

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

Case No.: SX-2014-CV-287

Consolidated with

Case No.: SX-2014-CV-278

Consolidated with

Case No.: ST-17-CV-384

Consolidated with

Case No.: ST-18-CV-219

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

vs.

UNITED CORPORATION, *Defendant.*

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

vs.

FATHI YUSUF, *Defendant.*

FATHI YUSUF, *Plaintiff,*

vs.

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

KAC357 Inc., *Plaintiff,*

vs.

HAMED/YUSUF PARTNERSHIP,
Defendant.

**HAMED'S REPLY
RE HIS EXPEDITED MOTION TO COMPEL RE CLAIM H-1 --
FATHI YUSUF'S FAILURE TO PAY FUNDS RE SALE OF THE DOROTHEA CONDO**

In his Opposition, Fathi Yusuf once again refuses to answer the one, single Interrogatory. He states (without declaration, evidentiary support or a properly signed interrogatory response) that his new story should be accepted without discovery -- that he didn't receive the final payment in or around 2012 (within three years of his deposition) when he requested the escrowed deed be released. Moreover, he states that he has absolutely no documents despite having received more than \$1.5 million – and having a duty to document the transactions as the nominee/agent. Finally, he ignores the fact that Hamed is allowed to obtain discovery based on the several legal theories in the motion to compel -- which Yusuf does not even address.

I. The Unanswered Interrogatory

Again, this is an **INTERROGATORY. He must be made to answer it and sign off on it**¹ – whether or not he says he has any documents – to the best of his ability:

Interrogatory 3 of 50 - New Claim Number II -001-- Old Claim #: 201
Reimbursement for Sale of the Dorthea condo

Describe **what was sold and to whom**, as well as **each payment received** for the sale of that stock -- with particularity. For each such payment, this will include but not be limited to payor, receiving party, amount, where deposited, present location of funds and what amount, if any, of this was given to any member of the Hamed family. Identify any documents which support or relate to your response, **and any witnesses who would have knowledge and what knowledge you believe they have.** (Emphasis added.)

Here are those questions broken out, 1-by-1:

1. What was sold ?

Was it the stock of a company, or was it real property? If it was the stock of a company, which company – and how much stock?

¹ Rule 33(b)(5) requires "Signature. The person who makes the answers **must** sign them." So Yusuf must provide a WRITTEN response to this interrogatory (not just a statement by counsel.)

2. To whom was it sold?

Was it sold to an individual or to a company? If so, identify the buyer.

3. As to the first payment you received as the nominee/agent:

- A. Who paid it to to you and in what form (cash, check, wire transfer, etc.) ?
- B. What was the date (or if not known, the approximate date) ?
- C. Who was the receiving party and the named Payee – was it Fathi Yusuf personally, or Y&S, or some other Yusuf entity?
- D. Where did the payment go? In what country? Was it put in an escrow account, or merged with Yusuf personal funds or the funds of some Yusuf entity?
- E. **Where is the money now?** If that first payment was later moved to another location, where is it now – is it in a segregated account or in a Yusuf personal or corporate account? Was it used by Yusuf to buy land? when and in what country?
- F. What amount, if any, of this **was given to any member of the Hamed family?**

4. Then the same answers must be given for the:

- A. Second payment.
- B. Third Payment.
- C. All of the other payments except the first and last payments.
- D. The last payment.

5. Then the following must be provided in assigned response by Yusuf: for “any witnesses who would have knowledge and what knowledge you believe they have.”

- A. Who was the witness?
- B. What knowledge do they have?

For example, who was the person to whom Fathi Yusuf gave the handwritten accounting in or about 2012 – Exhibit 8 to the Motion to Compel?

Was that Shawn Hamed,? When did that occur?

- C. Did you take the draft escrow agreement to Shawn Hamed in 2012 and ask him to release the stock – if so what did you say to him? In other words, what knowledge do YOU believe he has?

II. Documents Not Supplied

Despite being the nominee/agent for this transaction and receiving more than \$1.5 million from the buyers, Yusuf contends he does not have a single document related to the transaction—for example, he does not have:

1. The original correspondence leading up to the sale
2. The sale documents
3. Any bank deposits of funds received
4. Any Bank statements as to the funds after receipt
5. Any documents reflecting movement of the funds
6. Any correspondence with the escrow agent generally
7. Any correspondence with the escrow agent directly release of the stock
8. Any drafts or copies of his handwritten accounting document
9. Nothing.....not one single thing to suggest this \$1.5 million ever existed, or that the stock was ever sold.

In the motion, Hamed noted the following about such an agent's duty at footnote 2:

The agent's duty ordinarily includes **not only the duty of stating to his principal the amount that is due, but also a duty of keeping an accurate record of the persons involved, of the dates and amounts of things received, and of payments made.** *The agent has a duty to take such receipts as are customarily taken in business transactions.* His duty in these respects is satisfied if he acts reasonably in view of the business customs of the community and the nature of his employment." *Phillips v. Andrews*, 332 F. Supp. 2d 797, 806, 46 V.I. 233, 248, 2004 WL 1879912 (D.V.I. 2004), *aff'd*, 128 F. App'x 935, 2005 WL

984161 (3d Cir. 2005)(emphasis in the original). It is old, hoary, law that one who undertakes an agency pursuant to a contract owes the duties of an agent to the parties. *Lion Bonding & Sur. Co. v. O'Kelly*, 221 S.W. 1115, 1116 (Tex. Civ. App. 1920), *writ refused* (Feb. 2, 1921)(“when the appellant undertook to complete the contract it became an agent or trustee for the appellee; it owed him the duty of using reasonable economy and ordinary care and diligence in the performance of that trust.”)

So Fathi Yusuf, solely as an agent, basically received and **kept** \$1.5 million in funds that were not his....funds belonging to the Y & S Corporation. How was this accounted on his tax returns? The tax returns for the years 2000-2006 for Yusuf or whatever entity took the funds must be produced – as they must reflect that HE received the funds in these years – and paid taxes on them. Those are related documents.

On the other hand, if he pretended to be the nominee/escrow agent – but now admits that he is the person/entity that received the funds – he must either amend his past tax returns for those years to show the additional \$1.5 million – or take the income in this tax year. He cannot receive \$1.5 million of stolen funds of a corporation and move it to his personal use without taxes – and for that there must be documentation.

And how did \$1.5 million get into his hands? If it was not an illegal cash transfer, it must have been through some institution or trail. Even if he says he does not have the documents – he can DESCRIBE the institutions or documents used – as part of the interrogatory answer.

III. Yusuf's Counsel's Unsupported OPPOSITION Statements about "Scheduling"

Hamed is willing to accept that even a large, impressive firm such as DTF makes scheduling errors – and counsel might, under other circumstances,

thought the meeting on Thursday (the last day that this motion could be filed) was actual set for Friday.

Hamed is even willing to accept that counsel's calendar reflected the wrong date.

What seems odd, however, is that for every such meeting that has been held over the many months, Hamed's counsel (Hartmann) has sent out a pre-meeting confirmation of the day, date and time – and that the same was done here. Such an email notice was sent to both DTF lawyers on TUESDAY, December 18th – just two days before the meeting. Because Thursday was the last possible day for such meeting (**as the filing of this motion was due that same day**) in the **"Subject" line** of the email, Hartmann had written

Confirming Thursday at 11 am AST conf - Items for
Thursday Discussion with Kim/Carl/Charlotte

Moreover, in the body of the email was the following:

Charlotte & Kim:

The issues that will be capable of deposition and briefing (Charlotte's "Red" claims) are listed below.

I would like to discuss the discovery re: H-1 Dorothea (we would still like Fathi's narrative i.e. interrogatory response to what he recalls about when, how and how much he received – as well as what banks records would reflect that.

This was because in prior discussions – this information had been discussed, and delivery was promised before this motion was due. The full email is shown below:

From: [Carl Hartmann](#)
To: ["Charlotte Perrell"; Japinga, KIM \(kim@japinga.com\)"](#)
Cc: ["Gregory Hodges"; "Berholt"](#)
Subject: Confirming Thursday at 11 am AST conf - Items for Thursday Discussion with Kim/Carl/Charlotte
Date: Tuesday, December 18, 2018 5:55:00 PM

Charlotte & Kim:

The issues that will be capable of deposition and briefing (Charlotte's "Red" claims) are listed below.

I would like to discuss the discovery re:

H-1 Dorothea (we would still like Fathi's narrative i.e. interrogatory response to what he recalls about when, how and how much he received – as well as what banks records would reflect that.

Also H-152 and H-153.

Also, all of Yusuf's claims. I want to be clear that no other "factual" assertions or allegations will be made in motions or at trial that have not been set forth – with bu counsel or by affidavit/declarations.

Also need to discuss stips about additional docs/evid. – drafts of which have been circulated.

Carl

Hamed does not provide this to shame or denigrate or seek sanction as to Yusuf's counsel in any way. To the contrary, Yusuf's counsel should be commended for relentlessly trying to protect an uncontrollable and out-of-control client who has repeatedly (1) conveyed information through counsel which later turns out to be lies, (2) agreed to produce things and then gone back on those agreements and (3) lied about facts and then simple changed the facts after getting caught. Non-attendance was not sloppy—it was a misplaced effort to protect. Hamed does not blame counsel – which is doing the very best in a bad situation. It is clear that Yusuf's counsel could not attend a meeting to turn over information that the client lied about and refused to

produce – and could not let the client take the blame. (Hamed admits that earlier in these proceeding such maneuvers WERE ascribed to opposing counsel. **However, in the intense cooperation that has gone on in the claims processing and other discovery, it has become clear that over and over, Yusuf, not his counsel, has been responsible.** It is a difficult and problematic situation to be in for an attorney, and Hamed seeks no sanctions on counsel for that reason.)

Because all good lawyers strain to protect such clients, Hamed does not wish to pursue this further, but if Yusuf objects to these comments, an evidentiary hearing should be held. And at some point counsel must come to the realization that they cannot shield their client from their client's acts without some repercussions. They should not be sanctioned or scolded here – but their client **MUST** be held to account for this ridiculous waste of everyone's time when both sets of counsel are trying so hard to get through this complex process. This means factual statements about interrogatories **MUST** be on signed interrogatories – and that motions **MUST** be supported by declaration of the **CLIENT**, not mere statements of counsel in briefs which the client later, repeatedly, disavows.

IV. Yusuf Non-Responses to the Substance in Motion to Compel

A. Facts

Yusuf does not respond to or contest most of the facts set forth in the motion, thus Hamed asks that the four most critical facts be accepted for the purpose of this motion.

A. Fathi Yusuf received funds under the sales contract solely as a “nominee” agent and has no independent basis for retaining these funds.

B. On February 19, 2012, a signed Notice of Payment of Purchase Price and Authorization to Release Stock Certificates was issued to the escrow agent holding the stock under the contract. The Notice stated the following:

Pursuant to that certain agreement of Sale of Stock dated June 15th, 2000 by and between Hisham Hamed and Najah Yusef, as sellers, and Hakima Salem, as buyer, concerning [sic] the sellers' 1,000 shares of Y & S Corporation. . . .you are authorized and directed to release the shares of stock that have been endorsed by the sellers to the buyer (**Exhibit 7**, HAMD203435)

C. The amount owed Hamed from the sale had been reduced to a handwritten document, written by Yusuf and given to Hamed in February 2012, showing the total owed Hamed was \$802,966, and that in exchange for Hamed's signature, Yusuf would turn over the \$802,966 to Hamed. (**Exhibit 8**, Ex. 12 to Fathi Depo).

D. The stock was transferred to the Buyer in 2012 – and Fathi Yusuf wrote in his 2017 claims filings in this case that the \$802,966 was due to Hamed.

V. Applicable Law

Yusuf does not address and does not dispute the fact that Hamed has four independent, valid legal theories for recovery. Therefore, this should be accepted for the purpose of the motion and full discovery allowed here and at deposition:

- 1) Written acknowledgement in post-2006 documents and in post-2006 deposition
- 2) Partial performance (*Hamed v. Yusuf*, No. SX-12-CV-370, 2017 WL 3168458, at *15 (V.I. Super. July 21, 2017)(“the Court found that the limitations period had been tolled on the basis of Hamed's undisputed acknowledgement and partial payment of the debt.). Obviously, this decision is the law of the case here.
- 3) Required future performance, which does not occur.
- 4) Partial performance (performance other than payment).

Hamed would particularly note the second of these, “Partial Performance.” On its face, the contract requires that Fathi Yusuf act SOLELY as an agent for the sellers of the stock. As an agent, his duty was to collect the funds and distribute them evenly to the two fifty percent owners of the stock and then cause the escrow agent to release the stock. There is no factual dispute that the Escrow Agent WAS GIVEN INSTRUCTIONS UNDER THE CONTRACT in 2012. There is no dispute that the STOCK WAS TRANSFERRED UNDER THE CONTRACT in 2012. There is no dispute that Fathi Yusuf wrote a handwritten accounting and proffered it to the Hamed to cause this to happen in 2012. So even if the obvious, blatant and absolute (post-2006) affirmation in Yusuf's 2017 claims document did not moot this point – there is no dispute that there was partial performance in 2012 under the contract and that the SOL and laches were thus extended by the partial performance.

And for the purpose of this motion, as this is uncontested at both fact and law, Hamed should be allowed answers sought. And Yusuf should come prepared to his deposition on this claim.

Dated: December 31, 2018

A handwritten signature in blue ink, reading "Carl J. Hartmann III". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2018, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

Hon. Edgar Ross

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A handwritten signature in black ink, appearing to read "Carl J. Haddad", with a long horizontal flourish extending to the right.

CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)

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


