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

UNITED'S REPLY TO OPPOSITION TO MOTION FOR RECOVERY OF ADDITIONAL RENT FROM PARTNERHIP AS HOLDOVER TENANT

Defendant/counterclaimant United Corporation ("United") respectfully submits this Reply to Hamed's Opposition to Motion For Recovery of Additional Rent From Partnership As Holdover Tenant.

I. United Seeks Additional Rent from Partnership and Has Timely pursued the Claim.

A. United, as Landlord Has Brought the Additional Rent Claim.

Hamed continues to address this claim as a Yusuf claim, which Hamed argues cannot now be raised. *See* Opposition at p. 2 (arguing that "[N]o other claim for 'a reasonable rent increase' or 'special damages' was ever sought by Yusuf" and that Judge Brady and Master Ross have noted that "any new claims are now barred.") The claim at issue is not a Yusuf claim but rather a claim by United against the Partnership as a holdover tenant for additional rent incurred following notice and refusal to vacate ("Additional Rent Claim"). Thus, it is a debt of the Partnership. Hamed's attempt to mischaracterize the Additional Rent Claim as Yusuf's is incorrect–it has always been United's claim against the Partnership.

B. United's Additional Rent Claim Is Timely.

Hamed also argues the claim is "new" and "now barred." United's Additional Rent Claim is not *new*. From the outset of the litigation, United has maintained its claim for the additional rent and repeatedly has raised the issue throughout the entire wind up process.[1] Other rent claims by United have already been adjudicated. *See* Exhibit B to United's Motion—Judge Brady's April 27, 2015 Order (the "Rent Order"). The Court granted summary judgment to United finding it undisputed that the Partnership owed millions to United in unpaid past due rent for certain periods. As to Bay 1, the Court determined rent was due for the period from January 1, 2012 through "the date that Yusuf assumed sole possession and control of Plaza Extra-East" as to at least the

[1]United raised the Additional Rent Claim in: a) the First Amended Counterclaim (¶¶125-140) on behalf of United; b) Yusuf's Original Claims submitted to the Master on September 30, 2016 as a debt of the Partnership to United; c) Yusuf's' Amended Claims submitted on October 30, 2017 as a debt of the Partnership to United; and, d) Bench Memorandum at Exhibit A thereto as a debt of the Partnership to United. Hence, there is no merit to the argument that this is a "new" claim or that it is not United's claim.

undisputed amount. *See* Exhibit B—Rent Order, p.11. However, United always has maintained that it was entitled to additional increased rent consistent with the notices it provided for the January 1, 2012 to March 8, 2015 period in excess of the amount awarded in the Rent Order. Consequently, United's Additional Rent Claim calculates the remaining additional rent, net of that already awarded and collected for the period January 1, 2012 to March 8, 2015 at $6,974,063.10. *See* Exhibit C to United's Motion. Hence, the claim is not new or otherwise barred under a theory that it has not been previously pursued and it is properly before the Master.

II. Hamed's Characterization of Virgin Islands Law Is Incorrect.

A. Malling-Holm v. Feiner – Represents Virgin Islands Law as to Holdover Tenant

The Virgin Islands Territorial Court determined that "[W]ith the right to terminate the tenancy...carries the right to fix by notice a new rental rate for a new period." *Malling-Holm v. Feiner*, 4 V.I. 341, 347-48 (V.I. Terr., 1962). The Court explained that:

> [A] review of the cases cited in the jurisdictions where the question has arisen...convinces this court that *the better view* is that of the jurisdictions which hold that the tenant is liable for the increase, although he objects, if he holds beyond the term after notice of the increase.

Id. at 348 (emphasis added). The Court further explained that "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.* The finding that the landlord could fix the rate was not dependent upon the market value of the prospective rate and, in fact, the Court only referenced in *dicta* that the rate was not challenged as out-of-line with comparable accommodations. *Id.* at 349. The Territorial Court considered other cases and found the position that the landlord could fix the holdover rate to be "the better view" and did not require evidence of comparable rates or fair

market value to award additional rent. *Id.* To the extent that Hamed attempts to argue that such evidence is necessary, he misstates the holding of *Malling-Holm*.

B. The Partnership Is Still Liable for Increased Rent, Despite Objection of Hamed.

Hamed contends that simply because he objected to the increased rent that there was no agreement. This is incorrect. As set forth in *Malling-Holm*, a "tenant is liable for the increase, *although he objects*, if he holds beyond the term after notice of the increase." *Id.* at 348 (emphasis added). Hamed's objection is not determinative as to whether the Partnership is liable for the additional rent. Rather, the issue for the Master to determine is whether, as a result of the notices provided by United, the Partnership is deemed to have agreed to the increased rate because it knowingly remained in possession, despite ample notice of increased rent, as a holdover tenant and thus, is liable for the additional rent even though the Hamed objected to same.[2]

C. Marcelly v. Mohan – Involves Rent Control Laws and Is Inapplicable to this Case.

Hamed belabors the point that United did not cite to *Marcelly v. Mohan,* 16 V.I. 575 (V.I. Terr. 1979) despite the fact that it was authored by Henry Feuerzeig during his tenure as a Territorial Court Judge. United did not cite to it because it does not apply to this case. Rather, *Marcelly* involves a low income residential rental unit which was subject to "rent control" laws such that any alleged "contract to increase the rent was clearly prohibited by the rent control law." *Id.* at 583, *citing* 28 V.I.R. & R. §833-2(c). The Court held that "because the subject premises were subject to rent control, the parties could not validly agree to an increase in rent without the approval of the rent control officer." *Id.* at 584. United's landlord/tenant relationship with the

[2]Although Yusuf, in his individual capacity as a Partner, did not object, Hamed, who was also in possession of the Plaza Extra East location objected and refused to vacate, binding the Partnership to the liability for the increased rent.

Partnership is not subject to rent control laws and thus, the holding of *Marcelly* is inapplicable to this case.

D. Double and Graduated Rental Rates for Holdover Tenants Are Common in a Majority of States and Many States Dictate by Statute "Double Rental Rates" for Holdover Tenants.

Hamed further attacks the holding of *Malling-Holm* that the landlord is able to fix the increased rent for a holdover tenant as arcane and not reflective of the modern view. Hamed is incorrect. In fact, according to an American Bar Association publication:

> Holdover tenancies are so common that many states provide for a statutory "rent," often double the last rent due under the lease or double the "fair market rent."
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> . . .
>
> The parties to a lease can vary a statutory "double" rent remedy by providing otherwise in their lease, not only by reducing the "holdover" rent, but also by providing for higher amounts. Figures such as 125% or 150% are quite common (when negotiated), as are step approaches – such as 110% for the first 60 days. A New Jersey court has even approved an agreed-to tripling of the last rent charged under the lease.

Do You Really Know A "Holdover" Tenant When You See One? American Bar Association, Ira Meislik, eReport, ABA Section of Real Property, Trust and Estate Law, December 2012. Similarly, "within the ambit of the penalty theory, the American common-law view is that the landlord has the unilateral right to make the determination [as to the holdover rental rate], regardless of the tenant's consent." 84 Wash. U. L. Rev. 1287, 1301 (2006). Particularly in circumstances where a turn-over date is of special importance, penalty-type rental rates are widely used. *Id. citing* Restatement (Second) of Property: Landlord and Tenant §14.4 (1977). Increased holdover rates are so common in commercial leasing, that the terms of the holdover rental rate are the subject of specific negotiations; for example:

> The large office tenant will want to reduce the holdover rental rate, and it is common for landlords and tenants to agree on a fixed rate (for example, 125% to 150%) or graduated holdover rates based on the length of the holdover (for

> example, 125% for the first 30 to 60 days and 150% to 200% thereafter). A big concern for landlords is the ability to deliver the space to a succeeding tenant, so landlords typically will fight to keep some exposure on the expiring tenant for failing to timely vacate the space.

What's the Big Deal? Issues in Negotiating Large Office Leases, American Bar Association, Scott W. Dibbs, Probate and Property May/June 2014, 28-JUN Prob. & Prop. 42, 45. Hence, holdover rental rates which are designed to incentivize the holdover tenant to vacate are typical. Many states have statutory rates doubling the current rate and negotiations proceed from this baseline.[3] Holdover rates which are "double the fair market value" or triple the last rental rate are not uncommon.[4] Hamed's arguments to the contrary are incorrect and his arguments that they reflect the best rule for the Virgin Islands is, likewise, in error.

Here, United has demonstrated that notice was provided as to the termination of the landlord/tenant relationship more than a year in advance and that holding over would result in increased rent. The fact that rent was increased is not uncommon in a holdover tenant situation. Hamed refused to vacate. Such actions held United hostage and unable to use its property to generate profits without sharing them with Hamed. It also enabled Hamed's sons to continue to

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[3]Just by way of example, **Florida** statutes provide that "[W]hen any tenant refuses to give up possession of the premises at the end of the tenant's lease, the landlord...may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month..." 83.06-Right to demand double rent upon refusal to deliver possession, FL ST § 83.06. The same is true for, *inter alia*, **Mississippi**, § 89-7-25-Holding after notice; double rent, MS ST § 89-7-25, **Illinois**, 5/9-202-Wilfully holding over, IL ST CH 735 § 5/9-202; **New Jersey**, 2A:42-5-Holding over by tenant after giving notice of quitting; double rent recoverable, NJ ST 2A:42-5; **Iowa**, 562.2-Double rental value--liability, IA ST § 562.2; **Wisconsin**, 704.27-Damages for failure of tenant to vacate at end of lease or after notice, WI ST 704.27; **Missouri**, 441.080-Liability of tenants after termination of term, MO ST 441.080; **New York**, § 229-Liability of tenant holding over after giving notice of intention to quit, NY REAL PROP § 229; **South Dakota**, 21-3-8-Double damages for holding over by tenant after expiration of term and notice to quit, SD ST § 21-3-8; and **District of Columbia**, § 42-3207-Refusal to surrender possession; double rent., DC CODE § 42-3207. The **District of Columbia** statute belies *Hernandez v. Banks*, 84 A.3d 543 (2014) cited by Hamed for the proposition that damages are limited to a "reasonable rent" standard in a holdover tenant with notice situation.

[4] Even if the Master were inclined to award United an amount at "a rate that was reasonable" – the proper inquiry is what is a "reasonable *holdover rental* rate." Although United maintains that this inquiry is unnecessary as the landlord has the power to fix the holdover rental rate, to the extent that a "reasonable *holdover rental* rate" should be established, United has demonstrated that it is substantially higher than the last rental rate before the holdover period. At the very least, it is a topic for which additional discovery would be necessary.

get their exorbitant, unearned salaries. Under Hamed's theory, he could refuse to pay past due rent for millions of dollars (as he contested the rent that the Court ultimately determined was undisputed), refuse to vacate the premises, and avoid liability for increased rent while he obstinately remained in possession. Holdover tenants should not be rewarded for their obstinacy.

CONCLUSION

Since proper notices 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, at a minimum, the market rate or more appropriately, the typical holdover rate for the period in question. Discovery would 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,

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DATED: January 23, 2018

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2018, I caused the foregoing **United's Reply to Opposition to Motion For Recovery of Additional Rent From Partnership As Holdover Tenant**, which complies with the page and word limitations of Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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