S. Ct. Civ. No. 2013-0040

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.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX
Super. Ct. No. 370/2012 (STX)
HON. DOUGLAS BRADY, PRESIDING

REPLY BRIEF OF FATHI YUSUF & UNITED CORPORATION

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POINT I – THE SUPERIOR ERRED IN ENTERING A PRELIMINARY INJUNCTION

Appellee in his efforts to justify the Superior Court's preliminary injunction order ("Order") makes certain errors as discussed *infra*. However, as a threshold matter, Appellee glosses over the factual basis Appellee initially asserted to the Superior Court for the request for extraordinary equitable relief, JA-087 (at ¶20), for the second request for extraordinary relief, JA-301. Further, the claim that a "critical"[1] employee was improperly terminated was clearly in error as the evidence shows that the employee consistently self-reported that she worked about twelve hours a day for a full calendar year. *See* JA-1298-1341. Appellee promised a case that never came to fruition, but now on appeal Appellee understandably turns his focus to the facts that were not material to the Rule 65 motions. And no wonder – the Rubicon was not crossed, the stores were not closed, the inventory was being ordered, and the only "critical" employee to be fired was caught falsifying her hours. While trial courts have discretion in entering preliminary injunctions, that discretion is not unfettered and this Court should vacate the Superior Court's published memorandum opinion and Order for abusing its discretion.

A. THE COURT BELOW ERRED IN CONCLUDING THAT APPELLEE DEMONSTRATED A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

Before Appellants delve into the test for a preliminary injunction, *see Petrus v. Queen Charlotte Hotel Corp.,* 56 V.I. 548 (V.I. 2012), an initial observation - Appellee conflates whether there was an agreement in the first instance with whether that agreement is enforceable. To that end, Appellants have been entirely consistent – they do not dispute that there was an agreement in the mid 1980's, instead they argue that the agreement is different than the one alleged in this action.

i. Appellee Did Not Show Irreparable Harm – Damages Case

[1] *See* JA 301.

At its core, this case is about one thing – money.[2] *See* JA-398 (acknowledgment that the lawsuit was filed to seek the return of monies). Appellee argues that a family partnership is different and, as such, there can be irreparable harm. There is no limiting principle to Appellee's argument and, thus, Appellee by necessity is converting extraordinary relief into ordinary relief. This Court should reject a call to relax the well-established standards that "a preliminary injunction should not be granted [when] the injury suffered can be recouped in monetary damages." *IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007) (citation omitted).

Appellee recognized that the Superior Court predicated its basis for finding that there was irreparable harm on, *inter alia,* that: Hamed has been deprived of access to the bank accounts. Br. at p. 20. But Appellants were denied due process of law by not being able to dispute why the Hamed family members had been denied access and had their authorizations removed. The Superior Court abused its discretion because it used an "improper procedure in making a determination" by relying upon a hearsay affidavit as substantive proof without the aid of cross-examination. *See Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 821 (11th Cir. 2010).

Furthermore, as discuss *infra* at pages 12-13, the reason why the Hamed family members were removed is because Waleed and Mufeed Hamed acted in concert to steal $460K. The decision to remove the Hamed family members clearly falls within the "business judgment rule."[3] The Superior Court erred by relying on one-sided evidence of Appellee, and compounded this error by failing to employ the proper analysis as to whether the decision to remove the Hamed family members was justified under the "business judgment rule."

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[2] This case is not about a piece of land, or a work of art, that is unique. Instead this case is about the alleged ownership of three supermarkets. Indeed, no one could reasonably dispute that if Appellee was offered $500M he would settle the case (United would sell the stores for much less). And that illustrates the point – "the business of business is business."* *Milton Friedman (*Capitalism and Freedom* (1962)).

[3] *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974), whereby the "directors of a corporation . . . are clothed with [the] presumption, which the law accords to them, of being [motivated] in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge."

Appellee also argues that the Superior Court was correct in entering the Order to protect the assets of the purported "partnership" and points to the $2.7M withdrawn in September of 2012. However, the record clearly belies that notion. United's President testified that notice was given prior to the withdrawal of the $2.7 million amount, as an offset to the Hamed's prior defalcations. JA-578. Thus, the withdrawal was done because of monies taken by the Hameds in the past, and not because of some nefarious intent to dissipate any assets of the operations of the Plaza Extra Stores. If indeed there was any intent to dissipate any assets, Appellants could have done long done so long before the preliminary injunction hearing, Appellants of course did not do so. Now however, Appellee couches the withdrawal as a risk of dissipation of partnership assets, and not an accounting issue which this entire matter is essentially all about – any why at bottom this is a damages case.

However, when asked about the receipts and documents to substantiate the $2.7M figure, Maher Yusuf directly addressed this issue with the following testimony:

Q What documents did you give them?
A A stack of documents.
Q All these letters said they never got these documents, did you see that?
A That's untrue.
Q Where are the documents? Who did you give them to?
A Waleed Hamed and the whole family was there.
A *It was even in your office.*
Q *In my office?*
A *In your office, sir.*

JA-581-82 (emphasis added).[4] The Superior Court failed to consider this testimony, and further failed to make the finding that Maher Yusuf's testimony was not rebutted by Appellee, nor any of his "agents." Nothing in opinion indicates that the Superior Court ever considered Maher Yusuf's testimony concerning the documents and receipts that were provided. As a matter of fact, that the Superior Court did not consider *any* testimony from Appellants regarding the $2.7M withdrawal. Accordingly, the assertion that Appellants somehow were depleting the purported "partnership"

[4] The testimony as to Attorney Holt's office referred to the settlement discussions held between the two families in July of last year.

assets, and therefore Appellee was deserving of the drastic remedy of a preliminary injunction, is based on the mischaracterization of a single fact, namely the single offset-withdrawal of $2.7M by United. As such, the Superior Court's findings regarding the withdrawal of the $2.7M as an act to dissipate the assets of the purported "partnership" was clear error.

ii. There is No Enforceable "Partnership" Agreement

1. The Statute of Frauds Bars the Alleged Agreement

Appellee's opposition regarding the statute of frauds misses the point entirely. Significantly, Appellee testified that he was to be Fathi Yusuf's "partner" for the stated term of "forever." (JA-1544 at ¶ 111). Where an unwritten agreement purports to provide a stated term of greater than one year, the Second Circuit has unambiguously held that "the statute [of frauds] must apply to joint ventures having a stated term of more than one year." *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 827 (2d Cir. 1984). Appellee ignores *Ebker*.

Similarly, Appellee's authority is distinguishable on the basis that, as noted in *Ebkar*, "[oral] joint ventures are *usually* not for a stated term but for a stated purpose, and the implicit assumption that, however unlikely, this purpose *could be* achieved within one year." 739 F.2d at 827 (emphasis added). The present action does not involve the "usual" oral joint venture, as, again, Appellee testified to a stated term of "forever," which the statute of frauds renders unenforceable, and which disposes of this action as a matter of law. *Ebkar*, 739 F.2d at 828. *See also Fountain Valley Corp. v. Wells*, 98 F.R.D. 679, 683-65 (D.V.I. 1983) (holding that, under Virgin Islands law, "statute of frauds . . . bar[s] this Court from enforcing any alleged joint venture agreement" that "was to exist for more than one year"); *Rivkin v. Coleman*, 914 F. Supp. 76, 79 (S.D.N.Y. 1996) (holding that New York statute of frauds barred enforcement of alleged oral joint venture agreement where, as here, plaintiff testified that agreement was to continue "*forever*").[5]

[5] Appellee's reliance on *Smith v. Robson* is not in conflict and does not support Appellee's position, as the Territorial Court therein correctly noted that, in the usual case, "[p]artnerships and joint ventures without fixed terms are deemed

The partial performance exception to the applicability of the statute of frauds is inapplicable. First, "[p]art performance is an equitable doctrine available only where the principle relief sought is specific performance of the oral agreement, and has no application in an action at law for money damages." *Peer v. Hajoca Corp.*, No. 94-1542, 1995 U.S. App. LEXIS 12111, at *7 (4th Cir. Dec. 30, 1994) (applying Maryland law). Because the "principle relief" sought in this action is money damages, the equitable doctrine of part performance "has no application." *Id.* Second, the exception "only applies where 'part performance [] is clear, certain and definite in object and design as to be unequivocally referable to the agreement, [] which will precipitate a fraud if the agreement is not enforced." *Abed v. Azar*, No. 08-Civ-4404, 2010 U.S. Dist. LEXIS 1649, (S.D.N.Y. Jan. 5, 2010) at *11-12. Appellee has not established, let alone even pled, any such "clear, certain and definite" fraud in this action.

In addition, if "an act is equally consistent with an explanation having a basis in other than the alleged oral [partnership] agreement, the part performance relied upon will not remove the agreement from the bar of the Statute of Frauds." *Id.* at *12 (citation omitted). Here, Appellee's employment in the warehouse is "equally consistent" with the logical explanation that Fathi Yusuf – as a personal favor to a relative (a brother-in-law) – agreed to provide Appellee, a livelihood in Fathi Yusuf's own supermarket business with a share of the business' profits as employees only, without the legal liabilities and responsibilities of a *de jure* partner.[6] Accordingly, when, "there is a logical explanation for the actions of the parties [] that does not require the existence of the alleged joint venture agreement . . ., there is no partial performance of the agreement and the alleged relationship

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to be 'at will' subject to dissolution by either partner at any time." 44 V.I. 56, 61 (Terr. Ct. 2001) (noting that the alleged "agreement [in *Smith*] did not set forth any specific term"). However, as noted above, the present case does not involve the *usual* case, because Appellee has expressly identified a specific term of duration, *i.e.*, "forever." At best, even ignoring *Ebkar* and Appellants' other cases, *Smith* reflects that any determination regarding the statute at this preliminary stage still would be unwarranted, as "[d]eciding whether there was a contract between [the Hameds] and the [Yusufs] requires a determination of the intent of the parties – whether they manifested a mutual intent to be bound – and this question is one for the fact finder." *Smith*, 44 V.I. at 60-61 (citing *Macedon v. Macedon*, 19 V.I. 434 (Terr. Ct. 1983)).

[6] Tellingly, Appellee was not indicted in the criminal action on what Appellee now calls "partnership" income; he did not go to jail along with his "partner" (Fathi Yusuf); he did not sign any loan documents; did not pay partnership taxes or file partnership returns for more than 26 years until filing this action; and did not make any "ultimate calls" and major decisions of the business, all of which liabilities Fathi Yusuf assumed alone.

may not be used as the basis for seeking an accounting under partnership law." *Id.* at *14. *See also Fountain Valley*, 98 F.R.D. at 684 (rejecting partial performance exception upon appellate court's "conclusion that any performance on the part of [the defendant] was motivated by purely business reasons . . . and not the alleged joint venture agreement"). At best, any dispute regarding the applicability of the statute of frauds – as with a myriad of other disputed factual issues in this action – should have been submitted to the jury for a trial on the merits at the appropriate time, and should not have been decided by the trial court at the preliminary injunction stage. *See, e.g., Smith*, 44 V.I. at 60.

2. Statute of Limitations

Appellee mischaracterizes the evidence, as he must, because the record demonstrates Appellee's claim is barred by the statue of limitations. Appellee in his brief states: "[t]he critical transfer of Yusuf's stock diluting his interest to 7.5% … was not disclosed until the Appellant's 2012 Rule 12 filing in this case." Br. at p. 27. However, this conflicts with the testimony of Appellee's own "authorized agent." Waleed Hamed's testimony was:

> Q And in respect to that, well, tax transaction, that conversion from a C Corporation to an S Corporation, some of the shares of United Corporation they were transferred from Mr. – I'll be specific, Fathi Yusuf and his wife to their children, you were aware of that?
> A Yes.
> Q This was late 1999 Early 2000?
> A Yes.

JA-466.

So, when Appellee states that this was not disclosed, the record contradicts this statement. Because the Appellee's "authorized agent" had actual notice, since at the latest 2000, the statute of limitations renders the Appellee's claims legally unenforceable. And for good reason, the very point of the statute of limitations is to force litigants to enforce their purported rights/claims in a timely manner or else suffer the consequences of losing those rights/claims. Indeed, just recently the U.S. Supreme Court observed:

> the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.

Gabelli v. SEC, 133 S. Ct. 1216, 1221 (Feb. 27, 2013) (internal citations and quotations omitted). Further, Appellee is mistaken about the triggering event that starts the statute of limitations. "[A] right accrues when it comes into existence…. Thus the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli,* 133 S. Ct. at 1220 (internal citations omitted).

Here, the relevant facts are not in dispute, Fathi Yusuf and his wife owned 100% of United d/b/a Plaza Extra until, at the latest, 2000 when Fathi Yusuf and his wife divested themselves of their stock in United and gave it to their children. Accordingly, Fathi Yusuf cannot provide Appellee the relief he seeks, i.e., giving 50% of United's Plaza Extra business to Appellee.[7]

Although Appellee does not explicitly state, it appears that he is arguing that United is still sending rent notices qualifies as falling with "continuing violations" doctrine. *See Crawford v. Wash. County Children & Youth Servs.,* 353 Fed. Appx. 726, 729 (3d Cir. 2009). Under this exception, "an action is timely so long as *the last act evidencing the continuing practice falls within the limitations period*; in such an instance the court will grant relief for the earlier related acts that would otherwise be time barred." *Cowell v. Palmer Township*, 263 F.3d 286,292 (3d Cir. 2001) (internal quotations omitted, emphasis added). However, the plaintiff bears the burden that the "continuing violations" exception applies, *see West v. Philadelphia Elec. Co.,* 45 F.3d 744, 754-55 (3d Cir. 1995), which Appellee failed to do below. Under no circumstances can the fact that a rent notice was issued to Appellee qualify as a "violation" so as to provide a basis to assert the "continuing violations" exceptions to the statute of

[7] Indeed, this is why it appears Appellee names *both* Fathi Yusuf and United Corporation as Defendants in the case below.

limitations. Consequently, Appellee cannot rely on the rent notices to toll the statute of limitations, and the Superior Court's conclusion was in error and must be reversed.

3. Retirement of Appellee

Appellee avers that Appellants advanced the retirement of Appellee "after the PI Order, so it is untimely under S. Ct. R. 4(h)." Br. at p. 27. Appellee is mistaken, Appellants raised this issue at page 5-6 of their supporting memorandum of law, and cited to the same case below as they do on appeal, *viz.*: *Estate of Matteson v. Matteson*, 749 N.W.2d 557 (Wis. 2008). SA-009-10. Appellee's waiver argument must be summarily rejected.

Turning to the substance of Appellee's argument – he is mistaken that a partner can both be "retired" and "active." The testimony of Appellee was clear – he retired in or about 1996. JA-534; JA-538-39. "A partner's right of withdrawal *or retirement* from the partnership is an inseparable incident of every partnership, and no party is compelled to continue as a partner when, by his or her express will, he or she chooses to withdraw." 59A Am Jur 2d Partnership § 332 (emphasis added). Accordingly, Appellee's agent did *not* step into the shoes of his father, as a purported partner in the "Yusuf and Hamed partnership," as that is nothing more than a thinly veiled admission and/or substitution of a new partner. *See* 26 V.I.C. § 71(i). Indeed, the very reason that Appellee gave a power of attorney to his son was "because [he] was sick", JA-534, and of the possibility of his passing: "I say let me give the boy a power of attorney before we get -- maybe I die, maybe not, it's -- God knows." *Id.* If Appellee had passed away would Waleed Hamed been able to continue as Appellee's "authorized agent" after his death? The answer is clear – of course not. So when Appellee asserts on appeal that he was "active" because his son was acting his stead, Appellee has artfully, yet improperly, done and end-run around 26 V.I.C. § 71(i)'s clear prohibition regarding the admission of a new partner.

In respect to the contention that rent notices are evidence that Appellee is "active" or not "retired," such an argument defies common sense. In order for one to be "active" in respect to a

partnership, he has to actively do something. Sitting back and receiving a document is not being "active." Moreover, the rent notices, to the extent they have operative legal effect, support Appellant's position that Appellee is an ordinary creditor by virtue of his retirement. *See Estate of Matteson*, 749 N.W.2d at 572-73. Accordingly, as simply an "ordinary creditor" of the alleged partnership, Appellee failed to establish a reasonable likelihood of success on the partnership issues in this action, or that a money judgment was, somehow, an insufficient remedy at law.

4. No Admissible Evidence of Partnership Distributions

Appellee avers that "there is *ample* evidence to support the finding that profits were equally distributed between Yusuf and Hamed over the years." Br. at p. 28 (emphasis in original). But nowhere in the record is there any evidence that Appellee actually received partnership distributions. At best Appellee can cite to ¶32 of the Memo. Op. for the proposition that:

> 32. It had been the custom and practice of the Yusuf and Hamed *families* to withdraw funds from the supermarket accounts for their own purposes and use (see JA 1082; JA 1069), however such withdrawals were always made with the knowledge and consent of the other partner. JA 470:20-471:8; JA 783:3-785:9.

Br. at p. 9 (emphasis added). In other words, at best, Appellee can show that there were undefined "withdrawals" that were made to the Hamed *family* instead of Hamed himself.

Appellee's position is problematic for two reasons. First, it assumes that any payments to any Hamed family member, who are *also related to the Yusuf family by virtue of marriage,* are neither employment compensation, nor family gifts. Second, there is no statement as to when these withdrawals supposedly occurred. This is relevant because if the withdrawals did not take place (and there is no record evidence to support that they did) within the statute of limitations period, then this amplifies and supports Appellants' position that Appellee is time barred.

Moreover, Appellee cannot refute that a trial court "should err on the side of excluding compromise negotiations." *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, 451 Fed. Appx. 73, 77 (3d Cir. 2011) (internal citations and quotations omitted). The Superior Court erroneously allowed

into evidence the settlement discussions for their substantive evidence. *Accord Frett v. People,* 2013 V.I. Supreme LEXIS 25 (V.I. June 20, 2013) (reversing judgment based on erroneous admission of evidence). Here, like in *Frett,* the error was not harmless as the Superior Court directly relied on the contested evidence, JA-013 (Memo. Op. at ¶30). Thus, absent this erroneously introduced evidence, there was no evidentiary support for any partnership distributions to Appellee, which, in turn, weighed against Appellee's claim that he could show a probability of success on the merits.

Furthermore, just three days ago, this Court issued it opinion in *Connor v. People,* case no. 2011-0021 (V.I. July 2, 2013), and stated that Rule 408 prohibits "testimony that a party offered to pay a claim in an attempt to compromise it, *when offered to prove either the amount or validity of that claim.*" (citation omitted, emphasis added). So, just as in *Connor,* here, the 408 evidence was admitted in error and requires a vacatur of the decision below.

iii. The Record Evidence Reflects, at Best, Competing Inferences

Appellee posits that because *United States v. USX Corp.*, 68 F.3d 811, 827 (3d Cir. 1995) was a summary judgment case it is distinguishable. The fact that *USX* stands for the proposition that when there are competing inferences the case should be submitted to the fact finder supports, rather than detracts from, Appellants' argument. If *after full discovery,* there is insufficient basis to grant Rule 56 relief, then it follows that *without the aid of any discovery,* it is inappropriate to enter a preliminary injunction as the more exacting standard of Rule 65 requires the competing inferences to be submitted to the ultimate trier of fact, i.e., a Virgin Islands jury, that Appellee requested below.

Appellants submit that Appellee's anemic response to the chart comparing and contrasting the Rule 65 hyperbole to the record evidence only highlights that the Superior Court's factual findings were clearly erroneous as they were devoid of a credible evidentiary basis and/or bore no rational relationship to the supporting evidentiary data. *Shoy v. Virgin Islands*, 55 V.I. 919 (V.I. 2011). And because the findings of fact were devoid of credible evidentiary basis, that is, they were

"without support in inferences that may be drawn from the facts in the record," *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (*en banc*), the Superior Court abused its discretion.

B. THE COURT BELOW ERRED IN CONCLUDING THAT APPELLEE WOULD HAVE BEEN IRREPARABLY INJURED BY THE DENIAL OF INJUNCTIVE RELIEF

The Superior Court made the errant conclusion that a dispute between purported partners qualified as an irreparable harm. In constitutional law "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

So when the Superior Court cites to *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) (a § 1983 case) to find irreparable injury it erroneously conflated *constitutional rights* with *statutory or contractual rights*. This was legal error that tainted both the way the Superior Court viewed the facts and the manner in which it made its conclusions of law. Indeed, "[f]indings of fact influenced by an erroneous view of the law are entitled to no deference." *G.M. Trading Corp. v. Comm'r,* 121 F.3d 977, 980 (5th Cir. 1997); *see also Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 446 (4th Cir. 2003) (it is well established, that "[w]hen a court *misapprehends* or fails to apply the law with respect to underlying issues, it abuses its discretion." (emphasis added)).

Appellee at page 22 of his brief cites to *S & R Corp. v. Jiffy Lube Int'l, Inc.,* 968 F.2d 371 (3d Cir. 1992) for the proposition that "lack of control amounts to irreparable injury." But that case arose

> from the district courts denial of Jiffy Lube's motion for a preliminary injunction to halt Durst's continued use of the Jiffy Lube trademark …. Because we find that Jiffy Lube has clearly established irreparable injury to its mark from Durst's non-consensual use [of the Jiffy Lube trademark], we will reverse the decision of the district court….

Id. at 373. Trademarks are controlled by the Lanham Act, which *inter alia* was enacted to *protect the public* from "confusion concerning the origin of the goods or services." *Id.* at 375 (internal

quotations and citations omitted). All one has to do to understand that the argument that the Appellee advances does not hold water is to provide the full quotation from *S & R Corp.*:

> Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill. *Lack of control amounts to irreparable injury regardless of allegations that the infringer is putting the mark to better use*…. Finally, and most importantly for this case, trademark infringement amounts to irreparable injury as a matter of law.

Id. at 378 (emphasis added, internal quotations and citations omitted). Accordingly, because this is not a Lanham Act case, the claim that the Appellee would suffer irreparable injury was incorrect.

C. THE COURT BELOW ERRED IN CONCLUDING THAT INJUNCTION RELIEF WOULD NOT HAVE RESULTED IN GREATER HARM TO UNITED AND YUSUF

As an initial matter, when Appellee states that "Fathi Yusuf never testified to the contrary," Br. at p. 30, Appellee improperly attempts to shift the burden to the Defendants below. It is beyond cavil that the party seeking an injunction has both the burden of production and of persuasion. Turning to the claim that Appellants would suffer no greater harm, the best place where this harm is evident is the continued employment of Waleed Hamed, Mufeed Hamed and Wadda Charriez.

Waleed and Mufeed Hamed acted in concert to steal approximately $460K from Plessen Enterprises. JA-1763-64. As detailed in the derivative lawsuit, JA-1746-59, Waleed Hamed as the V.P. of Plessen, issued a check for $460K to himself, endorsed it, and then deposited it in his *personal* bank account. Conspicuously absent in the Appellee's brief is any mention of the $460K theft committed by Waleed and Mufeed Hamed.

The old adage goes: when it happens once – shame on them; when it happens twice – shame on you. What reasonable business person would want as managers two individuals who have demonstrated the audacity, gall, and moral turpitude to blatantly steal $460K? Without a doubt Waleed Hamed and Mufeed Hamed (who co-signed the check) committed a felony; indeed Attorney Holt has vicariously admitted as such by returning 50% of the $460K (i.e. $230K, *see* JA-1184). Waleed and Mufeed Hamed's theft of $230K is clear evidence as to why the Order has harmed the Appellants to a greater level that to the Appellee. As to Wadda Charriez – she was caught on tape

(JA-1405-71) and on paper (JA-1298-1403) falsifying her hours. Appellee attempts to minimize Ms. Charriez's theft (*see* Br. at p. 11, fn. 9), but it is not credible that one would to go to the bank, or the post office, on every single work day in a full calendar year and, thus, always work a twelve (12) hour day. Ms. Charriez, like Waleed and Mufeed Hamed, has demonstrated a propensity to steal, and United has been harmed by having to have three thieves in the office of the stores – with the opportunity to commit additional thefts. For this reason alone the Superior Court erred in providing Appellee with extraordinary equitable relief.[8]

Finally, the legally insufficient bond of $25,000 has "produced irreparable injury" to Appellants. The decision below must be reversed.

D. INJUNCTIVE RELIEF IS CONTRARY TO THE PUBLIC INTEREST

While "it is always in the public interest to prevent the violation of a party's *constitutional rights*," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted, emphasis added), it does not follow that injunctive relief furthers the public interest in forcing two purported partners to continue a business *ad infinitem*. Indeed, at-will partnerships can be terminated by any of the partners for any reason and at any time. 26 V.I.C. § 171(1). Forcing business partners who are adverse to each other to continue operating a business because of the employees that it employs is, at best, circular logic. In other words, since any business that has employees, by definition has employees that could lose their job if the employer went out of business, *every* business (that has employees) dispute would qualify as being in the public interest. This Court should reject such a proposition of law as this potential exception would swallow the rule that preliminary injunctions are extraordinary in nature. Accordingly, the Superior Court erred by entering the preliminary injunction order.

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[8] Separately, United has been harmed by having to keep on the payroll, among others, Waleed Hamed, Mufeed Hamed and Wadda Charriez. *See* Gaffney Dec. (JA-1806-07) (quantifying the monetary harm). Furthermore, the Order calls into question who is the proper party (i.e., United Corporation d/b/a Plaza Extra or the "Fathi Yusuf and Mohammad Hamed partnership") to a slew of pending cases. *See* DeWood Dec. (JA-1809-12); *see* Beckstedt, letter (JA-1814-16) (detailing the cases currently pending at the trial level). So when Appellee contends that "*they failed to submit any evidence to support this assertion.*" Br. at p. 30 (emphasis in original), that is patently false.

POINT II – THE SUPERIOR COURT ERRED IN ORDERING AN "AT WILL ORAL PARTNERSHIP" TO CONTINUE *AD INFINITEM*

Appellee mischaracterizes the record. The partnership dissolution *notices* did *not* say "proposed" on it. *See* JA-1023 (email from DeWood to Waleed Hamed –"I will be sending a formal notice of partnership dissolution notice, with a list of to-dos that will be required to complete an orderly dissolution."); JA-1024 (dissolution of partnership notice – "[t]his letter is to confirm the parties' desire to dissolve the above referenced partnership."). The only thing that was "proposed" was the dissolution agreement itself. *See* JA-1025 (email from DeWood to Waleed Hamed – "[p]lease find the attached proposed [p]artnership [d]issolution *[a]greement*."); JA-1026 (proposed partnership dissolution agreement).

So the Superior Court's view that only the termination of the purported partnership was "proposed" was clearly erroneous as the facts demonstrate that the partnership was terminated and all that remained was how the partnership assets would have been distributed in the winding up process. So with these facts corrected for this Court's consideration, it is clear that the Superior Court abused its discretion in entering the Order as Fathi Yusuf was well within his rights to terminate the purported at-will oral partnership. To that end, *Browne v. Ritchey*, 202 Ill.App.3d 137 (1990), clearly applies and this Court should adopt the reasoning in full to conclude that the Superior Court abused its discretion.

POINT III – THE BOND AMOUNT WAS LEGALLY INSUFFICIENT AND ILLUSORY

A. THE BOND ISSUE WAS TIMELY

Appellee argues that the bond issue is untimely, but Appellee's argument ignores the applicable law. For example, the Third and Seventh Circuits have considered the same timeliness argument that Appellee raises here – and both have rejected it. *See Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 887 (7th Cir. 2000); *Zambelli Fireworks Mfg. v. Wood*, 592 F.3d 412, 426 (3d Cir.

2010) (noting that Rule 65(c) "does not impose any obligation on the parties to seek a bond" at the initial preliminary injunction hearing; and that a "bond shall be issued *irrespective of any request by the parties*") (emphasis added).

B. A SEPARATE BOND HEARING WAS AND IS APPROPRIATE

Appellee has ignored Appellants numerous cases establishing the need for a separate bond hearing; and establishing that the failure to do so constitutes reversible error. Instead, Appellee distinguishes the authority by arguing that "the Third Circuit cases cited by the Appellants are easily distinguishable as they all involved cases where no bond was set, so a remand was required to address the posting of a bond." (Br. at 33 n.29 (citing cases)).

Indeed, if the Third Circuit in those cases found reversible error only because "no bond was set," then the appellate court could have remanded with the simple and sole instruction that the trial court *set a bond* – and, by Appellee's logic, a trial court could do so, without conducting a separate bond hearing. The Third Circuit expressly rejected that approach requiring the trial court to set a bond "following a *full hearing* on the issue." *Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012) (emphasis added). Appellee's attempt to distinguish the cases is unavailing; and, separately, Appellee's failed to even address Appellants' many other cases on the bond issue.[9]

C. APPELLANTS HAVE NOT "ADMITTED" ANY RELIEF IN THIS ACTION

In defending the Superior Court's incredible use of *Appellant United Corporation's* own "escrowed funds" to secure *Appellee's* injunction bond, Appellee insists on the factual and legal fiction that Appellants have "admitted" Appellee's alleged entitlement in this action to "50%" of the escrowed profits as an alleged "50/50" *de jure* partner with Appellant Fathi Yusuf. (Br. at 34). Appellants – who have not filed any pleadings in this action yet – have admitted no such thing.

[9] Appellee argues, alternatively, that "there was extensive testimony and evidence over two days of hearings regarding Plaza Extra's financial records and business operations" and that, according to Appellee, "the setting of a bond in this case fully complied with the procedural requirements of Rule 65(c)." (Br. at 33 n.29). However, Appellee fails to cite any actual hearing transcript or evidence supporting this naked argument.

Appellants dispute that Appellee is entitled to any relief under 26 V.I.C. § 75 based on Appellee alleged "partnership rights," as alleged in Count I (JA-048-49); and dispute that Appellee is entitled to any judicial declaration, as alleged in Count II (JA-049).[10] Appellants also deny the existence of any alleged *de jure* partnership, just as the Hameds themselves affirmatively denied the existence of any such partnership for decades when it suited them to do so.

Similarly, Appellee's references to deposition testimony in a *different action*, cannot be used as substantive proof of the matters asserted in *this action*. *See, e.g.*, 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (a court "cannot take judicial notice of truth of facts found in another case"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases). Maher Yusuf also merely testified in this action about an ambiguous "agreement" as to "[o]nly profits," and about which he did not otherwise know any "details." ([JA-696] at 34:20-24; [JA-697] at 35:1). The "agreement" that Maher Yusuf referenced, and that Fathi Yusuf referenced decades ago, is clearly *different than* the partnership agreement alleged in this action.

At best, Fathi Yusuf merely "committed to a position at a particular point in time [more than 12 years ago]. It does not mean that [he] made a judicial admission that formally and finally decides an issue" in this action. *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991). Regardless, even if Fathi Yusuf's decades-old testimony in a separate action and/or Appellants' briefs in this action to date somehow constituted judicial admissions (which they do not), "it does not follow that they may not amend them. Th[e] [Third Circuit] and several of our sister courts have recognized that judicial admissions may be withdrawn by amendment." *West Run Student Housing Assocs., LLC v. Campus View JMU, LLC*, 712 F.3d 165, 171-72 (3d Cir. 2013) ("'withdrawn or superseded pleadings' do not constitute judicial admissions").

[10] Appellants likewise dispute that Appellee is entitled to any of the relief requested in the First Amended Complaint (JA-176). (*See* 11/5/12 Renewed Motion to Dismiss (JA-924)).

"'This approach ensures that a particular claim will be decided on the merits rather than on technicalities.'" *Schomburg v. Dow Jones & Co.*, 504 Fed. Appx. 100, 103 (3d Cir. 2012). In addition, any "inconsistency between [a litigant's] two allegations at most creates an issue of fact." *Id.* at 105-06. This action should be decided on the merits, after a full trial, and not "on technicalities" or alleged judicial admissions relied upon by the Superior Court at the preliminary injunction stage on an incomplete record.

D. THE "ESCROWED FUNDS" DO NOT CONSTITUTE "ADDITIONAL SECURITY"

With respect to the Superior Court's illusory "additional security," Appellee claims that "it was certainly proper for the court to use [Appellant United Corporation's] escrowed funds as part of a bond." (Br. at 34 (relying on *Scarcelli v. Gleichman*, No. 2:12-cv-72, 2012 U.S. Dist. LEXIS 57776, at *13-14 (D. Me. Apr. 25, 2012)). Appellee claims also that Appellants "have [not] cited any cases to the contrary." (*Id.*). Both claims are wrong. *Scarcelli*, like each of Appellee's cases if analyzed in a full context, in fact supports Appellants' position. Substantively, Appellee's argument yet again ignores that injunction bonds are designed to protect incorrectly or wrongfully enjoined defendants, *i.e.*, Appellants here. Fed. R. Civ. P. 65(c). Because "the damages for an erroneous preliminary injunction cannot exceed the amount of the bond," those damages must be expressly included as a bond component, where, as here, the allegations in the complaint are in dispute. *Mead*, 201 F.3d at 888 (citation omitted); *cf. Scarcelli*, 2012 U.S. Dist. LEXIS 57776, at *1-2 (noting that the court there "deem[ed] all of the allegations in the [complaint] admitted for purpose of the pending [injunction motion] based on the defendant's [default]").

Accordingly, upon a finding of an erroneous preliminary injunction, the Superior Court's "additional security" would be *zero*, because the illusory security is not expressly included as a cash component of the present bond; and, because, if Appellants (or either of them) prevail, Appellee's interest in those funds based on any partnership claim in this action would be *zero*; and therefore improperly used Appellants' respective monies to secure Appellee's injunction bond!

E. THE PRESENT BOND IS LEGALLY INSUFFICIENT

As a fall-back, Appellee incredibly, asserts that "there is nothing before this Court to suggest $25,000 is insufficient by itself to protect Appellants if they were improperly enjoined, even without the escrowed profits being used." (Br. at 35). However, in the Emergency Bond Motion (JA-1792-1817), Appellants submitted two sworn declarations supporting the reasonable damage figures asserted. Appellee related assertion that Appellants "abandoned" (Br. at 34) the arguments in their Emergency Bond Motion below is also false. In fact, Appellants did not "abandon[]" the arguments in their Emergency Bond Motion below, but renewed them in this Court in their Renewed Stay Motion.

While Appellee now claims that he "explained [below] why all of [Appellants'] perceived losses were illusory (JA 1938-41), such as the loss of 'net equity'" (Br. at 35 n.31), Appellee's such explanation simply underscored the gross *inadequacy* of the present meager bond.[11] At bottom, Appellee's claim that Appellants' counsel "are crying 'wolf' to try to get an unwarranted increase in the size of the bond" (JA-1940) highlights Appellee's hyperbole and fundamental confusion regarding Rule 65(c) bond determinations. Even if defense counsel were "crying wolf," which is not the case, "[a]n error in setting the bond too high [] is not serious," because Appellants "still would have to prove [their] loss" at the end of this case to collect on the bond. *Mead*, 201 F.3d at 888. However, "an error in [setting the bond *too low*] produces irreparable injury." *Id.* Appellants respectfully submit that the current $25,000 security, which was set without any direct testimony or evidence on the Rule 65(c) bond issues during the preliminary injunction hearings, and which represents three one hundredths of one percent (00.03%) of Appellants' reasonable damage figures, is *too low*.

[11] Appellants concurrently filed reply in support of their Renewed Stay Motion addresses in greater detail (at pp. 13-19) how Appellee's discussion below regarding Appellants' damages as a result of the injunction – including rent, net equity, legal compliance costs/fees, and employees wages – is unavailing.

POINT IV –THE ORDER VIOLATES FED. R. CIV. P. 65(E)(1)

Appellants and Appellee agree on one thing – that 24 V.I.C. § 349(c) is controlling. Since "[t]he term 'labor dispute' includes *any controversy concerning terms* or conditions of employment," *id.* (emphasis added), the only question for this Court to consider is: whether the case below falls under with wide ambit of "any controversy concerning" the term of employment of Waleed Hamed, Mufeed Hamed, and Wadda Charriez? Appellants submit that it must.

As it currently stands United cannot terminate (with or without cause) any of the three aforementioned employees. Since 24 V.I.C. § 341 divests any Virgin Islands court of the ability to interfere with labor disputes – as defined in 24 V.I.C. § 349(c) – then it follows that the portion of the preliminary injunction order that circumscribes the ability of United to terminate its employees was void *ab initio* as it ran afoul of Rule 65(e)(1) and 24 V.I.C. § 341. This Court must correct this error of law by, at a minimum, vacating, in part, the Order.

CONCLUSION

Appellants respectfully request that this Court vacate the Order and remand the case for a trial on the merits.

Respectfully Submitted, Dated: July 6, 2013

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CERTIFICATE OF COMPLIANCE RE: PAGE LIMITS

Pursuant to this Court's consideration allowing an over length brief, counsel certifies that this brief is in compliance with the proposed expanded page limit.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to V.I. Supreme Court Rule 22(l) counsel certifies that the undersigned is a member of the Virgin Islands Supreme Court Bar.

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2013, I caused:

1. That the reply brief and supplemental appendix (volume I) was filed with the Clerk of the Virgin Islands Supreme Court via VISCEFS.

2. Pursuant to V.I. Supreme Court Rules 25(b) and 24(a), two original copies of the reply brief and one copy of the supplemental appendix (volume I) will be served via FedEx to:

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3. Pursuant to V.I. Supreme Court Rules 25(b) and 24(a), seven (7) copies of the reply brief and supplemental appendix (volume I) will be filed with the Clerk of the Virgin Islands Supreme Court via FedEx.

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