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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 MOTION TO COMPEL RE REVISED CLAIM H-146 –**

**IMBALANCE IN CREDIT CARD POINTS**

1. **INTRODUCTION**

During the course of the Partnership, it was not uncommon for each family to take turns charging Plaza Extra store merchandise, gross receipt taxes and other store expenses to their personal credit cards or to store credit cards issued in their individual names. This method of taking turns allowed *each family to earn an equal amount of very valuable credit card points*. As shown below this is many hundreds of thousands of dollars’ worth of cash equivalents. Starting in 2012,[[1]](#footnote-1) Hamed noted that this system broke down and credit card points went mainly to the Yusufs.[[2]](#footnote-2) After litigation began, the disparities intensified and by 2014, Hamed could not even get the Yusuf credit card records to do calculations. (**Exhibit 1**)

Accordingly, Hamed brought this revised claim to correct the imbalance in credit card points in Hamed's Submission of His Suggestions as to the Further Handling of the Remaining Claims Per the Master's Directions of August, 24, 2017**,** filed on October 30, 2017.

1. **Procedural Process**

In 2018, the Parties exchanged discovery pursuant to the August 4, 2018 Scheduling Order. After responses were produced on May 15, 2018, the parties entered into a series of letters and Rule 37 conferences to resolve their differences. Some issues were resolved, but a number of issues remain outstanding.

A Second Amended Joint Discovery and Scheduling Plan was filed on June 14, 2021. The following motion pertains to one Hamed revised claim only: H-146 – Imbalance in Credit Card Points.

1. **Facts**
2. **Yusuf’s unanswered interrogatory 22 of 50**

On February 21, 2018, Hamed propounded the following interrogatory:

**Interrogatory 22 of 50**

Interrogatory 22 of 50 relates to Claim No. H-146 (old Claim No. 3007): “Imbalance in credit card points,” as described in Hamed’s November 16, 2017 Motion for a Hearing Before Special Master, Exhibit 3 and the September 28, 2016 JVZ Engagement Report and Exhibits.

With respect to H-146, state the approximate value of these credit card points, by describing: the approximate number of points in each of the years 2008-the date of the splitting of the East and West stores[[3]](#footnote-3); the present value of that many points if negotiated on the date of these answers at the point-to-dollar value now -- and show all of your calculations, sources of information and support for this approximation. (**Exhibit 3**)

On May 15, 2018, Yusuf refused to respond to Hamed’s interrogatory:

Defendants object to this interrogatory as vague, ambiguous, and compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories under the JDSP and violates both the spirit and the terms of the JDSP limiting the number of interrogatory questions.

Defendants further 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 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. If Hamed seeks to revisit these issues, Hamed should bear the cost.

Without waiving any objection, Defendants submit that information relating to this request was previously provided to Hamed by John Gaffney in his correspondence dated May 17, 2016 and Defendants incorporate that response as this response as if fully set forth herein verbatim. (**Exhibit 4)**

On February 16, 2016, per Judge Ross’s request, Hamed prepared questions regarding specific general ledger entries it questioned or did not understand for response by John Gaffney. This item related to the imbalance in credit card points between the Hameds and Yusufs.

**Description**: There is an imbalance in credit card points between Yusuf Yusuf and Mafi Hamed, Nejeh Yusuf and Willie Hamed and Mike Yusuf and Shawn Hamed.

**General Ledger - Store, Date, Entry No. & Description** [as an example] (if applicable): East, 4/30/13, 29900, V.I.B.I.R - GROSS RECEIPT 3/30/13 PAID W/YUSUF 6073/3791 MIKE C/C 3940 NEJEH C/C5222, $158,381.20

**Question /Request for info**: Are the credit card points reflected in the general ledger and if so, please provide that information. If the credit card points are not reflected on the general ledger, for the years 2012 -2015, would you please account for the amounts paid to each of the following individual's credit cards - Fathi Yusuf, Yusuf Yusuf, Mike Yusuf, Nejeh Yusuf, Wally Hamed, Willie Hamed, Mafi Hamed and Shawn Hamed.

Please provide the canceled checks showing payment of Fathi Yusuf, Yusuf Yusuf, Mike Yusuf, Nejeh Yusuf, Wally Hamed, Willie Hamed, Mafi Hamed and Shawn Hamed credit cards. (**Exhibit 5**)

On May 17, 2016, John Gaffney provided the following response to this question, which Yusuf incorporated by reference in its response to interrogatory 22 of 50 on May 15, 2018. Gaffney noted “This request to identify credit card points creates significant new work such that is its (*sic.*) completely impractical”:

See objection to Item No. 3002. Without waiving that objection, credit card points are not reflected in the general ledger. You already know that because you were provided complete backups of Plaza accounting systems for all years and you loaded them into Sage software on your computers. You were given all rights to run not only complete general ledgers, but you also have the ability to run vendor reports showing all payments with credit cards.

This request to identify credit card points creates significant new work such that is its (*sic*) completely impractical.

\* \* \*

Included herein are copies of vendor reports for credit cards used at Plaza East. These reports reflect all activity since January 1, 2013 (the accounting conversion date). Prior to 2013, it is impractical if not impossible to provide all credit card activity as vendor accounts for credit cards never reflected activity properly. Sample general ledgers for the months of December 2012 and January 2013 are provided to demonstrate the deficiencies prior to my employment. Note that in 2012 all freight activity was rolled into single journal entries for St. Croix and in one account for both stores. Note also that in St. Thomas most of the freight was paid using Banco Popular credit cards. However, these payments are not associated with a vendor account for the corresponding Banco Popular credit cards. Instead, the AP clerk would simply change the name on the true vendor's account (probably Tropical Freight) when he or she was making the payment. So while a vendor account might have first been created at Tropical Freight, there were countless payments to the various credit cards actually used to pay Trofical Freight. Add to this the confusion of constantly changing addresses so that a payment to Banco Popular didn't get mailed to Tropical Freight. This was complete circumvention of controls.

Note the difference beginning in 2013. There are no payments in Freight Expense with a description of "Banco Popular." In 2013 a true system of controls was implemented to show WHO the vender is. Furthermore, the control system was designed to ensure that any credit card payments appearing in the general ledger expense accounts were conspicuous. This assures system integrity and guards against the likelihood of payment of non- business items by anyone. Simple stated, if I see a Banco credit card voucher in the general leger (*sic*) account for freight expense, I immediately know it's a posting error. And if the control account used to clear business expenses against payments with credit cards is anything other than zero, I am immediately alerted to a posting error. . . . (**Exhibit 6**)

On July 7, 2021, Hamed sent a letter to Yusuf’s counsel requesting a Rule 37 conference on Interrogatory 22 of 50. (**Exhibit 7**) Since that date, Hamed has not received a letter, email or phone call from Yusuf’s counsel responding to his request for a Rule 37 conference.

1. **Yusuf’s unanswered request for the production of documents 26 of 50**

On February 25, 2018, Hamed propounded the following request for the production of documents (RFPDs) 26 of 50. Although the request related to Yusuf claim Y-11 – Lifestyle Analysis, it is also applicable to Hamed’s claim H-146 with respect to the credit card statements for each of the Yusuf family members listed.

**Request for the Production of Documents, 26 of 50**, relates to Y-11, "Lifestyle Analysis." With respect to Y-11, please provide all bank account statements documenting deposits, all brokerage and retirement accounts documenting deposits and all credit card statements in the names of Fathi, Maher, Nejeh and Yusuf Yusuf (individually and any combination of joint accounts between them and all joint accounts with their spouses), from September 17, 2006 to September 30, 2016. Include but do not limit this to:

* All bank account statements documenting deposits or withdrawals
* All brokerage and retirement account statements documenting deposits or withdrawals
* All credit card statements (**Exhibit 8**)[[4]](#footnote-4)

On May 15, 2018, Yusuf declined to respond to Hamed’s request for the production of documents 26 of 50:

Defendants object to this Request for Production because it seeks personal financial information concerning Yusufs sons, who are not parties to this case.

Defendants further object to this Request because it seeks personal information when there has been no allegation that monies were removed from the partnership by any member of the Yusuf family which were not otherwise disclosed to the Hameds. Furthermore, unlike the Hameds, the Yusufs had sources of income other than the partnership which would account for income and assets in excess of the funds acknowledged to have been withdrawn from the partnership. Hence, the discovery is irrelevant because "the proposed discovery is not relevant to any party's claim or defense." V.I. R. Civ. P. 26(b)(2)(C)(iii).

To the extent documents already exist in the records, they may be found within the BDO Report which has been previously provided in the Tables to the BDO Reports and supporting documentation provided to Hamed on October 4, 2016. (**Exhibit 9**)

 On November 12, 2018, the parties held a Rule 37 conference. At that conference, Yusuf’s counsel indicated that no further information regarding RFPDs 26 of 50 would be forthcoming and therefore RFPDs 26 was ready for a motion to compel. That information was documented in a letter to Yusuf by Hamed on November 28, 2018:

RFPDs 26 of 50 – Relates to Y-11, Lifestyle Analysis

Attorney Perrell agreed that no more information would be forthcoming for the RFPDs related to Y-11 and therefore is ready for Hamed’s Motion to Compel. (**Exhibit 10**)

1. **Argument**

This Motion to Compel is submitted pursuant to the Second Amended Joint Discovery and Scheduling Plan of June 14, 2021.

1. **Applicable Discovery Rules**
	1. Rule 26 Duty to Disclose; General Provisions Governing Discovery

Rule 26 of Virgin Islands Rules of Civil Procedure (“Rule 26”) is the foundational rule governing discovery. It broadly allows discovery regarding “**any nonprivileged matter that is relevant to any party’s claim or defense**. Information within this scope of discovery need not be admissible in evidence to be discoverable.” V.I. R. CIV. P. 26(b)(1), emphasis added.

1. Rule 33 of the Virgin Islands Rules of Civil Procedure

Rule 33 of the Virgin Islands Rules of Civil Procedure (“Rule 33”), among other things, identifies the duties of the party responding.

1. Answers and Objections.

\* \* \* \*

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

1. Rule 34 of the Virgin Islands Rules of Civil Procedure

Rule 34 of the Virgin Islands Rules of Civil Procedure (“Rule 34”), among other things, identifies the scope of the document production and the duties of the party responding.

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information. . .

1. **Yusuf refuses to respond to Hamed’s interrogatory 22**

Interrogatory 22 directly relates to information needed by Hamed to calculate his claim – the number of credit card points accrued by each Yusuf and Hamed family member for Partnership purchases made on their personal credit cards. Further, to understand Yusuf’s defense to the claim, Hamed would like to know how many credit card points Yusuf thinks each family member had, as well as how Yusuf would value these points.

This shouldn’t be a problem for Yusuf to answer because on May 15, 2018, **Yusuf responded to Hamed’s Request to Admit 23 of 50 and *denied* that the Partnership management and accountant did not keep adequate records to calculate and state what credit card points were earned by each family.**

**Request to Admit Number 23 of 50**

Request to admit number 23 of 50 relates to Claim H-146 (old Claim No. 3007) as described in Hamed's November 16, 2017 Motion for a Hearing Before Special Master as "Imbalance in credit card points."

Admit or Deny that the Partnership's management and accountant did not keep adequate records to allow the Partnership to now calculate and state with specificity what credit card points were earned by paying for purchases/expenses incurred on behalf of the Partnership on the personal

credit cards of the Hameds and Yusufs, and thus, whether these points were split evenly between Partners.

**Response**:

Denied. (**Exhibit 11**)

1. **Yusuf refuses to produce documents for RFPDs 26**

The balance here is greatly in Yusuf’s favor, so the best defense is to obscure and refuse this most basic information. All that is involved are (1) credit card statements and (2) the list of payments for credit card reimbursements from the accounting. Yusuf refuses to respond to this straightforward document request. RFPDs 26 asks for the credit card statements for Fathi, Mike, Nejeh and Yusuf Yusuf. THEY HAD NOTICE OF THIS BACK YEARS, and if it is no longer being kept, it is because it was intentionally not kept. Furthermore, it can be requested from their financial institutions. Hamed can use this information to determine the number of points each person received during the relevant time period and then calculate any differential in points between the Partners. This is directly related to Hamed’s claim and therefore is discoverable.

It should be noted that the Hameds have given **full** access to all banking records both when Wally’s were requested on St. Croix and in regard to the foreign accounts – Yusuf has never done so.

1. **Conclusion**

Hamed’s interrogatory and request for documents discussed above clearly fall within Rule 26’s scope allowing discovery regarding “**any nonprivileged matter that is relevant to any party’s claim or defense**.” (Emphasis added). Hamed has patiently been trying to get responses to this discovery since *May 15, 2018*, with no success. Accordingly, Hamed respectfully requests that the Master compel Yusuf to answer Interrogatory 22 and RFPDs 26.

**Dated:** July 28, 2021 A

**Carl J. Hartmann III, Esq.**

*Co-Counsel for Plaintiff*

2940 Brookwind Drive

Holland, MI 49424

Email: carl@carlhartmann.com

Tele: (340) 719-8941

 **Joel H. Holt, Esq.**

 *Counsel for Plaintiff*

 Law Offices of Joel H. Holt

 2132 Company Street,

 Christiansted, Vl 00820

 Email: holtvi@aol.com

 Tele: (340) 773-8709 Fax: (340) 773-8670

**CERTIFICATE OF SERVICE**

 I hereby certify that on this 28th day of July 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

**Charlotte Perrell**

**Stefan Herpel**

Law House, 10000 Frederiksberg Gade

P.O. Box 756

St. Thomas, VI 00802

Cperrell@dnfvi.com

Sherpel@dnfvi.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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**CERTIFICATE OF COMPLIANCE WITH RULE 37(a)(1)**

I hereby certify that I made the required efforts in good faith to confer with counsel for United and Yusuf in order to obtain the foregoing requested information.

**Dated**: July 28, 2021     A

1. The original Hamed claim covered the period from the Brady Limitation Order date in 2006 to the time the stores were conveyed by the Master in March and May of 2015. However, since Yusuf has made it clear that these records were not kept in 2006-2011 and Hamed despairs of forcing discovery for those years, **Hamed voluntarily limits his claims to the period from 2012 to 2015**. Since the legal action began on September 17, 2012, any failure to keep the records after that date is spoliation – thus Yusuf’s refusal to produce is without any merit whatsoever. Moreover, Hamed has previously, voluntarily provided Yusuf with powers of attorney and other documents requested to allow Yusuf access to all of Hamed’s bank accounts requested, and to all of Hamed’s foreign accounts. Despite discovery, motions and even orders, Yusuf has not provided these. [↑](#footnote-ref-1)
2. **Exhibit 2** contains the narrative and exhibits from the engagement report prepared by Hamed’s CPA, Jackson Vizcaino and Zoomerfeld, LLP. [↑](#footnote-ref-2)
3. For purposes of this Motion to Compel only, Hamed limits this request to the time period from January 1, 2012-March 9, 2015, the date of the split of the East and West stores. [↑](#footnote-ref-3)
4. For purposes of this Motion to Compel only, Hamed is limiting his request to the credit card statements as described in the RFPDs 26 from January 1, 2012-March 9, 2015. This significantly simplifies this motion and the claims proceedings. [↑](#footnote-ref-4)