

**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
	)	JUDGMENT, AND
Defendants/Counterclaimants,	)	PARTNERSHIP DISSOLUTION,
v.	)	WIND UP, AND ACCOUNTING
	)	
WALEED HAMED, WAHEED HAMED,	)	
MUFEED HAMED, HISHAM HAMED, and	)	
PLESSEN ENTERPRISES, INC.,	)	
	)	
Additional Counterclaim Defendants.	)	Consolidated With
	)	
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.	)	
	)	
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.	)	

**MOTION FOR SUMMARY JUDGMENT AS TO Y-2 THROUGH 4,**  
**RENT DUE TO UNITED FOR BAYS 5 AND 8**  
**TOGETHER WITH INTEREST FOR RENT**  
**AND MEMORANDUM OF LAW IN SUPPORT**

United Corporation (“United”) through its undersigned attorneys, respectfully submit this Brief in Support of its Motion for Summary Judgment as to Y-2 through Y-4 as to Rent Due to United for Bays 5 and 8 together with prejudgment interest and prejudgment interest as to rent previously awarded as to Bay 1.

### **I. Background Facts**

United set forth its claim as to past due rent for Bays 5 and 8 (Y-2), for pre-judgment interest on unpaid rent for Bays 5 and 8 (Y-4) and for pre-judgment interest as to rent previously awarded for Bay 1 (Y-3). *See Exh. A*-Amended Claims and attachments. Claims Y-2, Y-3 and Y-4 are ripe for resolution by the Master. United shows that the facts are undisputed entitling it to an award in its favor as to these claims. If the Master deems there to be questions of material fact as to entitlement and the amounts claimed, then United requests an evidentiary hearing as to these claims.

#### **A. Rent Due from the Partnership for Bays 5 and 8**

United claims past due rent for Bays 5 and 8, which were leased by the Partnership at Plaza Extra-East at various points in time and utilized as extra storage as follows:

1. Bay 5–May 1, 1994 through July 31, 2001 (*7 years, 2 months*) (“Bay 5 Rent”)
2. Bay 8–May 1, 1994 through September 30, 2002 (*8 years, 5 months*) (“First Bay 8 Rent”)
3. Bay 8–April 1, 2008 through May 30, 2013 (*5 years, 1 month*) (“Second Bay 8 Rent”).

Fathi Yusuf set forth in his Declaration dated August 12, 2014, the square footage of each Bay, the period of the rental and the price per square foot. *See Exh. 1*–Aug. 12, 2014 Declaration of Yusuf. Also attached is a floor plan of the United Shopping Center reflecting the location of Plaza Extra-East and other commercial/retail storefronts referred to as “Bays.” *See Exh. 2*–United Shopping Center Floor Plan. In addition, United and Yusuf previously filed a Motion for Partial

Summary Judgment on Counts IV, XI and XII Regarding Rent, setting forth the basis for past due rent as to Bays 5 and 8 (Count XII). *See Exh. 3-Motion for Partial Summary Judgment-Re: Rent.*<sup>1</sup> The factual assertions and legal arguments set forth therein are incorporated herein by reference as if fully set forth herein verbatim.

**1. Bay 5 Rent – Period May 1, 1994 through July 31, 2001**

Bay 5 is located close to the entrance of Plaza Extra-East and is one of the most desirable storefronts in the United Shopping Center given its location and visibility. *See Exh. 4-Supplemental Interrogatory Response of Fathi Yusuf, No. 29 (“Supp. Interrog. Resp. No. 29”)* and *Exh. 2- United Shopping Center Floor Plan.*

From 1987 to the time of the fire at the United Shopping Center in 1992, Bay 5 was rented to a pharmacy. *See Exh. 4-Supp. Interrog. Resp. No. 29.* During this 1987-1992 timeframe, Plaza Extra East was utilizing a series of trailers behind the United Shopping Center as warehouse space to provide additional storage for inventory. *Id.* There were eight trailers, four on the bottom and four on top. *Id.* However, this storage system of trailers was very cumbersome and inefficient to access and effectively utilize. *Id. See Exh. 5-Dep. Waleed Hamed, 26:17-23.* As Plaza Extra East was being rebuilt and then reopening in 1994 following the fire, it needed additional space for storage which was easier to access. *See Exh. 4-Supp. Interrog. Resp. No. 29.*

As described more fully below, upon re-opening in May of 1994, Plaza Extra East began utilizing Bay 8 for storage. However, additional space was still needed. *Id.* Mike Yusuf and Waleed Hamed broke through a cement block wall between Bay 1 and Bay 5 to utilize the space in Bay 5 for storage of sodas on pallets. *Id. See Exh. 6-Decl. of Mike Yusuf, ¶2.* They made an

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<sup>1</sup> As more fully described in Sub-section 6, in its July 21, 2017 Order, the Court found there to be genuine issues of material fact precluding summary judgment as to the claims for rent as to Bays 5 and 8. Subsequently, additional discovery has been exchanged and is referenced herein which United believes eliminates any remaining disputed facts.

opening big enough for the forklift to go through. *Id.* Waleed Hamed has acknowledged that he and Mike broke through the wall and used the space in Bay 5 for storage of Plaza Extra-East sodas and other items. *See* Exh. 5-Dep. Waleed Hamed, 10:20-24; 11:12-24.

Q. So with regard to Bays 5 and 8, do you recall a scenario in which after the store reopened following the fire, that you and Mike broke through the wall between Plaza Extra Supermarket and Bay 5?

A. Yes.

...

Q. You do recall breaking through the wall, however, and then utilizing it for storage space, correct?

A. Yes.

Q. And wasn't it primarily used for the storage of sodas?

A. Among other things. There were different things that we used it for.

Q. All right. And the space that you broke through was large enough for a --- what is the thing that goes through? --forklift to go through?

A. Yes.

*Id.*

Bay 5 was utilized by Plaza Extra-East from May 1, 1994 (upon reopening after the fire) until July 31, 2001 for storage (*7 years and 2 months*). *See* Exh. 1-Yusuf Decl. ¶22.

Yusuf was not happy to discover that this particular Bay was needed for storage space because he would have preferred the space to be used as a retail store. *See* Exh. 6-Mike Decl., ¶3. *See* Exh. 4-Supp. Interrog. Resp. No. 29. In a conversation with Waleed Hamed, Yusuf explained that he would prefer to use the space to lease to retail, but that if Plaza Extra-East was going to use it for storage and needed the space, then it would have to pay rent, to which Waleed Hamed responded that he agreed. *Id.*<sup>2</sup> Specifically, Yusuf testified relating to Bay 5:

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<sup>2</sup> Waleed Hamed testified that he does not recall conversations with Yusuf about Bay 5 after breaking through the wall but that it is possible and could not dispute it, if Yusuf so testified. Specifically, Waleed Hamed testified:

Q. And you never had a discussion with Mr. Yusuf about breaking the wall, isn't that correct?

A. I'm not too sure if that's quite clear, but maybe at one time or another. I mean, it's been so long, I don't really recall if we did or we didn't.

Q. Do you recall Mr. Yusuf being upset that the wall had been broken through?

A. Don't recall that.

Q. But you wouldn't dispute it if Mr. Yusuf said that he was upset and discussed it with you?

A. Well, if he said so. I don't really recall that.

A. The store was using it. The store was using that warehouse. Look, when we open in 1994, I was in St. Thomas. I came and was surprised to see my building tearing apart, and I get angry, because I am the owner of that building. But Wally was smart enough, each time he do something he knows I don't like, he used to put my son with him. I say, Mike, you know about this? He say, Yes, Daddy, we need it and so. I say, Wally, you have to pay rent for this. He said, I will pay rent.

*See Exh. 7-Fathi Yusuf Depo., 82:12-21.* Further explaining, Yusuf testified, “[a]fter the fire, it was vacant. And we build the store in 1994. We reopen it and they tear up the wall. This is adjacent to Plaza Extra. He tear up 25 feet of that wall completely.” *Id.* at 85:6-9.

As Yusuf was in charge of setting the price and collecting the rent, he set the price at the same amount as other commercial tenants for that space. *Id.* Yusuf testified “[a]fter Plaza Extra, there is no tenant whatsoever took that place, except the people, the Diamond Girl, and they were paying \$12. That’s why I base my rent based on Diamond Girl rent.” *Id.* at 85:13-16. Yusuf also testified:

Q. And so it’s your testimony that your--you discussed it with Wally and you never had any intention for them to be able to use Bay 5 and 8 for free when they were using it?

A. Never.

Q. And do you know whether they were using it – during the periods that we have articulated do you know whether they were using it continuously?

A. Definitely.

Q. Okay.

A. I hear the conversation a few minutes ago, he say in and out. I want this gentleman to know that location is not a hotel to be in and out, it’s a warehouse.

Q. Okay.

A. There’s no in and out for – in a warehouse.

Q. With regard to Plaza Extra utilizing Bays 5 and 8, just to understand, you charged them the rent that you ultimately ended up charging the tenants who came in, is that right?

A. Yes.

Q. And in your mind, is that the clearest determination as to the fair market value of that space?

A. Yes, plus this is right almost next door to the Plaza Extra East.

*Id.* at 92:20-93:18.

As with the rent for Bay 1, United allowed the rent to accrue to provide the Partnership with greater liquidity (as the business was rebounding after the fire and as Plaza Extra-Tutu Park was just beginning to open). *See* Exh. 4-Supp. Interrog. Resp. No. 29. Waleed Hamed agreed to this arrangement. *Id.*

At some point in the first half of 2001, Yusuf explained that Plaza Extra-East cannot keep using Bay 5 for warehouse space as it is better utilized as retail space. *Id.* It was helpful to the Partnership to have other retail stores in the United Shopping Center which drive more customers to the area and then into Plaza Extra East. *Id.* However, using such visible space for storage did not help increase the traffic to the shopping center and by extension to Plaza Extra-East. *Id.* As Bay 5 is a highly visible space, the better use of the space was for retail. *Id.*

Beginning on September 1, 2001, United leased Bay 5 to a retail tenant operating as “Diamond Girl.” *Id.* The lease was produced in discovery to demonstrate the end of the period that Plaza Extra-East was utilizing Bay 5 and when United began leasing it to a third-party. *See Exh. 8-Lease Agreements with Diamond Girl, Bates FY015138-75. Id.* The lease with Diamond Girl was for ten years. *Id.* In December 2011, Diamond Girl entered into another lease with United and expanded their space to use Bay 4 in addition to Bay 5. *Id. See Exh. 8-Lease Agreements with Diamond Girl, Bates FY015176-211.* These leases reflect the price charged for the space and the ending time period of Plaza Extra-East’s occupancy of Bay 5. There is no written lease for Plaza Extra-East’s use of the Bays 5 or 8, just as there was no written lease for the use of the Bay 1 space to house the Plaza Extra-East store as the entire grocery store business was operating as United. *See Exh. 1-Yusuf Decl. ¶22.*

The Bay 5 Rent is calculated by multiplying the square feet occupied (3,125) by \$12.00 for 7.25 years. *See* Exh. 1-Yusuf Decl. ¶22. The total due for Bay 5 Rent is \$271,875.00. *Id.*

## **2. First Bay 8 Rent – May 1, 1994 through September 30, 2002**

Bay 8 is located in the corner of the United Shopping Center and is a double bay. *See* Exh. 2-Floor Plan. It is a less desirable location as a retail store given the limited storefront and lack of visibility being in the corner of the shopping center. *See* Exh. 4-Supp. Interrog. Resp. No. 29.

From 1987 to the fire in 1992, Bay 8 was rented to Ali's Hardware. As described above, the storage system of stacked trailers used by Plaza Extra-East at this time was inefficient. *Id.* As Plaza Extra-East was being rebuilt, it needed the additional space for storage. *Id.*

Following the fire, Plaza Extra-East reopened in May 1994 and began utilizing Bay 8 for additional storage. *Id.* Given its less desirable location as a retail store, its large size and easy access to the back of the bay with a roll-down door, it was suitable and more feasible to use as a warehouse. *Id.* and *See* Exh. 6-Mike Yusuf Decl. ¶5.

Bay 8 was occupied by Plaza Extra East from May 1, 1994 through September 30, 2002 (*8 years and 5 months*). *See* Exh. 1-Yusuf Decl. ¶23. As the space previously had been rented to a third-party but was now being utilized by Plaza Extra-East, Yusuf discussed with Waleed Hamed that Plaza Extra-East would need to pay rent for the use of this additional space and Waleed Hamed agreed. *See* Exh. 4-Supp. Interrog. Resp. No. 29. As with the rent for Bay 1, United allowed the rent to accrue to provide the Partnership with greater liquidity. *Id.* Waleed Hamed agreed to this arrangement. *Id.*

On October 3, 2001, the FBI seized substantially all of the financial and accounting records of the Plaza Extra Stores. *See* Exh. 1-Yusuf Decl. ¶8. At that time and for more than a decade thereafter, the criminal defense attorneys for the Yusufs and Hameds did not want any of the parties

to take any actions that supported the existence of a partnership as the owner of the Plaza Extra Stores, which included not requiring the past-due rent to be paid to United during the pendency of the criminal case or, if space continued to be utilized, to allow the rent to continue to accrue. *Id.*

From October 1, 2002 to April 1, 2008, Bay 8 space was rented to an entity called Riverdale, a food wholesaler. *See* Exh. 4-Supp. Interrog. Resp. No. 29. The lease for Bay 8 is attached to reflect when the First Bay 8 Rent period with Plaza Extra-East ended and the amount charged for this space. *See* **Exh. 9**–Riverdale Lease as to Bay 8 (Bates FY015212-247).

The First Bay 8 Rent is calculated by multiplying the square feet occupied (6,250) by \$6.15 for 8 years, 5 months. *See* Exh. 1-Yusuf Decl. ¶23. The total amount due to United for the First Bay 8 Rent is as set forth in Yusuf’s Aug. 12, 2014 Declaration for \$323,515.63. *Id.*

### **3. Second Bay 8 Rent - April 1, 2008 through May 30, 2013**

When the lease with Riverdale ended, Plaza Extra-East again began using Bay 8 for storage. *See* Exh. 4-Supp. Interrog. Resp. No. 29. As with the earlier period of use and the use of Bay 5, Yusuf discussed with Waleed Hamed that Plaza Extra-East would pay rent on the same terms as before and Waleed Hamed agreed. *Id.*

Plaza Extra East occupied and used Bay 8 from April 1, 2008 through May 30, 2013 (5 years and 1 month). *See* Exh. 1-Yusuf Decl. ¶24. The total amount due to United for the Second Bay 8 Rent is as set forth in Yusuf’s August 12, 2014 Declaration for \$198,593.44. *Id.*

As before, United allowed the rent for this period to accrue rather than demanding payment to allow the partnership greater liquidity and given the pendency of the criminal case to not take any action that would reflect that the business operated as a partnership. *Id.* at ¶8. Having the grocery store operations—which functioned as United—paying rent, to itself, would have raised concerns as to whether United or another entity operated the grocery store and possibly would

have exposed Mohammed Hamed, as a partner in the operations, when he had, otherwise, not been brought into the criminal case. *Id.* at ¶8.

#### **4. Acknowledgment that Bays 5 and 8 were used by the Partnership**

As to the timing of the use of the space, Yusuf has been clear that the space was utilized during these specific periods when not otherwise leased to third-parties and has provided the leases to the third-parties to demonstrate when the rental periods to Plaza Extra-East began and ended. Waleed Hamed has confirmed that the space was utilized, that Plaza Extra-East had unfettered and continuous access to the space for storage and that he is unable to dispute the timeframes of the use set forth by the Yusufs. Waleed Hamed testified:

Q. Isn't it true that United utilized the space at Bay 5 and 8 at points in time from 1994 through 2012?  
A. Yes, they did.

*See* Exh. 5-Waleed Hamed Depo. 9:14-17.

Q. ...So you're not disputing that Plaza Extra used the store—I'm sorry, used Bay 5 for storage at various points in time since 1994, correct?  
A. Correct.

...

Q. All right. Would you agree with me that Plaza Extra had unfettered access to Bay 5 at any time that it needed?  
A. I would say so, yes.

*Id.* at 12:11-14, 18-21.

Q. ...But when there was not a tenant, you used it that period of time when you were—when there was not a tenant correct?  
A. Yes.

*Id.* at 90:6-9.

Q. Last question, you would agree that your Plaza Extra East had full access to those Bays 5 and 8 when there was not—when they were not otherwise rented to a tenant?  
A. Yeah. We used them. We utilized them, yes.

*Id.* at 93:8-11.

Q. And your – just to clarify, you cannot dispute if Mike or another person the United side can testify as to when that use started? You cannot dispute that, correct?

A. My recollection doesn't serve me right now, to be honest with you.

*Id.* at 89:13-18.

Q. All right. And the same would be true for Bay 8. Correct? You do not know exactly when you started—when Plaza Extra East starting using Bay 8?

A. I don't exactly know the year, but we've used it off and on.

*Id.* at 89:21-25. Waleed Hamed further testified that Fathi Yusuf and Mike Yusuf would have personal knowledge of when the Bays were utilized by Plaza Extra. *Id.* at 56:6-10. Counsel for Hamed even attempted to elicit testimony that the use was not continuous (i.e., not on a daily basis) but Waleed Hamed testified that he could not say the spaces were not used on a daily basis and that it was possible that Plaza Extra products were stored there—every day—for all of those years that the spaces were not rented to a third-party. *Id.* at 92:20-93:4. Mike Yusuf confirmed that during the timeframes that Plaza Extra-East used Bays 5 and it was continuous use, not “off and on” and that there was always Plaza Extra-East inventory in those spaces. *See* Exh. 6-Mike Yusuf Decl. ¶¶5-6.<sup>3</sup>

##### **5. Partial Payment of Rent as to space used at the United Shopping Center at Sion Farm, St. Croix**

Yusuf considered the partial rent payments made by the Partnership as to Bay 1 as a partial payment of the total rent debt due which included the rent for Bays 5 and 8. *See* Exh. 4-Supp.

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<sup>3</sup> Yusuf anticipates that Hamed will argue in his Opposition that a document, which purports to be a report prepared by a Mr. Luff for United, somehow demonstrates that Bays 5 and 8 were vacant and not utilized by Plaza Extra-East during July and August of 2001.(Exh. 2 to the depositions taken on Jan. 21, 2019). Although Yusuf testified he had never seen the document before, the document actually appears to support Yusuf's testimony; i.e. that Bays 5 and 8 were not rented to third-parties at the time of the report (July/Aug. 2001), but, instead, were utilized by Plaza Extra. The document designates “Plaza Extra-Vacant” for Bays 5 and 8. Other bays not utilized by Plaza Extra for storage in the shopping center are simply designated as “Vacant” without any reflection that they were utilized by Plaza Extra. United shows that if this document has any evidentiary value, that it supports United's position that Bays 5 and 8 were being utilized and occupied by Plaza Extra-East when not otherwise rented to a third-party tenant on the dates which the document purports to reflect.

Interrog. Resp. No. 29. Waleed Hamed also confirmed that the rent check paid in February 7, 2012 for \$5,408,806.74 did not include all of the rent that was due to United from 1994 through 2012, but rather was a partial payment of the rent due to United.

Q. With regard to the check, Exh. 5, it simply says “PLAZA EXTRA (SION FARM) RENT” in the memo, correct?

A. Correct.

...

Q. Okay. So this rent check did not cover all of the rent for the space utilized by Plaza Extra from 1994 through 2012, it only covered a portion, correct?

A. Only covered a portion—yeah, portion of the years, yes.

*See* Exh. 5-Waleed Hamed Depo. 90:6-9, 23-25 – 91:4 and Exh. 5 attached thereto.

#### **6. Rent Accrued for Bays 5 and 8 for the Same Reasons it Accrued for Bay 1.**

United allowed the rent for Bays 5 and 8 for these periods to accrue rather than demanding payment so as to allow the partnership greater liquidity. *See* Exh. 1-Yusuf Decl. ¶24. Further, given the pendency of the criminal case, the criminal defense counsel for the parties advised them not to take any action that would reflect that the business operated as a partnership. *Id.* at ¶8. If United, which ran the grocery store operations and owned the United Shopping Center, suddenly paid rent to itself, such a payment would have raised concerns as to whether United or another entity operated the grocery store business. This would have exposed Mohammed Hamed as a partner in the grocery store operations and meant that he was possibly complicit to the charges for underreporting of income, when Mr. Hamed, otherwise, had not been brought into the criminal case. Hence, no demand was made for rent for this reason.

In addition, in October 2001, the FBI had raided the Plaza Extra Stores, taking with them substantially all of the financial and accounting records of the partnership and United. *Id.* at ¶5. Then, two years later, in September 2003, the federal government indicted United, Yusuf, three of Yusuf’s sons, and three of Hamed’s sons on tax evasion charges. The operating accounts of the

Partnership and United were immediately frozen pursuant to a federal injunction. As such, until the injunction was relaxed years later, collection of the rent that had accrued since making the first rent payment was impossible. *Id.* at ¶8. As a result, Yusuf made a decision and Waleed Hamed, on behalf of Hamed, agreed, that there was no prospect for the payment of rent during the pendency of the criminal case and that the rent would continue to be deferred. *Id.*

In May 2013, demand was made for payment. *See* Exh. 1-Yusuf Decl. ¶11 and Exh. B thereto. Yusuf testified that at his instruction, the attorney for United sent a letter dated May 17, 2013 to Hamed's attorney requesting payment of the past due rent which included rent for Bays 5 and 8. *Id.* Yusuf further testified that the May 17, 2013 letter contained errors in the amount of the outstanding unpaid rent that were corrected by the calculations set forth in his August 12, 2014 Declaration. *Id.* In response, on May 22, 2013, Counsel for Hamed advised that his client was now taking the position that portions of the Bay 1 rent and the Bay 5 rent were not due as a result of the running of the statute of limitations. *Id.* and Exh. C thereto. Hamed also took that position that there was not an agreement to pay rent for Bays 5 and 8. *Id.* Yusuf further testified that prior to that time, no one on the Hamed side had ever challenged or otherwise disputed the rental obligations of the partnership to United. *Id.* at ¶11.

### **B. Procedural History and Prior Rulings Relating to Rent**

There have been overlapping motions between the parties, which relate to the rent due to United. On or about September 9, 2013, United filed a Motion to Withdraw Rent. On May 13, 2014, Hamed filed a Motion for Summary Judgment asserting that the statute of limitation barred damages claimed by United and Yusuf including certain rent claims. A year passed and the Court had not ruled on the earlier-filed (9/9/13) United Motion to Withdraw Rent. So on August 12, 2014, United filed a Motion for Partial Summary Judgment on Counts IV, XI and XII Regarding

Rent.<sup>4</sup> *See* Exh. 3-United and Yusuf's August 12, 2014 Motion Re: Rent. Nine (9) months later on April 27, 2015, the Court issued an order ("Rent Order") as to the earlier-filed United Motion to Withdraw Rent (9/9/13) and Hamed's Motion for Summary Judgment (5/13/14). *See* **Exh. 10**-Rent Order. The Rent Order did not address the claims for past due rent as to Bays 5 and 8 and noted that "Defendant United's Counterclaim seeks back rent from Bays 1, 5 and 8 located in the same premises. However, for purposes of winding up the Partnership and because United's Motion only seeks rent for Bay 1, this Order addresses only Bay No. 1." *Id.* at p. 2, n. 1.

In the Rent Order, the Court determined that the claims for past due rent were not barred by the statute of limitations under both the "acknowledgment of the debt doctrine" as well as the "payment on account doctrine." *Id.* at p. 7-12. The Court found that "[i]n this case, both the acknowledgement of the debt doctrine and the payment on account doctrine apply to toll the statute of limitation on United's rent claims." *Id.* at p. 12. The Court further held that "[n]otwithstanding Plaintiff's [Hamed's] denial that the parties had an agreement regarding past rents, Yusuf, by his affidavit, swears that Waleed Hamed entered into an agreement to pay United past due rent..." *Id.* Further, the Court noted that Hamed acknowledged that "it is undisputed that United is the landlord and Plaza Extra is the tenant at the Sion Farm location, for which rent is due since January of 2012." *Id.* The Court also found that "Hamed has admitted on several occasions that Yusuf is in charge of rent." *Id.* at 9.

On July 21, 2017, the Court issued an Order (the "Limitation Order"). *See* **Exh. 11**-Limitation Order. There the Court addressed United's August 12, 2014 Motion for Partial Summary Judgment-Re: Rent (attached hereto as Exh. 3 and other statute of limitations motions filed by

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<sup>4</sup> For the Master's reference, Count IV –related to Yusuf's entitlement to an accounting, Count XI – related to United's claim for rent for Bay 1 from Jan. 1, 1994 to May 4, 2004 and Count XII – related to rent for Bays 5 and 8.

Hamed). At pages 7-8, the Court found that Count XII “presents as separate cause of action on behalf of United for debt in the form of rent.” *Id.* at p. 7. The Court then explained that its earlier Rent Order “effectively, though not explicitly, granted in part Defendant’s Motion for Partial Summary Judgement...filed on August 12, 2014 as to Count XI [United’s claim for rent for Bay 1 from Jan. 1, 1994 to May 4, 2004]” *Id.* The Court then addressed Count XII, where “United seeks an award of \$793,984.38 for rent owed with respect to ‘Bay 5’ and ‘Bay 8,’ which the partnership allegedly used for storage space in connection with the Plaza Extra-East store during various periods between 1994 and 2013.” *Id.* The Court found that based upon the Declaration of Waleed Hamed “that a genuine issue of material fact exists” as to whether there was an acknowledgment of the debt for rent for Bays 5 and 8. *Id.* at 8. The Court further noted that “United’s cause of action for rent is entirely unrelated to the partners’ respective actions for accounting except insofar as each partner will ultimately be liable in the final accounting for 50% of whatever debt is found to be owing from the partnership to United.” *Id.* at 8, n. 5.

In addition, the Master issued an Order on March 13, 2018 relating to United’s other rent claims for increased rent as a hold-over tenant as to Bay 1. Therein, the Master determined that the claims for rent are “United’s” as opposed to a “Yusuf” claim and cited to United’s earlier Motion to Withdraw Rent (9/9/13) and the Rent Order.

## **II. Argument**

### **A. United is Entitled to Recover Unpaid Rent for the Bays 5 and 8.**

As the Court and the Master have already determined, claims for rent are United’s claims for a debt that is due from the Partnership. In the Limitation Order, the Court explicitly found that that “United’s cause of action for rent is entirely unrelated to the partners’ respective actions for accounting except insofar as each partner will ultimately be liable in the final accounting for 50%

of whatever debt is found to be owing from the partnership to United.” *See* Exh. 10–Limitation Order at p. 8, n. 5. Hence, the Limitation Order’s determination relating to a timeframe limitation on the partner’s claims does not impact or otherwise preclude United’s claims for past due rent. In order to wind-up the affairs of the partnership, debts, which the partnership owes, must first be determined and paid before disbursing any remaining assets to the partners.

In addition, the Court has already made a number of findings about the rent arrangements between the Partnership and United in the Rent Order. Those include:

1) The Partnership is obligated to pay rent to United for the space utilized in the operations of the grocery store business.

2) Rent due from the Partnership was allowed to accrue for significant periods of time for various reasons which benefited the Partnership.

3) United’s claims for rent for Bay 1 for the period of time from January 1, 1994 to May 1, 2004 were tolled by the equitable tolling doctrines including “acknowledgment of the debt doctrine” and “partial payment doctrine.”

4) Fathi Yusuf was in charge of the rent, the amount to be paid and when it would be collected.

These findings are undisputed and also apply to United’s claims for rent for Bays 5 and 8.

### **1. Hamed Acknowledges Space Utilized and Benefitted the Partnership.**

Subsequent to the earlier filings and rulings relating to the rent, additional discovery has been exchanged and depositions taken. Waleed Hamed has acknowledged that Bays 5 and 8 were utilized by the Partnership for storage. The Partnership benefited from using the space for years. Yusuf testified that he discussed the matter with Waleed and, in particular, as to Bay 5 was not happy to use it as storage space but agreed to do so and that rent would need to be paid. Yusuf

testified that he had conversations with Waleed Hamed and that Waleed agreed to pay rent for Bays 5 and 8. Waleed Hamed has testified that he cannot dispute that these conversations occurred. Further, Waleed Hamed testified that Mike Yusuf and Fathi Yusuf would know the dates of occupancy for the Bays and that he could not dispute their statements.

**2. United has Set forth the Dates of Occupancy and the Rent Rate Charged Which Hamed Cannot Dispute.**

United has set forth the dates of occupancy, the rent rate charged which coincides with the rent charged to third-party tenants for the space demonstrating the fair market value of the rent charged and the dates that Plaza Extra's occupancy ended. United has further demonstrated that the space was used continuously and that Plaza Extra had unfettered access to the space during the periods for which rent is sought. Therefore, whether or not Plaza Extra inventory was in the space continuously (which United contends to be the case) or not, Plaza Extra could use the space at will and thus, was obligated to pay for the space. Waleed Hamed even testified that he believed on any given day, for the years on end, that the space was used that Plaza Extra product would be there. Hence, the Partnership used the space for years. The Partnership benefitted from using the space for additional storage in terms of need for additional inventory, ease of access and because additional storage space allowed the partnership to capitalize on bulk purchases that would need to be stored for significant periods of time before it could all be moved and sold. Not paying for the space (or the contention that the space was provided for free) is contrary to all of the dealings between the parties as to the use of the United Shopping Center. Yusuf testified that he never would have allowed the space to be used rent-free. In fact, one of the primary pieces of evidence offered by Hamed to demonstrate a Partnership (as opposed to the grocery store being owned by United) was the fact that the Partnership paid rent to United. Now, Hamed wants to have it both ways—a Partnership entitling him to half of the assets but also free rent from United. The

undisputed facts demonstrate that rent that is due from the Partnership for Bays 5 and 8 entitling United to an award of rent.

### **B. No Statute of Limitations Issues**

United anticipates that Hamed will attempt to argue that the claims for past-due rents for Bays 5 and 8 are barred by the statute of limitations.

First, United shows that the **Second Bay 8 Rent** for the period April 1, 2008 through May 30, 2013 could not be susceptible to a statute of limitation bar as the demand for payment made on May 17, 2013, is only five (5) years after the first month's rent would have been due and thus, clearly is within any possible six (6) year limitation.

Second, as to the **Bay 5 Rent** (May 1, 1994 through July 21, 2001 (*7 years and 2 months*)) and the **First Bay 8 Rent**, (May 1, 1994 through September 30, 2002 (*8 years, 5 months*)) the doctrine of equitable tolling would toll the statute of limitations as to these claims and render the claims for these periods of past due rent timely.

The Rent Order addresses the doctrine of acknowledgment of the debt and partial payment which would also apply as to United's claims for the Bay 5 Rent and the First Bay 8 Rent. The Court already determined in the Rent Order that the statute of limitations does not bar the claims for the rent going back to 1994 because of the "acknowledgment of the debt" doctrine, which holds that:

...It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run...Such conduct revised the cause of action so that the statute starts to run again for the full statutory period.

See Rent Order, p. 7. The Court also explained that the "payment on account" doctrine "...is regarded as an acknowledgment of liability." *Id.* at p. 8. The Court further explained that "there

can be no more clear and unequivocal acknowledgment of debt than actual payment.” *Id.* The Court found “in this case, both the acknowledgment of the debt doctrine and the payment on account doctrine apply to toll the statute of limitation on United’s rent claims.” *Id.* at 9.

In his most recent deposition, Waleed Hamed acknowledged that the \$5.4 million dollar rent payment to United only covered a portion of the rent due for the space that Plaza Extra occupied at the United Shopping Center from 1994 through 2012.

Q. Okay. So this rent check did not cover all of the rent for the space utilized by Plaza Extra from 1994 through 2012, it only covered a portion, correct?

A. Only covered a portion—yeah, portion of the years, yes.

*See* Exh. 5-Waleed Hamed Depo. 90:25–91:4. Further, Yusuf testified that he considered the rent payment to be a partial payment for all the rent that was due. *See* Exh. 4-Supp. Interrog. Resp. No. 29. Hence, under the payment-on-account doctrine, the partial payment made by the Partnership in 2012, which “only covered a portion” of the rent due and “did not cover all of the rent for the space utilized by Plaza Extra from 1994 through 2012” operates to toll any statute of limitations as to the Bay 5 Rent and the First Bay 8 Rent. *See* Exh. 5-Waleed Hamed Depo. 90:25–91:4.

As an additional basis for finding equitable tolling, United shows that in *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584 (3d Cir. 205), the Third Circuit Court of Appeals concluded:

There are three principal situations in which equitable tolling is appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action, and that deception causes non-compliance with an applicable limitations provision; (2) where the plaintiff in some extraordinary way has been prevented from asserting his rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

*Id.* at 591 (citations omitted).

Here, circumstances demonstrating equitable tolling exist under situations (1) and (2). Hamed, through his authorized agent, Waleed Hamed, actively misled Yusuf by agreeing that rent

for the earlier period (1994-2004) would be deferred because of the criminal case. United had to refrain from seeking rent during the pendency of the criminal case for various reasons: 1) the accounts were frozen or under the supervision of a federal monitor, 2) payment from United, to United would have raised questions about the existence of a partnership, which would have had criminal repercussions on Mohammed Hamed, and 3) as to the Bay 1 rent, an accurate calculation could not be made before the return of certain records that had been seized. As Yusuf explained, “another consideration that counseled in favor of letting the rent continue to accrue, rather than paying it, is that our criminal defense lawyers did not want us to take any actions that supported the existence of a partnership as the owner of the Plaza Extra Stores.” *See* Exh. 1-Yusuf Decl. ¶8.

Consequently, the time for pursuing such claims for rent was tolled as rent could not be paid during the pendency of the criminal case (and the partners benefited from the fact that it was not paid). Hence, the statute as to the unpaid rent was tolled until United was on notice that Hamed was renouncing a rent obligation previously recognized. That notice was first received from counsel for Hamed in a letter dated May 22, 2013. *See* Exh. 1-Yusuf Decl. and Exh. C, which responds to Exh. B attached thereto. Clearly, regardless of any representations made by the parties, United was prevented from collecting the rent following the raid in October of 2001 (and for years later) by virtue of the federal injunction which froze the accounts that could be used to pay the rent, making collection impossible. These extraordinary circumstances created by the bringing of the federal criminal case, further demonstrate that any limitations period for assertion of the Bay 5 Rent and First Bay 8 Rent claims for periods between May 1, 1994 and 2002 would be tolled. As such, there could be no time bar to assert against United’s counterclaim for the Bay 5 Rent and the First Bay 8 Rent.

### **C. United is Entitled to Recover Prejudgment Interest**

United is entitled to recover prejudgment interest at 9% per annum, as provided by V.I. Code Ann. tit. 11§ 951(a)(4), from the date it demanded payment – May 17, 2013. *See* Exh. 1-Yusuf Decl. and Exh.s B and C thereto. “As a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which is legally due. Awarding judgment interest is intended to serve at least two purposes: to compensate prevailing parties for the true costs of money damages incurred, and, where liability and the amount of damages are fairly certain, to promote settlement and deter attempts to benefit from the inherent delays of litigation. Thus, prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable.” *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193, 208 (3d Cir. 2004)(quotation marks and citation omitted); *see also, Booker v. Taylor Milk, Co.*, 64 F.3d 860, 868 (3d Cir. 1995)(“To fulfill this make-whole purpose, prejudgment interest should be given in response to considerations of fairness and denied when its exaction would be inequitable.”) (internal quotation marks and citation omitted); *Elbrecht v. Carambola Partners, LLC*, 2010 U.S. Dist. LEXIS 72158, \*19 (D.V.I. July 16, 2010) (same).

Here, there are no exceptional or unusual circumstances that would make it unfair for United to recover prejudgment interest. To the contrary, it would be entirely unfair to United if the Partnership is allowed to have the uncompensated use of United’s money after it made demand for payment in May of 2013. United was already prohibited from recovering rent during the pendency of the criminal case. It is certainly not inequitable for the Partnership to be required to pay interest at the legal rate (9%) on the Bay 5 Rent, First Bay 8 Rent and Second Bay 8 Rent from

May 17, 2013 when it was demanded. Yusuf has calculated the interest due from the demand through September 30, 2016, when the claims were filed is \$241,005.18. Such interest continues to accrue at the daily rate of \$195.78 until paid. *See* Exh. A–Yusuf’s Amended Claims and Exh. E attached there to which sets forth the calculations. Upon a determination of the amount due for the unpaid rents for Bays 5 and 8, the Master can assess the additional interest due from September 30, 2016 to the date of such a determination.

Likewise, as to Bay 1, the interest that accrued at 9% per annum on the rent actually awarded by the Rent Order (\$6,248,924.14) is \$881,955.08 as of May 11, 2015, when the rent was paid to United. *See* Exh. A–Yusuf’s Amended Claims and Exh. D attached thereto which sets forth the calculations.

### **III. Conclusion**

The Partnership’s obligation to pay rent to United has been clearly established throughout this case and reflects the separation between the Partnership and United. It is undisputed that the Partnership used Bays 5 and 8 for storage of Partnership inventory after the Plaza Extra-East store’s re-opening in May of 1994. It is undisputed that the Partnership used by Bay 5 and damaged the premises by breaking a cement wall to provide better access to it for use of forklifts. It is undisputed that the Partnership used Bay 8 for inventory storage given its convenience and size. It is undisputed that the Partnership had unfettered access to Bays 5 and 8 from the re-opening in May 1994 through 2012, when not otherwise rented to third-parties. It is undisputed what periods that Bays 5 and 8 were rented to third-parties as their leases reflect their occupancy dates. It is undisputed that the rates charged by United to the Partnership for the rent of Bays 5 and 8 mirrors the rates charged to third-party tenants and, thus, reflects a reasonable and fair rate in United’s dealing with the Partnership. It is undisputed that the partial rent payment made by the

Partnership in 2012 did not include payment for the rent due for Bays 5 and 8 or other rent due for Bay 1 during the same early time-frame (1994-2004). Yusuf testified that he had a conversation with Waleed Hamed regarding not only Bay 5 and his frustration about the destruction but that they would have to pay rent and that Waleed agreed. Yusuf also testified that he discussed with Waleed Hamed that he would have to pay rent for Bay 8 when it was utilized and that Waleed agreed. Waleed testified that he does not recall the conversations and that Yusuf and Mike Yusuf would know when Plaza Extra-East was using Bays 5 and 8. Hence, no factual issues remain for determination. Nor are there any legal arguments, which preclude judgment in United's favor in the amounts set forth in Yusuf's declaration. Hence, United is entitled to past due rent for Bays 5 and 8 in the amounts shown as follows: 1) Bay 5 Rent: \$271,875.00, 2) First Bay 8 Rent: \$323,515.63, and, 3) Second Bay 8 Rent: \$198,593.75.

United is also entitled to an award of prejudgment interest on the outstanding Bay 5 and 8 rents from the date demand for rent was made on May 17, 2013 to the date the Master renders his determination at a rate of \$195.78 per day. United is entitled to an award of prejudgment interest on the rent actually awarded by the Rent Order in the amount of \$881,995 as of May 11, 2015, when the rent was paid to United.

Finally, in the event that the Master determines there to be issues of fact as to the entitlement or amount of rent due to United, United requests an evidentiary hearing on the claims. Likewise, in the event that the Master determines there to be issues of fact as to the entitlement or amount of prejudgment interest due to United for Bays 5 and 8 as well as for the previously ordered rent as to Bay 1, then United requests an evidentiary hearing on those claims as well.

Respectfully submitted,

**DUDLEY, TOPPER AND FEUERZEIG, LLP**

**DATED:** February 25, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of February, 2019, I caused the foregoing **MOTION FOR SUMMARY JUDGMENT AS TO Y-2 THROUGH 4, RENT DUE TO UNITED FOR BAYS 5 AND 8 TOGETHER WITH INTEREST FOR RENT AND MEMORANDUM OF LAW IN SUPPORT**, which complies with the page or word limitation set forth in Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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**Index of Exhibits**  
**United’s Motion for Summary Judgment**  
**as to Y-2 through Y-4 for Rent for Bays 5 and 8 and**  
**Prejudgment Interest on Rent**

- Exhibit A** Relevant Excerpts from Yusuf’s Amended Accounting Claims with Exhibits  
A-1 – Summary of Claims,  
D – Interest Calculations for Bay 1 Rent Awarded, and,  
E – Interest Calculation on Bays 5 and 8 Rent Due
- Exhibit 1** August 12, 2014 Declaration of Fathi Yusuf
- Exhibit 2** United Shopping Center Floor Plan
- Exhibit 3** August 12, 2014 Motion for Partial Summary Judgment-Re: Rent
- Exhibit 4** Supplemental Interrogatory Response of Fathi Yusuf, No. 29
- Exhibit 5** Deposition of Waleed Hamed, January 21, 2019
- Exhibit 6** Declaration of Maher “Mike” Yusuf, February 25, 2019
- Exhibit 7** Deposition of Fathi Yusuf, January 21, 2019
- Exhibit 8** Lease Agreements with Diamond Girl as to Bay 5
- Exhibit 9** Riverdale Lease as to Bay 8
- Exhibit 10** Rent Order, April 27, 2015
- Exhibit 11** Limitation Order, July 21, 2017