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| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, | **Case No.: SX-2012-CV-370** |
| *Plaintiff/Counterclaim Defendant*, |  |
| vs.  **FATHI YUSUF** and **UNITED CORPORATION** | **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** |
|  |  |
| *Defendants and Counterclaimants*.  vs.  **WALEED HAMED, WAHEED** **HAMED, MUFEED HAMED, HISHAM HAMED,** **and PLESSEN ENTERPRISES, INC.**,  *Counterclaim Defendants*, | JURY TRIAL DEMANDED |
|  | Consolidated with |
| **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,*  vs. | **Case No.: SX-2014-CV-287** |
| **UNITED CORPORATION,** *Defendant.* |  |
| *­­­­­­*­­  **WALEED HAMED**,as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff*    vs.    **FATHI YUSUF**, *Defendant.* | Consolidated with  **Case No.: SX-2014-CV-278** |
| *­­­­­*­­  **FATHI YUSUF**, *Plaintiff*,  vs.  **MOHAMMAD A. HAMED TRUST***, et al,*  *Defendants.* | Consolidated with  **Case No.: ST-17-CV-384** |
| *­­­­­*­­  **KAC357 Inc.**, *Plaintiff*,  vs.  **HAMED/YUSUF PARTNERSHIP,**  *Defendant.* | Consolidated with  **Case No.: ST-18-CV-219** |
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**HAMED’S MOTION FOR SUMMARY JUDGMENT**

**AS TO CLAIM H-54 (DAAS LOAN)**

1. **Introduction**

**COMES NOW** Plaintiff Hamed, though undersigned counsel, pursuant to Rule 56 and moves for a judgment that his Claim H-21 be allowed.

1. **The Description of This Claim**

This claim involves the “Daas Mortgage” (with $79,OOO imbalance in payments owed to Hamed). This is a mortgage to a son-in-law of Fathi Yusuf that came from Partnership funds. The accounting document is attached as **Exhibit A**. Briefly, this is what the attached documents show:

1. At page 1, there is a account printout--everything seems correct on it. In other words, Daas *appears* to have paid the partnership in full.)
2. At page 10, under the Heading "Attention: Mr. Ahed Daas" (in Yusuf's handwriting), it shows that Yusuf is owed $203,500 and Hamed is owed the same.
3. However, if one looks at the highlighted items on the first page, **Yusuf had already collected $79,500.00 from Daas for his personal use**, leaving him owed only $124,000 ($203,500 less $79,500).
4. Daas then paid Plaza Extra a check for the $327,500, which was incorrectly split 50-50 between Hamed and Yusuf ($163,750 each).
5. Daas says the $327,500 is the $124k still due Fathi (after a credit for the first $79,500 payment to Fathi) and the $203,500 due Hamed, ln short, Fathi received $79,500 more than Hamed on the partnership loan to Daas, so he should pay this amount to Hamed from this partnership investment.

Hamed’s CPA submitted the following analysis in the Expert Report:

**Hamed Claim H-0054**: Unclear General Ledger entries regarding Daas corporate loan

**DESCRIPTION OF THIS CLAIM:** Hamed's CPA noted an unusual journal entry recorded on STT in 2013 with the description “Daas corporate loan.” This entry was later reclassed to intercompany with the description “reclass Daas pmt to intraco West acct” and recorded on West.

**ALL INFORMATION AND RELATED DOCUMENTS KNOWN TO HAMED:** Hamed's CPA interviewed the Hameds regarding these unusual journal entries. The Hameds stated that they are not aware of the entries or the business purpose. Hamed's CPA also provided John Gaffney a query dated February 15, 2016 (see Attachment VII) requesting an explanation of the business purpose and canceled checks, invoices and any other back up documentation.

**INFORMATION RECEIVED BY HAMED FROM YUSUF/GAFFNEY:**

John Gaffney did not respond to our request.

**HAMED'S CPA'S EXPERT ANALYSIS OF WHY THE CLAIM IS VALID:**

Hamed's CPA did not find any sufficient reliable audit evidence, nor were Hamed's CPA provided any audit evidence from John Gaffney, that this transaction is supported by the accounting records. As such, Hamed's CPA were not able to satisfy themselves of the following management assertions: 1. Occurrence 2. Accuracy or 3. Classification, as described in AU-C 315.A128. -- The total amount of this claim is $327,500. (Emphasis added.)

1. **Gaffney Analysis**

On July 26, 2019, John Gaffney provided his analysis of the state of the Partnership’s account records regarding this claim. It does not address, nor does it refute the facts above—that Yusuf was partially repaid – and then received 50% of the final payment. Exhibit B is his Report, Exhibit B-1 is his narrative and Exhibit B-2 are his attached exhibits.

**V. Statement of facts not in dispute**

(1) It is undisputed that Mr. Yusuf received a personal payment.

(2) It is undisputed that Mr. Yusuf then received 50% of the final payment.

(3) Thus, there is no dispute that Mr. Yusuf received $79,500 more than he should have from the Partnership—and Mr. Hamed, $79,500 less.

(4) Thus, their Partnership Accounts must be debited and credited these amounts respectively

(5) the expert opinion of Hamed’s CPA (Bracey Alexander) states there is no support as to such a disparity.

(6) Yusuf was ordered to submit any expert identifications or reports to contradict the report submitted by Hamed, but did not.

1. **Applicable Law**

What that exhibit does not show—and what is not in the accounting system materials provided to Hamed (or his CPA)—is why these unidentified “Nejeh” charges were paid by the Partnership. There is no detail or itemization. Thus, it is merely an unsubstantiated, “mere possibility” that this payment for Nejeh by the Partnership was for the Partnership and not Nejeh’s personal interests.

The Special Master has repeatedly set forth the applicable standard. Rule 56 of Virgin Islands Rules of Civil Procedure (hereinafter “Rule 56”) governs motions for summary judgment and sets forth the procedures thereto. Under Rule 56, “[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought” and “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.I. R. CIV. P. 56; *see also Rymer v. Kmart Corp.,* 68 V.I. 571, 575 (V.I. 2018) (“A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record.”). “A factual dispute is deemed genuine if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]’” and a fact is material only where it “might affect the outcome of the suit under the governing law[.]” *Todman v. Hicks*, 70 V.I. 430, 436 (V.I. Super. Ct. April 17, 2019)(quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)).

The reviewing court must view all inferences from the evidence in the light most favorable to the nonmoving party and take the nonmoving party's conflicting allegations as true if properly supported. *Kennedy Funding, Inc. v. GB Properties, Ltd.*, 2020 V.I. 5, ¶14 (V.I. 2020). “The movant may discharge this burden simply by pointing out to the … court that there is an absence of evidence to support the nonmoving party's case.” *Id.* (internal quotation marks and citation omitted).

**Once the moving party meets this burden, “the non-moving party then has the burden of set[ting] out specific facts showing a genuine issue for trial.” *Id.* (internal quotation marks and citation omitted). The non-moving party “may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial.”** *Rymer,* 68 V.I. at 576 (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)) (Emphasis added.) “Such evidence may be direct or circumstantial, but the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way.” *Kennedy,* 2020 V.I. 5, ¶14.

Moreover, the court “should not weigh the evidence, make credibility determinations, or draw ‘legitimate inferences’ from the facts when ruling upon summary judgment motions because these are the functions of the jury.” *Todman*, 70 V.I. at 437 (quoting *Williams*, 50 V.I. at 197); *see Kennedy,* 2020 V.I. 5, ¶14; *see also, Rymer*, 68 V.I. at 577 (“When considering a summary judgment motion, a trial judge may not weigh the credibility of evidence or witnesses.”). In deciding a motion for summary judgment, the court’s role “is not to determine the truth, but rather to determine whether a factual dispute exists that warrants trial on the merits.” *Todman*, 70 V.I. at 437 (citations omitted); *see Kennedy,* 2020 V.I. 5, ¶14 (noting that the court “decide only whether there is a genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party”). Accordingly, “if a credibility determination is necessary as to the existence of a material fact, a grant of summary judgment would be improper.” *Rymer*, 68 V.I. at 577.

Because summary judgment is “[a] drastic remedy, a court should only grant summary judgment when the ‘pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.’” *Rymer,* 68 V.I. at 575-76 (quoting *Williams,* 50 V.I. at 194). The Court is required to “state on the record the reasons for granting or denying the motion.” V.I. R. CIV. P. 56(a).

Here, there are no facts in dispute.

1. **Argument**

Hamed has shown that there was a doble payment to Fathi Yusuf. His expert opined that there was insufficient documentation of a basis for the 50% payment to Yusuf. It is obvious that if contrary detail exits, Yusuf can easily defeat this motion by (a) submitting it as an exhibit to the opposition, or (b) by seeking leave to submit his own contrary expert report out of time, or (c) by a declaration that he did not receive with the initial payment or the 50% later payment. As stated above, Yusuf’s burden under the applicable law is clear:

Once the moving party meets this burden, “the non-moving party then has the burden of set[ting] out specific facts showing a genuine issue for trial.” *Id.* (internal quotation marks and citation omitted). The non-moving party “may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial.” *Rymer,* 68 V.I. at 576 (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)) (Emphasis added.) “Such evidence may be direct or circumstantial, **but the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way**.” *Kennedy,* 2020 V.I. 5, ¶14. (Emphasis added.)

In the absence of any additional evidence, there is sufficient information in the record to show a unequal payment. If, however, the motion is denied because Yusuf does come forward and shows disputing evidence, Hamed will have to determine whether he will ask for a hearing. Absent that, Yusuf has no reasonable basis for denying the motion—just the mere possibility that the payment was equal.

1. **Conclusion**

This is a simple accounting motion. A 50-50 payment was incorrectly made as it did not take into account the earlier receipt by Fathi Yusuf of $79,500. Thus, the claim should be approved.

**Dated:** April 11, 2023 A

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of April, 2023, 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

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**CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)**

This document complies with the page or word limitation set forth in Rule 6-1(e).

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