

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,*

**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**

**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.*

Consolidated with

**Case No.: ST-17-CV-384**

**FATHI YUSUF**, *Plaintiff,*

vs.

**MOHAMMAD A. HAMED TRUST**, *et al,*  
*Defendants.*

Consolidated with

**Case No.: ST-18-CV-219**

**KAC357 Inc.**, *Plaintiff,*

vs.

**HAMED/YUSUF PARTNERSHIP**,  
*Defendant.*

**HAMED’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RE UNITED’S DAMAGES AS TO YUSUF’S Y-8 CLAIM (WATER)**

Hamed respectfully submits his Proposed Findings of Fact and Conclusions of Law regarding Yusuf’s Y-8 “Water Claim” for damages. Several brief comments are in order.

First, in the September 4, 2020, Order (at p. 22-23), the Master held that the soundest rule of law for the Virgin Islands for the tort of conversion was §222A of the Restatement (Second) of Torts.

Second, in the same September 4<sup>th</sup> Order, the Special Master found that United owned the water that the Plaza Partnership was selling to third parties, so that it “is entitled to the proceeds from the sale of such water.” *Id.* at pp 25-26.<sup>1</sup>

Third, in the November 9, 2020 Order, the Special Master also found that United is entitled to damages for the 131 month time period from “from April 1, 2004 through February 28, 2015.” See ORDER dated November 9, 2020, at 34.

Fourth, the Special Master previously held in his December 3, 2019, Order at pp. 13-14, regarding Yusuf’s claim for interest on certain back rent, since it was common practice for the Partnership to make lump sum payments when United made payment demands, *as opposed to monthly or even yearly payments*, it would be inequitable and unjust to award prejudgment interest for any such claims. Hamed respectfully submits that if any damages are awarded for the water claim, the same ruling should apply here.

With these comments in mind, Hamed hereby submits his proposed findings of fact and conclusions of law, which Hamed respectfully submits supports only one conclusion--that United failed to present sufficient evidence to prove its alleged damages

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<sup>1</sup> This ruling appears to possibly reject any argument by Hamed that, at best, United is only entitled to the value of the water, not the entire proceeds from the sale of the water.

for this claim.

## I. HAMED'S PROPOSED FINDINGS OF FACT

All references to the April 15<sup>th</sup> Hearing will be "Tr. \_\_\_" as there was only one volume of the hearing transcript. Hamed submits these proposed findings of fact:

1. As part of the partnership wind-up, United Corporation filed a claim against the Hamed-Yusuf partnership for water sales by the partnership to third parties, alleging (See Exhibit H-1 introduced into evidence at the April 15<sup>th</sup> hearing):

### F. Water Revenue Re Plaza Extra-East

Beginning in 1994, Plaza Extra-East began selling United's water. The proceeds for the first 10 years were used primarily for charitable purposes. From April 1, 2004, however, all revenue from the sale of United's water that was collected by Plaza Extra-East was to be paid to United. United has calculated the average water sales per month based upon two years of sales in 1997 (\$52,000) and 1998 (\$75,000) as \$5,291.66 per month. Multiplying the average monthly sales revenue by 131 months, United is owed \$693,207.46 from the Partnership for the water sales revenue from April 1, 2004 through February 28, 2015.

2. Prior to the April 15<sup>th</sup> hearing, United asserted on May 15, 2018, that its damages for this water claim were as follows (See Exhibit H-3 introduced into evidence at the April 15<sup>th</sup> hearing):

Defendants submit that the calculations set forth Yusuf's Amended Accounting Claims Limited to Transactions Occurring on or After September 17, 2006 ("Yusufs Claims") were based upon two years of sales in 1997 (\$52,000) and 1998 (\$75,000) for an average of \$5,291.66 per month. As Waleed Hamed was in charge of the Plaza Extra-East location where the sales took place, Yusuf will be seeking additional information from him as part of the written discovery propounded on him. The number listed in the claims was the average monthly sales multiplied by 131 months demonstrating that United is owed \$693,207.46 from the Partnership for the water sales revenue from April 1, 2004 through February 28, 2015.

3. At the April 15<sup>th</sup> hearing, Yusuf testified that United is entitled to damages in the amount of \$693,207.46. He based this calculation, as he did in United's discovery responses, on handwritten ledger pages he claims he saw that listed the total sales for two different years, 1997 and 1998. He testified that the water sales he believes he saw for 1997 were \$52,000 and were \$75,000 for 1998. He then averaged out these 24 months of alleged sales, which comes out to \$5,291.66 per month. Using that monthly average for the 131 months for the period from April 1, 2004, to February 28, 2015, yields a total figure of \$693,207.46. Tr. 12-13

4. Yusuf never produced the referenced ledger papers to Hamed. Tr. 25-27.<sup>2</sup>
5. Although he originally stated that Wally Hamed had written those pages, Yusuf admitted that now he does not know if the handwritten ledger pages were in Wally Hamed's handwriting or in Mike Yusuf's handwriting. Tr. 25
6. Fathi Yusuf admitted on direct examination that the water sales in 1997 and 1998 were much higher than the sales in the 2004 to 2015 time period. Tr. 8-9
7. He repeated this testimony on cross-examination, stating (Tr. 29-30):

Q So were there less trucks after the year 2000 than before the year 2000?

A Yes.

8. Fathi Yusuf testified that he thought water was sold by Plaza East for \$15 per 1000 gallons, but that the size of the water trucks varied from 2000, to 3000, to 5000, to 6000 gallons and up to 9000 gallons, with the average being 5000 gallons. Tr. 6-7
9. Fathi Yusuf admitted he was not at the St. Croix store on a daily basis from 2004 to 2015, as he was located at the St. Thomas store. Tr. 28
10. Fathi Yusuf testified that even when he was at the St. Croix store, he did not go outside and deal with the water trucks. Tr. 28
11. Fathi Yusuf confirmed he really did not know how many trucks were filled on a daily basis, stating during this exchange at the hearing (Tr. 11):

Q You had said that you thought an average was five trucks a day during this period 2004 through 2015. If you had to put sort of a bottom line on it, what would be, in your estimation, the lowest possible number of trucks on a per-day basis during that period?

MR. HOLT: Object to the form of the question; asking him to guess. He's already said he wasn't there.

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<sup>2</sup> The purported document has disappeared, as Fathi Yusuf admitted in his interrogatory responses introduced as Exhibit H-2 at the hearing:

As far as receipts go, Yusuf shows that he derived the value of his calculations from a sheet bearing Waleed's handwriting which reflected the values in 1997 and 1998. At present, Yusuf is unable to locate that document but is continuing to make a diligent search for same.

THE WITNESS: The bottom could be three or two; **when it's rainy days, zero.** I can't really predict one hundred percent how much. (Emphasis added).<sup>3</sup>

12. Fathi Yusuf admitted he knew the water sales were declining, with no water sales taking place for a period of time, testifying (p. 10):

See, I want you to be aware that during this time I was always working on St. Thomas. I just comes once a week every two weeks for three, four days, and when we -- when I noticed that no water was coming in, no money for the water we were selling to the trucks, I tried to get a record of what we selling and, unfortunately, nobody would give me the record that we used to write down in the receiving.

13. After being directed to amend his discovery responses, Fathi Yusuf filed a verified interrogatory response for United on November 4, 2019, stating as follows (See Exhibit H-2 introduced into evidence at the April 15<sup>th</sup> hearing):

**Waleed Hamed would have knowledge of the water revenue for the period** when Fathi Yusuf was present at Plaza Extra Tutu. Likewise, Yusuf Yusuf may have knowledge of same. (Emphasis added.)

14. Yusuf Yusuf did not testify at the April 15<sup>th</sup> hearing, nor was the referenced ledger page produced at the hearing.

15. Although, United never offered any calculation of its damages prior to the hearing other than the amount of \$693,207.46 (that was based **solely** upon the 1997 and 1998 lost ledger entries), at the hearing Fathi Yusuf was asked to calculate a theoretical loss based upon two 5000 gallon water trucks a day at \$75 per truck (\$15 per 1000 gallons), which he did, calculating a total loss of \$54,750. Tr. 13-14

16. United's counsel then asked if this number was close to the \$52,000 figure for 1997 leger entry he had seen, which Yusuf agreed was the case. Tr. 14-15

17. However, aside from the fact that this newly created figure was not included in any supplemental discovery response, it is not credible since Fathi Yusuf (and others) actually testified that the sales in 1997 were "much higher" than the sales in the 2004 to 2015 time period. Tr. 8-9, 29-30

18. Likewise, Fathi Yusuf's subsequent calculation based on five 5000 gallon water trucks per day from 2004 to 2015, totaling in excess of \$1.4 million, is equally not credible since is based on annual calculation of \$136,875 (Tr. 21-22), far more than the alleged annual amounts in 1997 (\$52,000) and 1998 (\$75,000), when supposedly there were many more trucks every day. Tr. 8-9, 29-30

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<sup>3</sup> Fathi Yusuf repeatedly testified that there were "zero" trucks on rainy days. See, e.g., Tr. 8

19. Mike Yusuf testified that he worked at Plaza East in 1991. Tr. 35
20. Mike Yusuf initially testified that he believed water was sold for \$15 per 1000 gallons, though he was not sure, but he subsequently testified that he was sure the price was \$15 per 1000 gallons despite being shown a declaration dated July 20, 2020, where he said prices fluctuated based on the supply and demand. Tr. 35-36, 38, 40-44
21. Mike Yusuf testified that water trucks ranged between 3500 and 9000 gallons per truck, although there were smaller ones, with the average size being 4000 to 5000 gallons. Tr. 36, 41.
22. He also testified that **the water sales “dropped off” after the 1990’s**, further undermining Fathi Yusuf’s new calculations based on two to five 5000 gallon water trucks a day. Tr. 37.
23. When asked how many water trucks a day would be filled on average per day between 2004 and 2015, Mike Yusuf testified it was hard to say, giving both the figures of 4 to 5 a day and then contradicting himself by saying it was 3 to 4 a day. Tr. 37-38
24. However, Mike Yusuf also testified that he was not at the Plaza East location on a daily basis after 2000, as he became the manager at the Plaza West location in 2000. Tr. 44-45.
25. Mike Yusuf now claims he saw the non-produced handwritten ledger pages that his father testified about, which Mike Yusuf thought was in his handwriting (Tr. 45-46); however, he did not testify about any dates or figures supposedly in the ledger, as his father had done.
26. Wally Hamed testified that he began at Plaza East in the mid 1980’s. Tr. 50
27. Wally Hamed also testified that the water sales in 1997 and 1998 were much higher than the sales in the 2004 to 2015 time period. Tr. 52-53
28. Wally Hamed testified that there would be **one or two trucks per day after 2000**, including the 2004-2015 period when he was a manager at Plaza East. Tr. 53.
29. Wally Hamed testified that the rate per gallon varied, although the last price he recalled was 1.5 cents per gallon. Tr. 53-54
30. Wally Hamed testified that the Plaza East Supermarket paid all costs associated with the sale of the water (electricity, pump and cistern maintenance, employee costs to pump the water, collect the funds, store account for the funds, pay gross receipt and income taxes), all of which was done from a separate Plaza Extra

partnership account. Tr, 55-56, 60.<sup>4</sup>

31. While United still sells water, it did not offer any evidence as to the amount of its water sales since 2015, which is totally within United's control. This creates a credibility issue as to the amount of the actual water sales between 2004 and 2015.
32. United also did not call its only manager who worked in the Plaza East Supermarket between 2004 and 2015, Yusuf Yusuf, who was in charge of the water sales. See Exhibit Y-8 at p. 3 ("Yusuf Yusuf was in charge of monitoring the water sales").

## II. HAMED'S PROPOSED CONCLUSIONS OF LAW

1. As per the November 9, 2020, Order of the Master, United is entitled to a hearing to prove its damages for its Y-8 water claim, as liability has already been determined.<sup>5</sup>
2. The purpose of an evidentiary hearing as to damages is to resolve ambiguities as to the amounts claimed. As noted in *Guardian Ins. Co. v. Gumbs*, No. ST-15-CV-195, 2016 WL 9525609, at \*11 (V.I. Super. Ct. Aug. 22, 2016):

An evidentiary proceeding to determine damages "is not required '[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain,' " but "damages are a 'sum certain' only in 'actions where the damages sought can be determined without resort to extrinsic proof.'" (Emphasis added)(Footnotes omitted).

3. As also noted in *Guardian, supra*, it is the claimant's burden of proof to prove its damages. *Id.* at \*12 ("Therefore, Guardian must prove any damages in excess of [any sums certain] at an evidentiary proceeding on damages").
4. As noted by the V.I. Supreme Court in *Maso v. Morales*, 57 V.I. 627, 635 (2012):

Deciding that a plaintiff *could* succeed on a damages claim even where the property was subsequently destroyed by an independent act does not entirely resolve Maso's case. **Maso must have established the value of the loss she suffered.** However, she need not establish this value to an exactitude. See RESTATEMENT (SECOND) OF TORTS § 912 ("One to whom another has tortuously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation *with as much certainty*

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<sup>4</sup> United offered no evidence as to the costs associated with the water sales, such as personnel, electricity, collection, billing, repairs, taxes paid or any similar amounts.

<sup>5</sup> By including this proposed finding, Hamed does not concede it converted water from United, but Hamed understands this issue has already been addressed by the Master.

*as the nature of the tort and circumstances permit.” (Emphasis added).*

5. In this case, damages for conversion are based on the value of the chattel converted at the time of its conversion, as noted by the then Territorial Court in *Archer v. Ramsay Motors, Inc.*, 21 V.I. 540, 547 (Terr. V.I. Aug. 7, 1985):

On the issue of plaintiff's damages stemming from defendants' wrongful conversion of his vehicle, the Court finds that plaintiff is entitled to an amount equal to the value of the vehicle at the time it was converted. Restatement (Second) of Torts § 927.

6. As to the “value” of an extracted resource such as water, reliance on § 927 of the Restatement (Second) of Torts is appropriate, as the Special Master has adopted the Restatement (Second) of Torts as the soundest rule for the Virgin Islands.
7. Based on the foregoing standards, United has not met its burden of proof regarding its alleged damages by relying upon the lost 1997 and 1998 ledger entries, **as every witness for United (as well as the partnership) agreed that the total water sales in 1997 and 1998 were far higher than during the 2004 to 2015 time period.**
8. Similarly, United has not met this burden of proof by attempting to assert for the first time at the April 15, 2021, hearing that this sum can be calculated by a rough estimate of the size and number of water trucks for each day of the 131 months between 2004 and 2015, as the evidence confirmed these figures (number of trucks, size of trucks, zero sales for some periods of time, price) varied from time to time. Indeed, the annual calculations it presented at the hearing for the first time based on these estimates exceeded the 1997 and 1998 sales, when United and the Yusufs admit sales were higher.
9. While Wally Hamed, who was a Plaza East store manager between 2004 and 2015, testified that there were one to two trucks per day, he did not specify the size of these trucks.
10. United did not call the only Yusuf manager who worked at the Plaza East store on a regular basis between 2004 and 2015, Yusuf Yusuf, to try to establish this evidence.
11. It also did not put on any evidence of the water sales once it took over the store's operations in 2015, which may have given credence to United's belated damage calculations.
12. Even assuming the base figures put into evidence, using one 4000 water truck per day (Wally Hamed-“one to two trucks per day”, Mike Yusuf-“average truck is 4000 to 5000 gallons”) at \$15 per 1000 gallons, the resulting figure of \$235,800 ( $\$15 \times 4 \times 30 \text{ days} \times 131 \text{ months}$ ) still assumes sales every day, when it is undisputed



that sales did not occur every day. In short, it is complete speculation as to the extent of the actual water sales between 2004 and 2015.

13. Finally, United's burden of proof as to any suggested calculation was also not met, as the amounts claimed are based on the retail sales figures and do not take into account the underlying costs of the sales (employee wages, electricity, maintenance, taxes, etc.).<sup>6</sup>
14. Thus, United's damage claim for its Y-8 water claim is rejected for lack of proper proof.

**Dated:** May 19, 2021

/s/ Joel H. Holt  
**Joel H. Holt, Esq.**  
*Counsel for Plaintiff*  
Law Offices of Joel H. Holt  
2132 Company Street,  
Christiansted, VI 00820  
Email: holtvi@aol.com  
Tele: (340) 773-8709  
Fax: (340) 773-8679

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<sup>6</sup> If the September 4<sup>th</sup> and November 9<sup>th</sup> Orders rejected the "water" as being the chattel that was converted, holding that it was the water proceeds that were converted, then this alternate finding is misplaced. However, it is respectfully submitted that the partnership always owned the proceeds, the issue is what is the value of the water before adding any costs associated with selling it. See, e.g, Am.Jur., Sec. 231 of "Mines and Minerals," at page 445:

In some cases, the plaintiff has been held entitled to the value of the coal or other mineral wrongfully mined, without allowing the defendant anything for the cost of digging or severing, for his equipment and facilities used in the trespass, or for breaking or other acts necessary to render the article marketable. A different rule of damages, and one more favorable to the defendant, has been followed by many courts. They deduct the cost of digging or severing the article in cases where the defendant is not chargeable with fraud, violence, or wilful negligence or wrong. (citations omitted).

Here, there certainly was no such fraud or wilful misconduct, as Yusuf not only knew all about the partnership selling the water, but was 'in charge of the office decisions' at that time. See, e.g., Tr. 11.

**Carl J. Hartmann III, Esq.**  
*Co-Counsel for Plaintiff*  
2940 Brookwind Dr.  
Holland, MI 49424  
Email: [carl@carlhartmann.com](mailto:carl@carlhartmann.com)  
Tele: (340) 642-4422

**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 19th day of May, 2021. I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

**Hon. Edgar Ross**  
Special Master  
% [edgarrossjudge@hotmail.com](mailto:edgarrossjudge@hotmail.com)

**Stefan Herpel**  
**Charlotte Perrell**  
TOPPER, NEWMAN FEUERZEIG LLP  
Law House, 10000 Frederiksberg Gade  
P.O. Box 756  
St. Thomas, VI 00802  
[sherpel@dnfvi.com](mailto:sherpel@dnfvi.com)  
[cperrell@dnfvi.com](mailto:cperrell@dnfvi.com)

/s/ Joel H. Holt