

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

REPLY TO OPPOSITION TO MOTION TO STRIKE HAMED'S AMENDED CLAIMS
NOS. 4, 5, AND 6

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), respectfully submit this Reply to "Hamed's Opposition to Yusuf's Motion to Strike As to Claims H-4, H-5, and H-6-Re Supermarket Lease Increase" filed on January 16, 2018 (the "Opposition"). In the Opposition, Hamed takes the position for the first

time in this case that the rent paid to United for the Partnership's occupancy of Plaza Extra East from May 5, 2004 was fixed at the monthly rate of \$58,791.38 and that this fixed rate was based on the calculations prepared by United that led to the rent payment of \$5,408,806.74 on February 7, 2012. This newly asserted position is simply the latest position in Hamed's ever shifting positions asserted to serve his convenience.

The Opposition is supported by the declaration of Waleed Hamed attached as Exhibit 2, which claims that the United calculations used to establish the rent payment on February 7, 2012 in the amount of \$5,408,806.74 were "intended to establish a fixed rent based on the 8 year average of rent paid the St. Thomas landlord for the St. Thomas Plaza Store." See Exhibit 2 to the Opposition at ¶4. Those same calculations were attached as an exhibit to United's Motion to Withdraw Rent filed on September 9, 2013 (the "First Rent Motion") and were referenced in ¶ 6 of Yusuf's Affidavit attached as Exhibit 1 to the Opposition and Exhibit 2 to Defendants' Motion to Strike Hamed's Amended Claim Nos. 4, 5, and 6 (the Motion"). Those calculations were also attached as Exhibit 3A to Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent filed on August 12, 2014 (the "Second Rent Motion"). Exhibit 3 to the Second Rent Motion was Yusuf's declaration dated August 12, 2014, which the Opposition completely ignores. The reason Hamed ignores that more recent and detailed declaration is that he chose to respond to that declaration with his own counter declaration whereas he never submitted any declaration in support of his opposition to the First Rent Motion. If one compares the August 24, 2014 declaration of Waleed Hamed attached as Exhibit 1 to his Opposition to United's Second Rent Motion, also attached hereto as **Exhibit 1**, with his most recent declaration attached as Exhibit 2 to the Opposition, one can easily determine that Hamed has no credibility whatsoever regarding the actual formula for calculating the rent due to United from the Partnership.

In order to understand Hamed's August 24, 2014 declaration (Exhibit 1), one must refer to Defendants' Statement of Undisputed Material Facts, which is referred to as the "DSOF" in ¶ 4 of that declaration. A copy of Defendants' DSOF is attached as **Exhibit 2**. All references in the DSOF to Exhibit 3 are to the August 12, 2014 Yusuf Declaration. *See* DSOF at ¶ 2.

Paragraph 7 of the DSOF contains four sentences describing the percentage of sales formula used to calculate rent due to United from the Partnership from May 5, 2004 forward. Paragraph 7 of Hamed's corresponding declaration does not dispute the terms of this formula but merely disputes when the discussion about changing the formula took place. *See* Exhibit 1 at ¶ 7.

Paragraph 8 of Hamed's previous declaration is relevant only to the extent that it attaches "United's written statement of rent due used in the 2012 settlement of past rents" as Exhibit C. Neither paragraph 7 nor paragraph 8 of Hamed's previous declaration made any reference whatsoever to a "fixed" monthly rent.

Paragraph 10 of the DSOF states, among other things, that "Waleed Hamed and Yusuf met in early 2012, and they agreed that the rent beginning on May 5, 2004 and going forward could be determined . . . because Waleed Hamed and Yusuf had previously agreed that the percentage-of-sales rent formula would become effective on that date." In paragraph 10 of his previous declaration, Hamed stated, among other things, that "while I agreed in 2012 that rent would be paid for the 2004 to 2012 period, the remaining assertions are not accurate." Again, he does not dispute that the rent beginning on May 5, 2004 and going forward would be determined based on the percentage of sales rent formula.

Paragraph 11 of the DSOF reads in full as follows:

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

of \$5,408,806.74 by means of a check signed by Waleed Hamed and by Yusuf's son, and there is **no dispute** that it covered unpaid rent for that nearly 8-year period. *Id.* at ¶ 7; *see also*, **Exhibit 3A**.

In response to "DSOF #11," Hamed stated: "The amount was paid as indicated, but it was not agreed to in 2004 as suggested by Defendants." *See* Exhibit 1 at ¶ 11.

Paragraph 16 of the DSOF states: "Rent is due from January 1, 2012 to date at least in the amount based on the percentage-of-sales formula that was used to write the joint check for the preceding 8-year period paid on February 7, 2012. *See* Exhibit 3 at ¶ 7 and 17." Hamed's previous declaration responded by stating that "any rent due is limited to the formula for the St. Thomas store using the correct square footage." *See* Exhibit 1 at ¶ 16. Again, Hamed makes no mention of any "fixed" monthly rent and provides no explanation whatsoever how square footage of the Plaza Extra East store has any relevance whatsoever to the percentage of sales formula.

At paragraph 17 of the DSOF, the rent from January 1, 2012 through August 30, 2014 was calculated using the same percentage of sales formula used to calculate the payment that was made on February 7, 2012. The calculations for that rent were set forth in ¶ 18-20 of Yusuf's declaration dated August 12, 2014 and Exhibit F to that declaration. *See* Exhibit 3 to Defendants' Motion.

Hamed's response to DSOF No. 17 stated that "these figures are incorrect as the wrong square footage was used to make this calculation, which should be 67,498 square feet, not 69,680 square feet, as used by Defendants." *See* Exhibit 1 at ¶ 17. Attached as **Exhibit 3** are the same calculations attached as Exhibit F to Yusuf's declaration dated August 12, 2014. As the Master can readily see, this percentage of sales formula makes no mention whatsoever of the square footage of Plaza Extra East since the formula is entirely driven by sales rather than square footage. Exhibit 3 shows that the rent due from Plaza Extra East for 2012 equals \$702,908, which translates into a monthly rent of \$58,575.67. The second page of Exhibit 3 provides the calculations reflecting the rent due from Plaza Extra East for 2013 in the amount of \$654,190.09, which translates into a

monthly rent of \$54,515.84. To calculate the rent due from Plaza Extra East for the period from January 1, 2014 through August 30, 2014, Yusuf added the rent due from 2012 (\$702,908) to the rent due for 2013 (\$654,190.09) and divided that sum by 24, which resulted in an average monthly rent of \$56,545.75 x 8 months equaling \$452,366.03. *See Exhibit 3 to the Motion at ¶ 20.* Accordingly, as clearly reflected in Yusuf's August 12, 2014 declaration, the rent for Plaza Extra East is not a fixed amount, but in fact varies depending upon the sales experience of Plaza Extra Tutu Park and Plaza Extra East for any given period of time. The reliable record evidence establishes that the Partners have consistently applied the percentage of sales formula and that there never was any fixed monthly rent payable to United.

Hamed's new and completely unsupported claim that Yusuf's calculations that led to the \$5,408,806.74 payment of February 7, 2014 were intended to establish a fixed monthly rent of \$58,791.03 is completely unsupported by record evidence. Obviously, Hamed does not bother to edify the Master how that monthly rent amount can be derived from the calculations included as Exhibit 2A of his Opposition. Hamed has simply conjured up this notion of fixed rent for the first time because the percentage of sales formula when applied to the 2012 and 2013 real estate taxes paid to Tutu Park, Ltd. (\$79,009.87) and the 2014 real estate taxes paid to Tutu Park, Ltd. (\$43,069.36) result in slightly larger payments being made to United.

Hamed attempts to over play the fact that Yusuf's original affidavit dated September 5, 2013 and the calculations referenced in that affidavit did not include the additional amounts that are the subject of the Motion and such additional amounts were not referenced in the Court's "Rent Order" dated April 27, 2015. That is simply because these additional amounts were not billed by Tutu Park, Ltd. until September 2015. *See Exhibit 4* consisting of an email dated September 26, 2015 from counsel for Tutu Park, Ltd., a letter dated September 25, 2015 from Tutu Park Mall to Yusuf, and Tutu Park Mall's 2014, 2013 and 2012 tax recovery billing. The percentage rent invoice

that led to the matching payment of \$41,462.28 was first presented in Tutu Park Mall's letter dated December 4, 2015 with attached percentage rent invoice. As clearly established in the Motion, Yusuf, as Liquidating Partner, paid these undisputed real estate taxes and then made a matching payment to United based on the same percentage of sales formula he had consistently applied since calculating the rent that was paid on February 7, 2012. While it is true that Yusuf, as the Liquidating Partner, initially rejected Tutu Park, Ltd.'s claim for percentage rents, given the fact that Hamed had failed to obtain United's and Yusuf's release of liability under the Tutu Park, Ltd. lease as he was obligated to do under the Plan and Master's Order of April 30, 2015, Yusuf chose to pay Tutu Park, Ltd.'s percentage rent invoice on behalf of Hamed. Obviously, that payment represented a partnership distribution to Hamed for which Yusuf was entitled to an identical distribution.

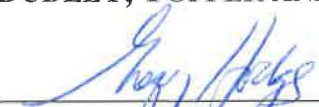
For all of the foregoing reasons, Defendants respectfully request the Master to find that Hamed's Amended Claims Nos. 4, 5, and 6 are invalid and to strike these claims from Hamed's Amended Claims.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: January 22, 2018

By:



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St. Thomas, U.S. V.I. 00804-0756

(340) 774-4422

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2018, I caused the foregoing **Reply To Opposition To Motion To Strike Hamed's Amended Claims Nos. 4, 5, And 6**, which complies with the page or word limitation set forth in Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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EXHIBIT 1

**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, MUFEEED HAMED,
HISHAM HAMED,
and PLESSEN ENTERPRISES, INC.**,

Counterclaim Defendants.

CIVIL NO. SX-12-CV-370

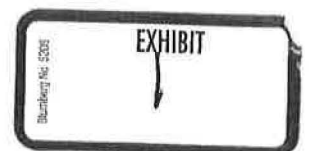
**ACTION FOR DAMAGES
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF**

JURY TRIAL DEMANDED

DECLARATION OF WALEED HAMED

I, Waleed Hamed a/k/a Wally Hamed, declare, pursuant to 28 U.S.C. Section 1746, as follows:

1. I have personal knowledge of the facts set forth herein.
2. The "Black Book" referenced by Defendants in their August 12, 2014, summary judgment "rent" motion was produced by them in discovery.
3. The "black book" had numerous pages removed from it before being produced by the Defendants in this case.
4. Regarding the assertions in the last two sentences of #4 of Defendants' Rule 56.1 Statement of Facts ("DSOF"), there was never any agreement that the Plaza Extra Sion Farm store owned by the Hamed/Yusuf



partnership would pay \$5.55 per square foot per year for the time period between 1994 and 2004. Indeed, that amount was above market value for the time period prior to 2004.

5. Regarding the assertions in the last two sentences of DSOF #5, the partnership had ample funds to pay rent when due, as evidenced by the accumulation of assets from the partnership profits. Moreover, Fathi Yusuf was not the person who decided when to do an accounting, as we (the Hameds and the Yusufs) would all agree when it was a good time to do so. Indeed, as just one example, United's 30(b)(6) designee, Maher Yusuf, testified that he and Mufeed Hamed decided to do an accounting in 2001.
6. Regarding the assertions in DSOF #6, the entry in the "black book" referenced by Defendants as somehow demonstrating the first and last date rent was paid before 2012 (a copy of which is attached as **Exhibit A** (YUSF 106955)), is incorrect. The "black book" does not even mention rent between 1986 and 2004 anywhere, as suggested by Defendants. Moreover, the "black book" produced by Yusuf in discovery contains only one entry as to rent, on page YUSF 106953 (See **Exhibit B** attached to this declaration), which deals with rent in the mid-1980's before the store was open. In short, the portions of the "black book" produced by Defendants do not support Defendants' claim as to the amount of rent charged the Plaza Sion Farm store by United or the times of payment.
7. Regarding the assertions in DSOF #7, there was never any discussion in 2002 or 2003 about changing the rent formula in 2004 as asserted by

Defendants.

8. Regarding the assertions in DSOF #8, there were never any discussions in 2004 about deferring any rent payments, as asserted by Defendants. In fact, rent 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. Finally, there is no outstanding rent owed by Plaza Extra Sion Farm for the time period before 2004, which is why United's written statement of rent due used in the 2012 settlement of past rents (**Exhibit C** attached) did not include any amounts prior to that date.
9. Regarding the assertions in DSOF #9, there is no rent owed for the time period prior to 2004, as previously noted, so any assertion to the contrary is untrue. Moreover, the "black book" did not show when rent was paid, as suggested by Defendants, as noted above.
10. Regarding the assertions in DSOF #10, while I agreed in 2012 that rent would be paid for the 2004 to 2012 period, the remaining assertions are not accurate. As previously noted, there was never an agreement in 2004 to defer the calculation of rent, nor were any records still needed to determine when the last rent payment was made, which was well after 1993. There was also no agreement in 2012 to defer the calculation of rent for the time period prior to 2004.
11. Regarding the assertions in DSOF #11, the amount was paid as indicated, but it was not agreed to in 2004 as suggested by Defendants.
12. Regarding the assertions in DSOF #12, the rent calculations were based on inaccurate amounts (\$5.55 per sq. ft. and 69,680 total sq. ft.).

13. Regarding the assertions in DSOF #13, there is no rent due except for the time period from 2012 to now, as the amount for that time period is in dispute.
14. Regarding the assertions in DSOF #14, all rent has been paid for this time period, as previously noted.
15. Regarding the assertions in DSOF #15, the assertion that my father, Mohammad Hamed, somehow "waived" the statute of limitations defense is not supported by the deposition excerpts referenced by Defendants. In this regard, those excerpts show that my father first stated that he had no personal knowledge about any such 1994-2004 rent being owed. While he was then asked a series of hypothetical questions premised on the proposition that "if" such a rent obligation existed, a review of those excerpts reveals that he had no personal knowledge of any such amounts owed, much less that there is a "clear, unequivocal and decisive act" to waive the statute of limitations rights on any amounts due that were time-barred. Indeed, my father clearly stated that he did not know whether the rent for this time period was owed, nor was he even aware that this issue was a dispute now. See **Exhibit D** at p. 106.
16. Regarding the assertions in DSOF #16, any rent due is limited to the formula for the St. Thomas store using the correct square footage.
17. Regarding the assertions in DSOF #17, these figures are incorrect as the wrong square footage was used to make this calculation, which should be 67,498 sq. ft., not 69,680 sq. ft., as used by Defendants.
18. Regarding the assertions in DSOF #18, no agreement to rent any

additional space was ever entered into, nor was such space ever needed.

19. Regarding the assertions in DSOF #19, there was no agreement to use Bay 5 other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost. Indeed, if rent were to be charged, the space would not have even been used on a periodic and temporary basis.
20. Regarding the assertions in DSOF #20, there was no agreement to use Bay 8 other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost. Indeed, if rent were to be charged, the space would not have even been used on a periodic and temporary basis.
21. Regarding the assertions in DSOF #21, there was no agreement to use Bay 8 other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost. Indeed, if rent were to be charged, the space would not have even been used on a periodic and temporary basis.
22. Regarding the assertions in DSOF #22, there was no agreement to use Bay 5 or Bay 8 other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost. Indeed, if rent were to be charged, the space would not have even been used on a periodic and temporary basis.

Dated: August 24, 2014



Waleed Hamed a/k/a Wally Hamed

			1,000. -	
		sent	750. -	
		Rec'd	500. -	
	check #	425	2,500. -	
	check #	408	5,000. -	
3-29-93	check #	425	15,000. -	
4-20		446	5,000. -	
5-14		460	5,000. -	
6-1		1039 & 1040	1,500. -	
7-8		1215	2,500. -	
8-9		1381	2,500. -	
9-9		1552	2,500. -	
9-30		557	5,000. -	
11-4		1779	5,000. -	
12-21	<u>N V S</u>	619	6,500. -	
12-46		1927	1,500. -	
3-5	10,000 + 5,000 - 2,000		1,500. -	
5-15-94	Cash	# 99158	5,000. -	
6-29-94	check	# 136	15,000. -	
6-30-94	Five	(Fifties) worth	5,000. -	
7-13-94	Five	(Fifties) worth	2,500. -	
7-15-94	VOID	paid	13,700. -	

United owes plaza as of
 12-31-1993 \$ 399,295.00
 Paid 399,295.00



(4)

United Fruit Co

5-84 prudential Backe

194,295.65
30,000.00

property tax

224,295.65
24,676.69

less 1/16

199,618.96
234.25

less 1/16

199,384.71
592.50

less For land

198,792.21
100,000.00

X X X 98,792.21

\$
28 month X 16,000.00 Int.
24 month Rest 1-1-84 to 12-31-85

448,000.00
202,000.00
98,792.91

X X X

749,292.00
399,295.00

Scotia Bank

349,997.00
300,000.00

owed to YUSUF

49,997.00

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	71,914.23
5-5-2004 to 12-31-2004	<u>335,491.76</u>

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	126,000.00
Total Amount Paid	<u>4,430,496.57</u> a

Tutu Park Store Sales:

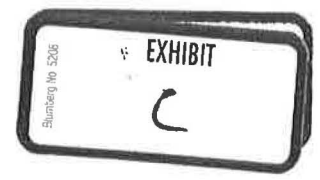
5-5-2004 to 12-31-2011	261,474,323.91
Portion of Sales - Rented building	217,895,269.93 b
Portion of Sales - Area built by Plaza	<u>43,579,053.98</u>

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	-7,874,897.13
	<u>266,009,325.57</u>

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



IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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MOHAMMED HAMED by His Authorized
Agent WALEED HAMED,

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vs.

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Defendants/Counterclaimants,

vs.

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

Additional Counterclaim Defendants.)

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

THE VIDEOTAPED ORAL DEPOSITION OF MOHAMMAD HAMED

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

Reported by:

Cheryl L. Haase
Registered Professional Reporter
Caribbean Scribes, Inc.
2132 Company Street, Suite 3
Christiansted, St. Croix U.S.V.I.
(340) 773-8161

Burnberg No. 5208

EXHIBIT

0

MOHAMMAD HAMED -- DIRECT

1 until December 1993?

2 **THE INTERPRETER:** From the beginning?

3 **MR. HODGES:** '86, 1986.

4 **THE INTERPRETER:** Okay.

5 Yes.

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

9 **THE INTERPRETER:** Yes.

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

13 **MR. HARTMANN:** Object as to form.

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

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

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

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

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

EXHIBIT 2

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,)
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vs.)
)
WALEED HAMED, WAHEED HAMED,)
MUFEEED HAMED, HISHAM HAMED, and)
PLESSEN ENTERPRISES,)
)
Additional Counterclaim Defendants.)
)
)
)
)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

JURY TRIAL DEMANDED

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

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

1.

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

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AND FEUERZEIG, LLP

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2.

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

3.

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

Q: ...the United Corporation is the – is the company that you’ve been paying rent to for many years, is that correct?

A: Yes, since we started.

See Exhibit 1, deposition of Hamed, dated March 31, 2014, p. 86.¹ See also Exhibit 2, testimony of Waleed Hamed on January 25, 2013, p. 98.

4.

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

¹ Exhibit 1 will contain all cited pages from the transcript of Hamed’s deposition on March 31, 2014 (“Vol. I”) and April 1, 2014 (“Vol. II”).

5.

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

6.

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

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

Q. So if he [Yusuf] –if he –if he told you how much you owe, would you disagree with him?

...

A. Yes, he [Yusuf] know exactly.

Q. He [Yusuf] knows exactly how much is owed?

A. Yeah, how much we owe him.

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

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

7.

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

8.

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

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

9.

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

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

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

10.

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

11.

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

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

12.

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

13.

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

14.

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

15.

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

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

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

A. He says that he's not denying the rent, and that Mr. Yusuf is the one who used to, in other words, determine the – the rental rate, and he's the one who would collect the rent.⁵

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

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

Id. at Vol. II, p. 118.

16.

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

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

17.

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

18.

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

19.

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

20.

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

21.

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

22.

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

23.

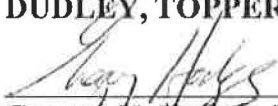
The total outstanding unpaid rent for all the space used by Plaza Extra – East from January 1, 1994 through August 30, 2014 is \$6,603,122.23, excluding the "disputed" increased rent from January 1, 2012 through the present. Id. at ¶ 26.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August 11, 2014

By:


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Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

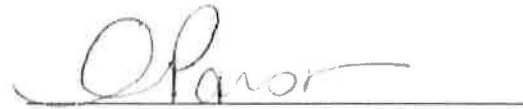
I hereby certify that on this 11th day of August, 2014, I caused the foregoing **UNITED CORPORATION'S MOTION FOR SUMMARY JUDGMENT UPON ITS CLAIMS FOR RENT AS TO THE PLAZA EXTRA – EAST LOCATION** to be served upon the following via e-mail:

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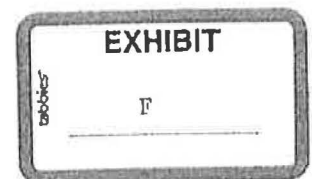


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EXHIBIT 3

UNITED CORPORATION INC.
PLAZA EXTRA
U S VIRGIN ISLANDS
PHONE: 460-719 1870 FAX: 460-719 8874

Plaza Extra TuTu Park Mall Sales From 01-01-2012 To 12-31-2012	31,075,735.56	
Less 10,000 SQ.FT Bulid 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
OF THE VIRGIN ISLANDS
PHONE: 848-759-1878 FAX: 848-759-1874

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><u>654,190.09</u></u>	

EXHIBIT 4

Gregory Hodges

From: Steve Russell <steve@mdrvi.com>
Sent: Saturday, September 26, 2015 12:23 PM
To: Joel Holt; Gregory H. Hodges
Subject: United Corp.; property tax reimbursement at Tutu Park Mall
Attachments: UnitedReimburseRecap9-25-15.pdf; 2014TaxReimbursRqst 9-25-15.pdf

Good morning. Attached is a revised billing for United Corp's portion of the 2014 property taxes, along with the supporting bills and "paid" receipts, and an explanatory cover letter to our tenants regarding recent tax issues. The reimbursement figure has been calculated and is payable pursuant to Section 3 of United's Lease with Tutu Park Limited.

As you know, we also received bills dated August 28, 2015, retroactively charging property taxes for 2012 and 2013. Despite ongoing negotiations with the assessor, there is substantial confusion regarding these and the payment / appeal deadlines associated with them, so we have not billed our tenants for these reimbursements yet. However, since I understand that United is in the process of winding up its affairs, I am providing preliminary calculations of what United's reimbursement would be based on the assessor's current position.

Please let me know if further information is required. All best, Steve

Charles S. Russell, Jr.
Moore Dodson & Russell, P.C.
P.O. Box 310
St. Thomas, VI 00804
Tel: (340) 777 5490
Fax: (340) 777-5498

DISCLAIMER: This email contains confidential and possibly attorney-client privileged materials. If you are not the intended addressee, please delete this email from your systems and notify the sender at steve@mdrvi.com.



September 25, 2015

Mr. Fathi Yusuf
United Corporation d/b/a Plaza Extra
C/O Honorable Edgar J. Ross
St. Croix, USVI

RE: Tutu Park, Ltd. Real Estate Taxes

Dear Mr. Yusuf,

Tutu Park, Ltd. has enjoyed a 100% exemption for the assessed value of the property for real estate taxes under their Economic Development Commission ("EDC") exemption. This benefit has been passed along to our tenants and the real estate taxes paid have been limited to those on the underlying value of the land. As we communicated to tenants in the 2012 and 2013 Tax Recovery Reconciliations, the EDC exemption for the assessed values expired on December 31, 2011. We were, however, never billed by the Tax Assessor's Office for the assessed values subsequent to the expiration until the 2014 Real Estate tax bills issued in 2015.

Attached is the calculation for the 2014 real estate taxes which we paid. The amount includes both land and improvements in the assessed value for 2014.

The substantial increased in billing came to us with no warning or discussion from the Tax Assessor's Office. Please be aware that on August 28, 2015 we have received retroactive billing for 2012 and 2013, which we are in the process of paying. We have also received the 2015 Real Estate tax bill that is due by February 1, 2016.

Tutu Park, Ltd. has filed a Tax Appeal with the Tax Assessor's Office to challenge the assessed values and related real estate tax and will seek all possible remedies for the benefit of our tenants. We will keep you apprised of this progress and any reduction or refund of real estate taxes would be returned to the Tenant.

Yours very truly/

A handwritten signature in black ink, appearing to read "Donna Liska", is written over the typed name and title.

Donna Liska
General Manager

DWL/

Tutu Park Mall
2014, 2013 and 2012 TAX RECOVERY

Tenant: PLAZA EXTRA

Billing Date: September 23, 2015

The total demised premises of Tutu Park Mall is 456,601 square feet and the total square footage of Plaza Extra is 61,086 sq.ft. which would allocate 13.38% of the tax billing to Plaza Extra.

			<u>2014</u>	<u>2013</u>	<u>2012</u>
Real Estate Taxes			321,893.56	305,976.01	284,531.25
<u>Mall Square Footage</u>					
Kmart	106,585				
Plaza Extra	61,086	13.38 %	<u>43,069.36</u>	<u>40,939.59</u>	<u>38,070.28</u>
Western Auto	22,400				
Merchant's Bank	12,000				
McDonald's	3,000				
Office Max Bldg.	63,500				
Mall	177,000				
My Brother's Workshop	11,030				
TOTAL	456,601				
Balance DUE:			<u>\$ 122,079.23</u>		

Please be advised that, since 1993, Tutu Park, Ltd. has enjoyed an exemption for the assessed improvements and have paid real estate taxes assessed on the underlying value of the LAND only. That exemption expired as of December 31, 2011 and therefore the real estate tax bills issued subsequent to that date were based on the LAND only. As of 2014 Bill, the Tax Assessor's office billed assessed improvements. As of August 17, 2015 the Tax Assessor retroactively assessed improvements for 2012 and 2013.

Tutu Park Mall
**2014 TAX RECOVERY
 TAX BILL**

Tenant: PLAZA EXTRA

Billing Date: September 23, 2015

The total demised premises of Tutu Park Mall is 456,601 square feet and the total square footage of Plaza Extra is 61,086 sq.ft. which would allocate 13.38% of the tax billing to Plaza Extra.

		<u>2014</u>	
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<u>Mall Square Footage</u>			
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Western Auto	22,400		
Merchant's Bank	12,000		
McDonald's	3,000		
Office Max Bldg.	63,500		
Mall	177,000		
My Brother's Workshop	11,030		
TOTAL	<u>456,601</u>		
2014	Balance DUE:		<u>\$ 43,069.36</u>