described in question 4 above is relevant to a laches analysis, whether the Court's underlying conclusion and the findings regarding delay and prejudice were erroneous, foreclosed by the Supreme Court's decision in *United Corp. v. Hamed*, 64 V.I. 297, 310 (V.I. 2016), and contrary to the evidence, including the BDO Report (and supporting documents), Mr. Yusuf's previously filed declarations in this case, and the declaration of BDO's Mr. Scherrer submitted by Yusuf as part of his Motion for Reconsideration; and

6) Whether the Court's limitation of the transactions to be reviewed by the Master as part of the accounting process to those post-dating September 17, 2006 (as opposed to those post-dating January 1, 1994, the undisputed last date of partnership reconciliation) was arbitrary and unsupported by any case law and hence improper.

DATED: August ____, 2017

DOUGLAS A. BRADY
Judge of the Superior Court

A T T E S T:

Estrella H. George
Clerk of the Court

By: _____
Deputy Clerk

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