

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
Defendants/Counterclaimants,)	JUDGMENT, AND
v.)	PARTNERSHIP DISSOLUTION,
)	WIND UP, AND ACCOUNTING
)	
WALEED HAMED, WAHEED HAMED,)	
MUFEED HAMED, HISHAM HAMED, and)	
PLESSEN ENTERPRISES, INC.,)	
)	
Additional Counterclaim Defendants.)	Consolidated With
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WALEED HAMED, as Executor of the)	
Estate of MOHAMMAD HAMED,)	
)	
Plaintiff,)	CIVIL NO. SX-14-CV-287
v.)	
)	
UNITED CORPORATION,)	ACTION FOR DAMAGES AND
)	DECLARATORY JUDGMENT
)	
Defendant.)	
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WALEED HAMED, as Executor of the)	
Estate of MOHAMMAD HAMED,)	
)	
Plaintiff,)	CIVIL NO. SX-14-CV-278
v.)	
)	
FATHI YUSUF,)	ACTION FOR DEBT AND
)	CONVERSION
)	
Defendant.)	
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**YUSUF'S OPPOSITION TO HAMED'S MOTION TO COMPEL RESPONSES TO
THREE REQUESTS TO ADMIT
AND
STIPULATED REQUEST FOR EXPEDITED DETERMINATION**

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Defendant/counterclaimant Fathi Yusuf ("Yusuf"), through his undersigned counsel, respectfully submits this Opposition to Hamed's Motion to Compel Responses to Three Requests to Admit and Stipulated Request for Expedited Determination ("Motion to Compel").

I. Summary

This discovery dispute ultimately stems from the failure of Mohammad Hamed and his son, Waleed, as executor of his estate ("Hamed") to pursue an accounting when he had the opportunity, prior to the submission of his purported accounting claims. As a result, Hamed never determined whether he had actual accounting claims – instead of just questions — which by his own admission, may never ripen into claims.¹ Hamed's accounting questions are onerous, often focusing on minutia and confusion as to ledger entries made by John Gaffney in his role as the Partnership accountant. Gaffney has spent countless hours attempting to respond to these questions and provide detailed explanations but often to no avail. At the December 15, 2017 hearing ("December Hearing"), the parties discussed whether discovery should be allowed on Hamed's accounting questions which Hamed mislabeled as "claims" before the Court had an opportunity to rule on whether they should remain in the case or be stricken. The parties also discussed who would be required to pay for Gaffney's time in responding if discovery did proceed.

With the filing of his discovery, which is the subject of this Motion to Compel (and much of the other discovery Hamed has served), Hamed has done exactly what counsel for Yusuf warned he might do:

...they're [Hamed] going to submit an interrogatory to Mr. Yusuf about an accounting issue and it is clear that he's [Yusuf's] not going

¹As the Master is well aware, the requirement for this submission is set forth in "Final Wind Up Plan Of The Plaza Extra Partnership," entered on January 9, 2015 (the "Plan"), §9, Step 6.

to be able to answer that...Mr. Gaffney will have to answer that, and since the partnership is not paying him now, the question of the time he spends compiling information and answering questions is going to be a serious question.

Mr. Gaffney is going to have to answer all those questions. There is no doubt about it. And so the issue is going to be who is going to pay for the time he spends answering those questions.

See **Exhibit A** - December Hearing Transcript, p. 29:8-30:2.

Following the December Hearing, the parties negotiated the Joint Discovery and Scheduling Plan ("JDSP") wherein Hamed designated certain claims ("H-41 to H-141") as Gaffney-specific claims for which he would compensate Gaffney for his time to respond. It now is clear that Hamed arbitrarily limited the subset of his claims relating to accounting questions to H-41 to H-141;² intending all along to ask Yusuf the balance of his accounting questions on claims outside that designation, which Yusuf could not answer without seeking information from Gaffney – all so that Hamed would not have to pay Gaffney for his time spent responding. Thus, a substantial portion of Hamed's discovery to Yusuf is an effort to circumvent Hamed's agreement to compensate Gaffney for time he will incur answering Hamed's various accounting questions.

While only three Requests to Admit are at issue in this Motion to Compel, a much larger number of Requests to Admit, Interrogatories and Requests to Produce are at stake, all of which should have been directed to Gaffney and not Yusuf.³ The Master's direction is needed as to

² The Motion to Compel (p.2) falsely suggests that the parties agreed to these 100 claims "**as the Gaffney – reviewed 'accounting issues.'**" As will be shown below, Hamed arbitrarily reduced his "Gaffney – reviewed accounting issues" from 125 to 100 in the negotiations leading up to the JDSP.

³ Specifically, the following Hamed discovery submissions should be directed to Gaffney (collectively the "Gaffney Additional Discovery"): a) Requests to Admit 10-21,23-25 in addition to Requests to Admit Nos. 2-3 for a total of 17 out of 49 or 34%; b) Interrogatories 4-5,8-13,17-

whether Hamed can seek to circumvent the parties' efforts to develop a logical discovery process that matches the request relating to an accounting issue with the person knowledgeable to respond and who should have to pay for Gaffney's time to respond, bearing in mind that this entire process was instituted as a result of Hamed's failure to secure the information earlier.

As to Request to Admit No. 1, Yusuf submits that his response is proper, in compliance with the rules and explains the basis for the admission and qualifications. Hamed seeks to create a "gotcha" scenario rather than to secure a complete and truthful response to the request. Hence, there is no basis to award the relief sought by Hamed and the responses should remain as given.

II. Hamed's Failure To Secure Answers to Accounting Questions Before Submitting his Claims and the Genesis of the JDSP.

Hamed and Yusuf were ordered to submit their claims – not questions – by September 30, 2016. Hamed was well aware of this deadline, but wasted repeated opportunities to determine whether he possessed any accounting claims and to have his accounting questions answered. As the deadline for claims submission approached, Hamed "object[ed] to the requirement that he submit a full statement of disputes and objections to that accounting." *See* Hamed's Revised Claims, p. 8. In fact, Hamed has yet to offer a viable excuse for failing to abide by the deadline for submitting genuine claims.

Hamed does not and cannot dispute that he never engaged an accountant to prepare an accounting of the partnership business or of partner withdrawals and distributions. In fact, Hamed does not disagree with John Gaffney's April 3, 2017 declaration that he spent an extraordinary

18,22-23,26,31-32 for a total of 15 out of 49 or 30%; and, c) Requests to Produce 1,3-4,8-12,14-18,20 for a total of 14 out of 47 or 29%. Copies of the Gaffney Additional Discovery are attached as **Exhibit B**.

amount of time with Hamed's accountants answering their questions or that Hamed ignored Gaffney's proposal, set forth in a letter dated May 17, 2016, which was reviewed and approved by the Master, "to have a VZ accountant work on premises with the original records" instead of burdening Gaffney with the task of gathering and spoon feeding information to Hamed's accountants. See Yusuf's Motion to Strike Hamed's Claim Nos. H-41 Through H-141 and Additional "Maybe" Claims. ("Yusuf's Motion to Strike Claims") at p. 3, note 1, and Exhibit C to that Motion, particularly at ¶ 6 of Exhibit C. Nor does Hamed dispute Gaffney's further description that:

In addition to complete access to all physical records of the Partnership business, since 2013, Plaintiff or his representatives have had real time access to current data and records, including the Sage50 Accounting System, as well as unfettered access to the Partnership's bank account information.

See Yusuf's Motion to Strike Claims, Exhibit C, ¶ 2. Hence, Hamed had every opportunity to gather the information needed to answer his accountants' questions and determine whether those questions represented actual claims.

Hamed chose to squander that opportunity. Thus, despite having engaged accountants for years, who had access to all the same information to which Yusuf had access, Hamed never undertook to prepare his own Partnership accounting. At best, Hamed provided only a smattering of challenges to specific transactions as well as a list of questions which he mislabeled as "claims." Hamed and his accountants engaged in a time-wasting, unproductive exercise to raise questions regarding journal entries made by Gaffney for the period 2013 to present when he was responsible for the Partnership accounting.

At the December 2017 Hearing, Counsel for Yusuf addressed this issue. Hamed acknowledged that he had no proof that any of these ledger entries were improper and conceded that “a lot of them may disappear” after questioning Gaffney about them. *See* Exhibit A at 23:7-8. Attorney Holt stated “I will agree, of the 165, you might have 80 to 90 disappear once somebody says, no, that was spent on this.” *Id.* at 23:23-24:1. Counsel for Yusuf raised the issue of submitting discovery on the Hamed claims to Yusuf, but which really should be directed to Gaffney. Yusuf’s counsel explained that in Gaffney’s declaration:

[Gaffney] said that he spent at least 50 times more time answering questions from their side and providing information than he did with us [Yusuf]....at some point in time the partnership stopped paying Mr. Gaffney, and it stopped paying Mr. Yusuf’s salary as well.

See Exhibit A at 28:25-29:6. As set forth above, counsel for Yusuf raised the concern that:

they’re going to submit an interrogatory to Mr. Yusuf about an accounting issue and it is clear that he’s not going to be able to answer that, that Mr. Gaffney will have to answer that, and since the partnership is not paying him now, the question of the time he spends compiling information and answering questions is going to be a serious question...

...Mr. Gaffney is going to have to answer all those questions. There is no doubt about it. And so the issue is going to be who is going to pay for the time he spends answering those questions. And I would respectfully submit that the plaintiffs [Hamed] ought to have to pay that in full.

Id. at p. 29:8-30:2.

Counsel for Hamed responded stating “I don’t think that plaintiff [Hamed] should have to pay....” *Id.* at p. 28:8-9. The Master then weighed in stating “see if you can agree on a course of conduct, if not, just file an objection...and bring it before me at the appropriate time.” *Id.* at p.

30:12-15. There was some discussion about whether to resolve the motions, which would limit or narrow the claims, before engaging in discovery. Ultimately, the parties were required to submit a joint scheduling plan by January 12, 2018.

Counsel for the parties attempted to craft a logical discovery plan acknowledging that much of the discovery Hamed sought included specific accounting questions which were best directed to Gaffney, as the Partnership accountant, and would require extensive time from him to respond. On January 3, 2018, counsel for Hamed submitted a proposed plan in the form of a motion. *See* email and proposed motion attached as **Exhibit C**. The Master's attention is specifically directed to §B of the proposed motion entitled "Hamed's Plan as to 125 Accounting Claims." In a January 5, 2018 email, attached as **Exhibit D**, counsel for Yusuf responded stating that Yusuf could not agree to the plan outlined in the motion for the reasons set forth in the email and proposed a discovery plan that essentially tracked Form 16-A of the V.I. Rules of Civil Procedure. In a series of emails from counsel for Hamed on January 5 and January 8, 2018, the number of Hamed's "accounting claims" was mysteriously reduced from 125, as mentioned in the January 5, 2018 email, to 100, without explanation. *See* email exchange and revised proposed JDSP attached as **Exhibit E**. The Master's attention is specifically drawn to §A of the proposed JDSP referring to the "100 'Accounting' Issues H-41 through H-141" and §A(1), which proposed to reduce Gaffney's hourly rate to \$70 per hour from the \$100 per hour purposed in the motion attached as part of Exhibit C. On January 9, 2018, counsel for Hamed sent the email and proposed discovery and scheduling plan attached as **Exhibit F**. Counsel for the parties continued to negotiate the JDSP. On January 12, 2018, counsel for Yusuf sent an email and revised proposed JDSP, attached

as **Exhibit G**, to counsel for Hamed. This was the version that was ultimately submitted to the Master, with only minor revisions not germane to the Motion to Compel.

As can be seen from the drafts of the JDSP and discussions relating thereto, Hamed was keen on keeping Gaffney's hourly rate as low as possible. Moreover, the initial number of "accounting claims" was unilaterally reduced from 125 to 100. While the JDSP ultimately submitted to the Master clearly reflected an agreement that Hamed would have to pay for Gaffney's time in responding to discovery concerning the H-41 through H-141 claims, it did not contain an agreement that Hamed should not have to pay for any other discovery that is most appropriately addressed to Gaffney.

Yusuf believed and understood that Hamed had selected this subset of 100 claims to be answered by Gaffney based upon his actual discovery needs and as Gaffney was the proper source to provide the answers needed (again, which may or may not evolve into actual claims). However, it now appears that Hamed selected the claims to be directed to Gaffney, not solely because he was the Partnership accountant with the best knowledge as to these issues, but rather to arrive at an arbitrary subset of "accounting claims" which would limit Hamed's financial exposure to Gaffney for his services. As Hamed began submitting discovery on claims outside of the H-41 to H-141 group, it became clear that these were obviously questions that should be directed to Gaffney, but, instead, were being directed to Yusuf –to avoid paying Gaffney.

Specifically, as to Request to Admit Nos. 2 and 3 – they are clearly discovery which should be directed to Gaffney.

Request to Admit No. 2:

Request to admit number 2 of 50 relates to Claim H-18 (previously identified as 275) – described in the claims list as “KAC357, Inc. payment of invoices from FreedMaxick.”

Admit or deny that the Partnership did not reimburse KAC357, Inc. for the invoices shown in Exhibit 275, of the Exhibits to JVZ Engagement Report, September 28, 2016, bates numbers JVZ-001240-JVZ-001241.

RESPONSE:

Yusuf objects to this Request for Admission as it is properly directed to John Gaffney. Yusuf shows that this Request along with other discovery recently submitted should be directed to John Gaffney and maintain that these items were not included in the original list of Gaffney Items H-41 through H-141 in what appears to be an attempt to circumvent the agreement for John Gaffney to respond to discovery and that payment for his time to be at the expense of the Hamed pursuant to the Joint Discovery and Scheduling Plan. Further responding, Yusuf has no knowledge as to this particular payment by KAC357, any request for reimbursement or the accounting of same and, therefore, can neither admit or deny this Request to Admit.

Hamed points out that Request to Admit No. 2 relates to claim H-18, outside the arbitrary H-41 to H-141 subset. Clearly, in order to effectively respond to this request, Yusuf would need to engage Gaffney to, among other things, look up the submission and confirm whether a payment was made or whether it was accounted for by another means, such as an off-set. Hamed should have included this accounting claim in the subset of matters submitted to Gaffney for response. Hamed's motivation is to seek substantive responses from Gaffney, but to require Yusuf to pay for it, as Gaffney would need to spend the time to respond to the question and provide the information

to Yusuf but could not seek remuneration from Hamed as it relates to a claim outside the arbitrary subset of claims for which Hamed has agreed to pay for Gaffney's time.

Likewise, as to Request to Admit No. 3 which provides:

Request to admit number 3 of 50 relates to Claim H-153 (previously identified as 3009a) – described in the claims list as “Partnership funds used to pay United Shopping Center's Property Insurance.”

Admit or deny that after 9/17/2006 the Partnership paid the United Shopping Center's property Insurance – which included protection for properties other than the Plaza East Store.

RESPONSE:

Yusuf objects to this Request for Admission as it is properly directed to John Gaffney. Yusuf shows that this Request along with other discovery recently submitted should be directed to John Gaffney and maintains that these items were not included in the original list of Gaffney Items H-41 through H-141 in what appears to be an attempt to circumvent the agreement for John Gaffney to respond to discovery and that payment for his time to be at the expense of the Hamed pursuant to the Joint Discovery and Scheduling Plan.

Further responding, according to the documentation submitted by Hamed, such inquiries were previously directed to John Gaffney who researched the question and provided them the following detailed response:

PE [Plaza Extra] funds paid insurance for the shopping center because that was the agreement between Fathi Yusuf and Mohammad Hamed. The payment of insurance by PE was a 25 year practice.

I found the commercial liability and property policies for 2012 that reflect, among other things, the value of the insured properties. Subsequent policies are likely to be substantially the same.

Invoice payments for policies paid by Plaza STT are unavailable since those records remain in St.

Thomas. I searched the invoices paid by East in 2014 without success...2013 records are too far back in the warehouse to conduct a search for this blanket request.

In lieu of the extensive document request, provided herein are the schedules of Prepaid Insurance for years 2012 through 2015 with remarks regarding allocation of charges between the Plaza stores and the Shopping Center as I learned them.

The first schedule for 2012 was inherited from Margie Soeffing (prior United Corp dba Plaza Extra Controller). I could not understand her allocations sufficiently nor could she offer much help as she admitted a great deal of confusion about insurance. After several conversations with her and then Fathi Yusuf, I prepared a new schedule to close 2012 and to provide a base for moving forward to 2013.

Consequently, it is clear that Hamed has already received a substantial response from John Gaffney and that his investigation into the issue revealed that an allocation was in fact made. The allocation and schedule were provided to Hamed. Hence, Yusuf objects to this Request as he is without knowledge to either admit or deny same and shows that it is properly directed to John Gaffney if any further clarification even is needed.

This is clearly a matter for Gaffney despite the fact that it relates to claim H-153, which is outside of the H-41 to H-141 subset. In fact, while investigating the response, Yusuf discovered that Gaffney had already provided a detailed response to Hamed on this issue. In an effort to be responsive, Yusuf reproduced the information Gaffney had earlier provided to Hamed. Yet, Hamed still takes issue. Rather than acknowledging receipt of the information, Hamed attempts to engage in gamesmanship.

Neither of the responses to Request to Admit No. 2 or 3 are improper. The information sought therein is properly directed to Gaffney and should be included in the discovery submitted to him directly for which he should be compensated. To require Yusuf to respond will simply mean that Yusuf will have to engage Gaffney and then compensate Gaffney for providing Hamed his responses. This is the very scenario that was sought to be avoided when preparing the JDSP. To the extent that Hamed seeks to take the position that his arbitrary designation is all that Hamed will agree to compensate, then Yusuf requests the Master to address the issue and render a determination as to the discovery that should be directed to Gaffney and how he is to be compensated for his time.

III. Request to Admit No. 1:

As to Request to Admit No. 1, Hamed protests Yusuf's detailed response given in good faith to clarify his admission. There is nothing deficient or improper as to this response.

Request to Admit 1 of 50:

Request to admit number 1 of 50 relates to Claim H-13 (Previously identified as 210) – described in the claims list as “Hamed payment of taxes during criminal case.”

Admit or deny that Fathi, Fawzia, Maher, Nejeh, Syaid, Zayed and Yusuf Yusuf's income taxes were paid with Partnership funds for the years 2002-2012, but the Hamed taxes were not paid with Partnership funds.

RESPONSE:

Yusuf admits that the partnership agreement required that the Yusuf family's personal income taxes as well as United's taxes be paid from the United operating account as members of the Yusuf family were the only individuals claiming for tax purposes any of the income derived from the grocery store operations and such income was recognized by United. None of the Hamed family claimed any

of the distributions they received from the Yusuf-Hamed partnership on their income tax returns and thus, incurred no such tax liability for said income. The partnership agreement was for the splitting of net profits after the payment of taxes which would be incurred by United and the Yusuf family members.

Hamed takes exception to use of the term "Partnership agreement" contending that there was no *written* partnership agreement. All of the parties readily acknowledge that the Partnership agreement was not reduced to writing. However, there was still an oral agreement. In this response, Yusuf explained that the Partnership agreement (as agreed orally between the partners) was as set forth in his response. There is nothing improper or misstated in the response.

Yusuf submits that the explanation comports with the requirements of the rules as well as the good faith obligations to admit that which can be admitted and explain that which cannot. The response and explanation is not favorable to Hamed and so he seeks to avoid it by feigning a violation of the rules, where none exists. Hence, there is no basis to grant his Motion to Compel.

CONCLUSION

Hamed ignored the process as set forth in the Plan, disregarded the directions of the Master, did not submit an accounting, and his Claim Nos. H-41 through H-141 and others are questions, not claims. Nonetheless, the parties created a framework to proceed with discovery bearing in mind the volume of inquiries that related to accounting efforts of Gaffney and the need to compensate him for his time running such questions to ground. Hamed's submission of accounting questions to Yusuf, which should be directed to Gaffney, demonstrates a bad faith effort to circumvent the agreement to compensate Gaffney for the time he will spend responding to the inquiries. There are no less than 43 discovery submissions, in addition to the ones at issue here

for an average of 31% of the total discovery served on Yusuf, which will turn on whether Hamed can finagle the time from Gaffney to respond. Yusuf respectfully requests the Master to either deny the Motion to Compel or revise the matters designated for Gaffney responses to include those listed herein which are more properly directed to him and for which Hamed should be required to compensate Gaffney. As to Yusuf's response to Request to Admit No. 1, Yusuf submits that his response is compliant with the applicable rules and made in an effort to be responsive and, therefore, should be allowed to remain as is.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: April 6, 2018

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2018, I caused the foregoing **Yusuf's Opposition to Hamed's Motion to Compel Responses to Three Requests to Admit and Stipulated Request for Expedited Determination** 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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