

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,	)	CIVIL NO. SX-12-CV-370
v.)	
)	
FATHI YUSUF and UNITED CORPORATION,	)	ACTION FOR INJUNCTIVE
	)	RELIEF, DECLARATORY
	)	JUDGMENT, AND
Defendants/Counterclaimants,	)	PARTNERSHIP DISSOLUTION,
v.	)	WIND UP, AND ACCOUNTING
)	
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,)	
)	
Additional Counterclaim Defendants.	)	Consolidated With
)	
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED,)	
)	
	)	CIVIL NO. SX-14-CV-287
Plaintiff,)	
v.	)	ACTION FOR DAMAGES AND
	)	DECLARATORY JUDGMENT
UNITED CORPORATION,)	
)	
Defendant.)	
)	
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED,)	
)	
	)	CIVIL NO. SX-14-CV-278
Plaintiff,)	
v.	)	ACTION FOR DEBT AND
	)	CONVERSION
FATHI YUSUF,)	
)	
Defendant.)	

**UNITED'S MOTION FOR RECOVERY OF ADDITIONAL RENT FROM
PARTNERHIP AS HOLDOVER TENANT**

Defendant/counterclaimant United Corporation ("United") respectfully submits this Motion For Recovery of Additional Rent From Partnership As Holdover Tenant and shows as follows:

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade
P.O. Box 756

St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

I. Factual Summary

A. The Partnership's Tenancy With United

As has already been established, the Partnership rented space from United for the operation of the grocery store business at the Plaza Extra East location. *See Exhibit A* – Declaration of Fathi Yusuf dated August 12, 2014, ¶1. The primary space was Bay 1 although the Partnership also used additional space in Bays 5 and 8 at various times. The rent was calculated by Fathi Yusuf, as agent for United. *Id.* at ¶1. Substantial periods of time would lapse between rent payments, as the Partnership would use the flexibility with the landlord to manage cashflow. *Id.* at ¶¶ 2-3. Nonetheless, there has never been any dispute that the Partnership was to pay rent to United and that Yusuf, as agent for United, determined the amount of rent and time of payment. *Id.* at ¶1. Judge Brady made various findings regarding the rent due from the Partnership to United including that Yusuf was “in charge of the rent” and “controlled” it in his Order awarding substantial past due rent to United. *See Exhibit B* – Judge Brady’s April 27, 2015 Order (the “Rent Order”).¹ The Court further found that “Plaintiff [Hamed] does not argue that the Partnership is exempt from paying rent to United” and admitted so in their filings that “ ‘it is undisputed that United is the landlord and Plaza Extra [the Partnership] is the tenant at the Sion Farm [Plaza Extra East] location for which rent is due since January of 2012.’ ” *See Exhibit B – Rent Order*, p. 11. The Rent Order

¹ Judge Brady found that “Hamed has admitted on several occasions that Yusuf is in charge of rent” and that:

Hamed has admitted that the Partnership owes United rent: ‘We pay rent...we owe Mr. Yusuf...I don’t pay for half. Still we owe him some more.’ Exhibit E, Hamed Deposition, p. 86; 10-14. Through an interpreter, Hamed admitted that rent is controlled by Yusuf, that he [Hamed] does not object to paying rent and that Yusuf (on behalf of United) could charge rent and collect it. Exhibit E, Hamed Deposition, p. 119; 7-11.

See Exhibit B - Rent Order, p. 4 and 9.

addressed those claims for past due rent which were undisputed, leaving the claims for additional increased rent for Bay 1 for later adjudication. *Id.* at p.2, n. 1.

B. Notice of Termination and Increased Rent if Holding Over

In September 2010, United provided notice to the Partnership by communicating with both Waleed Hamed and Mohammad Hamed of its intention to end the landlord-tenant relationship at the Plaza Extra East store, terminated the lease arrangement, and requested that the Partnership² vacate the premises. *See* Exhibit A, ¶16. The Hameds refused and remained on the premises despite having more than a year's notice to vacate. *Id.* Beginning on January 1, 2012 through March 31, 2012, United provided notice to the Partnership that rent was increased to \$200,000.00 per month plus 1% per month interest on the unpaid balance if the premises was not vacated before then. *Id.* Thereafter, beginning on April 1, 2012 through March 8, 2015, United provided formal notice of increased rent of \$250,000 per month. *See* Exhibit D to Yusuf's Declaration. Again, the Hameds refused to vacate. Subsequent notices followed and the Hameds still failed to vacate. *See* Exhibit E to Yusuf's Declaration.

United maintained that it had authority to require the additional increased rent, but moved for summary judgment at least as to the amount based on the rental rate calculations for the period immediately preceding 2012, reserving for later determination its claims to the increased rent. *Id.* at ¶17. The Court granted summary judgment as to the undisputed amount based upon the earlier rate but left the additional increased rent issue, which was in dispute, for later determination. *See* Exhibit B – Rent Order. The total outstanding balance of the increased rent claimed as to Bay 1 for the period of the holdover calculated at the increased rate at which United had provided formal

² At the time of these Notices, the Hamed family members were on-site at the Plaza Extra East location, but no Partnership had been conceded or determined by the Court.

notice, net of the rent recovered pursuant to the Rent Order, is \$6,974,063.10. See **Exhibit C** - Calculation of additional rents attached to Yusuf's Original Claims as Exhibit C.

II. United is Entitled to Recover the Increased Rent Rate from the Partnership as a Holdover Tenant.

A tenant is under a duty, it being a covenant express or implied in all leases, to deliver up possession of the premises to the landlord upon the expiration or termination of the lease. *Malling-Holm v. Feiner*, 4 V.I. 341, 348, 1962 WL 129366, at *1 (V.I. Terr., 1962). Upon the tenant's failure or refusal to surrender possession at the end of the lease term, the landlord may elect to treat the tenant as a holdover tenant and seek possession and damages. *Id.* Where a landlord has notified a tenant before the termination of the term, that the rent will be increased by a specified amount should the tenant hold over beyond the term, a tenant becomes liable for the increased rental if the tenant, in fact, holds over, regardless of whether he remains silent with reference to the notice or fails to express assent to the new terms. *Id.* The Virgin Islands Territorial Court explained:

...such rule was 'based on reason', in that 'the landlord has the right to state the terms of a prospective new leasing, and to allow the tenant to substitute different terms, by merely remaining in possession, is to deprive the landlord of control of his property.'

Id., citing *Sheriff v. Kromer*, 232 Ill. App. 589 (Ill. App. 1 Dist. 1924). See also, *David Properties, Inc. v. Selk*, 151 So. 2d 334 (Fla. Dist. Ct. App. 1st Dist. 1963); *Russells Factory Stores v. Fielden Furniture Co.*, 33 Tenn. App. 688, 232 S.W.2d 592 (1950); 32 Am. Jur. 2nd 950, p. 800; 52 C.J.S., Landlord and Tenant, § 506, page 292; 109 A.L.R. 203 (where a tenant receives reasonable notice of a change in rental, his continuance in possession beyond the rent period renders him liable for the new rent, notwithstanding any protest he may make).

Here, multiple notices were provided and the Hameds had been allowed over a year to vacate the premises but refused. *See* Exhibit at ¶16 and Exhibits D and E to same. Further, the parties testified that Yusuf, as agent for United, would be able to establish the rent to be paid to United. *See* Exhibit A at ¶1; Exhibit B at p. 4 and 9. Over the years, the Partnership benefitted from United's below market rent rates and extensive flexibility as to payment, allowing the Partnership business operations to thrive and to manage cash flow without the burden of a monthly rent obligation. *See* Exhibit A at ¶¶2-3, 5-6. However, United, as the landlord, is in control of its property and has the right to demand payment and set the rent rate following termination of the lease upon proper notice. The Partnership cannot simply ignore the notices and deprive United of control of its property simply by remaining in possession and refusing to vacate. Hence, the Partnership is liable to United for the increased rent as set forth in the notices provided by United in the total amount of \$6,974,063.10. This rent obligation is a debt of the Partnership and should be paid to United prior to distributions to the Partners.

CONCLUSION

Hamed's refusal to turn over the premises deprived United of the use and control of its property. More than a year's notice was provided of the need to vacate and formal notice of increases in the rent rate were also provided in the event of failure to vacate. The Hameds simply elected to ignore United and deny it possession of its property. The Partnership benefitted from United's below market rates for decades and its flexibility and leniency in collection. Yet, when United provided more than adequate notice to vacate, the Hameds simply disregarded the warning notices. As proper warnings were provided, United is entitled to recover the increased rent rates from the Partnership as a holdover tenant net of the rent already received.

In the event that the Master is disinclined to award the full amount of the increased rent for any reason, United respectfully requests the opportunity to establish its entitlement to recover the difference, if any, between the rent actually paid and the market value of the rent for the period in question. Discovery may be required in that event. Furthermore, as United was denied the opportunity to use its property, it suffered a loss of business opportunity as a result of the Hamed's refusal to vacate, the value of which would also require discovery.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: January 12, 2018

By:



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(340) 774-4422

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, I caused the foregoing **United's Motion For Recovery of Additional Rent From Partnership As Holdover Tenant** to be served upon the following via the Case Anywhere docketing system:

Joel H. Holt, Esq.
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EXHIBIT A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

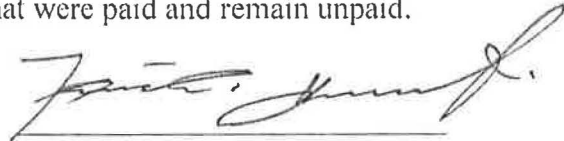
24. For the period from April 1, 2008 through May 30, 2013, Plaza Extra-East has occupied and owes rent for Bay 8 (“Second Bay 8 Rent”). The Second Bay 8 Rent is calculated by

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

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

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

Dated: August 12, 2014



Fathi Yusuf

United Corporation dba Plaza Extra

Tutu Park Store Sales:

1-1-2004 to 12-31-2004	32,323,902.88
Less: 1-1-2004 to 5-4-2004	-10,849,029.02
Sales 5-5-2004 to 12-31-2004	<u>21,474,873.86</u>

Tutu Park Store:

Paid Rent, Water, & Property Tax	263,577.53
Paid 1.5% Overage	<u>71,914.23</u>
5-5-2004 to 12-31-2004	335,491.76

1-1-2005 to 12-31-2005	515,361.54
1-1-2006 to 12-31-2006	590,533.60
1-1-2007 to 4-1-2007	255,699.33
4-2-2007 to 12-3-2007	468,689.55
1-3-2008 to 12-5-2008	540,180.12
1-5-2009 to 12-10-2009	529,799.66
1-6-2010 to 12-3-2010	527,565.40
1-1-2011 to 12-31-2011	<u>541,175.61</u>

Rent, etc. 5-5-2004 to 12-31-2011	4,304,496.57
Parking Lot Cleaning	<u>126,000.00</u>
Total Amount Paid	4,430,496.57 a

Tutu Park Store Sales:

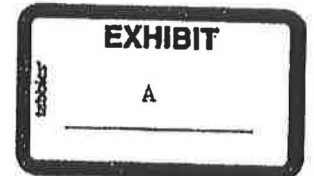
5-5-2004 to 12-31-2011	261,474,323.91
Portion of Sales - Rented building	<u>217,895,269.93</u> b
Portion of Sales - Area built by Plaza	43,579,053.98

Total Paid as a % of Sales (Rented Bldg.) = a/b 2.0333147073%

Sion Farm Sales:

Sion Farm Sales 5-5-2004 to 12-31-2011	273,884,222.70
Less: R/X	<u>-7,874,897.13</u>
	266,009,325.57

Calculated Rent as a % of Sales Sion Farm \$ 5,408,806.74




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

64866

Check Number: 64866
Check Date: Feb 7, 2012

Check Amount: \$5,408,806.74
Discount Taken Amount Paid
5,408,806.74

Item to be Paid - Description
Rent - Sion farm

<p>UNITED CORPORATION D/B/A PLAZA EXTRA 4C & 4D ESTATE SION FARM CHRISTIANSTED, VI 00821 (340) 778-0240 (340) 719-1870</p>		<p>BANCO POPULAR DE PUERTO RICO 101-852-2118</p>	<p>64866 DATE Feb 7, 2012 AMOUNT \$ 5,408,806.74</p>
<p>Five Million Four Hundred Eight Thousand Eight Hundred Six and 74/100 Dollars</p>			
<p>PAY TO THE ORDER OF:</p>	<p>UNITED SHOPPING PLAZA P.O. BOX 783 C'SHED ST. C ROIX, VI 00821</p>	<p>VOID AFTER 90 DAYS</p> <p> AUTHORIZED SIGNATURE</p>	
<p>Memo: PLAZA EXTRA (SION FARM) RENT</p>			
<p>⑆066886⑆ ⑆026806674⑆ 196m348830⑆</p>			

DEWOOD LAW FIRM

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BY: FIRST CLASS MAIL & EMAIL ONLY

May 17, 2013

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

Re: Rent Due -- Plaza Extra -- East Operations

Dear Attorney Holt,

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

Rent due for Plaza Extra -- East

**Bay No. 1 January 1, 1994 through April 4, 2004
69,680 SQ. FT. at \$5.55 10 years and 95 days Balance Due \$3,967,894.19**

**Bay No. 5 May 1, 1994 through October 31, 2001
3,125 SQ. FT. at \$12.00 6 years and 184 days Balance Due \$243,904.00**

**Bay No. 8 April 1, 2008 through May 30, 2013
6,250 SQ. FT. at \$12.00 5 years and one month Balance Due \$381,250.00**

Total Amount Due \$4,593,048.19

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

Sincerely,

Nizar A. DeWood, Esq.



FY 004004

JOEL H. HOLT, ESQ. P.C.

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

Tele. (340) 773-8709
Fax: (340) 773-8677
E-mail: holthj@gol.com

May 22, 2013

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

By Email and Mail

Re: Plaza Extra

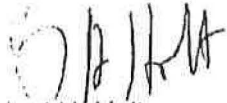
Dear Attorney DeWood:

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

1. **Bay No. 1-**The rent claimed is for the time period between 1994 and 2004. There was never any understanding that rent would be paid for this time period, much less at that rate. In any event, this inflated claim is clearly barred by the statute of limitations.
2. **Bay No. 5-**The rent claimed for the time period between 1994 and 2001 is for vacant space was used without charge until a tenant could be located. Thus, there was never any agreement to pay rent for this space either. In fact, the rate your client is attempting to charge is grossly inflated as well. In any event, this claim is also barred by the statute of limitations.
3. **Bay No. 8-**The rent claimed for this Bay was never agreed to, as the items stored there were removed from a space in a trailer where everything was just fine. Moreover, no one would agree to pay the amount you claim is due for warehouse storage, The fact that this amount is even being sought confirms that Fathi Yusuf should no longer be a partner in the Plaza Extra supermarkets, as it is a breach of the duty of good faith and fair dealing (that every partner owes the partnership) when you try to extort money from your own business. In any event, these items will be removed from Bay 8 to the second floor of the store since your client now wants to charge rent for this space.

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

Yours,

A handwritten signature in black ink, appearing to read "J. H. Holt", written in a cursive style.

Joel H. Holt

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

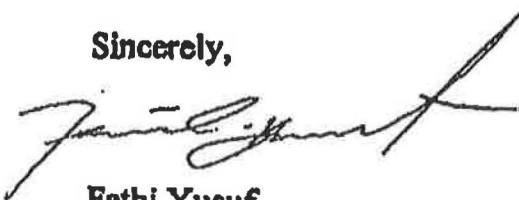
January 12, 2012

Mr. Mohamed Hamed,

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

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

Sincerely,



Fathi Yusuf



FY 004000

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

January 13, 2012

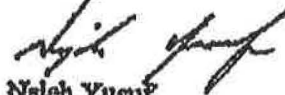
Mr. Mohamed Hamed,

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

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

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

Sincerely,



Najeh Yusuf
for Fathil Yusuf

CC: Wally Hamed

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

Date: January 19, 2012

****VIA CERTIFIED MAIL -- RETURN RECEIPT REQUESTED****

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

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

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

Dear Mr. Hamed,

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

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

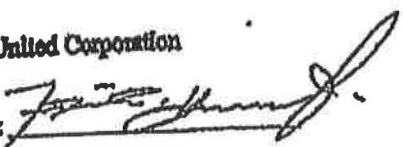
Page | 1

FY 004002

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

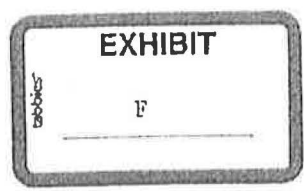
Sincerely,

United Corporation

By: 
Fathi Yusuf, CEO

UNITED CORPORATION
PLAZA EXTRA
 U S VIRGIN ISLANDS
 PHONE 340-730-1870 FAX 340-730-1879

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



UNITED CORPORATION
PLAZA EXTRA
 U.S. VIRGIN ISLANDS
 PHONE: 462-719-1870 FAX: 462-719-1874

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

CHRONOLOGY OF RENTS

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



EXHIBIT B

RECEIVED
R. 5/12/15
69841

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED by his authorized agent WALEED HAMED
Plaintiff)
Vs.)
FATHI YUSUF and UNITED)
CORPORATION, ET AL)
Defendant)

CASE NO. SX-12-CV-370
ACTION FOR: DAMAGES; ET AL

NOTICE
OF
ENTRY OF JUDGMENT/ORDER

TO: JOEL HOLT, ESQ.; CARL HARTMANN III, Esquire
NIZAR DEWOOD, ESQ.; GREGORY HODGES, Esquire
MARK ECKARD, ESQ.; JEFFREY MOORHEAD, Esquire

HON. EDGAR ROSS (edgarrossjudge@hotmail.com)
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT
LAW CLERKS; LAW LIBRARY; IT; RECORD BOOK

Please take notice that on APRIL 27, 2015 Memorandum Order was

entered by this Court in the above-entitled matter.

Dated: April 27, 2015

ESTRELLA H. GEORGE (ACTING)

Clerk of the Superior Court



By: IRIS D. CINTRON

COURT CLERK II

FACTUAL BACKGROUND

In its instant Motion, United seeks allegedly past due rents for Bay No. 1 of United Shopping Plaza, defined therein as “69,680 Sq. Ft. Retail Space...,” “utilized for the day to day operations of Plaza Extra East Store located at 4C and 4D Estate Sion Farm, St. Croix, Virgin Islands.” Motion, 1-2.¹ Since 1986 this retail space has been leased by United to the Hamed-Yusuf Partnership (“Partnership”). According to United, and supported by the Affidavit of Defendant Yusuf, the Partnership has paid rent to United for leasing that space while operating Plaza Extra - East. Between 1986 and 1993, the parties settled rents following a request made by United. Motion, 3. Additionally, between 2004 and 2011, after United requested a rent payment for those years, the Partnership authorized payment to United for \$5,408,806. Motion, 7 (Yusuf Affidavit, ¶7 and Exhibit B).

However, according to United, the Partnership owes United substantial unpaid rents from 1994-2004 and from January 1, 2012 - September 30, 2013. As a result of the injunction, entered in April 2013, Yusuf, a United shareholder, is unable to unilaterally withdraw money from the Partnership accounts for the purpose of paying rent or for any other reason. United requests the Court to allow United to withdraw rent in the amount of \$3,999,679.73 (for 1994-2004) and \$1,234,618.98 (for 2012-2013) for a total of \$5,234,298.71 from the Partnership’s account. Motion 1-2.

United argues that it was a common practice for the Partnership to make lump sum rent payments as opposed to monthly or even yearly payments. Motion, 3. United argues that it did not

¹ Defendant United’s Counterclaim seeks back rent from Bays 1, 5 and 8 located in the same premises. However, for purposes of winding up the Partnership and because United’s Motion only seeks back rent for Bay No. 1, this Order addresses only Bay No. 1.

seek rental payments for 1994-2004 because certain relevant financial records, informally referred to as the “black book,” were seized by the FBI during the course of a criminal investigation. Motion, 7; Yusuf Affidavit, ¶8. As a result, United was unable to properly determine the amounts of past due Partnership rent and for that reason did not demand payments.

United explains in detail that the rent for Plaza Extra - East “is calculated based upon the 2012 sales of Plaza Extra -Tutu Park, St. Thomas store...” (Motion, 4). “The sales are divided by the square footage to arrive at a percentage amount. That percentage amount is multiplied by the sales of the Plaza Extra - East store located at 4C & 4D Estate Sion Farm, St. Croix.” Motion, 5. According to United, this formula has been agreed upon by United and the Partnership and “...was used to calculate the rent for the period of May 5th, 2004 through December 31st, 2011... the monthly rate of \$58,791.38 is what the current monthly rent is.” Yusuf Affidavit, ¶8; Exhibit C (Rent Calculations Sheet).

Plaintiff, in his Response, argues that Yusuf cites no procedural basis that would allow United, in its capacity as landlord, to withdraw rents from the Partnership’s accounts. Response, 1. Plaintiff further argues that United has issued rent notices for \$250,000.00 per month as opposed to the \$58,791.38 per month stated in Yusuf’s affidavit for rent allegedly due from January, 2012. Response, 4. Without disputing that some rent is due, Plaintiff disputes United’s calculations, pointing to discrepancies in the store’s square footage² and implying that the rent for Plaza Extra - Tutu and Plaza Extra - East should be identical. Response, 4-5.

² Plaintiff argues that the square footage of Bay No. 1 is 67,498 sq. ft. as opposed to United’s claim of 69,280 sq. ft. Response, 4-5. United has consistently averred that Bay No. 1 is 69,680 sq. ft. The Court will accept the previously undisputed square footage of Bay No. 1 as 69,680 sq. ft. and will allow monetary adjustments based on deviations from this area measurement if more accurate assessments in the future reveal that this area measurement is inaccurate. This can be accomplished as part of the Liquidating Partner’s and Master’s responsibilities during the wind up process.

Plaintiff, in both his Response and Summary Judgment Motion, asserts a statute of limitations defense for the past rents (1994-2004). Plaintiff cites V.I. Code Ann Tit. 5, §31(3) which sets a six year statute of limitations for "...actions upon contract or liability, express or implied, excepting those mentioned in paragraph (1)(C) of this article." Response, 5-6; Plaintiff's Summary Judgment Motion, 2-3.

United responds to Plaintiff's statute of limitations argument by claiming that Yusuf and Plaintiff's authorized agent, Waleed Hamed, reached an oral agreement in early 2012 to have the Partnership pay the past due rent back to United. Opposition, 10-11. This oral agreement was allegedly breached by Plaintiff when his attorney sent United a letter dated May 22, 2013 claiming that no agreement on rent had ever been reached. Opposition, 11; Exhibit D. Yusuf, by his affidavit, asserts that an agreement was reached for past rent to be paid when the Partnership's "black book" was returned by the FBI and a proper calculation could be achieved. Yusuf Affidavit, ¶¶4-6. Only when Yusuf's son discovered that the FBI had returned the black book in early 2013, did United calculate the past rent and seek repayment from the Partnership.

Hamed has admitted that the Partnership owes United rent: "We pay rent...we owe Mr. Yusuf... I don't pay for half. Still we owe him some more." Exhibit E, Hamed Deposition, p. 86; 10-14. Through an interpreter, Hamed admitted that rent is controlled by Yusuf, that he does not object to paying rent and that Yusuf (on behalf of United) could charge rent and collect it. Exhibit E, Hamed deposition p. 119; 7-11. In fact, when Hamed was asked "...if rent was not paid from January 1, 1994 through May 4, 2004, would you agree that rent should be paid," Hamed responded, "It should be paid." Exhibit E, Hamed Deposition, p. 117; 21-25.

Yusuf claims that he alone had been in charge of calculating rent and had bound the Partnership to paying United rent. Opposition, 11; Exhibit B, Yusuf Deposition p. 86; 8-12. Yusuf specified that United would charge the Partnership rent at \$5.55 per square foot, “the same as the old one.” *Id.* Yusuf states that the rental terms, as discussed with Hamed, revived the previous arrangement which had begun in 1986 and extended the landlord-tenant relationship from January, 1994 through 2004, briefly discussing how rent is calculated for Plaza Extra - East based on the percentage of sales from the Plaza Extra - St. Thomas store. Yusuf Deposition p. 88; 4-9; p. 89; 19-22.

DISCUSSION

The Court will examine whether the Partnership owes United rents from 1994 to 2004 (past due rent) and from 2012 to 2013. This inquiry is limited to the issue of rents and does not extend to other relief sought by Defendants’ Counterclaim or to other aspects of Plaintiff’s Motion for Partial Summary Judgment beyond the issue of past due rents.

1. The Court has the authority to order the Partnership to repay past due rent.

Plaintiff argues that United has failed to cite a procedural justification for the Court to order the Partnership to pay past due rent to United. Response, 1.

Without a written partnership agreement, as is the case between Hamed and Yusuf, courts will look to the Uniform Partnership Act to determine a partnership’s property and its obligations to creditors (codified at 26 V.I.C. § 24; § 177, respectively). “The reason is that dissolution does not terminate or discharge pre-existing contracts between the partnership and its clients, and ex-partners who perform under such contracts do so as fiduciaries for the benefit of the dissolved partnership.” *Labrum & Doak v. Ashdale*, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998).

In connection with winding up the Partnership, the Court has made several discretionary decisions regarding asset allocation in accordance with the Uniform Partnership Act and for the benefit of the partners. *See* Final Wind Up Plan, entered January 9, 2015. As the parties move forward with the wind up process, it is necessary to determine what constitutes Partnership property. Most of this determination can and should be done without judicial intervention but, in the case of past rents, Hamed cannot agree with Partnership creditor United, or with Yusuf, a United shareholder and Hamed's equal partner in the Partnership, as to the amount of rent that the Partnership owes United.

The Virgin Islands Supreme Court, in denying Defendants' appeal of this Court's Wind Up Plan, stated that "...matters that fall within the administration of winding up the partnership, over which the Superior Court possesses considerable discretion... are not immediately appealable." *Yusuf v. Hamed*, 2015 V.I. Supreme LEXIS 6, at *5-6 (V.I. February 27, 2015)(citing *Belleair Hotel Co. v. Mabry*, 109 F.2d 390, 391 (5th Cir. 1940); *see also United States v. Antiques Ltd. P'Ship*, 760 F.3d 668, 671-72 (7th Cir. 2014)).

Appellate courts, when treating a lower court's supervision over a wind up process as similar to a receivership, "...have recognized 'the scores of discretionary administrative orders a [trial] court must make in supervising its receiver.'" *Hamed*, 2015 V.I. Supreme LEXIS 6, at *6 (quoting *S.E.C. v. Olins*, 541 Fed. Appx. 48, 51 (2d Cir. 2013) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1020 (2d Cir. 1975)).

With the aim of winding up the Partnership in a fair and efficient manner, the Court in this Order exercises its "considerable discretion" to determine how much rent the Partnership owes to United as a debt due and owing under the Uniform Partnership Act.

2. The statute of limitations does not bar Defendant United's claim for rent and United is entitled to past due rent in the amount of \$3,999,679.73 for 1994-2004.

Plaintiff argues that the Partnership is not responsible for rent from 1994-2004 because the six year statute of limitations for actions in debt expired in 2010, two years before the filing of his original Complaint in this action. Defendant United argues that the parties entered into an oral contract in 2012 that bound the Partnership to pay the past due rents as soon as a proper accounting could be done (i.e. the black book was recovered). When the black book was located in early 2013 and United made a subsequent demand for past rent, Plaintiff claimed that "there was never an understanding that rent would be paid for this time period..." and even if there had been, the statute of limitations had expired (preventing all claims for rents that came due prior to September, 2006). Motion, Exhibit D. According to Defendant United, the Partnership renegeing on the agreement to pay back rents constituted a breach of contract which carries a six year statute of limitations that has yet to expire.

The Court views this matter somewhat differently. While 5 V.I.C. § 31(3) sets a six year statute of limitations for contractual liabilities such as payment of rents, there are certain equitable principles which operate to toll a statute of limitations. The "acknowledgment of the debt" doctrine (also known as the "revival of the promise to pay" doctrine) is recognized as follows:

A debt which is time-barred may be "revived" by an acknowledgment by the debtor. 'It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run. . . . Such conduct revives the cause of action so that the statute starts to run again for the full statutory period.'

Gee v. CBS, Inc., 471 F. Supp. 600, 663 (E.D. Pa. 1979)(quoting *Developments in the Law Statutes of Limitations*, 63 Harvard L.Rev. 1177, 1254 (1950)).

Most courts only apply the acknowledgment of the debt doctrine when there exists “a clear, distinct, or unequivocal acknowledgment of the debt... [which] is sufficient to take the case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies.” *CBS, Inc.* 471 Supp. at 664 (citing *In re Nicolazzo's Estate*, 414 Pa. 186, 190, 199 A.2d 455, 458 (1964), quoting *Palmer v. Gillespie*, 95 Pa. 340 (1880)).

Courts have employed a second equitable principle when tolling a statute of limitations, referred to as the “payment on account doctrine.” Similar to the acknowledgment of the debt doctrine, the payment on account doctrine “... is regarded as an acknowledgment of liability.” *Basciano v. L&R Auto Parks, Inc.*, 2012 U.S. Dist. LEXIS 17750, *36-39 (E.D. Pa. February 10, 2012)(citing *Quaker City Chocolate & Confectionery Co. v. Delhi-Warnock Bldg. Ass'n*, 53 A.2d 597, 600 (Pa. 1947)(“There can be no more clear and unequivocal acknowledgment of debt than actual payment.”)). To toll the statute of limitations, a partial payment “must constitute a constructive acknowledgment of the debt from which a promise to pay the balance may be inferred.” *GE Med. Sys. v. Silverman*, 1998 U.S. Dist. LEXIS 886, * 20-21 (E.D. Pa. Feb. 2, 1998)(quoting *City of Philadelphia v. Holmes Electric Protective Co.*, 335 Pa. 273, 6 A.2d 884, 888 (Pa. 1939)). See also *Quaker City Chocolate & Confectionery Co.*, 53 A.2d at 600 (“Ordinarily, a payment on account of a debt is regarded as an acknowledgment of liability

and of willingness to pay the balance due thereon and therefore is held to interrupt the operation of the statute").³

In this case, both the acknowledgment of the debt doctrine and the payment on account doctrine apply to toll the statute of limitations on United's rent claims.

Regarding the acknowledgment of the debt, United has proven with sufficient certainty that the Partnership owes United rent from 1994 to 2004. Notwithstanding Plaintiff's denial that the parties had an agreement regarding past rents, Yusuf, by his affidavit, swears that Waleed Hamed entered into an agreement to pay United past due rent once the black book was recovered in early 2013. Opposition, 10-11; Exhibit D, Yusuf Affidavit, ¶¶4-6. Yusuf specifically addresses how rent is calculated (\$5.55 per square foot), stating that the past due rent is "the same as the old one," referring to the 1986-1994 rental amounts. Yusuf Deposition p. 86; 8-12. Yusuf presents more than sufficient evidence that the Partnership's arrangement with United from 1986 to 1994 was identical, in terms of past due rent, as the arrangement between 1994 through 2004.

Nothing presented by Hamed calls into questions the validity of this debt or the application of the acknowledgment of the debt doctrine. Hamed has admitted on several occasions that Yusuf is in charge of rent, that the Partnership owes United rent for January 1, 1994 through May 4, 2004, and that the rent for this period should be paid to United. Opposition, Exhibit E, Hamed Deposition, p. 117-119. It is clear that the Partnership, through the statements of both Hamed and Yusuf, has

³ Courts will only allow "...a payment on a debt to qualify as an acknowledgment..." if there is an "unequivocal acknowledgment" of the debt, but have considered a debtor's payment on part of a debt to evidence an acknowledgment of the debt and therefore have tolled the statute of limitations. *See Basciano*, 2012 U.S. Dist. LEXIS 17750, at *36. From the acknowledgment of the debt the law will infer a promise to pay the underlying debt. *Receiver of Anthracite Trust Co. v. Loughran*, 19 A.2d 61, 62 (Pa. 1941) (citing *Dick v. Daylight Garage*, 335 Pa. 224, 6 A.2d 823, 826 (Pa. 1939)).

acknowledged a debt for rents owed to United, which is determined to be in the amount of \$3,999,679.73 (based upon 69,680 sq. ft. @ \$5.55/sq. ft.) for the period January 1, 1994 to May 4, 2004.

Similarly, the payment on account doctrine acts as a bar to Plaintiff's statute of limitations defense. The Partnership's partial payments "...constitute a constructive acknowledgment of the debt from which a promise to pay the balance may be inferred." *GE Med. Sys.*, 1998 U.S. Dist. LEXIS 886, at *20-21. For the period of the operation of Plaza Extra – East from 1986 through 2011, the Partnership made two lump sum rent payments to United (covering the periods from 1986-1994 and from 2004-2011). Motion, Yusuf Affidavit, ¶7; Exhibit B (previous rental check for \$5.4 million). United and Yusuf have explained in detail how rent is calculated and why United did not collect rent for the period in question due to the unavailability of their financial records. Motion, 4, 7; Yusuf Affidavit, ¶8.

Therefore, both the acknowledgment of the debt doctrine and the payment on account doctrine apply to the facts of the rent dispute between United and the Partnership. The six year statute of limitations for United's past rent claims was tolled as a result and began to run on May 22, 2013 when Hamed first disputed the validity of the 1994-2004 rent debt. Motion, Exhibit D. United is within the timeframe with which to bring this claim and has presented sufficient information, through affidavits, depositions, and other evidence in the record, for the Court to grant United's Motion as to that period and to direct the Partnership to pay United the sum of \$3,999,679.73.

3. Defendant United is also entitled to rent from 2012 to 2013 in the amount of \$58,791.38 per month.

Plaintiff does not argue that the Partnership is exempt from paying rent to United. “[I]t is undisputed that United is the landlord and Plaza Extra is the tenant at the Sion Farm location, for which rent is due since January of 2012.” Response, 1. Rather, Plaintiff claims that United itself has created a dispute regarding rents from January 2012 by issuing rent notices seeking increased rent in the amount of \$250,000.00 per month, rather than the \$58,791.38 per month set out in Yusuf’s affidavit. Response, 4. The proof before the Court is clear as to United’s claim that rent is due for Bay No. 1 at the rate of \$58,791.38 per month from January 1, 2012 to September 30, 2013, when United’s Motion was filed.⁴

As the fee simple owner and landlord of Bay No. 1 United Shopping Plaza, United is entitled to rents from the Partnership for its continued use of Bay No. 1 for the operations of Plaza Extra - East. Therefore, the Court will order the Partnership to pay United the sum of \$1,234,618.98 for rent from January 1, 2012 through September 30, 2013, Plus rent due from October 1, 2013 at the same rate of \$58,791.38 per month until the date that Yusuf assumed sole possession and control of Plaza extra – East.

On the basis of the foregoing, it is hereby

ORDERED that Defendant United Corporation’s Motion to Withdraw Rent is GRANTED, and the Liquidating Partner, under the supervision of the Master, is authorized and directed to pay

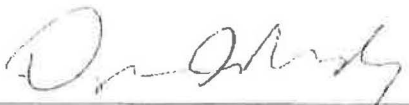
⁴ It is acknowledged that United delivered notices to the Partnership following the April 2013 Preliminary Injunction, seeking to collect an increased rent sum of \$250,000.00. United presents in its Motion and proofs no numerical or factual justification for such claims, which are not considered in this Order.

from the Partnership joint account for past rents due to United the total amount of \$5,234,298.71, plus additional rents that have come due from October 1, 2013 at the rate of \$58,791.38 per month, until the date that Yusuf assumed full possession and control of Plaza Extra – East. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED, in part, as to Plaintiff's claims that the statute of limitations precludes Defendant United's claims for past due rent.

Dated:

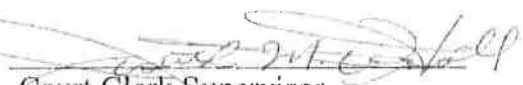
April 27, 2015


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By:


Court Clerk Supervisor

4/27/15

CERTIFIED TO BE A TRUE COPY
This 27th day of April 20 15

CLERK OF THE COURT

By  Court Clerk

EXHIBIT C

EXHIBIT C

Calculation of Additional Rent Net of Rent Paid

January 2012 through March 2012 \$200,000 per mo. - \$58,791.38 = \$141,208.62 per mo. x 3
mo. = \$423,625.86

April 2012 through February 2015 \$250,000 per mo. - \$58,791.38 = \$191,208.62 x 34 mo. =
\$6,501,093.08

March 1, 2015 through March 8, 2015 = \$49,344.16 (\$191,208.62 ÷ 31 x 8)

\$6,501,093.08	
423,625.86	
<u>49,344.16</u>	
\$6,974,063.10	Total Additional Rents