

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

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Case No.: ST-17-CV-384

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.

**HAMED'S MOTION AS TO HAMED CLAIM H-167:
UNDOCUMENTED PAYMENTS TO AN UNKNOWN VENDOR FROM PARTNERSHIP
FUNDS DURING THE PERIOD WHEN HAMED WAS EXCLUDED FROM ACCOUNTS**

I. Introduction

Hamed's claim H-167 alleges the Yusufs' wrongful spending of two Partnership checks, apparently approved by Nejeih Yusuf, in the total amount of \$19,500. There is no supporting documentation, and the two checks were to a vendor unknown to Hamed. CPAs discovered this took place just after Judge Brady's TRO, in the Spring of 2013, while Hamed was illegally (under RUPA) excluded from reviewing Partnership Accounts.

II. Facts

This matter began on August 20, 2012, when Fathi and Mike Yusuf unilaterally stated that Hamed was not a partner in the three supermarkets and took \$2,784,706.25 from a Partnership account, transferring it to the *United Tenant Account*, where the Hameds could not see what was happening. Yusuf and United then spent that Partnership money for non-supermarket, non-United investments. Those acts were the issue in Hamed's September 17, 2012 complaint here—and a central focus during Spring of 2013.

Hamed then filed for a TRO, alleging at paragraph 17, that "Yusuf unilaterally and wrongfully converted \$2.7 million from the Plaza Extra supermarket accounts. . . ." Thereafter, because Hamed had the temerity to press a TRO to stop this, Yusuf called the police to the store, asserted a criminal charge against the Hameds and demanded the police remove them from the stores or he would "shut them down". In response, Judge Brady granted an emergency evidentiary TRO hearing on January 25th and 31st, 2013.

While excluding Hamed from the ability to see what was being spent during Spring of 2013, Yusuf also began paying out Partnership funds to his personal lawyer¹ and, as is

¹ In the May 23, 2018 "Objection to Subpoena" Yusuf and United (belatedly) conceded that they took almost \$400,000 to pay their lawyer to litigate against Hamed here:

United Corp. and Fathi Yusuf...agree that any amounts from the \$504,590.50 that paid for legal work on the civil case and other matters unrelated to the criminal case [from the Partnership Account] **was not for the benefit of the partnership**, that amount is not in dispute....(Emphasis added.)

the case here, to his sons' business associates unknown to the Hameds—persons and entities with whom the Partnership had never previously done business, and never again did so after Hamed regained the ability to see transactions. Nor has Hamed's counsel been able to locate such a business on St. Croix or elsewhere. **Exhibit 1**, *Dec. of Counsel*.

However, on April 25, 2013, this Court ruled for Hamed. Judge Brady found the following at paragraph 38 of that Order: "Funds from supermarket accounts have also been utilized unilaterally by Yusuf, without agreement of Hamed. . . ." *Id.* at 11, para. 38; and at page 10, footnote 9, "a real concern exists that continuing diversions will not be traceable as the Plaza Extra store have had no system of internal controls in existence...." Finally, Judge Brady found that not only had the Yusufs taken money out of the Partnership Accounts, but, at 5, ¶ 36, he stated that they then lied to the Court under oath about the funds—about non-Partnership, non-United entities to which the funds were provided.²

36. On the first hearing day, [under cross-examination with documents] Mahar Yusuf, President of United Corporation testified under oath that he used the \$2,784,706.25 withdrawn from the Plaza Extra operating account to buy three properties on St. Croix in the name of United. On the second hearing day, **Mahar Yusuf contradicted his prior testimony and admitted** that those withdrawn funds had actually been used to invest **in businesses not owned by United, including a mattress business. . . .**

Thus, when Hamed's CPAs examined the books of the Partnership, they explicitly were looking for "unknown vendors". See *Exhibit 2* at ¶ 5(d), *CPA's Declaration*.

d. [The CPAs] Reviewed the general ledger for **strange or unusual transactions (transactions such as duplicate payments, payments to parties in interest, payments to unknown vendors**, large or unusual adjustments and unexplained journal entries). (Emphasis added.)

²The denial of access to Partnership information, and lying about how such funds are spent and to whom they are going violates RUPA section 26 V.I.C. § 73(c)(1):

- (c) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:
- (1) without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter

This is how, in the RUPA 'winding-up' review of the books, Hamed was able to determine that just a month after Judge Brady's decision but before Hamed regained access, Yusuf was writing Partnership Account checks to several "unknown vendors", Claim H-167 being just one example, as Yusuf wrote a check to Daytona for \$15,000 on May 27th. This is the entry as it appears in the Partnership's books, and (as discussed below) this and the cancelled checks are the ONLY information Hamed has ever received in the financials, Sage50 computer accounting system, Bi-Monthly Reports or elsewhere:

295456, PJ, Daytona Beach Market And Deli, \$15,000 5/27/13, 37866, Cdj,
Daytona Beach Market And Deli - Invoice: 295456^[3]

Moreover, Yusuf was unable to provide any contract, invoice, receipt, correspondence, vendor identification or other documentation in discovery—filing what is an obviously evasive response—a REALLY, improper, evasive response.

RFPD 18 of 50: H-167 "Checks to Daytona Beach Market & Deli."

With respect to H-167, please provide all documents which relate to, support and explain all [two] of the 2013 general ledger entries "checks to Daytona Beach Market & Deli," including, but not limited to **documents identifying that entity**, invoices, bank statements, credit card statements, and canceled checks. **This is an unfamiliar vendor to the Hameds.** (Emphasis added.)

Response: Defendants object on the grounds that the responsive information cannot be readily obtained by making reasonable inquiries as these inquiries require the skilled and detailed attention and focus of John Gaffney, former Partnership accountant, to revisit his accounting and work papers. Yusuf is no longer being paid to function as the Liquidating Partner to answer questions on behalf of the Partnership and the accounting that took place during the liquidation process. Likewise, John Gaffney is no longer employed by the Partnership to function in the role as Partnership accountant. To respond to these questions, the expertise and knowledge of John Gaffney is necessary, which diverts him away from his employment with United. Rather, if Hamed seeks information from John Gaffney for questions as to the accounting efforts he undertook as the Partnership accountant, Hamed should be required to compensate John Gaffney for his time in researching and preparing those responses. Furthermore, many of these inquiries as to the Partnership accounting are duplicative of questions

³ A second check was written to Daytona just before Hamed recovered full access to the books—by filing motions to compel access to these accounts over the Summer of 2013.

Stt, 10/18/2013, 2751, PJ, Daytona Beach Market And Deli, \$4,500/
10/19/13, 38691, Cdj, Daytona Beach Market And Deli - Invoice: 275

Gaffney has previously addressed at or near the time that the transactions took place. **Reorienting now as to transactions from years ago constitutes an undue burden and causes unnecessary time and expense.**^[4] If Hamed seeks to revisit these issues, Hamed should bear the cost. Without waiving any objection, Defendants show that the documentation relating to same has been provided previously as part of the documentation provided with the Bi-Monthly report. Hence, **Yusuf objects to further reproducing information that has already been provided as the burden to secure the information is equally borne by Hamed.**^[5]

III. Applicable Law

"Property acquired by a partnership is property of the partnership and not of the partners individually." 26 V.I.C. § 23 (the "Revised Uniform Partnership Act" or "RUPA").

"Property is partnership property if acquired in the name of the partnership." RUPA §24(a)(1). "A partner may use or possess partnership property *only on behalf of the partnership.*" RUPA § 71(g). Most importantly, RUPA § 74(a)(2) imposes a partner's duty:

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

⁴ It is unexplained how 2013 transactions here are just 'too old to bother with' or 'unduly burdensome' as to just two transactions.

As for only John Gaffney knowing who these guys are and what this was for: (1) Mr. Gaffney is not a party here. RFPDs cannot be directed to non-parties. Rule 34(a) ("A party may serve on any other party a request within the scope of Rule 26(b)") and (2) Mr. Gaffney did not do business with them, did not sign the contracts or invoices, did not receive the goods or service, did not sign the receipts and was not in charge when this was done. This is a *management activity*, an 'alleged' vendor transaction interaction for good or services.

As for these documents being "information that has already been provided"—that is simply a lie. Hamed has gone through ALL information provided. There are no invoices, vendor identifications, correspondence, contracts with Daytona or detail on either transaction. This detailed review included the Sage50 system and all Bi-Monthly Reports and attachments. See Exhibit 1. Yusuf should be forced to stand before the Special Master and explain under oath when, how and *on what date* this happened.

⁵ Although Hamed sent a detailed Rule 37.1 letter to Yusuf on May 16th, and has since sent several emails trying to set up a time/date for the conference, no responses have been received—and Hamed is under no duty to play such games with opposing counsel—or to force Yusuf to supplement his improper answers. One of the possible negative effects of filing such blank and evasive responses in response to RFPDs and then fooling around about rectifying them is that if the other side simply files its motion, you are just plain stuck with your non-production. This is particularly true where the time for written inquiries and responses has run out under the applicable *Discovery Plan*. See Exhibit 1.

Thus, when the Yusufs provided funds to Daytona for the benefit of United, Neje'h's other business interests or themselves, they created a debit to the Yusuf 71(a) partnership account. Under RUPA, taking from your partner when denying him the ability to see the books is not tortious conversion, fraud or embezzlement—it is simply a 'RUPA wind-up' claim; a credit to the partner's account. That is Hamed's claim.

IV. Argument

No doubt Yusuf will magically "find" documents not provided in discovery that attest that Daytona was a really well-known and legitimate supplier of purple widgets—and that for two weeks in the Spring of 2013, unbeknownst to Willie Hamed (who was at the St. Thomas store all the time) purple widgets were all the rage with the kids and \$15,000 of them sold like hotcakes making a splendid profit. (They were, no doubt, so popular, another \$4,000 of them were purchased in October.) But, having refused to produce those documents in discovery because they were 'irrelevant', 'too old to bother with', 'something only Gaffney would know about' or 'that Hamed should pay for'—and lying to the Court by attesting in the discovery response that those documents HAD been provided in the Bi-Monthly Reports, Sage50 or otherwise—**Yusuf cannot now rely on such documents in opposition**. Any attempt to sandbag Hamed with documents previously withheld in direct contravention of Rule 34 will be met with an immediate motion to strike them.

Thus, these are two totally unknown and unidentified payments of Partnership funds to folks only the Yusufs knew—with no contracts, no invoices, no identification of the vendor, no surrounding communications, no receipts, no knowledge of the Hameds about the vendor and no other documentary support. Absent any documentation with supporting detail, the entries are bogus—just something Yusuf told his bookkeeper to write. Just ink.

V. Conclusion

In the Spring of 2013, the Yusufs directly and openly lied to this Court about taking funds and for what they were used. They only admitted this was a lie on a second day of the hearing a week later—in a brutal cross-examination where Mike Yusuf was confronted with documents showing he had lied. Similarly, just this week, Yusuf has (belatedly) admitted that during that same 2013 period he took almost \$400,000 out of the Partnership to pay his lawyers to litigate against his partner. During that same 2013 period, when he denied Hamed the ability to see what was happening in Partnership accounts, and just after Judge Brady wrote an opinion saying that he couldn't unilaterally control Partnership accounts, Yusuf quickly paid out thousands of dollars to an unknown vendor before Hamed could again gain access. Finally, in the past two weeks, Yusuf stonewalled any discovery responses as to this claim which arose in that same 2013 period, and lied in those discovery responses about having given such supporting documents to Hamed.

What more can possibly be said? This claim should be allowed.

Dated: May 26, 2018



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2018, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

Hon. Edgar Ross (w/ 2 Mailed Copies)
Special Master

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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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Defendants.

Ex. 1

**DECLARATION OF COUNSEL
AS TO HAMED'S MOTION REGARDING HAMED CLAIM H-167**

I, **CARL J. HARTMANN**, declare under penalty of perjury pursuant to 28 U.S.C. Section 1746, as follows:

1. I have personal knowledge of the facts set forth herein.
2. I am an attorney licensed to practice law in the U.S. Virgin Islands.
3. I am co-counsel for Mohammad Hamed (now the Mohammad Hamed Estate) in *Hamed v. Yusuf et al.*, **SX-12-CV-370**.
4. I conducted and/or directed attempts to identify the payee of the checks at Issue here: "Daytona Beach Market & Deli" as follows:

A. Hamed's sons were interviewed and stated: that they did not know of the vendor, that the Partnership had never done business with the vendor, that since the two checks at issue, they have not done subsequent business with the vendor, that their understanding is that it is someone that NejeH Yusuf has dealings with in one of his "outside" (i.e. non-Partnership, non-United) businesses, and that Waheed ("Willie") Hamed had never seen the vendor or any of its products or services in the St. Thomas store where he was and is the manager and as to which the entries refer.

B. I searched or caused to be searched the internet using the terms "Daytona Beach Market & Deli", "Daytona Beach Market and Deli", "Daytona AND St. Croix" and "Daytona AND Plaza Extra". The only relevant results returned were related to this action. We also searched business and telephone listings in the USVI and Florida without success.

5. I reviewed and directed attempts to review all financial information provided to Hamed his counsel and his CPAs which might relate to this vendor. There are no invoices, receipts, vendor identifications, correspondence, contracts with Daytona or detail on either transaction. This detailed review included the Sage50 computer accounting system, all Bi-Monthly Reports and attachments, as well as the responses to Hamed's CPAs.
6. Hamed sent a detailed Rule 37.1 letter to Yusuf on May 16, 2018, and has since sent several emails trying to set up a time/date for the conference, no responses have been received.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability to ascertain.

Dated: May 26, 2018.



Carl J. Hartmann, Esq.

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JURY TRIAL DEMANDED

Consolidated with

Case No.: SX-2014-CV-287

**ACTION FOR DECLARATORY
JUDGMENT**

JURY TRIAL DEMANDED

Consolidated with

Case No.: SX-2014-CV-278

**ACTION FOR DEBT AND
CONVERSION**

JURY TRIAL DEMANDED

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

Plaintiff,

vs.

UNITED CORPORATION,

Defendant.

WALEED HAMED, as the Executor of the
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Plaintiff,

vs.

FATHI YUSUF,

Defendant.

Ex. 2

I, **BRACEY ALEXANDER**, declare under penalty of perjury pursuant to 28 U.S.C. Section 1746, as follows:

1. I am a Certified Public Accountant.

2. I am employed by and write this Declaration as an authorized representative of Prager Metis CPAs, LLC., a GGI Independent Member; previously Jackson Vizcaino Zomerfeld, LLP.

3. Prager Metis is a Top 10 International firm with over 60 partners and principals, more than 400 team members, and ten offices worldwide including New York, Los Angeles, London, Miami, New Jersey, and Connecticut.

4. I have personal knowledge of the factual assertions herein as the Engagement Manager for a team of CPAs and staff that submitted an Expert Report in this action based on a year long agreed upon procedures engagement conducted in St. Croix and in Florida. We were retained to ascertain and I did participate in ascertaining the following: (1) The accuracy and completeness of the Plaza Supermarket Partnership and Subsidiaries' (the "Partnership") accounting records and financial statements based on established standards (2) Expenses and transactions that were valid business expenses or served a business purpose based on established standards (3) Improper transactions and those that lacked a proper business purpose were properly documented as claims (4) A proper estimate for value of such claims.

5. It was agreed that the procedures we were to perform would be based on procedures similar to those prescribed in audit engagements as described in U.S. Statements on Auditing Standards (SAS) AU Section 500 to obtain *Audit Evidence* to support the financial information provided by the Yusufs. As part of that process we:

a. Met with and interviewed John Gaffney (the Partnership's controller), Plaza Extra Partnership accountants, bookkeepers, and staff to obtain an understanding of the accounting system and controls.

b. Met with and interviewed Plaza Extra Partnership managers.

c. Obtained and reviewed the extensive information listed in Attachment II to our Expert Report.

d. Reviewed the general ledger for strange or unusual transactions (transactions such as duplicate payments, payments to parties in interest, payments to unknown vendors, large or unusual adjustments and unexplained journal entries).

e. Requested supporting documentation (such as bank statements, cancelled checks, registers, invoices, agreements and other financial records) for transactions listed in Attachment V to our Expert Report.

f. Compared financial information to underlying supporting documentation.

g. Documented transactions which appeared to be improper and those that lacked proper business purpose in Attachment III to our Expert Report.

6. Thus, that Expert Report is based on procedures similar to those used to obtain *Audit Evidence* to determine if expenses or transactions were valid business expenses or serve a business purpose and we listed the applicable standards we applied for claims both generally, and where needed, individually.

7. The facts, related documents, issues and estimates were described individually for each of Hamed's claims.

8. We reviewed the accounting records from 2012 on as the earlier records were deemed by the other CPA expert to be inadequate.

9. We originally identified more than 450 questions or "exceptions" for items we were not able to determine if it was valid business expense or serve a business purpose.

10. We investigated these and sent many written inquiries to the Defendants to the attention of Mr. John Gaffney.

12. We were able to exclude many of the exceptions based on information provided.

13. These were pared down to 165 items we were not able to determine if it was a valid business expense or serve a business purpose.

14. Those items were included individually in our Expert Report and later presented to the Special Master as the 165 "Hamed Claims" in Hamed's Revised Claims.

15. We have read and reviewed the motion submitted by Mr. Yusuf and the United Corporation which seeks to strike 117 of the exceptions we noted.

16. We know of no accounting basis which allows us to eliminate such validly identified exceptions in bulk, as they propose.

17. To the contrary, to have an accurate and complete record of a Partner's account, a determination of the validity of questioned items must be made.

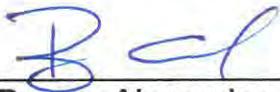
18. We note that Mr. Yusuf and the United Corporation attempt to characterize these exceptions in various ways, however, there is no valid accounting distinction between such items regardless of what they are labeled. To obtain an accurate and complete record of a Partner's account, these must be reviewed and validated.

19. For proper accounting of any business, including a partnership, if partners pay themselves funds they were not entitled to from the business accounts, or cannot show that an accounting entry was legitimate, the amount must be validated for there to be an accurate and complete accounting.

20. There appears to be some confusion by the Defendants, or an attempt by Mr. Yusuf to try to confuse our accounting *phrasing* as to these exceptions with what they mean; that it appears, based on the records and our examination, that Mr. Yusuf may have used Partnership funds for his and United's benefit -- using the accounting system as a means to do so.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 15, 2018



Bracey Alexander