

In support of its Motion to Withdraw, Defendant United attached a calculation sheet showing the monthly amount due, and the basis for that amount.

The exhibits attached to United's Motion to Withdraw Rent clearly establishes the parties past practices of settling rent, and the amounts due. On September 19th, 2013, Plaintiff filed his opposition Response to United's Motion to Withdraw Rents. Plaintiff's opposition Response consists of four commentaries and two arguments against current and past rent demands. United will first address Plaintiff's four commentaries, followed by the two arguments regarding current and past rents.

Plaintiff's Four Commentaries.

Commentary One: Plaintiff asserts that "in seeking the payment of rent, United again concedes that Plaza Extra Supermarket is a separate legal entity from United."

Plaza Extra Supermarket is not a separate legal entity, it is a trademark owned by United Corporation; it is a *d/b/a* of United. The rent due and requested is reflective of a business operation agreement where United is entitled to the value of rents for the space it owns, and not because it is charging a separate entity for rent. Any two individuals can agree to use the space owned by one of the parties to operate a business, and both parties can agree to what the rental value of the premises is. According to Plaintiff, any such agreement necessarily means there is a "partnership." These repeated declarations by Plaintiff that every demand for rent to be paid is a concession of partnership is false and a desperate attempt to use the rent issue to prove a partnership.

Commentary Two: "There is no procedural basis that would allow this court to grant the extraordinary relief of allowing United to withdraw funds from the bank account of its tenant, Plaza Extra Supermarket."

There is certainly a procedural basis here. It is called eviction proceedings, followed by an action for damages in the civil division of the Superior Court. In this case, the Court has issued a Preliminary Injunction on April 25th, 2013. Defendant United therefore brings this Motion before this Court as a precautionary measure to address these issues in the Court where this instant action lies. Defendant United is more than pleased to withdraw this rent motion, and commence an immediate separate eviction proceedings against Plaintiff to recapture possession of its property, and for rents due.

Commentary Three: Plaintiff then comments that “the issue of rent is disputed.”

There is no dispute as to rent. Over the years, the parties have always settled all rents due by way of one lump sum payments upon demand by United Corporation regardless of when requested. Never before has Plaintiff ever asserted the defense of statute of limitations, or asked Defendant United to request any rents due within six (6) years of the date they become due. As early as February 7th, 2012, Plaintiff seems to have no problem agreeing to the value of rents due United Corporation. Those rents were certainly for periods exceeding six (6) years. Now, suddenly Plaintiff in bad faith alleges that the rent amount is in dispute, and that even if there is rent due, the statute of limitations bars Defendant United's claim. This of course is belied by the full and express admission of Waleed Hamed's June 27th, 2013 Affidavit where he states as follows:

“United charges Plaza Extra rent for the space used by the Supermarket.” See *Declaration of Waleed Hamed* at ¶3, **EXHIBIT A**.

The Court should note that even Waleed Hamed's Affidavit does not state that United charges a “partnership” for rent. Waleed Hamed specifically states that the United charges Plaza Extra. The

record is clear at this point that Plaza Extra is nothing but a trademark, and not an entity or association. If anything, this is direct evidence of the lack of the existence of a partnership.

Moreover, Waleed Hamed's own declaration fails to ever declare that no rent was ever agreed upon for any periods of time. Therefore, Waleed Hamed's under oath declaration contradicts the assertions in Plaintiff's opposition Response that the parties never agreed to rents due for the period of 1994 through 2004. Again, one only needs to look at the words of Waleed Hamed: **"United charges Plaza Extra rent."** Period.

Commentary Four: United's suggestion that this court has treated the Defendants any different than the Plaintiff is untrue (and insulting).

Unfortunately, these statements are true. Plaintiff is reminded to cite the very Motions that remain outstanding before this court without a hearing. Plaintiff should also be reminded of the incredible speed which their Motions have been adjudicated by this Court. Plaintiff cites two Motions that this Court granted, one being uncontested, while the other a relatively simple procedural Motion concerning discovery. However, before the court remains Defendant's Rule 12(b)(6) Motion which has been pending for over 10 months. Also, the Court has failed to schedule a hearing on Defendant's Motion to terminate employees Waleed Hamed, Mufeed Hamed, and Wadda Charriez. That motion has been pending since May. Defendants will file a separate Motion with this honorable Court to highlight their significant concerns. Defendants will not be subjected to insults and accusations from the Plaintiff when there is a very valid concern with the delays in adjudicating Defendants' Motions.

Having addressed Plaintiff's four meritless commentaries, United now turns to Plaintiff's dual arguments in opposition to United's claim to 1) current rent and 2) past rents due.

United's Current Rent Claims:

It is well established that Bay 1 of the United Shopping Plaza is the main retail space that has been and to date remains occupied for the day to day operations of the Plaza Extra - East Store (located at 4C & 4D Estate Sion Farm, St. Croix, Virgin Islands). There is no lease agreement, nor has any lease agreements ever been signed between the parties. The current monthly rent of \$58,791.38 for Bay 1 is calculated based on the yearly sales of the Plaza Extra - Tutu Park, St. Thomas store. The sales are divided by the square footage to arrive at a percentage amount. That percentage amount then is multiplied by the sales of the Plaza Extra - East store located at 4C & 4D Estate Sion Farm, St. Croix. See *Calculation of Rent*, **Exhibit C** (percentage highlighted in yellow). This formula was used previously and agreed upon to calculate the rent due from May 5th, 2004 through December 31st, 2011. To date, despite repeated demands for rents due for the period of January 1, 2012 through September 2013 in the amount of \$1,234,618.98, Plaintiff Hamed refuses to jointly sign a check for the amount due.

In his opposition Response, Plaintiff now makes the startling argument that “the terms of the St. Thomas” store lease governs the landlord-tenant issue for the Plaza Extra Supermarket in Sion Farm. This meritless allegation fails to cite a single fact, document, notice, or any communication between the parties that the terms of the St. Thomas store somehow govern the use and occupancy of the Plaza Extra – East (Sion Farm) store. The parties have never tied the terms of the St. Thomas store lease to the occupancy and use of the Sion Farm store. This argument is beyond ridiculous, and frankly is a dishonest attempt to force Defendant United to recognize a lease where one never existed in return for receiving the rent due.

It is worth repeating again here what Waleed Hamed averred in his June 27th, 2013 Declaration: "United charges Plaza Extra rent for the space used by the Supermarket." See *Declaration of Waleed Hamed* at ¶3, **EXHIBIT A**. Nowhere does Waleed Hamed reference the St. Thomas store. Nowhere does Plaintiff or Waleed Hamed ever states that the Plaza Extra – East (Sion Farm) has a lease agreement with United Corporation. Indeed, the only figure related to the St. Thomas store is the sales figure, and not any other terms of the lease with the Tutu Park mall. Nothing in the calculations of the February 7th, 2013 rent references anything in the St. Thomas store's lease. Again, all that is referenced in the rent calculation sheet (**Exhibit C**) is the sales of the St. Thomas store. To suddenly somehow connect the Plaza Extra – East (Sion Farm) rent to the lease agreement United Corporation has with the Tutu Park Mall must be rejected.

As such, United is entitled to the rents due as documented in its Motion without delay, and without the creation of a new lease agreement, where one never existed.

The Increased Rent Demand Argument

On January 1st, 2012, Defendant United made it clear to Plaintiff that it wishes to terminate any business relationship it had with him, and to recapture possession of its Sion Farm premises. Defendant United does not waive its right to assert the increased rent demand, which United will address in a separate counterclaim. At trial, United's counterclaim for the increased rent may be accepted or rejected. However, that is a separate issue from current and past rents amounts that are due and liquidated. It is for that reason, United did not address the increased rent demand in its Motion to Withdraw Rent.

Therefore, whether or not Defendant United is entitled to increased rent is not an issue here. Nothing should preclude this Court from adjudicating United's current right to withdraw rents based on the parties' prior practices. After all, it was this Court's preliminary injunction that ordered the parties to continue management of the stores as they have done for the last nearly 30 years.

II. UNITED' S CLAIMS FOR PAST RENTS: Rents Due for the period of 1994 to 2004.

As stated in its Motion to Withdraw Rent, the parties have settled in the past any rents owing to United upon United's request regardless of the number of years. That has been the customary practice between the parties: mainly, that United is entitled to make demands for rents due as it makes a request. For example, the parties settled the rents due between 1986 and 1993, and between 2004 and 2011. In both periods, the parties settled the rent when requested by United. In both events, the rents was requested beyond the statute of limitations of six (6) years. There was no dispute as to amount, and neither was there a dispute as to whether defense of statute of limitations ever applied.

United now turns to Plaintiff's contention that there is a dispute as to whether the parties agreed to the rents due for the period of 1994 to 2004. Plaintiff, in his opposition response, asserts that "United has failed to demonstrate that any such rent was ever agreed to." That assertion was addressed by United's treasurer and secretary Fathi Yusuf, who stated in his Affidavit that United held off on the demand for rent because certain financial records that were seized by the U.S. Government and were therefore unavailable to Defendant United to ensure proper calculation

(only as it relates to the exact period of time) the rents were due. See, *Affidavit of Fathi Yusuf*, **EXHIBIT B**. At no time did Plaintiff Hamed ever contend that Defendant United was not entitled to any rents due on grounds of statute of limitations. It is only after September 18th, 2012, the date this action commenced did Plaintiff Hamed decide to contest something as basic as the rent due for that period. The parties past practices further preclude Plaintiff from suddenly invoking the statute of limitations as a defense.

For example, for the past period of 2004 through 2011, the parties agreed that the value of rent for Bay 1 is \$5,408,806.74. The parties already settled that amount by disbursing a check in the amount of \$5,408,806.74, which equals monthly rent of \$58,791.38 (\$5,408,806.74/ 92 months). So much so, that Plaintiff Hamed repeatedly attaches a copy of that rent check in support of the position that a partnership exists between Defendant Yusuf and Plaintiff Hamed. Thus, on the one hand, Hamed uses evidence of a rent check to prove the existence of a purported partnership, and then turns around and denies that he [Plaintiff Hamed] has ever agreed to pay rent for Bay 1 for the period of January 1st, 1994 through May 4th, 2004. To ensure that United does not receive any rent, Plaintiff Hamed relies on the statute of limitations just in case the court finds that there was an agreement permitting United to withdraw rents. Plaintiff's position must be rejected. Plaintiff does not deny that rent was settled between the parties from 1986 to 1994, nor does Plaintiff deny that rent was owed from 2004 through 2011. Again, Plaintiff's own purported agent Waleed Hamed even concedes that "United charges Plaza Extra rent for the space used by the Supermarket." See *Declaration of Waleed Hamed* at ¶3, **EXHIBIT A**.

CONCLUSION

Whatever relationship the parties may ultimately be deemed to have in this action (partnership/business venture/business agreement), the simple and narrow issue before this court is that Defendant United, as the fee simple owner of the premises currently in use by the Plaza Extra – East (Sion Farm), is entitled to the value of the rent for the periods of 1994 through 2004, and 2011 through September 2013. If Plaintiff Hamed feels the urge not to agree to the withdrawal of the value of rent, then by all means this alleged partnership/ joint venture / business agreement should vacate the premises forthwith, and the parties could resolve their dispute as to amounts owed in a separate civil action.

For the foregoing reasons, it is respectfully requested that an Order permitting Defendant United to Withdraw Rents in the amount of \$5,234,298.71 be granted.

Date: September 27, 2013

Respectfully Submitted,

DEWOOD LAW FIRM
Attorney for Defendant United

By: /s/Nizar A. DeWood
Nizar A. DeWood, Esq.
2006 Eastern Suburbs, Suite 102
Christiansted, V.I. 00820
T. (340) 773-3444
F. (888) 398-8428

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2013, I caused a true and exact copy of the foregoing Defendant United's Reply in Opposition to Plaintiff's Response to United's Motion to Withdraw Rent was served on counsel for the Plaintiff at the below address.

Joel H. Holt Law Office of Joel H. Holt 2132 Company Street Christiansted, VI 00820	Carl Hartmann 5000 Estate Coakley Bay, L-6 Christiansted VI 00820 carl@carlhartmann.com
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/s/ Nizar A. DeWood

Nizar A. DeWood

EXHIBIT

A

Affidavit of Waleed Hamed

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

**FATHI YUSUF AND UNITED
CORPORATION,**

Appellants/Defendants,

v.

MOHAMMAD HAMED By His
Authorized Agent **WALEED HAMED,**

Appellee/Plaintiff.

S. Ct. Civ. No. 2013-CV-0040

Re. Super. Ct. Civ. No. 2012/370

DECLARATION OF WALEED HAMED

I, Waleed Hamed a/k/a Wally Hamed, declare, pursuant to 28 U.S.C.

Section 1746, as follows:

1. I have personal knowledge of the facts set forth herein as a manager of the Plaza Extra Supermarkets and in my capacity acting as my father's representative under a power of attorney in the Plaza Extra operations, which I deal with on a day-to-day basis.
2. Since I first began to work in the late 1980's in the Plaza Extra Supermarket at Sion Farm, St. Croix, it was always understood that Plaza Extra was a partnership between my father, Mohammad and Fathi Yusuf.
3. It was also understood that United Corporation owned the shopping center at Sion Farm, which was solely owned by Yusuf and his family, as my father had no interest in that corporation. United Corporation was the landlord for the Plaza Extra Supermarket at Sion Farm. United charges Plaza Extra rent for the space used by the supermarket.
4. When Plaza Extra expanded to St. Thomas in the early 1990's and then to the west end of St. Croix in the early 2000's, these stores were also part of the partnership.
5. The three Plaza Extra Supermarkets have always been jointly managed by Yusuf and Hamed, eventually with one member from each family acting as a co-manager for each of the three stores. This joint management has been critical to the success of these three stores



6. This joint management has been very successful, as evidenced by the fact that the stores generated over \$43,000,000 in net profits (after estimated taxes and all expenses) between 2003 and 2010, which was escrowed with Banco Popular Securities under an order entered in the criminal proceedings pending in the District Court.
7. Indeed, the three stores now employ approximately 600 people and service both St. Croix and St. Thomas.
8. A criminal case for tax fraud was filed in the District Court of the Virgin Islands in 2003 against United Corporation and several members of the Yusuf and Hamed families, including myself and Fathi Yusuf. My father, Mohammad Hamed, was not charged (and never has been charged).
9. Prior to the filing of the criminal case, all profits from the three Plaza Extra Supermarkets had been distributed equally between my father and Fathi Yusuf. As I testified at the hearing in this matter, they had primarily used the funds to buy properties throughout the Virgin Islands, placing the properties in the names of various corporations that were owned 50/50 by the Hamed and Yusuf families.
10. As I already noted, after the criminal case was filed, the net profits of the three Plaza Extra Supermarkets have been escrowed and still have not been distributed.
11. After a plea agreement was reached in the criminal case in 2010, the charges against the individual defendants were dismissed, but United Corporation pled guilty and is still awaiting sentencing. In this regard, United Corporation was required to do several things before sentencing, including the filing of true and accurate tax returns for the time period between 2002 and 2010, as no returns were filed while the criminal charges were pending, although estimated tax payments were made quarterly.
12. After the plea, the three Plaza Extra Supermarkets continued to operate as before, with one member of each family acting as a co-manager in each store.
13. In early 2012, Fathi Yusuf had his lawyer contact me pursuant to the power of attorney I have for my father, who informed me that Fathi Yusuf wanted to break up the partnership.
14. Discussions then followed as to what to do with the three Plaza Extra Supermarkets.

15. In June of 2012, when negotiations broke down, Fathi Yusuf's lawyer sent a letter taking over the partnership -- threatening to fire all of the Hameds.
16. By that time, tensions had developed between the Hamed and Yusuf families, which began to severely affect the day-to-day management of the three Plaza Extra Supermarkets.
17. In August of 2012 Yusuf unilaterally removed \$2.7 million from the supermarket account, something that had never been done in the past, absent the mutual consent of the two partners. Yusuf was specifically told that this should not be done and a demand was made to return them after they were removed. When the funds were not returned, this litigation was filed.
18. As noted by the court in its findings, tensions continued in the day-to-day management of the Plaza Extra Supermarkets resulting in (1) the police being called by Yusuf to the store, (2) repeated threats by Yusuf to remove all Hamed family members, (3) attempts by Yusuf to fire key managerial employees and (4) repeated statements by Yusuf that he would close the stores.
19. This tension had a direct negative effect on the day-to-day management of the business
20. However, now that the preliminary injunction has been issued, the business operations of the three Plaza Extra Supermarkets have been able to operate without threats and intimidation by Fathi Yusuf, which was occurring on almost a daily basis before the preliminary injunction was issued.
21. Thus, if the preliminary injunction is stayed, chaos will return to the Plaza Extra Supermarkets which would harm my father's interest in the three Plaza Extra Supermarkets.
22. As discussed, one open issue in the criminal case involves the filing of true and accurate tax returns by United Corporation and payment of taxes not covered by the estimated taxes that were paid during this time period.
23. United Corporation has insisted on filing tax returns for this time period claiming 100% of the profits of the Plaza Extra Supermarkets, even though it has repeatedly acknowledged here that 50% of these profits belong to my father, Mohammad Hamed.
24. As the plea agreement contemplated clearing up these tax issues, I became quite concerned about this process, as my father had not filed his taxes since 1997 (although taxes on his share of the Plaza Extra profits

had been paid), which I had presumed would be cleared up as part of the tax filings still due in the criminal case.

25. In this regard, an opportunity was provided to clear up all of its tax issues from the beginning of Plaza Extra's existence as part of the plea agreement, including interest and penalties. For example, a lump sum payment of \$10,000,000 was made in 2011 to satisfy all tax obligations occurring before 2002 for the three Plaza Extra stores.
26. It was subsequently calculated that \$6.5 million in taxes was still due for the time period between 2002 and 2010, even though estimated taxes has been paid quarterly.
27. As my father had not filed tax returns since 1997 and it was becoming clear that United Corporation might not include him in satisfying the tax obligations owed on the profits from the three Plaza Extra Supermarkets, my father filed all of his tax returns for the time period from 1997 to 2011 on May 16, 2013, as part of the IRB's amnesty program known as "Operation Last Chance." He reported 50% of the profits from the Plaza Extra partnership as his income. He also reported to the IRB that the taxes due on this income had been paid in full by prior payments made by Plaza Extra from the partnership accounts held by United Corporation, including the \$10,000,000 payment for additional taxes owed on the profits of the Plaza Extra Supermarket prior to 2002. Finally, he pointed out that significant taxes were still due on the income reported for the time period between 2002 and 2010, which was in the process of being paid as part of the closure of the criminal case.
28. My father also submitted documents to the IRB demonstrating that the three Plaza Extra Supermarkets were operated by a partnership (including all of the admissions submitted to the court in this case) and not by a corporation, even though United Corporation was now claiming 100% of the profits on its tax returns for this same time period.
29. On June 19, 2013, as part of the closure of the criminal case, a check for approximately \$6.5 million was submitted to the IRB for taxes owed primarily on the profits of the Plaza Extra Supermarkets.
30. While I did not know it at the time, I have since learned that these funds were removed from the escrowed profits at Banco Popular Securities at the request of the lawyer for the defendants in this case, as per the attached letter.
31. As the escrowed profits belong equally to my father, I was upset that they would be removed without his knowledge or consent, although we had all

EXHIBIT

B

Affidavit of Fathi Yusuf

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED

Plaintiff

Vs.

FATHI YUSUF
UNITED CORPORATION

Defendants

CIVIL NO. SX-12-CIV-370

CIVIL ACTION

ACTION FOR DAMAGES

AFFIDAVIT OF FATHI YUSUF

AFFIDAVIT OF FATHI YUSUF

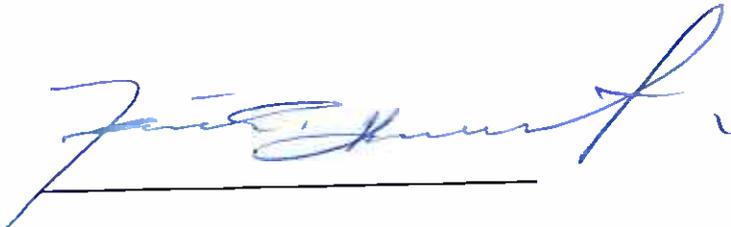
I, Fathi Yusuf, pursuant to 28 USC §1746, declare under oath that:

1. I am an adult of sound mind, and I am the treasurer and secretary of United Corporation, as such I am aware of the facts herein.
2. I have made repeated demands for rent outstanding to Plaintiff Hamed regarding the current rent obligations owed to United.
3. United Shopping Plaza is divided into various sized retail spaces. Each retail space is referred to as a "Bay." Since 1986, Bay 1, a 69,680 Sq. Ft. (approx.) retail space has been occupied by the Plaza Extra Supermarket in Sion Farm, St. Croix.
4. For the period of January 1st, 2012 through September 1, 2013 there is rent outstanding and due in the amount of \$1,234,618.98.
5. The period of January 1st, 2012 through September 1, 2013 reflects a 21 month rental period at a monthly rate of \$58,791.38 for a total of \$1,234,618.98. The monthly rate is calculated based on the sales of the Plaza Extra Store in St. Thomas.
6. This rate has been agreed upon by myself and Mohammed Hamed and was used to calculate the rent for the period of May 5th, 2004 through December 31st, 2011. The

attached Exhibit C shows how the calculations have been done, and to which everyone agreed to by issuing a check in the amount of \$5,408,806.74. Therefore, the monthly rate of \$58,791.38 is what the current monthly rent is.

7. For the period of January 1, 1994 through May 4th, 2004, there is rent outstanding in the amount of \$3,999,679.73 (69,680 Sq. Ft. of Retail Space @ \$5.55 sq. ft.). This reflects a rental period of 10 Years & 125 days. The rate of \$5.55 sq. ft. has always been significantly below market value.
8. United did not make a demand for the rent for the period of January 1, 1994 through May 4th, 2004 because records concerning the exact months that rental period began and ended were in the possession of the Federal government. Plaintiff knows well these records are in the possession of the federal government, and has never made any objections or denied that no agreement existed regarding the payment of rents.
9. It is respectfully requested that an Order permitting United withdraw the back rent of \$5,234,298.71 the value of all rents due for Bay 1.
10. As the fee simple owner of United Shopping Plaza, Defendant United is also entitled to repossess the premises immediately as a result of Plaintiff's bad faith refusal to allow United to withdraw rents at a rate that has already been agreed on.
11. Whether the court declares this to be partnership, a business agreement, or any other legal entity, the rent due must be paid, and there can be no excuse for failure to pay any rent.

Date: 9-9-2013



Fathi Yusuf

EXHIBIT

C

Calculations of Rent Due

United Corporation dba Plaza Extra

Tutu Park Store Sales:

1-1-2004 to 12-31-2004	32,323,902.88
Less: 1-1-2004 to 5-4-2004	-10,849,029.02
Sales 5-5-2004 to 12-31-2004	<u>21,474,873.86</u>

Tutu Park Store:

Paid Rent, Water, & Property Tax	263,577.53
Paid 1.5% Overage	71,914.23
5-5-2004 to 12-31-2004	<u>335,491.76</u>

1-1-2005 to 12-31-2005	515,361.54
1-1-2006 to 12-31-2006	590,533.60
1-1-2007 to 4-1-2007	255,699.33
4-2-2007 to 12-3-2007	468,689.55
1-3-2008 to 12-5-2008	540,180.12
1-5-2009 to 12-10-2009	529,799.66
1-6-2010 to 12-3-2010	527,565.40
1-1-2011 to 12-31-2011	<u>541,175.61</u>

Rent, etc. 5-5-2004 to 12-31-2011	4,304,496.57
Parking Lot Cleaning	126,000.00
Total Amount Paid	<u>4,430,496.57</u> a

Tutu Park Store Sales:

5-5-2004 to 12-31-2011	261,474,323.91
Portion of Sales - Rented building	217,895,269.93 b
Portion of Sales - Area built by Plaza	<u>43,579,053.98</u>

Total Paid as a % of Sales (Rented Bldg.) = a/b 2.0333147073%

Sion Farm Sales:

Sion Farm Sales 5-5-2004 to 12-31-2011	273,884,222.70
Less: R/X	-7,874,897.13
	<u>266,009,325.57</u>

Calculated Rent as a % of Sales Sion Farm \$ 5,408,806.74