IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED,	)	Case No. 1:12-cv-00099
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FATHI YUSUF and UNITED CORPORATION,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

Defendants submit this response in opposition to Plaintiff's Motion for a Temporary Restraining Order and/or a Preliminary Injunction (the "TRO Motion") (Doc. # 1-4).

Introduction

Mohammad Hamed's ("Hamed") true motivation in seeking the extraordinary remedy of injunctive relief is not to protect any alleged "partnership" rights. Rather, Hamed, through his son and "authorized agent," Waleed Hamed, who is a defendant in a related pending criminal action, and on behalf of the entire Hamed family, seeks, under the guise of an injunction, to bring United Corporation's ("United") operations to a grinding halt and thus somehow leverage the injunction as a means of extorting a private resolution of Defendants' claims regarding the Hameds' defalcation and skimming of the corporation's accounts. The TRO Motion should be denied.

Factual Background[1]

A. United Corporation

United was duly organized and incorporated as a corporation in the USVI on January 15, 1979, approximately 34 years ago, by Fathi Yusuf. (F. Yusuf Aff. ¶ 3; M. Yusuf Aff. ¶¶ 2-3).[2]

[1] For a general discussion *see* Doc. # 11 at p. 2-3.

United, in relevant part for purposes of this action, is in the "supermarket" business. (Complaint ¶¶ 5-7). Indeed, United always has been organized, maintained and owned by the Yusuf family. (M. Yusuf Aff. ¶ 4).

B. The "Plaza Extra Stores"

The Complaint references "a grocery supermarket on the east side of St. Croix named Plaza Extra, which was [and is] located in a shopping center operated by United." (Complaint ¶ 5). In fact, since 1979, United *alone* has owned and owns the subject shopping center, known as the "United Shopping Plaza," in fee simple absolute. (F. Yusuf Aff. ¶ 5; M. Yusuf Aff. ¶ 6). United finished building the United Shopping Plaza in 1983. (F. Yusuf Aff. ¶ 5).

C. The Criminal Action

In or around 2003, as referenced in the Complaint, United, along with certain of its shareholders and non-shareholders, including two of Hamed's sons, Waleed Hamed and Waheed Hamed, were indicated in a criminal action styled, *UNITED STATES OF AMERICA, et al. v. YUSUF, et al.*, Case No. 2005-15F/B (the "Criminal Action"), which is pending in this Court. (Complaint ¶¶ 8, 10; M. Yusuf Aff. ¶ 9).

As alleged, the "parties" are currently prohibited from removing funds from United's "banking and brokerage" accounts for the Plaza Extra Stores, apart for the stores' normal operations, because of an "Order" entered by this Court in the Criminal Action. (Complaint ¶¶ 8, 10). Additionally, on February 26, 2010, in the Criminal Action, United, its attorneys, the individual defendants in the action, and the Government entered into a Plea Agreement (the "Plea Agreement," which is Doc. # 1248 in the Criminal Action, and a copy of which is available in this action at Doc. # 1-11).

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[2] The October 9, 2012 Affidavit of Fathi Yusuf (Doc. # 11-1) is cited herein as "F. Yusuf Aff." and the October 9, 2012 Affidavit of Maher Yusuf (Doc. # 11-2) is cited as "M. Yusuf Aff."

At bottom, as explained in greater detail in the Notice of Removal (Doc. # 1 ¶¶ 14-26), the Plea Agreement is undisputedly based on the representations by the defendants in the Criminal Action, and their counsel, to the Government that, United exists and has always existed as a corporation, not a partnership; and that, related to the corporate and individual income tax returns at issue in the Criminal Action, no partnership exists or ever existed during the relevant tax periods.

At all relevant times, Hamed, through his sons, and otherwise, was aware of the proceedings in the Criminal Action, including the representations made therein, the execution of the Plea Agreement, and the entry of "Order[s]" as acknowledged in the Complaint. (Complaint ¶¶ 8, 10). Significantly, during those proceedings, Waleed and Waheed Hamed, as co-defendants in the Criminal Action and co-signatories of the Plea Agreement, never expressed the view that their father, Hamed (the plaintiff here), was a partner with Fathi Yusuf and/or a partner in United. (M. Yusuf Aff. ¶ 9). To the contrary, the defendants in the Criminal Action, including the Hamed sons, through their respective counsel and otherwise, represented at all relevant times to the Government and others that United was a corporation and that the Hameds' affiliation with United was a mere business arrangement – not a partnership. (F. Yusuf Aff. ¶¶ 11, 16; M. Yusuf Aff. ¶¶ 9-12).

D. The Hameds' "Skimming" From United Corporation

In 2011, United received a hard drive with scanned copies of voluminous records concerning the Criminal Action. (M. Yusuf Aff. ¶ 19). The records revealed substantial evidence of financial irregularities, including defalcation by Waleed Hamed of United's monies. (F. Yusuf Aff. ¶¶ 8-9; M. Yusuf Aff. ¶ 19). At all relevant times, Waleed Hamed had worked at the Plaza Extra store in Sion Farm in the sole capacity of an employee. (F. Yusuf Aff. ¶¶ 6; M. Yusuf Aff. ¶ 19).

For example, the records provided to United in the Criminal Action revealed that Waleed Hamed declared more than $7.5 million in stock and bond purchases in 1994, when his only salary as an employee of United never had exceeded $75,000 during the 1990s and he had no other known

source of income during that period. (F. Yusuf Aff. ¶ 8). Even the Government took the position that Waleed Hamed and his brother, Waheed Hamed, had "skimmed" money from United. (F. Yusuf Aff. ¶ 10).

E. The Families' Private Settlement Discussions

Fathi Yusuf confronted the Hameds in private about his serious concerns regarding their defalcation of and skimming from United's monies, and his desire to dissolve the two families' business relations. (F. Yusuf Aff. ¶¶ 8, 12). During subsequent attempts to settle the matter privately, the relations soured and the Hameds adopted a threatening, aggressive and hostile posture towards the Yusufs. (M. Yusuf Aff. ¶¶ 20-21). Although the parties' private negotiations continued until June 2012, no settlement agreement was reached, because, once the Yusufs' attorneys realized the Hameds' true intent in seeking to interject the term "partnership" into the negotiations, the parties could not agree on the fact that any Hamed family member, including Hamed, was actually ever a true partner with Fathi Yusuf and United or either of them. (F. Yusuf Aff. ¶ 13; M. Yusuf Aff. ¶ 24). Indeed, upon the realization of the Hameds' true and disturbing intent in seeking to use those terms, as noted above, Fathi Yusuf now understands that any formal or legal reference to Hamed as a "partner" in or with United and/or Fathi Yusuf would be untrue and misleading. (F. Yusuf Aff. ¶ 15).

E. The Complaint

In September, 2012, because their settlement demands were ineffective, the Hameds adopted and embarked upon a different extortion strategy – spiteful scorched-earth litigation, including the filing of the instant action on or about September 17, 2012.[3]

Argument[4]

[3] On or about September 19, 2012, the Hameds also filed against the Yusufs an alleged defamation action, styled as *Mohammad Hamed, Waleed "Wally" Hamed, Waheed "Willy" Hamed, Mufeed "Mafi" Hamed, and Hisham "Shawn" Hamed v. Fathi Yusuf*, case no. SX-12-cv-377 (V.I. Superior Court).

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). An injunction likewise "'should be granted only in limited circumstances.'" *Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship*, 938 F. Supp. 304, 307 (quoting *American Telephone & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994) (additional citation omitted)). "'This proposition is particularly apt in motions for preliminary injunctions, when the motion comes before the facts are developed to a full extent through the normal course of discovery,'" as applies here. *Barclays*, 938 F. Supp. at 307 (quoting *American Telephone*, 42 F.3d at 1427).

In particular, a preliminary injunction is appropriate "only if the [movant] 'produces evidence sufficient to convince the [trial] court' that *each* of four factors favor preliminary relief: 1) the likelihood that the plaintiff will prevail on the merits at the final hearing; 2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; 3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and 4)the public interest. *Barclays*, 938 F. Supp. at 307 (quoting *New Jersey Hosp. Assoc. v. Waldman*, 73 F.3d 509 (3d Cir. 1995) (additional citation omitted)). "[A] failure . . . to make the requisite showing regarding any one of these four factors must result in this Court denying [the] motion for a preliminary injunction." *Id.* (citing *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982)).

I. There Is No Likelihood of Success on the Merits.

[4] Although the TRO Motion requests "a temporary restraining order, pursuant to Rule 65(b), or a preliminary injunction, pursuant to Rule 65(a)," Plaintiff concedes that the matter should appropriately "just proceed as a preliminary injunction" under Rule 65(a). (Doc. # 1-4 at 1). Based on this concession, among other reasons, Defendants have moved to proceed on the TRO Motion as a request for a preliminary injunction and have framed the analysis in this Response in the context of Rule 65(a). Defendants' motion to proceed (Doc. # 1-9) is pending.

The first requisite showing the Court must consider in deciding whether to issue a preliminary injunction is "the likelihood that the plaintiff will prevail on the merits at the final hearing." *Barclays*, 938 F. Supp. at 307 ("the burden is on the party seeking [injunctive] relief to make a *prima facie* case showing a reasonable probability that it will prevail on the merits"). Here, Plaintiff alleges two causes of action under the VIUPA, both of which are premised on the supposed "partnership" between "Hamed and Yusuf" that allegedly was "formed" "[i]n the mid-1980's." (Complaint ¶ 5). However, as set forth in greater detail in the Motion to Dismiss (Doc. # 11), which is hereby incorporated by reference, Plaintiff clearly does not – and, as a matter of law – cannot "make a *prima facie* case showing a reasonable probability that he will prevail on the merits." *Barclays*, 938 F. Supp. at 307

Specifically, Plaintiff asserts "[i]t is undisputed that there is a partnership between the plaintiff and Fathi Yusuf regarding the operation of the three Plaza Extra supermarkets in question." (TRO Memo. at 6). This assertion is simply *false*. As reflected in the Affidavits of Fathi Yusuf (Doc. # 11-1) and Maher Yusuf (Doc. # 11-2), the parties bitterly dispute the existence of any such supposed partnership. Instead, the only relevant and truly "undisputed" facts between the parties are the absence of any written or memorialized partnership agreement supporting Plaintiff's fanciful claims; and absence of the existence of even a single partnership tax return, statement of partnership or other regulated declaration or document containing the words "partner" or "partnership" in the 29-year period during which Plaintiff incredibly now claims a supposed partnership existed. (*See, e.g.*, F. Yusuf Aff. ¶ 17).

Under these and similar circumstances, an injunction should not issue.[5] At bottom, because the supposed partnership between "Hamed and Yusuf" (Complaint ¶ 5) never existed, Plaintiff's

[5] *See, e.g., Southex Exhibitions, Inc. v. Rhode Island Builders Ass'n*, 279 F.3d 94, 97-98 (1st Cir. 2002) (affirming trial court's denial of preliminary injunction based on lack of likelihood of ultimate

causes of action under the VIUPA necessarily fail. (*See* Doc. #11 at 4-13). Separately, based on Plaintiff's active denial and general silence *for the past 29 years*, at least, of the supposed partnership, the doctrines of judicial estoppel, quasi-estoppel, unclean hands and/or issue preclusion bar Plaintiff from bringing the instant claims. (*See id.* at 13-18, 19-20). Lastly, the statute of frauds likewise bars any of Plaintiff's implied claims of interest in any real property allegedly owned by the supposed partnership. (*See id.* at 18). Accordingly, because Plaintiff has failed to establish the likelihood of ultimate success on the merits, the TRO Motion should be denied on this basis alone.[6]

II. There Is No Irreparable Harm.

A movant's failure to "meet their burden of demonstrating that they would suffer irreparable harm" in the absence of a preliminary injunction "constitutes a sufficient basis on which to deny the injunction." *IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 478 (3d Cir. 2007). Specifically, "a preliminary injunction should not be granted if the injury suffered can be recouped in monetary damages." *Id.* at 479 (citing *Frank's GMC Truck Center, Inc. v. Gen. Motors Corp.*, 847 F.2d

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success on the merits where, among other reasons in dispute regarding alleged partnership, the written agreement at issue, which described the contracting parties as "partners," "[wa]s simply entitled 'Agreement,' rather than 'Partnership Agreement'"; the alleged partner "only" agreed to advance monies, as opposed to "shar[ing] equally or at least proportionately in partnership losses"; and the alleged partner "never filed either a federal or state partnership tax return"); *Envirogas Inc. v. Walker Energy Partners*, 641 F. Supp. 1339, 1346 (W.D.N.Y. 1986) (finding, in partnership dispute, that movant seeking preliminary injunction failed to establish likelihood on the merits where, as here, there were "litigable questions as to the nature of the relationship of the parties and their intent under the [partnership] agreements" at issue in that case); *Bloomington Partners, LLC v. City of Bloomington*, 364 F. Supp. 2d 772, 780 (C.D. Il. 2005) (finding that movant seeking preliminary injunction failed to establish likelihood on the merits without first "convince[ing] th[e] court that an enforceable, complete, and unambiguous agreement existed" supporting the allegations); *Hull v. Paige Temporary, Inc.*, No. 04 C 5129, 2005 U.S. Dist. LEXIS 28826, at *44-45 (N.D. Il. Nov. 16, 2005) (finding, as a matter of law, that an alleged "phantom partnership program [wa]s unenforceable for indefiniteness" where "[n]o aspect of the phantom partnership program was ever put into writing," and the plaintiff's "statement" supporting her "interpret[ation]" of the alleged partnership contract "constitute[d] the only terms of the contract").

[6] Even assuming, *arguendo*, Plaintiff could establish merely *some* chance of prevailing on the merits, the TRO still should be denied. *See Valentino McBean v. Guardian Ins. Agency*, 52 F. Supp. 2d 518, 522 (D.V.I. 1999) (affirming Territorial Court's denial of preliminary injunction where the plaintiffs therein showed only "*some* chance of prevailing on the merits") (emphasis added).

100, 102 (3d Cir. 1988) ("[A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement . . . .")).

Rather, "'[a] clear showing of irreparable injury is an absolute necessity. The requisite injury must be more than merely serious or substantial, and it must be of a peculiar natures, so that money cannot atone for it.'" *McBean v. Guardian Ins. Agency*, 52 F. Supp. 2d 518, 521 (D.V.I. 1999) (internal citation omitted). "Further, there is no irreparable harm if an adequate remedy at law exists." *Id.* (citing, among other cases, *Jaz Ltd. P'ship v. Gov't of the Virgin Islands*, 25 V.I. 364, 369 (D.V.I. 1990)). "A movant's burden with regard to establishing irreparable harm is quite heavy" and the legal standard is "exacting." *Barclays*, 938 F. Supp. at 310. In the present action, Plaintiff argues "that [he] will be irreparably harmed [in five ways] if the requested [injunction] is not granted." (TRO Motion at 8). Plaintiff's argument is baseless.

a. Past Alleged Acts

Plaintiff points to "numerous [past] acts" that already have allegedly interfered with his supposed "statutory right to participate in the operation of the three Plaza Extra stores, jeopardizing the success of these three Plaza Extra stores and threatening their very existence," including the past act of "remove[ing] $2.7 million from the three Plaza Extra supermarket accounts." (TRO Motion at 8).

However, as here, where alleged damage due to past acts "has already been suffered" and the movant seeks the correction of past alleged wrongs, there is no irreparable harm. *See, e.g.*, *Envirogas*, 641 F. Supp. at 1344 (denying preliminary injunction where, among other reasons, "a large part of the predicted damage to [the movant]'s reputation ha[d] already been suffered" and "[a]ny further damage . . . as a result of a denial of a request for injunctive relief would appear to be minimal"); *First Health Group Corp. v. Nat'l Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 235 (M.D. Pa. 2001) ("[S]ince the purpose of a preliminary injunction is to deter, not to punish, any irreparable harm

alleged by Plaintiff must be prospective. A preliminary injunction is not a vehicle through which a plaintiff can seek correction of past wrongs.") (internal citation omitted). Moreover, the challenged acts, including the removal of $2.7 million dollars, are "a purely economic injury, compensable in money, [and thus] cannot satisfy the irreparable injury requirement." *IDT*, 250 Fed. Appx. at 478 (internal quotation and citation omitted).

b. Continued Operation of the Stores

Second, Plaintiff fears "the continued operation of the three Plaza Extra supermarkets." (TRO Motion at 8. However, there is nothing in the record to indicate that this fear has any reasonable basis whatsoever. *See McBean*, 52 F. Supp. 2d at 521 (finding that the movants therein failed to demonstrate the irreparable injury required for a preliminary injunction where "there [wa]s nothing in the record" credibly supporting the professed fear). The fear is likewise remote and speculative. *See Jaz*, 25 V.I. at 369 ("Remote or speculate harm is not sufficient to establish irreparable harm.") (citation omitted) (finding that allegation something "may" happen was insufficient to establish irreparable harm). Indeed, the record evidence shows that Plaintiff's fear regarding the continued operation of the subject stores is wholly unfounded. (*See* F. Yusuf Aff. ¶¶ 18-20).

In support of his supposed fear concerning the future operation of the stores, Plaintiff quotes, without any analysis, *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997). (TRO Motion at 8-9).[7]

[7] In *Anderson*, the court observed that irreparable harm requires "at least . . . some cognizable danger of recurrent violation of [] legal rights." 125 F.3d at 164 (internal citation and quotation omitted). The plaintiff in *Anderson*, a retired police officer, claimed that the Virgin Islands Police Department commenced an unlawful surveillance operation of him and his attorney solely in response to the officer's filing of an employment discrimination complaint against the Police Department, in violation of the officer's First Amendment constitutional freedoms. *Id.* at 159-60. Following the trial court's two-day hearing on the officer's motion for a preliminary injunction to terminate the surveillance operation pending a hearing on the merits, the "court found the Government's [*i.e.*, the Police Department's] witnesses 'completely uncredible' and held that the sole

The facts of this action are easily distinguished from the facts in *Anderson*. Moreover, the Third Circuit in *Anderson* found that the trial court, in ruling on the officer's motion for a preliminary injunction, had "err[ed]" in its analysis of irreparable harm. *Id.* at 163. Specifically, the Third Circuit found that the trial "court had failed to set forth findings regarding the Government's intention to continue its surveillance in the future" and had failed to "address the following questions: (1) whether the government's surveillance is ongoing, and (2) whether there is a credible threat that it will recur in the future." *Id.* at 163-64. In the present action, as set forth above, and in sharp contrast to *Anderson*, Plaintiff has failed to establish not only that his claims on the merits are credible, but also that there is a credible threat to the stores' future operation. *Cf. Anderson*, 125 F.3d at 159 (noting the trial court's finding, following a 2-day injunction hearing, that the government's witnesses were "completely uncredible" and finding that the police officer had established a likelihood on the merits, *i.e.*, that the "sole reason" for the subject police surveillance operation was an unlawful retaliation to the lawsuit filed against the Police Department) and 164 (observing that, if the professed risk of continued surveillance was not "true" or did not credibly exist, then "an injunction is unnecessary and unsupportable").

Moreover, "'[m]ore than a risk of irreparable harm must be demonstrated." *Barclays*, 938 F. Supp. at 310 (noting also that an injunction "'may not be used simply to eliminate a possibility of a remote future injury'") (quoting *Acierno v. New Castle Co.*, 40 F.3d 645, 655 (3d Cir. 1994)). Here, the fear concerning the continued operation of the subject stores is simply "a remote future injury," which does not constitute irreparable harm supporting injunctive relief under Plaintiff's "heavy" burden. *Id.* Any theoretical risks related to the stores' future operations likewise "can be adequately remedied by an award of monetary damages at a trial on the merits." *See McBean*, 52 F. Supp. 2d at

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reason for the Government's surveillance of [the police officer] and his attorney was the filing of [the officer]'s lawsuit" against the Police Department. *Id.* at 159.

521 (finding that risk exposure due to inability to obtain insurance and any additional future damage to insured property due to deterioration for lack of proceeds to rebuild can be adequately remedied by a monetary damages award).

c. Goodwill, Customers and Reputation

Plaintiff also fears the "the threatened harm to the goodwill and loss of customers of Plaza Extra." (TRO Motion at 9). This fear, however, as with any fear concerning the continued operation of the stores, is not credibly supported by any record evidence, as required, *McBean*, 52 F. Supp. 2d at 521; and, at best, is simply a "remote future injury" that does not constitute potential irreparable harm, *Barclays*, 938 F. Supp. at 310. In addition, the Third Circuit has made clear that injuries such loss of goodwill, consumers and reputation are "limited to 'the special problem of [consumer] confusion that exists in cases involving trademark infringement and unfair competition.'" *IDT*, 250 Fed. Appx. at 479 (citing *Acierno*, 40 F.3d at 653-54). "As the harm claimed by [Plaintiff in this action] is not analogous to the harm caused by consumer confusion, the line of cases recognizing loss of goodwill or reputation as irreparable harm is not applicable." *Id.*[8]

d. Future Family Business

Plaintiff further claims "that the Hamed family has operated these three supermarkets for over 25 years along with the fact that they want to keep these successful stores in the family business

[8] In support of his argument that the potential harm to the goodwill and loss of customers of Plaza Extra somehow warrants a finding of irreparable harm, Plaintiff relies on *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4th Cir. 1994). (TRO Motion at 9). Such reliance is unavailing. As noted above, the Third Circuit has limited the applicability of cases recognizing loss of goodwill, reputation or customers as irreparable harm between *competitors* "to the special problem of [consumer] confusion that exists in cases involving trademark infringement and unfair competition." *IDT*, 250 Fed. Appx. at 479 (internal citation and quotation omitted). *Multi-Channel TV* is a case between "*competing* cable television providers," 22 F.3d at 548 (emphasis added), and thus is inapplicable here. Moreover, "the decisions of other circuits," such as *Multi-Channel TV*, a Fourth Circuit decision, "are not binding on the district courts in this Circuit." *United States v. Maury*, Nos. 09-2305/09-2306/09-2345/09-2346/09-2356, 2012 U.S. App. LEXIS 19474, at *81 n.27 (3d Cir. Sept. 17, 2012).

in the future for new family members also warrants a finding of irreparable harm." (TRO at 9). In support of this claim, Plaintiff quotes, without any analysis, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970).[9] The claim is baseless.

Semmes, which was decided in 1970 in the context of a "strict appellate review standard," is inapposite. *See Augusta News Co. v. News Am. Publ'g*, 750 F. Supp. 28, 32 n.8 (D. Me. 1990) (analyzing *Semmes* and noting that the appellants in that case "failed to establish that there were abuses of discretion or clear errors of law in the trial courts' findings that the destruction of the appellees' businesses constituted irreparable harm"). Rather, as in *Augusta News*, "[t]he standard in this proceeding requires Plaintiff to establish that its business *will be destroyed* without the protection of a preliminary injunction." 750 F. Supp. at 32 n.8 (emphasis added). *See also Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 57 (2d Cir. 1979) (requiring, in the context of irreparable harm analysis, a credible showing of an "immediate [financial] disaster") (citing *Semmes*); *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 363 n.5 (2d Cir. 1974) (requiring, in the context of irreparable harm analysis, a credible showing of "an immediate and drastic financial peril") (citing *Semmes*).

Significantly, subject to this standard, Hamed has not established that the Plaza Extra stores "will be destroyed" without an injunction, or that there exists an "immediate disaster" or a "drastic

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[9] Plaintiff also relies on *Bryne v. Calastro*, 205 Fed. App. 10 (3d Cir. 2006) and *Kendall v. Russell*, No. 2007-126, 2008 U.S. Dist. LEXIS 3420, 49 V.I. 602 (D.V.I. Jan. 16, 2008), as cases "where the facts," according to Plaintiff, "are similar to those in this case." (TRO Motion at 9). However, a plain reading of those cases shows that the facts therein have no meaningful similarity to the facts here. Specifically, *Bryne* involves ERISA. 205 Fed. App. at *12. Following a preliminary injunction hearing to remove the administrators pending a full hearing on the merits, the trial court in *Bryne* found "an overwhelming amount of documentary support for [the union's] allegations concerning excessive expenditures and salaries," though "the record [wa]s almost completely devoid of any facts contradicting [the union's] assertions." *Id.* at *13. No such situation or "overwhelming" disparity of evidence exists in this action. *Kendall* involves an action brought by a sitting judge of the Superior Court against the members of the Virgin Islands Commission on Judicial Disabilities arising under the Revised Organic Act and challenging the commission's commencement of removal proceedings against the judge under a codified legislative act. 49 V.I. at 606-608. The facts in *Kendall* thus are hardly "similar" to those in this action, as Plaintiff claims.

financial peril," and has not even addressed these showings. Plaintiff also has not established, or even addressed, what percentage, if any, of the businesses at issue "will be destroyed" without an injunction. *See Augusta*, 750 F. Supp. at 32-33 (noting its "satisf[action] that a ten percent loss of business cannot constitute irreparable injury justifying the radical remedy of a preliminary injunction" and that even a proven "loss of thirty percent of . . . business was not sufficient to constitute irreparable injury") (citing *Stendig Int'l, Inc. v. B & B Italia*, S.p.A., 633 F. Supp. 27, 28 n.3 (S.D.N.Y. 1986)). Plaintiff likewise has failed to present any evidence whatsoever regarding his or his family's own finances, for purposes of somehow arguing, under *Semmes*, that he "cannot survive" without the drastic remedy of an injunction until a full trial can be had on the merits. *See Buffalo Courier-Express*, 601 F.2d at 57 (rejecting alleged irreparable harm where the evidence did not establish a financial threat of "immediate disaster") (distinguishing *Semmes* on this basis); *SCM*, 507 F.2d at 363 n.5 (affirming denial of preliminary injunction where the evidence did not establish "an immediate and drastic financial peril") (distinguishing *Semmes* on this basis).

Further, Defendants strongly dispute the claim that any member of the Hamed family has ever "operated" the stores as a partner or otherwise. (TRO Motion at 9). Indeed, Defendants aver exactly the opposite. (*See* F. Yusuf Aff. ¶6; M. Yusuf Aff. ¶19). Thus, unlike in *Semmes*, a franchisor-franchisee dispute in which the movant (the franchisee) relied on the terms of an "existing valid" written franchise agreement with Ford Motor Company (the franchisor) in seeking an injunctive, 429 F.2d at 1206, there is no such "existing valid" partnership agreement in this action. *See Augusta*, 750 F. Supp. at 33-34 (distinguishing *Semmes* on this basis, and noting that a party seeking injunctive relief "cannot reasonably expect that the law would guarantee the continued existence of [an alleged business] relationship . . . simply because the consequence of discontinuing that relationship would be the loss of its business," where, as here, the party has failed to credibly establish the existence of an "existing valid contract[]" or enforceable promise). Nor does Plaintiff establish, or even assert in

the TRO Motion, any material "unequal status as existed in *Semmes*." *See Rumbaugh v. Beck*, 491 F. Supp. 511, 519 (E.D. Pa. 1980) (stating that, where the company at issue in that case was "a two-man enterprise consisting of the plaintiff and the defendant," which company "hardly [could] be likened to a Ford Motor Company" against one of its franchisees, "any analogy with the application of *Semmes*" was "militate[d]").

e. Removal of Assets

Plaintiff's final purported fear of irreparable injury is that, because, in Plaintiff's own estimation, "Yusuf has extensive investments overseas," it somehow follows "that [Yusuf] could easily remove these significant assets beyond the jurisdiction of this Court if the [injunctive] relief sought is not granted." (TRO Motion at 10). In support of this fanciful argument, Plaintiff claims that "the Third Circuit has repeatedly held irreparable harm may be found where there is a request for injunctive relief to freeze assets if it appears those assets may be removed if such relief is not granted." (*Id.* (citing *Elliott v. Kiesewetter*, 98 F.3d 47, 58 (3d Cir. 1996) and *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 (3d Cir. 1990))). The argument is meritless, as Plaintiff's claim of what "the Third Circuit has repeatedly held" in *Elliott* and *Hoxworth* is misleadingly inaccurate and misstates the applicable standards. In addition, any additional freeze order would be unnecessary given the freeze order that is currently in place, and thus does not constitute irreparable harm.

In *Elliott*, involving intra-family claims brought by the beneficiaries of a family estate against the estate administrator, the Third Circuit expressly "emphasize[d] that this is an *extraordinary case* that demanded *extraordinary measures* by the district court to preserve what was left of the family assets." 98 F.3d at 58 (emphasis added). Indeed, in sharp contrast to the situation here, the underlying litigation in *Elliott* involved three separate proceedings – (1) an "Accounting Action," which "was a demand for an accounting of the[] family's assets and [wa]s premised on various claims against [the administrator] alleging breach of fiduciary duties, fraud, unjust enrichment and

violations of the Uniform Gifts to Minors Act," *id.* at 50; (2) a "Fraudulent Conveyance Action," which was "a second lawsuit alleging that [the administrator] and his second wife [] fraudulently conveyed [the subject] family assets . . . into the joint or individual name of [the administrator's wife] . . . in order to protect the assets from a judgment in the Accounting Action," *id.*; and (3) a third action before the trial court seeking an injunction to, in relevant part, "to preserve the [family] assets . . . in the possession, custody or control of [the administrator] that w[ould] be necessary to satisfy the judgment and other equitable remedies ultimately to be entered in the Accounting Action," *id.* at 52. The trial court, after considering the relevant evidence, entered an injunction, referred to as the "Freeze Order," which on appeal was the subject of the Third Circuit's relevant discussion in *Elliott*. *Id.* at 52.

Importantly, the primary basis supporting the issuance of the Freeze Order in *Elliott* was that, prior to its issuance, a full trial on the merits already had occurred in the Accounting Action, in which trial a "jury [had] returned a verdict" against the administrator; the jury had "determined, *inter alia*, that [the administrator] had breached various fiduciary duties that he owed to the Beneficiaries"; and the "[e]vidence at trial" revealed that the Beneficiaries held property interests in numerous assets that the administrator had acquired. 98 F.3d at 51-52. "The evidence at trial [also] revealed that the total principal value of the family assets to which the Beneficiaries had an interest equaled over $ 3.4 million," and the jury separately awarded punitive damages. *Id.* at 54. Following the jury trial in the Accounting Action, the administrator "moved for a new trial or alternatively for judgment notwithstanding the verdict," in which motion the administrator challenged neither "the sufficiency of the trial evidence" nor "the jury's findings of liability on the basis that the evidence was insufficient." *Id.*

Accordingly, under the "extraordinary" facts at issue in *Elliott*, none of which are at issue here, the Third Circuit found that the district court had not abused its discretion in entering an

injunction freezing the assets of the administrator. *Id.* at 55. Indeed, "[t]he district court entered the Freeze Order only after the jury found that the Beneficiaries had a legitimate interest in the [subject] family assets and that [the administrator], in acquiring the Beneficiaries' interests in the assets, had breached his fiduciary duties, committed fraud, and unjustly enriched himself." *Id.*

Hoxworth, involving the Third Circuit's review of a "preliminary injunction designed to protect a potential future damages remedy in a class action alleging securities fraud and civil RICO violations," also presented "extraordinary circumstances," none of which are present here. 903 F.2d at 189. Like in *Elliott*, but unlike here, the plaintiff-penny stock purchasers in *Hoxworth* "filed three separate" actions, which eventually "were consolidated for purposes of pretrial proceedings." *Id.* at 190-91. The plaintiffs in *Hoxworth* then moved for a preliminary injunction freezing the assets of the defendant-securities dealers, whereupon the district court conducted a four-day evidentiary hearing on the preliminary injunction and granted it. *Id.* at 191.

Based on the weight of "undisputed evidence" introduced at the subject injunction hearing, including "essentially uncontroverted evidence regarding [the securities dealers'] sagging financial fortunes," the district court in *Hoxworth* found, in relevant part, that the stock purchasers "were likely to prevail on the merits of their various securities claims," the securities dealors' "markups and markdowns were excessive," and the dealers "intentionally withheld [material] information from its customers," the stock purchasers. *Id.* at 193. With respect to irreparable harm, the district "court [also] determined that in light of [the dealers'] significant financial and legal difficulties," the dealers were "unlikely to have sufficient assets to satisfy plaintiffs' potential future judgment." *Id.* The district court likewise determined that a specific dealer, a co-defendant in *Hoxworth*, had "failed to offer a plausible business explanation for [certain] asset transfers" that he *already* had made. *Id.* "Based on those findings, the district court concluded that [this co-defendant] was attempting to put

his assets beyond the reach of the court, which threatened the irreparable injury of making plaintiffs' likely future judgment against [the dealer] unenforceable." *Id.*

In the case at bar, in sharp contrast to *Hoxworth*, Plaintiff has not established that an injunction is warranted due to Defendants Fathi Yusuf's and United Corporation's "escalating financial difficulties" or prior "substantial transfers of assets beyond the power of this court." *Cf. Hoxworth*, 903 F.2d at 205 (affirming district court's finding of irreparable harm based on evidence of the securities dealers' prior "substantial transfers of asserts beyond the power of th[e] court" and "escalating financial difficulties") (internal quotation and citation omitted).

Notwithstanding Plaintiff's statement of belief regarding undisclosed "investments overseas" (TRO Motion at 9), and his belief as to "eas[e]" of transfer to those jurisdictions (*id.*), Plaintiff likewise has introduced no evidence whatsoever regarding "the likelihood that [any] particular foreign jurisdiction at issue will fail to allow plaintiffs their day in court." *Hoxworth*, 903 F.2d at 207. Indeed,

> [a]s the discussion in *Hoxworth* shows, "a mere statement of belief that the defendant can easily make away with or transport his money or goods" is an insufficient basis for a finding of likely irreparable harm. Cases in which courts have restrained the disposition of assets to protect damages remedies have, like *Hoxworth*, commonly involved evidence that the defendants have already attempted to put assets out of reach or engaged in financial misconduct. This is not such a case. Here Plaintiff has provided no real basis for his assertion that Defendant plans to transfer assets out of the country, and nothing in his submissions or the record as a whole provides support for such a belief.

Dubois v. Abode, 2004 U.S. Dist. LEXIS 30596, at *6 (D.N.J. 2004)(internal citations omitted) (simple conclusion that, because the defendant was an Arab (a native of Lebanon), he was likely to transfer his assets there, was "far too thin to support preliminary injunctive relief"; requiring instead a showing of definite "plans to remove [] assets from the reach of a possible judgment") (unpublished opinion).

The Third District also cautioned in *Elliott* that "the equitable power in certain situations to protect a future damages remedy . . . is far from unlimited." *Id.* at 57 (citing *Hoxworth*, 903 F.2d at 197). Further, though a trial court enjoys this equitable power, it "does not mean that such an injunction [freezing assets] is appropriate in a run-of-the-mill damages action. The traditional requirements for obtaining equitable relief must be met." *Id.* (quoting *Hoxworth*, 903 F.2d at 197). Similarly, "a court may not preserve a potential money judgment by freezing a defendant's assets that are unrelated to the underlying litigation." *Id.* at 58 n.8 (citation omitted). In addition, "'as a general rule an injunction will not be issued in a money damages case,'" such as the present case, "'prior to a determination of liability and an award of damages.'" *Hoxworth*, 903 F.2d at 197 n.16 (quoting *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1119 (3d Cir. 1989)).

At bottom, Plaintiff's reliance on *Elliott* and *Hoxworth* is unavailing in the present run-of-the-mill damages case involving an alleged "partnership" dispute, especially prior to any determination of liability and damages award.[10]

III. The Defendant Will Suffer Irreparable Harm if the Preliminary Injunction is Issued.

Plaintiff's request for injunctive relief, if given, would irreparably harm United Corporation as a going concern. Plaintiff has requested that this Court "enjoin[] Yusuf *from withdrawing any funds from any* partnership bank account or brokerage account without the consent of Hamed …." (TRO Memo. at p. 11 (emphasis added)). United Corporation's day-to-day business operations and, in turn, its value as a going concern, would be irreparably harmed as Hamed would be allowed to veto any request to withdraw any fund from any bank account. The relief requested would allow Hamed

[10] Separately, even if the requested asset freeze was supportable legally and factually, which it clearly is not, it would be wholly unnecessary in light of the asset freeze that is already in place in the Criminal Action, as Plaintiff acknowledges. (Complaint ¶¶ 8, 10).

to micro-manage United Corporation and would provide unfettered discretion, and by extension complete control, of United Corporation.

Indeed, if "one of the goals of the preliminary injunction analysis is to maintain the status quo," *Opticians Ass'n of America v. Independent Opticians of America,* 920 F.2d 187, 197 (3d Cir. 1990) (internal citation omitted), then this goal would not be achieved as the preliminary injunction gives the Plaintiff much more control then he has ever had. What could be more of a harm than to allow a party, whose interest's are clearly adverse to Defendants, complete and total control of cash flow of a business that processes thousands of transactions a day? In essence, the business interloper will have ascended to the throne of United Corporation. This Court should reject Plaintiff's invitation to do so.

IV. A Preliminary Injunction is Not in the Public's Interest.

"[T]he public interest is hardly served by the sheer *in terrorem* effect of allowing plaintiffs to impose (or even threaten to impose) burdens on defendants above and beyond those necessary to protect plaintiffs' otherwise unsatisfiable claims." *Hoxworth*, 903 F.2d at 198. Contrary to the Plaintiff's assertion, in this case an injunction is not only *not* in the public's interest it is actually contrary to the public's interests.

As stated above, the true intent of the Plaintiff's Complaint is to delay and frustrate the on-going Federal Criminal Court case. However, as Congress has provided in the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, that, in general, federal criminal cases must come to a prompt resolution in 70 days. *See also* Fed.R.Crim.P. 50 (calling for the prompt disposition of criminal cases and providing that criminal cases take precedence over civil cases).

Because a grant of a preliminary injunction in this civil case will delay and frustrate the prompt resolution of the Criminal Action the public's interest is not served under any objective view of the facts.

Additionally, as detailed in the Defendants' motion to dismiss (Doc. # 11), the Plaintiff's case rests upon an oral argument that fails to comport with the VIUPA and the Statute of Frauds. The public interest is *not* served by permitting a litigant to wait decades after a purported partnership was made and then allow him to bring a civil case against the other purported partner. Simply stated, the equity doctrines of laches, unclean hands, estoppel (judicial and/or quasi), *see* Doc. # 11 at p. 13-18, militates in favor of finding *against* the imposition of a preliminary injunction.

Finally, in respect to the Plaintiff's claim that the continued operation of three large supermarkets is in jeopardy (and by extension the hundreds of employees working there), such an allegation is specious, at best. As demonstrated in the affidavit of Fathi Yusuf, there has been no effect on United's day-to-day operations, nor is there any plan to cease operations. (*See* F. Yusuf Aff. at ¶18). What Plaintiff has done is to raise the specter of a non-existent problem to create a situation that the resolution of, i.e., the imposition of a preliminary injunction, is the very outcome he desires. The Court should reject such an Hegelian construct. Accordingly, this fourth factor also weighs against the request for equitable relief.

Conclusion

For all of the foregoing reasons, Defendants request that this Court enter an Order denying Plaintiff's Motion for a Temporary Restraining Order and/or a Preliminary Injunction, and awarding to Defendants such further relief as the Court deems appropriate.

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Respectfully submitted,

/s/ Joseph A. DiRuzzo, III
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Dated October 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on October 10, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of a Notice of Electronic Filing generated by CM/ECF:

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