

IN THE 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,*

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**WALEED HAMED**, as the Executor of the  
Estate of MOHAMMAD HAMED, *Plaintiff,*

vs.

**UNITED CORPORATION**, *Defendant.*

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**WALEED HAMED**, as the Executor of the  
Estate of MOHAMMAD HAMED, *Plaintiff*

vs.

**FATHI YUSUF**, *Defendant.*

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**FATHI YUSUF**, *Plaintiff,*

vs.

**ESTATE OF MOHAMMAD A. HAMED,**

*Defendants.*

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**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'S RESPONSE TO SUPPLEMENTAL BRIEFING  
AS TO: (1) RESTITUTION ELEMENTS AND  
(2) SOL REGARDING YUSUF CLAIM Y-8 – WATER SALES AT EAST STORE**

On October 15, 2020, United filed a response to this Court's September 3, 2020 Order directing the Parties to address (1) the elements of a claim for Restitution and (2) the triggering event for the SOL for the claims asserted in Yusuf's Claim Y-8. Several brief follow-up comments are in order, which will hopefully streamline this Court's analysis of these remaining two issues on the Y-8 partial summary judgment motions.<sup>1</sup>

### **I. Restitution**

In its September 3<sup>rd</sup> opinion, this Court denied Yusuf's partial summary judgment motion as to the conversion and unjust enrichment claims, but reserved ruling on his restitution claim, directing the Parties to submit a *Banks* analysis on this theory of recovery. On page 28 of the September 3<sup>rd</sup> Order, it was noted that the elements of unjust enrichment are:

In 2014, the U.S. Virgin Islands Supreme Court "reformulated the elements of the unjust enrichment cause of action to require the plaintiff to prove (1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff. *Walter v. Walter*, 60 V.I. 786, 779-780 (V.I. 2014).

The Parties were then directed to brief the differences, if any, between the elements of a claim for unjust enrichment and restitution, rejecting Hamed's assertion that the *Walters* decision had resolved this distinction.

On pages 8-9 of his October 15<sup>th</sup> filing, Yusuf did a *Banks* analysis of what constitutes the difference between these two theories of recovery, concluding in part:

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<sup>1</sup> Even if liability for these water claims were found, proof of any damages remains a hotly contested issue, which was not before the Court in these pending motions. In this regard, damages are being sought for alleged water sales from 2004 through 2015 based on a calculation of alleged water sales in 1997 and 1998, even though there is no documentation of those sales, nor is there any documentation of the alleged water sales between 2004 and 2015.

Under the Delaware Supreme Court's formulation of the elements of restitution, it appears that the "knowledge of receipt of benefit" element in the Virgin Island Supreme Court's delineation of unjust enrichment would be left out of the cause of action for restitution, while in all other respects the two claims would be identical. United believes that this is the soundest rule for the Virgin Islands, because the goal of restitution is not to punish a wrongdoer, but rather to make a party whole who has been deprived of his or her property.

While thorough and well-reasoned, should Yusuf's analysis be adopted, it would not comply with the admonition in *Walters v. Walters*, 60 VI 768, 778-79 (V.I. 2014), that unless the "knowledge of receipt of benefit" element is added, the goal of deterrence in establishing the elements of a claim would be missing.

Thus, the issue of what constitutes the elements of a restitution claim (*i.e.*, what is "the soundest rule for the Virgin Islands") depends on whether the Special Master finds that this "knowledge" element is still required for a restitution claim to satisfy the deterrence purpose of a given claim.

Obviously if it is found that the "knowledge" element is still required, then the elements for unjust enrichment and restitution are the same, requiring partial summary judgment to be denied for the restitution claim for the same reasons already given for denying the unjust enrichment claim.

Moreover, even if it is found that this "knowledge" element is not part of a restitution claim, the result is the same. In this regard, these elements for a restitution claim without the "knowledge" claim would then be as follows:

- (1) that the defendant was enriched;
- (2) that such enrichment was at the plaintiff's expense; and
- (3) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff.

However, partial summary judgment was denied on page 28 of the September 3<sup>rd</sup> Order for the unjust enrichment claim because the "there is clearly a genuine dispute as to the

terms of the agreement made as to the Water Proceeds,” which pertains to the second element above, summary judgment as to the restitution claim should also be denied even if the “knowledge” element is eliminated from this restitution claim.

## **II. Statute of Limitations (SOL)**

As for the SOL issues raised by Yusuf, there is a threshold question that needs to be addressed—what type of claims are those asserted in Y-8 by Yusuf? The answer to that question dictates the response to this Court’s question—when does the SOL begin to accrue?

Hamed has always argued that Yusuf’s Y-8 “water” claim is based on an alleged contractual relationship. In deposition, Yusuf described when and where the alleged arrangement was entered into, that it was a “bargained for exchange” and that Hamed “accepted” the terms. Thus, Yusuf’s Y-8 water claim certainly appeared to Hamed to be based upon an alleged “bargained for” exchange—a contract—where Hamed agreed to spend money and in return the partners would “sell water”.<sup>2</sup>

As noted, the September 3<sup>rd</sup> Order sought clarification on when this 6 year statute would be triggered. While there is no V.I. Supreme Court case directly on point, Yusuf cited the dicta in footnote 19 of the V.I. Supreme Court holding in *Vanterpool v. Gov't of Virgin Islands*, 63 V.I. 563, 594 (2015), which stated:

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<sup>2</sup> If this is a contract-based claim, the SOL for a contract claim is six years. See 5 V.I.C. §31(3)(A). Moreover, as this Court noted on pages 21-22 of its September 3<sup>rd</sup> Order, there is a Virgin Islands statute that expressly states that equitable claims, like unjust enrichment and restitution, are subject to the same statute of limitations as the underlying legal claim, stating in 5 V.I.C. §32(a):

- (a) An action of an equitable nature shall only be commenced within the time limited to commence an action as provided in this chapter.

. . . . Nevertheless, we note that this Court has previously held that the statute of limitations on a cause of action begins to run from the date the cause of action accrued, which ordinarily is the date upon “occurrence of the essential facts that give rise to that cause of action.” *Anthony v. FirstBank V.I.*, 58 V.I. 224, 230 (V.I.2013) (quoting *Burton v. First Bank of P.R.*, 49 V.I. 16, 20 (V.I.Super.Ct.2007)); see also *Sunoco, Inc. (R & M) v. 175–33 Horace Harding Realty Corp.*, 969 F.Supp.2d 297, 304 (E.D.N.Y.2013) (“[A] cause of action for breach of contract did not accrue until ... the Defendant refused to pay.”); *Olson v. Rugloski*, 277 N.W.2d 385, 387–88 (Minn.1979) (stating that a contract is breached when a party “refuses to pay or unreasonably delays payment of an undisputed amount”). These principles apply in quantum meruit cases as well. See, e.g., *Zic v. Italian Gov’t Travel Office*, 149 F.Supp.2d 473, 476 (N.D.Ill.2001) (citing *Rohter v. Passarella*, 617 N.E.2d 46, 52 (Ill.App.Ct.1993)) (quantum meruit “cause of action accrues upon presentment and subsequent rejection of a bill for services”); *Maglica v. Maglica*, 78 Cal.Rptr.2d 101, 106–08 (Cal.Ct.App.1998) (when the statute of limitations begins to run depends upon the nature of the parties’ relationship and expectations as to when compensation would be due); *Generation Partners, LP v. Mandell*, 2011 Conn.Super. LEXIS 1913, at \*10, 2011 WL 3671966 (Conn.Super.Ct. July 22, 2011) (statute of limitations began to run on claims of quantum meruit and unjust enrichment when defendants refused demand for payment, as this was “the earliest point in time that the plaintiffs could have suffered an injury”).

Thus, while dicta, this holding obviously states the applicable law that answers the question raised in the September 3<sup>rd</sup> Order **if Y-8 is an equitably based contract claim.**<sup>3</sup>

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<sup>3</sup> While there is no need to address this issue now, the conversion claim—a tort—is also barred by the “gist of the action” doctrine as discussed by Judge Brady in *Pollara v. Chateau St. Croix, LLC*, 2016 WL 2865874 \*6 (V.I. Super. May 3, 2016), holding (after doing a full *Banks* analysis):

Briefly, the gist of the action doctrine is applied when the claims are: “(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.” *Kjaer*, 60 V.I. at 898.

*Id.* at \*6. Judge Brady then dismissed the plaintiff’s tort claims, finding the underlying facts were based on certain contractual obligations between the parties. See also, *Edwards v. Marriott Management Corp. (Virgin Islands), Inc.*, 2015 WL 476216, at \*6 (V.I. Super. Ct. Jan. 29, 2015)(“This is also in line with our jurisdiction’s recognition of the gist of the action doctrine, which ‘is designed to maintain the conceptual distinction between breach of contract claims and tort claims’ and that, ‘[a]s a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims.”).

However, while this analysis initially seemed simple to Hamed, Yusuf adamantly states at 12 of his October 15<sup>th</sup> filing that these claims **are not contract based claims**:

United did not frame its Y-8 claim as a breach of contract claim in its opening and reply briefs in support of its motion for partial summary judgment on that claim.

Moreover, and more critical here, the ultimate finding in the September 3<sup>rd</sup> Order that Yusuf was entitled to seek damages for his “water” claim was not based on any alleged contract either, but on a **statute**, stating as follows:

In the U.S. Virgin Islands, the landlord is permitted to charge the tenant for water. Title 28 V.I.C. § 795 provides that “[n]othing contained in this section shall prohibit the landlord from assessing costs and charges against the tenant for water and/or electricity; provided that the tenant shall be charged based on the amount of water and/or electricity the tenant uses.” **The Master interprets this statute to mean that the landlord, not the tenant, owns the water on the landlord’s property, and it follows that the landlord, not the tenant, is entitled to the proceeds from the sale of such water.**

*Id.* at pp. 25-26. (Emphasis added) (Footnotes omitted).

Thus, the appropriate questions to resolve appear to be (1) what is the SOL for an action where liability is based on a statute and (2) when is that SOL triggered in such an action? The first answer is easy, as an action based on a liability created by statute is six years. See 5 V.I.C. §31(3)(B).

The Banks analysis of the issue of when the statute of limitations begins to run *on a liability created by a statute* is seemingly very brief. There are almost no modern cases on the issue—perhaps because one of the few courts to address the issue makes it clear that this is unequivocal, and based on a citation to the U.S. Supreme Court:

In reaffirming the Country Court holding today, a reiteration of a few salient points is appropriate. First, this court has remained mindful of the generally accepted law that a cause of action arising from a statute accrues and the period specified in the statute of limitations begins to run when the violation giving rise to the liability occurs. See *Unexcelled Chemical Corp. v. United States* (1953), 345 U.S. 59, 65.(Emphasis added.)

*Zion Nursing Home, Inc. v. Creasy*, 6 Ohio St. 3d 221, 224, 452 N.E.2d 1272, 1275 (1983). In the Supreme Court decision cited, the respondents made an argument which is analogous to the Yusuf/United position here:

Respondent argues that even if this cause of action is subject to the two-year statute of limitations contained in § 6 of the Portal-to-Portal Act, the present suit was timely. The contention is that the cause of action accrues, and the two-year period begins to run, only after it is administratively determined by the Department of Labor that the contractor is liable to the United States for liquidated damages.

*Id.* at 65. The U.S. Supreme Court, however, rejected this argument, holding:

We conclude that "the cause of action accrued," within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed. . . . A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling.

*Id.* This statement, perhaps, explains the lack of cross-jurisdictional alternative views on this issue. In any event, Hamed cannot locate other cases on this issue. Thus, it is respectfully suggested this is not only the best rule for the Virgin Islands, but, more accurately, the only applicable formulation.

In short, the answer to the second question—when does the SOL begin to accrue on liability created by statute—is when the liability was incurred. Here, that is when the tenant, the partnership, used the water in question. Moreover, the landlord, United, certainly was aware of the tenant's use of the water as it was taken, as noted on page 24 of the September 3rd Order:

The evidence demonstrates that the Partnership intentionally exercised of dominion or control over the Water Proceeds and seriously interfered with the right of United to control the Water Proceeds—to wit, it is undisputed that (i) The Partnership's accounting employees handled any money collected from the water sales and deposited said money into the Partnership account (Hamed's CSOF ¶¶ 18-19); (ii) The money collected from the water sales were commingled with the Partnership's daily proceeds from Plaza Extra-East sales (Hamed's CSOF ¶ 21); . . . (iv) Each year from 2004 until the dissolution of the Partnership in 2015, the Partnership paid the income taxes each year on the total annual income, which would have included the profit from the water sales, if any (Hamed's CSOF ¶ 23);

Of course, the referenced accounting records and tax returns were actually United's own records and tax returns. In short, United was on notice of the partnership using its water in 2004, and every year thereafter, as it was being used.

As such, the SOL began to run on Yusuf's statutory rights each time the water was taken and used by the partnership. Thus, applying this six year SOL to the date this "water" claim was first asserted on September 30, 2016, any "water" claims prior to September 30, 2010, are time barred.

The same analysis applies to the conversion claim that is subject to a six year SOL pursuant to 5 V.I.C. § 31(3)(D), as United was clearly aware of this alleged conversion of its "chattel"—its water--in 2004, so that any "water" claims prior to September 30, 2010 are also time barred.

Finally, as this liability is based on a statute, and not on any conversations that Yusuf had with Hamed, there are no representations involved, much less misrepresentations, and no reliance on any such statements either—meaning there cannot be any equitable tolling of the SOL for this liability based on a statute.

### **III. Conclusion**

For the reasons set forth herein, it is respectfully submitted as follows:

1. the question to what constitutes the elements of restitution are those set forth in United's October 15<sup>th</sup> filing subject to the Special Master determining whether the "knowledge" element still needs to be added to satisfy the "deterrence" factor discussed in *Walters*; and
2. the question as to when the SOL begins to accrue depends on the nature of the claim, so that even though an equitable "contract" claims would begin to accrue when a demand was first made (and refused), the September 3<sup>rd</sup> opinion based the partnership's liability on a statute that accrues as the water is taken, so any claims prior to September 30, 2010, are time barred; and
3. there can be no equitable tolling for a SOL based upon a liability created by statute.



**Dated:** October 22, 2020



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**CERTIFICATE OF WORD/PAGE COUNT**

This document complies with the limitations set forth in Rule 6-1 (e).



### CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of October, 2020, I served a copy of the foregoing by email, 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.