

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

**MOHAMMAD HAMED, BY HIS
AUTHORIZED AGENT WALEED 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.,**

COUNTERCLAIM DEFENDANTS.

**WALEED HAMED, AS EXECUTOR OF THE
ESTATE OF MOHAMMAD HAMED,**

PLAINTIFF,

v.

UNITED CORPORATION,

DEFENDANT.

MOHAMMAD HAMED,

PLAINTIFF,

v.

FATHI YUSUF,

DEFENDANT.

Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE
RELIEF, DECLARATORY
JUDGMENT, PARTNERSHIP
DISSOLUTION, WIND UP, and
ACCOUNTING**

CONSOLIDATED WITH

Civil No. SX-14-CV-287

**ACTION FOR DAMAGES and
DECLARATORY JUDGMENT**

CONSOLIDATED WITH

Civil No. SX-14-CV-378

**ACTION FOR DEBT and
CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter “Master”) on Yusuf’s motion to clarify or modify the joint discovery and scheduling plan. In response, Hamed filed an opposition and Yusuf filed a reply thereafter.

On January 29, 2018, the Master signed off the joint discovery and scheduling plan (hereinafter “Discovery Plan”) submitted by Parties on January 12, 2018. The Discovery Plan provided, in relevant part pertinent to this motion:

A. Discovery as to Hamed Claims H-41 through H-141

Defendants Fathi Yusuf (“Yusuf”) and United Corporation (“United”) will be filing a Motion to Strike Claims H-41 to H-141, which, if granted, will obviate the need for any discovery relating to any claim that is stricken. Plaintiff will be opposing that Motion.

In the event the Motion is denied in part or in full, the parties agree to the following discovery regarding any of the Claims H-41 to H-141, which survive that Motion:

1. Mr. Gaffney will be paid by Hamed at the rate of \$150.00 per hour for the time he works, set forth in a contemporaneous kept timesheet for answering the items in this “Section A”. Mr. Gaffney will submit daily emails to counsel for Hamed informing them of the hours worked and what was done. Unless counsel for Hamed disapproves the work by the end of the following day, Mr. Gaffney will continue the work. If it is disapproved, the Master will be consulted for a decision before work resumes. These emails will then form the basis of weekly billings that shall be paid within one month of receipt of same.

2. For each of the Hamed Claims numbered H-41 through H-141¹, which survive the Motion, John Gaffney will provide a written response, in his fiduciary capacity as the Partnership Accountant, to the following two items:

a. Interrogatory: Provide a written statement describing this transaction, with reference to when the actual activity or delivery occurred, who the persons/entities are, what amounts were involved, and what it was for (with reference to why the funds are allegedly properly charged to the Partnership) and making reference to any checks, invoices or other relevant documents.

b. Production of Documents: Attach to the above Interrogatory response, the documents referenced in your response.

3. Mr. Gaffney’s responses to interrogatories and document requests will be provided in the bi-weekly period in which they are completed and not in groups or all at once, by July 31, 2018. The parties may also subpoena third parties related to the transactions at issue.

4. Hamed shall have a total of fourteen hours to depose Mr. Gaffney with respect to any of the Claims H-41 – H-141 that survive the Motion. Yusuf and United will be allowed a similar amount of time at each examination for cross-examination, which will not be charged to Hamed’s 14 hours, and Hamed re-direct, which will be charged to his 14 hours. The depositions shall be conducted on four separate, non-consecutive days of Hamed’s selection based on Mr. Gaffney’s reasonable availability, unless Mr. Gaffney agrees to a different schedule, and the Notice of Deposition shall specify the

claims and responses to be covered in the deposition. The parties may agree to tape or video-recorded deposition rather than a court reporter.

5. The written portion of this process will be completed by Mr. Gaffney by July 31, 2018.

6. No part of these funds paid to Mr. Gaffney by Hamed will be paid by him or shared by him with Yusuf or United or any third person or entity.

¹ Gaffney will be allowed to identify, collect and transport sales journals for Plaza Extra-Tutu Park and Plaza Extra-West from January 2013 through April 2015 as needed. Hamed will arrange or pay for the transport.

In his motion, Yusuf argued that this motion was “necessitated because Carl J. Hartmann, III (“Hartmann”), one of the attorneys for plaintiff/counterclaim defendant Waleed Hamed, as the Executor of the Estate of Mohammad Hamed (“Hamed”), sent an email to John Gaffney on April 26, 2018 attaching a memorandum that seeks to place unilateral restraints on Mr. Gaffney’s potential work under the [Discovery] Plan.” (Motion, p. 1) Yusuf claims that Attorney Hartmann’s “unsolicited advice and instructions are inconsistent” with the Discovery Plan. (Id.) Yusuf pointed out that Attorney Hartmann claimed in his email to Yusuf’s counsel, Charlotte Perrell, that “any discussions or communications between counsel for Yusuf and Mr. Gaffney regarding the Memo or Mr. Gaffney’s work under the [Discovery] Plan ‘would not only be interference—but would violate a raft of ethical issues.’” (Id., at p. 3; Exhibit 1, Email from Carl Hartmann to Charlotte Perrell, dated April 25, 2018) As such, Yusuf requested the Court to clarify and/or modify the Discovery Plan by including the following terms: (1) Yusuf’s counsel must be included in the communications contemplated under Section A(1) of the Discovery Plan – Yusuf argued that while the Discovery Plan is silent regarding Yusuf’s counsel’s involvement in these communications—namely, communications between Mr. Gaffney and Attorney Hartmann regarding Mr. Gaffney’s work under the Discovery Plan and communications between Attorney Hartmann and the Master regarding any of Mr. Gaffney’s work disapproved by Attorney Hartmann for payment by his client—“counsel for Yusuf should be copied on all such communications, if only because the discovery process provided for in

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the [Discovery] Plan should be mutual and transparent.” (Motion, p. 4); (2) Nothing in the Discovery Plan precludes Mr. Gaffney from engaging in ex parte communications with either Hamed’s counsel or Yusuf’s counsel regarding his work under the Discovery Plan – Yusuf argued that there is nothing in the Discovery Plan that supports Hamed’s instruction to Mr. Gaffney to not engage in an ex parte communications with Yusuf and Yusuf’s counsel. (Id., at p. 4-5); (3) Nothing in the Discovery Plan requires United to continue paying Mr. Gaffney’s regular salary while he works on the discovery matters for which Hamed must pay under the Discovery Plan – Yusuf argued that the memorandum Attorney Hartmann sent to Mr. Gaffney is effectively seeking to modify Section A(6)¹ of the Discovery Plan by stating in that Mr. Gaffney cannot “split fees or enter into any arrangement that accomplishes such a splitting via a reduction or substitution of your regular wage/bonus.” (Id., at p. 5; Exhibit 2, Memorandum from Carl Hartmann to John Gaffney, dated April 25, 2018) Yusuf further argued that, “[a]s long as Gaffney does not pay or share any portion of the amounts paid to him by Hamed under the [Discovery] Plan the amount Gaffney receives from United is simply irrelevant” and “United, as Gaffney’s employer, should have the freedom not to pay Gaffney for time periods when he is not performing work on its behalf.” (Motion, p. 5); and (4) Attorney Hartmann’s memorandum to Mr. Gaffney is nothing more than an unsolicited interpretation of the Plan, which has no binding effect upon Gaffney except to the extent otherwise ordered by the Master. (Id., at p. 2) Yusuf also requested the Master to direct counsel for Hamed to “cease issuing unsolicited memos to Mr. Gaffney containing instructions regarding the manner in which he is to conduct his work under the [Discovery] Plan.” (Id., at p. 5)

¹ Section A(6) of the Discovery Plan provides: “No part of these funds paid to Mr. Gaffney by Hamed will be paid by him or shared by him with Yusuf or United or any third person or entity.” (Discovery Plan, dated January 29, 2018)

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In his opposition, Hamed argued that the terms that Yusuf sought to clarify and/or modify were “explicitly bargained for” and “after extended, specific negotiation” (Opp., p. 2, 12)—namely: (1) Mr. Gaffney shall act in a “fiduciary capacity” for the entire Partnership (Id., at p. 2); (2) Mr. Gaffney shall submit daily emails to Hamed’s counsel (Id.); (3) Mr. Gaffney’s daily email to Hamed’s counsel shall include Mr. Gaffney’s hours and the work that was done (Id.); (4) any disputes Hamed’s counsel has with Mr. Gaffney’s hours and/or work shall be directed to the Master (Id.); and (5) in turn, the Master would provide Mr. Gaffney with any necessary directions (Id.). Hamed attached several exhibits to support his position, including declarations and redacted correspondences regarding the negotiation of the Discovery Plan. As to the issue of Mr. Gaffney’s daily email to Hamed’s counsel, Hamed stipulated that he will “immediately provide copies of Mr. Gaffney’s daily emails to Yusuf/[Yusuf’s counsel].” (Id., at p. 12) Hamed also noted in his opposition that he does not intend to direct or instruct Mr. Gaffney, seek ex parte communication with the Master, or direct Mr. Gaffney’s employment or payment by United. As such, Hamed claimed that “it would be a unmitigated disaster to allow Yusuf/[Yusuf’s counsel] to direct responses, or give legal advice on how to respond to Mr. Gaffney in this limited process—something Hamed expressly bargained to avoid—as this will create an endless progression of interference, incomprehensible discovery responses” and thus, “[n]o change to the [Discovery] Plan is needed.” (Id.)

In his reply, Yusuf pointed out that Hamed failed to address the memorandum Attorney Hartmann sent to Mr. Gaffney, the very reason Yusuf claimed to have necessitated his motion. Yusuf also pointed out that, as to Hamed’s stipulation as to Mr. Gaffney’s daily email to Hamed’s counsel, Gaffney should simply copy Yusuf’s counsel on the original email. Furthermore, Yusuf also reiterated the arguments from his motion.

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DISCUSSION

The Master will address each of Yusuf's request in turn.

Yusuf's Request #1: Yusuf's counsel must be included in the communications contemplated under Section A(1) of the Discovery Plan.

Hamed stipulated in his opposition that he will "immediately provide copies of Mr. Gaffney's daily emails to Yusuf/[Yusuf's counsel]." As such, the Master will order Mr. Gaffney to include Yusuf's counsel on the daily email he is required to submit to Hamed's counsel under Section A(1) of the Discovery Plan.

Yusuf's Request #2: Nothing in the Discovery Plan precludes Mr. Gaffney from engaging in ex parte communications with either Hamed's counsel or Yusuf's counsel regarding his work under the Discovery Plan.

Section A(2) of the Discovery Plan provides that "John Gaffney will provide a written response, in his fiduciary capacity as the Partnership Accountant." Given that Mr. Gaffney is responding to interrogatories and producing documents in his fiduciary capacity as the Partnership accountant, Mr. Gaffney is neither represented by Yusuf's counsel or Hamed's counsel. As such, the Master believes it is best for Mr. Gaffney to not engage in ex parte communications with either Yusuf/Yusuf's counsel or Hamed/Hamed's counsel regarding his work under the Discovery Plan, and for Yusuf/Yusuf's counsel and Hamed/Hamed's counsel to not engage in ex parte communications with Mr. Gaffney regarding his work under the Discovery Plan. Moreover, the Master further believes that it is best for Parties to not engage in ex parte communications with the Master as to the Discovery Plan, except under circumstances permitted under the applicable rules. As Yusuf clearly stated in his motion, "the discovery process provide for in the [Discovery] Plan should be mutual and transparent." (Motion, p. 4) As such, the Master will order: (i) Mr. Gaffney to not engage in ex parte communications with either Yusuf/Yusuf's counsel or Hamed/Hamed's counsel regarding his work under the Discovery Plan, (ii) Yusuf/Yusuf's counsel and Hamed/Hamed's counsel to

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not engage in ex parte communications with Mr. Gaffney regarding his work under the Discovery Plan, and (iii) Parties to not engage in ex parte communications with the Master as to the Discovery Plan, except under circumstances permitted under the applicable rules.

Yusuf's Request #3: Nothing in the Discovery Plan requires United to continue paying Mr. Gaffney's regular salary while he works on the discovery matters for which Hamed must pay under the Discovery Plan.

Hamed stated in his opposition that he does not intend to direct Mr. Gaffney's employment or payment by United. Section A(6) of the Discovery Plan provides that: "No part of these funds paid to Mr. Gaffney by Hamed will be paid by him or shared by him with Yusuf or United or any third person or entity." There is no reason for Hamed to pay Mr. Gaffney for the work Mr. Gaffney performs for United. Similarly, there is no reason for United to pay Mr. Gaffney for the work Mr. Gaffney performs under the Discovery Plan, which is to be paid for by Hamed. As such, Hamed should only be responsible for the payment of Mr. Gaffney for work performed under the Discovery Plan and United should only be responsible for the payment of Mr. Gaffney for work performed for Yusuf/United.

Yusuf's Request #4: Attorney Hartmann's memorandum to Mr. Gaffney is nothing more than an unsolicited interpretation of the Discovery Plan, which has no binding effect upon Mr. Gaffney except to the extent otherwise ordered by the Master.

As noted above, the Master believes it is best for Mr. Gaffney to not engage in ex parte communications with either Yusuf/Yusuf's counsel or Hamed/Hamed's counsel regarding his work under the Discovery Plan and for Yusuf/Yusuf's counsel and Hamed/Hamed's counsel to not engage in ex parte communications with Mr. Gaffney regarding his work under the Discovery Plan. Any clarifications or disputes as to the Discovery Plan should be brought to the attention of the Master. Attorney Hartmann's memorandum to Mr. Gaffney in this instance has no binding effect. Mr. Gaffney will be ordered to raise any questions he has as to the

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Discovery Plan to Parties, and if Parties cannot agree on a response to Mr. Gaffney's question(s), then Parties should submit Mr. Gaffney's question(s) to the Master.

Accordingly, it is hereby:

ORDERED that Yusuf's motion to clarify or modify the Discovery Plan is **GRANTED** in part and **DENIED** in part. It is further:

ORDERED that Mr. Gaffney shall include Yusuf's counsel on the daily email he is required to submit to Hamed's counsel under Section A(1) of the Discovery Plan. It is further:

ORDERED that Mr. Gaffney shall not engage in ex parte communications with either Yusuf/Yusuf's counsel or Hamed/Hamed's counsel regarding his work under the Discovery Plan. It is further:

ORDERED that Yusuf/Yusuf's counsel and Hamed/Hamed's counsel shall not engage in ex parte communications with Mr. Gaffney regarding his work under the Discovery Plan. It is further:

ORDERED that Parties shall not engage in ex parte communications with the Master as to the Discovery Plan, except under circumstances permitted under the applicable rules. It is further:

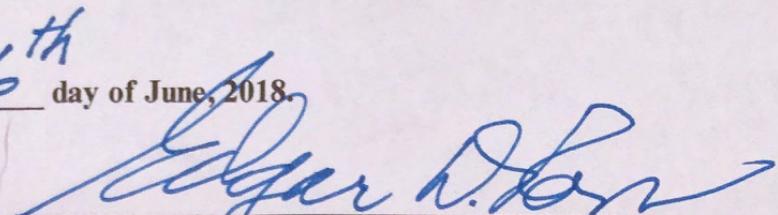
ORDERED that Hamed shall only be responsible for the payment of Mr. Gaffney for work performed under the Discovery Plan. It is further:

ORDERED that Yusuf shall only be responsible for the payment of Mr. Gaffney for work performed for Yusuf/United. **And** it is further:

ORDERED that Mr. Gaffney shall raise any questions he has as to the Discovery Plan to Parties, and if Parties cannot agree on a response to Mr. Gaffney's question(s), then Parties shall submit Mr. Gaffney's question(s) to the Master.

Hamed v. Yusuf, et al.
SX-12-CV-370; SX-14-CV-278; SX-14-CV-287
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DONE and so ORDERED this 6th day of June, 2018.


EDGAR D. ROSS
Special Master