

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

MOHAMMAD HAMED by His Authorized)	
Agent WALEED HAMED,)	
)	CIVIL NO. SX-12-CV- 370
<i>Plaintiff,</i>)	
v.)	ACTION FOR DAMAGES
)	INJUNCTIVE AND
FATHI YUSUF and UNITED CORPORATION,)	DECLARATORY RELIEF
)	
<i>Defendants.</i>)	JURY TRIAL DEMANDED
_____)	

EXHIBIT A
SEALED

MOTION TO FILE DOCUMENTS UNDER
SEAL DATED FEBRUARY 27, 2013

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DIVISION OF ST. CROIX**

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<i>Plaintiff,</i>)	CIVIL NO. SX-12-CV- 370
v. _{vj})	
)	ACTION FOR DAMAGES
FATHI YUSUF and UNITED CORPORATION,)	INJUNCTIVE AND
)	DECLARATORY RELIEF
<i>Defendants.</i>)	
)	JURY TRIAL DEMANDED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff filed a request for a temporary restraining order ("TRO") on September 18, 2012. Defendants moved to convert this to a preliminary injunction ("PI") on September 28, 2012. On January 9, 2013, the plaintiff filed a renewed request. An evidentiary hearing with regard to the motions was held on January 25th and continued on January 31, 2013. Thus, this matter is ripe for disposition.

I. Findings of Fact

The Court hereby makes the following findings of fact:

1. In 1973, with the assistance of defendant Fathi Yusuf ("Yusuf") and his family, plaintiff Mohammad Hamed ("Hamed") and his family moved to the U.S. Virgin Islands. 1/25 Tr, p 196:3-23.
2. Yusuf is Hamed's brother-in-law. 1/25 Tr, pp 196:3-15 and 197:17-22.
3. Hamed was initially a salesman, selling merchandise door-to-door. 1/25 Tr, p 197:2-4.
4. After Hamed had saved sufficient funds, he opened a grocery store in Estate Carlton. 1/25 Tr, p 197:5-9.
5. Hamed then opened a second grocery store in Glynn. 1/25 Tr, p 197:10-12.
6. In 1979, Yusuf incorporated United Corporation ("United") in the U.S. Virgin Islands. DEx 7.
7. United subsequently started to build a shopping center at Estate Sion Farm, St. Croix. Yusuf wanted to include a supermarket in the shopping center. PEx1, p 199:7-9 (Fathi Yusuf Feb. 2, 2000, deposition in *Idheileh v United and Yusuf*,



STT Superior Court No. 156/1997 ("Idheileh Case"). Yusuf encountered financial difficulty in completing construction of the shopping center and opening the supermarket, telling Hamed "I owe the people money, I have to pay tomorrow and I don't have it." PEx 1, pp 14:5-15:14.

8. Because of Yusuf's financial difficulties, Hamed provided Yusuf with all of Hamed's life savings to allow Yusuf to complete the shopping center and open the supermarket. 1/25 Tr, p 198:15-197:6; PEx 1, p 14:19-20.

9. Yusuf testified in his 2000 deposition as follows (PEX 1, pp 14:5-15:1):

When I was in the financial difficulty, when I was in financial difficulty, my brother-in-law, he knew. I shouldn't – he started to bring me money. Okay? He own a grocery, Mohammed Hamed, while I was building, and he have some cash. He knew I'm tight. He started bring me money. Bring me I think 5,000, 10,000. I took it. After that I say, Look we Family, we want to stay family. I can't take no money from you because I don't see how I could pay you back. So he insisted, Take the money. If you can afford to, maybe pay me. And if you can't, forget about it. Okay. He kept giving me. I tell him, Under this condition I will take it. I will take it. He kept giving me until \$200,000. **Every dollar he make profit, he give it to me.** (Emphasis added).

10. Yusuf had no prior experience in the supermarket business. PEx 1, p 16:3-5.

11. Yusuf told Hamed that he wanted Hamed to be part of the Plaza Extra partnership, but that Hamed would have to sell his two grocery stores and only work with Plaza Extra, which Hamed did. 1/25 Tr, p 200:4-12.

12. Hamed gave the money from the sale of these two stores to Yusuf as his partner in the Plaza Extra supermarket "winning or loss". 1/25 Tr, p 200:13-23.

13. Hamed became a partner with Yusuf, along with Yusuf's two nephews in the Plaza Extra supermarket partnership (PEX 1, p 15:2-14):

I say, Brother-in-law, you want to be a partner too? He said, Why not? You know, as a family, we sit down. Says, How much more can you raise. Say, I could raise 200,000 more. I said, Okay. Sell your grocery. I'll take the two hundred, four hundred. You will become 25 percent partner. So we end up I'm 25 percent, my two nephew 25 each, and my brother-in-law, Mohammad Hamed, 25 percent. I don't recall the year, could be '83 or '84, but at least thanks God in the year that Sunshine Supermarket opened, because his supermarket is the one who carries these two young men and my brother to go into supermarket with me. So I have their money, I finish the building.

14. When the building was finished, the partnership sought a loan to begin operations, but the loan application was denied, causing the two nephews that were partners to request the return of their funds and to leave the partnership. As Yusuf noted in his deposition (PEX 1, pp 17:6-13, 22-24):

Then, but when I been denied [for loans], I have to tell my partner what's going on. I been entrusted to handle the job perfect, and I am obligated to report to my partner to anything that happened. I told my nephews and I told

my partner, Hey, I can't get a loan, but I'm not giving up. So two, three days later my two nephews split, say, We don't want to be with you no more, and we want our money. I say I don't have no money to pay you. . . .We come to an agreement, I pay them 12 percent on their money, and 150,000 default because I don't fulfill my commitment.

15. Yusuf offered to repay Hamed's partnership contribution and have Hamed leave the partnership, as noted in his deposition (PEx 1, pp 17:24-18:8):

We wait until my partner, which is my brother, came. He's an older man. And we came up to Mr. Mohammed Hamed, I say, You want to follow them? He say, Yeah, I will follow them, but do you have any money to give? I say, Look, Mr. Hamed, you know I don't have no money. It's in the building, and I put down payment in the refrigeration. But if you want to follow them, if you don't feel I'm doing the best I can, if you want to follow them, you're free to follow them. I'll pay you the same penalty, 75,000. I will give you 12 percent on your 400,000.

16. Hamed agreed to stay as a partner with Yusuf, a fact Yusuf has acknowledged (PEx1, pp 18:9-10; 18:16 to 19:10):

He [Hamed] says, Hey. If you [Yusuf] don't have no money, it's no use for me to split. I'm going to stay with you.

All right. I say, Okay. You want to stay with me, fine.

~*~*~

And my partner only put in \$400,000. That's all he put in, **and he will own the supermarket.** I have no problem. . . .

They say, Mr. Yusuf, we knows each other. I trust you. I keep going. Okay. Now, I told him about the two partner left, Mr. Hamed. You know, these two guys, they left, my two nephew, they was your partner and my partner. **I give you a choice. If you pay penalty with me and pay the interest with me, whatever they left is for me and you.** But if I must pay them the one-fifty penalty and pay them 12 percent, then Plaza Extra Supermarket will stay three-quarter for Yusuf and only one-quarter for you.

He says, Do whatever you think is right. I tell him, You want my advice? I be honest with you. You better off take 50 percent. **So he took the 50 percent.**" (Emphasis added).

17. Yusuf repeated this history of the partnership's formation in verified interrogatory answers filed in the *Idheileh* Case, stating in part in a verified response to interrogatories #2 and #6 (PEx 28):

Mohamed Hamed is a partner in Plaza Extra Supermarkets and has been since the mid-1980's. . . .with respect to Plaza Extra, the original partners were Khalid Ali, Isam Yusuf, Mohamed Hamed, and Defendant Yusuf. **By the time Plaza Extra opened in 1986, Mohamed Hamed and Defendant Yusuf were the only partners.** (Emphasis added).

18. As a partner in the Plaza Extra Supermarkets, Hamed was entitled to 50 percent of the profits but was liable for 50% of all payables, as well as being exposed to the loss of his initial partnership contribution. 1/25 Tr, pp 199:17-22, 200:16-23 and 205-24-206:24.

19. Yusuf has acknowledged this fact under oath (PEx 1, pp 23:18-25, 24:1, 4-5):

But I want you please to be aware that my partner's with me since 1984, and up to now his name is not in my corporation. And that -- excuse me and that prove my honesty. Because if I was not honest, my brother-in-law will not let me control his 50 percent. And I know very well, my wife knows, my children knows, that **whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.**

But due to my honesty . . . my partner, he never have it in writing from me. (Emphasis added).

20. Hamed and Yusuf agreed and the Court finds that the partnership term would be indefinite. 1/25 Tr, p 210:4-8 (Q: How long is your partnership with Mr. Yusuf supposed to last? When does it end? A: Forever. We start with Mr. Yusuf with the supermarket and we make money. He make money and I make money, we stay together forever."); PEx 1, p 18:18-23 ("I'm obligated to be your partner as long as you want me to be your partner until we lose \$800,000").

21. Yusuf stated under oath and the Court finds that it was public knowledge that Hamed was his partner even before the supermarket, Plaza Extra, opened (PEx 1, p 20:10-12):

Every single Arab in the Virgin Islands knew that Mr. Mohammed Hamed is my partner, way before Plaza Extra was opened.

22. A second Plaza Extra Supermarket was opened in St. Thomas in 1992-93 with a third person. 1/25 Tr, pp 26:24-29:1.

23. Litigation subsequently ensued with this third person in the St. Thomas Superior Court, in *Idheileh v United and Yusuf*, STT Superior Court No. 156/1997. PEx 1.

24. In that litigation, Yusuf signed an affidavit stating in ¶¶ 2-5, and 7 as follows (Depo Exhibit 6 to PEx 1):

- My brother in law, Mohamed Hamed, and I have been full partners in the Plaza Extra Supermarket since 1984 while we were obtaining financing and constructing the store, which finally opened in 1986.
- Mohamed Hamed and I decided to open a St. Thomas Plaza Extra store and used our own capital and later obtained financing to make the store ready for opening.
- Mohamed Hamed gave his eldest son, Waleed (a/k/a Wally), power of attorney to manage his interests for the family.

- We negotiated a lease for the St. Thomas store with Tutu Park Ltd. and executed the agreement on May 30, 1991.
 - Hamed did not want a third partner, but I convinced him that Ahmad could run the store and would protect all of our investments.
25. Consistent with Yusuf's affidavit, both Mohammad and Waleed Hamed testified -- and the Court finds -- that Hamed and Yusuf agreed that Waleed Hamed a/k/a Wally Hamed, would act on his father's behalf as to Hamed's partnership rights and obligations pursuant to a power of attorney. 1/25 Tr, pp 46:1-10; 47:5-7; 47:18-48:2 and 202:18-25.
26. The opening of the St. Thomas store caused a strain on the business, as noted by United and Yusuf in their summary judgment pleading in the *Idheileh* Case, requiring the Hameds and Yusuf to have to work long hours, and to give personal guarantees to obtain additional credit (PEx 29 at p 15):
- The Hameds and Mr. Yusuf worked 18 hour days for free, put their credit on the line, gave personal guarantees to vendors, and did everything they could to make a profit.
- Yusuf acknowledged that these joint efforts in the St. Thomas store paid off, stating: "The Hameds and I were able to turn the store around by the last part of 1994." Depo Exhibit 6 to PEx 1, ¶ 41.
27. The third person's interest in the St. Thomas Plaza Extra was eventually bought out. 1/25 Tr, p 28:8-14.
28. In 2002, the partnership opened a third Plaza Extra Supermarket on the west end of St. Croix, known as Plaza Extra West. 1/25 Tr, pp 29:20-31:5.
29. The three Plaza Extra Supermarkets currently employ over 600 people located on both St. Croix and St. Thomas. 1/25 Tr, p 238:4.
30. Defendant Yusuf made a judicial admission in this case that Hamed and Yusuf entered into an oral agreement in 1986 to split the net profits of the Plaza Extra supermarkets 50/50. (PEx 2, p 3):
- In 1986, due to financial constraints, **Defendant Yusuf and Plaintiff Hamed entered into an oral joint venture agreement.** The agreement called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets....Plaintiff Hamed received 50% of the net profits thereafter. (Emphasis added).
- Defendants repeated this admission in a subsequent filing here. (PEx 3, p11):
- There is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operation of Plaza Extra Store.
31. United made similar statements in a complaint in another matter recently filed in this Court -- but alleged that it is the partner with Hamed -- and that Fathi was acting for United in forming the partnership, *United v. Waleed Hamed*, STX Civ. No. 2013/3, alleging (PEx 4, ¶¶ 11, 14):

Sometime in 1986, **Plaintiff United, through its shareholder and then President, Fathi Yusuf, entered into an oral agreement**, whereby Plaintiff United and Defendant Hamed's father, Mohammed Hamed, agreed to operate a grocery store business. . . . In 1986, the joint venture resulted in the first supermarket store being opened. United began using the trade name "Plaza Extra" and the first supermarket in this joint venture was named Plaza Extra Supermarket. Since 1986, two additional stores opened in the U.S. Virgin Islands; the second in Tutu Park, St. Thomas; the third in Grove Place, St. Croix. (Emphasis added.)

32. Over the years, Hamed and Yusuf have jointly shared the profits and losses. 1/25 Tr, p 44:12-15.
33. They shared profits from the Plaza Extra Supermarket operations in part by using them to purchase multiple properties throughout the Virgin Islands, including the real property where Plaza West is located, always splitting the ownership of these properties 50/50, with members of the each family owning 50% of each such corporation used to buy the properties. 1/25 Tr, pp 39:11-41:13.
34. Hamed and Yusuf have jointly managed the stores by having one member of the Hamed family and one member of the Yusuf family together manage each of the Plaza Extra Supermarkets; originally with Mohammad Hamed and Fathi Yusuf, and later with Mafi Hamed and Yusuf Yusuf managing the Sion Farm store along with Wally Hamed, Willie Hamed and Fathi Yusuf along with Nejah Yusuf operating the St. Thomas store and Shawn Hamed and Mike Yusuf managing the Plaza West store on St. Croix. 1/25 Tr, pp 31:6-33:13 and 147:13-20; also 1/31 Tr, p 33:4-17.
35. Hamed acknowledged that Yusuf told him at the outset that it would be best if his name was not on the bank loans, but that he would be liable for 50% of the payments, which Hamed agreed to pay. 1/25 Tr, pp 205:24 to 206:25. As Hamed explained, he let Yusuf "take care of the office" while he was "in charge of the warehouse so it's even." 1/25 Tr, p 206:20-22. The Court finds this deference to allowing Yusuf to take care of the office explains why United's name appeared on many governmental filings.
36. Yusuf admitted that they agreed to operate the partnership this way, using his and United's names, but that Hamed is his 50/50 partner in Plaza Extra Supermarket even though Hamed's name is not part of United Corporation (PEX1, pp 23:18 to 24:5):

But I want you please to be aware that my partner's with me since 1984, and up to now his name is not in my corporation. . . . And I know very well, my wife knows, my children knows, that whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner. But due to my honesty . . . my partner, he never have it in writing from me."
37. Yusuf admitted under oath that the effect of this agreement is that whenever one is talking about Plaza Extra, its use, even if used along with the name "United Corporation" really means "me and Mr. Mohammed Hamed." PEX 1, p 69:13-21.

38. Yusuf stated in interrogatory response #6 in the *Idheileh* Case that Plaza Extra was a distinct partnership and that the "partners operated Plaza Extra under the corporate name of United Corp":

By the time Plaza Extra opened in 1986, Mohamed Hamed and Defendant Yusuf were the only partners. **These partners operated Plaza Extra under the corporate name of United Corp., . . .** (Emphasis added.)

39. The fact that the partnership between Hamed and Yusuf is distinct from United Corporation is also demonstrated by the fact that United, which owns the shopping center, sends rent notices to Hamed at the Plaza Extra Supermarket in Sion Farm (PEX 7), which rent Plaza Extra, as tenant, pays to United, as landlord. PEX 8 and 9. 1/25 Tr, pp 44:25-48:21.

40. Indeed, Mahar ("Mike") Yusuf, who is the President of United Corporation, submitted an affidavit (PEX 19), as to which he testified about at the TRO/PI hearing (1/25 Tr, pp 212:3 to 215:11), that states in paragraph 17 as follows:

More importantly, United has always charged rent for the use of part of its retail premises **by the Plaza Extra Supermarket operation** on Sion Farm, St. Croix. **Mohammed Hamed** has always understood that United would charge for the use of its retail space, **and would deduct the value of such rent in arriving at the net profits of the Plaza Extra Supermarkets.** (Emphasis added).

He testified that it did so because his father and Hamed have a business agreement to share the profits of the Plaza Extra store 50/50. 1/25 Tr, p 214:2-11.

41. Pursuant to this landlord-tenant relationship, in February 2012, Plaza Extra Supermarkets partnership paid United Corporation over \$5 million in back rents for the period 1/2004 through 12/2011 from the Plaza Extra supermarket accounts. PEX 8, 1/25 Tr, pp 48:24-51:9.
42. The supermarket operations have always been referred to as "Plaza Extra." For example, the stores use the letterhead "Plaza Extra" with no mention of United, while United Corporation uses its own letterhead. As Yusuf Yusuf, one of Fathi Yusuf's sons who co-manages the Sion Farm store, explained (DEX 15; 1/31 Tr, pp 33:18-34:16):

Q Okay. And showing you Exhibit Number 15, which is the -- I think the last one. These are the rules and regulations that are dated July of 1997, is that correct?

A Yes.

Q And these are on the letterhead, Plaza Extra, is that correct?

A Correct.

Q And these are for the Plaza Extra store at Sion Farm?

A Correct.

Q It doesn't say United Corporation, does it?

A No.

- Q And who do you understand owns the Plaza Extra East store?
A My dad.
Q And he ever told you he has a partner?
A Yes.
Q And who is the partner in that store?
A Mohammad Hamed.

43. Likewise, the three Plaza Extra Supermarkets maintain and account for operations separately -- with separate bank accounts distinct from United Shopping Center's bank account. 1/25 Tr, p 35:12-20 and 36:22-38:25.

44. In 2003, United was indicted for tax evasion in federal court, along with Yusuf and several other members of the Hamed and Yusuf families, although the Plaintiff Hamed was not indicted. 1/25 Tr, pp 222:11-223:6 and 134:15-23.

45. The federal government appointed a receiver in 2003 to run the Plaza Extra stores, depositing all profits in investment accounts at Banco Popular Securities and Merrill-Lynch, where they remain through the current date. 1/25 Tr, p 137:13-138:19; 1/25 Tr, pp 41:22 to 42:18

46. In 2011, United pled guilty to tax evasion. Charges were dismissed against the other defendants. 1/25 Tr, p 154:3-9.

47. The criminal proceeding against United is still pending, as the terms of the plea require further "complete and accurate" tax filings, as no tax returns have been filed since 2002 (although estimated taxes in excess of \$10 million have been paid from the grocery store accounts) as well as the adoption of certain accounting procedures for Plaza Extra. 1/25 Tr, pp 241:23-245:12; also 1/31 Tr, p 90:4-16. DEx 2.

48. Around the time of the plea agreement, it was agreed between the Hamed family and the Yusuf family that all checks written on a Plaza Extra Supermarket account had to be signed by one member of the Hamed family and one member of the Yusuf family. 1/25 Tr, pp 100:11-16 and 228: 2-11

49. In February of 2012, Yusuf had his lawyer send a dissolution of partnership notice to Hamed, which stated in part (PEX 10 and 11):

As it stands, the partnership has three major assets: Plaza Extra - West (Grove Place, including the real property), Plaza Extra - East (Sion Farm) and Plaza Extra (Tutu Park, St. Thomas).

50. Yusuf's lawyer then sent a partnership dissolution agreement on March 13, 2012, to Hamed (referencing the February 12, 2012, letter dissolving the partnership) stating in part the following facts (PEX 12):

WHEREAS, the Partners have operated the Partnership under an oral partnership Agreement since 1986.

WHEREAS, the Partnership was formed for the purposes of operating Super Markets in the District of St. Croix, and St. Thomas; and

WHEREAS, the Partners have shared profits, losses, deductions, credits, and cash of the Partnership;

WHEREAS, the Partners have certain rights and responsibilities under the Virgin Islands Revised Uniform Partnership Act ("Act") governing dissolution of partnerships, and hereby desire to vary or confirm by the terms of this Agreement;

PLAZA EXTRA

Section 1.1: Assets of the Partnership

1. PLAZA EXTRA EAST- Estate Sion Farm. St. Croix
2. PLAZA EXTRA WEST- Estate Grove, St. Croix (Super Market Business ONLY)
3. PLAZA EXTRA - Tutu Park. St. Thomas

51. The parties then began negotiations to dissolve and separate the partnership assets, though no agreement has yet been reached. 1/25 Tr, p 58:15-20.
52. Although both Hamed and Yusuf had withdrawn funds in their own name previously, and both parties provided copies of such checks (PEX 27 and DEX 1), Wally Hamed testified that such withdrawals were always made with the knowledge and consent of each partner. 1/25 Tr, pp 137:22-139:20; also 1/31 Tr, pp 122:22-123:9. No witness contradicted this testimony, so this Court finds that this was an agreed practice of the partnership.
53. In August of 2012, Yusuf moved \$2.7 million from a segregated Plaza Extra Supermarket operating account despite the fact that Hamed objected to this unilateral withdrawal from this Plaza Extra account in writing, noting that it was a violation of the federal TRO. PEX13; 1/25 Tr, pp 246:1-250:4.
54. Despite demands by the Hamed family, those funds have never been returned to the Plaza Extra Supermarket bank account. 1/25 Tr, p 250:5-17.
55. Wally Hamed testified that Yusuf's withdrawal of \$2.7 million in August of 2012 was the first time Plaza Extra Supermarket funds had ever been withdrawn by either Hamed or Yusuf without the consent of both parties. 1/31 Tr, p 123:5-9. No witness contradicted this testimony, so this Court accepts that statement as an established fact.
56. Wally Hamed also testified that Yusuf had previously diverted \$802,966 from another business investment jointly owned by the Hamed and Yusuf family and that the whereabouts of these funds was unknown. 1/25 Tr, pp 88:8-90:17 and PEX 18. No witness contradicted this testimony, so this Court accepts that statement as an established fact.
57. While Mike Yusuf, United's president, initially testified under oath that the \$2.7 million that was withdrawn from the Plaza Extra bank account was used to buy three properties on St. Croix in United's name (1/25 Tr, pp 250:2 to 251:15), he subsequently changed this testimony, admitting he had testified falsely as to the present location of these funds, as these funds had actually been used to invest

in businesses that are not owned by United, including a mattress business. 1/31 Tr, pp 118:12-120:2.

58. With regard to the \$2.7 million check reflecting those funds removed from the supermarket operational accounts, both comptrollers for the supermarkets and United hired by Yusuf testified that they could not tell the Court anything about the transaction including how that money had been spent or where it is now. 1/31 Tr, pp 107:22-112:11 (Gaffney "did not have "current day-to-day vision on the cash receipts and disbursements") and 63:14:-64:7 (Al-Khaled "didn't have a chance to touch [United accounts]").
59. Wally Hamed also testified about other checks subsequently being written on partnership bank accounts by Yusuf to Yusuf/United lawyers without Hamed's permission -- in excess of \$145,000. 1/25 Tr, pp 76:5-81:12, PEx15 and 16. No witness contradicted this testimony, which the Court thus accepts as an established fact.
60. Yusuf has continued to unilaterally withdraw funds from the supermarket accounts up to and even after the TRO/PI hearing, writing two checks totaling \$223,000 to Yusuf/United lawyers without Hamed's consent just prior to and shortly after these hearings. PEx 30.
61. United has asserted that there is a TRO in the criminal case addressing such withdrawals of funds. 1/25 Tr, pp 76:5-81:12.
62. This Court heard testimony that Yusuf has violated that TRO in the criminal case because he removed funds from this account without permission, and also because he hired a relative, Ayman Al Khaled. 1/31 Tr, p 61:11-12.
63. Neither Wally Hamed nor his father (who was not indicted) appear to have standing to enforce the TRO in the criminal case, even though they believe the withdrawal of the \$2.7 million and the payments of Yusuf's counsel's fees violate that TRO order. 1/31 Tr, p 126:5-11.
64. In any case, this Court cannot enforce the TRO in the criminal case.
65. Thus, absent an injunction from this Court, as requested by Hamed in this case, there is nothing the Hamed family can do to prevent future withdrawals of Plaza Extra funds by Yusuf of some or all of the funds in Plaza Extra Supermarket's bank account, as has been done recently. 1/31 Tr, pp 124:15-20, 125:21-24, 126:5-11 and PEx 30.
66. On January 8, 2013, defendant Yusuf spoke to a 15 year accounting employee at the Plaza Extra Sion Farm store, Wadda Charriez, who deals with payroll and other central accounting operations at this store. 1/25 Tr, pp 181:24-183:6.
67. She was described by an accountant hired by Yusuf, John Gaffney, as being a "very good worker" and "excellent at her job." 1/31 Tr, p 94:2-6.
68. Despite this fact, Yusuf told Charriez he thought she was given a bonus because the Hamed family was trying to "buy [her]." 1/25 Tr, pp 182:22-183:6.

69. In fact, it was Yusuf Yusuf who had decided to give Charriez a larger bonus, not any member of the Hamed family. 1/25 Tr, pp 184:3 to 185:2.
70. Despite this fact, Fathi Yusuf told Charriez she was fired and he threatened to expose her for stealing if she challenged her firing -- which he stated would render her ineffectual as a witness in "court." 1/25 Tr, p 185:6-16.
71. Because the Hamed sons were co-managers of the Plaza Extra Sion Farm store, Wally and Mafi Hamed, had not been consulted about this termination of a key employee Mafi called Charriez and told her to return to work. 1/25 Tr, pp 185:17-186:8.
72. Mafi Hamed did so because in the past decisions to fire key store employees were always discussed between a Hamed and a Yusuf representative before a decision was made. 1/25 Tr, p 179:4-24.
73. Yusuf Yusuf, the Yusuf son who jointly manages the Sion Farm store with Mafi and Wally Hamed, acknowledged that he did not consult the Hameds before his father told Charriez that she was fired. He testified that he did not need to do so, even though he admitted that Mafi Hamed was an equal manager in the Sion Farm store. 1/25 Tr, pp 166:3-20; also 1/31 Tr. pp 33:7-17; 39:3-20, 40:20-41:10.
74. On January 9, 2013, Charriez returned to work at the Plaza Extra Sion Farm store as instructed by Mafi Hamed. 1/25 Tr, pp 164:19-165:13.
75. Yusuf was present and started screaming at Charriez, telling her to leave or he would call the police. 1/25 Tr, pp 186:9:-187:15.
76. Yusuf also told the two Hamed sons who jointly manage the Plaza Extra Sion Farm store that they both they were "fired" and that they must leave the store at once. 1/25 Tr, pp 94:1-95:2 and 187:12-19.
77. Yusuf then called the police to the store. 1/25 Tr, pp 94:5-25.
78. When Charriez and the Hamed sons would not leave the store, Yusuf demanded that the police officers "immediately arrest" them and remove them from the store. 1/25 Tr, pp 94:1-95:3.
79. Yusuf stated that if the officers did not do so, he would immediately "close the Plaza Supermarket store" 1/25 Tr, p 94:9-95:2, 164:19-165:18, 187:12-15 .
80. No witness contradicted this testimony about what Yusuf said on January 9th, which the Court thus accepts as established facts.
81. Indeed, Mike Yusuf, who was present, acknowledged hearing his father threaten to close the store, which his father had also said he would do on other occasions as well. 1/25 Tr, pp 253:25-254-8.
82. The Hamed manager in the St. Thomas store, Waheed Hamed, also testified that Yusuf would yell in front of store employees that he was firing the Hamed brothers and closing the store, causing these employees to become afraid of losing their jobs. 1/25 Tr, p 149:20 - 150:18.

83. Another Plaza Extra Supermarket employee who works in the St. Thomas store, Kareema Dorsett, also testified that Yusuf has told her he may close the store, which she reported to the Hamed manager because she was worried about losing her job that she needed to support her family. 1/25 Tr, pp 158:18-159:12.
84. Charriez remains employed at Plaza Extra, but she testified that she works under a great deal of stress because of the situation. 1/25 Tr, pp 187:22-188:8.
85. The Court heard conflicting testimony about whether Charriez had properly reported her hours, but this issue is not a determination for this Court to make in these hearings.
86. The Court finds Charriez's attempted discharge is relevant to the request for injunctive relief, however, as it shows (1) the breakdown that has occurred in the Hamed-Yusuf joint management of the Plaza Extra stores and (2) the inappropriate behavior by Yusuf in dealing with store employees.
87. The Court also heard conflicting testimony about whether there were problems in the current operation of the stores regarding the payment of vendors and the purchasing of inventory, particularly in the St. Thomas store. Compare 1/25 Tr, p 143:17-146:19 with 1/25 Tr, p 228:23-229:9 and DEx 11 and 12.
88. The Court heard conflicting testimony about two "accountants" being hired by Yusuf, one Yusuf's nephew, with conflicting testimony being given about both their roles in the business. 1/25 Tr, pp 69:17-73:24. and 1/31 Tr, pp 52:2-10, 54:21-55:10, 56:1-19, 63:14-64:7; 68:17-69:3, 95:11-96:8, 103:13-104:23 and 109:14-110:11.
89. The Court heard conflicting testimony about disputes regarding what tax returns need to be filed to conclude the criminal case, as none have been filed since the criminal case was initiated. 1/25 Tr, pp 134:15 to 136:22; 242:16-245:5.
90. The conflicting testimony about the operation of the stores, the retention of these two "accountants" and the issues related to the filing of tax returns amply demonstrate the tension that now exists between the Hamed and Yusuf interests, which has a negative impact on the current operation of the three Plaza Extra Supermarkets.
91. No profits have been distributed from the "profits" account now at Banco Popular since the criminal indictment was issued -- with a current balance in that account being in excess of \$43 million. 1/25 Tr, p 41:5-25; PEx 26.
92. Those Plaza Extra profits cannot be removed by any party while the TRO in the criminal case is still in effect. 1/25 Tr, p 119:4-6.
93. However, once the TRO in the criminal case is lifted, those funds could be unilaterally removed by Yusuf, as he has done since mid-August, 2012, with funds from the Plaza Extra Supermarket bank accounts.
94. Absent an injunction issued by this Court, there is nothing the Hamed family can do to prevent a similar removal of some or all of the \$43 million of Plaza Extra funds in these investment accounts by Yusuf. 1/31 Tr, pp 125:21-24, 126:5-11.

95. While the criminal case has not yet been dismissed due to a dispute over the filing of the remaining tax returns (1/25 Tr, pp 134:15 to 136:22; 242:16-245:5) this Court has no control over when the criminal case will be dismissed.

96. The defendants have averred in pleadings before this Court that Yusuf recently diluted his ownership in United down to just 7.5%, arguing on page 11 of the defendants Rule 12 opposition memorandum (PEX 2, p 11) as follows:

Even if the Amended Complaint sufficiently alleges that a "Hamed & Yusuf partnership" exists, the only relief Mohammad Hamed would be entitled to is a fifty percent (50%) share of **Defendant Yusuf's 7.5% ownership of Defendant United's outstanding stocks.** (Emphasis added.)

97. The Court finds that this allegation raised by the defendants creates an inference that Yusuf is attempting to minimize his exposure to any judgment obtained by Hamed against him arising out of the operations of the three Plaza Extra Supermarkets.

II. Conclusions of Law

The Court hereby makes the following conclusions of law:

1. While plaintiff initially sought a temporary restraining order, because a full evidentiary hearing was held with both parties and counsel present, this matter will be treated as a motion for a preliminary injunction, as requested by the defendants.
2. As set forth by the Virgin Islands Supreme Court in *Petrus v. Queen Charlotte Hotel Corp.*, 2012 WL 1313744, at *3 (VI. Apr. 10, 2012), before this Court can issue a preliminary injunction, it must consider four factors:
 - (1) whether the movant has shown a reasonable probability of success on the merits;
 - (2) whether the movant will be irreparable injured by denial of the relief;
 - (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
 - (4) whether granting the preliminary relief will be in the public interest.
3. In considering these four factors, this Court considers the testimony and other evidence presented by the parties.
4. To the extent that parties made statements in prior court filings in this case, they are barred from taking positions inconsistent with those statements under the doctrine of judicial admissions. *Berkeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006)); see also *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269, 275 (3d Cir. 2004).
5. Similarly, party admissions against interest in other proceedings, which this Court admitted into evidence, are admissible pursuant to Rule 801(d) of the Federal Rules of Evidence, which are applicable to this Court. See *Virgin Islands v.*

Toussaint, 2011 WL 3875802, at *2 (V.I.Super. 2011) (Footnote 7 provides in part "The Federal Rules of Evidence apply to matters before this Court"); *see also Terrell v. Coral World*, S.Ct. No.2010-0058, at 7 n.7 (V.I. July 20, 2011) ("[T]he Federal Rules of Evidence ... have been recently adopted by the Legislature to replace the Uniform Rules of Evidence....").

6. This Court can also take judicial notice of certain facts under Rule 201 of the Federal Rules of Evidence. The Court took such notice at the hearings.

A. Probability of Success on the Merits Regarding the Partnership

7. This case involves a claim by the plaintiff, Mohammad Hamed ("Hamed") that he formed a partnership in the mid-1980's with Fathi Yusuf ("Yusuf") to own and operate the Plaza Extra Supermarket at Sion Farm, St. Croix, which partnership operations were subsequently expanded to two other locations, one in St. Thomas and one in the west end of St. Croix.
8. Partnerships are interpreted pursuant to Title 26 of the Virgin Islands Code, which is the Uniform Partnership Act ("UPA") as adopted by the Virgin Islands Legislature.
9. While the current rights and duties of partners are covered by the 1998 amendments to the Title 26 implementation of the UPA, the issues related to the formation of a partnership in the Virgin Islands prior to 1998 is interpreted under the 1914 version of the Uniform Partnership Act codified by statute in this jurisdiction in Title 26 (main volume). *Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 514 (D.V.I. 2001).
10. The version of the UPA in effect prior to 1998, 26 V.I.C. §21 provided:
 - § 21. Partnership defined
 - (a) A partnership is an association of two or more persons to carry on as co-owners a business for profit.
11. The version of the UPA in effect prior to 1998, 26 V.I.C. §22 provided:
 - § 22. Rules for determining the existence of a partnership
In determining whether a partnership exists, these rules shall apply. . . .
 - (4) **The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business,**
(Emphasis added)
12. The fact that profit-sharing is a critical factor in determining the existence of a partnership is illustrated by the sole decision in this jurisdiction identifying specific factors to be considered as to the formation of a partnership, where the court considered (1) whether actual business operations ever existed and (2) whether a *fixed formula for profit sharing existed*. *Addie v. Kjaer*, Civ. No. 2004-135, 2011 WL 797402, at *3 (D.V.I. Mar. 1, 2011).
13. This Court finds that the plaintiff has met his burden of showing a reasonable probability of success on the merits because:
 - (1) In demonstrating that there is a partnership between himself and Yusuf in the operation of the three Plaza Extra supermarkets in the Virgin Islands under the pre-

1998 version of the UPA, as it is undisputed that the plaintiff Hamed and Yusuf agreed to share the profits from the grocery business that became known as Plaza Extra Supermarket and then did in fact share those profits 50/50, which creates prima facie evidence of a partnership pursuant to section 22.

(2) Once the sharing of profits is shown, it is defendants' burden to show to a preponderance of the evidence that a partnership was not formed. *DeMarchis v. D'Amico*, 637 A.2d 1029, 1034 (Pa. Super. 1994) (same UPA provision).¹

(3) Defendants have not demonstrated that the various non-dispositive factors regarding partnership formation are absent. Courts look to a variety of traditional factors in determining whether a partnership was or was not formed, such as the intent to form a partnership, the sharing of profits and losses, joint management of the business, the sharing of risks and responsibilities, contributions of capital, whether the agreement was for an indefinite duration and similar factors. *Ziegler v. Dahl*, 691 N.W.2d 271, 277 (N.D. 2005); *Southex Exhibitions, Inc. v. Rhode Island Builders Ass'n., Inc.*, 279 F.3d 94, 99 (1st Cir. 2002) (An agreement to do business together with no fixed termination date is indicative of a partnership arrangement).

(4) This prima facie showing by Hamed that a partnership existed was not rebutted by the defendants to a preponderance of the evidence based upon a review of these traditional partnership factors.

(5) To the contrary, the Court finds that even without that presumption, plaintiff has demonstrated that many of the traditional factors courts consider in determining the existence of a partnership are present here. In this regard, in addition to proving that the parties intended to share and did share the net profits of the Plaza Extra grocery business, the plaintiff has demonstrated by a clear preponderance of the evidence that the other traditional aspects of a partnership also exist here, as set forth in the findings of fact, including (1) Hamed and Yusuf joined together with the intent to establish a partnership to operate a supermarket, (2) for their common benefit, (3) with each contributing funds and services to start the business, (4) for an indefinite

¹ The Court stated:

In determining whether a partnership exists [this section] provides that '[t]he receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business ...' In the instant case, the trial court found that \$40,000.00 was withdrawn from an investment account containing proceeds of the business and appellants received \$20,000.00 of that money. **The trial court was required to view this fact as *prima facie* evidence that a partnership existed between [the parties] for the operation of the automotive repair business, which if unrebutted, would remain sufficient to establish the existence of a partnership.** Once the evidence of a profit distribution was introduced, the burden of proof shifted to . . . the party denying the partnership's existence, to show that the payment was not a profit distribution, or that a partnership did not exist. (Emphasis added). *Id.*

period of time, (5) jointly sharing the risks and losses of the business and (6) jointly managing the supermarket business known as Plaza Extra.²

14. Thus, even if the amended version of the UPA adopted by the Legislature in 1998 were applicable regarding the formation of this partnership, which did not adopt the "prima facie evidence" standard found in the 1914 UPA,³ this Court finds that the plaintiff still has met the required showing that there is a reasonable probability of success on the merits in demonstrating that there is a partnership between himself and Yusuf in the operation of the three Plaza Extra supermarkets based on the traditional factors courts consider in determining that a partnership exists.
15. While defendants argue that Hamed and Yusuf only formed a joint venture and not a partnership, a joint venture is analyzed in the same manner as a partnership under the law of the Virgin Islands. It is subject to, and interpreted under the UPA. *Boudreaux v. Sandstone Grp.*, No. CIV. 1014/1991, 1997 WL 289867, at *6 (Terr. V.I. May 16, 1997).
16. Moreover, even if a joint venture were different from a partnership, the Court finds that the facts in the record make it clear that the parties intended to and did form a partnership rather than a joint venture based on the analysis set forth above.
17. Indeed, the Court finds that the recent averments submitted by Yusuf, who did not testify at the hearing, that the parties formed a joint venture and not a partnership are not credible based on the evidence before this Court, including the multiple admissions made by Yusuf over many years before this litigation was filed that a partnership has existed since 1986, including the notice of dissolution of partnership that was given by Yusuf's lawyer to Hamed regarding his partnership with Hamed in the three Plaza Extra Supermarkets.

² Cases from other jurisdictions list a variety of factors that might be considered -- and those lists vary widely because they are all "examples." Plaintiff has satisfied many of them. In Illinois the plaintiff must show that the parties (1) joined together to carry on a trade or venture, (2) for their common benefit, (3) with each contributing property or services to the enterprise, and (4) having a community of interest in the profits. *Landers-Scelfo v. Corp. Office Sys., Inc.*, 827 N.E.2d 1051, 1057-58 (Ill. App Ct. 2005). New York has a long list of factors that can be considered: (1) sharing of profits; (2) sharing of losses; (3) ownership of partnership assets; (4) joint management and control; (5) joint liability to creditors; (6) intention of the parties; (7) compensation; (8) contribution of capital; and (9) loans to the organization. *Murray v. Murray*, 2011 WL 3631310, at *3 (NY Sup. Ct. July 22, 2011). In Texas, to establish a partnership a plaintiff must show (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise ("equal right of control"). *Burchinal v. PJ Trailers-Seminole Mgmt. Co., LLC*, 372 S.W.3d 200, 215-16 (Tex. App.--Texarkana 2012).

³ As amended, 26 V.I.C. §22 still provides that one "who receives a share of the profits of a business **is presumed to be a partner** in the business. . . ." (Emphasis added).

18. While defendants complain that there is no written partnership agreement, there is no statutory requirement in Title 26 that such agreements be in writing. Likewise, partnerships are deemed to be "at will" agreements, subject to dissolution by either partner at any time. Thus, partnership agreements are not within the Statute of Frauds and need not be in writing. *Smith v. Robson*, 44 V.I. 56, 2001 WL 1464773, at *3 (Terr. V.I. June 26, 2001.)⁴
19. Moreover, even if the Statute of Frauds were applicable to the formation of a partnership, the doctrine of part performance would render it inapplicable here as the parties now have operated this partnership for over 25 years, so that the Statute of Frauds defense would no longer be available. *Id.*, citing *Birnbaum v. Zenda*, 15 V.I. 329 (Terr.Ct. 1978). Even partial performance takes a case out of the Statute of Frauds where it would be inequitable to allow a party to invest time and labor upon the faith of a contract that did not exist. *Smith, supra*, citing *Henderson v. Resevic*, 6 V.I. 196 (D.V.I.1967).
20. While the defendants argue that the parties have used the corporate form of United Corporation to operate their business, Yusuf admitted that the use of United did not mean that Hamed was not his partner and in reality Hamed was his partner in the Plaza Extra Supermarkets.
21. Based on Yusuf's own admissions, the Court concludes that United's involvement in the operations of the partnership does not rebut the fact that a partnership existed. *McDonald v. McDonald*, 192 N.W.2d 903, 908 (Wis. 1972); *Granik v. Perry*, 418 F.2d 832, 836 (5th Cir. 1969) ("The fact that joint adventurers may determine to carry out the purpose of the agreement through the medium of a corporation does not change the essential nature of the relationship"); *Jolin v. Oster*, 172 N.W.2d 12 (1969) (corporation was vehicle for conducting the business of a partnership or joint venture); and *Sheridan Healthcorp, Inc. v. Amko*, 993 So.2d 167, 170 (Fla. Dist. Ct. App 2008) (fact that partner elected to conduct the partnership through the use of a corporate form does not change the essential nature of the relationship).
22. Indeed, where one partner assumes the responsibility for obtaining or filing papers as part of his share of partnership responsibilities, as Yusuf did here, the fact that he does not place those papers in the partnership's name is not in any way dispositive in the determination of the existence of a partnership. *Al-Yassin v. Al-Yassin*, 2004 WL 625757 (Cal. Ct. App Mar. 30, 2004)⁵ and *Mardanlou v. Ghaffarian*, 135 P.3d

⁴ Also, as noted in *Smith*, although an exception to this may exist with regard to partnerships to own real property, *Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I. 1983), plaintiff makes no claims with regard to real property here, so the Court need not address this issue.

⁵ While the defendants try to distinguish *Al-Yassin*, they are unsuccessful as the case closely tracks the facts in the present case. There, two brothers went into business together, with one brother filing all of the official government filings. While telling the other brother that they are partners and taking the second brother's money, the first brother filed paperwork showing himself to be the owner. When the second brother

904 (Utah Ct. App 2006)(questioned on other issues). Thus, the absence of partnership K-1's as being dispositive proof of a lack of partnership can be and has been rejected by reviewing courts -- especially where one of the partners does the business of the operation and controls such filings. *B2B CFO Partners, LLC v. Kaufman*, 856 F.Supp.2d 1084, 1094-1095 (D.Ariz. 2012). Documents such as permits, applications for insurance, the application for a service mark or trade name or W-2's in one partner's name do not contradict the existence of a partnership as a matter of law. *Malone v. Patel*, 2012 WL 1142251, 18-21 (Tex. App.—Houston [1 Dist.] Apr. 5, 2012).

23. In summary, the facts in the record before the Court demonstrate that the plaintiff is likely to prevail on his claim that a partnership exists between himself and Yusuf regarding the three Plaza Extra Supermarkets.

B. Irreparable Harm

24. Having established that he is likely to succeed on the merits regarding the existence of a partnership in the Plaza Extra Supermarkets, Hamed is entitled to 50/50 share in the profits of the partnership business -- as well as protection of his "equal rights in the management and conduct of the partnership business" pursuant to 26 V.I.C. §71 (b) and (f), as amended in 1998.⁶

25. This Court has statutory authority to protect these partnership rights by the issuance of equitable relief (*i.e.*, injunctive relief) if necessary to enforce the partner's rights granted by 26 V.I.C. §71. See 26 V.I.C. § 75(b)(2).

26. In determining whether the plaintiff will suffer irreparable harm if injunctive relief is not granted, the harm anticipated need not be fatal to the business. To establish irreparable harm,

a plaintiff need not demonstrate that the denial of injunctive relief will be *fatal* to its business. It is usually enough if the plaintiff shows that its legal remedies are inadequate. If the plaintiff suffers a **substantial injury that is not accurately measurable or adequately compensable by money damages**, irreparable harm is a natural sequel." *Scarcelli v. Gleichman*, 2012 WL 1430555, at *4 (D. Me. Apr. 25, 2012)(citing *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18–19 (1st Cir.1996) (internal citations omitted). (Emphasis added).

27. When considering "irreparable harm" regarding those rights in the context of a closely held partnership, relief is appropriate at "preliminary stages" where the parties have a long personal and family history and dispute whether what was formed was partnership or joint venture -- particularly where there is "significant animosity between the parties" and one is trying to exclude the other partner from

sought his partnership share, the first brother argued that the second brother was not on any of the filed "official" forms. *Id.* at *1. The *Al-Yassin* court rejected this argument. *Id.*

⁶ The prior version of Title 26 had a similar provision codified at §71(5).

control of the business. *Health & Body Store v. JustBrand Ltd.*, 2012 WL 4006041, at *5 (E.D. Pa. Sept. 11, 2012).⁷

28. In a partnership, diversion of revenue to accounts controlled only by one party can cause irreparable harm if funds are removed without explanation of what was done with them, as occurred here, indicating the possibility that all such funds can be removed from these same accounts again and possibly be removed from the jurisdiction of the court. *Health & Body Store, supra* at *4.⁸
29. The Court finds irreparable harm based on that fact that over \$3,000,000 in partnership funds were already diverted by Yusuf from the partnership account, which continued even after the injunction hearings, without any explanation of where the funds are except to the extent they have been invested in an unrelated mattress business, after initially claiming the funds had been used to buy real property in the Virgin Islands. These facts, including the initial attempt to conceal the true facts from the Court, create the reasonable inference that funds may be removed in the future from the jurisdiction, rendering the collectability of a money judgment questionable. *Allstate Ins. Co. v. TMR Medicbill Inc.*, 2000 WL 34011895, at *10 (E.D.N.Y. July 13, 2000); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354-55 (2d Cir. 1986).
30. Management rights can also be unique and irreplaceable, denial of which rights cannot be adequately compensated by an award of monetary damages, warranting injunctive relief. *Sonwalkar v. St. Luke's Sugar Land P'ship, L.L.P.* 2012 WL 3525384 (Tex. App.—Houston [1 Dist.] Aug. 16, 2012). The Court finds that there has been interference with Hamed's management rights based upon the record before it and that there will be irreparable harm based on the reasonable inference that there will be additional interference with such management rights in the immediate future.
31. As also noted by the Third Circuit, "[g]rounds for irreparable injury include loss of control of reputation, loss of trade and loss of goodwill." *S & R Corp. v. Jiffy Lube Intern., Inc.*, 968 F.2d 371, 378 (3d Cir. 1992) (citing *Opticians Ass'n of America v. Indep. Opticians of America*, 920 F.2d 187, 195 (3d Cir.1990)). The Court finds

⁷ The court in that similar case applied two Third Circuit decisions where there was no written agreement governing the respective rights of the parties. The court found irreparable harm when one party tried to exclude the other partner from the business.

⁸ The court in that same case noted:

Defendants are also diverting revenue to an account which they exclusively control. Under these circumstances . . . Plaintiffs have made a strong showing that at trial they are likely to establish Defendants' breach of their fiduciary duty of loyalty. See *Clement v. Clement*, 436 Pa. 466, 260 A.2d 728, 729 (Pa.1970) (self-dealing and diversion of partnership funds constitutes a breach of fiduciary duty); cf. 15 Pa.C.S. § 8331(5) ("All partners have equal rights in the management and conduct of the partnership business."). *Id.* at * 4.

irreparable harm based on a reasonable inference that absent relief, it is likely that a loss of control of reputation, loss of trade and loss of goodwill will occur.

32. Unilateral interference with employee relationships may also raise an inference of irreparable harm if not addressed by the Court. *Sheridan Broad. Networks, Inc. v. NBN Broad., Inc.*, 693 A.2d 989 (Pa. Super. Ct. 1997).⁹ Such interference has occurred here and is likely to continue absent injunctive relief being entered.
33. Based on the findings made by this Court and the applicable law, this Court finds that the plaintiff has demonstrated that he will be irreparably harmed if a preliminary injunction is not issued for multiple reasons, as follows:

(1) Hamed's statutory right to participate in the management of the partnership business will be jeopardized, particularly since Yusuf is now asserting that Hamed has no rights in the business other than a claim for 50% of the profits, which exclusion from the partnership business cannot be made whole by an award of monetary damages;

(2) The continued day-to-day operation of the partnership business will be jeopardized by the erratic behavior of Yusuf in dealing with the partnership and the partnership employees, as evidenced by the events that took place on January 9th – when the police were called to the Sion Farm store -- damaging its good will and reputation; which behavior is likely to continue if injunctive relief is not granted;

(3) The long-term operation of the partnership business is also currently in jeopardy, as Yusuf has threatened to close the business on several occasions, attempted to fire the Hamed managers and threatened at least one other management employee, all which would cause irreparable harm if allowed to continue;

(4) Hamed's statutory right to his share of the partnership profits will be jeopardized by the unchecked ability of Yusuf to divert those funds from the partnership bank accounts and brokerage accounts to accounts beyond the control of the partnership, which Yusuf has already done without Hamed's consent, removing almost \$3,000,00 before the hearings in January and then continuing to remove over \$100,000 after the hearings (again without Hamed's consent), in direct violation of Yusuf's fiduciary duty to the partnership;

(5) There is a clear risk of a monetary judgment being uncollectible by the removal of a significant portion of funds from the business, so that Hamed's right to such funds may likely be uncollectible, as (1) Yusuf has previously diverted funds from the reach of Hamed (2) he has invested partnership money in unrelated ventures, like a mattress company, using other names and (3) he has

⁹ We conclude that the lower court had a reasonable basis to conclude that NBN's interference with employee relationships would irreparably harm Sheridan. *Sovereign, supra; John G. Bryant Co., supra* (the unwarranted interference with employee relationships constitutes irreparable harm). *Sheridan*, 693 A.2d at 995.

now given away the bulk of his interest in the United Corporation by transferring it to other family members, significantly diluting his own assets.

C. Balancing of Interests

34. Balancing the parties' interests and potential hardships requires that neither party have the right to exclude the other from any part of the business. *Health & Body Store* 2012 WL 4006041, at *5-6.¹⁰
35. In this regard, there is no greater hardship to Yusuf or United in granting injunctive relief, as the Court is simply directing that the status quo of the Plaza Extra Supermarket operations be maintained as they have been for the last 25 years prior to the current disputes that began just prior to this litigation. See, *Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 197 (3rd Cir. 1990)(balancing harm is to maintain status quo by returning to the last "peaceable noncontested status of the parties").

D. Public Interest

36. Regarding the public interest, this case involves three large supermarkets which affect the employment of some 600 Virgin Islanders. Enforcing statutory rights and issuing an injunction to preserve the continued operation of these three stores as well as civility in the work place is certainly in the public's interest.

¹⁰ The Court stated:

Balancing the parties' interests and potential hardships requires that **neither party have the right to exclude the other from any part of the business**, including the Websites, bank accounts, vendor lists, and other proprietary information of the business. Under normal circumstances, the Court would leave it to the parties to effectuate and maintain the business in this fashion through the remainder of this litigation. However, given the current toxic relationship between the parties, directing them to interact for the betterment of HBS while this litigation continues raises serious concerns.

Although this case is only in its preliminary stages, it is clear that there is significant animosity between the parties. Personal and familial issues underlie the parties' business relationship dating back to Zelenko's childhood relationship with Bruce Singer, and his assumption of control....

The circumstances described raise a substantial concern that the parties will be unable to work cooperatively, and that the joint venture will suffer severely as a result. *Id.*

E. Appropriate Relief

Injunctive relief is appropriate to preserve the statutorily defined status quo. Pending the outcome of this matter, Hamed and Yusuf (and their designated representatives) are directed to observe the status quo as follows:

- a) All normal operations of the three Plaza Extra Supermarket stores shall continue as they have for the past 25 years, with Hamed and Yusuf (or their designated representatives) jointly managing the Plaza Extra Supermarket operations, without any unilateral changes of management, employees, methods or activities.
- b) No funds will be disbursed from the supermarket operations accounts without the consent of both Hamed and Yusuf (or their designated representatives), with a signature required on all checks from one of the Hamed representatives and one of the Yusuf representatives. A copy of this order will be provided to the banks holding those funds.
- c) No funds will be removed from the Banco Popular Securities investment account (containing approximately \$43 million at the current time) without the consent of Hamed and Yusuf (or their designated representative). A copy of this order will be provided to any firm holding those funds.
- d) Defendants Yusuf and United will return all funds removed from the partnership bank accounts without Hamed's consent, including the \$2.7 million and the approximately \$365,000 paid to counsel as evidenced by Plaintiff's Hearing Exhibits 13, 15 and 30.
- e) Because there is over \$43 million in partnership profits that are frozen by this Court's order, the need for a bond to protect the plaintiff's partnership rights as provided by statute, is minimal. In this regard, as the Court has made a finding that a partnership exists and that a significant amount of funds exists in what the Court has now made "controlled" accounts, it is clear that a portion of the partnership's significant assets are "placed in escrow" and Hamed's portion serves as additional bond. See, *e.g.*, *Scarcelli v. Gleichman*, 2012 WL 1430555, at *6 ("the Court concludes that it need not require Plaintiff to post any additional security. In light of the escrow established by this injunction, the Court is satisfied that the escrowed amounts would pay any costs and damages should it later be determined that Defendant Gleichman was wrongfully enjoined or restrained by this Order.") The Court finds that a bond of \$5,000 in addition to the escrowed funds is sufficient under the circumstances. The Plaintiff is directed to post a \$5,000 bond with the Clerk of the Court forthwith, providing notice of the posting to the defendants.

Dated:

HONORABLE DOUGLAS A. BRADY
JUDGE, SUPERIOR COURT

ATTEST: VENETIA VELAZQUEZ
Clerk of Court

By: Deputy Clerk