

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,

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.

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

**HAMED REPLY TO YUSUF'S OPPOSITION TO HAMED'S MOTION FOR
SUMMARY JUDGEMENT RE HAMED REVISED CLAIM H-1—FATHI YUSUF'S
FAILURE TO PAY FUNDS RE SALE OF THE Y&S STOCK
FROM THE SALE OF THE DOROTHEA CONDOS AND LAND**

I. Introduction

Hamed moves for summary judgment on the H-1 "Dorothea" claim of \$802,966. This amount, plus interest, is a valid claim by Hamed and should be credited to Hamed's Partnership account when all claims are reconciled. Although Yusuf has repeatedly admitted the validity of the claim both in writing and testimony, Yusuf now opposes Hamed's motion because 1) it is allegedly barred by Judge Brady's Limitation Order due to "fragmenting" the laches defense, thus "straddling" the Limitations Order, 2) the claim is an "accounting" claim and thus interest as well as the defenses of acknowledgement of debt doctrine, continuing violation and/or partial performance are not applicable, 3) there is no evidence the bulk of the funds were collected after the Limitations Order cutoff, and 4) if not barred, the correct claim amount should be \$600,000, not \$802,966.

II. Hamed's Claim is not Barred by Judge Brady's Limitation Order

A. *There is no effort by Hamed to "fragment" the laches defense*

At pp. 6-8 of the Opposition, Yusuf attempts to argue that because the contract to sell the stock in the Y&S corporation (the entity that owned the Dorothea property) was signed on June 15, 2000, despite the fact that the only documented payment for the Y&S stock occurred in 2011, this is an effort by Hamed to "fragment" the laches defense because the contract signing and the documented payment "straddles" Judge Brady's Order re Limitations on Accounting ("Limitations Order") pre-September 17, 2006 cutoff date. In other words, Yusuf asserts that the claim is barred by the Limitations Order because the signing of the contract occurred prior to the Limitations Order cutoff date and perhaps some of the payments were made before the cutoff date.

This is simply a linguistic attempt to avoid the most basic black letter precept of any affirmative defense (including laches)—that the party asserting an affirmative defense has the burden to factually demonstrate that the events giving rise to the defense occurred when and how the movant alleges. See e.g., *Herman Miller, Inc. v. Blumenthal Distrib., Inc.*, No. LACV1704279JAKSPX, 2019 WL 1416472, at *20 (C.D. Cal. Mar. 4, 2019):

Because the statute of limitations and laches are affirmative defenses, Office Star bears the burden of proof to establish that the claims are untimely. See, e.g., *Payan v. Aramark Mgmt. Servs. Ltd. P'Ship*, 495 F.3d 1119, 1122 (9th Cir. 2007) (“[B]ecause the statute of limitations is an affirmative defense, the defendant bears the burden of proving that the plaintiff filed beyond the limitations period. . . .”)

That 2019 case is doubly instructive here because that Court also notes that (as is the case with RUPA) although the applicable statute does not contain an express limitations period as to which laches can be applied, if laches is being applied by analogy, then certainly the burden to prove the factual predicates of the affirmative defense is equally applicable. *Id.*

Thus, although Judge Brady stated that laches applies to claims before 2006, it is not “fragmentation” for Hamed to note that the facts of record demonstrate that at least one, and perhaps all payments were made long after 2005—in 2011. To suggest that this is ‘fragmentation’ rather than simply stating the facts and then requiring the basics of an affirmative defense is mere sophistry. There is simply no evidence, as to which Yusuf has the full and affirmative burden, that any actual performance by the buyer occurred prior to September 17, 2006. To the contrary, what Yusuf calls a “fragmentary” \$150,000 documented receipt of contract funds in 2011 is the only actual proof of when any payments were made, by Yusuf’s own admission. (SOF ¶ 32)

What is really happening here is Fathi Yusuf wants the court to blindly apply the doctrine of laches without inquiry merely because the contract came into existence prior to 2006. But the actual monetary claim by Hamed arises when money was received by Yusuf and not disbursed to Hamed. To qualify for laches, Yusuf, having the burden to demonstrate an affirmative defense, must show facts that place the buyer's performance of that contract by making payments which had to be distributed to Hamed, prior to 2006 – in other words, the Master must “follow the money” to determine when Hamed's actual claim for funds arose.

Yusuf openly admits that at least one payment was received and not disbursed to Hamed in 2011.0 (SOF ¶ 32) He admits that there is not a single document, writing, bank record, check, email or any other proof that anything other than the original signing of the contract occurred prior to 2006. (SOF ¶ 30) He has no checks or bank deposits before 2006.

What Yusuf calls “fragmentation” is his total lack of any evidence under his affirmative burden to qualify for laches by showing that any funds – even a single penny – was actually received prior to 2006. And that fact is telling here where he was not a Partner, but, rather, an uninvolved contractual fiduciary whose sole job was to collect and disburse party funds—a fiduciary who either kept no records or refuses to produce them. He now asks the Court to reward him for this obfuscation. In short, absent such proof of any payment being received prior to September 17, 2006, this affirmative defense fails.

B. Yusuf's \$1.6 million claim is not analogous and was denied because there was no intervening event by Hamed to revive it

Yusuf argues that because his \$1.6 million dollar claim (part of Yusuf's Y-10 claim, Past Partnership Withdrawals and Distribution Reconciliation) occurred in 2001, but Yusuf did not unilaterally withdraw the funds until 2012, the claim is "straddling" the pre-2006 time limit imposed in Judge Brady's Limitations Order and is barred.

In effect, Yusuf is arguing that *his* claim happened prior to the Limitation Order and *his* attempt to revive it by unilaterally withdrawing the funds in 2012 was unsuccessful, so there should never be an exception to the limitation period. This reasoning is faulty. *It is Yusuf, not Hamed who withdrew the money in 2012.* Yusuf cannot revive *his own* stale claim by arguing partial performance when *he* is the one withdrawing money from the Partnership account. Contrast this with the Dorothea claim – the written contract was formed in 2000 but it was *Yusuf* who did not distribute Hamed's share of the sale funds as required by the contract after admittedly receiving funds pursuant to the contract in 2011. The fact that Yusuf conveniently cannot come up with *any* of the documents to substantiate the remaining *\$1.3 million* payments nor can he remember when the payments were made does not mean the payments occurred prior to 2006. Here there is no such evidence. Finally, Yusuf committed another act under the contract in 2012, well after the September 17, 2006, cut-off date when he requested that Shawn Hamed release the Y&S stock pursuant to the contract, which Shawn Hamed did when he signed the requested release in February 2012.

In another odd assertion, Yusuf contends at pp. 3-4 of his Opposition that his April 1, 2014 deposition testimony meant that he received the payments for the Y&S stock (and

by extension, the Dorothea property) less than three years after the contract for the sale of the stock was signed in 2000. That is NOT what Yusuf said at his deposition. Yusuf testified in response to "when did you get that money?":

I get that money, I don't have a date. But I get that money maybe, I can guarantee you, it's not 3 years. It's less than 3 years. I sold this property many, many years ago.

If Yusuf's interpretation were to be believed, the following three things had to occur:

1) he received almost all of the money for the Dorothea prior to the contract's payment due date of January 15, 2004, 2) he then received an additional, random \$150,000 payment pursuant to the contract in November 2011, and 3) at least 8 years after the overwhelming majority of the money was paid for the stock, the buyers requested the release of the stock in Y&S. At his 2014 deposition he was asked when he received the funds, and he said three years earlier, meaning three years before the deposition, not three years after the contract was formed. That exactly matches the 2011 receipt of funds that is the only documented receipt.

III. Hamed is making a claim for damages, with interest

A. RUPA allows interest on claims just as any other VI claim at law

Yusuf tries to make a distinction between an "accounting claim" and a claim for damages, with interest. Unfortunately for him, the *Revised Uniform Partnership Act* (RUPA), as adopted in the U.S.V.I., explicitly allows interest on RUPA claims just as it would be allowed in any other VI claim at law. Our enactment of the statute mirrors the Uniform Act.

Virgin Islands Code Annotated Title 26. Partnerships Chapter 1. Uniform Partnership Act Subchapter I. General Provisions 26 V.I.C. § 5 § 5
Supplemental principles of law

(a) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(b) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate is that specified in Title 11, section 951, Virgin Islands Code.

Added Feb. 12, 1998, No. 6205, § 1, Sess. L. 1998, p. 103, eff. May 1, 1998. 26 V.I.C. § 5, VI ST T. 26 § 5 Current through Act 7471 of the 2012 Regular Session Annotations current through March 7, 2013. (Emphasis added.)

The Uniform Act is the same, but also supplies the valuable official commentary.

SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].

Comment: The principles of law and equity supplement RUPA unless displaced by a particular provision of the Act. This broad statement combines the separate rules contained in UPA Sections 4(2), 4(3), and 5. These supplementary principles encompass not only the law of agency and estoppel and the law merchant mentioned in the UPA, but all of the other principles listed in UCC Section 1-103: the law relative to capacity to contract, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other common law validating or invalidating causes, such as unconscionability. No substantive change from either the UPA or the UCC is intended.

It was thought unnecessary to repeat the UPA Section 4(1) admonition that statutes in derogation of the common law are not to be strictly construed. This principle is now so well established that it is not necessary to so state in the Act. No change in the law is intended. See the Comment to RUPA Section 1101.

Subsection (b) is new. It is based on the definition of "interest" in Section 14-8-2(5) of the Georgia act and establishes the applicable rate of interest in the absence of an agreement among the partners. **Adopting States can select the State's legal rate of interest or other statutory interest rate, such as the rate for judgments.** (Emphasis added.)

That is exactly the case here, as can be seen from decisions on this point in other jurisdictions where such prejudgment interest is uniformly awarded on RUPA claims. For example, in *Simpson v. Thorslund*, 151 Wash. App. 276, 288, 211 P.3d 469, 475–76, 2009 WL 2138990 (2009), the Court held:

Thorslund contends the trial court erred in granting Simpson prejudgment interest. We review an award of prejudgment interest for an abuse of discretion. “Prejudgment interest awards are based on the principle that a defendant ‘who retains money which he ought to pay to another should be charged interest upon it.’” “The plaintiff should be compensated for the ‘use value’ of the money representing his damages for the period of time from his loss to the date of judgment.” Usually, such compensation is liquidated, meaning that “the amount at issue can be calculated with precision and without reliance on opinion or discretion.” But, a claim need not be actually liquidated so long as it is “ ‘determinable by computation with reference to a fixed standard’ ” and calculated without reliance on opinion or discretion (i.e., judgment). Such is the case here. (Footnotes omitted).

Not only does this do away with Yusuf's argument regarding prejudgment interest on such RUPA accountings, it also does away with his attempted distinction between “accounting” and “claims.” In *Simpson v. Thorslund*, we have almost an identical situation. “[Hamed] should be compensated for the ‘use value’ of the money representing his damages for the period of time from his loss to the date of judgment.”

In fact, the identical argument Yusuf attempts here was presented in a RUPA action in Texas—*Farnsworth v. Deaver*, 147 S.W.3d 662, 666, 2004 WL 2341255 (Tex. App. 2004). There the court (while not allowing that position) stated that EVEN IF, *arguendo*, that position were accepted, then in a RUPA accounting claim the Texas generic prejudgment interest statute (very much the same as the VI statute) would force the same result from a different direction.

Next, the Farnsworths also argued that if they owed the Deavers payment for their capital account, then **the trial court erred in allowing prejudgment interest to accrue on that sum at 10% per annum**

“[b]ecause no prejudgment interest statute applies to this case.” Assuming *arguendo* that their argument was true, then the answer to the problem is found in their own brief. **They acknowledge that the prejudgment interest scheme established under § 304.101 et seq. of the Texas Finance Code applied if no other statute did.** See *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530–31 (Tex.1998) (dealing with Texas Revised Civil Statute art. 5069–1.05, § 6(a), the predecessor to § 304.101 et seq. of the Texas Finance Code). And, at the time of judgment, see *Natural Gas Clearinghouse v. Midgard Energy, Co.*, 113 S.W.3d 400, 414 (Tex.App.-Amarillo 2003, pet. denied) (holding that the applicable rate is that in existence at the time of judgment), prejudgment interest accrued at the rate of 10% per annum.⁶ **So, if no statute applied, as argued by the Farnsworths, then the trial court was entitled to adopt a rate of 10%, and, again, that happens to be the rate ordered in the judgment.** (Emphasis added.)

In short, RUPA allows interest on accounting claims, so it does not matter what term Yusuf uses to describe a claim.

B. Hamed does have the ability to argue acknowledgment, continuing violation and partial performance as exceptions to laches or SOL

It is undisputed that as a nominee under the contract, Fathi Yusuf had the following obligations: 1) collect the payments, 2) direct the release of the stock once all payments had been made and 3) distribute to Hamed his share. Yusuf admits that he obtained payments, directed the release of the stock, and owed Hamed his share. (SOF ¶ 9)

It is undisputed that Yusuf *acknowledged* the debt twice in two depositions after 2006 (2014 and 2019) and also in writing (2016). This acknowledgment revives Hamed's claim, as noted by Judge Brady in his April 17, 2015 Order. This was exactly what Judge Brady found with regard to Mohammad Hamed's deposition testimony about the \$5 million in back rent he awarded to Yusuf. “It is clear that the Partnership, through the statements of both Hamed and Yusuf, has acknowledged a debt for rents owed to United. . .” Order, *Hamed v Yusuf*, SX-12-CV-370 at pp. 9-10 (Apr 4, 2015).

It is undisputed that *partial performance* under the contract occurred upon receipt of the only documented contractual payment, which was in 2011. A new contractual failure to distribute occurred at that time, thereby resetting the statute of limitations "SOL." Partial performance also was invoked when Yusuf asked Shawn Hamed to sign the *Notice of Payment of Purchase Price and Authorization to Release Stock Certificates* for Y&S, which Hamed did in 2012.

Finally, Yusuf's laches or SOL arguments are barred under the "*continuing violations*" doctrine. As the seller's nominee for collection under the contract, Fathi Yusuf (as an escrow agent) had a legal duty to either 1) distribute funds each time a partial payment was made by the purchaser (which occurred at least once in 2011) or 2) distribute all of the funds when requesting the release of the stock from the seller (which occurred in 2012), neither of which he did.

C. The Partners alleged "acquiescence to informal recordkeeping" is not applicable in this case

Yusuf tries to argue at pp. 8-9 of his Opposition that the Partners "acquiesce[ed] to informal recordkeeping" in reimbursement of the Dorothea condo contract and therefore Hamed has no recourse to make a claim just because Yusuf can't prove he received the proceeds prior to the September 2016 cutoff date. This is just nonsense. This transaction was not an instance of "informal recordkeeping." On this occasion there was a written, signed contract with a separate entity, the Y&S corporation. The contract specified the duties of the agent, Fathi Yusuf. Fathi Yusuf had a duty to pay Hamed's share of the proceeds under the contract. He failed to pay Hamed his share and he further failed to maintain accurate records of payments, which was part of his fiduciary duty as an agent. He cannot now claim that his lack of recordkeeping should get him off

the hook for paying Hamed his share. Judge Brady has repeatedly noted that Yusuf kept the records and cannot hide behind the his faulty and obstructive "absence" of records which helps the Yusuf cause.

Yusuf tries to imply that the payments were made prior to 2006 simply because the contract stated that the last payment was due on January 15, 2004. However, the contract also had provisions for the possibility of the payments being paid late. Indeed, Yusuf admitted that late payments occurred in his discovery responses when he stated "[i]nterest was paid. . . ." (SOF ¶ 30) The information Hamed had and acted on was a payment in 2011 and a release of stock in 2012. To say that Hamed should have known that Fathi Yusuf received payments prior to 2011 when Yusuf can't even say himself when he received the payments is absurd. Hamed exercised his rights as soon as he had some indication that his claim had become ripe in 2011 and early 2012.

IV. Yusuf's "Fuzzy Math" Regarding the Amount Owed Hamed Should be Rejected

Yusuf claims that \$150,000 for a batch plant should be subtracted from the amount owed Hamed, even though Yusuf admits in his Opposition on p. 15 that "Mr. Yusuf testified that of the total \$1.5 million received, that \$150,000 of Hamed's share was directed to be paid a concrete batch plant to cover a payment that Hamed had failed to make to the batch plant some 10 years earlier [2001]." This reduction is not appropriate because, by Yusuf's own words, this batch plant payment was allegedly due in the pre-2006 time period of the Limitations Order.

Further, and equally important, this \$150,000 is a claim that Yusuf has brought separately – Y-12 – Foreign Accounts and Jordanian Properties. The viability of that claim should be properly discussed when that claim is considered.

Also, in deposition testimony, Fathi Yusuf stated that another \$105,932 should be subtracted from the amount owed to Hamed for the Dorothea transaction (\$802,966). Yusuf testified that Mr. Hamed gave a loan to a friend of Mr. Yusuf's and the \$105,000 was repayment of that loan. However, Yusuf now states that he already reimbursed Hamed for this loan.

A.[FATHI YUSUF] This is a loan was given to a friend of mine. I asked Mr. Mohammad Hamed at that time to go ahead and give him 75,000 dinar. The dinar equal to hundred and five nine thirty-two U.S. currency. I add them together, and I end up owing this.

But after I give them this paper, I went to Jordan and I give him his money right in front of his own wife. Whatever, it's 52,000 and change. (47:24-25-48:1-6)

Yusuf raises the idea that he repaid Hamed for this loan in his 2019 deposition testimony. If this were the case – Hamed refutes that the loan was repaid – this should have been brought as a claim, just at the \$150,000 for the batch plant was brought as a claim. Yusuf did not bring this as a claim in September 30, 2016, nor did he raise it as a revised claim in October 31, 2017. Accordingly, this offset should not be considered because it wasn't brought as a timely claim.

V. Conclusion

In conclusion, Hamed is entitled to the full \$802,966 that is owed for the Dorothea property. He is also entitled to prejudgment interest. Both should be entered in favor of Hamed against Yusuf on Claim H-1 and credited to his Partnership account when all claims are reconciled.

As stated above, Hamed has stated a valid claim under RUPA, he is entitled to prejudgment interest under RUPA, he is not "fragmenting" the laches defense or "straddling" the pre-2006 limitation time period, and Yusuf's assertion that claim H-1 is

barred by the Limitations Order fails for each of the following reasons, any one of which is sufficient to negate Yusuf's defense: 1) the "acknowledgment of the debt doctrine," 2) partial performance after the initial limitations period, and 3) the continuing violations doctrine under VI law.

Dated: April 24, 2019

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

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 6-1(e)

I hereby certify that the above document meets the requirements of Rule 6-1(e) and was served this 24th day of April, 2019. I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

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