S. Ct. Civ. No. 2013-0040

In the Supreme Court of the Virgin Islands

FATHI YUSUF and UNITED CORPORATION,
Appellants/Defendants,

v.

MOHAMMAD HAMED, by his authorized agent, WALEED HAMED,
Appellee/Plaintiff.

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

OPENING BRIEF OF FATHI YUSUF & UNITED CORPORATION

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively "Appellants") appeal from the April 25, 2013, Orders of the Virgin Islands Superior Court, Division of St. Croix. In the matter styled as: *Mohammad Hamed by his authorized agent Waleed Hamed, v. Fathi Yusuf and United Corporation*, Case No. SX-12-CV-370. JA-001.[1] The Superior Court had jurisdiction over the matter below pursuant to 4 V.I.C. § 76(a), as the case involved a civil action. On May 13, 2013, Appellants filed a Notice of Appeal. JA-0001. Under VISCR 5(a)(1), Appellants' appeal was timely because said appeal was filed within 30 days of the entry of the appealable order. The Virgin Islands Supreme Court has jurisdiction over "[i]nterlocutory orders of the Superior Court of the Virgin Islands . . . granting, continuing, modifying, refusing or dissolving injunctions." 4 V.I.C. § 33(b)(1). Further this Court has jurisdiction to review otherwise non-appealable order(s) when the order is inextricably intertwined with an appealable order. *In re Drue*, 57 V.I. 517, 522 (V.I. 2012) citing to *Simpson v. Golden Resorts, LLLP,* 56 V.I. 597 (V.I. 2012).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court properly entered a preliminary injunction against the Appellants.

This Court's examination of the Superior Court's application of law is plenary, while the Superior Court's findings of fact are reviewed for clear error. *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010). Under the clearly erroneous standard, a finding of fact may be reversed on appeal only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting evidentiary data. *Shoy v. Virgin Islands*, 55 V.I. 919 (V.I. 2011).

Courts "employ a tripartite standard of review for . . . preliminary injunctions." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002). "[F]indings of fact for clear error.

[1] Numbers shall refer to pages of Joint Appendix which appear in the bottom right hand corner of each page of the Appendix as follows: JA-001, JA-002, etc.

Legal conclusions are assessed *de novo*. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *Id.*

The Superior Court abuses its discretion when it makes a decision that "rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012) (quoting *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009). Additionally, the Superior Court abuses its discretion if it, *inter alia,* "follows improper procedures in making a determination." *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 821 (11th Cir. 2010) (internal quotation marks omitted).

Even if the Superior Court identifies the correct legal standard, it abuses its discretion if its "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (*en banc*) (internal quotation marks and citation omitted).

2. Whether the Superior Court erred in entering a preliminary injunction order forcing an "at-will oral partnership" to continue *ad infinitem.*

This issue was raised at the trial level by way of Appellants' motion to stay. JA-1820. The standard of review is *de novo* as this Court must review the Superior Court's application of the Uniform Partnership Act. *See Simmonds, supra.*

3. Whether the Superior Court erred in setting a bond in the amount of $25,000.

This issue was raised at the trial level by way of motions to reconsider (JA-1792) and stay (JA-1820). The standard of review of a bond amount is an abuse of discretion. *Zambelli Fireworks Mfg. Co. v. Wood,* 592 F.3d 412, 426 (3d Cir. 2010).

4. Whether the Superior Court's preliminary injunction order is prohibited by Title 24 of the Virgin Islands Code and/or Fed. R. Civ. P. 65(e)(1).

This issue was raised by way of motion to stay. JA-1831. This Court reviews *de novo* application of law. *See Simmonds, supra.*

STATEMENT OF RELATED CASES AND PROCEEDINGS

The following are related cases: *United States, et al. v. United Corporation, et al.,* case no. 1:05-cr-15 (D.V.I.) (criminal action against United Corporation d/b/a Plaza Extra, Fathi Yusuf and others but *not* against Mohammad Hamed) ("the Criminal Action"); *United Corporation v. Waleed Hamed,* case no. SX-13-CV-3 (breach of fiduciary duty, conversion, among others); *United Corporation v. Waheed Hamed,* case no. ST-13-CV-101 (breach of fiduciary duty, conversion, among others); *Yusuf Yusuf, derivately on behalf of Plessen Enterprises, Inc., v. Waleed Hamed, et al.,* case no. SX-13-CV-120 (derivative shareholder lawsuit against Waleed Hamed for converting $460K of corporate assets). *Mohammad Hamed, et al. v. Fathi Yusuf*, Case No. SX-12-cv-377 (defamation action).

STATEMENT OF THE CASE

On or about September 17, 2012, Appellee, by his self-appointed "authorized agent Waleed Hamed," filed this commercial dispute against Yusuf and United regarding the existence of an alleged oral partnership between Yusuf and Appellee dating back to the "1980's" regarding certain supermarket businesses on St. Croix and St. Thomas. JA-042. Appellee also filed a Motion for a Temporary Restraining Order and/or a Preliminary Injunction, and an accompanying Memorandum of Law, pursuant to Fed. R. Civ. P. 65, both dated September 18, 2012 ("the initial Rule 65 motion"). JA-082; JA-083. Among other things, the initial Rule 65 motion alleged immediate irreparable harm, to wit:

> If the partnership's operations are not secured immediately, the continued operation of the three Plaza stores will be in jeopardy, as well as the continued employment of its 600 employees, resulting in irreparable harm to these partnership assets. Indeed, Plaza is in serious jeopardy of losing customers to other stores, destroying its good will built up over the years.

JA-090. Additionally, attached to the initial Rule 65 motion was an affidavit of Waleed Hamed that alleged, *inter alia,* that Yusuf's "acts are clearly designed to undermine the partnership's operations, jeopardizing their continued success and existence…. f) Unilaterally cancelling orders placed with vendors and not ordering new inventory for the three Plaza supermarkets"'. JA-096-100.

On October 10, 2012, Yusuf and United moved to dismiss the Complaint or, alternatively, to strike certain portions therein and for a more definite statement. On October 19, 2012, prior to a resolution of the motion to dismiss, Appellee filed a First Amended Complaint, which added a third count. JA-176. The First Amended Complaint did not seek to pierce the corporate veil of United. JA-176-92. Yusuf and United again moved to dismiss the First Amended Complaint on November 5, 2012, which motion remains pending. JA-258

On January 9, 2013, Appellee filed an "Emergency Motion and Memorandum to Renew Application for TRO" ("the second Rule 65 motion"). JA-301. The allegations in the second Rule 65 motion were, *inter alia,* that:

> … the present supermarket operations may be so compromised that they will no longer be viable if the Court does not intervene…. In fact, just *yesterday* (emphasis in original) defendant Yusuf openly intimidated a *critical* (emphasis added) long time employee, telling her that the Hameds "bought you out" and then telling her she was fired, even though Yusuf is not the manager of the store where she works. The store's manager, Mafi Hamed, has rescinded that attempted termination, but absent Court intervention, the threat of irreparable harm now clearly exists at this store, ….

JA-301. Further, the second Rule 65 motion goes on to provide five (5) explicit acts (JA-303-04) that, as the record evidence before this Court demonstrate, were clearly contradicted at the evidentiary hearings.

On January 24, 2013, the majority shareholders of United moved for leave to intervene in the case below and for a declaratory judgment regarding Appellee's underlying attempt – by alleging the existence of a *de jure* oral partnership in the Plaza Extra Stores' operations – to dilute the majority shareholders' interest in United's business operations. JA-035.

The Superior Court held evidentiary hearings on the merits of the Renewed TRO Application on January 25 and 31, 2013. JA-333; JA-663. Exhibits were entered into the record by both sides. JA-816-1485. However, subsequent to the evidentiary hearings, Appellee filed numerous motions to supplement the record. *See* JA-1505; JA-1671; JA-1681; JA-1684. Yusuf and United opposed Appellee's supplementation motions as being procedurally improper, and depriving

the Appellants with an opportunity to dispute and/or cross examine. *See* JA-1659; JA-1676. Appellee filed his various replies as to why the post-hearing evidence should have been admitted. *See* JA-1662; JA-1678.

The Parties submitted their respective proposed finding of fact and conclusion of law, JA-1523; JA-1584.

On April 25, 2013, the Superior Court entered an Order (JA-003), and a precedential Memorandum Opinion (JA-005) ___ V.I. ___, 2013 V.I. LEXIS 25, granting Appellee's request for a preliminary injunction. Notably absent from the Memorandum Opinion is any discussion of the evidentiary basis for the $25,000 bond amount. Further, the Memorandum Opinion falls to acknowledge the testimony of the Appellants' witnesses or the exhibits admitted into evidence that refuted or contradicted the allegations contained in either of the Rule 65 motions. Further, with the exception of Appellants' exhibit 1 (JA-1082), 2 (JA-1093) and 7 (JA-1154), the decision below wholesale fails to mention, let alone discuss, any of the Appellants' evidence that directly contradicted the claims that the Plaza stores were in "serious jeopardy", that inventory was not being ordered; and that employees were being terminated for "vindictive reasons." The Superior Court also entered an Order granting Appellee's motions to supplement the record. JA-1712.

On May 9, 2013, Yusuf and United filed three substantive motions with the Superior Court relating to the injunction: a Motion to Reconsider and to Modify Preliminary Injunction to Terminate Employees Mufeed Hamed, Waleed Hamed and Wadda Charriez (JA-1725); an Emergency Motion to Stay Preliminary Injunction Order (JA-1818); and an Emergency Motion for Reconsideration of Preliminary Injunction Order and for Stay of Same Pending Posting of Adequate Bond (JA-1792). On May 31, 2013, the Superior Court entered an order denying the bond modification request (JA-1969) and an order denying, *inter alia,* Appellants' motion to stay (JA-1971).

On May 13, 2013, Appellants noticed this interlocutory appeal. JA-001.

STATEMENT OF THE FACTS

United Corporation d/b/a Plaza Extra

United leases retail spaces at its shopping center (known as the "United Shopping Plaza") and operates a grocery supermarket business that does business under the trademark "Plaza Extra." JA-552. United is the sole owner of the "Plaza Extra" trademark. JA-442-44. Yusuf and other members of the Yusuf family incorporated United in 1979 as a USVI corporation; and, since then, they alone have organized, maintained and owned United. JA-1154; JA-444; JA-764.

Since its inception in 1979, United has reported all of its tax obligations – and has filed all of its tax returns – as a *corporation* under either Subchapters "C" or "S" of the Internal Revenue Code ("IRC") and never as a *partnership* under any partnership designation of the IRC or otherwise. JA-559. No income tax filing of United has ever reflected Appellee as an asset owner, partner or shareholder of United. *Id.* Similarly, Appellee has never paid a single tax dollar to any governmental taxing authority on the income claimed to be attributable to him as an alleged partner with United or Yusuf, or either of them, in any supermarket operations. *Id.*[2]

Specifically, the allegations in this action relate to three supermarket locations that United operates under its "Plaza Extra" trademark: Plaza Extra East in Sion Farm, St. Croix; Plaza Extra West in Plesson/Grove, St. Croix; and Plaza Extra St. Thomas in Tutu Park, St. Thomas. JA-178. *None* of the equitable injunctive relief requested by Appellee in his complaint is directed at United. Appellee likewise concedes that he owns no interest whatsoever in United or its operations. Incredibly, however, the injunction under appeal restrains United alone and its "operations of the three Plaza Extra Supermarket stores." JA-027.

The Criminal Action

[2] *See also* JA-1965 (email from Appellee's counsel acknowledging that less than one month ago Appellee filed his delinquent tax returns).

The instant injunction also defies the proceedings in a related pending Criminal Action, in which Appellee's "authorized agents" allowed a federal judge to accept a plea agreement premised upon factual representations that are directly at odds with the ones asserted in this action. JA-448-49; JA-458; JA-554; JA-1093; JA-1113; JA-1121; JA-1130. Appellants, as well as two of Appellee's "authorized agents" (Waleed and Waheed Hamed), including his self-appointed "authorized agent" in this action (Waleed Hamed), were indicted in the Criminal Action, Case No. 2005-15F/B, which is pending in the District Court of the Virgin Islands, Division of St. Croix. JA-1611. Waleed and Waheed Hamed, as co-defendants in the Criminal Action and co-signatories of a plea agreement (JA-1113) entered therein, never expressed the claim that their father (Appellee Mohammad Hamed) held any interest in the Plaza Extra Supermarket stores as an alleged "partner" with Fathi Yusuf or otherwise JA-448; JA-554. Nor did Appellee ever appear in the Criminal Action as a claimed "partner" with Yusuf or otherwise claim any interest in the same supermarket income in which he disingenuously now claims a 50% interest in the present action. JA-448.

To the contrary, when it was convenient in the Criminal Action, the Appellee and his authorized agents actively denied the very allegations that are raised in this action. *Id.* For example, during a July 2009 hearing in the Criminal Action, the Government argued that, setting aside the corporate "formalities" of United's share certificates, prior deposition testimony in an unrelated civil proceeding indicated that United's shares in the Plaza Extra supermarket "income" were owned "fifty percent" each by the Yusuf and Hamed families. JA-1138-41. The "unrelated civil proceeding" referenced by the Government is the very same matter which produced the deposition relied upon almost exclusively by the Superior Court and the Appellee below. The Government argued, relying on the same prior deposition testimony, that Appellee may own 50% of the Plaza Extra supermarket assets and that United's shareholders thus "may not actually own any part of the

company."[3] Defense counsel in the Criminal Action, including counsel for Appellee's "authorized agents" expressly disavowed the Government's arguments and claims, without any dispute or clarification. JA-1130.

In 2010, the parties in the Criminal Action eventually entered into a plea agreement and other written agreements memorializing the plea, which the District Court accepted. JA-1093; JA-1113; JA-1121. Under the plea, United alone admitted to a federal criminal violation and alone agreed to pay significant monetary penalties, totaling more than $11 million. JA-1113. By allowing United to plead guilty and pay the subject penalties, and by failing to assert in the Criminal Action the same partnership allegations that he has asserted here, Appellee and his "authorized agents" not only duped the federal court but also obtained from it substantial rights and benefits, including the dismissal of the criminal case against Appellee's "authorized agents" and, potentially, the full satisfaction of civil tax liabilities which, if Appellee is to be believed, would have been owed by Appellee for the tax years 1996-2001. JA-1121-29.

The Families' Settlement Discussions

The Yusuf and Hamed families, directly and through their respective attorneys, thereafter engaged in private settlement "discussions" regarding the suspected defalcation of United's monies, and the desire to dissolve the families' extensive business relations. JA-383-90. The Parties' settlement discussions were unsuccessful; and, on or about September 17, 2012, *after* United's payment of the $10 million dollar assessment, *after* Appellee's and Waleed Hamed's receipt of the benefits afforded in the criminal case, but *before* United's sentencing in the criminal case, Appellee filed the instant commercial dispute.

[3] On January 22, 2013, the Appellants moved the trial court to take judicial notice of adjudicative facts of the docket entries filed in the criminal action (*United States, et al. v. United Corporation, et al.*, case no. 1:05-cr-15 (D.V.I.), which included a CD of the docket entries and docket sheet. JA-035. To date that motion remains outstanding. However this Court can take judicial notice of the docket entries available on PACER, and in particular docket entry 1151, which was the Government's allegation regarding the ownership of United d/b/a Plaza Extra.

Testimony of Mohammad Hamed

Appellee testified that he and Yusuf are from the same "village" in the West Bank in Isreal; and are brothers-in-law, as Appellee's cousin is married to Yusuf's sister. JA-529-31. According to Appellee's testimony, Yusuf indicated that, because Appellee had tried to "help" Yusuf with the various loans, and as repayment thereof, Appellee was going to be Yusuf's "partner" in an existing business arrangement that Yusuf had with a separate individual, "to open a supermarket." JA-531.

Appellee agreed to "start with Mr. Yusuf." *Id.* However, Appellee conceded that Yusuf – in Yusuf's name alone – obtained separate $1 million and $2.5 million dollar loans from Banco Popular and Scotiabank, respectively (a portion of the $2.5M loan was used to pay the outstanding Banco Popular loan), and Yusuf signed the loan documents and personal guaranties for such financing himself. *Id.*; JA-537-39.

Appellee simply worked in the Plaza Extra East supermarket's warehouse, from which position he "retired" a "[l]ong time" ago. JA-534; JA-538-39.[4] Notwithstanding these and other admissions, Appellee maintains that he is Yusuf's "partner" "forever." JA-532; JA-542.

Appellee never testified, nor did Appellee ever introduce into the record: (a) any documentary evidence that Appellee is a partner with United, or (b) that he has any ownership interest in United. Indeed, the only testimony of Appellee as to the alleged "partnership" is an alleged partnership between Yusuf and Appellee. JA-533 ("[a]nd Mr. Yusuf tell me, you is my partner, not your son… I tell him I'm not saying nothing, you is my partner.", (JA-541).

However, Appellee did not offer any evidence of personal liability for any partnership obligation such as a written guaranty or other documentation reflecting Appellee's execution of a single loan document with any bank, financial institution, lender, insurance company, or other institution related to the Plaza Extra Stores. Appellee likewise conceded that he has never signed

[4] Specifically, Waleed Hamed testified that Appellee retired from United – and, thus, from any alleged partnership or interest therein – in 1996. JA-431.

any loan document, written guaranty or other such paper for any documented financial loss or liability of the supermarket operation. JA-539 (indicating that "I'm [sic] not sign nothing")). In short, to the District Court in the Criminal Action, all taxing authorities and the world in general, Appellee is a complete stranger to United.

Moreover, with respect to the control and management of the supermarket, Appellee confirmed that there is no right of joint control or management; instead, "*Mr. [Fathi] Yusuf, he is in charge of everybody*" and in charge of "*all the three store[s].*" JA-533; JA-542 (emphasis added). Appellee also confirmed that all of his sons are mere "employees" of the supermarkets – and are *not* in any self-labeled "partner" relationship with Yusuf. JA-533 (noting Appellee's "agree[ment] with "[w]hatever" management decision Fathi Yusuf makes), JA-541-42.

Indeed, Appellee also failed to offer any evidence of a single filed partnership tax return, statement of partnership, or other regulated declaration or document containing the words "partner" or "partnership" in the approximately 30-year period during which Appellee claims a supposed partnership existed. Appellee also failed to offer any evidence of a single document establishing that (a) he ever received a share of the supermarket profits at any time over the past 26 years, as opposed to a salary as a regular employee; or (b) that United or Yusuf ever shared with or distributed to Appellee any profits. Appellee's testimony failed, wholesale, to support the requested Rule 65 relief, because, as he conceded, he retired a long time ago from the alleged partnership at issue in this action. JA-534; JA-538-39.

Although Appellee signed an affidavit to support the Rule 65 motions, he amazingly testified that he does not know the contents of his affidavit or the contents of Waleed Hamed's affidavit (which Appellee's affidavit purports to agree to and bolster) because he does not read or understand written English. JA-533-34; JA-540-41. Rather, he "sign [sic] the paper" because his son "want[ed]" it signed. JA-540-41.

Testimony of Waleed ("Wally") Hamed

Waleed Hamed is an employee of United and started such employment in 1986 at United's Plaza Extra East Sion Farm location as a "bagger" and other such duties. JA-355; JA-1612. Waleed Hamed does not dispute that Fathi Yusuf is and always has been ultimately responsible for the entire operations of United. JA-358; JA-432.

Yusuf in fact is the only individual who has the "ultimate call" relating to the operations of United, including to ultimately resolve any disagreements between the respective co-manager employees at the Plaza Extra Stores. JA-437. Nor does Waleed Hamed dispute that Appellee retired from Plaza Extra East in 1996. JA-431.

Indeed, during the period when the alleged partnership started until it ended, *i.e.*, "the middle '80s until 1996," when Appellee retired, Waleed Hamed attested that Appellee never had signatory authority over any Plaza Extra bank account whatsoever. *Id.*

Around that time, as to Plaza Extra St. Thomas only, Waleed Hamed maintains that Yusuf and Appellee "took on another *partner* in St. Thomas," named Ahmad Idheileh. JA-359-60 (emphasis added). Again referring to Ahmad Idheileh as a "partner," Waleed Hamed maintains that Mr. Idheileh was eventually "bought [] out" as an alleged "partner" in the alleged "partnership," which, according to Waleed Hamed, was between Yusuf, Hamed and Ahmad Idheileh. JA-366; JA-438. In fact, there was no such "partnership," as Ahmad Idheileh and United entered into a written *Joint Venture Agreement* relating to the Plaza Extra store and, therefore, the parties' rights under that written agreement were subject to *joint venture* law. JA-439; JA-1497.

Waleed Hamed conceded that, in his opinion, there is no difference between a joint venture and a partnership – *i.e.*, according to Waleed Hamed, they are the "same." JA-440. However, it is undisputed that no Hamed family member, including Appellee himself or Waleed Hamed, signed the agreement guaranteeing the lease of the Plaza Extra store in Tutu Park. JA-440; *see also* JA-1217-19 (showing Yusuf alone signed a personal guarantee).

Waleed Hamed maintained that the "problems" between the Yusufs and Hameds that gave rise to the case below developed no later than February 7, 2012. JA-383. The Yusufs and Hameds thereafter commenced settlement "discussions" with attorneys. JA-390. These discussions were not successful. Waleed Hamed conceded that the current dispute is over monies claimed to be owed to the Hamed family and that this lawsuit was filed to recover those monies. JA-398.

Notwithstanding the foregoing, Waleed Hamed subsequently conceded that recent actual photographs of Plaza Extra East (JA-1143), "depict a grocery store full of inventory that [] is not about to close any time soon." JA-453. With respect to the payroll employee Wadda Charriez, Waleed Hamed does not dispute that "having employees file false time records to reflect hours that they worked when they didn't actually work [is] against company policy." JA-454.

Waleed Hamed also agrees that United "doesn't pay people for hours that they did not work." *Id.* Thus, as Waleed Hamed concedes, a manager of the Plaza Extra Stores would have good cause to fire an employee who steals from and is paid by United. JA-455. Moreover, Waleed Hamed does not dispute that, because Yusuf is above management, and Yusuf has the "ultimate call" relating to the operations of United, Yusuf obviously would have unilateral good cause to fire such an employee too. JA-437.

Waleed Hamed also concedes that the Hamed family has been exploring other business opportunities to compete with the business of United, including the purchase of the Marina Market property in the Red Hook area of St. Thomas via a company owned by Hamed family members, including Appellee, *i.e.*, 5H Holdings. JA-460; JA-464.

Testimony of Waheed ("Willy") Hamed

Waheed Hamed is an employee of United and a co-manager of United's St. Thomas store. JA-473; JA-1613. When describing his management duties, Waheed Hamed, as with virtually all of the parties in this action, casually uses the word "partner," indicating that the store is "run by [him]

and [his] *partner* which is one Yusuf one Hamed in each store." JA-474 (emphasis added)). Waheed Hamed specifically maintains that his "partner" at the St. Thomas store is Nejeh Yusuf. JA-484-85.

When Waheed Hamed was asked to disclose the terms of any alleged partnership agreement with Najeh Yusuf, Waheed Hamed initially claimed that "[w]e own 50 percent, they own 50 percent, that's all I know," apparently referring mistakenly to the casual use of the word "partner" used by Yusuf when referring to Appellee. JA-485.

Tellingly, Waheed Hamed subsequently confirmed that: (a) the Plaza Extra St. Thomas store did not close in the summer of 2012 and is currently operating (JA-483); (b) the store's shelves are adequately stocked (*id.*; *see also* JA-1143 and JA-1263); the store's inventory is adequate (JA-483; *see also* JA-1143 and JA-1263); the store has a full complement of employee*s* (JA-483); all of the store's employees are being paid (*id.*); and Yusuf has not shut down the store (JA-484).

Testimony of Hisham Hamed

Hisham Hamed is an employee of United and a co-manager of United's Plaza Extra West store. JA-587. As with his brother (Waleed Hamed), Hisham Hamed claims to be yet another self-appointed "agent for [his] father" (Appellee). *Id.*

Hisham Hamed does not know the terms of the alleged partnership between Yusuf and Appellee. JA-592. Rather, Hisham Hamed agrees with whatever such terms Appellee alleges. JA-594. Since Appellee sued Yusuf and United, the only operational "problem[]" that allegedly has resulted at Plaza Extra West is, according to Hisham Hamed, that he and Maher Yusuf "[are] not getting along." JA-590.

Testimony of Mufeed Hamed

Mufeed Hamed is an employee of United and manages the Plaza Extra East store in Sion Farm. JA-492. Mufeed Hamed claims that, since this litigation began, the sole "difficult[y] in the operations" of the Plaza Extra East store is that "Yusuf Yusuf and [Mufeed Hamed] stopped talking," which, according to Mufeed Hamed, has "created a lot of . . . uncomfortable situations . . .

making decisions for the store." JA-498-99. Nevertheless, Mufeed Hamed subsequently confirmed that: (a) the Plaza Extra East store is still open (JA-499-500); (b) the store is fully stocked (JA-500); (c) the store's warehouse is fully stocked (*id.*; *see also* JA-1143); (d) the store's vendor's are all getting paid (JA-500); and (e) the store's employees are all getting paid (*id.*).

Mufeed Hamed, a co-manager at Plaza Extra East, incredibly testified that he *personally* "would really have to consider [] further" whether there would be grounds to fire a hypothetical store employee who stole over $10,000 from the store by submitting false timesheets. JA-501. However, Mufeed Hamed then conceded that it would be "totally reasonable" for anyone else in his position, having reviewed the facts, to say, "you know what, you stole from me for $10,000, [and] you're out." *Id.* Mufeed Hamed likewise conceded that he would not even be able to reasonably disagree (or "fight") with someone in his position who said, "I'm firing this person for stealing $10,000 from [the store] over this year." *Id.*

Testimony of Wadda Charriez

Wadda Charriez is an employee of United, to which she refers as "Plaza Extra United Corporation," and works in payroll at the Plaza Extra East store. JA-512-13. If Charriez works more than 40 hours a week, she is paid $18 an hour (time and a half) for overtime. JA-524. Store employees, such as Charriez, do not work on Thanksgiving, which is a holiday, but they are paid eight hours that day. *Id.* Charriez in fact did not work on Thanksgiving in 2012, but she manually entered her time to falsely reflect that she worked twelve hours that day, four of which hours she was paid time and a half wages for overtime. JA-525. Upon being confronted with the false timesheet, Charriez now claims that her manual time-entry that day was a "mistake." JA-524.

Testimony of Maher ("Mike") Yusuf

Maher Yusuf, as President of United Corporation, testified that:

a. Yusuf alone executed the guaranty for the lease relating to the Plaza Extra store in St. Thomas (JA-550-51; *see also* JA-1218);

b. Yusuf alone exercised all of United's important management and operational decisions, such as, by way of example, controlling the check-signing policies at the Plaza Extra Stores (JA-560);

c. Appellee never signed any loan document, written guaranty or other such paper for any documented financial loss or liability of the supermarket operations (JA-551; *accord* DX 8 (JA-1162));

d. Appellee never exercised any management decision in respect to United (JA-554).

With respect to the operations of the three Plaza Extra Stores, Maher Yusuf also confirmed that:

a. the stores are not under any real threat of closing down (JA-560; JA-565-66);

b. the stores are not under any real threat of reduced operations (JA-560; JA-565-66);

c. rather, the vendors are all being paid in the normal course of business (JA-561; JA566; JA-568; DX 12 (JA-1267));

d. the inventory is being ordered in the normal course of business (JA-561; JA-565-66; DX 12(JA-1267));

e. the approximately 600 employees at the stores are not in jeopardy of losing their respective jobs (JA-570); and

f. at bottom, the day-to-day operations of the three stores has not changed in any material way since the filing of this action in September 2012 (JA-561; JA-565-71; DX 12 (JA-1267)).

Indeed, allowing any of the Hamed family employees to now have "equal" management rights for the Plaza Extra Stores, as requested in the Rule 65 motions, not only would change the status quo of the stores' operations since their inception but would materially harm the stores. JA-570. Moreover, none of the feigned "concerns" that Appellee raised in the Rule 65 motions have come true. *Id.* Likewise, the respective operating accounts at the respective Plaza Extra Stores are sufficiently funded such that the stores are not facing any liquidity problems. JA-562-63.

Testimony of Yusuf Yusuf

Yusuf Yusuf has held a management position at Plaza Extra East in Sion Farm since 2000 as a store manager. JA-670; JA-695. Yusuf Yusuf's management position includes the supervision of a

non-essential employee, Charriez, who is a payroll clerk and is one of the clerks who handles the store's payroll. JA-670; JA-695-96; JA-752. Charriez has been Plaza Extra East since at least 2000. JA-671. Charriez is paid on an hourly basis, and is paid time and a half for overtime. JA-674.

On January 8, 2013, Charriez was involved in a workplace incident based on her violation of the rules and regulations (DX 15 (JA-1472)) of the Plaza Extra East store. JA-672; JA-691. Among other requirements, the rules and regulations require all employees at the Plaza Extra East store to:

a. punch out for lunch after six hours of work (JA-690; DX 15 (JA-1472) at Rule # 16);

b. refrain from cheating, as any employee found cheating will be immediately dismissed (JA-690; DX 15 (JA-1472) at Rule # 17);

c. punch their time cards immediately after being relieved of the day's work duties (JA-690; DX 15 (JA-1472) at Rule # 18); and

d. refrain from stealing, as any employee found stealing will be immediately dismissed and subject to arrest (JA-690; DX 15 (JA-1472) at Rule #23).

In late November 2012, after a global operational change that Yusuf had ordered to be implemented, Yusuf Yusuf noticed an irregularity on Charriez's time-keeping records, *i.e.*, that Charriez had manually altered her timesheets to reflect a full-day's work on a holiday (Thanksgiving) on which she did not in fact work. JA-672-73; JA-706-07; DX 13 (JA-1292)). Charriez had not obtained Yusuf Yusuf's permission to manually enter her time on any given day, let alone every day; or, to Yusuf Yusuf's knowledge, any other supervisor's such permission. JA-685.

Specifically, Charriez manually entered her timesheet for November 22, 2012, to reflect that she worked from 7:38 a.m. in the morning to 7:20 p.m. in the evening – nearly a 12-hour shift. JA-677; DX 13 at p. 6 (JA-1297). Yusuf Yusuf knew that Charriez's entry was false and fraudulent, as he had worked at the store the same day and thus knew firsthand that Charriez had not worked a minute that day, let alone 12 hours. JA-677.

Charriez's falsification of her November 22, 2012, timesheet also raised suspicions about her time-reporting practices in general. *Id.* For example, Yusuf Yusuf reviewed Charriez's timesheets

for the entire year 2012. JA-678; DX 13 (JA-1292). The review of those 2012 records showed that Charriez consistently (a) manually entered her time, as opposed to using the "normal" electronic punch-in system relying on the employee's social security number and handprint; and (b) reported work shifts of approximately 12 hours on a daily basis. JA-678-79.

Using the store's DVR system, Yusuf Yusuf then reviewed video-imaged records reflecting the times that Charriez entered the store to start her work day and the times that she left the store at the end of her work day. JA-682-83; DX 14 (JA-1404)). The video images showed, and Yusuf Yusuf's testimony established, that Charriez consistently falsified her timesheets during the 2012 period in question. JA-683-87; DX 14 (JA-1404-06; JA-1436; JA-1440; JA-1442)).

A comparison of the store's time-keeping records with its video-imaged records during nearly every other work day in 2012 shows a similar pattern of Charriez submitting false and fraudulent timesheets, for which she was paid by United, including time and a half pay for alleged overtime. *See generally* DX 13 (JA-1292) and DX 14 (JA-1404).

Based on Charriez's submission of false and fraudulent timesheets, among other acts, Charriez violated Plaza Extra's rules and regulations. JA-691; DX 15 (JA-1472). Management of Plaza Extra East thus had good cause to terminate Charriez's employment. JA-692. Mufeed Hamed, a co-store manager at Plaza Extra East, has had access at all times to the same information and same DVR system, *i.e.*, the same timesheets and same video-images that Yusuf Yusuf obtained. JA-702-03. Thus, there was and is no need for Yusuf Yusuf to share his findings with any other manager, including Mufeed Hamed and Wally Hamed, as, again, these managers have access to the same information as does Yusuf Yusuf. JA-702-03; JA-708. Moreover, Charriez, who assisted with payroll, was not an essential store employee and could be easily replaced. JA-692-93. At bottom, Charriez was initially dismissed, as provided for in the stores' rules and regulations (DX 15 (JA-1472)), and for the good cause established by the stores' records and video-images (DX 13 (JA-1292) and DX 14 (JA-1404)), for her submission of false and fraudulent timesheets and receipt of

payment for those timesheets – and not for any reasons involving the current dispute involving the Plaintiff. JA-708.

Yusuf Yusuf also confirmed the following:

a. inventory at the Plaza Extra East store is fully current (JA-693; DX 6 (JA-1143));

b. vendors of the Plaza Extra East store are being paid in the normal course of business (JA-693);

c. there have been no unusual disruptions at the Plaza Extra East related to the order of supplies and merchandise (*id.*);

d. Yusuf Yusuf has not witnessed Yusuf block or stop any payments to vendors of the Plaza Extra East store, or attempt to do those things (*id.*);

e. as to all of the Plaza Extra Stores, there is no credible threat that the closes will prematurely be closed (JA-694); and

f. none of the allegations in the Hameds' TRO application, such as the stores' threatened closing, etc., have come to pass (*id.*).

ARGUMENT

POINT I – THE SUPERIOR ERRED IN ENTERING A PRELIMINARY INJUNCTION

Appellee in his complaint and moving papers promised a "partnership" case that never materialized. In requesting the *extraordinary* and *drastic* remedy of preliminary injunctive relief on a feigned "emergency" basis, Appellee also asserted that a "Rubicon" had been crossed, *e.g.*, that United was in "serious jeopardy" of closing its Plaza Extra stores if its operations were "not secured immediately." However, the hearing evidence, including testimony from the stores' employees and exhibits depicting normal operations, confirmed that this sensationalism was simply hyperbole.

Appellee – claiming to be a "partner" in an alleged partnership with Yusuf dating back to the 1980s – testified that, since the very beginning, Yusuf alone has been and "is in charge of everybody" and in charge of "all the three store[s]" (JA-533; JA-542); that Appellee's sons, including Waleed Hamed, are mere "employees" and thus are not in any alleged partnership with Yusuf (JA-533); Appellee has signed "nothing" to guaranty the supermarkets' losses or to otherwise document

any alleged interest in the supermarket operations (JA-537-39); and Appellee disassociated himself from those operations a "[l]ong time" ago when he "retired" in 1996 (JA-534; JA-538-39; JA-431).

Indeed, to the outside world, Appellee – generally, and to the tax authorities, specifically – has been a *total stranger* to the very partnership that he now claims has existed for the past 26 years.[5]

Ignoring the great weight of the evidence and testimony introduced into the record, the Superior Court improperly relied almost exclusively on excerpts of a decades-old deposition transcript from an unrelated action and other such supposed "admissions" to determine that the heart of this commercial dispute – *i.e.*, whether or not a partnership exists – is undisputed. Rather, Appellee – as the movant below– failed to carry his *heavy* burden establishing that each of the four injunction factors detailed in *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548 (V.I. 2012), entitled him to the entry of an extraordinary injunction order at this preliminary stage of the proceedings. In support of its order, the Superior Court relied almost exclusively on Yusuf's decades-old deposition testimony (JA-816) in a different action, in which Appellee was not a party. This reliance was misplaced, as courts may not take judicial notice of either factual findings or the record of another case, including testimony, as substantive proof of the matters asserted. *See, e.g.*, 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (a court "cannot take judicial notice of truth of facts found in another case"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases). At best, Yusuf's prior deposition testimony merely means that he "committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue." *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991); *see also AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3d

[5] *See, e.g., In re PCH Assocs.*, 949 F.2d 585, 602-03 (2d Cir. 1991) ("mo[st] important[]" "evidentiary fact[]" relating to partnership issues is "conduct of the parties . . . *with respect to third parties*") (finding no joint venture relationship where, among other reasons, "nothing in th[e] record indicat[ed] that any third parties that dealt with the [business or defendant] believed [the movant] to be a participant in the business or looked to [the movant]'s creditworthiness as a basis for doing business").

Cir. 2009) (noting, in an analogous context, that a jury must resolve legal conclusions based on conflicting factual issues).

The Superior Court's determination that Appellee carried his burden was erroneous and this Court must vacate the decision as it was contrary to Rule 65, applicable case law, and was founded upon inadmissible evidence.

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

i. Appellee Did Not Show Irreparable Harm – Damages Case

"A movant's burden with regard to establishing irreparable harm is quite heavy" and the legal standard is "exacting." *Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship*, 938 F. Supp. 304, 310 (D.V.I. 1994). "[W]hen the preliminary injunction is directed not merely at preserving the status quo but, as in this case, *at providing mandatory relief, the burden on the moving party is particularly heavy*." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980) (emphasis added).

"'The requisite injury must be more than merely serious or substantial, and it must be of a peculiar nature, 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). Thus, "a preliminary injunction should not [have] be[en] granted [when] the injury suffered can be recouped in monetary damages." *IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007) (citation omitted).

Any meaningful review of the record evidence shows that this commercial dispute concerns only money. Appellee's self-appointed "agent," Waleed Hamed, conceded as much, acknowledging that the lawsuit was filed to seek the return of monies. JA-398. Although Appellee's basis in the Rule 65 motions included alleged "diversion" of $2.7 million dollars from Plaza Extra's accounts, and alleged improper "removal" of other such funds for legal fees, etc.", (which were all disputed factual issues as Maher Yusuf testified that the Hameds were aware of the transfer (JA-569-70) and failed to object to them (JA-578-79), the foregoing allegations make it clear that "a preliminary

injunction should not be granted if the injury suffered can be recouped in monetary damages." *IDT.*, 250 Fed. Appx. at 479 (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 . . . .")).

Similarly, Appellee's allegations regarding loss of goodwill, customers, and reputation are unsupported by the record, as the supermarket stores clearly were operating normally (a point that the decision below glosses over); and which, at best, are simply "remote future injur[ies]" that do not constitute potential irreparable harm for preliminary injunction purposes. *Barclays*, 938 F. Supp. at 310. The Superior Court in relying on *IDT,* (JA-023) failed to take into account that the Third Circuit has made clear that injuries such loss of goodwill, consumers and reputation are "limited to 'the special problem of [consumer] confusion that exists in cases involving trademark infringement and unfair competition.'" *IDT*, 250 Fed. Appx. at 479 (citing *Acierno*, 40 F.3d at 653-54). "As the harm claimed by [Appellee] is not analogous to the harm caused by consumer confusion, the line of cases recognizing loss of goodwill or reputation as irreparable harm is not applicable." *Id.*

The Superior Court relied on *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir. 1989), for the proposition that "an award of monetary damages may not provide an adequate remedy where the amount of loss alleged is not capable of ascertainment." JA-023. However, this statement is taken out of context. First, it should be noted that the *Instant* court made this statement within the context of a breach of contact case and not a partnership case. Second, the Superior Court failed to note that this was just the first in a conjunctive three prong test, and the Superior Court did not find (because the record evidence does not support) the other two prongs. *Instant,* 882 F.2d at 802 ("(a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected."). There can be no dispute, there is over $40M in liquid assets that are currently being held by United (JA-1261), and no witnesses

testified that there are insufficient funds to satisfy a monetary damage award; nor is there any record evidence that Appellee's claim could not be valued (e.g. with an economist and/or forensic accountant).

Further, the court below erred in relying on *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) as the basis for its finding irreparable injury. In *Anderson,* "[a]t issue [was] the district court's permanent injunction forbidding the Police Department from further surveillance of Anderson … without the court's prior approval." *Id.* at 152. The facts of the *Anderson* case and this case could not be any more different, and the Superior Court erroneously applied *Anderson* in granting Appellee a preliminary injunction based on a "violation of [his] legal rights."

Additionally, in a foot note (JA-025) the Superior Court relied on an affidavit of Wally Hamed that alleged that the Hamed family members had been denied access to bank accounts and that their signature authorization had been removed, as support for its legal conclusion that there was irreparable harm to the Appellee. However these events occurred after the hearings and the thus Appellants were never given an opportunity to address these claims. The Appellants could have shown that the reason for these actions was that Waleed Hamed and Mufeed Hamed had acted in concert to steal $460K from Plessen Enterprises, a separate entity jointly owned by the Hamed and Yusuf families. *See* JA-1837-85. Not only were the Appellants deprived of due process of law by not being given at opportunity to respond, the Superior Court abused its discretion insofar as it followed an "improper procedure in making a determination" by relying upon a hearsay affidavit as substantive proof. *See Thomas, supra.*

At bottom, the error in the decision below is best illustrated by the Superior Court's determination that the Appellants' "actions have deprived [Appellee] of his rights to equal participation in the management and conduct of the business." JA-025. While 26 V.I.C. § 71 allows for equal rights in the management and conduct of a partnership business, it does not follow that any time there is a commercial dispute between partners (be majority-minority or 50-50% owners)

injunctive relief is available. To credit the Superior Court's legal reasoning would allow injunctive relieve to any partner or LLC member who alleged interference in management; thus, turning an "exacting" standard into an easy one for injunctive relief. The decision below must be reversed.

ii. There is No Enforceable "Partnership" Agreement

1. The Statute of Frauds Bars the Alleged Agreement

The Superior Court's conclusion that the statute of frauds did not apply (JA-019) to is matter of law subject to this Court's plenary review. *Simmonds, supra.*

The Superior Court acknowledged that the term of the alleged partnership agreement was "forever." JA-009. In this context, where an unwritten agreement purports to provide a stated term of greater than one year, the Second Circuit Court of Appeals has clarified that:

> Despite some sweeping pronouncements to the effect that the New York statute of frauds [] does not apply to joint ventures, these must mean only that a writing is not required simply because the transaction is a joint venture, and the statute must apply to joint ventures having a stated term of more than one year, as the plain language of [the statute] dictates.

Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 827 (2d Cir. 1984) (internal citation omitted). In *Ebker*, the Second Circuit found that "the statute of frauds renders unenforceable the oral joint venture agreement containing a stated term of [greater than one year] as found by the jury." *Id.* at 828 (rejecting the argument that the "Statute of Frauds did not apply to joint ventures at all" and alternative argument that, even "if the statute applied, the five-year joint venture agreement would be treated as a partnership at will").

Based on the undisputed evidence that the alleged partnership at issue was to continue "forever," the statute of frauds renders the agreement unenforceable which should dispose of this action as a matter of law. *Ebker*, 739 F.2d at 828. *See also Fountain Valley Corp. v. Wells*, 98 F.R.D. 679, 683-65 (D.V.I. 1983) (holding that, under Virgin Islands law, "statute of frauds . . . bar[s] this Court from enforcing any alleged joint venture agreement" that "was to exist for more than one year"); *Rivkin v. Coleman*, 914 F. Supp. 76, 79 (S.D.N.Y. 1996) (holding that New York statute of

frauds barred enforcement of alleged oral joint venture agreement where, as here, plaintiff testified that agreement was to continue "*forever*").

2. Statute of Limitations

The Superior Court's failure to conclude the statute of limitation applies is a matter of law subject to this Court's plenary review. *See Simmonds, supra.*

Appellee's purported "agent," Waleed Hamed, testified to having a power of attorney that Appellee executed in either 1995 or 1996. JA-378. Waleed Hamed also testified that he was aware in either 1999 or 2000 that Yusuf's ownership interest in United, and thus the ownership of the supermarkets at issue in this case, was devolved to Yusuf's children. JA-466. It is black letter law that notice of an action taken in derogation of the principal's rights to the agent (Waleed Hamed) is notice to the principal (Appellee). Restatement (Second) of Agency, § 275. Further, the longest statute of limitations that might apply in this action is, at most, 10 years. 5 V.I.C. § 31. Accordingly, as late as 2000, Appellee was aware that Yusuf had divested his ownership interests to his children. And, because the case below was brought at least 11 ½ years after Appellee was aware of the divestment, the action, irrespective of its merits, is clearly prohibited by the statute of limitations. The Superior Court's finding of probability of success on the merits was in error and this Court must vacate the decision.

3. Retirement of Appellee

The Superior Court's conclusion as to the legal effect of the retirement of a partner *vis-à-vis* the partnership is a matter of law subject to this Court's plenary review. *See Simmonds, supra.* The decision below erroneously fails to take into account undisputed facts and their legal affect.

"When a partner retires . . ., the partnership is dissolved." *Estate of Matteson v. Matteson*, 749 N.W.2d 557, 568 (Wis. 2008) (applying Wisconsin Uniform Partnership Act provisions) (citation omitted). "An existing partner has two primary options upon initiating a partnership dissolution[:] . . . (1) (continuation) to permit the business to continue and claim his or her interest in the dissolution

value as a *creditor*, or (2) (wind-up) to force the dissolved business to wind up and take his or her part of the proceeds." *Id.* (citation omitted) (emphasis added). Upon election of a continuation, when the remaining partner ultimately ends and dissolves the business, the retiring/exiting partner receives his elected sum of the partnership's dissolution value ""as an *ordinary creditor*,' with creditors of the dissolved partnership having priority over an existing partner's claims." *Id.* at 572-73 (citing Wis. Stat. § 178.37) (emphasis added).

Here, it is undisputed that Appellee "retired" from the alleged partnership in or about 1996. JA-534; JA-538-39. Accordingly, as simply an "ordinary creditor" of the alleged partnership, Appellee failed to establish (and the Superior Court erred in concluding) a reasonable likelihood of success on the partnership issues in this action, or in proving that a money judgment could not satisfy the Appellee who is, at best, an ordinary creditor. *Matteson*, 749 N.W.2d at 568. The decision below was entered in error and this Court must vacate the decision.

4. No Admissible Evidence of Partnership Distributions

The Superior Court found that Appellee and Yusuf formed "an oral partnership agreement to operate the supermarkets, by which they share profits and losses." JA-013. The Superior Court relied heavily on Appellee's exhibit 12 (JA-1025) and acknowledged that they were admitted over objection. JA-013 (Memo. Op. at fn. 4).

The Superior Court admitted the privileged settlement communication pursuant to Fed. R. Evid. 408 for "historical context." *Id.* This was clear legal error as neither "historical" nor "context" appears in Rule 408, let alone in proximity to each other. While it is well established that appellate courts "review for abuse of discretion a [trial] court's decision to admit or exclude evidence," *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1341 (3d Cir. 2002), to the extent a trial court's decision depends upon its interpretation of a Federal Rule of Evidence, this Court's review is plenary. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749 (3d Cir. 1994). It is well established that

> Rule 408 applies where there is a dispute between parties, or at least an apparent difference of view ... concerning the validity or amount of a claim. A dispute need not crystallize to the point of threatened litigation; a mere difference of opinion will suffice to warrant the exclusion. In determining whether a dispute exists, the facts of each case are critical to a district court's exercise of discretion. *Ultimately, when in doubt, the district court should err on the side of excluding compromise negotiations.*

ECEM European Chem. Mktg. B.V. v. Purolite Co., 451 Fed. Appx. 73, 77 (3d Cir. 2011) (internal citations and quotations omitted, emphasis added).

The Superior Court improperly relied upon privileged settlement discussions, PX 11 (JA-1024) and PX 12 (JA-1025), as substantive proof of the existence of a partnership, and for the fact that profits had been distributed, both in contravention of Fed. R. Evid. 408(a). Absent this erroneously introduced evidence, there was no evidentiary support for any partnership distributions to Appellee, which, in turn, weighed against Appellee's claim that he could show a probability of success on the merits.

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

"Where, 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). Specifically, the hearing testimony regarding United's present supermarket operations – including the testimony offered by Appellee and his sons – confirmed that the claims in the Rule 65 motions were factually baseless:

Rule 65 Hyperbole	Record Evidence
Initial Rule 65 Motion "If the [supermarket] operations are not secured immediately, the continued operation of the three Plaza Extra stores will be in jeopardy, as well as the continued employment of its 600 plus employees, resulting in irreparable harm" (JA-100).	Plaza Extra Stores Generally Maher Yusuf, on behalf of United Corporation d/b/a Plaza Extra, testified that: • the stores are still open; • vendors are getting paid; • employees have not been intimidated; • rather, employees are all getting paid; • customers have not been lost; and • the operations are otherwise normal. (JA-560-71; DX 12 (JA-1267).

Indeed, Plaza is in serious jeopardy of losing customers to other stores, losing good will built up over the years (*id.*).	Yusuf Yusuf, a United employee and co-manager of Plaza Extra East, similarly testified that none of the Hameds' TRO hyperbole has come to pass. (JA--694). Yusuf Yusuf also attested to the good cause related to Wadda Charriez's termination. (JA-691; DX 15 (JA-1472)).
Second Rule 65 Motion A "new wave of activity . . . has suddenly picked up to such a fervent rate that the present supermarket operations may be so compromised that they will no longer be viable if the Court does not intervene" (JA-301).	Ayman Al-Khaled, who currently serves as a controller at United d/b/a Plaza Extra, and is familiar with its finances and operations, also testified that there have been no unusual disruptions at the Plaza Extra Stores. (JA-721). Plaza Extra East St. Croix Waleed Hamed, an employee at Plaza Extra East, acknowledges that, as reflected by recent actual photographs of the store, including of its warehouse and inventory areas, the "grocery store [is] full of inventory [and] is not about to close any time soon." (JA-453).
"[S]tore employees are being intimidated—threatening a major business and 600 jobs" (*id.*).	Mufeed Hamed, an employee at Plaza Extra East, likewise acknowledges that the store is open and fully stocked, its warehouse is fully stocked, the vendors are all getting paid, and the store's employees are all getting paid. (JA-499-500). Yusuf Yusuf, a co-manager of Plaza Extra East as noted above, also confirms that the store is operating normally. (JA-693; DX 6 (JA-1143)).
"[Fathi] Yusuf has engaged in numerous acts that now have arisen to the level of requiring emergency relief," including "Threats to close the store as a means of intimidating employees," and "Refusal to pay valid supplier amounts & interference with ordering" (JA-303).	Plaza Extra West St. Croix Hisham Hamed, an employee at Plaza Extra West St. Croix, testified that, since the Hameds started this lawsuit, the only operational "problem[]" that allegedly has resulted at Plaza Extra West is that he and Maher Yusuf, a co-manager, "[are] not getting along." (JA-590).
"[T]he defendants have crossed the Rubicon – they are out of control" (JA-304).	Plaza Extra St. Thomas Waheed Hamed, an employee at Plaza Extra St. Thomas, acknowledges that the St. Thomas store is currently operating in the normal course. (JA-483).
Without an injunction, "there will be nothing left to save" (JA-304).	Karema Dorsette, an employee at Plaza Extra St. Thomas, also confirmed that she is employed and the store is still open. (JA-491).

At best, the testimony and evidence reflect the following *competing inferences* concerning the alleged partnership that, again, "must be submitted to the fact finder." *USX*, 68 F.3d at 827; *Smith v. Robson*, 44 V.I. 56, 60-61 (Terr. Ct. 2001); *Rivkin*, 914 F. Supp. at 79. The Superior Court's

determination that, based on the disputed record evidence, erred in concluding the Appellee had demonstrated a reasonable probability of success on the merits.

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

The record evidence is clear – Appellee retired in 1996. JA-431. Thus, the denial of the Rule 65 motions would have placed Appellee in exactly the same position that he was in for the better part of two decades. Indeed, Appellee filed his initial Rule 65 motion in September of 2012, and the Superior Court did not grant the motion until the very end of April, a span of over half a year. If Appellee suffered no irreparable injury in waiting for six months for the Superior Court to rule, then the conclusion that Appellee was facing irreparable injury in the first instance was factually, and hence legally, incorrect.

Further, the record evidence was clear - no store employees have been, or will be, fired without cause. And, indeed, the record evidence is clear that they are, in fact, still employed. Even assuming that Appellee is a "partner", the appointment of his sons as purported "authorized agents" is nothing more than the substitution/admission of a new partner – which is explicitly prohibited without the consent of the existing partners. 26 V.I.C. § 71. No such consent was provided in this action. Accordingly, among the other reasons addressed herein, Appellee would have suffered no irreparable injury, and the Superior Court's conclusion to the contrary was erroneous.

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

The ramifications of the Order are far reaching. The Superior Court has effectively stripped United of virtually all its assets and its income stream, and devolved the assets and income stream to a disputed, at-will, oral partnership which has been terminated. The Order has left United with all of its liabilities, while at the same time turning United's secured creditors into unsecured creditors because every contract, security agreement, and UCC financing statement, lists United as the debtor. *See, e.g.* DX 8 (Tutu Park lease) (JA-1162). The Superior Court's Order has rendered United

effectively insolvent and has left the secured and unsecured creditors flapping in the wind. Finally, the Superior Court's Order has turned the status quo on its head and pierced the corporate veil, *see, e.g., Radaszewski v. Telecom Corp.,* 981 F.2d 305, 306 (8th Cir. 1992) (discussing tripartite test to pierce the corporate veil), despite the fact that Appellee (a) did not plead such relief , (b) did not request such relief, and (c) did not provide any evidence supporting such relief.

The Superior Court's Order destroys the status quo by providing Appellee with management rights via mandatory relief that Appellee did not previously have. Thus, Appellee has been able to keep employed Waleed and Mufeed Hamed as managers in the Plaza Extra store notwithstanding their misconduct. JA-1725. Additionally, United has been unable to terminate Charriez for her defalcation as well. *Id.*

Separately, as discussed in greater detail *infra*, the legally insufficient bond of $25,000 "produces irreparable injury" to Appellants because the bond is the only "promise that the defendant will be reimbursed for losses suffered if it turns out that the order was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation" and is wholly in adequate for that purpose. *Am. Bible Soc'y v. Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971). The Superior Court's conclusion that this factor militates in favor of Appellee was erroneous and must be reversed.

D. INJUNCTIVE RELIEF IS CONTRARY TO THE PUBLIC INTEREST

The Superior Court concluded that the Plaza Extra Supermarkets should continue to operate because the public interest is served by the continued employment of 600 Virgin Islanders. JA-026. Based on the Superior Court's reasoning, the closing of the Plaza Extra Supermarkets will not be in the public's interest, but that is exactly what the injunction order precipitates.

The Superior Court also concluded that there is an at-will oral partnership (which Appellants dispute), but, regardless, an at-will partnership can be terminated by any of the partners for any reason and at any time. 26 V.I.C. § 171(1). *See infra* at Point II. Because the injunction is completely

unworkable and legally deficient, every employee likely will be terminated upon the partnership's dissolution. Consequently, contrary to the Superior Court's conclusion, the continued employment of 600 Virgin Islands is put at risk -- and not saved -- by the Order.

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

Here, the Superior Court made the following finding of fact:

> "Thereafter, discussion commenced initiated by Yusuf's counsel regarding the *"Dissolution of Partnership."* Pl. Ex. 10, 11, 12. On March 13, 2012, through counsel, Yusuf sent a Proposed Partnership Dissolution Agreement to Hamed, which described the history and context of the parties' relationship, including the formation of an oral partnership agreement to operate the supermarkets, by which they shared profits and losses. Pl. Ex. 12. Settlement discussion followed those communications but have not to date resulted in an agreement.

Memo. Op. at 9 (JA-013, emphasis supplied).

Although Appellants dispute that the dissolution notice was properly admitted, once being admitted it constitutes evidence of both the "bitter and the sweet" *viz.*: it comes in at all it comes for all purposes. The Superior Court's failure to acknowledge the full extent of the document was error because the dissolution notice, relied upon by the Superior Court as proof of the claimed partnership, had the legal effect of terminating the claimed "at-will partnership" between Yusuf and Appellee.

It is well established that a partnership at will ceases to exist upon notice by a partner of his intent to dissolve it. *See Browne v. Ritchey*, 202 Ill.App.3d 137 (1990). Before the *Browne* court was an at-will-partnership which was terminated by defendant partner when he sent a telegram stating his intent to dissolve partnership. The *Browne* Court noted that since the defendant partner acted within his rights under the agreement and the UPA in terminating his relationship with plaintiff, grant of preliminary injunction requiring him to continue in that relationship was an abuse of discretion.

Here, as in *Browne*, the Superior Court specifically found that the termination of the "partnership" occurred on March 13, 2012, by way of a "Dissolution Notice" (JA-1025); further, the

Dissolution Notice contained an agreement as to the scope and terms of the "partnership." With the partnership terminated, the Superior Court should not have issued a preliminary injunction order demanding that the parties continue to operate the disputed partnership because there are no continuing partnership operations to manage.

Illinois, which has adopted the UPA, also recognizes the same injunction requirements as the Virgin Islands. In *Browne,* the Illinois Supreme Court, marrying the injunction requirements with the partnership law regarding dissolution arrived at the following precise and relevant holding:

> With respect to their duration, partnerships are formed either for a fixed or specified term or without reference to any term. Partnerships formed without reference to any term are partnerships at will. (59A Am.Jur.2d Partnership §§ 87, 89, (1987).) Such partnerships [] are subject to dissolution at any time by the express will of any partner. (59A Am.Jur.2d Partnership §§ 89, 818 (1987).) All that the dissolving partner need do is give notice of his intent to dissolve the partnership to his co-partners.

Id. (some citations omitted).

The *Browne* court then held "there is a distinction between the power and right to dissolve a partnership. However, as to partnerships at will, a *dissolution at the election of one of the* partners is not a breach of contract and the dissolving partner incurs no liability regardless of his motive or any injury to his co-partners "who neglected to protect themselves by an agreement to continue for a definite term." *Id.* at 811.

The Superior Court erroneously used the partnership Dissolution Notice as proof of the existence of an at-will partnership and simultaneously ignored its terminative effect upon the alleged partnership. Therefore the relief of continued joint management is legally impermissible, since the partnership does not exist beyond the termination notice. Thus, the entry of an order forcing Appellee and Yusuf to maintain the continued joint management of a partnership/joint venture that has been terminated was a clear abuse of discretion. The Order below must be reversed.

POINT III – THE BOND AMOUNT WAS LEGALLY INSUFFICIENT AND ILLUSORY

Without waiver of Appellants' arguments regarding the injunction itself, the current bond of $25,000 fails to satisfy its primary purpose, *i.e.*, "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained," Fed. R. Civ. P. 65(c). As raised below (JA-1792), trial courts should err on the high side when setting an injunction bond. An error in the other direction produces irreparable injury to the enjoined party. Further, in the absence of prior evidence regarding the full bond consequences, a trial court is unable to impose a reasonable security. The failure to conduct a proper bond analysis constitutes reversible error.

The Superior Court's 2-page May 31, 2013 Order Denying Bond Modification (JA-1969), which does not cite a single case, rests on two "bases." *Id.* Both are flawed.

A. APPELLANTS PROFFER AN ABUNDANCE OF CASE LAW SUPPORTING THEIR POSITION

There is no dispute that the preliminary injunction hearings were devoted to the merits of the injunction request, as opposed to the bond amount. *Id.* (acknowledging that "[n]o evidence was presented at the evidentiary hearing, or thereafter, relative to the costs and damages [Appellants] would sustain if it were to be determined that injunctive relief had been entered wrongfully").[6] Rather, in denying Appellants' emergency request for a bond modification upon learning the bond amount, the Superior Court incredibly indicated, first, that Appellants "proffer[ed] no case law to the effect that a second and separate hearing on the setting of security bond [sic] is required or appropriate." JA-1969. Appellants' emergency bond motion in fact proffered *seventeen* separate cases supporting the requested modification.[7] The Superior Court simply ignored those cases.

Regardless, Rule 65(c) plainly requires a separate bond hearing in certain situations, including, where, as here, the injunction hearings and record evidence fail to directly address:

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[6] Appellants' bond motion sets forth sworn evidence identifying their costs and damages if the injunction should not have been imposed. JA-1805-17.

[7] *See* JA-1792-1804.

- the "financial ability" of the party to be enjoined as a measure of its potential damages resulting from any injunction, *see, e.g., H.I. Constr., LLC v. Bay Isles Assocs., LLLP*, 53 V.I. 206, 223 (Terr. Ct. 2010) (clarifying that a trial court "is unable to impose a reasonable bond as required as part of an order for injunctive relief" absent testimony on the Rule 65(c) considerations, including the enjoined party's financial ability);

- "the value of assets encumbered" or "the likely amount of [the plaintiff's] expected recovery" upon the entry of any injunction, *see, e.g., Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 189 (3d Cir. 1990) (concluding that a preliminary injunction "must be set aside" absent such evidence); and

- the "full" consequences of any injunction or the "necessary findings" supporting the bond determinations, *see, e.g., Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012) (vacating trial court's grant of preliminary injunction where, as here, the court failed to conduct a "full hearing" on the bond requirement); *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 887 (7th Cir. 2000) (expressing concern, as alternate basis to reverse preliminary injunction, over trial judge's failure to "alert[]" the enjoined party in advance of an injunction hearing that the hearing would be devoted to anything other than the merits of the injunction request); *Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991) (trial court "abuses" its discretion in setting bond amount when it "fails to require an adequate bond or to make the necessary findings in support of its [bond] determinations").

Because the present bond of $25,000 is completely devoid of a credible evidentiary basis and otherwise bears no rational relationship to the evidentiary record below, which, again, did not address the "full" bond consequences, the Superior Court erred by failing to conduct a proper bond hearing.

Appellee's related claim that Appellants' damage figures were not "timely raised" (JA-1938) is likewise unavailing. For example, the court in *Mead* considered the same argument, 201 F.3d at 887. In *rejecting* the argument, the Seventh Circuit Court of Appeals held:

> Nothing in the record suggests . . . that the [trial] judge alerted [defendant] Abbot to this requirement in advance of the hearing. A litigant naturally would suppose (in the absence of notice) that a hearing on a request for a preliminary injunction will be devoted to the merits of that request, rather than to fixing the amount of bond. . . . We trust that in the future the [trial] court will notify the parties of the ground rules and endeavor to set bonds at levels reflecting full consequences.

Id. Similarly, in the present action, nothing in the record suggests that the Superior Court alerted Appellants to any requirement in advance of the preliminary hearings to address the bond issues. As such, as noted in *Mead*, Appellants "naturally" supposed (in the absence of notice) that the

preliminary injunction hearings "w[ould] be devoted to the merits of that request, rather than to fixing the amount of bond." *Id.* *See also Zambelli Fireworks Mfg. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (noting that Rule 65(c) "does not impose any obligation on the parties to seek a bond" at the initial preliminary injunction hearing). Here, as noted, the bond issues were not addressed during the injunction hearings, as the trial court failed to alert the parties to address the issue. Further, the instant bond represents approximately *00.03% (three one hundredths of one percent)* of the damages that Appellants represented to the trial court *with* sworn testimony in their bond motion.

B. THE TRIAL COURT'S DETERMINATION REGARDING "ADDITIONAL SECURITY" IS LEGAL ERROR

Together with the $25,000 cash security, the trial court also determined that Appellee's "interest in the 'profits' accounts of the [supermarket] business now held at Banco Popular" somehow serves as "additional security" under Rule 65(c). JA-027; JA-1969-70. That determination was legal error.

i. Appellants Have Not "Admitted" Entitlement to Any Relief In This Action

According to the Superior Court, "that the [Appellee] is entitled to 50% of the [supermarket] profits" is an established fact--it is an uncontested admission by both defendants. JA-1969. Significantly, however, Appellants have not "admitted" that Appellee is entitled to any relief in this action whatsoever. Indeed, Appellants' motion to dismiss remains pending. Appellants likewise affirmatively deny the existence of any alleged *de jure* partnership between Yusuf and Appellee – just as the Hameds themselves affirmatively denied the existence of any such partnership for decades when it suited them to do so, including in the Criminal Action.

Further, as noted above at pages 19-20, the Superior Court's heavy reliance on Yusuf's decades-old deposition testimony in a different action, in which Appellee was not a party, is misplaced, as courts may not take judicial notice of either factual findings or the record of another case, including testimony, as substantive proof of the matters asserted.

ii. Regardless, the Purported "Additional Security" Is Illusory

Regardless, the claim that 50% of the funds belong to Appellee (JA-1937) again overlooks that fact that a Rule 65(c) bond is designed to protect incorrectly or wrongfully enjoined defendants. *See, e.g., Hoxworth*, 903 F.2d at 210 ("because of attenuated procedure, an interlocutory order has a higher than usual chance of being wrong") (citation omitted). In addition, because "the damages for an erroneous preliminary injunction cannot exceed the amount of the bond," those damages must be expressly included as a cash bond component. *Mead*, 201 F.3d at 888 (citation omitted). Here, a finding that Appellants were wrongfully enjoined would necessarily entail that Appellee has no entitlement to the enjoined funds. Thus the alleged "additional security" is illusory and cannot constitute "additional security".

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

The Superior Court's Order, to the extent it addresses employer and employee issues, is explicitly prohibited by Fed. R. Civ. P. 65(e)(1), which provides that Rule 65, and any attendant order issued under Rule 65's power, does not modify any statute relating to TRO's and/or preliminary injunctions.

24 V.I.C. § 341 provides, in full, that: "*[n]o court of the Virgin Islands shall have jurisdiction to issue* any restraining order or temporary or *permanent injunction in a case involving* or growing out of *a labor dispute*, except in strict accordance with the provisions of this chapter." (emphasis added). Because the Order at issue interferes with employer-employee relations, it is void *ab initio* as a matter of law. This Court must correct this error of law by, at a minimum, vacating, in part, the preliminary injunction order.

CONCLUSION

For the reasons set forth above the Appellants respectfully request that this Court vacate the preliminary injunction Order and remand the case for a trial on the merits.

Respectfully Submitted, Dated: June 13, 2013

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CERTIFICATE OF COMPLIANCE RE: PAGE LIMITS

Pursuant to this Court's order allowing an over length brief, counsel certifies that this brief is in compliance with the thirty-five page limit.

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CERTIFICATE OF BAR MEMBERSHIP

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

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2013, I caused:

1. That the brief and joint appendix (volumes I – V) was filed with the Clerk of the Virgin Islands Supreme Court via VISCEFS.

2. Pursuant to V.I. Supreme Court Rules 25(b) and 24(a), two original copies of the brief and one copy of the joint appendix (volumes I – V) were served via FedEx to:

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3. Pursuant to V.I. Supreme Court Rules 25(b) and 24(a), seven (7) copies of the brief and joint appendix (volumes I – V) were filed with the Clerk of the Virgin Islands Supreme Court via FedEx.

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