

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

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

*Plaintiff/Counterclaim Defendant,*

vs.

**FATHI YUSUF** and **UNITED CORPORATION**

*Defendants and Counterclaimants. vs.*

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

*Counterclaim Defendants.*

**Case No.: SX-2012-CV-370**

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

**JURY TRIAL DEMANDED**

Consolidated with

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**WALEED HAMED**, as the Executor of the Estate  
of MOHAMMAD HAMED, *Plaintiff,*

vs.

**UNITED CORPORATION**, *Defendant.*

**Case No.: SX-2014-CV-287**

Consolidated with

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**WALEED HAMED**, as the Executor of the Estate  
of MOHAMMAD HAMED, *Plaintiff*

vs.

**FATHI YUSUF**, *Defendant.*

**Case No.: SX-2014-CV-278**

Consolidated with

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**FATHI YUSUF**, *Plaintiff,*

vs.

**MOHAMMAD HAMED TRUST**, *et al, Defendants.*

**Case No.: ST-17-CV-384**

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**HAMED'S MOTION TO STRIKE CLAIM Y-8 ON PROCEDURAL GROUNDS:  
UNITED'S SEPARATE CONTRACT CLAIM FOR WATER SALES TO THE PARTNERSHIP  
VIOLATES THE STATUTE OF LIMITATION AND THE STATUTE OF FRAUDS**

## I. Introduction

In its counterclaim (via the *Revised Claims*), United Corporation ("United") asserts a contract claim (Y-8) in the amount of \$693,207.46. This is solely a United claim. It has nothing to do with Hamed's and Yusuf's internal relationship in the Partnership. It is based on an alleged vendor contract pursuant to which United would supply water for sale at a Plaza Extra Supermarket, for which United would be paid. Although Hamed has asserted that this was actually the Partnership's own water, no factual contentions are at issue here *as this is a motion predicated solely of the legal infirmity of the claim.*

Hamed asks that the claim be struck prior to depositions and briefing, as a matter of law, on two distinct procedural grounds: (1) pursuant to the applicable VI *statute of limitations* ("SOL"), Yusuf provided dispositive facts in its responses on May 15, 2018 that preclude the first portion of the claim, up to September 17, 2006, and (2) he admitted facts as to the entire claim relating to the *statute of frauds*—as there is no writing as to the agreement for water.

## II. Facts

United is a party to this litigation as a defendant and counterclaimant. It is not a partner. United's claim in this context is solely that of a third-party vendor against the Partnership. At page 12 of its October 30, 2016 *Revised Claims*, United asserted the following as its counterclaim:

### F. Water Revenue Re Plaza Extra-East

Beginning in 1994, Plaza Extra-East began selling **United's water**. The proceeds for the first 10 years were used primarily for charitable purposes. **From April 1, 2004**, however, all revenue from the sale of United's water that was collected by Plaza Extra-East **was to be paid to United**. United has calculated the average water sales per month based upon two years of sales in 1997 (\$52,000) and 1998 (\$75,000) as \$5,291.66 per month. Multiplying the average monthly sales revenue by 131 months, United is owed \$693,207.46 from the Partnership for the water sales revenue from April 1, 2004 through February 28, 2015. (Emphasis added.)

The phrase "was to be paid" means that United asserts a contract under which it "was to be paid" in return for supplying water to the Partnership for sale at a Plaza Extra store.

Under the *January 29, 2018 Discovery Plan*, written claims discovery is completed. In discovery, United was unable to describe any post-September 17, 2006 documents as to this claim,<sup>1</sup> and, critically, **nor it could describe a written contract providing that it "was to be paid" for water, executed on any date**. Moreover, in response to Hamed's interrogatory #2, (as to Claim Y-08 - Old Claim #: Yusuf III.F- Water Revenue Owed United) Yusuf repeated the same, unsupported recitation that "[a]fter May 5, 2004, the proceeds from the sale of United's water were to be paid to United."

Describe in detail, by month, from Sept 17, 2006 to 2014, the amount of water sold to the Partnership, by whom it was sold, the number of gallons per month, the per gallon cost in each of those months, the total value of the gallons sold by month, year and total amount - and describe any ledgers, shipping invoices, receipts or other documents which support your claim as well as any witnesses who would have knowledge and what knowledge you believe they have.

**RESPONSE:**

Defendants first object that this Interrogatory is unclear as it requests information about water sold "to the Partnership." United's claim against the Partnership is that the Partnership sold **United's water** from the Plaza Extra-East location. After May 5, 2004, the proceeds from the sale of United's water **were to be paid to United, not the Partnership**. Nonetheless, in an effort to respond to what appears to be questions relating to the support and calculations for water sales due to United from the Partnership, Defendants submit that the calculations set forth Yusuf's Amended Accounting Claims Limited to Transactions Occurring On or After September 17, 2006 ("Yusuf s Claims") were based upon two years of sales in 1997 (\$52,000) and 1998 (\$75,000) for an average of \$5,291.66 per month.<sup>[2]</sup> As Waleed Hamed was in charge of the Plaza Extra -East location where the sales took place, Yusuf will be seeking additional information from him as part of the written discovery propounded on him. The number listed in the claims was the average monthly sales multiplied by 131 months demonstrating

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<sup>1</sup> Interrogatory 2 of 50 is set forth in toto just below. As to documents, it required United to: describe any ledgers, shipping invoices, receipts or other documents which support your claim as well as any witnesses who would have knowledge and what knowledge you believe they have. (Emphasis added.)

<sup>2</sup> No underlying documents were listed for post-September 17, 2006 sales or agreements — this is simply BDO's regurgitation of "what Fathi told us" and pre-2006 information from way back in the 1990's, when even Yusuf admits the agreement was to give the funds to charity.

that United is owed \$693,207.46<sup>[3]</sup> from the Partnership for the water sales revenue from April 1, 2004 through February 28, 2015. Yusuf submits that discovery is on-going and that he will supplement this response as and when appropriate.

### **III. Applicable Law**

#### **1. The USVI Statute of Limitations**

The SOL applicable in this action is 5 V.I.C. §31(3).<sup>4</sup> The statute of limitations for actions sounding in contract is 6 years. Thus, the limitations period for United Corporation's claim is 6 years. The SOL governing counterclaims relates back to the time the original complaint was filed. *James v. Antilles Gas Co.*, 2000 WL 1349233 (V.I. Super. 2000) (Cabret, J.) The SOL for United's contract claim are barred to the extent that they arose more than 6 years before the complaint was filed on September 17, 2012. Thus, the bar date of September 17, 2006.

#### **2. The Statute of Frauds**

In 2015, the VI Supreme Court examined the statute of frauds in detail in *Brouillard v. DLJ Mortg. Capital, Inc.*, 63 V.I. 788, 797–98, 2015 WL 6549224, at \*5–6 (V.I. Oct. 28, 2015)(footnote omitted). At 5-6 of that decision, the Court stated:

#### **C. The Superior Court correctly granted summary judgment on the Brouillards contract claims because they were barred by the Statute of Frauds.**

The Brouillards filed two contract claims against FirstBank in their answer to the motion for summary judgment: breach of the implied covenant of good faith and fair dealing and breach of contract. Both counterclaims rely on the Brouillards' belief that FirstBank had a contractual obligation to provide additional funding in the form of a second loan to be executed in early 2007. The Brouillards allege that FirstBank's failure to provide additional funding has resulted in a breach.

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<sup>3</sup> Although the facts are not at issue here, it is interesting to note that the calculations are based on sales before the SOL. None are based in the actual years after the SOL, and no documents are provided to demonstrate anything from September 17, 2006 forward.

<sup>4</sup> §31 *Time for commencement of various actions.* That section states: (3) Six years (A) An action upon a contract or liability, express or implied, excepting those mentioned in paragraph (1)(C) of this section."

To establish a breach of contract claim, the Brouillards must prove that a contract existed, that there was a duty created by that contract, that such duty was breached, and that as a result they suffered damages. *\*\*798 Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 135 (V.I. 2009). We need only address the first element of whether a contract existed in responding to the Brouillards' appeal, because it is dispositive.

\* \* \* \*

the Brouillards **rely on prior communications with FirstBank's loan officer to establish that they had an oral agreement. Yet, even assuming that an oral agreement existed, it is barred by the Statute of Frauds. As codified in the Virgin Islands**, the Statute of Frauds, 28 V.I.C. § 244 provides in relevant part:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof is in writing, and subscribed by the party to be charged therewith, or by his lawful agent under written authority:

- (1) An agreement that by its terms is not to be performed within one year from the making thereof.
- (2) A special promise to answer for the debt, default, or misdoings of another person.

Thus, in the Virgin Islands, any agreement to be performed for a period greater than one year is void and unenforceable under the Statute of Frauds unless it is evidenced by a writing to which the party to be charged with the obligation has subscribed. And, an oral agreement regarding an interest in property for a period greater than one year is void and unenforceable under the Statute of Frauds. See 28 V.I.C. § 244(1). (Emphasis added.)

Accordingly, Yusuf's contention that "[a]fter May 5, 2004, the proceeds from the sale of United's water *were to be paid to United*, not the Partnership" is nothing more than an attempt to describe an oral vendor contract in 2004 that would be enforced in the ensuing years.

#### **IV. Argument**

##### **1. SOL**

Yusuf has admitted that the first half of his claims through September 17, 2006 occurred prior to the limitations period. "From April 1, 2004, however, all revenue from the sale of United's water that was collected by Plaza Extra-East was to be paid to United." Page 12 of Yusuf's October 30, 2016 *Revised Claims*. Thus, claims from 2004 to September 17, 2006 are barred.

## 2. Contract

Yusuf has no written contract of any date, no post-September 17, 2006 written receipts, no written memoranda —he has nothing that suggests such a contract existed between United and the Partnership. To the extent that he alleges an oral contract, he admitted that it was formed in 2004 and was to be performed from that time until present — far more than one year. Thus, his claim is barred by the Statute of Frauds.

## V. Conclusion

Even leaving aside the fact that this wasn't even United's water, there is no claim here as a matter of law. There never has been. Since this is not a "Partnership Claim," no "special agreements that benefit Yusuf" like the alleged tax agreements are at issue. This is simply an alleged oral contract between a vendor and a grocery store for water. To the extent that it involves claims before the SOL bar date, it is void as a matter of law for that period. To the extent that it alleges a multi-year contract beginning in 2004, it is void under the Statute of Frauds.

**Dated:** May 25, 2018



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## CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of May, 2018, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

**Hon. Edgar Ross** (w/ 2 Mailed Copies)  
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## CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)

This document complies with the page or word limitation set forth in Rule 6-1(e).

