**SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

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| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, | **Case No.: SX-2012-CV-370** |
| *Plaintiff/Counterclaim Defendant*, |  |
|   vs.**FATHI YUSUF** and **UNITED CORPORATION** | **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** |
|  |  |
|  *Defendants and Counterclaimants*. vs. **WALEED HAMED, WAHEED** **HAMED, MUFEED HAMED, HISHAM HAMED,** **and PLESSEN ENTERPRISES, INC.**,  *Counterclaim Defendants*, | JURY TRIAL DEMANDED |
|  | Consolidated with |
| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,* vs.  | **Case No.: SX-2014-CV-287** |
| **UNITED CORPORATION,** *Defendant.* |  |
| *­­­­­­*­­**WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff*  vs.  **FATHI YUSUF**, *Defendant.* | Consolidated with**Case No.: SX-2014-CV-278** |
| *­­­­­*­­**FATHI YUSUF**, *Plaintiff*, vs. **MOHAMMAD A. HAMED TRUST***, et al,* *Defendants.* | Consolidated with**Case No.: ST-17-CV-384** |
| *­­­­­*­­**KAC357 Inc.**, *Plaintiff*, vs. **HAMED/YUSUF PARTNERSHIP,** *Defendant.* | Consolidated with**Case No.: ST-18-CV-219** |
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**PLAINTIFF HAMED’S OPPOSITION TO**

**YUSUF’S MOTION FOR SUMMARY JUDGMENT AS TO**

**REVISED CLAIM Y-2—RENT CLAIMED BY UNITED FOR BAYS 5 AND 8**

1. **Introduction**

United claims rents beginning in 1994 for two store areas called “Bays” adjacent to the Plaza Extra store in Sion Farm. *See 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*, *Hamed v Yusuf*, SX-12-CV-370 (Feb 25, 2019) (“SJ Motion”), at p. 2. As is discussed in detail below, United attempts to blur several different rental periods into one big, long imaginary *oral* lease that lasted almost 20 years. In fact, the **re**-revised United claim is for three *separate* leases which lasted from five to eight years each. Yusuf’s argument can be outlined as follows:

1. Even though there was no written contact, no writing ever mentioned such a contract, and no financial document ever shows any such rent collected or accruing,
2. “Hamed acknowledges space utilized and benefitted the partnership;” (SJ Motion at p.15); and
3. “There is no statute of limitations issue” because there was an admission[[1]](#footnote-2) and partial performance by the store. (SJ Motion at p. 17)

There are two key points here:

First, the statute of frauds (“SOF”), is dispositive, so the Special Master need not reach the statute of limitations (“SOL”) issue.

Second, if the Master *does* reach the SOL issue, United is wrong: There was no admission—United confuses the affirmation of use of the premises with an affirmation of a contractual obligation, and no partial performance, as the store never paid a cent for the “alleged rent obligations” under a lease contract for Bays 5 and 8.

1. **Counter-statement of uncontested facts[[2]](#footnote-3)**

United alleges that the United Shopping Plaza rented Bays 5 and 8 to the Partnership at various times, starting in 1994. SJ Motionat p. 2. Hamed states that Plaza Extra-East did *use* Bays 5 and 8 at various times as a convenience, but either (1) any rent claim was included in the payments and settlement already made to United or, more to the point, (2) he never *agreed to pay* (nor did he pay) *additional rent* for those spaces. (COSF¶¶ 26 and 29)

For an ‘agreed upon’ contract to have existed for such additional rent, the parties would have had to reach a meeting of the minds on the terms, such as the amount of rent. (COSF¶¶ 26 and 31) Hamed notes that United, even now, discusses at least three different amounts per square foot for Bays 5 and 8 (the United Corporation *Accounts Receivable Current Month* report adds a fourth rental amount), and is asking the Master to “calculate” a fair rent in retrospect. (COSF¶¶ 1, 3-6, 11, 13, 17, 25 and 30)

In addition, United has alleged, at various times, that the Bay 5 lease ended either on October 31, 2001 or July 31, 2001. (COSF¶ 11 and 17) *Yusuf initially stated that Bay 8 was used only from April 1, 2008 to May 30, 2013*. (COSF¶ 11) He then stated that Bay 8 was *also* used from May 1, 1994 to July 31, 2001.[[3]](#footnote-4) (COSF¶ 17)

Finally, even ignoring the *statute of* *frauds*, two of the time periods United alleges Plaza Extra-East used for Bays 5 and 8 are clearly outside of the statute of *limitations* time period set by Judge Brady in his July 21, 2017 Order, *Hamed v Yusuf*, SX-12-CV-370. (COSF¶ 20)

1. **Argument**

As noted, there are two equally strong reasons for denying this claim.

1. **The Statute of Frauds is Dispositive Here**
	* 1. Definition of Statute of Frauds regarding Real Property in the USVI

The Virgin Islands *Statute of Frauds*, V.I. Code Ann tit. 28, § 241(a), requires real estate contracts of more than a year to be in writing:

Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.

28 V.I.C. § 242. As Judge Brady noted in *Stanley v. Browne*, 62 V.I. 384, 391–92, 2015 WL 5121406, at \*3 (V.I. Super. Apr. 30, 2015), *aff'd,* 66 V.I. 328, 2017 WL 449955 (V.I. Feb. 2, 2017):

The Statute of Frauds, codified in the Virgin Islands at V.I. Code Ann tit. 28, § 241(a), requires that the conveyance of any interest in real property, outside of a lease for no more than one year, must be in writing.

Yusuf admits, and there is no dispute, that there is no writing here.

* + 1. There is no “Admission” exception here to the V.I. Statute of Frauds

Although United does not address the statute of frauds,it discusses the concept of an “admission” of the existence of a lease contract by Hamed in his SOL argument. United tacitly asserts an exception to the statute of frauds—that even though there was no writing, a contract should be “implied” because Hamed has somehow “admitted” such a contract was formed *in 1994*. But what United really contends is that it can claim an exception if Wally Hamed admits the store “used the property” or discussed “use of­” the property with Mr. Yusuf.[[4]](#footnote-5) SJ Motion at pp. 15-16. This is simply confusion as to what constitutes an exception to the SOF—the admission of the *use* of a premises is not an admission of the existence of a contract for such use – or its terms. Otherwise, the SOF would not exist, as such an exception would always eat the rule.

 Fortunately, Judge Francoise recently considered this exact issue—of such admissions as potential exceptions to the Statute of Frauds—and provided a full *Banks* analysis. *Urh v. Buffo*, No. ST-2015-CV-0000315, 2017 WL 476837, at \*5 (V.I. Super. Feb. 3, 2017)(emphasis added)(footnotes omitted):

The Court recognizes that courts in other jurisdictions adopted a common law principle providing that a party waives application of a statute of frauds if it admits that a contract exists. **However, the Supreme Court of the Virgin Islands has not adopted this common law rule**. Therefore, the Court must conduct the three-factor analysis provided in *Banks v. International Rental and Leasing Corp.* to determine Virgin Islands common law. . . .

The Superior Court addressed whether party admissions take a contract out of the application of the Statute of Frauds in *Mountaintop v. Colombian Emeralds International*. The court held that “[t]he statute of frauds is waived if the defendant admits **to the existence of a contract** in the pleadings or testimony.”

Most other courts hold that a party cannot simultaneously admit that it orally arrived at an agreement with another party while asserting a defense afforded by a statute of frauds. A review of court opinions from other jurisdictions reveals that the majority determines that such admissions take the contract outside the application of a statute of frauds. The majority of courts holds that the main purpose of a statute of frauds is evidentiary. The U.S. Court of Appeals for the Seventh Circuit provides the following explanation:

The principal purpose of the statute of frauds is evidentiary. It is to protect contracting or negotiating parties from the vagaries of the trial process. A trier of fact may easily be fooled by plausible but false testimony to the existence of an oral contract. This is not because judges or jurors are particularly gullible but because it is extremely difficult to determine whether a witness is testifying truthfully.50

**Therefore, if a party accused of violating a contract admits to the contract's existence and its terms, the evidentiary function of a statute of frauds is unnecessary**.

Here, United absolutely does not argue that Hamed “**admits to the contract's existence and its terms**.” To the contrary, what United argues is that Wally Hamed has admitted *use* of the premises. SJ Motion 15-16. But that is circular logic. What is absent is even a suggestion, no matter how slight, that either Mohammad or Wally Hamed ever “admit[ed] to [a Bay 5 & 8 lease] *contract’s* existence and its *terms*.” Indeed, United repeatedly agrees both in testimony and discovery that there was no written agreement and no agreement as to other terms:

**Request to Admit 9 of 50:**

Admit or Deny that there was no written agreement between Hamed and Yusuf after the date that Hamed sued Yusuf in 2012 that the Partnership would pay rent on Bays 5 & 8.

**Response:**

Admitted. (CSOF ¶ 22)

On December 18, 2018, Yusuf also stated that there were no pre-litigation documents related to the alleged Bays 5 and 8 rent.

**Yusuf Claim Y-2 (Rent for Bay 5&8), Hamed RTP 21, 34, lnterrog. 29:**

There are no additional documents responsive to this request beyond the

Declaration of Fathi Yusuf dated August 12, 2014 attached as Exhibit 3 to the Defendant's Motion for Partial Summary Judgment on Counts IV, IX and XII Regarding Rent. (CSOF ¶ 24)

 During his testimony on January 21, 2019, Fathi Yusuf testified that Plaza Extra East *did not* have a lease when it was using Bay 5, but the following tenant, Diamond Girl, *did* have a lease for Bay 5:

Q. (Mr. Hartmann). . . .You said that in addition to

Plaza Extra, you had other tenants in there, Mr. Yusuf, in

Bay 5?

A. [FATHI YUSUF] I—I had before, I think it was the pharmacy.

And we catch fire. After the fire, it was vacant. And we

build the store in 1994. . . .

This is adjacent to Plaza Extra. (p. 85, lines 2-8)

\* \* \* \*

A. [FATHI YUSUF] After the fire, sir. After Plaza Extra fire, the

first tenant called me, myself, a tenant. The first tenant

was Plaza Extra East. The second tenant was Diamond Girl. (p. 86, lines 4-6)

\* \* \* \*

Q. **[Mr. Hartmann] Now, when you had Diamond in there, did Diamond**

**have a lease?**

A. [FATHI YUSUF] **Yes.**

Q.. . . **.And when Plaza was in there, did Plaza have**

**a lease?**

A. **No.** (p. 86, lines 9-14) (CSOF ¶ 32) (Emphasis added.)

 Moreover, United repeatedly admits, through its multiple arguments about what the lease terms “*should* be” that there *never was any* ***contemporaneous*** *agreement, no meeting of the minds when the alleged contract was being formed* (or subsequent admission) *on the terms*—even the most essential terms which are amount of rent and the ability not to get thrown out at Yusuf’s whim.[[5]](#footnote-6)

For instance, on August 27, 2001, Thomas Luff, property manager for the United Shopping Plaza, faxed a letter to Fathi Yusuf regarding a series of reports related to the United Shopping Plaza’s tenants.[[6]](#footnote-7) One report in particular, *Accounts Receivable Current Month*, dated July 27, 2001, states that Bays 5 and 8 are “plaza extra-Vacant.” (CSOF ¶ 2, p. FBIX237825)[[7]](#footnote-8) It also shows that while the rent per month for Bay 5 would be $7.01 and Bay 8 would be $5.50 if occupied by a tenant, *no such rent was being charged, collected or* ***accrued***. (CSOF ¶ 2-3) Thus, contemporaneously, no rent was contemplated or shown as accruing as due in the financial records.

United, however, does not even follow that written *Accounts Receivable Current Month* price per square foot. Rather, it now suggests that the Court use $12 per square foot for Bay 5. *But it is clear that at least three other amounts were discussed by Yusuf and another of United’s employees, Thomas Luff, making that most essential term of the contract – the amount of rent charged – unknowable*:

1. July 27, 2001: $7.01 per square foot, *Accounts Receivable Current Month*
2. September 3, 2001: $10 per square foot, Diamond Girl lease for Bay 5
3. December 1, 2011: $12 per square foot, Diamond Girl lease for Bays 4 & 5 (an additional 1,250 square feet over Bay 5)
4. May 17, 2013 and August 12, 2014: $12.00 per square foot, Fathi Yusuf Declaration[[8]](#footnote-9) (CSOF ¶¶ 3-4, 6, 11 and 17)

How could there be a meeting of the minds on a contract where there was no meeting of the minds on the rent amount—an amount that United even *now* asks this Court to *make up retroactively from other lease agreements*.[[9]](#footnote-10) In his deposition of January 21, 2019, Fathi Yusuf conceded that he never told Hamed nor established what the price per square foot would be charged at the time Plaza Extra-East used Bays 5 and 8.

Q. [Mr. Hartmann] When he used it without your knowledge, did you

ever say to him, You need to pay me $12 an hour (sic)?

A. [FATHI YUSUF] I said, I will charge you rent.

Q. You did?

A. Yes.

Q. And how much did you say?

A. I have no idea.

Q. You have no idea.

A. I have no idea.

 (CSOF ¶ 31) It is critical to note that the other lease agreements United now proposes should be used to retroactively “create terms” here, contain provisions any normal lease for Bays 5 and 8 would have – such as the fact that the landlord couldn’t throw the lessee when it got a real cash paying customer.

Q. [Mr. Hartmann] If you wanted to move Diamond in—when you moved

Diamond in, **didn't you just go to them and say you have to**

**take the Plaza Extra stuff out?**

\* \* \* \*

**Q. Didn't you tell him Hamed?**

**A. [FATHI YUSUF] Yeah, yeah**.

\* \* \* \*

Q. And you could tell them [Hamed-Plaza Extra] to leave any time?

A. Yeah, because **I give it to them** and they used it.

I really feel bad to have that bays always close. It does

not look good for the building. But no tenant come in.

When the tenant come, the right one, we negotiate, and he

have it for $12. (p. 88, lines 3-5, 7-8, 11-16) (CSOF ¶ 32) (Emphasis added.)

Yusuf said “I give it to them.” (CSOF ¶ 32)

 The Diamond Girl leases, first for Bay 5 and then for Bays 4 and 5, as well as the lease for Bay 8, had the following written term regarding the duration of the lease:

6. TERM OF LEASE: [Bay 5]

The Term of this lease shall be for a period of Ten (10) calendar years commencing on September 1, 2001. (CSOF ¶ 4);

6. TERM OF LEASE: [Bays 4 and 5]

The Term of this lease shall be for a period of Five (5) calendar years commencing on 1 December 2011. (CSOF ¶ 6) and

6. TERM OF LEASE: [Bay 8]

The Term of this lease shall be for a period of Sixty-Three (63) calendar months commencing on October 1, 2002. Tenant shall have first option on Bay 8 for a further term of five years. (CSOF ¶ 5)

 United suggests now, retroactively, that the Special Master use those other leases here to “divine” the terms for Bays 5 and 8. He wants the Court to supply terms that did not exist in 1994.

 Finally, there was not then and is not now even a meeting of the minds as to when Plaza Extra-East actually used Bays 5 and 8. How will the Special Master “decide” that issue in the absence of a writing? United’s witness, Fathi Yusuf, isn’t even sure of the timeframes the Bays were used:

* May 17, 2013 – Yusuf demands rent for Bay 5 for May 1, 1994-October 31, 2001 and for Bay 8, April 1, 2008 through May 30, 2013 and (COSF¶ 11)
* August 12, 2014 – Yusuf now changes the time period for the rent for Bay 5 to May 1, 1994-July 31, 2001 and added a new time period for Bay 8 for May 1, 1994-September 30, 2002, in addition to the April 1, 2008 through May 30, 2013 time period (COSF¶ 17).

Add to that the fact that Wally Hamed disputes that Plaza Extra-East used the Bays in 1994 or 1995:

Q.[Ms. Perrell]. . . .All right. Let's say from 1995. From 1995 to 2001, when Plaza Extra East was utilizing Bay 5, you can't say that there was any point in which it was not being (p. 87, lines 23-25) fully utilized?

A. I believe we had the containers, the eight containers in the back after we opened, we reopened after the fire. I don't think we were using Bay 5 at that time. I mean, if my recollection serves me right, we had the containers in the back, so, therefore, we didn't need to use Bay 5 –

**\* \* \* \***

A. [WALLY HAMED]—but we had containers in the back. We were utilizing eight containers in the back for storage. So why would I need that additional space when I had space in the back? (COSF¶ 27)

The minute the court involves itself in constructing the terms such as the “amount of rent” or the “length” of the lease it demonstrates that these terms were never really agreed to. If there were no such terms, there is no exception and thus the Statute of Fraud applies.

1. **Statute of Limitations: Judge Brady’s “July 21, 2017” Order bars this claim**

 United attempts to blur several different rental periods into one big, long imaginary *oral* lease that lasted more than 20 years. In fact, the re-revised United claim is actually for three *separate* oral leases which lasted from five to eight years each:

1) Bay 5–May 1, 1994 through July 31, 2001 (“Bay 5 Rent” for 7 years)

2) Bay 8–May 1, 1994 through September 30, 2002 (“First Bay 8 Rent” for 8 years)

3) Bay 8–April 1, 2008 through May 30, 2013 (“Second Bay 8 Rent” for 5 years). (CSOF ¶¶ 17 and 21)

On July 21, 2017, Judge Brady issued an order limiting claims to transactions that occurred on or after September 17, 2006 (hereinafter called the “SOL Order.” (CSOF ¶ 20) While the third time period is within the statute of limitations, the other two clearly are not. Thus, the first two leases must be denied pursuant to that SOL Order.

1. The first lease—Bay 5 Rent – May 1, 1994 through July 31, 2001

United alleges that, beginning in 1994 when Mohammad Hamed was still running the operation[[10]](#footnote-11), Mr. Yusuf entered into an oral agreement for a lease of Bays 5 and 8 with (oddly) Wally Hamed.[[11]](#footnote-12) SJ Motion at pp. 4, 7. As stated above, it is undisputed that there is no writing from that time or any period thereafter showing that either Hamed entered into such an agreement. (CSOF ¶¶ 22, 24-25, 32) There is no subsequent writing, from 1994 to the time of the legal action in 2012 ever mentioning such an agreement existed. More to the point there is not a single financial record that shows or even suggests that such rent was accruing or claimed.

It is clear that this 1994-2001 time period is clearly outside of the limitation period created by Judge Brady’s order. As noted above, the only writing regarding the rental of Bays 5 and 8 did not occur until 2001 and no rent was due or collected. (CSOF ¶¶ 2-3) Thus, this is outside of the limitations period.

1. The second lease—May 1, 1994 through September 30, 2002

Again, there is no writing, mention, financial record or other support for the existence of such a lease or rent due and it is clearly outside of Judge Brady’s limitation period. (CSOF ¶¶ 22, 24-25, and 32)

* 1. These “leases” are distinguishable from the Bay 1 rent in Judge Brady’s April 27, 2015 decision

On April 27, 2015, Judge Brady issued an order regarding rent for Bay 1, the Plaza Extra East store premises, *Hamed v Yusuf*, SX-12-CV-370 (“rent decision”). In that rent decision, Judge Brady ordered rent to be paid to the United Corporation for the time periods of 1994-2004 and January 1, 2012-September 30, 2013.

Judge Brady found the following facts in his Bay 1 rent decision:

* Mohammad Hamed admitted in 2014 deposition testimony that that rent was due for the Plaza Extra operation at Sion Farm;
* Yusuf charged the Partnership a pre-negotiated rate of $5.55 per square foot for 1994-2004, the same square footage charge as the 1986-1993 rate;
* Yusuf couldn’t determine the time frame to charge rent because the FBI retained the financial records documenting what month the Partnership should begin paying rent in 1994;
* Waleed Hamed entered into an agreement to pay United past due rent for the 1994-2004 time period once the black book was recovered in early 2013; and
* Yusuf and Hamed jointly negotiated and the Partnership paid a new monthly amount for the 1994-2004 time period for Plaza Extra-East. (CSOF ¶ 18)

*None of those factual bases are present here*. The Bays 5 and 8 rent claims differ greatly from the overall Sion Farm store operation rent. First, there is no evidence of a negotiated rental rate for either Bay 5 or 8. (CSOF ¶ 31) Indeed, a possible range of $7.01-$12.00 per square foot for Bay 5 and a range of $5.00 to $6.15 for Bay 8 has been discussed above. (CSOF ¶¶ 1, 3-6, 11 and 17) Both Wally and Willie Hamed testified that there was no agreement to pay this rent, nor did Fathi Yusuf make any request to pay rent at the time Bays 5 and 8 were in use. (CSOF ¶¶ 26, 31 and 36-37) Critically, **Mohammad Hamed was never deposed regarding these Bays**. (CSOF ¶ 14) Finally, there was no impediment to determining the price per square foot for Bays 5 and 8 because there is no allegation that United’s financial records relating to Bays 5 and 8 were unavailable during the Statute of Limitations time period.[[12]](#footnote-13)

Most important though, is that in Judge Brady’s situation, *Mohammad Hamed had agreed to the existence of such rent for Bay 1* in deposition, *but he never agreed to anything about Bays 5 and 8*. Nor did the store ever partially perform this alleged obligation – *it never paid a cent under such a contract*. Accordingly, the facts regarding Bays 5 and 8 are completely different from the facts in Judge Brady’s rent decision. Rents for Bays 5 and 8 for the 1994-2002 time period should be denied due to being outside of the SOL Order.

1. *Settlement Check*

It is undisputed that on February 7, 2012, the Partnership paid the United Shopping Center $5,408,806.74. The memo on the check stated “Plaza Extra (Sion Farm) Rent.” (CSOF ¶ 7). Nothing in the writing limits this to Bay 1, and there are no other signed writings. However, on May 17, 2013, Attorney Nizar DeWood, representing United Corporation, then sent a letter to Attorney Holt stating that

On behalf of United Corporation, the following is a notice of the value of rents due as follows:

**\* \* \* \***

Bay No. 5 May 1, 1994 through October 31, 2001

3,125 SQ. FT. at $12.00 6 years and 184 days Balance Due $243,904.00

Bay No. 8 April 1, 2008 through May 30, 2013

6,250 SQ. FT. at $12.00 5 years and one month Balance Due $381,250.00

These amounts are undisputed, and have been outstanding for a very long time - before 2012. This amount does not reflect the rent increase requested and noticed to Mohammed Hamed since January 1, 2012. We reserve our client’s right for the additional rents due and owing based on the rent increase after January 1, 2012. . . . (CSOF ¶ 11)

On May 22, 2013, Attorney Holt sent a letter to Attorney DeWood, responding on behalf of the Hameds that there never was an agreement to pay rent for Plaza Extra-East’s use of Bays 5 and 8.

2. Bay No. 5 -The rent claimed for the time period between 1994 and 2001 is for vacant space **was used without charge until a tenant could be located**. **Thus, there was never any agreement to pay rent for this space either.** In fact, the rate your client is attempting to charge is grossly inflated as well. In any event, this claim is also barred by the statute of limitations.

3. Bay No. 8 -**The rent claimed for this Bay was never agreed to**, as the items stored there were removed from a space in a trailer where everything was just fine. Moreover, no one would agree to pay the amount you claim is due for warehouse storage, the fact that this amount is even being sought confirms that Fathi Yusuf should no longer be a partner in the Plaza Extra supermarkets, as it is a breach of the duty of good faith and fair dealing (that every partner owes the partnership) when you try to extort money from your own business. In any event, these items will be removed from Bay 8 to the second floor of the store since your client now wants to charge rent for this space. (CSOF ¶ 12)

Attorney DeWood never contradicted this or sent contrary facts in response. There is nothing in writing which proves United’s view. Critically (as this is what Judge Brady’s “Bay 1” decision was predicated on) on April 1, 2014, Mohammad Hamed testified in his deposition that *rent was due for Bay 1 only*. He was never questioned about, nor did he make any admissions as to the other bays.

1. **Conclusion**

In conclusion, United’s motion for summary judgment should fail for the following reasons:

1. The rent requested for Bays 5 and 8 violates the Statute of Frauds because there is no written agreement and each “lease” period exceeds one year;
2. The Statute of Frauds exception for an admission of a contract and its terms is not applicable because there was no agreement as to the critical terms – the amount of rent, the length of lease or even the start of lease time period;
3. In addition to the Statute of Frauds, Judge Brady’s limitation order knocks out rent for Bays 5 and 8 for the 1994 through 2002 time period, as those transactions occurred before September 17, 2006; and
4. There was settlement by the payment of $5,408,806.74.

**Dated:** April 1, 2019 A

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**CERTIFICATE OF SERVICE**

 I hereby certify that on this 1st day of April, 2019, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

**Hon. Edgar Ross**

Special Master

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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).

1. At page 4, and footnote 2 of the SJ Motion, United tries to fabricate an “admission” to the existence of a contract for rent by Waleed “Wally” Hamed. It is useful to examine exactly what United states the record shows and what the record clearly does not show. United states “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.* (Emphasis added.) But, Hamed directs the Special Master’s attention to the footnote in support of this contention. He admitted only to a conversation about what happened to the wall. There is absolutely no admission as to a discussion about rent or rent being due. This is the allegedly supporting and probative footnote presented by United in its entirety:

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. [↑](#footnote-ref-2)
2. Pursuant to the Court’s new rule, promulgated on March 1, 2019, the counter-statement of uncontested facts are numbered and incorporated as **Exhibit A.** They will be referred to as “CSOF ¶.” [↑](#footnote-ref-3)
3. As the Master will recall, Yusuf is somewhat obsessed with getting more than the almost $10 million he has gotten from the Partnership for the Plaza Extra-East rent. Despite the settlement of $5 million and Judge Brady’s $4.5 million for additional back rent, Yusuf filed, and on March 13, 2018 the Special Master denied, his attempt to get another “5 times” market value in additional rent – stating:

Here, Yusuf dealt with the Partnership on behalf of a party—namely, United—having an interest adverse to the Partnership, in violation of Title 26 V.I.C. § 74(b)(2). Additionally, Yusuf did not act consistently with the obligation of good faith and fair dealing, in violation of Title 26 V.I.C. § 74(d). Thus, the evidence and facts surrounding Yusuf’s action through United—terminating the lease with the Partnership at Bay 1, treating the Partnership as a holdover tenant, and raising United’s rent significantly higher than the agreed upon rent—demonstrates a transaction prohibited by law and tainted by a conflict of interest and self-dealing. [↑](#footnote-ref-4)
4. Yusuf never claims, nor was there any contemporaneous discussion of terms, such as what any rent amount would be. (CSOF ¶ 31) To the contrary, Yusuf admits that there was absolutely *no writing on the terms* – and no discussion of the amount of rent (or any other specific terms such as the duration of the lease) at any time. (CSOF ¶¶ 22-24 and 31) Yusuf asks the Court to “determine” these terms now, retroactively, by comparison to other leases. [↑](#footnote-ref-5)
5. As for there being an actual, real lease, in his January 21, 2019 testimony, Fathi Yusuf testified that tenants other than Plaza Extra East had leases for Bays 5 and 8 and that that United could not move out tenants with a lease, such as Diamond Girl, during their lease period.

Q.. . . .**And when Plaza was in there, did Plaza have a lease?**

A. **No**.

Q.. . . .**And on the Diamond lease, it said they could be there for a** **certain amount of time, right?**

A. **Yes.**

Q. And you couldn't move them out just one day because you felt like it, could you? A. I don't want to move them out.

**Q. Oh, no, of course not, 'cause they're a rent-paying tenant** --

\* \* \* \*

Q. Could you move Plaza Extra out any time?

A. Yes.

**\* \* \* \***

Q. If you wanted to move Diamond in -- when you moved Diamond in, didn't you just go to them and say you have to take the Plaza Extra stuff out?

A. Who?

Q. Didn't you tell him Hamed?

A. Yeah, yeah.

Q. You did?

A. Yeah.

Q. And you could tell them to leave any time?

A. Yeah, because I give it to them and they used it. I really feel bad to have that bays always close. It does not look good for the building. But no tenant come in. When the tenant come, the right one, we negotiate, and he have it for $12. (COSF ¶ 32) [↑](#footnote-ref-6)
6. Yusuf testified that he had never seen the Luff document before. (CSOF ¶ 33) However, there is no dispute that the document *was* seized by the FBI during the raid on the Plaza Extra stores in 2001 in which business records were collected. (CSOF ¶ 40) Thus, this is a contemporaneous business record – of a type which Waheed “Willie” Hamed testified that he had seen come in to Yusuf via the communal office fax at Plaza Extra-Tutu on a monthly basis. (CSOF ¶ 38) Fathi Yusuf worked at Plaza Extra-Tutu at the time Willie Hamed saw the reports. (CSOF ¶ 35) But in the end, the fact the FBI seized them as business records from the office of the business is probative. [↑](#footnote-ref-7)
7. Yusuf argues that the designation “Plaza Extra-Vacant” for Bays 5 and 8 somehow shows that Plaza Extra was using those bays because the other empty bays were designated “Vacant.” SJ Motion at 10, fn. 3. Unfortunately for Yusuf, he did not notice that Bay 7 also has the designation “Plaza Extra-Vacant” and Yusuf has not made any assertion that Plaza Extra used Bay 7 in 2001. (CSOF ¶ 2, p. FBIX237825) Thus, Yusuf’s supposition regarding the meaning of this designation that it “proves” Plaza Extra used Bays 5 and 8 in July and August of 2001 is erroneous. This is exactly why the SOL exists! [↑](#footnote-ref-8)
8. Bay 8 had a similar issue with the amount of rent per square foot: 1987-1992 Ali Hardware lease, according to Yusuf, charged “$5 a square foot, plus maintenance and property tax;” July 27, 2001 *Accounts Receivable Current Month* report stated $5.50; the 2002-2007 Idheilah-Zgheir “Riverdale” lease provided no rent for the first three months, $5.00 for the first year and $6.00 for years 2-5 of the lease; May 17, 2013 letter from Yusuf’s lawyer stated $12.00 per square foot; and Fathi Yusuf’s August 12, 2014 declaration required $6.15 for both Bay 8 time periods (1994 to 2002 and 2008 to 2013). (CSOF ¶¶ 1, 3, 5, 11 and 17) [↑](#footnote-ref-9)
9. Compare this with Yusuf’s admission as to revised Hamed claim H-1 regarding Dorothea. In the H-1 claim, there WAS a writing, there WAS a specific amount agreed to. *Hamed Motion and Memorandum for Summary Judgement Re Hamed Revised Claim H-1 -- Fathi Yusuf’s Failure to Pay Funds Re Sale of the Y&S Stock Resulting in the Sale of the Dorothea Condos and Land*, *Hamed v Yusuf*, SX-12-CV-370 (Feb 25, 2019) at p. 5. [↑](#footnote-ref-10)
10. Mohammad Hamed was working in 1994 and 1995. (CSOF ¶ 14) [↑](#footnote-ref-11)
11. Yusuf alleges that, despite the fact that Mohammad Hamed was still active, this oral agreement was with Wally Hamed. SJ Motion at pp. 4, 7. [↑](#footnote-ref-12)
12. Yusuf argues that the pending criminal case made it impossible to request rent during that time period. SJ Motion, pp. 7-8. However, that argument fails as Yusuf never made any request for rent or determined of the amount of rent per square foot during Plaza Extra-East’s usage prior to the FBI raid in 2001, despite his testimony that he knew Plaza was utilizing Bays 5 and 8. (CSOF ¶ 31) and SJ Motion at pp. 4-5. [↑](#footnote-ref-13)