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

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

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED TRO APPLICATION

Defendants hereby file this response in opposition to Plaintiffs' January 9, 2013 "Emergency Motion and Memorandum to Renew Application for TRO" ("Renewed TRO").

Introduction

In September 2012, when Plaintiffs filed this commercial dispute and initially sought the *extraordinary* and *drastic* remedy of a preliminary injunction, Plaintiffs sensationally predicted that, "[i]f the [alleged] partnership's operations are not secured immediately, the continued operation of the three Plaza Extra stores [1] will be in jeopardy, as well as the [2] continued employment of its 600 plus employees," and that "Plaza Extra [3] is in serious jeopardy of losing customers to other stores, [4] losing employees due to moral problems, [5] losing suppliers, and otherwise [6] losing its goodwill." (Sept. 18, 2012 TRO Motion at 5). Plaintiffs also claimed – ironically, as the record now confirms – that Defendants were "no more than crying 'wolf'" in arguing against the necessity of a preliminary injunction. (Oct. 22, 2012 Reply at 20).

Significantly, approximately four months later, *none* of Plaintiffs' initial predictions has come true. The supermarkets have operated and continue to operate in the normal course, and they are not in jeopardy; the "600 plus employees" have retained their employment in the normal course; no customers have been lost to other stores outside of the normal course; no employees have been lost in the normal course due to "moral problems"; no suppliers have been lost outside of the normal course; and no goodwill has been lost outside of the normal course.

Undeterred, Plaintiffs renew their sensationalism, claiming this time that "the defendants have crossed the Rubicon – they are out of control," and that they, according to Plaintiffs, "are looting funds, hiring allies, firing and intimidating witnesses and trying to damage the operations of the stores and their reputations." (Renewed TRO at 4). Relying on the inadmissible hearsay of Waleed Hamed, Mohammad Hamed's son and self-appointed "authorized agent," Plaintiffs similarly claim in their Renewed TRO that a "new wave of activity" now requires emergency relief. (*Id.* at 1).

Nothing has changed since Plaintiffs initially moved for preliminary injunctive relief – the request for injunctive relief was meritless back then, and is meritless now. Plaintiffs, under the guise of an injunction, still seek to bring United Corporation's operations to a grinding halt and thus somehow leverage the desired injunction as a means of extorting a private resolution of Defendants' own claims regarding the Hameds' defalcation and

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skimming of the corporation's accounts. The TRO request – both in its original and "renewed" versions – should be denied in its entirety. [1]

Relevant Factual Background

1. The relevant factual background is more fully set forth in Defendants' October 10, 2012 Response (D.V.I. Doc. # 12) to the initial TRO request.

2. Subsequently, on October 19, 2012, and prior to a resolution of Defendants' motion to dismiss the original complaint, Plaintiffs filed their First Amended Complaint, which added a third count to the First Amended Complaint, and is the only pleading presently before the Court.

3. On November 2, 2012, Defendants moved to strike the October 22, 2012 Declaration of Waleed Hamed (D.V.I. Doc. # 18-5) that Plaintiffs attached to their October 22, 2012 Reply (D.V.I. Doc. # 18) in support of their original TRO request; or, in the alternative, moved for leave to file a sur-reply to the arguments that Plaintiffs raised for the first time in their reply brief.

4. Defendants' such motion to strike is pending.

5. On November 5, 2012, Defendants moved to dismiss the First Amended Complaint, which motion is pending.

[1] Defendants hereby repeat their request that this Court proceed on Plaintiffs' instant Renewed TRO as a motion for a preliminary injunction, as opposed to a temporary restraining order; and, in support thereof, hereby rely on and incorporate herein Defendants' September 28, 2012 Motion to Proceed, which prior motion is pending and raises the same request with respect to Plaintiffs' initial TRO motion.

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6. On November 12, 2012, prior to any meaningful discovery in this action, any scheduling order or any resolution of various pending substantive motions, Plaintiffs moved for partial summary judgment regarding Count I of the First Amended Complaint. (D.V.I. Doc. # 36).

7. Count I is the primary relief requested in this action, as Plaintiffs seek summary judgment therein as to:

> i. a judicial declaration regarding the existence of an alleged partnership between Mohammad Hamed and Fathi Yusuf;
>
> ii. Mohammad Hamed's supposed entitlement, under 26 V.I.C. § 71(a), to 50% of the alleged partnership's profits, assets and receivables; and
>
> iii. Mohammad Hamed's supposed entitlement, under 26 V.I.C. § 71(f), to "fully and equally participate" in the alleged partnership's operations.

(Nov. 12, 2012 Motion for Partial Summary Judgment at 12).

8. The District Court remanded the action three days later, on November 16, 2012. (D.V.I. Doc. # 39).

9. On November 21, 2012, Defendants filed their Motion to Strike Self-Appointed Representative, requesting that, prior to resolving any other substantive motions, this Court strike Waleed Hamed as Mohammad Hamed's self-appointed representative or "authorized agent." (Nov. 21, 2012 Motion to Strike Self-Appointed Representative at 1).

10. Defendants' such motion to strike is pending.

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11. On December 20, 2012, in response to Plaintiffs' premature summary judgment motion, Defendants filed their Rule 56(d) Motion and Alternative Motion for Enlargement of Time to Respond to Motion for Partial Summary Judgment.

12. Defendants' Rule 56(d) motion is pending.

13. On December 24, 2012, notwithstanding Defendants' Rule 56(d) motion, and rather than limiting any objections thereto to a response brief, Plaintiffs asked this Court to "deem conceded" the premature summary judgment motion. (Dec. 24, 2012 Motion to Deem Conceded).

14. On January 9, 2013, Plaintiffs also filed their Renewed TRO, which is the subject of this response brief.

15. The following day, by its Order dated January 10, 2013, this Court scheduled a hearing on the TRO request for January 25, 2013.

16. Plaintiffs' feigned "emergency" relies on the statements in the January 9, 2013 Declaration of Waleed Hamed attached to the Renewed TRO.

17. Significantly, Defendants have moved to strike the January 9, 2013 Declaration of Waleed Hamed in its entirety, as it disregards fundamental evidentiary rules that bar hearsay statements and require a declarant's testimony to be based on personal knowledge. (Jan. 21, 2013 Motion to Strike).

18. Separately, the Renewed TRO is meritless.

Argument

A. Legal Standards

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As noted in Defendants' response to the initial TRO motion, which Defendants incorporate herein in full, 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." (Oct. 10, 2012 Response at 5 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). An 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 Bus. Credit, Inc. v. Four Winds Plaza P'ship*, 938 F. Supp. 304, 307 (D.V.I. 1996) (citation omitted).

B. <u>There Is No Likelihood of Success on the Merits.</u>

Plaintiffs insist on the fiction that, in their one-sided interpretation of "the defendants' own admissions in their pleadings," Mohammad Hamed "is a [*bona fide*] partner in the Plaza Extra grocery business." (Oct. 22, 2012 Reply at 3). The interpretation is both legally and factually incorrect.

i. <u>Sharing of Profits</u>

According to Plaintiffs, "the defendants' admissions regarding the sharing of profits is enough by itself . . . to find that [Mohammad Hamed] is likely to succeed on the merits of his claim that he is a partner in the Plaza Extra grocery business and is entitled to protection of his rights as a partner." (*Id.* at 5). However, the Virgin Islands Uniform Partnership Act

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("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, as here, "the profits were received in payment of a debt by installments or otherwise." V.I. Code Ann. tit. 26, § 22(c)(3)(i).

Even if the presumption of a partnership under any version of the Uniform Partnership Act ("UPA"), including the VIUPA, did apply in this action, which Defendants dispute, the presumption is rebuttable. Significantly, the instant record reflects a fundamental dispute as to whether, among other material issues: (a) Fathi Yusuf and Mohammad Hamed ever intended to enter into a *bona fide* partnership with each other; (b) Mohammad Hamed ever has had an obligation to share losses of the Plaza Extra Supermarkets; and (c) Mohammad Hamed ever has had the right to exercise any authority over any decisions of any of the Plaza Extra Supermarkets, let alone "major business decisions." *See, e.g., Eagan v. Gory*, 374 Fed. Appx. 335, 340 (3d Cir. 2010) ("agree[ing]" with trial court that partnership 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").[2]

[2] Plaintiffs' state that "[Defendants] have [] admitted that Mohammad Hamed is entitled to a share of the profits of the operations." (Oct. 22, 2012 Reply at 3). The statement, in its full context, is false. Indeed, the record evidence does not support the alleged admission.

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ii. Rent Issues

Plaintiffs rely heavily on the so-called "rent issues," arguing that "United [Corporation] would not be *sending eviction notices to itself* if it was the owner and operator of these three supermarkets!" (Oct. 22, 2012 Reply at 3) (original emphasis). Such reliance is misplaced, as the issuance of rent notices is consistent with the parties' agreement. Indeed, the "net income" for the Plaza Extra operations can only be calculated *after* rent is properly accrued and accounted for. In other words, revenue less expenses is the accounting calculus that must be performed *before* net income can be determined, and, in turn, before profits be accounted for in order to arrive at the Plaintiffs' interests.

iii. Other Issues

As noted in Defendants' response to the initial TRO motion, an injunction should not issue absent "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"). Indeed, in the present action, an injunction cannot issue based on the parties' fundamental dispute as to the alleged "partnership," including: the specific terms of any such agreement; the parties' respective intent, viewed objectively, in entering into any business arrangement; the alleged sharing of losses thereunder; and the alleged joint management of the supermarkets at issue. *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 success on the merits where, among other reasons in dispute

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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"). The foregoing cases, and the others cited in Defendants' papers, are dispositive of the instant TRO request.[3]

[3] Even assuming, *arguendo*, that Plaintiffs could establish only *some* chance of prevailing on the merits, the TRO still should not issue. *See Valentino McBean v. Guardian Ins. Agency*, 52 F. Supp. 2d

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Plaintiffs ignore these cases. Instead, Plaintiffs argue that Fathi Yusuf has "never denie[d] the existence of the partnership." (Oct. 22, 2012 Reply at 7). The record belies this argument. For example, Fathi Yusuf has stated that he "could not and cannot use the words 'partner' or 'partnership' as relating to Mohammad Hamed in any legal or formal document, based on [his] view that doing so would be a lie and a dishonest misrepresentation to the U.S. Government and the public." (Oct. 9, 2012 Affidavit of Fathi Yusuf at ¶ 15). He likewise has stated that "[t]he central allegations in the [c]omplaint in this action and the motion for a temporary restraining order as not true." (*Id.* at 19). These record statements, among others, plainly establish that Fathi Yusuf denies the existence of the alleged partnership. Plaintiffs' argument to the contrary is simply absurd.

Plaintiffs also dispute Defendants' argument, as re-cast by Plaintiffs, "that [Mohammad Hamed] cannot establish a partnership due to the failure to produce any partnership tax returns or related documentation of a partnership." (Oct. 22, 2012 Reply at 8). Plaintiffs are wrong both in their recasting of Defendants' argument and, perhaps most importantly, in their understanding of the applicable legal standards.[4]

As Defendants note, "[o]ne of the most important tests of whether a partnership exists between two persons is the intent of the parties." *Ziegler v. Dahl*, 691 N.W.2d 271, 275 (N.D. 2005) (citing, among other authorities, 59A Am. Jur. 2d *Partnership* § 136 (2003)). (*See*

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).

[4] Plaintiffs' mischaracterization and/or misleading interpretation of (a) the record evidence, (b) the applicable case law, including Plaintiffs' own cases, and (c) Defendants' position is rampant in all of Plaintiffs' papers, including their October 22, 2012 reply brief.

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also Defendants' Jan. 8, 2013 Reply in Further Support of Rule 56(d) Motion at 7-9 (citing additional cases and refuting Plaintiffs' position that intent is "irrelevant")). While the absence of partnership tax returns and related publicly filed documentation does not, standing alone, conclusively establish that a partnership or joint venture does not exist, it is both relevant to and probative evidence of a party's objective intent that no partnership or joint venture exists. Indeed, Plaintiffs' *own cases* belie their position regarding the lack of any tax or corporate documentation in this action. *See, e.g., Dundes v. Fuersich*, 831 N.Y.S.2d 347, ***34-35 (N.Y. Sup. Ct. 2006) (lack of any partnership tax returns is "clearly evidence" supporting lack of alleged partnership, though "not conclusive" evidence) (cited by Plaintiffs); *Zito v. Fischbein*, 11 Misc. 3d 713, 716 (N.Y. Sup. Ct. 2006) (lack of partnership tax returns, among other "indicia of partnership," stands as an "affirmative indication" that party is "an employee . . ., not a true partner, for a partner would have had to receive a K-1 to record his partnership distribution for the tax year") (cited by Plaintiffs); *Prince v. O'Brien*, 256 A.D.2d 208, 212-13 (N.Y. App. 1998) (plantiff's "designat[ion] and compensate[ion] as an employee of defendants' corporation," not as a partner, among other "traditional indicia of partnership" relevant to trial court's finding that "no viable [partnership] claims" existed) (cited by Plaintiffs).

Plaintiffs also claim that "courts are not so blind, finding," in Plaintiffs' strained re-statement of the case law, "that where one partner controls the paperwork and filings . . . such a 'paperwork trail' is not relevant – or even works against the defendant." (Oct. 22, 2012 Reply at 8). The cases state no such thing. For example, in *Al-Yassin v. Al-Yassin*, Case

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No. A099324, 2004 Cal. App. Unpub. LEXIS 2880 (Cal. App. Ct. Mar. 30, 2004) (unpublished), the court did not find that a partnership existed simply because "one partner control[ed] the paperwork," as Plaintiffs suggest. Rather, under the specific facts in that case, the trial court in *Al-Yassin* based its finding on a determination, "following the presentation of testimony and evidence to the court" after a trial on the merits, that the defendant therein "*acted* as though he and [the plaintiff] were partners," including by submitting financial information to accountants for an accounting of the parties' respective "shares" in the business arrangement. 2004 Cal. App. Unpub. LEXIS 2880, at *8, *18-19.[5] Of course, no such finding on the merits has been made in this action. *Cf. Dundes*, 831 N.Y.S.2d at ***23 (denying motion for summary judgment where "record contain[ed] disputed issues of fact as to the existence of a joint venture . . . requiring a trial of all [] causes of action" and where the "evidence . . . reveal[ed] disputed issues of fact concerning the parties' intent regarding their business arrangement") (cited by Plaintiffs); *Zito*, 11 Misc. 3d at 717 (granting summary judgment that alleged partnership *did not exist* where lack of partnership tax returns, and other evidence, "together with the absence of contradictory evidence sufficient to establish indicia of partnership, mandate[d] dismissal of the [alleged partnership] claims) (cited by Plaintiffs); *Prince v. O'Brien*, 256 A.D.2d 208, (N.Y. App. 1998) (affirming trial court's summary judgment that alleged partnership *did not exist* where, "at

[5] *Al-Yassin* involved the appeal from a "final judgment." 2004 Cal. App. Unpub. LEXIS 2880 at *1. In sharp contrast, the present issues involve a request for preliminary relief absent any meaningful discovery whatsoever, let alone a final judgment after a full trial on the merits. *Cf. id.* at *18 ("well established that the question whether a partnership or joint venture exists is primarily one of fact, to be determined by the trier of fact from the evidence and inferences to be drawn therefrom") (citation omitted).

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trial, the evidence of any traditional indicia of partnership was clearly insufficient," and where "defendant referred to plaintiff as his 'partner' in a promotional video, but [later] claim[ed] it was only in the slang sense") (cited by Plaintiffs); *In re Ashline*, 37 B.R. 136, 140-41 (Bankr. N.D. N.Y. 1984) (concluding, based on "the testimony and conduct of the parties and the documentary evidence," that IRS failed "to demonstrate the existence of the alleged partnership agreement," where, among other factors regarding the parties' intent, "there was no probative evidence submitted to show any form of co-ownership," "all required insurance certificates [were] in [an] individual capacity and not in the name of the partnership," and there was an "absence to establish what, if any, control the [alleged partner] maintained over general business decisions") (cited by Plaintiffs); *Mardanlou v. Ghaffarian*, 135 P.3d 904, (Utah App. Ct. 2006) ("indicating that the necessity of each [alleged partnership] factor will be based largely on the facts of the case," and affirming trial court's final judgment on the merits where, among other factors, a "lease/purchase agreement establishe[d] that [the parties] entered into this [lease] agreement . . . as either a partnership agreement or joint venture," and an "insurance document contain[ed] both plaintiff and defendant [] as insureds under the policy inferring a partnership") (cited by Plaintiffs).

Plaintiffs also argue that the statute of frauds "defense does not apply to formation of a partnership under the UPA" and that "this defense is unavailable in the USVI where one party has fully performed under a contract." (Oct. 22, 2012 Reply at 9 (citing *Smith v. Robson*, 44 V.I. 56, 61 (Terr. Ct. 2001)). These arguments are unavailing. First, the decision in *Smith* conflicts with the district court's decision in *Fountain Valley Corp. v. Wells*, 98 F.R.D. 679,

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683-65 (D.V.I. 1983), which foreclosed claims relating to an alleged oral joint venture agreement based on the statute of frauds. Thus, "[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 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).

Smith actually supports Defendants' argument that Plaintiffs cannot establish a likelihood of success on the merits, as the court in *Smith* denied summary judgment where, under the facts of that case, "there [wa]s an issue of material fact as to the existence of the alleged oral [partnership] agreement." 44 V.I. at 61. Indeed, "where there is an issue of material fact as to the existence or substance of an alleged agreement summary judgment *must be denied.*" *Id.* at 60 (emphasis added) (citation omitted). The same reasoning applies in the context of a TRO, where "[d]eciding whether there was a [partnership] contract . . . requires a determination of the intent of the parties – whether they manifested a mutual

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intent to be bound – and this question is one for the fact finder" (*id.*), not for the court in a TRO or preliminary injunction hearing.

Plaintiffs' arguments regarding full and/or partial performance issues fail for the same reason, *i.e.*, these disputed issues of material fact simply cannot be decided at this stage of the proceedings. *See, e.g., Burns v. Caribbean Villas & Resorts Mgmt., Inc.*, Case No. CV-03-234, 2005 Me. Super. LEXIS 83, at *37 (Me. Supr. Ct. July 25, 2005) ("Because the court concludes that . . . there are disputes of material fact relating to [performance] issues, summary judgment cannot be granted") (noting also "that the part performance doctrine does not apply," as here, "when damages are sought"); *Spiller v. Lucci*, Case No. 06-83, 2010 U.S. Dist. LEXIS 76383, at *11-12 (D.V.I. July 28, 2010) ("find[ing] that genuine issues of material fact exist[ed] as to whether [plaintiff] can avoid the bar of the Statute of Frauds," and thus denying plaintiff's motion for summary judgment).[6]

At bottom, because Plaintiffs cannot establish a likelihood of success on the merits, this Court "must" deny the present preliminary injunction motion. *Barclays*, 938 F. Supp. at 307 ("a failure . . . to make the requisite showing regarding any one of these four

[6] Plaintiffs' remaining claims in this context are frivolous, including the unsupported claim that, because "Mohammad Hamed was not a party to any criminal case, so he cannot be bound by the statements made in such a case" (Oct. 22, 2012 Reply at 9). (*See, e.g.*, Renewed Motion to Dismiss at 13-18, 19-20 (citing cases)). At best, the claims present yet additional disputed material facts that should be decided by the ultimate trier of fact – the jury. Similarly, as addressed herein and in Defendants' prior papers, Plaintiffs' reliance on Fathi Yusuf's prior deposition testimony and on the parties' settlement negotiations is entirely misplaced. Moreover, *Evans v. Covington*, 795 S.W.2d 806 (Tex. App. Ct. 1990), on which Plaintiffs rely in attempting to introduce evidence of settlement negotiations, is easily distinguished. In *Evans*, unlike here, the party who was objecting to the settlement negotiation evidence was also the same party who "first introduced" the evidence. 795 S.W.2d at 809. Plaintiffs – not Defendants – invited the error in this action.

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[preliminary injunction] factors *must* result in this Court denying [the] motion for a preliminary injunction.") (citation omitted) (emphasis added).

C. <u>There Is No Irreparable Harm.</u>

"[A] preliminary injunction should not be granted if 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) (citing *Frank's GMC Truck Center, Inc. v. Gen. Motors Corp.*, 847 F.2d 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.

The challenged past acts in the present action, including the removal of $2.7 million dollars, all constitute "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). Plaintiffs in their October 22, 2012 Reply side-step any meaningful analysis of the irreparable harm factor, with the exception of four cases, addressed below. The cases are inapposite.

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First, Plaintiffs reference a 1953 case, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and then sweepingly conclude that Defendants' argument with respect to past acts is "directly contrary to the established law," presumably, *Grant.* Tellingly, Plaintiffs ignore any discussion of the "established law" that is cited and discussed in Defendants' October 10, 2012 Response. Those cases are dispositive of Plaintiffs' claims. *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). These cases are consistent with *Grant*, which affirmed the trial court's denial of injunctive relief and emphasized the "necess[ity] . . . [of] some cognizable danger of recurrent violation, something more than the mere possibility" of such violation. 345 U.S. at 633 (noting that the alleged injury in that case "had been voluntarily terminated and intention to resume them had been negatived under oath").

Second, relying on hearsay and/or unsupported speculation, Plaintiffs maintain that "monetary relief will not protect" them. (Oct. 22, 2012 Reply at 17 n.14 (citing *Allstate Ins. Co. v. TMR Medibill Inc.*, Case No. CV-00-0002, 2000 U.S. Dist. LEXIS 23142 (E.D.N.Y. July 13, 2000), *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), and *Signal Capital*

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Corp. v. Frank, 895 F. Supp. 62 (S.D.N.Y. 1995)). *Allstate*, *Marcos* and *Signal* actually support Defendants' position – not Plaintiffs' position.

Allstate involved a massive insurance fraud scheme in which certain defendants "admitted in their plea allocations [in a separate criminal action] that their insurance fraud scheme was committed with the knowledge and participation" of other defendants in the civil action, and "admitted the factual allegations contained in each relevant count of the indictment." 2000 U.S. Dist. LEXIS 23142, at *13, *18-19. The defendants in *Allstate* also "d[id] not [] dispute the fact that they w[ould] be liable for substantial damages" in the civil action. *Id.* at *14. Further, there was record evidence that the "defendants began systematically to dissolve defendant corporations, close bank accounts, and dispose of real property after defendants learned of a criminal investigation into the insurance fraud scheme." *Id.* at *22. Under those facts, the court in *Allstate* concluded that a preliminary injunction was warranted, finding that "the dissolution of . . . defendant corporations following the investigation . . ., in conjunction with the closing of all of their corporate bank accounts . . ., raise[d] a strong inference of a concerted attempt to frustrate a potential judgment." *Id.* at *32. The record in this action clearly does not support any such "inference." *Cf. id.* at *39-40 (noting that, unlike here, the plaintiffs in *Allstate* had offered evidence of "actual ... transfers or dispositions of assets that would frustrate a judgment") (citing *Signal*).

Marcos, involving the former dictator, Ferdinand Marcos, his family, and the "well-publicized circumstances leading up to the [] upheaval in the Philippines," is also easily

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distinguished from the instant case. 806 F.2d at 348 (noting that the allegations included "a variety of activities constituting a gross denial of human rights, including abduction, murder, torture, summary incarceration . . . [and] widespread and systematic theft of funds and properties"). Similarly, the Republic of the Philippines, as the plaintiff therein who was seeking a preliminary injunction, "ha[d] also presented evidence that the funds used to acquire the properties [subject to the requested injunction] were illegally obtained." *Id.* at 354-55. This action involves no analogous facts whatsoever.

Lastly, in *Signal*, also cited by Plaintiffs, the court emphasized in this context that "intent to defraud [a potential adverse judgment] is required and may not be lightly inferred." 895 F. Supp. at 64 (citation omitted) (discussing the plaintiff's request for an order of attachment and a preliminary injunction). The court in *Signal* denied the requested attachment and preliminary injunction, based on its "find[ing] that [plaintiff] ha[d] not demonstrated an intent on the part of [defendants] to frustrate any judgment." *Id.* at 64-65.

In sum, even the cases on which Plainitffs rely – *Allstate*, *Marcos* and *Signal* – support Defendants' position that this is a damages case at its core and, therefore, that Plaintiffs have failed to establish the "heavy" and "exacting" showing of irreparable injury.

D. <u>The Balance of Factors Supports the Denial of Injunctive Relief.</u>

Plaintiffs baldly assert in this context that "the defendants are not being asked to do anything other than to continue operating the supermarkets exactly as they have been operated for over 25 years." The record, including Defendants' Renewed Motion to Dismiss and any evidence that will be admitted at the January 25, 2013 TRO hearing, expressly

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refutes this assertion. In fact, the entry of an injunction would afford rights that Plaintiffs have never enjoyed – and would irreparably harm Defendants in an amount that no bond could reasonably secure.

E. The Public Interest Also Supports the Denial of Injunctive Relief.

"[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 v. Blinder, Robinson & Co.*, 903 F.2d 186, 198 (3d Cir. 1990)). Here, as noted in Defendants' October 10, 2012 Response, the public interest would not be served by (a) turning the supermarkets' operations upside down; (b) frustrating the pending federal criminal court case; and (c) permitting a litigant to wait decades after a purported partnership was made and then allowing him to bring a civil case against the other purported partner in derogation of the equitable doctrines of laches, unclean hands, and estoppel (judicial and/or quasi).

Conclusion

For all of the foregoing reasons, and the reasons to be raised at the January 25, 2013 hearing and any future briefing papers, Defendants request that this Court enter an Order denying Plaintiffs' request for preliminary injunctive relief in its entirety; and awarding to Defendants such further relief as the Court deems appropriate.

Respectfully submitted,

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January 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2013, a true and accurate copy of the foregoing was forwarded via hand delivery to *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and email delivery to *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.

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