**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

|  |  |
| --- | --- |
| **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** |
|  |  |

**HAMED’S POST HEARING FILING RE YUSUF’S Y-2 and Y-4 CLAIMS**

**(RENT AND INTEREST ALLEGEDLY DUE TO UNITED FOR BAYS 5 AND 8)**

Hamed hereby respectfully submits his Proposed Findings of Fact and Conclusions of Law regarding the February 4, 2021, hearing on Yusuf’s Y-2 and Y-4 claims for rent and interest allegedly due for Bays 5 and 8 of the United Shopping Plaza owned by United Corporation (“United”). Several preliminary comments are in order.

First, Hamed withdraws his prior Statute of Frauds argument, as it is now undisputed that the alleged Bay rentals were not for a fixed period of time and could be terminated at any time. As noted by the Virgin Islands Supreme Court in *Yusuf v. Hamed,* 59 V.I. 841, 852 (2013), agreements that can be terminated in less than a year are outside the Statute of Frauds, which Yusuf cited in his prior briefing on this issue in response to Hamed’s SOF defense, as noted in the Special Master’s November 13, 2019, Opinion (at pp. 11-12) denying summary judgment.

Second, Hamed asserts that United’s rent claim prior to September 17, 2006, is barred by Judge Brady’s July 21, 2017, Order cutting off claims that pre-date September 17, 2006 (the “Limitations” Order”). However, the Special Master previously held that this Limitations Order does not *necessarily* apply to claims regarding United, so this point will not be reargued here, although Hamed expressly preserves this objection in the event it may be needed for an appeal of this issue.[[1]](#footnote-1) **It should be noted, however, that Hamed does believe the pre-2002 Y-2 rent claims for both Bays 5 and 8 are clearly barred by the applicable statute of limitations, as set forth the Conclusions of Law herein.** [[2]](#footnote-2)

Third, the Conclusions of Law set forth herein propose alternate findings, as noted. For example, Hamed asserts that no rent is due, so that no interest is owed. However, if there is a finding that rent is due, Hamed asserts that no interest is due based on the previous finding made by the Special Master in his December 3, 2019 Order finding that no interest was owed for the back rent on Bay 1, holding as follows (at pp. 13-14):

The foregoing shows that it was common practice for the Partnership to make lump sum rent payments when United made rent payment demands, as opposed to monthly or even yearly rent payments, and that the construct of Parties’ rent payment arrangement for Bay 1 throughout their relationship never provided for prejudgment interest. Thus, the Master finds it inequitable and unjust to award prejudgment interest in this instance.

In short, alternate proposed findings need to be submitted to address the multiple findings that the Master might make based on the hearing records.

With the foregoing comments in mind, Hamed submits his proposed Findings Of Fact and Conclusions of Law.

1. **HAMED’S PROPOSED FINDINGS OF FACT**Hh

This matter proceeded to a hearing on February 4, 2021, with the following testimony being presented by the Parties:[[3]](#footnote-3)

1. **Fathi Yusuf-First Witness**

On direct examination, Fathi Yusuf testified:

1. That he was in charge of determining what rent was to be paid United by the Partnership. (Tr. 14).
2. That the United Shopping Center burned down in 1992 and was rebuilt so that it reopened in May of 1994. (Tr. 14-15).
3. That he worked in St. Thomas in 1994, but came back to St. Croix every 10 days. (Tr. 15).
4. That he saw the Plaza East Supermarket using Bays 5 and 8 in May of 1994. (Tr.15-16).
5. That Bay 5 is 3,125 square feet. (Tr. 17, 19).
6. That Bay 8 is 50 feet by 125 feet (6,250 sq ft). (Tr. ).
7. That the supermarket used Bay 8 for storage when the store reopened. (Tr. 20).
8. That he had a conversation with someone on the “Hamed side” that they would have to pay rent for Bay 8 and Bay 5. (Tr. 20)
9. That the supermarket broke a hole in the wall so it could access Bay 5 for storage, which he saw and told Wally Hamed “You have to pay rent.” (Tr. 22, 25).
10. That Wally agreed to pay rent for Bay 5. (Tr. 27).
11. That he and Wally reached an agreement in 2012 on back rent for the time period 2004 to 2012 for $5,408,806.74, but he testified that this figure did not include rent for Bays 5 and 8. (YEx. 3 and YEx. 4, Tr. 30-34)
12. That United had the absolute right to expel the supermarket from Bays 5 and 8 *at any time*, telling Wally “as soon the tenant come in, you have to get out.” (Tr. 37-38, 109)
13. That his lawyer did not send a letter to the Hameds until May 17, 2013, to demand rent for Bays 5 and 8. (YEx 5, Tr. 40-41)
14. That he never thought this rent claim for Bays 5 and 8 would be contested. (Tr. 42)
15. That he read an affidavit he said his counsel prepared (YEx 2), reciting from it that he calculated the rent owed for Bay 5 to be $12 a square foot. He could not recall how that calculation was made. (Tr. 45, 46)
16. That YEx 11 is a retail lease for Bay 5 starting September 3, 2001, for $12 a square foot, so that he is seeking rent from the supermarket from May, 1994 to September 3, 2001, based on this figure. (Tr. 47-48)
17. That the Affidavit prepared by his counsel states that (YEx 2) he was seeking rent for Bay 8, which had 6,250 sq. ft., at $6.15 per sq. ft. from May 1, 1994 through September 30, 2002, for a total of $323,515.63. (Tr. 49-50 )
18. That YEx 12 is a lease for Bay 8 by United to Mamud Idheilah commencing October 1, 2002. (Tr. 50)
19. That he then rented Bay 8 to the supermarket again from 2008 through 2013, but that he did “not know the price at that time.” (Tr. 50-51)
20. That the affidavit prepared by his counsel, which he read into the record, states that rent for Bay 8 for this second time period was also $6.15, for a total of $198,593.75. (Tr. 51-52)
21. That he has *never* communicated anything about these rents to any of his accounting personnel, **and there have never been any accounting records showing the accrual of any the rents he now seeks**. (Tr. 52-54)
22. That he allowed this rent to accrue without seeking payment. (Tr. 54)
23. That in another, similar, situation United had rented a laundry to Mohammed Hamed for $600 a month, but in that transaction there WAS a lease that contained an amount, and that it also contained a specific term that the tenant had to pay for water. Yusuf testified that he did not charge Hamed for water usage and also allowed Hamed to charge someone else twice that much money for the premises, but that he did not void the lease, even though he could have done so. Yusuf testified that he mentioned all of this “Just to show you the kind of man I am . . . . I am here for dignity, not for money.” (Tr. 54-55)

On cross-examination, Fathi Yusuf:

1. Admitted that his lawyer, Nizar Dewood, sought $12 a square foot for rent for Bay 8 in the May 17, 2014, letter, which Yusuf admitted was *wrong*. (Tr. 62-63)
2. Admitted that his lawyer, Nizar Dewood, only sought rent for the time period 2008 to 2013 for Bay 8, in the May 17, 2013, letter without any mention of the rent being due for Bay 8 from 1994 through 2002. (Tr. 63).
3. Admitted that the December 23, 2013, counterclaim filed by United did not seek rent for Bay 8 from 1994 through 2002 and sought $16.15 per sq. ft. in rent for Bay 8 from 2008 through 2013, which he said was also *wrong*. (HEx C, Tr. 64-67)
4. Admitted he does not pay rent to himself for the warehouse space he has in the Frank Weisner building he owns, even though it is a different company. (Tr. 71)
5. **Admitted that one always pays less for warehouse space**. (Tr. 72)
6. Admitted that Bay 5 leased to Diamond Girl in 2001 for retail sales required United to make certain improvements, including the installation of air-conditioning, before the new tenant had to pay rent at $12 per sq. ft. (YEx 11, Tr. 74-75)
7. Admitted that Bay 8 leased to a new tenant in 2002 required United to make certain improvements, including a loading door, a working bathroom and warehouse lighting before the new tenant had to pay rent. (YEx 12, Tr. 75-78)
8. Denied that he ever saw the August 27, 2001, letter sent by the Shopping Center Manager, Thomas Luff, stating that (1) Bays 5 and 8 were vacant, (2) with no entry on the accounts receivable entry listing any rent due for either space **and (3) the sq. ft. rental rate for Bay 5 listed at $7.01 and the sq. ft. rental rate listed for Bay 8 at $5.50.** (HEx F, Tr. 78-83)[[4]](#footnote-4) (Emphasis added.)
9. Denied he ever saw the February 2012 document that had the United tenant accounts listed, which noted (1) the deposit of the $5,408,00 rent settlement check and (2*) also notes that the Bay 8 rent has now been paid*. (HEx, 85-88)[[5]](#footnote-5)
10. **Admitted that he has no documents that contain any record of any alleged back rent for Bays 5 and 8.** (Tr. 90-91, 113)
11. **Admitted that he had no idea what rent he planned on charging for Bay 5 until he had a new retail tenant who agreed to pay $12 per sq. ft.** (Tr. 92)
12. Admitted that **he did not provide a rental figure to Wally**, the only person he spoke to in 1994, when he said he was going to charge rent. (Tr. 93-94)
13. Admitted he did not tell Wally the rent for Bay 5 was $12 after he signed the Diamond Girl lease in 2001. (Tr. 94)
14. Admitted Nizar Dewood was his lawyer when Judge Brady entered the preliminary injunction on April 25, 2013, just three weeks before Nizar Dewood sent the May 17, 2013 letter demanding rent for Bay 5 from 1994 to 2001 and for Bay 8 from 2008 to 2013. (HEx K, Tr. 101)

On redirect, Fahti Yusuf testified:

1. That Bay 1 was not listed on YEx F. (Tr. 108)
2. That Wally “forced” him to allow Bay 5 to be used as a warehouse until he (United) could find a tenant, at which time Wally would have to move out. (Tr. 109)
3. That he has no documentation for the lease for Bays 1, 5 and 8, as there was no lease for Bays 1, 5 and 8. (Tr. 113)
4. **Mike Yusuf-Second Witness**

On direct examination, Mike Yusuf testified:

1. That he worked at Plaza East from 1992 to 2000 (Tr. 116)
2. That Plaza East used Bay 8 as a warehouse right after the Plaza East supermarket reopened in 1994 (Tr. 116-117)
3. That Plaza East would have to move out of Bay 8 if someone else wanted to rent the space (as well as Bay 5). (Tr. 117, 153)
4. That Plaza East opened up a wall large enough for a forklift to drive through and began using Bay 5 as a warehouse right after the Plaza East supermarket reopened in 1994, which Fathi Yusuf was angry about when he found out about the hole in the wall, which Bay was used continuously by Plaza East until 2001 when an outside tenant was found. (Tr. 118-121)
5. That Plaza East had containers for that could be and were used to warehouse items behind the store from 1994 to 2000. (Tr. 123-124)
6. That **he never had any conversations with any Hamed about rent for Bays 5 and 8**, as his father (Fahti Yusuf) always dealt with rent for the store. (Tr. 124) (Emphasis added.)
7. That notwithstanding the fact the he did not deal with rent issues, he thought that the partnership was supposed to pay rent for Bays 5 and 8, even though he does not recall ever discussing rent with his father. (Tr. 125)
8. That the partnership needed **warehouse space** for the Plaza East store and benefitted from the use of Bays 5 and 8. (Tr. 126) (Emphasis added.)
9. That he remembered Thomas Luff, but that he never discussed anything with him that had to do with Plaza East. (Tr. 126-127)
10. **That Thomas Luff did show him ledgers that showed who the tenants were and which tenants owed rent**.[[6]](#footnote-6) (Tr. 127)

On cross-examination, Mike Yusuf:

1. Admitted that additional land was purchased in 1993 by United behind the Plaza East store where trailers were stacked that were used for storage. (Tr. 129-130)
2. Admitted in 2000 he moved to Plaza West as the manager of that store, so he did not go back to see if Bays 5 and 8 were still being used. (Tr. 130-131)
3. Admitted that the building constructed for the Plaza West store had lots of storage space that Plaza East would use. (Tr. 131)
4. Admitted he did not know where Plaza East would store any items sent to it by Plaza West. (Tr. 132)
5. Testified he saw Plaza East using Bay 8 after 2008. (Tr, 134)
6. **Admitted he does not know what the fair market price for warehouse space would be in the 1994-2001 time period**. (Tr. 141) (Emphasis added.)
7. Admitted he had no idea about what rent would be charged for Bays 5 and 8, as he never discussed it with his father. (Tr. 141-142)
8. Admitted Thomas Luff was the property manager, but he could not recall what Luff did with the reports that were generated. (Tr. 150)
9. Admitted Plaza East also used Bay 7 for a period of time. (Tr. 151-152)

On redirect, Mike Yusuf testified:

1. That Plaza East could be “put out” of Bays 5 and 8 anytime a third party renter was available. (Tr. 153)
2. That Mike Yusuf never discussed anything with Mr. Luff. (Tr. 153-154)
3. **Wally Hamed-Third Witness**

On direct examination, Wally Hamed testified:

1. That he started working for Plaza East in 1986. (Tr. 157)
2. That the partnership bought an acre of land behind the store after the fire in 1992 so that it could put trailers there for storage of inventory after Plaza East reopened in 1994. (Tr.157)
3. That he and Mike Yusuf broke a hole into the wall between Plaza Extra and Bay 5 **for warehouse storage** from time to time, but that Fathi never told him that United would charge rent for this Bay. (Tr. 159-160) (Emphasis added.)
4. That **he would not have utilized the space in Bay 5 if he knew Plaza Extra would be required to pay additional rent**, as there were other spaces in Plaza Extra that could have been used for warehousing materials if needed. (Tr. 160) (Emphasis added.)
5. That Plaza East did store items in Bay 8 as well from time to time, but **he would not have used that space either if he had known Plaza East would be required to pay additional rent**. (Tr. 161) (Emphasis added.)
6. That the Plaza West store was made as large as it was so that it could also provide storage to Plaza East after it was finished in 2000. (Tr. 161-162)
7. **That the May 17, 2013 letter from Nizar Dewood (HEx B) was the first time he was ever told that United would seek rent for Bays 5 and 8.** (Emphasis added.)
8. When he received the May 17, 2013, letter from Nizar Dewood (HEx B), he immediately had Plaza East remove everything in Bay 8, which was not a significant amount of items, which he would have done a long time ago if he had known United would seek rent for its use. (Tr. 162)

On cross-examination, Wally Hamed:

1. Admitted that at any time United had a tenant for Bay 5, Plaza East would have to immediately clean it and move out. (Tr. 165)
2. Admitted that when he spoke with Fathi Yusuf about rent, neither one ever referred to Bay 1. Bay 2 or Bay 3, as all discussions were just about Plaza Extra, without reference to a particular Bay. (Tr. 166-167)
3. Admitted that the rent check in the amount of $5,408,806.74 was for rent owed by Plaza Extra to United for the time period between 2004 and 2012, so that it would not have covered rent claims before 2004 or after 2012, **although it would cover all rent claims between those dates, including rent claims for Bay 8**. (Tr, 169-172) (Emphasis added.)
4. Admitted that rent for Bays 5 and 8 were never discussed with Fathi Yusuf and that Plaza Extra “never agreed” to pay any such rent. (Tr. 173).
5. Admitted the partnership benefited from the use of Bays 5 and 8. (Tr. 173-174)
6. Admitted the partnership could have paid rent for Bays 5 and 8, but Fathi Yusuf chose not to charge for it. (Tr. 175)
7. Admitted that the partnership knows it must pay rent when it is owed. (Tr. 175. 177)

On redirect, Wally Hamed testified:

1. That the partnership is not required to pay any amount of rent that Fathi Yusuf or United demands, pointing out that **the Master rejected that very same argument when he denied Yusuf’s claim for an extra $250,000 per month from 2012 to 2015**. (Tr. 178) (Emphasis added.)
2. Critically, that the only benefit Plaza East would have received from using Bays 5 and 8 is, at best, whatever the sq. ft. value of **warehouse rent** would be. (Tr. 178-179)

[Note, the only benchmark for warehouse rent was $5.50 per foot, and even that was a full lease—it did not require the tenant to move out on a moment’s notice. Thus, if there was an agreement for rent, it was for less than $5.50.]

1. That Plaza East would have moved out of Bays 5 and 8 if they had known Fathi Yusuf or United intended to charge rent, as Plaza East had other storage space available in its own store it could have used. (Tr. 178)
2. That prior to Nizar Dewood’s May 17, 2013, he never had any idea Fathi Yusuf or United would try to charge any rent for Bays 5 and 8. (Tr. 179, 180)
3. That YEx 3, the calculation of rent owed by the partnership to United from 2004 through 2012 of $5,408,806.74 does not say this amount is limited to back rent for Bay 1 where the main store is located, as it does not mention any Bay number. (179-180)
4. That the check for $5,408,806.74 (YEx 4) simply says “Plaza Extra, Sion Farm, Rent.” (Tr. 180)
5. That at the time he wrote the $5,408,806.74 check, he thought he was paying whatever rent the partnership still owed United. (Tr. 180)
6. That the $5,408,806.74 check covered the time period from 2004 to 2012, but he never knew there would be a rent claim by United that would predate 2004 when he wrote the check on February 12, 2012, as Nizar Dewood’s May 17, 2013, letter was the first time he ever heard that rent for Bay 8 would be sought. (Tr. 180-181)
7. **HAMED’S PROPOSED CONCLUSIONS OF LAW-RENT (Claim Y-2)**
8. **Proposed Conclusion of Law #1 Re United’s Claims for Rent for Bays 5 and 7.**
9. United has claimed back rent for Bays 5 and 8 of the United Shopping Center for three different time periods, identified as Claim Y-2.
10. United bears the burden of proof as to its claims.
11. United has failed to meet its burden of proof on this Y-2 rent claim.
12. In this regard, while there is no dispute that the Plaza Extra partnership occupied Bays 5 and 8 at different periods of time, *United must establish* by a preponderance of the evidence that the parties entered into an agreement to pay a specific amount of rent it seeks to collect. Hamed has denied there was ever an agreement to pay any amount of rent for either Bay at any time, much less a specific amount.
13. It is undisputed that there was never a written lease for any of the alleged time periods in question.
14. It is undisputed that the Plaza Extra partnership had to immediately move out of the Bays at any time Fathi Yusuf asked it to do so if a third party retail tenant was found for the space, so this was an at-will tenancy terminable at any time by United.
15. It is undisputed that Yusuf was ordered to produce all records related to this alleged rental. [[7]](#footnote-7)
16. It is undisputed that United did not offer any document or other written communication that even referenced any such rental agreement between the parties or what the rental amount was.
17. It is undisputed that Fathi Yusuf did not even decide what rent he thought United should seek for either Bay until after Judge Brady entered a preliminary injunction against him this litigation on April 25, 2013.
18. Moreover, the claimed amounts of rent, and the alleged rental periods for which rent is allegedly due, have varied widely since the first claim for rent was made on the partnership by Attorney Dewood on May 17, 2013.[[8]](#footnote-8)
19. **BAY 5**
20. As for Bay 5, Fathi Yusuf testified that the $12.00 per sq. ft. rate, **which** **he first decided to charge in 2013 after Judge Brady entered the April 25, 2013, preliminary injunction order,** is based upon the sq. ft. rate charged in the 2001 lease to a new tenant, referred to as Diamond Girl. (HEx 11)
21. It is undisputed that this written lease was for a retail tenant, with standard rental terms, for which United agreed to make certain improvements at the beginning of the lease, including installing air-conditioning. (HEx 11 at ¶9)
22. It is undisputed that this rental rate of $12.00 per sq. ft. is for a retail store, while Plaza Extra was only using the space as a warehouse, which generally rents for a rate much lower than retail rent.
23. Moreover, despite Fathi Yusuf’s assertion that he is the sole person to decide what rent should be paid, **the Master has already determined** that such a broad statement is not correct as to such “decisions” made after the initiation of this action, as set forth in his March 13, 2018, Order denying United’s claim for excess rent of $250,000 per month after February, 2012.
24. There is no evidence that the partnership ever agreed to pay any rent for Bay 5, much less this retail rate of $12.00 per sq. ft. first paid by a third party tenant in 2001 after Plaza Extra was told to move out of Bay 5.
25. The only rental record produced at the hearing, which was a record returned by the FBI to United, listed the fair market value of the Bay 5 retail space in 2001 (prior to the Diamond Girl lease) at $7.01 per sq. ft. (See HEx F at HAMD664275) (letter from United’s Property Manager, Thomas W. Luff).[[9]](#footnote-9)
26. Thus, United’s claim for rent for Bay 5 at the hearing of $12 per sq. ft. is based only on evidence of the rent charged to a new *retail* tenant which had a written lease (with normal retail lease terms), as opposed to a fair market value for warehouse rent (for an at-will tenant, with no terms, who could be immediately removed without any notice).
27. As such, United has failed to meet its burden of proof that the rent it sought at the hearing (1) was ever agreed to or (2) that the $12.00 sq. ft. amount is seeks for Bay 5 for unfinished warehouse space was even reasonable or would have ever been agreed to.
28. **BAY 8**
29. As for Bay 8, Fathi Yusuf testified that the $6.15 per sq. ft. rate, **which** **he first decided to charge in 2013 after Judge Brady entered the April 25, 2013, preliminary injunction order,** is based upon the sq. ft. rate charged in the 2002 lease to a new tenant. (HEx 12)
30. It is undisputed that this lease was for a retail tenant for which United also agreed to make certain improvements at the beginning of the lease, including installing a bathroom and lighting. (HEx 12 at ¶8)
31. It is undisputed that this rental rate of $6.15 per sq. ft. is for a retail store, while Plaza Extra was only using the space as a warehouse, which generally rents at a rate lower than retail rent.
32. Moreover, despite Fathi Yusuf’s assertion that he is the sole person to decide what rent should be paid, **the Master has already determined** that such a broad statement is not correct as to such “decisions” made after the initiation of this action, as set forth in his March 13, 2018, Order denying United’s claim for excess rent of $250,000 per month after February, 2012.
33. There is no evidence that the partnership ever agreed to pay any rent for Bay 8, much less this retail rate of $6.15 per sq. ft. first established in 2002 after Plaza Extra was told to move out of Bay 8.
34. The only rental record produced at the hearing regarding warehouse use, which was a record returned by the FBI to United, listed the fair market value of the Bay 8l space in 2001 (prior to the Diamond Girl lease) at $5.50 per sq. ft. (See HEx F at HAMD664275) (letter from United’s Property Manager, Thomas W. Luff).[[10]](#footnote-10)
35. Thus, United’s claim for rent for Bay 8 at the hearing of $6.15 per sq. ft. is based only on evidence of the rent charged to a new retail tenant who had written lease (with normal retail lease terms), not warehouse rent (at-will tenant, with no terms, and immediate removal).
36. As such, United has failed to meet its burden of proof that the rent it sought at the hearing (1) was ever agreed to or (2) that the $6.15 sq. ft. amount is seeks for Bay 8 for unfinished warehouse space was even reasonable or would have ever been agreed to.
37. **Proposed Alternate Conclusion of Law #2 Re Hamed’s SOL defense to Claim Y-2 for Bay 5 for the time period 1994-2001 and Bay 8 for the time period 1994-2002.**

**[NOTE: This alternate proposal need only be considered if Proposed Finding A has not been adopted.]**

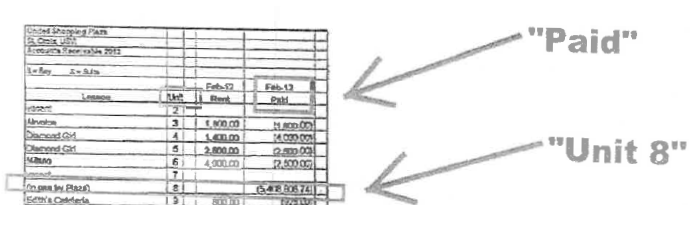
1. Hamed asserts that these claims against the partnership are barred by the statute of limitations (SOL), which it immediately raised on May 22, 2013 (HEx J) in response to Dewood’s May 17, 2013, letter demanding rent. (YEx 5)
2. The statute of limitations is an affirmative defense and thus Hamed bears the burden of proof.
3. The SOL for an action to recover rent is six years pursuant to 5 V.I.C. § 31(3)(A).
4. It is undisputed that Plaza Extra moved out of Bay 5 at the very latest by mid-2001, as a new tenant signed a new lease on September 3, 2001. (YEx 11)
5. It is undisputed that Plaza Extra moved out of Bay 8 at the very latest by mid-2001, as a new tenant signed a new lease on October 1, 2002. (YEx 12)
6. This claim for rent for Bays 5 and 8 was not filed until December 23, 2013 (HEx C), when United filed its counterclaim to Hamed’s September 20, 2012, Complaint.
7. Thus, more than six years had passed before this claim was filed, as both rent claims were fully accrued and allegedly due no later than September 3, 2001, (Bay 5) and October 1, 2002, (Bay 8) respectfully.
8. United’s argument that these rent claims did not accrue until a demand was made and then rejected in May of 201s is without merit for several reasons:

* This was not “a mutual, open and current account” as defined by 5 V.I.C. § 33, as this debt (unlike the rent on Bay 1 as to which Judge Brady made findings) has never been acknowledged and has always been contested by Hamed.[[11]](#footnote-11)
* Even if this was a “mutual, open and current account” as defined by 5 V.I.C. § 33, the SOL begins to accrue when on the last date services were performed. *See, e.g*., *In re the Estate of Vanterpool*,[[12]](#footnote-12) 2010 V.I. Lexis 113 (Super Ct., Dec. 30, 2010)(rejecting the argument that the SOL begins when a demand for payment is made, finding instead that the SOL begins on the last date services were performed).[[13]](#footnote-13)

1. Moreover, there is no evidence adduced at the February 4th hearing that warrants a finding that the SOL was tolled for Bay 5, as there was for United’s Bay 1 rent claim due to Mohammad Hamed’s statements “acknowledging” the rent due for the Plaza Extra store, which invoked “the acknowledgement of the debt doctrine and the payment on account doctrine.” Here, not only was there no proffered testimony from Mohammad Hamed, the evidence is clear that Wally Hamed is not even *alleged* to have subsequently acknowledged the debt, nor were any rent payments ever made on Bay 5.
2. Thus, there is no basis for applying either “the acknowledgement of the debt doctrine and the payment on account doctrine,” that was United’s burden to prove, which it failed to do.
3. **Alternate Proposed Conclusion of Law #3 Re Hamed’s “Payment” defense to Claim Y-2 for Bay 8 for the time period 2008-2013.**

**[NOTE: This alternate proposal need only be considered if Proposed Finding A has not been adopted.]**

1. Hamed also asserts that the rent for Bay 8 for the time period 2008-2013 is barred based on the affirmative defenses of payment and accord and satisfaction, which are affirmative defenses for which the partnership has the burden of proof.
2. It is undisputed that the partnership paid $5,408,806.74 to United for rent from 2004 to 2012, with a notation on the check “Plaza Extra (Sion Farm) Rent.”
3. Wally Hamed testified that he thought this payment would cover all rents due to United by the partnership since 2004.
4. There is no evidence that Wally Hamed thought that rent was being charged for Bay 8, as he had the partnership promptly remove everything from Bay 8 after being told by Attorney Dewood on May 17, 2017, that United expected rent for Bay 8
5. Fathi Yusuf denies the check covered rent for Bay 8 for the time period in question.
6. To resolve this discrepancy, the Master relies on the United Shopping Center business record kept in the normal course of business, produced by Hamed in 2013 that contains a February 12, 2012, contemporaneous entry (which is the same date as the $5,408,806.74 check) marking the Bay 8 rent as paid in full (HEx I at HAMD262211):[[14]](#footnote-14)



1. Thus, United’s claim for rent for Bay 8 between 2008 through February, 2012, is denied, as the partnership has met its burden of proof on this affirmative defense of payment for this time period.
2. **Alternate Proposed Conclusion of Law #4 Re Claim Y-2 (Rent)-Rent is due, but at a warehouse rate.**

**[NOTE: This alternate proposal need only be considered if Proposed Findings A, B and C have not been adopted.]**

1. As Wally Hamed admits the partnership used Bays 5 and 8 as a warehouse when not rented to a retail tenant, which benefitted the partnership if warehouse rated were applied, the Master finds that United is entitled to rent at the rate of $\_\_\_\_\_ per sq. ft. for Bay(s) \_\_\_ for the time periods from \_\_\_\_\_\_\_\_\_\_\_\_\_ to \_\_\_\_\_\_\_\_\_.

**Note: Rents for the various tenants listed in the August 27, 2001, letter from United’s Property Manager from the FBI files range as low as $2.40, with Bay 5 listed at $7.01 per sq. ft. (not $12.00) and Bay 8 listed at $5.50 per sq. ft. (not $6.15) (Ex G at p. HAMD665066) Using these figures, rent for one year for Bay 5 and Bay 8 would be:**

**Bay 5**

**$2.40 times 3,125 sq. ft=$7,500**

**$5.50 times 3,125 sq. ft.=$17,187.50**

**$7.01 times 3,125 sq. ft.=$21,906.25**

**Bay 8**

**$2.40 times 6,250 sq. ft.=$15,000**

**$5.50 times 6,250 sq. ft.=$34,375**

1. **HAMED’S PROPOSED CONCLUSIONS OF LAW-Interest (Claim Y-4)**

**A. Proposed Conclusion of Law #1 Re Claim Y-4 (interest)-No interest is due, as no rent is owed**

1. As it was concluded that no rent is owned on Bays 5 or 8, no interest is owed.
2. Thus, Claim Y-4 is rejected.

**B. Alternate Proposed Conclusion of Law #2 Re Claim Y-4 (interest)-No interest is due even if rent is owed.**

1. While rent was found to be due as noted, the award of prejudgment interest is one that is discretionary. See *Isaac v. Cricholaw*, 63 V.I. 38, 69-70 (Super. Ct. February 10, 2015) (“The grant or denial of prejudgment interest remains within the sound discretion of the trial court.”).
2. United never made a demand for rent until May 17, 2014. (YEx 5).
3. Yusuf testified this was because rent was agreed to be deferred so that the Plaza Extra Supermarket could utilize the funds for other needed purposes. (Tr. at p.\_\_)
4. **There is also no history of the parties paying interest on back rent claims, as the 2012 agreed upon calculation for back rent for Bay 1 for the time period from 2004 to 2012 (YEx 4) did not include any adjustment for interest. In fact, neither Dewood’s May 17, 2013, demand for rent (YEx 5), the claim for rent in United counterclaim (HEx C), Yusuf’s 2014 affidavit (YEx 2), nor United’s interrogatory responses (YEx 9) sought any prejudgment interest.**
5. As the Master held in his December 3, 2019, Order at pp. 13-14, regarding Yusuf’s claim for interest on the Bay 1 rent, since it was common practice for the Partnership to make lump sum rent payments when United made rent payment demands, as opposed to monthly or even yearly rent payments, the construct of Parties’ rent payment arrangement for Bays 5 and 8 throughout their relationship never provided for prejudgment interest (like Bay 1).
6. Thus, the Master finds it would be inequitable and unjust to award prejudgment interest for any of the Y-2 rent claims and rejects Yusuf’s Y-4 claim.
7. **SUMMARY**

Hamed respectfully submits the preceding Findings and Conclusions. Counsel will be glad to supplement this filing if requested.

*Counsel for Hamed*

**Dated:** February 23, 2021 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Joel H. Holt, Esq.**

Law Offices of Joel H. Holt

2132 Company Street,

Christiansted, Vl 00820

(340) 773-8709

holtvi@aol.com

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

*Co-Counsel for Plaintiff*

5000 Estate Coakley Bay, L6

Christiansted, Vl 00820

Email: carl@carlhartmann.com

**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 23rd day of February, 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

**Stefan Herpel**

**Charlotte Perrell**

TOPPER, NEWMAN FEUERZEIG LLP

Law House, 10000 Frederiksberg Gade

P.O. Box 756

St. Thomas, VI 00802

sherpel@dnfvi.com

[cperrell@dnfvi.com](mailto:cperrell@dnfvi.com)

*/s/ Joel H. Holt*\_\_\_\_\_

1. This objection was placed on the record in this case at Tr. 11-12 of the February 4th hearing. [↑](#footnote-ref-1)
2. The Master commented on this possible conclusion on pp. 3-5 of his November 13, 2019, opinion, which was dependent on the evidence adduced at the hearing. [↑](#footnote-ref-2)
3. All cites to the hearing transcript will be to “Tr.\_\_” as there was only one volume of the hearing transcript. Yusuf exhibits will be referred to as “YEx\_\_” and Hamed exhibits will be referred to as “HEx\_\_.” [↑](#footnote-ref-3)
4. HEx G was then marked showing the Luff letter came from the Plaza Supermarket records returned by the FBI after the criminal case was concluded. [↑](#footnote-ref-4)
5. HEx I was identified as a document produced in discovery (along with hundreds of other documents) by Hamed in 2013, well before this rent dispute arose. [↑](#footnote-ref-5)
6. These ledgers have never been produced despite this Court directing all such documents to be produced. [↑](#footnote-ref-6)
7. Indeed, despite the Master’s January 7, 2019, Order, directing Yusuf to produce all such records, he claimed had no such records. Interestingly, Hamed was able to locate two such records (HEx G and H), which Yusuf denied were United Shopping Center records even though one letter, addressed to Yusuf, was seized in an FBI raid, while the other is clearly a record of the shopping center tenant accounts. This lack of any records documenting an agreement to the rent now being sought is an additional basis for finding that United has not carried its burden in this claim. [↑](#footnote-ref-7)
8. Attorney Dewood sent a letter on May 17, 2013, seeking rent for Bay 5 from 1994 through 2001 at $12.00 per sq. ft. and for Bay 8 from 2008 through 2013 for $12.00 per sq. ft. (YEx 5). There was no claim asserted for rent for Bay 8 from 1994 though 2002 and Yusuf testified that the $12.00 figure for Bay 8 was incorrect.

   Similarly, Attorney Hodges signed a counterclaim dated December 23, 2013, that only sought rent for Bay 5 from 1994 through 2001 at $12.00 per sq. ft. and for Bay 8 from 2008 through 2013 for $16.15 per sq. ft. (HEx C). **There was no claim asserted for rent for Bay 8 from 1994 though 2002** and Yusuf testified that the $16.15 figure for Bay 8 was incorrect as well.

   Indeed, rents for the various tenants listed in the August 27, 2001, letter from United’s Property Manager (from the FBI files) list Bay 5 and 8 as being vacant, with no rent being accrued at all. (Ex G at p. HAMD665068 to HAMD665070). [↑](#footnote-ref-8)
9. To assist the Master, the relevant excerpt from this exhibit is attached as Tab 1. [↑](#footnote-ref-9)
10. To assist the Master, the relevant excerpt from this exhibit is attached as Tab 1. [↑](#footnote-ref-10)
11. Indeed, the May 17, 2013, letter did not even mention Bay 8. [↑](#footnote-ref-11)
12. To assist the Master, this case is attached to this filing as Tab 2. [↑](#footnote-ref-12)
13. Indeed, under United’s view of the law, it could demand rent for Bay 7 next week (which Mike Yusuf said was used by Plaza Extra as well) and then file suit tomorrow claiming this “never before made” demand triggered the commencement of the SOL so that this 19 year old claims is not time barred. This legal argument is rejected. [↑](#footnote-ref-13)
14. To assist the Master, the relevant excerpt from this exhibit is attached as Tab 3. [↑](#footnote-ref-14)