

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

REVISED EXHIBIT A

**HAMED OPPOSITION TO UNITED'S STATEMENT OF FACTS TO UNITED'S RE-FILED
MOTION FOR SUMMARY JUDGMENT AS TO Y-2 THROUGH Y-4:
RENT DUE TO UNITED FOR BAYS 5 AND 8 TOGETHER WITH INTEREST FOR RENT**

I. Introduction

Pursuant to the Special Master's Order of May 13, 2019, on June 22, 2019 Yusuf re-filed ***United's Motion for Summary Judgment as to Y-2 Through Y-4, Rent Due to United for Bays 5 And 8 Together with Interest for Rent and Memorandum of Law in Support.***

However, Yusuf's 'revised' Motion for Summary Judgment is almost exactly the same as his original Motion (February 25, 2019) – what was added was a Statement of Facts. *Accordingly, Hamed responds only to Yusuf's new factual filings, but relies on his original Oppositions and Counter-Statement of Undisputed Facts ("CSOFs"), filed on April 1, 2019. His original factual response was filed as Exhibit A, on April 1, 2019; thus, this is Revised Exhibit A.*

II. Hamed's Opposition to *United's Statement of Facts*

A. Hamed is in agreement with United regarding some of United's statement of facts

Hamed does not dispute the following United statements of fact ("USOFs"): ¶¶ 1, 4-8, 12-14, 18, 20, 24-26, 30-31, 36 and 54-55.

B. Hamed "disputes" the following United Statement of Facts

Hamed disputes the following USOFs: ¶¶ 2-3, 9-11, 15-17, 19, 21-22, 27-29, 32-35, 37-40, 41-53 and 56-61 for the reasons set forth as follows:

USOF ¶ 2

2. 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:

- a. Bay 5–May 1, 1994 through July 31, 2001 (7 years, 2 months) ("Bay 5 Rent")
- b. Bay 8–May 1, 1994 through September 30, 2002 (8 years, 5 months) ("First Bay 8 Rent")
- c. Bay 8–April 1, 2008 through May 30, 2013 (5 years, 1 month) ("Second Bay 8 Rent").

Hamed Response:

First, Hamed disputes that Bays 5 and 8 were ever 'leased' by the Partnership – there is no written lease between United and the Partnership for the use of the Bays and there is no written documentation regarding the time periods the Partnership used the Bays and never any written reference to such a lease. (COSFs ¶¶ 22-25) Hamed further disputes that the time periods United alleges that the Partnership casually used Bays 5 and 8 are accurate. Because there was no writing documenting the time periods of usage by the Partnership, even United itself has guessed at the time Periods. (At different times during this proceeding, Yusuf has stated that the Bay 5 lease ended either on October 31, 2001, and at other times, July 31, 2001.) (COSF ¶ 11,17) *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. (COSF ¶ 17)

USOF ¶ 3

3. 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.

Hamed Response:

Hamed need not comment on whether Fathi Yusuf set forth the square footage of each Bay, the period of the rental and the price per square foot in his August 12, 2014 Declaration. However, Hamed does dispute the contention that the Partnership “rented” the Bays (COSFs ¶¶ 2, 22-24), the time periods of use (COSFs ¶¶ 11, 13, 17, 27) and on a “price per square foot” basis. (COSFs ¶¶ 3, 11, 13, 22-24, 26, 30-31, 36-37)

USOF ¶ 9

9. 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.

USOF ¶ 10

10. 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.

Hamed Response:

Hamed disputes the contention that Wally Hamed felt that storage system of trailers had to be abandoned and the Bays used. When asked “[w]ould you agree with me also that that particular system of storage was a bit cumbersome?,” Hamed responded “[y]es.” Waleed Hamed, 26:21-23. Wally Hamed did not say that the Partnership had to use the Bays because the trailer system was not working. Wally Hamed definitely **did not** say that had he known Yusuf was going to charge the Partnership extra rent for the Bays, he would have used the Bays in the first place. Rather, when presented with an easier rent-free or as a part of the overall use of the Sion Farm location for which rent was already paid alternative, he assented to using the Bays for storing inventory.

USOF ¶ 11

11. 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.* and,

USOF ¶ 15

15. 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.

Hamed Response:

Hamed disputes the contention that Plaza Extra East began utilizing Bay 5 and 8 for storage in May 1994. (COSF ¶¶ 27) Wally Hamed testified that he didn't recall Plaza Extra-East using Bay 5 and 8 in 1994. (COSF ¶¶ 27) He also did not believe Bay 5 was used in 1995. (COSF ¶¶ 27) In fact, he stated that the eight containers were still behind the Plaza Extra-East store during those years, so the store would not need or use Bays 5 and 8. (COSF ¶¶ 27) Further, as Yusuf has admitted, there is no written record documenting the various, intermittent times of usage of Bays 5 and 8. (COSFs ¶¶ 22-24)

USOF ¶ 16

16. Yusuf was not happy to discover that this particular Bay [Bay 5] 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.

Hamed Response:

Hamed disputes Yusuf's characterization of not wanting the United Shopping Center to be used as warehouse space. For example, Waheed "Willie" Hamed testified in his deposition on January 22, 2019, that he heard telephone conversations between Fathi and Mike Yusuf and Wally Hamed where Fathi Yusuf gave Mike Yusuf and Wally Hamed permission to use Bays 5 and 8 as a warehouse. (COSF ¶ 36) Further, United leased Bay 8 as a warehouse to Riverdale (Idheilah-Zgheir) from October 2002 to January 2007:

17. USE OF PREMISES:

It is understood, and Tenant so agrees, that the Leased Premises, during the term hereto, shall be used and occupied by Tenant only for the operation of a Wholesale Grocery Warehouse. (Yusuf Exhibit 9, p. 9 of 36, COSF ¶ 35)

USOF ¶ 17

17. 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.*

USOF ¶ 19

19. Specifically, Yusuf testified relating to Bay 5:

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 Exhibit 6, Fathi Yusuf Depo., 82:12-21.

Hamed Response:

Hamed disputes that Wally Hamed agreed to pay rent for Bays 5 and 8. The record is clear and uncontested. **He never entered into any such agreement.** No such agreement has been produced, **and no such agreement has ever been referred to or otherwise discussed in any other document of record.**

On January 21, 2019, Wally Hamed testified in his deposition that Bays 5 and 8 were provided to the Partnership either rent-free or **as part of the overall use of the "Sion Farm" location (as set forth on the rent check) for which rent was already paid**—there was no "additional" lease or agreement. Further, no writing or other evidence exists to support the assertion that he had a 30 year old conversation with Fathi Yusuf where he agreed or Fathi Yusuf asked that the Partnership would pay extra rent for the Bays. (COSF ¶ 26) Further, Waheed "Willie" Hamed testified in his January 22, 2019 deposition that he heard a telephone conversation between Fathi and Mike Yusuf and Wally Hamed where Fathi Yusuf gave Mike Yusuf and Wally Hamed permission to use Bays 5 and 8 as a warehouse. (COSF ¶ 36) Willie Hamed testified that when Fathi Yusuf gave permission to Mike Yusuf and Wally Hamed to use the United Shopping Plaza's bays as warehouse space for Plaza Extra East, Yusuf did not make a request for rent or say rent would have to be paid at some point. (COSFs ¶¶ 36-37) Finally, again, there is no written lease agreement between the United Shopping Center and the Partnership establishing a lease agreement, time period or rental amount – and never any mention or reference to this in any other documents. (COSFs ¶¶ 22-25, 31)

USOF ¶ 21

21. 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.

USOF ¶ 22

22. 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.

Hamed Response:

Hamed disputes the assertion that Fathi Yusuf charged the Partnership the “same amount as other commercial tenants for that space.” **It is critical to note that Fathi Yusuf has asserted several differing rental amounts for the price per square foot for Bays 5 and 8 and he has articulated several different methods for determining the rent.** For Bay 5, he recently alleges he chose the rent of the tenant renting the space *after* the Partnership had used it and used a rate that included Bay 4, an additional 1,250 square feet, that the Partnership did not use. (COSF ¶ 30) For Bay 8, Fathi Yusuf claimed he used the amount charged to the tenant who occupied the space *prior* to the Partnership's use of the Bay. (COSF ¶ 30) Because there was never any such contemporaneous agreement, Yusuf now tries to “construct” what he thinks rent should have been. **His own** range of rents claimed owed for the Bays has gone from no rent due (COSF ¶ 2) to \$12.00 per square foot (COSF ¶ 6) for Bay 5 and no rent due (COSF ¶ 2) to \$16.15 per square foot (COSF ¶ 13) for Bay 8.

Bay 5

August 27, 2001

- Thomas W. Luff, Property Manager for the United Shopping Plaza, sent a letter to Fathi Yusuf showing that Bays 5, 7 and 8 were “plaza-extra Vacant” for the months of July and August 2001, there was no rent due for the covered period and there was no “balance forward.” (COSF ¶ 2)
- If Bay 5 were to be rented, the Luff letter listed the amount of rent per square foot for Bay 5 (3,125 square feet) as \$7.01 per square foot. (COSF ¶ 3)

September 3, 2001

- Diamond Girl rented Bay 5 (3,125 square feet) for \$10.00 per square foot. (COSF ¶ 4)

December 1, 2011

- Diamond Girl rented Bays 4 and 5 (4,375 square feet) for \$12.34 per square foot. (COSF ¶ 6)

May 17, 2013

- Attorney Nizar DeWood, on behalf of the United Corporation, asserted rent was owed for Bay 5 (3,125 square feet) at \$12.00 per square foot. (COSF ¶ 11)

December 23, 2013

- United Corporation filed an Answer and Counterclaim in *Hamed v Yusuf*, X-12-CV-370, asserting rent was owed at \$12.00 per square foot for Bay 5 (3,125 square feet). (COSF ¶ 13)

August 12, 2014

- Fathi Yusuf's declaration asserted that rent was owed for Bay 5 (3,125 square feet) at \$12.00 per square foot. (COSF ¶ 17)

January 21, 2019

- According to his deposition, Yusuf determined the cost per square foot to the Partnership for Bay 5 by looking at the amount paid by a tenant (Diamond Girl) who rented the space after the Partnership used the space. (COSF ¶ 30)

Bay 8

1987-1992

- Ali Hardware rented Bay 8 for \$5.00 per square foot, plus maintenance and property tax. (COSF ¶ 1)

August 27, 2001

- Thomas W. Luff, Property Manager for the United Shopping Plaza, sent a letter to Fathi Yusuf showing that Bays 5, 7 and 8 were "plaza-extra Vacant" for the months of July and August 2001, there was no rent due for the covered period and there was no "balance forward." (COSF ¶ 2)
- If Bay 8 were to be rented, the Luff letter listed the amount of rent per square foot for Bay 8 as \$5.50 per square foot. (COSF ¶ 3)

October 1, 2001

- Riverdale rented Bay 8 was \$0 for the first three months, \$5.00 per square foot for the first full year and \$6.00 for the remaining term of the lease. (COSF ¶ 5)

May 17, 2013

- Attorney Nizar DeWood, on behalf of the United Corporation, asserted rent was owed for Bay 8 at \$12.00 per square foot. (COSF ¶ 11)

December 23, 2013

- United Corporation filed an Answer and Counterclaim in *Hamed v Yusuf*, SX-12-CV-370, asserting rent was owed at \$16.15 per square foot for Bay 8. (COSF ¶ 13)

August 12, 2014

- Fathi Yusuf's declaration asserted that rent was owed for Bay 8 at \$6.15 per square foot. (COSF ¶ 17)

January 21, 2019

- Fathi Yusuf testified in his deposition that he determined the cost per square foot for Bay 8 by looking at the amount of rent paid by the tenant (Ali Hardware) occupying the space *prior* to the Partnership's use of Bay 8. (COSF ¶ 30)

USOF ¶ 23

23. As with the rent for Bay 1, United allowed the rent to accrue so as 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 Exhibit 4-Supp. Interrog. Resp. No. 29. Waleed Hamed agreed to this arrangement. *Id.*

Hamed Response:

Hamed never agreed to the payment of rent for Bays 5 and 8 and, by extension, did not agree to allow non-existent rent to accrue for greater liquidity. There is no document or reference to such an agreement anywhere in the historical record. Thus, Hamed incorporates his responses to USOFs 2-3, 17 and 19 into this response.

USOF ¶ 27

27. These leases reflect the price charged for the space and the ending time period of Plaza Extra East's occupancy of Bay 5.

USOF ¶ 29

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

Hamed Response:

Hamed objects to the time periods United contends the Partnership used Bay 5 and objects that the Partnership even owes rent for Bays 5 & 8 – having paid rent by check for all of “Sion Farm”, without division into different bays. (COSFs ¶¶ 2, 22-24) In this regard, Wally Hamed testified that he did not believe the Partnership used Bay 5 in 1994 or 1995. (COSF ¶ 27) Further, Yusuf doesn't have clarity (or any records) regarding the time periods the Partnership utilized Bay 5. Yusuf has offered varying time periods: May 1, 1994-October 31,

2001 (COSFs ¶¶ 11, 13) and May 1, 1994-July 31, 2001. (COSF ¶ 17) Hamed incorporates his responses to USOFs ¶¶ 2-3, 17 and 19 into this response.

USOF ¶ 28

28. 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 Exhibit 1-Yusuf Decl. ¶22.

Hamed Response:

Hamed disagrees that the lack of lease for Bays 5 and 8 was analogous to the lack of lease for Bay 1. In Bays 5 and 8, the Partnership had to (and did) vacate the premises whenever a better tenant came along. (COSF ¶ 28) It was clearly not a lessee, it was a causal user. The Partnership did not have to vacate Bay 1 and never did vacate the space to accommodate another tenant during the Partnership – it had a lessor's rights. (COSFs ¶¶ 28, 32)

USOF ¶ 32

32. 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.*

USOF ¶ 33

33. Bay 8 was occupied by Plaza Extra East from May 1, 1994 through September 30, 2002 (*8 years and 5 months*). See Exhibit 1-Yusuf Decl. ¶23. As the space had previously 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 Exhibit 4-Supp. Interrog. Resp. No. 29.

USOF ¶ 34

34. As with the rent for Bay 1, United allowed the rent to accrue so as 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). *Id.* Waleed Hamed agreed to this arrangement. *Id.*

Hamed Response:

Hamed disputes the assertion that Bay 8 was occupied in 1994 and 1995, as Wally Hamed testified that the eight containers were still behind the Plaza Extra-East store during those years, so the store would not need or use Bays 5 and 8. (COSF ¶ 28)

Yusuf also had varying dates for when the Partnership used Bay 8: April 1, 2008-May 30, 2013 (COSFs ¶¶ 11, 13), April 1, 2008-September 30, 2013 (COSF ¶ 17) and a second time period from May 1, 1994-September 30, 2002. (COSF ¶ 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. (COSF ¶ 17)

As for liquidity, Hamed asserts this is a fabrication on Yusuf's part, as Wally Hamed has testified that he never agreed to pay rent for Bays 5 and 8. Additionally, Hamed does not believe the Bays were even used by the Partnership in 1994 and 1995, the time period when the liquidity would be needed. There is no evidence that it did. Finally, Yusuf, through various documents, letters and court filings, gave differing dates of use for the Bays. If he didn't even know the exact dates of use, how could he say that he delayed rent demands to give the Partnership "liquidity"?

USOF ¶ 35

35. On October 3, 2001, the FBI seized substantially all of the financial and accounting records of the Plaza Extra Stores. See Exhibit 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 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.*

Hamed Response:

Hamed disputes this contention. Any testimony about the intent of counsel is hearsay. Furthermore, if there was any such plan, it was not the intent of the parties that such plan would allow Mr. Yusuf to steal half of the value of the Partnership because of such a fiction. Thus, Yusuf is attempting to suggest to this Court that Mr. Hamed "voluntarily" intended to surrender tens of millions of dollars. Finally, and most importantly, Mr. Hamed was not a defendant in that case and was not, therefore, part of any such activities.

USOF ¶ 37

37. 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).

USOF ¶ 38

38. 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 August 12, 2014 Declaration for \$323,515.63. *Id.*

USOF ¶ 39

39. When the lease with Riverdale ended, Plaza Extra East again began using Bay 8 for storage. See Exhibit 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.*
40. Plaza Extra East occupied and used Bay 8 from April 1, 2008 through May 30, 2013 (5 years and 1 month). See Exhibit 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.*

USOF ¶ 40

40. Plaza Extra East occupied and used Bay 8 from April 1, 2008 through May 30, 2013 (5 years and 1 month). See Exhibit 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.*

USOF ¶ 41

41. As before, United allowed the rent for this period to accrue rather than demanding payment so as 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.

Hamed Response:

As has been explained in previous responses, Hamed disputed these assertions for multiple reasons: (1) Hamed denies that there was any agreement on the part of Hamed to pay rent for Bay 8 (CSOFs ¶¶ 14, 26, 37), (2) Yusuf has given differing dates that the Partnership used Bay 8 (CSOFs ¶¶ 11, 13, 17), (3) Yusuf has given different amounts of rent per square foot due (CSOFs ¶¶ 3, 11, 13, 17, 30, 31), (4) no written lease exists articulating the terms and agreement of the Partnership to “rent” the space (CSOFs ¶¶ 22-25) and (5) Yusuf's “theories” about Hamed's legal exposure in the criminal case are just that. Hamed's responses to USOFs ¶¶ 2-3, 11, 15, 21-22, 27, 29, and 34-35 are incorporated here.

USOF ¶ 42

42. As to the timing of the use of the space, Fathi 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 Exhibit 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.

Hamed Response:

Hamed has presented evidence that creates a factual dispute about the time frames Bays 5 and 8 were utilized. (CSOF ¶ 27) Further, United and Yusuf themselves don't know when the Partnership utilized the Bays, as they have offered up differing dates in letters, affidavits and court filings. (CSOFs ¶¶ 11, 13, 17) Finally, there are no written lease showing an agreement to rent the Bays or the time periods the Bays were used. (CSOFs ¶¶ 22-25).

USOF ¶ 43

43. 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.

Hamed Response:

Yusuf has taken this portion of the Wally Hamed's deposition out of context and did not provide these excerpts in United's exhibit package. Wally Hamed was testifying regarding a document prepared by United's property manager, Thomas Luff, in 2001. **When asked if he had personal knowledge of the document and its contents, Hamed responded "no."** When asked who would have personal knowledge, Hamed responded Fathi or Mike Yusuf.

Q. [Mr. Hartmann] But -- but what I'm asking you is they presented you with a document. Could you look at that document, please? The document that counsel gave you. She asked you if you'd ever seen this document and you said you hadn't. This was Exhibit 2. 53:13-17

* * * *

Q. Okay. And if you look down on the left side of the document, it says Bay 2. And then it says, "U-Rental & Sales." Then it says Bay 3, "American Beeper." Then it says Bay 4, "Vacant." Then it says Bay 5, "plaza extra-Vacant," okay?

So using this document to refresh your recollection as to the status of Bay 5 on July 27th, '01, can you tell me whether that part -- that bay was occupied in July of 2001?

A. No, it says vacant.

Q. Okay. But -- but do you have any personal knowledge?

A. No.

Q. Okay. Who would have that personal knowledge?

A. Fathi Yusuf, Mike Yusuf, or the property manager.

Q. Okay. So -- so they might be able to tell you whether it was vacant or not; is that correct?

A. Yes. 55:18-25-56:1-10

Hamed notes that Yusuf gives credence to and relies on Wally Hamed's recollections and references to the very document that proves Hamed's case. Yusuf credits Hamed's recollections in a manner that is consistent with the very document that proves Hamed's point here—the Bays

were vacant. **Hamed says nothing in support of Yusuf's position**, to the contrary, his testimony and this document directly contradict Yusuf.

USOF ¶ 44

44. 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.

Hamed Response:

Hamed disputes that Wally Hamed agreed that the years that there weren't tenants in Bays 5 and 8, the Partnership was using the Bays. First, Wally Hamed testified that he did not believe the Partnership was using the Bays in 1994 and 1995 because the containers used for storing excess Partnership merchandise were still behind Bay 1 in those two years. (COSF ¶ 27) Second, United's own business records showed the Bays to be vacant in 2001—a time period that United now says the Partnership was utilizing the Bays. (COSF ¶ 2) Third, United itself couldn't decide when the Bays were being used, as they offered up different dates in affidavits, letters and court filings. (CSOFs ¶¶ 11, 13, 17)

USOF ¶ 45

45. 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. ¶¶5-6.²

[Footnote 2: 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.]

Hamed Response:

Hamed disputes that Wally Hamed agreed that the years that there were not tenants in Bays 5 and 8, the Partnership was using the Bays and incorporates his response to USOF ¶ 44. As for United's footnote 2, Willie Hamed testified in his deposition that he had seen the *Accounts Receivable Current Month* reports before and noted that they were faxed to the St. Thomas communal office fax on at least a monthly basis by the St. Croix accountant. Willie Hamed stated that "[w]hoever gets the fax, gives it to the respective party." (COSF ¶ 38) Finally, on the Luff report, Hamed Exhibit 2, FBIX237825, Bay 7 also shows that it is "plaza extra-Vacant." United and Yusuf never have said that the Partnership used Bay 7. The United Shopping Center document speaks for itself – Bays 5, 7, and 8 were identified as being vacant for that month. This is also supported by the fact that no accounts receivables were pending for those three Bays.

USOF ¶ 46

46. 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. Interrog. Resp. No. 29.

USOF ¶ 47

47. 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, Exhibit 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 Exhibit 5-Waleed Hamed Depo. 90:6-9, 23-25 – 91:4 and Exhibit 5 attached thereto.

Hamed Response:

Yusuf's contention totally mistakes the facts and Wally Hamed's testimony. Wally Hamed testified that it is a portion of the **years**, not a portion of the premises. All of the documentary evidence, and the only documentary evidence, demonstrates that this was a payment on Sion Farm, not some individual Bay or portion thereof. There has never been a single document produced that suggests otherwise.

USOF ¶ 48

48. 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 Exhibit 1-Yusuf Decl. ¶24.

Hamed Response:

As has been stated many times throughout the Hamed responses to USOFs, there was no agreement to pay rent for Bays 5 and 8. (CSOFs ¶¶ 26, 37) Mohammad Hamed testified in his deposition on April 1, 2014 that rent was due for Bay 1 only. He was not asked whether rent was due for Bays 5 or 8. (CSOFs ¶ 14) Yusuf's argument regarding liquidity makes no sense since there was never an agreement to pay rent for those two Bays in the first place.

USOF ¶ 49

49. Further, given the pendency of the criminal case, the criminal defense counsel for the parties counseled 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. *Id.*

USOF ¶ 51

51. 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.*

Hamed Response:

Yusuf's hearsay evidence regarding what criminal defense counsel for the parties may or may not have said is irrelevant to this claim. Similarly, Yusuf's speculation regarding what exposure Mohammad Hamed would or would not have had is also irrelevant. Both are irrelevant because there was never an agreement by the Hameds to pay rent for Bays 5 and 8. (CSOFs ¶¶ 14, 26, 37) Further, Hamed disputes that Wally Hamed agreed to defer the rent because he never agreed to paying rent for Bays 5 and 8 in the first place.

USOF ¶ 50

50. 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.

Hamed Response:

Yusuf's claim that the FBI took all of the United Shopping Center records and therefore Yusuf couldn't determine the price per square foot to charge the Partnership for Bays 5 and 8 does not make any sense. Yusuf testified in his deposition that he set the price for Bay 8 based on the rental price Ali Hardware paid for the space from 1987 to 1992. (COSF ¶ 30) Yusuf produced no lease for Ali Hardware and testified that all documents he had in his possession regarding Bays 5 and 8 had been produced, leading to the conclusion that Yusuf does not have the Ali Hardware lease, the FBI didn't have the Ali Hardware lease and Yusuf didn't need the Ali Hardware lease to set the price for Bay 8. (CSOFs ¶¶ 24, 30) Similarly, for Bay 5, Fathi Yusuf testified that the \$12.00 per square foot price came from the Diamond Girl lease. The Diamond Girl lease charging \$12.00 per square foot was derived from a 2011 lease – a lease written 10 years after the FBI raid. (CSOF ¶ 6) Clearly, Yusuf did not need the seized FBI documents to set the price per square foot for Bay 5.

USOF ¶ 52

52. In May 2013, demand was made for payment. See Exhibit 1-Yusuf Decl. ¶¶11 and Exhibit 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.*

USOF 53

53. 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.*

Hamed Response:

As has been noted in Hamed's responses to USOFs ¶¶ 21-22, United and Yusuf offered several different amounts for the Bay's price per square foot. For instance, the United Shopping Center's contemporaneous business record showed the price per square foot for Bay 5 as \$7.01 and Bay 8 as \$5.50 in 2001. (CSOF ¶ 3) United's December 23, 2013 Answer and Counterclaim in *Hamed v Yusuf*, SX-12-CV-370, pegged the price at \$12.00 per square foot for Bay 5 and \$16.50 per square foot for Bay 8. (CSOF ¶ 13). Truth be told, Yusuf didn't know what the price per square foot should be and continued to offer up differing values as the litigation progressed. His 2014 affidavit, for instance, states that the price per square foot for Bay 5 as \$12.00 and said he derived that number from tenant Diamond Girl's 2011 lease. However, Diamond Girl's 2011 lease was for two Bays – 4 and 5, not just one Bay. (CSOF ¶ 6)

USOF ¶ 56

56. 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.

Hamed Response:

Hamed disputes Yusuf's characterization in USOF ¶ 56. Hamed did not believe that rent for Bays 5 and 8 were due, so there was no reason to dispute something that Hamed did not believe existed.

USOF ¶ 57

57. 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, to which there was an opposition filed by Hamed and a reply filed by United. 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 to which United and Yusuf filed their opposition. A year passed and the Court had not ruled on the earlier-filed 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. 3 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.

Hamed Response:

Two things should be noted about this recitation. First, that rent decision was issued before Judge Brady determined the laches/statute of limitations issue. The prior rent decision is inconsistent with his decision and will be appealed by Hamed. Second, Judge Brady's own decision explicitly refused the relief that Yusuf seeks here (see USOF ¶ 58).

USOF ¶ 58

58. 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. The Rent Order also explained that "[T]his inquiry is limited to the issue of rents and does not extend to other relief sought by Defendant's Counterclaim or to other aspects of Plaintiff's Motion for Partial Summary Judgment beyond the issue of past due rent." *Id.* at p. 5.

Hamed Response:

Yusuf attempts to put a thick layer of lipstick on a pig. Yusuf repeatedly briefed and argued its exact position here to Judge Brady who refused the relief sought. A review of that decision shows that **this in effect yet another motion to reconsider a subject that has been long settled – adequate compensation for these Bays.** In any case, as stated above, the subsequent laches/SOL decision obviates such relief.

USOF ¶ 59

59. 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.

Hamed Response:

Judge Brady’s laches decision filed after the earlier rent decision is based on laches, not the statute of limitations. He declared clearly and explicitly that all pre bar date obligations were obviated by laches. Thus, there has never been a consideration of this issue under the laches doctrine. His decision clearly bars any post decision claims prior to 2007.

USOF ¶ 60

60. 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 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.

Hamed Response:

Once again, Yusuf tries to refer to this as “the Limitation Order.” This was a consideration of the issues under the statute of limitations. The Court’s decision with regard to laches is clear, no claims survive the bar date. Period. Yusuf again attempts to evade the bar date on what the Court clearly and expressly referred to as a “factual issue.” In its laches decision it is clear that factual issues before that date are obviated.

USOF ¶ 61

61. 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 dated September 9, 2013 and the Rent Order.

Hamed Response:

The Master obviously is aware of his own decision—Hamed merely notes that the Master, in denying relief, stated that Yusuf’s continuous attempts to get addition funds “demonstrates a transaction prohibited by law and tainted by a conflict of interest and self-dealing.” March 13, 2018 Order at 6. Hamed agrees that the Master’s decision of that date should be applied here as well.

III. Conclusion

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

1. There are many disputes of material facts;
2. 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;
3. 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;

4. 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
5. There was settlement by the payment of \$5,408,806.74.

Dated: July 21, 2019



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CERTIFICATE OF SERVICE AND AS TO RULE 6-1(e)

I hereby certify that the above document is an EXHIBIT and is not required to meet the requirements of Rule 6-1(e) and was served this 21st day of July, 2019. I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

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