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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, v. FATHI YUSUF and UNITED CORPORATION, Defendants/Counterclaimants, v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC., Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING Consolidated With
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY JUDGMENT
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	CIVIL NO. SX-14-CV-278 ACTION FOR DEBT AND CONVERSION

UNITED'S REPLY TO HAMED'S OPPOSITION TO UNITED'S MOTION FOR SUMMARY JUDGMENT AS TO Y-2 (UNPAID RENT FOR BAYS 5 AND 8)

United Corporation ("United") through its undersigned attorneys, respectfully submits this Reply Brief to Hamed's Opposition to United's Motion for Summary Judgment as to Y-2 (Unpaid Rent as to Bays 5 and 8).

I. No Statute of Frauds Violation

Hamed's statute of frauds argument is misplaced. As the Supreme Court has already found in this case:

> [T]his Court has held that the statute of frauds has no application to oral contracts that, while intended to last for more than a year, have no stated durational terms and *could* conclude within a year. *Peppertree Terrace v. Williams,* 52 V.I. 225, 232 n.5 (V.I.2009) ("'**It is well settled that the oral contracts invalidated by the [s]tatute [of frauds] because they are not to be performed within a year include only those which *cannot* be performed within that period.**'" (quoting 9 Richard A. Lord, Williston On Contracts § 24–3 (4th ed. 1999))); *see also Smith v. Robson,* 44 V.I. 56, 62 (V.I.Terr.Ct.2001) ("It is immaterial that the performance of the **853 contract *actually* exceeds one year.... [A] contract for lifetime employment need not be in writing because the employee's death could occur at any time." (citing *Cooper v. Vitraco, Inc.,* 320 F.Supp. 239 (D.V.I.1970))). Accordingly, because the Superior Court found that the partnership is an indefinite at-will agreement—a finding that Yusuf and United do not challenge—the statute of frauds is not implicated.

Yusuf v. Hamed, 59 V.I. 841, 852–53, 2013 WL 5429498, at *5 (V.I., 2013).

Here, the arrangement as to the rent of Bays 5 and 8 by the Partnership was indefinite and terminable at-will by United at any time that it elected to rent to another third party renter—i.e. an entity or person not affiliated with the Yusuf or Hamed families engaged in the operation of the Plaza Extra grocery stores through the Yusuf-Hamed Partnership. Yusuf testified in response to questions from Counsel for Hamed regarding the difference between the arrangement between United and a third-party tenant (e.g., Diamond Girl) and the arrangement between United and the Partnership (referred to as "Plaza Extra"):

> 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. Could you move Plaza Extra [the Partnership] 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 [Hamed/the Partnership] 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…

See **United Exhibit 7**, Yusuf Depo. 86:8-25, Hamed COSF¶32. Hence, the arrangement for the Partnership's use of Bays 5 and 8 was undefined in duration and terminable at any point that United elected to rent to another tenant. The "statute of frauds has no application to oral contracts that, while intended to last for more than a year, have no stated durational terms and *could* conclude within a year." *Yusuf v. Hamed*, 59 V.I. 841, 852–53, 2013 WL 5429498, at *5 (V.I., 2013). The arrangement with the Yusuf-Hamed Partnership for the use of Bays 5 and 8 constitutes an oral contract with no stated durational terms and *could* conclude within a year, should United have elected, at any point, to rent the space to third-parties and, therefore, does not implicate or violate the statute of frauds.[1] Hence, Hamed's arguments that in order to waive the application of the

[1] An alternative theory of liability and recovery was acknowledged in *Peppertree Terrace v. Williams,* cited above, where the Virgin Islands Supreme Court determined that a quasi-contract was created as a result of an oral agreement for the use and occupancy of real property for which payments were made to the owner in exchange for certain services including utilities, maintenance as well as occupancy. 52 V.I. 225 (V.I.2009). In the concurring opinion, Justice Swan found that the oral arrangement was a quasi-contract between the occupier of the premises and the owner for rent, such that it would be inequitable for the recipient to have accepted and retained the benefits without payment of value even in the absence of a written agreement. *Id.* As further evidence of a quasi-contract, the concurring opinion noted that it is a customary practice for a landowner to charge for services provided to an occupant of the land. *Id.* at 52 V.I. 225, 245, 2009 WL 2043870, at *12 (V.I.,2009). Justice Swan found the landowner to be entitled to recovery in *quantum meruit*, based on an "implied-in-law contract." *Id.* citing *Int'l Data Prods. Corp .,* 492 F.3d at 1325.

Likewise, Judge Brady recognized the theory of recovery in *Carlos Warehouse v. Thomas*, finding that:

statute of frauds, the party must admit the contract exists is inapplicable. The agreement as to the rent for Bays 5 and 8 does not require a writing as it is terminable at-will, hence, the requirement for an admission so as to waive the application of the statute of frauds is not required – the statute of frauds does not apply and therefore, its application does not need to be waived through an admission.

Hamed feigns frustration about a lack of formality as to the arrangement for renting of the storage space for Bays 5 and 8 and the fact that it was an oral agreement in order to avoid payment. However, Hamed previously touted the legal import of an "oral lease" agreement between the Partnership and United as to Bay 1, which, likewise, lacked the formalities he now claims essential, when offering it as one of the primary pieces of evidence to demonstrate the existence of the Partnership. Hamed offered the fact that the Partnership paid rent to United, pursuant to an informal oral agreement, as dispositive of the existence of a Partnership (which operated the grocery store) separate from United (which owned the property where the store operated and to

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> A quasi-contract or implied in law contract, on the other hand, involves *no assent between the parties, no meeting of the minds.* Instead *the law implies a promise* on the part of the defendant to pay a particular debt. Thus, the *implied in law contract is indeed no contract at all,* it is simply a rule of law that requires restitution to the plaintiff of something that came into defendant's hands but belongs to the plaintiff in some sense.

64 V.I. 173, 191, 2016 WL 2865948, at *8 (V.I.Super., 2016).

While it is United's position that the arrangement for the payment of rent for Bays 5 and 8 is not subject to the statute of frauds because it was for no specified duration and terminable at-will and that there is evidence of mutual assent to this arrangement, United remains entitled to judgment for the rent due as to Bays 5 and 8 as a quasi-contract such that it would be inequitable for the Partnership to have accepted and retained the benefits of the use of Bays 5 and 8 for storage of inventory, utilities and having destroyed and damaged the property, without payment of value, even in the absence of a written agreement. Moreover, recovery would be proper under a *quantum meruit* theory, the value of which United has demonstrated to be the fair market value of the space when rented to a third-party–the rate used by United to calculate the amount due. Hamed admitted that the space was used. United has demonstrated that the space was used continuously during the period set forth by United. Hamed does not contest United's position as to the time-frames utilized. These facts combined demonstrate that that United is entitled to the amounts sought as to Bays 5 and 8.

whom the Partnership paid rent). After using the "oral" and "informal" lease concept as a sword to demonstrate the existence of a Partnership, Hamed now attempts to use it as a shield to avoid an obligation to pay rent, deeming it too uncertain and a violation of the statute of frauds. However, to the extent that a party's frustration is relevant, United's frustration is warranted. Hamed did not go to United in advance of occupying the space at Bay 5 and inquire whether the Partnership could use the space for extra storage of the Partnership's inventory. Quite the opposite—Hamed damaged United's property, breaking through a concrete wall, creating a hole large enough to drive a forklift through, into valuable, highly visible, commercial, retail space to use for easily accessible, on-site warehouse storage. Although Mike Yusuf was a participant, Waleed Hamed knew that Fathi Yusuf was in charge of all matters relating to renting the United Shopping Center that he was not consulted before the destruction took place. Hence, there was no "gift" or intent by United to provide the space for free.[2] Rather, the Partnership simply began occupying the space, without making arrangements with United in advance. When Yusuf learned of the damage and use, he was angry and did not want the space used for storage. Hamed does not dispute that Yusuf was frustrated and expressed that frustration. Hence, there was never any intent

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[2] Waleed Hamed testified that he "believed" that the use of the space was rent-free but this was not based upon any conversation with Mr. Yusuf:

> Q. [PERRELL] you indicated that it was your understanding
> that Bays 5 and 8 were to be provided by United to the
> partnership rent-free; is that correct?
> A. [WALEED HAMED] That's correct.
> Q. . . . .And you had no communications with
> Mr. Yusuf in this regard; is that correct?
> A. That's correct.
> Q. . . . .So it is your belief that it was rent-free,
> despite not having any conversations with Mr. Yusuf about
> that?
> A.That is correct.

See Waleed Deposition, p. 9:3-13; Hamed COSF¶26. United shows that the "belief" is a self-serving position worthy of no probative value as there is no reason for Hamed to "believe" that the Partnership's use and occupancy of a space would be assumed to be free. Such an unfounded assumption is contrary to all other dealings between the Partnership and United relating to the payment of rent and in the alleged absence of a conversation with Yusuf.

by United to enter into an arrangement in which the Partnership would use the space at all, much less use it rent-free. Rather, the occupancy was thrust upon United by the Partnership's destruction of the property and unpermitted use. Upon determining that the Partnership was in need of the additional space for storage, the arrangement then was reached wherein the Partnership could remain in the space until such time as United rented it to a third party—terminable at-will, at any time by United. The Partnership occupied the space, enjoyed the use of utilities and the convenience of a location adjacent to the Plaza Extra store and was only required to pay rent when cash flow and other considerations allowed for it, as determined by Yusuf, acting as landlord for United, who had a vested interest in the success of the Partnership. This arrangement has all of the hallmarks of a rental relationship with the Partnership paying rent to the owner, United upon demand for an unspecified duration and terminable at-will. Yet, Hamed seeks to argue that despite destroying the property, occupying the space without advance permission, gaining the benefit of storage facilities on-sight (as opposed to off-site requiring trucking and other inconveniences), receiving the use of utilities and the benefit of flexible payment when conditions were suitable, that the Partnership owes nothing to United for the years it continuously occupied the spaces. If the integral piece of evidence demonstrating the very existence of the Partnership is the Partnership's payment of rent to United for the space occupied for the grocery store operations, why would the arrangement be any different as to the space occupied by the Partnership for storage of inventory needed and owned by the Partnership in the furtherance of the operation of the grocery store? There is no logical basis for this position, other than Hamed's desire to avoid payment for the benefits previously received, now that the Partnership has been established.

II. The July 21, 2017 Order limiting the timeframe as to the claims *between the partners*, does not apply to claims of United for debts of the Partnership.

Hamed attempts to argue that United's claims for rent as to Bays 5 and 8 violates the "statute of limitations" decision in Judge Brady's July 21, 2017 Order. This is in error for two reasons. First, Judge Brady's July 21, 2017 Order specifically rejected any arguments that the statute of limitations applied to any *claims between the partners*. *See* **United Exhibit 11**-July 21, 2017 Order at p.1, 12.[3] Hence, it is a misnomer and inaccurate for Hamed to label the July 21, 2017 Order as the "SOL Order" when the decision specifically denied and rejected the statute of limitations argument. Rather, the July 21, 2017 Order limited the claims *between the partners* as to their accounting claims, under equitable doctrines, to only those claims arising after September 17, 2006. However, this limitation as to claims *between the partners* does not impact debts of the Partnership. Rather, the Court explicitly found 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* **United Exhibit 11**-July 21, 2017 Order at p.8, n.5. Hence, Judge Brady's determination relating to a timeframe limitation on the *partners' claims* in the July 21, 2017 Order does not impact or otherwise preclude United's claims for past due rent. Moreover, this issue was previously raised by Hamed relating to United's other rent claims for increased rent as a hold-over tenant as to Bay 1 and the Master disposed of such arguments in his Order on March 13, 2018, finding that the claims for rent are "United's" as opposed to "Yusuf's". Therefore, the equitable limitation imposed upon claims *between the partners* in the July 21, 2017 Order is not

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[3] Judge Brady explained "…the statute of limitations, by its plain language, has no direct applicability to individual, claimed credits and charges presented within the accounting process. Accordingly, Plaintiff's [Hamed] Motion for Partial Summary Judgment will be denied." *See* **United Exhibit 11**-July 21, 2017 Order at p.1, 12.

applicable and does not bar the claims of United for unpaid rent for Bays 5 and 8. Nothing in the July 21, 2017 Order prohibits this claim by United for an unpaid debt.

The only relevant portion of July 21, 2017 Order as to the claims for Bays 5 and 8 is the finding that there existed questions of fact regarding Bays 5 and 8 precluding summary judgment for United at that time, thereby denying United's August 12, 2014 Rent Motion as well as Hamed's Motion for Partial Summary Judgment Re: Statute of Limitations. *See* United Brief, p. 13-14 and United Exhibit 11-July 21, 2017 Order p.7-8. Judge Brady explained that **"Mohammed Hamed's comments acknowledging the debt, which formed the basis for the Court's judgment as to Count XI [granting United's Motion to Withdraw Rent for Bay 1], do not explicitly distinguish between rent owed for Bay 1 and the rent owed by Bays 5 and 8."**[4] *Id.* at p. 8. As set forth in the current United Motion, since the time of the August 12, 2014 Rent Motion, additional discovery has been conducted and the matter is now ripe for adjudication. *See* United Brief, p. 3, fn.1. United shows that the statements and evidence presented in its brief demonstrate an absence of genuine issues of material fact and thus, entitle it to an award of rent for Bays 5 and 8 as set forth therein. In his Opposition, Hamed offers no arguments relating to a statute of limitations defense except for erroneous contention that the July 21, 2017 Order prohibits two of the rent claims. As set forth above, this is incorrect—the July 21, 2017 Order imposing limitation upon claims *between the partners* is inapplicable to United's rent claims.

[4] This statement, coupled with Waleed Hamed's acknowledgment of continuous use of Bays 5 and 8 by the Partnership, Yusuf's acknowledged roll as the individual responsible for all issues relating to rent, Yusuf's testimony on behalf of United that he never intended to rent the space to the Partnership in the first place, much less to provide it to them rent free, all support an award of rent for Bays 5 and 8.

III. Additional Clarifications Contradicting Hamed's Arguments

Throughout Hamed's Opposition Brief, there are various statements and arguments that are inaccurate.

A. United's Representations as to the Dates of Occupancy by the Partnership Are Correct.

Hamed argues that the dates as to the occupancy reflected by United have changed and, therefore, that they must be uncertain. United set forth the correct dates in the its August 12, 2014 Motion and Declaration of Yusuf which are accurate and further supported by the subsequent interrogatory responses and documents produced reflecting when third-party tenants occupied Bays 5 and 8. *See* **United Exhibits 1, 3, 4, 6, 7, 8** and **9**. Further, Waleed Hamed admitted that the Partnership used Bays 5 and 8 when not occupied by a third-party tenant. *See* **United Exhibit 5**-Waleed Hamed Depo. 9:14-17; 12:11-14, 18-21; 93:8-11. Waleed Hamed further admitted that Mike Yusuf or others on the United side would have accurate information as to the dates of occupancy and that he could not dispute those dates. *Id.* at 56:6-10; 89:13-18, 21-25. Further, Hamed admitted that the he could not dispute that the occupancy would have been continuance during those periods. *Id.* at 92:20-93:4.

B. The Luff Report Has No Probative Value

Hamed argues that the report allegedly prepared by a Mr. Luff constitutes a business record. The proper foundation was not laid for the admission of the report as a business record and therefore, it cannot be considered as sufficient evidence in support of Hamed's position in opposition. Even if considered, it offers no relevant evidence as to the issues before the Court.

First, at the time that it was allegedly prepared, the Partnership was not an acknowledged legal entity. Rather, by all outward appearances, United operated Plaza Extra East. Despite those appearances, as has been established, the Partnership was actually a tenant of United's occupying

Bay 1 and operating the grocery store business. However, the Luff Report fails to reflect a tenant for Bay 1 at all–the largest single tenant in the United Shopping Center. If the report is to be believed and reflective of the true arrangements as Hamed purposed, then United operated the grocery store business and there was no tenant paying rent as to Bay 1—clearly this was not the case. Moreover, as of July 2001, the date on the Accounts Receivable page (FBIX237825), there are no arrears noted for Bay 1. However, as of that point, Judge Brady has already determined that rent in excess of $2.8 million dollars had accrued and was due to United for Bay 1. *See* **United Exhibit 10**-Rent Order, awarding $3,999,679.73 for Bay 1 rent for 1994 to 2004. Clearly, the Luff Report does not reflect the true rental arrangements between the Partnership (an entity not even acknowledged at the time) and United. If anything, it reflects that Bays 5 and 8 were not occupied by a third-party renter at the purported date of the report and that Plaza Extra was occupying those Bays, according to Mr. Luff. Mr. Yusuf confirmed that he had not seen the report and does not recall ever receiving it. Hence, Hamed's assertions as to the Luff Report fail to provide any probative value as to Hamed's contention that the Partnership was to occupy the space in Bays 5 and 8 without rent, a position contrary to all of the parties' prior dealings.

C. Settlement Check of $5,408,806 Did Not Cover Bays 5 and 8

Hamed argues that the settlement check of $5,408,806 ("Partial Settlement Check") paid on February 7, 2012, covers the rent due, if any, as to Bays 5 and 8. *See* Hamed Opposition Brief, p. 15-16. However, Judge Brady has already determined that the Partial Settlement Check only covered the rent due United for the period between 2004 to 2011. *See* **United Exhibit 10**-Rent Order, p. 2. Waleed Hamed acknowledged that the Partial Settlement Check only covered a portion of the years that the rent was due:

> Q. 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 **United Exhibit 5**-Waleed Hamed Depo. 90:6-9,23-5 – 91:4 and Exh. 5 attached thereto. It is United's position that the Partial Settlement Check did not and could not include rent for Bays 5 and 8 for the three periods claimed.

1. The Bay 5 Rent claimed covers the period from May 1, 1994 to July 31, 2001 –it is not covered by the Partial Settlement Check, which relates to 2004-2011.
2. The First Bay 8 Rent claimed covers the period from May 1, 1994 through September 30, 2002 – it is not covered by the Partial Settlement Check, which relates to 2004-2011.
3. The Second Bay 8 Rent claimed covers the period from April 1, 2008 to May 30, 2013 and therefore, could not have been covered by the Partial Settlement Check, which relates to 2004-2011 as a portion of the rent claim occurred *after* that date and *after* the date the check was issued in February of 2012.

Hence, the dates alone demonstrate that the Partial Settlement Check could not have included the rent claims for Bays 5 and 8.

IV. Conclusion

United's rent claims for the Partnership's continuous occupancy of Bays 5 and 8 for the periods specified is not subject to the statute of frauds as the arrangement was not of a set duration and terminable at-will. Recovery of the unpaid rent is available under various theories including quasi-contract, entitling United to damages for *quantum meruit*. The July 21, 2017 Order does not apply to United's rent claims and, therefore, does not bar the claims for Bays 5 and 8. The Partial Settlement Check was to cover rent between 2004 and 2011 and therefore, does not cover the rent claims for Bays 5 and 8 because these were for periods before 2004 and for portions of rent after

2011. Hence, for the foregoing reasons, United is entitled to an award of rent for Bays 5 and 8. In the alternative, the disputes raised by Hamed create genuine issues of material fact entitling United to an evidentiary hearing.

Respectfully submitted,
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DATED: April 24, 2019 By: /s/Charlotte K. Perrell

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2019, I caused the foregoing **UNITED'S REPLY TO HAMED'S OPPOSITION TO UNITED'S MOTION FOR SUMMARY JUDGMENT AS TO Y-2 (UNPAID RENT FOR BAYS 5 AND 8)**, 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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