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

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| MOHAMMAD HAMED, by his authorized agent, WALEED HAMED, | ) | |
| Plaintiffs, | ) | |
| v. | ) | CIVIL NO. SX-12-CV-370 |
| FATHI YUSUF and UNITED CORPORATION, | ) | |
| Defendants. | ) | |

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR RULE 56(d) MOTION**

Plaintiffs in their opposition raise four ostensible reasons why, in their view, Defendants' Rule 56(d) Motion should be denied. Each reason is meritless.[1]

**A. It is Simply Too Early in Litigation for Summary Judgment to be Properly Briefed and Opposed.**

First, Plaintiffs argue that summary judgment is somehow "warranted" based simply on the lack of any disagreement, according to Plaintiffs, regarding Mohammad Hamed's entitlement to 50% of the profits of the operations of the Plaza Extra Supermarkets. (Opp. at 2). Plaintiffs argue also that "receipt of a share of the profits raises the presumption of a partnership," which, according to

[1] Plaintiffs' December 24, 2012 "Motion to Deem Plaintiff's Partial Summary Judgment Motion Conceded and Reply to Defendant's [sic] Rule 56 Request" improperly conflates two briefing papers: a "motion to deem . . . conceded"; and a "reply" in opposition (hereinafter, the "Opposition") to Defendants' Rule 56(d) Motion, which in substance is a *response* in opposition. The instant reply brief addresses Plaintiffs' arguments directed at the Rule 56(d) issues. Defendants have responded to the "motion to deem conceded" issues in a separate response brief, filed concurrently herewith. Defendants' arguments in this reply brief and the separate response brief are intended for the limited purpose of addressing Plaintiffs' opposition to the Rule 56(d) Motion and "motion to deem conceded," respectively. Defendants' such arguments are *not* offered in response to Plaintiffs' summary judgment motion, which response Defendants does not waive and expressly reserves pending a ruling regarding the Rule 56(d) Motion.

Plaintiffs, "the defendants have [failed] to rebut." (*Id.*). These arguments are factually and legally incorrect.

As background, Plaintiffs allege in Count I of their Amended Complaint, which count represents the central dispute between the parties and the primary requested relief, that "a[n] [oral] partnership was formed between the two parties," presumably, between Mohammad Hamed and Fathi Yusuf, during some undisclosed "time period." (First Amended Complaint (D.V.I. Doc. # 15) at ¶¶ 9, 35). Specifically, Plaintiffs allege that the purported "Partnership has as its terms, by oral agreement," seven (7) distinct and specific components:

> [1] 50/50 sharing of profits,
>
> [2] 50/50 sharing of losses,
>
> [3] joint management of the three Plaza Extra supermarkets,
>
> [4] joint control of all Partnership funds,
>
> [5] authority of the partners to act for the Partnership as its agents,
>
> [6] joint ownership of the property and assets of the Partnership, and
>
> [7] the joint control of the accounting operations of the Partnership as a distinct entity.

(Id. at ¶ 35).

Defendants have moved to dismiss the First Amended Complaint. (*See generally* Renewed Motion to Dismiss (D.V.I. Doc. # 29)). Significantly, among other material disputed issues, Defendants maintain that Mohammad Hamed would be entitled, if anything in this action, to only a fifty percent (50%) share of profits of Fathi Yusuf's 7.5% ownership of United Corporation's outstanding stocks. (*Id.* at 11). In addition, Defendants maintain that Mohammad Hamed's such receipt of profits was received in payment of and "in exchange for a loan of $225,000 and $175,000


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cash payment," which "loan was repaid in full." (*Id.* at 3). There is no record evidence establishing the six remaining "terms" or components of the alleged "Partnership."

In other words, Defendants *do not concede* – and, in fact, expressly dispute – that Mohammad Hamed and Fathi Yusuf ever agreed, orally (as alleged by Plaintiffs) or otherwise, to any "50/50 sharing of losses, joint management of the three Plaza Extra supermarkets, joint control of all Partnership funds, authority of the partners to act for the Partnership as its agents, joint ownership of the property and assets of the Partnership [or] joint control of the accounting operations of the Partnership as a distinct entity." (First Amended Complaint at ¶ 35). With respect to the first term of the alleged partnership, the "50/50 sharing of profits," Defendants also expressly dispute Plaintiffs' claim that such split applies to the Plaza Extra Supermarkets' entire profits, as opposed to only a split of Fathi Yusuf's 7.5% ownership of United Corporation's outstanding stocks. Accordingly, at best, any supposed agreement as to the seven alleged partnership "terms" are genuine issues of material disputed fact, which cannot be decided on the present record as a matter of law – or even properly briefed absent the Rule 56(d) relief that Defendants have requested. *See, e.g., Thale v. Collector Imports, LLC*, Case No. 3:05-CV-330, 2008 U.S. Dist. LEXIS 73173, at *10-11 (W.D. Ky. Sept. 23, 2008) ("*the issue of whether or not a partnership existed between [two persons] is itself a genuine issue of material fact and therefore it [is] not appropriate for resolution upon a motion for summary judgment*") (emphasis supplied).

Plaintiffs' argument regarding the "presumption" of a partnership based simply on a "share of the profits" is misplaced. (Opp. at 2). Indeed, the Virgin Islands Uniform Partnership Act ("VIUPA") provides that "[t]he sharing of gross revenues does *not* by itself establish a partnership . . ." V.I. Code Ann. tit. 26, § 22(c)(2) (emphasis added). Further, receipt of a share of profits does *not* create a presumption of a partnership if "the profits were received in payment of a debt by


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installments or otherwise." V.I. Code Ann. tit. 26, § 22(c)(3)(i). Here, as noted above, Mohammad Hamed's profits were received in payment of a debt, *i.e.*, "a loan of $225,000 and $175,000 cash payment." (Renewed Motion to Dismiss at 3). The presumption of a partnership under any version of the Uniform Partnership Act ("UPA"), including the VIUPA, therefore does not apply in this action.

Even if it did apply, which Defendants dispute, the presumption under the UPA is rebuttable. *See, e.g., Eagan v. Gory*, 374 Fed. Appx. 335, 340 (3d Cir. 2010) ("agree[ing]" with trial court that presumption under New Jersey UPA "was rebutted by evidence that," among other trial evidence, the defendant in that case "did not intend to enter a *[bona fide]* partnership" and the plaintiff in that case "had neither an obligation to share losses nor authority over major business decisions"). In this action, the present record reflects a clear dispute as to whether Fathi Yusuf ever intended to enter into a *bona fide* partnership with Mohammad Hamed. (*See* Oct. 9, 2012 Affidavit of Fathi Yusuf (D.V.I. Doc. # 29-1) ("Yusuf Aff.") at ¶¶ 11-13 (noting that the parties do not and "could not agree on the fact that any Hamed family member, including Mohamm[a]d Hamed, was actually ever a true partner with [Defendants]"); Oct. 9, 2012 Affidavit of Maher Yusuf, as President of United Corporation ("United Corp. Aff.") at ¶ 26 (noting that any reference to United Corporation as a "'partnership' . . . would be inconsistent with the decades of representations made to third-parties and is factually incorrect").

Similarly, the record reflects a dispute as to whether Plaintiffs, including Mohammad Hamed, ever has had an obligation to share losses or authority over the business decisions of any of the Plaza Extra Supermarkets, let alone "major business decisions." (*See* Yusuf Aff. at ¶ 6 (noting that Mohammad Hamed "has never worked in any management capacity at any of the Plaza Extra Stores) and ¶11 (noting that, "until filing this action, Mohamm[a]d Hamed never declared himself to


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be [Fathi Yusuf's] formal or legal partner in 26 years"); United Corp. Aff. at ¶ 11 (noting that Mohammad Hamed "has never requested a K-1 Partnership schedule, or ever declared this to be a partnership to a single governmental or taxing agency" and that he "never filed a U.S. Partnership Tax Return on behalf of United"), ¶13 (noting that Mohammad Hamed "has never participated in any managerial decisions at United [Corporation] and its Plaza Extra stores"), and ¶14 (noting that Mohammad Hamed "has never filed partnership statements with the Office of the Lt. Governor of the Virgin Islands" and "has never demanded that such a statement be filed").

Again, at this early stage of the proceedings, there exist genuine issues of material disputed fact regarding the existence of any alleged partnership, which issues cannot be decided on the present record as a matter of law and thus should be addressed at a later stage, under Federal Rule of Civil Procedure 56(d), after Defendants have had a sufficient opportunity to conduct general discovery.

### B. The Parties' Labels Are Not Conclusive.

Plaintiffs next argue in their opposition that "there is no distinction between calling something a 'partnership' and a 'joint venture.'" (Opp. at 2). The argument misses the point. Merely calling a business relationship a "joint venture" does not necessarily create a *bona fide* joint venture under the VIUPA or otherwise as a matter of law. In other words, "the manner in which the written [or oral] agreements characterize or label the parties' relationship is not conclusive in determining whether a partnership [or a joint venture] has been created." *Cont'l Res., Inc. v. PXP Gulf Coast, Inc.*, Case No. CIV-04-1681-F, 2006 U.S. Dist. LEXIS 72870, at *54 (W.D. Okla. Oct. 5, 2006) (addressing Texas UPA); *see also In re Lona*, 393 B.R. 1, *16 (Bankr. N.D. Cal. 2008) ("[T]he existence of a partnership is not determined by the parties' designation of their arrangement. Instead, it depends primarily upon the intention of the parties ascertained from the terms of any


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agreement, from the parties' acts and from the surrounding circumstances as a whole.") (citation omitted); *Byker v. Mannes*, 641 N.W.2d 210, 211, 216 (Mich. 2002) ("In determining whether a partnership exists, . . . it is unimportant whether the parties would have labeled themselves 'partners.'") ("The law must declare what is the legal import of [parties'] agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable.").

In the present action, regardless of the parties' designation of their arrangement as a "partnership" or a "joint venture," there is a fundamental dispute as to whether Mohammad Hamed has any partnership rights whatsoever under the VIUPA or any other authority. Specifically, as a threshold matter, and as addressed above, because Mohammad Hamed's profits were received in payment of a debt, the presumption of a *bona fide* partnership (or a *bona fide* joint venture) under any version of the UPA or any other authority does not apply. Assuming, for argument's sake only, the presumption of a partnership (or a joint venture) did apply, any such presumption has been rebutted, as Mohammad Hamed had neither an obligation to share losses nor authority over any business decisions of the Plaza Extra Supermarkets. *See Eagan*, 374 Fed. Appx. at 340; *Cont'l Res.*, 2006 U.S. Dist. LEXIS 72870, at *44-45 (noting that, among other elements, a partnership or joint venture requires "an agreement to share losses" and "a mutual right of control or management of the enterprise," and that, "[i]f there is no evidence of any one of these elements, then there is no joint venture and no partnership") (citing the Texas UPA).

At best, again, these issues are genuine issues of material disputed fact and cannot be properly briefed until, at a minimum, after Defendants have had a sufficient opportunity to conduct general discovery.


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### C. The Joint Venture Issues and the Parties' Objective Intentions Are Relevant.

Plaintiffs argue that "federal law makes no distinction between a 'partnership' and a 'joint venture," and, so, according to Plaintiffs, "the 'intent' to form one or the other is irrelevant to the issues in this case." (Opp. at 3). This argument, as with their argument regarding the parties' subjective labels as between a "partnership" or "joint venture," misses the point.

First, the claim that "federal law makes no distinction between a 'partnership' and a 'joint venture'" is misleadingly overbroad. (*Id.*). For example, "[a] key feature of a partnership, distinguishing it, for instance, from a joint venture, is that it is the conduct of a business for a sustained period for the purposes of livelihood or profit and not merely the carrying on of some single transaction." *Khader v. Hadi Enters.*, Case No. 1:10cv1048, 2010 U.S. Dist. LEXIS 135514, at *10 (E.D. Va. Dec. 22, 2010) (citation and internal quotation omitted).

Moreover, even if a joint venture may be considered "something of a subspecies of partnership," and even if certain parts of the VIUPA might apply to joint ventures, the distinction is unquestionably relevant. Among other things, the statute of frauds serves as a bar to the enforcement of any alleged oral joint venture agreement. *See, e.g., Fountain Valley Corp. v. Wells*, 98 F.R.D. 679, 683-65 (D.V.I. 1983) (foreclosing claims relating to alleged oral joint venture agreement based on the statute of frauds, even though, for other purposes, the VIUPA applied to the alleged joint venture). Further, "[w]here, as here, the facts permit competing inferences concerning the existence of an agreement to form a joint venture, the issue must be submitted to the fact finder." *United States v. USX Corp.*, 68 F.3d 811, 827 (3d Cir. 1995) (reversing trial court's grant of summary judgment as to alleged business partner where there was disputed evidence regarding partner's status as a joint venturer). *See also Saga Petroleum, LLC v. Arrowhead Drilling, LLC*, Case No. CV-08-110, 2010 U.S. U.S. Dist. LEXIS 53168, at * (D. Mont. Mar. 11, 2010) (noting that, "[g]enerally," whether


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the circumstances of a particular case fall within an exception to the statute of frauds is a question of fact, as well as whether a joint venture is "actually" a partnership, "and depends on the rights and responsibilities assumed by the joint venturers") (recommending that motion for partial summary judgment regarding joint venture issues be denied).

Second, although a partnership may be formed "whether or not the persons intend to form a partnership" (V.I. Code Ann. tit. 26, § 22(a)), the parties' *objective* intentions are not "irrelevant," as Plaintiffs argue. (Opp. at 3). Rather, *subjective* intentions are irrelevant, as "the proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership." *Byker*, 641 N.W.2d at 218 (quoting Michigan UPA). *See also Ziegler v. Dahl*, 691 N.W.2d 271, 275 (N.D. 2005) ("One of the most important tests of whether a partnership exists between two persons is the intent of the parties.") (citing, among other authorities, 59A Am. Jur. 2d *Partnership* § 136 (2003)); *Hillman v. Cannon*, 810 N.W.2d 25, (Iowa Ct. App. 2011) ("an intent to associate is the crucial test of partnership," regardless of the phrase "whether or not the persons intend to form a partnership" in the UPA, which concerns subjective intent only) (citation omitted); *Brown v. 1401 New York Avenue, LLC*, 25 A.3d 912, 913 (D.C. App. 2011) ("[W]hether a partnership exists is an issue of fact, turning less on the presence or absence of legal essentials than on the intent of the parties, as gathered from their conduct and dealings with each other"; "the question ultimately is [an] objective one: whether the parties intended to do the acts that in law constitute a partnership") (citation and internal quotation omitted); *In re Lampe*, 331 F.3d 750, 757 (10th Cir. 2003) ("the parties' intentions, the terms of their agreement, and the manner in which they carry out their business determines their status") (Kansas UPA); *Embassy of the Federal Republic of Nigeria v. Ugwuonye*, Case No. 10-cv-1929, 2012 U.S. Dist. LEXIS 157422, at *14-15, *17 (D.D.C. Nov. 2, 2012) ("While a partnership may be


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proved by express agreement, it may also be inferred from the acts of the parties and the intentions implied by those acts"; "The question whether a partnership existed in fact or by estoppel is a question of fact for the consideration of the jury.") (citation and internal quotation omitted) (denying motion for summary judgment); *Ramone v. Lang*, Case No. 1592-N, 2006 Del. Ch. LEXIS 71, at *43, *51 (Del. Ch. Apr. 3, 2006) ("still the case . . . that the creation of a partnership is a question of intent") ("mere fact that [one party] colloquially used the word 'partners' publicly at certain meetings and in certain documents does not overcome, as between [the parties in suit], their inability to establish a [de facto partnership] by contract").

*Byker*, and the other cases cited, above highlight Plaintiffs' fundamental confusion regarding the distinction between and relevance of *subjective* intentions and *objective* intentions – the latter of which are clearly relevant to the issues in this case. Plaintiffs' attempt to distinguish *Commissioner v. Tower*, 327 U.S. 280, 286-87 (1946), and related unsupported claim that "the Uniform Partnership Law [does not] look[] to . . . the 'intent' of the parties" (Opp. at 2-3), are equally confused, as shown above.

### D. The Rule 56(d) Motion is Neither Diversionary Nor Deficient.

Plaintiffs in their opposition essentially ignore the legal standards and legal analysis set forth in the Rule 56(d) Motion, including the legal standard that, "[w]hen, as here, there has been no adequate initial opportunity for discovery, a strict showing of necessity and diligence that is otherwise required for a Rule 56(f) request for additional discovery does not apply." *Metro. Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1337 (Fed. Cir. 2008) (citation omitted). Rather, Plaintiffs' weakly argue that the Rule 56(d) Motion "is just a diversionary tactic," since, according to Plaintiffs, "the affidavit submitted by the defendants is deficient." (Opp. at 4). The argument is simply false.


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As noted above and in greater detail in the Rule 56(d) Motion, "a strict showing of necessity and diligence that is otherwise required for a Rule 56(f) request for additional discovery does not apply" in this action. *Metro. Life Ins.*, 527 F.3d at 1337. Regardless, Defendants' papers filed in this action clearly identify numerous areas of necessary discovery that remains to be taken prior to any meaningful analysis of the disputed alleged partnership issues, including, as discussed in this reply brief:

1. the formation of the alleged partnership, which Defendants dispute exists or ever was formed;

2. the specific terms of the alleged oral partnership agreement;

3. whether any alleged share of profits applies to the three Plaza Extra Supermarkets' entire combined profits or, at best, to only a split of Fathi Yusuf's 7.5% ownership of United Corporation's outstanding stocks;

4. the alleged 50/50 sharing of losses;

5. the alleged joint management of the three Plaza Extra Supermarkets;

6. Mohammad Hamed's alleged contributions to the alleged partnership, including whether his claimed entitlement to partnership profits derives from the repayment of a debt;

7. the manner, if any, in which Mohammad Hamed has declared the alleged partnership to the public; and

8. the tax papers, if any, that Mohammad Hamed has filed reflecting his instant partnership claims.

Indeed, as Defendants have noted, the present record reflects that the parties in this action do not and "could not agree on the fact that any Hamed family member, including Mohamm[a]d Hamed, was actually ever a true partner with [Defendants]" and that any reference to United Corporation as a "'partnership' . . . would be inconsistent with the decades of representations made to third-parties and is factually incorrect." (*See* Yusuf Aff. at ¶¶ 11-13; United Corp. Aff. at ¶ 26).


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The record likewise belies Plaintiffs' claim that the Rule 56(d) Motion is "diversionary." (Opp. at 4). Specifically, as reflected in the Rule 56(d) Motion, Defendants intend to oppose Plaintiffs' summary judgment motion, and to file their own such motion, once discovery is complete in the due course of proceedings. (Rule 56(d) Motion at 8). Further, although Defendants previously had been (and still are) hesitant to engage in potentially unnecessary discovery absent any resolution of the various pending substantive motions or any scheduling order, Defendants already have noticed the depositions of various parties for the limited purpose of responding to Plaintiffs' premature summary judgment motion. (*Id.* at 7). At bottom, given the unique procedural posture of this action, Defendants have attempted to advance the action as reasonably as possible in good faith and without undue delay while, at the same time, protecting and enforcing their legal rights.

## Conclusion

For the reasons in this reply, and in the Rule 56(d) Motion, Plaintiffs' opposition is without merit. Defendants respectfully request that the Court enter an Order denying Plaintiffs' Motion for Partial Summary Judgment *without prejudice* as the motion was filed prematurely; and allowing the parties, including Defendants, sufficient opportunity to conduct discovery and to prepare a response in opposition to any summary judgment motion upon re-filing. Alternatively, in the event the Court does not grant the Rule 56(d) Motion, Defendants respectfully request that the Court enter an Order granting Defendants an enlargement of time of fourteen (14) days of any such order within which to respond to Plaintiffs' Motion for Partial Summary Judgment; and awarding such other relief as is deemed just and appropriate.

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Respectfully submitted,

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Dated: January 8, 2013

## CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2013, a true and accurate copy of the foregoing was forwarded via email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.

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