IN THE SUPREME COURT
OF THE VIRGIN ISLANDS
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No. 2013-40

IN THE

Supreme Court of the Virgin Islands

FATHI YUSUF and
UNITED CORPORATION,

Appellants,

v.

MOHAMMAD HAMED, by his
authorized agent, WALEED HAMED,

Appellee.

ON APPEAL FROM
THE SUPERIOR COURT OF THE VIRGIN ISLANDS
Civ. No. 370/2012 (STX)
(Hon. Douglas A. Brady, Presiding)

OPPOSITION BRIEF

Joel H. Holt, Esq.
Counsel for Appellee

Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820

Carl J. Hartmann III, Esq.
Co-Counsel for Appellee

Carl J. Hartmann III, Attorney
5000 Estate Coakley Bay, L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820

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STATEMENTS OF JURISDICTION, ISSUES, STANDARD OF REVIEW AND RELATED CASES

Appellee agrees with Appellants' statements of *Jurisdiction, Issues* and *Related Cases*. He also agrees with the *Standard of Review*, except Issue 2, which raises mixed questions of law and fact. This Court has plenary review over matters of law and reviews questions of fact for clear error. *St. Thomas-St. John Bd. Of Elections v. Daniel,* 49 V.I. 322, 329 (V.I. 2007).[1]

STATEMENT OF THE CASE

Appellee agrees with the *Statement of the Case* except: (1) Appellants removed to the District Court, which remanded for lack of federal jurisdiction (JA 143, JA 284) and (2) the court below did grant Appellants' post-hearing motions clarifying the scope of the injunction. JA 1969, JA 1971. It has also now denied the motion to intervene.

STATEMENT OF FACTS

Absent a showing of clear error, the "facts" in this case are those found by the Superior Court ("court") in its opinion.[2] It first addressed the family history between Hamed and Yusuf, and the initial desire to create a supermarket (JA 007-008):

> 1. Plaintiff and Defendant Yusuf have a longstanding friendship and familial history which preceded their business relationship. JA 528-530.
>
> 2. In 1979, Fathi Yusuf incorporated United Corporation ("United") in the U.S. Virgin Islands. JA 1154.
>
> 3. United subsequently began construction on a shopping center located at Estate Sion Farm, St. Croix. Thereafter, Defendant Yusuf desired and made plans to build a supermarket within the shopping center. JA 823:1-14.

Appellants did not contest these facts. The court then noted Yusuf's financial difficulties which resulted in him bringing others, including Hamed, into the supermarket business:

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[1] The Appellants appear to concede that a different standard applies to this issue. On page 31 of their brief they argue a clear "abuse of discretion."

[2] References in the court's decision are replaced here by those in the *Joint Appendix*.

4. Subsequently, Yusuf encountered financial difficulty in completing construction of the shopping center and opening the supermarket, was unable to procure sufficient bank loans, and told Plaintiff Mohammad Hamed ("Hamed") that he was unable to finance the completion of the project. At Yusuf's request, Hamed provided funding to Yusuf's project from proceeds of Hamed's grocery business. JA 915:4-JA 916:14.

5. Hamed provided Yusuf with monies to facilitate completion of construction on the shopping center and to facilitate opening the Plaza Extra supermarket in Estate Sion Farm, St. Croix. JA 529:5-531:13.

6. Upon Yusuf's request, Hamed sold his two grocery stores to work exclusively as a part of Plaza Extra. JA 532:4-15.

7. Hamed contributed to Yusuf's project funds as they were available to him, including the entire proceeds from the sale of his two grocery stores, with the agreement that he and Yusuf would each be a 50% partner in the Plaza Extra Supermarket, "in the winning or loss." JA 532:16-23.

8. **Hamed initially became a 25% partner of Yusuf, along with Yusuf's two nephews who each also had a 25% interest in the Plaza Extra Supermarket business**. JA 916:2-14 (emphasis added).

9. Yusuf sought additional bank financing to complete the construction of the building for the Plaza Extra business, which loan application was eventually denied, as a result of which Yusuf's two nephews requested to have their funds returned and to leave the partnership. JA 831:6-24.

10. With the withdrawal of Yusuf's nephews, **the two remaining partners of the Plaza Extra Supermarket business were Hamed and Yusuf.** Notwithstanding the financing problems, Hamed determined to remain with the business, having contributed a total of $400,000 in exchange for a 50% ownership interest in the business. JA 831:24-833:10 (emphasis added).

Appellants do not suggest that any of the historical facts in ¶¶ 4-10 are erroneous—which include the bolded points taken *verbatim* from the testimony of Yusuf and United.

Instead, Appellants resort to an unwarranted personal attack on Hamed, trying to belittle Hamed as nothing more than an illiterate "warehouse clerk."[3] However, as Hamed testified, he gave up everything to join this partnership with Yusuf (JA 532:4-15):

[3] For example, Appellants argue that Hamed improperly signed an affidavit because he cannot read English, but he testified the affidavit was explained to him before he signed. JA 541:1-8. More to the point, Hamed *testified to the same facts* that were in his affidavit. JA 527-542. Yusuf did not take the stand to refute Hamed's testimony.

Q Now, what happened to the store in Carlton and the store in Glynn?

A I sold it.

Q And what did you do with the money?

A Mr. Yusuf he tell me **if you be here in the business supermarket you cannot have a next business of your own, you have to be completely work in the Plaza Extra.** Nothing else you can do about it. And I sell the market and I sell Carlton Grocery.

Q: And what did you do with the money from the sale?

A **I put it with the money I pay for Mr. Yusuf**. (Emphasis added.)

In fact, Yusuf acknowledged these contributions (JA 832), as the court noted in ¶ 7.[4]

The court went on to make findings as to the existence and terms of the partnership, taken from admissions by Yusuf and United in pleadings both in an earlier Superior Court case and before the court here, finding (JA 008-009):

11. Yusuf and Hamed were the only partners in Plaza Extra by the time in 1986 when the supermarket opened for business and Hamed has remained a partner since that time. JA 1510. (Sworn to by Yusuf in a signed discovery response.)

12. As a partner in the Plaza Extra Supermarket business, Hamed was entitled to fifty **(50%) percent of the profit and liable for fifty (50%) of the "payable"** as well as loss of his contribution to the initial start-up funds. JA 376:12-21; JA 532:16-23; JA 538:23-25, JA 832:16-23; JA 837:18-25 (emphasis added). [5]

13. Yusuf and Hamed have both acknowledged their business relationship as a partnership of an indefinite term. JA 832:18-23. ([Yusuf:] "I'm obligated to be your partner as long as you want me to be your partner until we lose $800,000."); JA 542:4-8. (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.")

[4] As will be discussed throughout this brief, Yusuf gave a deposition in another Superior Court case, *Idheileh v. United Corp. and Yusuf*, Case No. 156/1997, Terr. Ct., (Div. St. Thomas and St. John) where Yusuf and United were defendants. The highlighted excerpts from this deposition were marked as Hamed's Ex.1-A at hearing, (JA 912-923) which show this project would never have succeeded without Hamed's investment and experience, as he was the only one who had previously been in the grocery business.

[5] This finding specifically refutes Appellants' contention that Hamed took no personal risk for partnership obligations. Yusuf stated under oath that Hamed was liable for 50% of the partnership's *payables*. JA 837:18-838:1, 4-5. Hamed also testified that Yusuf told him he did not have to sign the bank loan guarantees so long as Hamed agreed to and in fact paid 50% of such obligations. Hamed agreed and did so. JA 538:18-25.

14. Yusuf testified in the *Idheileh* case that it was general public knowledge that Yusuf was a business partner with Hamed even before the Plaza Extra supermarket opened. JA 834:10-12.[6]

15. **Yusuf has admitted _in this case_ that he and Hamed "entered into an oral joint venture agreement" in 1986** by which Hamed provided a "loan" of $225,000 and a cash payment of $175,000 in exchange for which "Hamed [was] to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets" in addition to the "loan" repayment. Yusuf states that the parties' agreement provided for "a 50/50 split of the profits of the Plaza Extra Supermarket stores." JA 926, JA 927, *Pl.Ex. 2.* Indeed, **Yusuf confirms [_in this case_] that "[t]here is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store....The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is."** JA 971. (Emphasis added.)

Appellants have attacked the court's finding that a "partnership" existed to operate the Plaza Extra Supermarkets, but these findings were amply supported by the hearing record. Indeed, *these findings were based on sworn judicial admissions of Yusuf and United—**made both recently in this*** **case and in the past. For example, both bolded quotes in Finding ¶ 15 were taken by the court *verbatim* from recent documents in this case.** JA 926, JA 927 and JA 971. While Yusuf did not testify at the hearings to controvert or explain these admissions, Hamed testified (JA 532:18-23):

Q Okay. And what was your understanding of your relationship with Mr. Yusuf?
A I'm his partner. We own 50 and he own 50 in the winning or loss. . . .
Q 50 percent of what?
A 50 percent of the supermarket.

Moreover, two of Yusuf's sons, Maher Yusuf (United's President) and Yusuf Yusuf (the Sion Farm store co-manager) testified that the Plaza Extra Supermarkets are jointly owned by their father and Hamed, _currently_ operating under that agreement. JA 545:18-547:11 and JA 696:10-697:5. Thus, these findings are not clearly erroneous.

[6] This finding, again based on Yusuf's own sworn testimony in the *Idheileh* case (JA 834:10-12), also negates the Appellants' assertions that third parties and United never knew Hamed was a partner in the Plaza Extra Supermarkets.

The court also made findings as to how the three stores have been *jointly* managed by the partners in much the same way for some 26 years (JA 010-011):

> 18. In the *Idheileh* litigation, Yusuf provided an affidavit wherein he stated that "[m]y 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." JA 1490, *Pl.Ex. 1, Aff. of Fathi Yusuf, Depo. Ex.6* (emphasis added).
>
> 19. Hamed and Yusuf have jointly managed the stores by having one member of the Hamed family and one member of the Yusuf family co-manage each of the three Plaza Extra Supermarkets. Originally, Hamed and Yusuf personally managed the first Plaza Extra store, with Hamed in charge of receiving, the warehouse and produce, and Yusuf taking care of the office. JA 358:11-19. Yusuf's management and control of the "office" was such that Hamed was completely removed from the financial aspects of the business, concerning which Hamed testified "I'm not sign no thing.... Fathi is the one, he sign...he sign the loan, the first one and the second one." JA 539:16-21.
>
> 20. During recent years, in every store there is, at least, one Yusuf and one Hamed who co-manage all aspects of the operations of each store. Mafeed Hamed and Yusuf Yusuf have managed the Estate Sion Farm store along with Waleed Hamed. Waleed Hamed, Fathi Yusuf and Nejah Yusuf operate the St. Thomas store, and Hisham Hamed and Mahar Yusuf manage the Plaza West store on St. Croix. JA 363:6-367:11; JA 147:11-20; JA 492:10-22; JA 695:6-17.

Again, Appellants did not contest any of the findings of fact in ¶¶ 18-20.

The court then made specific findings as to the distinction between the entity that operates Plaza Extra Supermarkets and United Corporation and how that distinction was blurred at times *by Yusuf.* (JA 011):

> 21. In operating the "office," Yusuf did not clearly delineate the separation between United "who owns United Shopping Plaza" and Plaza Extra, despite the fact that **from the beginning Yusuf intended to and did "hold the supermarket for my personal use**." JA 823:1-7. Despite the facts that the supermarket used the trade name "Plaza Extra" registered to United (JA 977, ¶ 14) and that the supermarket bank accounts are in the name of United (JA 1040, JA 1044), **[Yusuf stated:] "in talking about Plaza Extra. . .when it says United Corporation. . .[i]t's really meant me [Yusuf] and Mr. Mohammed Hamed."** JA 833:13-21. (Emphasis added.)
>
> 22. Yusuf admitted in the *Idheileh* action that Plaza Extra was a distinct entity from United, although the "partners operated Plaza Extra under the corporate name of United Corp." JA 1512.

> 23. The distinction between United and the Plaza Extra Supermarkets is also apparent from the fact that United, as owner of United Shopping Center, has sent rent notices to Hamed on behalf of the Sion Farm Plaza Extra Supermarket, and the supermarket has paid to United the rents charged. JA 992; JA 1006; JA 1022; JA 380:24-383:9; JA 544:18-546:15.

The record also supports these findings. For example, the findings in ¶ 23 are based on United (as the owner of the Sion Farm shopping center) routinely sending rent notices to its tenant, Plaza Extra Supermarket (*addressed to Hamed)*. JA 992-1005. Even after the entry of the court's April 25th findings, United continued to send these notices, ratifying this finding. JA 1975. Evidence was also admitted showing that rent of $5,400,000 had been paid for 2004 to 2011. JA 1006. How can United argue that Plaza Extra is not a separate entity with Hamed as an owner when it accepted $5.4 million and still sends rent notices as the landlord to Hamed as the head of Plaza Extra Supermarkets? Indeed, Maher Yusuf (United's president) testified how rent is deducted from the gross profits of Plaza Extra before determining its net profits to be split 50/50 between the partners. JA 546:16-547:11.

In fact, the court's finding that the partnership is distinct from United is based on a myriad of evidence, including Yusuf's sworn admission in the *Idheileh* case that the "partners operated Plaza Extra under the corporate name of United Corp" (JA 1512) and United's own, separate judicial admission just this year that (JA 977):

> 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 <u>in this joint venture</u> 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.)

Indeed, Finding ¶ 21 explains why United improperly filed tax returns claiming 100% of the profits from the Plaza Extra Supermarkets, which remains the subject of the still pending criminal case, as Yusuf had United report the partnership income as its own. [7] In short, the court's findings in ¶¶ 21-23 are not clearly erroneous.

The court then reviewed the events after criminal proceedings were filed in 2003.

> 24. In 2003, United was indicted for tax evasion in federal court, along with Yusuf and several other members of the Hamed and Yusuf families in that matter in the District Court of the Virgin Islands, Div. of St. Croix, known as *United States and Gov't of the VI v. Fathi Yusuf, et al., Crim. No. 2005–15* ("the Criminal Action"). However, Plaintiff Hamed was not indicted. JA 554:11-555:6; 466:15-23.
>
> 25. In connection with the Criminal Action, the federal government appointed a receiver in 2003 to oversee the Plaza Extra Supermarkets, who deposits all profits into investment accounts at Banco Popular Securities and, originally, at Merrill–Lynch. Those "profits" accounts remain at Banco Popular Securities to the present. JA 373:15-374:18; 469:13-470:19.
>
> 26. In 2011, United pled guilty to tax evasion in the Criminal Action. Charges were dismissed against the other Defendants, by Plea Agreement. JA 1094
>
> 27. The Criminal Action against United remains pending, as the terms of the Plea Agreement require "complete and accurate" tax filings. United has filed no tax returns since 2002, although estimated taxes have been paid from the grocery store accounts, and mandatory accounting procedures for Plaza Extra have been adopted. JA 572:12-577:12.; JA 752:4-16; JA 1093.
>
> 28. At some point between late 2009 and 2011, at Yusuf's suggestion, the Hamed and Yusuf families agreed that all checks drawn on Plaza Extra Supermarket accounts had to be signed by one member of the Hamed family and one member of the Yusuf family. JA 432:11-16; 560:2-11.

Appellants have not argued any of the findings in ¶¶ 24-28 are erroneous.

Appellants do assert, however, that certain "representations" (allegedly) made in the criminal case should somehow be binding on Hamed in this case. As the court

[7] While Appellants assert that Hamed did not pay taxes based on a partnership, Yusuf was in charge of such filings. It is undisputed that <u>100% of the estimated taxes on *Plaza Extra's profits were paid*</u>. While United improperly claimed 100% of this income, contrary to its own admissions that Hamed is entitled to 50% of the profits, **Hamed has now filed his returns, reporting 50% of the profits of the partnership as his income. JA 1965. Any claim that Hamed has not filed his taxes is untrue.**

noted in Finding ¶ 24, Hamed was not indicted. How can alleged representations made in the criminal case be binding on a non-defendant? In fact, **Appellants cannot point to even one such "representation."** While they _argue_ (Brief at p. 7) that (1) Hamed's sons (who were defendants) "*_never expressed_ the claim* that their father held any interest in the Plaza Extra stores as an 'alleged' partner with Fathi Yusuf, and (2) that Hamed did not "*_ever appear_* in the Criminal Action as a claimed 'partner' with Yusuf," there were absolutely no "representations" made in the criminal case by anyone, much less any "representations" by Hamed. This illusory argument can be easily rejected.

The court then made several findings about the events occurring in 2011 in the criminal case, which led to tension developing in the partnership (JA 012-013):

> 29. In late 2011, United had its newly retained accountant review a hard drive containing voluminous financial records related to the Criminal Action, following which Yusuf accused members of the Hamed family of stealing money from the supermarket business and threatening to close the store and to terminate the United Shopping Plaza lease. JA 714:5-10; JA 383:15-384:8.
>
> 30. Thereafter, discussions commenced initiated by Yusuf's counsel regarding the "Dissolution of Partnership." *PL.Ex. 10,* JA 1023; *11*, JA 1024; *12*, JA 1025. 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. JA 1025, *Pl.Ex. 12.* Settlement discussions followed those communications but have not to date resulted in an agreement. JA 390:15-20.

Appellants do not contend the factual findings in ¶¶ 29-30 are erroneous.

The court then went on to make the following additional finding relating to events that took place in the partnership after 1996 (JA 013-014):

> 31. Although Plaintiff retired from the day-to-day operation of the supermarket business in about 1996, Waleed Hamed has acted on his behalf pursuant to two powers of attorney from Plaintiff. JA 377:24-380:2; 504:6-505:8; 534:18-25; JA 1490. Both Plaintiff and Yusuf have designated their respective sons to represent their interests in the operation and management of the three Plaza Extra stores. JA 363:6-367:11.

One exhibit the court relied upon in ¶ 31 was Yusuf's 2000 affidavit stating:

> 4. Mohamed Hamed gave his eldest son, Waleed (a/k/a Wally), power of attorney to manage his interests for the family.

Clearly Yusuf acquiesced in his partner's son performing in his father's stead and representing his father's interest day-to-day—which he has done since 1996. Thus, the record fully supports Finding ¶ 31. The court went on to address the long history of equal access to and control of both bank accounts and profit distributions:

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

This finding is not disputed. The court then discussed how this practice changed, with Yusuf suddenly and unexpectedly taking funds without Hamed's approval:

> 33. Waleed Hamed testified that Fathi Yusuf utilized Plaza Extra account funds to purchase and subsequently sell property in Estate Dorothea, St. Thomas, to which it was agreed that Hamed was entitled to 50% of net proceeds. Although Yusuf's handwritten accounting of sale proceeds confirms that Hamed is due $802,966, representing 50% of net proceeds, (JA 1046) that payment has never been made to Hamed and the disposition of those sale proceeds is not known to Hamed. JA 420:8-422:17.
>
> 34. Each of the three Plaza Extra Supermarkets maintains and accounts for its operations separately, with separate bank accounts. In total, the stores maintain a total of approximately 11 accounts. JA 367:12-20; 368:22-370:25; 561:10-13.
>
> 35. On or about August 15, 2012, Yusuf wrote a check signed by himself and his son Mahar Yusuf and made payment to United in the amount of $2,784,706.25 from a segregated Plaza Extra Supermarket operating account, despite written objection of Waleed Hamed on behalf of Plaintiff and the Hamed family, who claimed that, among other objections, the unilateral withdrawal violated the terms of the District Court's restraining order in the Criminal Action. JA 578:1-582:14; JA 1034.
>
> 36. On the first hearing day, Mahar Yusuf, President of United Corporation testified under oath that he used the $2,784,706.25 withdrawn from the Plaza Extra operating account to buy three properties on St. Croix in the name of United. On the second hearing day, Mahar Yusuf contradicted his prior testimony and admitted that those withdrawn funds had actually been used to invest in businesses not owned by United, including a mattress business, but that

none of the funds were used to purchase properties overseas. JA 582:2-583:15; JA 780:12-782:2.

Appellants have not suggested that even one of the findings of fact in ¶¶ 31-36 is clearly erroneous. *They do not even dispute finding 36—that the president* of *United falsely testified under* oath *on a* <u>*central*</u> *point—how the diverted funds had been spent.* Shortly after the $2.7 million was unilaterally removed from the partnership's operating account by Yusuf, this case was filed, with injunctive relief sought to stop this conduct. JA 082.

The court then made a critical finding regarding the criminal case (JA 015-016):

> 37. A restraining order was entered by the District Court in the Criminal Action which remains in place and restricts withdrawal of funds representing profits from the supermarkets that have been set aside in the Banco Popular Securities brokerage account pending the conclusion of the Criminal Action or further order of that Court. JA 373:15-374:18; 451:4-12. The Criminal Action will remain pending until past tax returns are filed. JA 466:15-468:22; 574:16-577:5. As of January 18, 2013, the brokerage account had a balance of $43,914,260.04. JA 1261. This Court cannot enforce the restraining order or otherwise control any aspect of the Criminal Action or its disposition.

This finding points out that there is $43,914,260.04 in partnership profits. These profits are held solely in United's name, even though Hamed is entitled to 50% of these funds. Thus, these funds are at risk of withdrawal by United (like the unilateral withdrawal of the $2.7 million) if the District Court restraining order is lifted. The court then took note of the partnership's current problems:

> 38. Funds from supermarket accounts have also been utilized unilaterally by Yusuf, without agreement of Hamed, to pay legal fees of defendants relative to this action and the Criminal Action, in excess of $145,000 to the dates of the evidentiary hearing. JA 408:5-414:9; JA 1040; 16, JA 1044.[8]
>
> 39. Since at least late 2012, Yusuf has threatened to fire Hamed family managers and to close the supermarkets. JA 481:20-482:22; 490:18-491:12; 585:25-586:19.
>
> 40. On January 8, 2013, Yusuf confronted and unilaterally terminated 15 year

[8] This amount is now almost $500,000. JA 1520-1522, 1671-1675, 1678-1683.

accounting employee Wadda Charriez for perceived irregularities relative to her timekeeping records of her hours of employment, threatening to report her stealing if she challenged the firing or sought unemployment benefits at Department of Labor, JA 513:20-517:16. Charriez had a "very critical job" with Plaza Extra (JA 511:17-19), and the independent accountant retained by Yusuf agreed that she was "a very good worker" and that her work was "excellent." JA 756:2-6. Because the Hamed co-managers had not been consulted concerning the termination or shown any proof of the employee's improper activity, Mafeed Hamed instructed Charriez to return to work the following day. JA 511:4-24; 517:17-518:8. On Charriez' January 9, 2013 return to work, Yusuf started screaming at her, and told her to leave or he would call the police. JA 518:9-519:1. Yusuf did call police and demanded on their arrival that Charriez, and Mufeed Hamed and Waleed Hamed be removed from the store, and threatened to close the store. JA 425:5-426:15; 496:19-497:18; 519:5-520:8. The incident that occurred on January 9, 2013, the same day that Plaintiff's Renewed Motion was filed, coupled with other evidence presented demonstrates that there has been a breakdown in the co-management structure of the Plaza Extra Supermarkets. JA 473:25-474:18; 475:17-478:19; 498:21-499:8.[9]

41. "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." JA 1512. Defendants now claim that Yusuf is the owner of only 7.5% of the shares of United (JA 934) (which could adversely affect Plaintiff's ability to enforce his claims as to the partnership "operated [as] Plaza Extra under the corporate name of United Corp."

Other than the issue related to Charriez, these findings in ¶¶ 37-41 are uncontested.

Absent clear error, Hamed submits the court's findings as the facts in this case.

SUMMARY OF ARGUMENT

The court correctly applied the four requisite factors for granting a preliminary injunction ("PI") set forth in *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548 (V.I.

[9] Appellants attempt to characterize Wadda Charriez as a "thief," claiming she *repeatedly* falsified her hours. They base this on store surveillance cameras that show people as they enter and leave the store. This evidence was disputed, as Charriez was not required to "punch in" (JA 698:3-20) because she performed work outside normal hours—such as banking---so her arrivals and departures do not reflect her hours JA 699:3-21. The court was free to reject Appellants' assertions based on the evidence. In fact, the store's accountant (Appellants' own witness) acknowledged that her job was critical. He said she was a good worker and her work was excellent. JA 755:20-756:8. Thus, the evidence was equally susceptible to the view that this was a valued manager and potential witness who Yusuf openly tried to intimidate by threating to accuse her of theft if she challenged his actions—as expressly noted by the court.

2012). As Appellants acknowledged, whether injunctive relief was properly granted is subject to an abuse of discretion standard, citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002). A trial 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 at* 56 V.I. 548, 554.

The evidence regarding the likelihood of success on the merits that a partnership exists is overwhelming, due to Appellants' *unequivocal* admissions. The evidence also demonstrated that the management of the partnership had been *taken over* and was out of control—supporting a finding that Hamed would be irreparably harmed if relief was not granted. Likewise, the court correctly found that granting preliminary relief would not result in even greater harm to Appellants and granting the relief would serve the public. Thus, the court did not abuse its discretion in entering the preliminary injunction.

ARGUMENT

I. The Preliminary Injunction was properly entered

A. The court properly found the probability of success on the merits

In this case, there are two *completely uncontested* critical findings the court made based upon many repeated admissions by both Appellants—in the past *and in this case*—neither of which rely on Appellee's statements or any other outside source:

1. In 1986 Hamed and Yusuf entered into an agreement with regard to the Plaza Extra Supermarkets, which is still being adhered to; and
2. Pursuant to that agreement, Mr. Hamed is entitled to receive and has received 50% of profits from the three Plaza Extra Supermarkets.

Yusuf and United first made these admissions under oath in the *Idheileh* case:

- In 2000, Yusuf testified under oath in a deposition where United was the co-defendant, describing this partnership in detail. Referring to Hamed, he stated "**whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner**" (JA 837:23-25)—concluding "[e]very single Arab in the Virgin Islands knew that **Mr. Mohammed Hamed is my partner, way before**

Plaza Extra was opened." JA 834:10-12. (Emphasis added.)

- Attached to that deposition was an affidavit from Yusuf stating (JA 1490):

  > 2. 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. (Emphasis added.)
  >
  > 3. 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. (Emphasis added.)

- In that same case, Yusuf signed interrogatory responses under oath stating in part **"Mohamed Hamed is a partner in Plaza Extra Supermarkets and has been since the mid-1980's. . . .**" JA 1511. (Emphasis added.)

Appellants now argue that the admissions made in the *Idheileh* litigation are not binding as they are "fact findings" from another case. **This objection was never raised below,** so it was waived. These sworn statements are not "fact findings." They are sworn factual statements of direct personal knowledge, admissible as party admissions under Rule 801(d)(2) of the F.R.Evid., now applicable here. As noted in 30B *Graham, Federal Practice and Procedure, § 7011* in discussing 801(d)(2), admissions of a party opponent have "always been and continue to be regarded as substantive evidence." *Id.* at p.116.

Yusuf then made these admissions again in 2012 before this litigation began through his lawyer who sent correspondence to Hamed about the partnership dissolution, describing the historical formation of the partnership as well as its assets—the three Plaza Extra supermarkets. JA 013. Moreover, they then made *multiple* judicial admissions **after** this case was filed:

- When Yusuf and United moved to dismiss the case *here*, they admitted in that motion that there was **"an oral joint venture agreement"** commencing in 1986 with Hamed which provided for **"a 50/50 split of the profits of the Plaza Extra Supermarket stores."** JA 260-261. (Emphasis added.)

- In their reply to that motion, Appellants again stated "[t]here is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store....**The issue here again is not whether Plaintiff Hamed is**

entitled to 50% of the profits. He is." JA 971. (Emphasis added.)

These are judicial admissions **that are binding on the Appellants**. As the Third Circuit has held, it is a "well-settled rule that a party is bound by what it states in its pleadings" *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006). *See also Parilla v. IAP Worldwide Serv., VI, Inc.,* 368 F.3d 269, 275 (3d Cir. 2004). Thus, this inquiry should end here, as this rule prevents Appellants from now trying to contradict what they have repeatedly admitted *in this case.*[10]

Moreover, after this action was filed, United brought a separate suit earlier this year against Hamed's son in the Superior Court, alleging in part (JA 977):

> 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 [USVI]; the second in Tutu Park, St. Thomas; the third in Grove Place, St. Croix. (Emphasis added.) [11]

As if all of this is not enough, during the hearing, when United's President (Maher Yusuf) was asked why United sends rent notices to Hamed at Plaza Extra, he testified it did so because the store is currently operating under the agreement between Hamed

[10] Appellants themselves cite *W.R. Grace & Co. v. Viskase Co.,* 1991 WL 211647, at *2 (N.D. Ill. 1991), which also held that judicial admissions "may not be contradicted." *Id.*

[11] This admission by United is particularly damaging to Appellants' argument here that United and its shareholders are innocent bystanders to the partnership and the corporation is being "invaded." **This admission demonstrates that *without question United was completely involved in the partnership's dealings with the corporation and the use of corporate resources from the very beginning—as the court found.***

and his father.[12] JA 696:10-697:5. Another son, Yusuf Yusuf (a store co-manager) also testified that Hamed is *currently* a partner with his father. JA 545:18-547:11.

Incredibly the Appellants still have not abandoned their argument on appeal, even though they have made *even more judicial admissions after the order now on appeal was entered.* First, in one of their post-PI motions, Appellants *continued* to admit Hamed is entitled to 50% of the profits from the Plaza Extra Supermarkets. JA 1727 (emphasis added):

> 2. Defendants argued that while *Mohammed Hamed* ***is entitled to 50% of the profits of the operations of the Plaza Extra Supermarkets pursuant to an oral agreement entered into in 1986*** *with Defendant Fathi Yusuf. . . .*

Second, just days before filing their brief here, *United* filed pleadings in another case in the Superior Court seeking to disqualify opposing counsel—stating that Plaza Extra was a partnership, not a corporation, relying on Judge Brady's PI decision. JA 1979-1980.

Thus, there are extensive admissions, including binding judicial admissions. They support the court's finding of a partnership, but the court did not stop with just these admissions. It also went through a detailed analysis of the law applicable to determining when a partnership exists, even where such admissions do not exist.

As the court noted in Conclusions ¶¶ 13-14 (JA 021-022), profit sharing is the primary statutory factor that demonstrates the existence of a partnership, whether one applies the UPA in effect when this partnership began in 1986 (prior version, 26 V.I.C. §

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[12] As the record reflects, these rent notices were sent by United to Hamed regarding the rent owed by Plaza Extra, confirming that United is a distinct entity from Plaza Extra. JA 992-1005. *Indeed, after the PI was entered, United sent a letter to Hamed as head of Plaza Extra Supermarkets seeking June 2013 rent.* JA 1975. It also sent a letter (again to Hamed as the head of Plaza Extra Supermarkets) for back rent from Plaza Extra extending back into the 1990's. JA 1966.

22(4) or the current version 26 V.I.C. § 22(c)(43)).[13]

In this case, there is *substantial* evidence regarding the partnership's distribution of profits, both from a hearing witness (JA 376:7-15) who testified about using these profits "50/50" to jointly purchase multiple properties throughout the USVI (JA 371:11-373:13), as well as pleadings filed by Appellants, admitting:

> 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.** JA 926.

Appellants failed to come forward with _any_ evidence to rebut this presumption, as the court noted in Conclusion ¶ 13. JA 021-022.

Once the sharing of profits exists, it is a defendant's 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) (under UPA). In this regard, courts look to a variety of traditional factors in determining whether a partnership was or was not formed, none of which is dispositive: intent to form a partnership, the sharing of profits and losses, joint management of the business, the sharing of risks, contributions of capital, and whether the agreement was for an indefinite duration and similar factors. *See, e.g., Ziegler v. Dahl*, 691 N.W.2d 271, 277 (N.D. 2005).

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[13] As the partnership was formed in 1986, the court held in Conclusion ¶ 3n.7 (JA 018) that the provisions of Title 26 in effect at that time control the issues related to the formation of the partnership. *See Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 514 (D.V.I. 2001). As § 22(4) of that act stated:

> ....
>
> (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).

However, as the court also noted in ¶ 13n.8, the new version of the UPA adopted by the Legislature (26 V.I.C. § 22(3)) essentially reaches the same conclusion, so it does not really matter which version of the UPA is applied to the facts in this case. JA 022.

In the 2000 *Idheileh* deposition, where Yusuf and United were represented by the same counsel, the detailed terms of the partnership were fully explained under oath:

1. Initial Capitalization: "my partner [plaintiff]. . .put in. . .$400,000." JA 832:16.

2. Duration of Agreement: "I'm obligated to be your partner as long as you want me to be your partner until we lose $800,000. If I lose 400,000 to match your 400,000, I have all the right to tell you, Hey, we split, and I don't owe you nothing." JA 832:19-23.

3. Share: "I tell him, You want my advice? I be honest with you. You better off take 50 percent. *So he took the 50 percent."* JA 833:8-10. (Emphasis added.)

4. Business Scope/Splitting of Risk: "his name is not in my corporation [but]. . . .whatever Plaza Extra owns in assets, in receivable **or payable**, we have a 50 percent partner." JA 837:19-20, 23-25. (Emphasis added.)

5. Form of Agreement (Oral): "But due to my honesty . . .my partner, he never have it in writing from me." JA 838:1, 4-5.

6. Yusuf's Contribution of the use of United Corporation's Resources: "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. JA 837:18-25. (Emphasis added.)

7. Distinction between owning the supermarket operations and owning United: Yusuf testified he owned "50 percent of Plaza Extra in 1986," and *made the specific distinction* that at the same time he owned 100% of the "United Shopping Plaza." JA 823:1-2.

In short, all of the attributes of a partnership were described by Appellants, in detail—beyond the sharing of profits, as noted by the Court's Conclusion ¶ 14. JA 022.

In response, Appellants failed to come forward with any evidence to rebut the presumption that arises once the sharing of profits was shown, other than the guarantee of certain loans by Yusuf in the 1980's.[14] The court found in ¶ 14 (JA 022)

[14] As noted, Hamed explained why this happened, testifying that Yusuf told him it would be acceptable if he did not sign these obligations so long as he agreed to pay 50% of them, which he agreed to do. JA 537:24-538:5, 17-25.

that a consideration of these other "traditional factors" further supported a finding that there was a partnership in addition to the presumption created by the sharing of profits. Thus, Conclusion ¶ 15 (JA 022) that Hamed was likely to prevail on the merits of his claim as to the existence of the partnership was fully supported by the record.[15]

The court also addressed the Appellants' arguments about the partnership's involvement with United, first noting in Conclusion ¶ 11 that Yusuf had responsibility for office functions and set up running of the office this way. JA 020-021. The court also held that the fact that the partner conducting the business does some acts through a corporate entity does not change the essential nature of the relationship of the parties, citing *Granik v. Perry,* 418 F.2d 832, 836 (5th Cir. 1969). JA 021-022. The court then held in Conclusion ¶ 12 (JA 021):

> Where, as here, the parties agree that one partner is designated to take charge of "the office" and assumes the responsibility for obtaining or filing the relevant documents as a part of his share of the partnership responsibilities, his failure to file that documentation in the name of the partnership does not mean that no partnership exists. Partners may apportion their duties with respect to the management and control of the partnership such that one partner is given a greater share in the management than others. Thus, the fact that one partner may be given a greater day-to-day role in the management and control of a business than another partner does not defeat the existence of the partnership itself. *Al–Yassin v. Al–Yassin,* 2004 WL 625757, *7 (Cal.Ct.App. 2004).

This finding is amply supported by the record in this case and the case cited is directly on point, which explains why the Appellants did not address it in their brief.

Regarding the tax returns, the Appellants conceded this is not a dispositive point in their proposed findings, citing *Dundes v. Fuersich*, 831 N.Y.S.2d 347 (N.Y.Sup. Ct.

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[15] While the Appellants also argue that Hamed and Yusuf only formed a joint venture and not a partnership, a joint venture is a subspecies of a partnership—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.*, 1997 WL 289867, at *6 (Terr. V.I. May 16, 1997). Indeed, the court found in Conclusion ¶ 10 (JA 20) that Appellants' claim that this is a joint venture was not credible based on numerous admissions.

2006) (lack of partnership tax returns is merely "evidence". . .**"not conclusive" evidence**). Moreover, because of the criminal case, **all** of United's tax filings **before 2002** were challenged and no new tax returns were filed until this year by Appellants either. Equally important, Hamed has now filed all of his tax returns, reporting his 50% of the partnership profits as his income, so the claim that he has not done so is untrue. JA 1965. Likewise, all taxes due on his income have been paid by the funds generated by the operations of the Plaza Extra supermarkets.[16]

Finally, Hamed testified that his partner Yusuf was "in charge *for* everybody," not "***of*** everybody." (Misquote of JA 533 by Appellants at 10 of their brief *significantly* changes the meaning.) So Yusuf ran the office "*for* everybody" while Hamed ran the warehouse. This does not mean Hamed was not an equal partner or gave up his right to jointly manage. Thus, Hamed can reassert his right to jointly manage the business, as he did here, when Yusuf acted unilaterally in his own self-interest: removing $2.7 million without Hamed's permission, attempting to fire key management employees for his own vindictive reasons and now trying to take 100% of the partnership profits. Just as Hamed could agree to let Yusuf run the office, as an equal partner he can withdraw that decision anytime, as Hamed has done in seeking judicial relief here. In short, what authority Yusuf had or did not have does not negate the fact that a partnership existed.

In summary, there is more than ample evidence to support the court's conclusions that Hamed was likely to succeed on the merits of his partnership claim. Indeed, based on the admissions in this record, that evidence is overwhelming.

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[16] The IRB has confirmed in writing that Hamed's taxes are paid in full based on his tax returns reporting 50% of the Plaza Extra profits as his. *See* Opposition to Appellants' Motion to Stay. One has to ask why United would still claim 100% of the profits in its tax filings, but the answer appears to be clear—**it wants to claim all of the $43,914,260.04 as its own once the District Court restraining order is lifted.**

B. The court properly found "Irreparable Harm," not just a "damages" claim

Appellants contend this is just a "damages case" so that equitable relief in the form of an injunction is improper, arguing in essence that there is no showing of irreparable harm.[17] The court below took note of this in Conclusion ¶ 18. JA 023. In Conclusion ¶ 19 (JA 023-024), the court described what must be found to demonstrate irreparable harm, which is the same standard discussed in Appellants' brief. The court explained in Conclusion ¶¶ 16-22 (JA 022-025) why the evidence in this case demonstrated that Hamed would suffer irreparable harm if the PI were not granted:

- Since there is a likelihood of success on the merits, Hamed is entitled to reinstatement of his partnership rights, as set forth in 26 V.I.C. § 71(b) and (f), to equally manage and conduct the partnership business, as well as to receive 50% of the partnership profits.[18] Conclusion ¶ 16, JA 022.
- Pursuant to 26 V.I.C. § 75(b)(1) and (2)(i), courts can grant equitable (injunctive) relief to enforce these statutory rights. Conclusion ¶ 17, JA 023.
- Yusuf arbitrarily addressed employee issues and threatened to close the stores, leading to tensions with employees and between co-managers in the operation of the business. Conclusion ¶ 21, JA 024.
- Hamed has been deprived of equal participation in the management and conduct of the business, including the denial of access to its bank accounts. Conclusion ¶ 22, JA 025.

The court also noted the unilateral diversion of millions of dollars and **the false testimony of United's president under oath about the use and present location of these funds**, raising a specific concern for this court in footnote 9 of Conclusion ¶ 19 as

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[17] Appellants raise this "irreparable harm" issue in several sections of their brief (I.A.i & iii, I.B). The issue is being addressed here by the Appellee in this single section.

[18] 26 V.I.C. § 71 lists a "[p]artner's rights and duties" including subsection (f) that states:

> **Each partner has equal rights in the management and conduct of the partnership business.** (Emphasis added.)

to whether continuing diversions will be traceable. JA 023. Similarly, the court also expressed a concern in footnote 10 to Conclusion ¶ 22 about Appellants' depriving Hamed access to all of the partnership bank accounts. JA 025.

These conclusions certainly support a finding of irreparable harm, as the court found that Yusuf sought to totally deprive Hamed of his management and ownership rights—which would include his right to jointly manage the stores, the right to the partnership's operating accounts and the right to continue to hire and fire Thus, pursuant to 26 V.I.C. § 75(b)(1) and (2)(i), the court had the power to protect Hamed's statutory *right to equal management in the conduct of the business* by utilizing, *inter alia*, equitable relief as it did here.[19]

Appellants' studiously and totally ignored the Court's primary focus in finding irreparable harm—to protect Hamed's statutory rights to participate in the management of the business. Appellants also failed to discuss two of the key cases the court cited.

First, the court cited *Health & Body Store v. JustBrand Ltd.*, 2012 WL 4006041 (E.D. Pa. Sept. 11, 2012), which is directly on point. That court applied several Third Circuit decisions to a case where parties with a similar, long personal and family history also disputed whether what was formed was a partnership or joint venture. That court also noted "significant animosity between the parties." It then found irreparable harm when one party tried to exclude the other partner from the joint management:

[B]alancing the parties' interests and potential hardships requires that **neither**

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[19] 26 V.I.C. § 75 provides in relevant part:

> (b) A partner may maintain an action against the partnership or another partner for legal **or equitable relief**, with or without an accounting as to partnership business, to:
> (1) enforce the partner's rights under the partnership agreement;
> (2) **enforce the partner's rights under this chapter**, including:
> (i) the partner's rights under sections 71, 73, or 74 of this chapter;

> **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. *Id.* at * 5-6.

Like this case, that action was at an early stage of the proceedings.

The court below also cited *S&R Corp. v. Jiffy Lube,* 968 F.2d 371, 378 (3d Cir. 1992), which held that "lack of control amounts to irreparable injury" as the court found occurred here. *See also Sonwalkar v. St. Luke's Sugar Land P'ship, L.L.P.*, No. 01-11-00473, 2012 WL 3525384 (Tex. App.-Houston [1 Dist.] 2012) (management rights are unique and irreplaceable, which cannot be adequately compensated by damages, warranting injunctive relief) and *Scarcelli v. Gleichman*, No. 2:12-cv-72-GZS, 2012 WL 1430555, at *4 (D.Me. 2012) ("To establish irreparable harm, however, a plaintiff need not demonstrate that the denial of injunctive relief will be *fatal* to its business").

While the Appellants did not discuss these cases, they did attack the court's reliance in Conclusion ¶ 19 on *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797 (3d Cir. 1989), arguing it is a contract case, not a partnership case. A review of *Instant Air* confirms that the Third Circuit approves the entry of injunctive relief to protect a statutory right, as that Court cited to several Third Circuit cases where such relief had been granted when a statutory right was implicated, even though the statutory scheme did not expressly provide for such relief. *Id.* at 803, citing *Bateman v Ford Motor Co.*, 302 F.2d 63, 66 (3d Cir. 1962) (Dealer's Day in Court Act) and *Bergen Drug Co. v. Parke Davis & Company*, 307 F. 2d 725 (3d Cir. 1962). In this case, not only are several statutory rights in Title 26 implicated, but 26 V.I.C. § 75(b) expressly contemplates equitable relief being granted if needed to protect those rights.

The "paramount purpose" of preliminary injunctive relief is to assure that the nonmovant does not take unilateral action which would prevent the court from providing effective relief to the movant should he ultimately prevail on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 977 (10th Cir. 2004) (citing 11A C. Wright et al., Federal Practice & Procedure § 2947, p. 123 (2d ed.1995)). In *Semmes Motors v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970), Judge Friendly noted that having run the business for 20 years, a family's loss of business was not measurable in monetary terms: "the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award." For over 25 years Hamed and his sons have engaged in the grocery business with the Yusufs, warranting judicial protection from the Appellants' actions here.[20]

By analogy, if the Hameds hired a security company to deny the Yusufs entry to the stores and cut-off their access to all bank accounts and financial information, could the Hameds keep the Yusufs from getting a PI by arguing this is just a damage claim? The UPA, as codified by Title 26, is expressly designed to avoid such a result.

Moreover, as noted by the court's findings, there were significant diversions of funds by the Appellants from the partnership operating accounts as well as interference with the store managers and key employees, which can both support the entry of injunctive relief if these matters significantly interfere with the partnership's operations. As noted in *Health & Body Store,* 2012 WL 4006041, at *4-6, concerns about being able

[20] This specific language from *Semmes* was cited with approval by the Third Circuit in *Instant Air Freight,* 882 F.2d at 803.

to work together, as well as diverting revenues from joint accounts to accounts only one party controlled—all directly applicable in this case—are proper additional considerations for entering a PI. In fact, as the court here noted, not only did the Appellants remove $2.7 million from the partnership accounts before the litigation commenced, funds *continued* to be unilaterally removed before and after the January hearings. Finally Hamed was completely denied access to these accounts.[21]

Indeed, unwarranted interference with employee relationships by itself, as described in Conclusion ¶ 21, can also independently support the entry of injunctive relief. *Sheridan Broadcasting Networks, Inc. v. NBN Broadcasting, Inc.*, 693 A.2d 989, 995 (Pa.Super. 1997). Yusuf's screaming at employees, terminating them unilaterally, calling the police for their removal, accusing them of crimes if they testify and threatening to close the stores certainly satisfy this standard.

Appellants' raise several opposition arguments in their brief, none of which are sufficient to overcome the court's finding of irreparable harm. First, while Appellants' argue that "loss of good will and customers" does not support the entry of injunctive relief except where customer confusion exists, the court did not rely on the loss of "good will and customers" in granting the PI. Thus, this argument is not relevant.

Appellants also prepared a chart (Brief at p. 26) of certain items that they argue should have been "submitted to the fact finder," citing *United States v USX Corp.,* 68 F.3d 811 (3d Cir. 1995) and two other cases holding that *summary judgment* should not be granted if there are facts in dispute. Because the PI was not a summary judgment

[21] These continuing problems answer the Appellants' argument that the PI was not needed since so much time lapsed between the initial TRO request and the entry of the PI. The relief was needed when the case was filed and became even more imperative as the case was removed and remanded.

order, these cases are fully distinguishable—as that standard is inapplicable.

Finally, Appellants argue that no employees have been fired and business is proceeding as usual (Brief at p. 26), so that injunctive relief was not warranted. The court found that there were events taking place that warranted the PI, as noted by Findings ¶¶ 33-41. JA 014-016. It is respectfully submitted that the Court did not abuse its discretion in making those findings and entering the PI after considering all of the evidence (including the items in the chart on p. 26).[22]

Thus, it is respectfully submitted that the court properly concluded that Hamed would suffer irreparable harm if the PI was not entered.

C. The court properly rejected the other "Success on the Merits" arguments

Appellants raised several other arguments in an attempt to try anything to counter the overwhelming evidence that a partnership existed. These are essentially affirmative defenses or evidentiary matters and are addressed in the order raised.

1. Statute of Frauds

The statute of frauds issue was addressed by the court in Conclusion ¶¶ 5-8. JA 019. Appellants argue that there is no written partnership agreement. However both the pre-1998 Uniform Partnership Act and post-1998 revision allow oral agreements and preclude the statute of frauds. 26 V.I.C. §§ 21-22 (main volume, now repealed) and 26 V.I.C. § 2(7) (pocket parts). Even if this were not the case, "at will" partnerships are subject to dissolution by either partner at any time--they can be terminated within one year by either party, even if the partnership actually continues over a longer period of

[22] Appellants' assertion that employees will only be fired for cause, coupled with the request to modify the PI to terminate Hamed's sons and the key financial manager who testified against Appellants, is precisely the type of "bullying tactics" the court below determined needed to be enjoined to protect Hamed's management rights. JA 1961.

time. Thus, at-will partnership agreements are not within the Statute of Frauds and need not be in writing. *Smith v. Robeson,* 44 V.I. 56, 61 (Terr. Ct. 2001.)[23] In addressing this issue, the Appellants did not even discuss or try to distinguish *Smith,* even though the court relied upon it in rejecting this argument.

Moreover, as the court noted in ¶ 7 (JA 019): "if a party can show that part of an oral agreement was performed, the oral contract is taken out of the statute of frauds and becomes binding. *Sylvester v. Frydenhoj Estates Corp.,* 47 V.I. 720, 724 (D.V.I. 2006)." Clearly such part performance has occurred here (since at least 1986) which would take this matter out of the Statute of Frauds if it were applicable.

2. Statute of Limitations

Hamed's claims are not barred by the statute of limitations, as the partnership is still operational. Indeed, Maher Yusuf (testifying as United's president) said that Yusuf and Hamed have a *presently effective* agreement to jointly operate Plaza Extra, which is why United is still sending notices to Plaza Extra.[24] JA 546:2-15.

> Q Why are you sending the notices to Mohammed Hamed?
> A Because Mohammad Hamed has a business agreement. . . .
> Q To operate the store?
> A To operate the store. . . .
> Q And you're still sending these letters to Mr. Hamed in 2012 and 2013, so take it that business agreement is still in place?
> A As far as I know. (Emphasis added.)

Moreover, the alleged violations of Hamed's partnership rights all occurred in 2012 and 2013, as noted in the hearing testimony and the court's findings.

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[23] Also, as noted in *Smith,* although an exception to this may exist with regard to certain partnerships to own real property, citing *Fountain Valley Corp. v. Wells,* 98 F.R.D. 679 (D.V.I. 1983), plaintiff makes no claims with regard to real property here.

[24] Fathi and Maher Yusuf have both signed many of United's rent notices sent to Hamed as head of "Plaza Extra." JA 992-1005.

Appellants' confusing reference to Yusuf covertly divesting himself of a significant part of his interest in United to avoid judgment as triggering this limitations defense is also misplaced. The critical transfer of Yusuf's stock diluting his interest to 7.5% (which the court found to be relevant in Finding ¶ 41, JA 016) was not disclosed until the Appellant's 2012 Rule 12 filing in this case. JA 934. Thus, this argument (which is really a summary judgment issue) can be summarily rejected.

3. Hamed's "Retirement"

Appellants also now raise the argument that Mohammad Hamed's retirement from day-to-day work was the equivalent of his withdrawing from the partnership, terminating his interest and making him nothing more than a "creditor" of the partnership *back in 1996*. This was raised after the PI Order, so it is untimely under S. Ct. R. 4(h).

In any event, while Hamed did not participate in the supermarket operations on a day-to-day basis after 1996, he remains active, **as can be seen in the $5.4 million settlement of past rent claims and in the current rent notices sent from United to Hamed as head of Plaza Extra.** Hamed testified that after 1996 his eldest son, Wally Hamed, acted pursuant to a power of attorney to undertake his day-to-day responsibilities. JA 534:18-25. In 2000, Yusuf and United provided a sworn statement that Wally was acting *for* his father and undertaking his father's day-to-day duties pursuant to the POA. JA 1490. *Thus, in 2000, four years after Hamed allegedly terminated all involvement in 1996, Appellants testified that the partnership was still operating under the agreement* with Wally in that role. As is often the case in family owned partnerships, Yusuf has similarly delegated many of his duties to his sons over the years. JA 363:6-367:11. Since that testimony in 2000, Appellants have continued under that same arrangement **for 13 more years**, as the court found at ¶ 31 (JA 013):

> 31. Although Plaintiff retired from the day-to-day operation of the supermarket business in about 1996, Waleed Hamed has acted on his behalf pursuant to two powers of attorney from Plaintiff. Both Plaintiff and Yusuf have designated their respective sons to represent their interests in the operation and management of the three Plaza Extra stores.

Thus, the court's finding of fact is not clearly erroneous, as there is nothing to support Appellants' argument that Hamed withdrew from the partnership in 1996 or has acted in a manner consistent with terminating his interest.[25] This also moots Appellants' argument (Brief at p. 28) that the appointment of Hamed's son was an unauthorized addition of a new partner to the partnership allegedly in violation of 26 V.I.C. § 71, as no one testified that any such "addition" of a new partner took place.

In short, this is just another (very belated) "lawyer created" argument unsupported by any facts.

4. Evidence of partnership distributions

Appellants finally argue that there was no admissible evidence regarding partnership distributions except for the certain "settlement communications" that should not have been admitted. However, as noted above, there is *ample* evidence to support the finding that profits were equally distributed between Yusuf and Hamed over the years. Thus, the argument that the partnership dissolution documents should not have been admitted *to prove this point* need not be addressed, as they were neither offered for, nor relied upon by the Court regarding the issue of partnership distributions.

To the extent this Court wishes to address their admissibility for some other reason, the court held (JA 013) (emphasis added):

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[25] The Appellants reliance on *Estate of Matteson,* 749 N.W. 2d 557, 568 (Wis. 2008) is misplaced. That decision relies on a specific (and very detailed) Wisconsin statute dealing with retirement. Title 26 of the V.I. Code does not contain any such statute. The fact that Wisconsin needed such a statute to accomplish this supports Appellee.

> [Footnote 4] The evidence was not offered to prove the validity or amount of Plaintiffs claims, but rather to put into context the history of the parties' relationship which may be accepted as evidence for another purpose under R. 408(b). <u>Further, the exhibits offer nothing beyond evidence presented wherein Yusuf has similarly characterized the history</u>. . . .

It is respectfully submitted that this ruling, while irrelevant to the issue raised in this appeal, properly explained why Rule 408 did not bar the admission of these exhibits. In this regard, Rule 408 was recently amended to clarify its scope. As noted in the official commentary to the revision:

> Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Here, the three exhibits in question (#10, 11 and 12, JA 1023-1033) all include language stating facts about the partnership (its assets, date of formation, etc.) before getting to any discussion of the terms being negotiated. These facts are what the court took note of, particularly PEx. 10, which are simply a restatement of the same facts elsewhere in the record. Clearly where these exhibits were not used for the proof of those facts, they were admissible under Rules 402 and 403 for the historical context as stated by the court. Thus, there was no error in admitting these documents for that purpose.

D. The court properly found no greater harm to Appellants

The relative levels of potential harm to the parties was addressed in Conclusion ¶¶ 23 - 25 . JA 025-026. As the court found:

> 24. The remedy sought and the relief to be imposed does not deprive Yusuf of his statutory partnership rights to equal management and control of the business. Rather, it simply assures that Hamed is not deprived of the same legal rights to which he is entitled. Neither party has the right to exclude the other from any part

of the business. *Health and Body Store, LLC, supra,* 2012 WL 4006041, at *5.... The court carefully followed *Opticians Ass'n* of *Am. v. Indep. Opticians* of *Am.,* 920 F.2d 187, 197 (3d Cir. 1990) (balancing harm is to maintain *status quo* by returning to the last "peaceable noncontested status of the parties.")

Likewise, the Court also addressed the issue of how Plaza Extra was operating before the issuance of the PI, stating in part in Conclusion ¶ 14 (JA 022) as follows:

> 14. . . . By dividing the initial management of the business between the warehouse, receiving and produce (Hamed) and the office (Yusuf), the parties jointly managed the business. As years passed and additional stores opened, joint management continued with the sons of each of the parties co-managing all aspects of each of the stores.

Indeed, *every* Hamed or Yusuf family member who testified at the hearing acknowledged that the management arrangement to which the court returned the parties had been in place for years. Moreover, Fathi Yusuf never testified to the contrary. In fact, his sworn statements in the 2000 litigation confirm that the stores have operated this way for years. Thus, the PI did not change the *status quo*.

In short, while Appellants argue that they are irreparably harmed by the PI, *they failed to submit any evidence to support this assertion.* Moreover, the dire protestations of future "irreparable harm" are directly contradicted by the *only* evidence submitted as to the current state of the post-PI business operations. JA 1960. Appellants did not address this. As such, the PI only re-established the *status quo* that has existed for decades in running these very successful supermarkets. Appellants' argument that the *status quo* has always included his 'absolute authority' is addressed above. Thus, the court properly considered this factor in issuing the injunction.

E. The court properly analyzed the "Public Interest" factor

The issue of the public's interest was addressed in Conclusion ¶¶ 26 and 27. JA

026. Appellants' assertion that these three stores will now close and these employees will be laid off is unsupported by any evidence. In fact, the only evidence in the record regarding the current operation of the three stores confirms that they are all open and these employees all continue to be fully employed today. JA 1960. Thus, the court did not err in finding that the "public interest" supported the entry of the PI.

II. The partnership was not terminated

In another new argument, Appellants suggest that Yusuf dissolved the partnership, which somehow prohibits the court from issuing an order dealing with the business—claiming they sent a notice of dissolution, which *instantly dissolved the partnership*, citing *Browne v Ritchie,* 559 N.E. 2d 808 (Ill. App. 1 Dist. 1990). At the outset, Appellants mischaracterize what the Court found in ¶ 30 (JA 013):

> 30. . . .on March 13, 2012, through counsel, Yusuf sent a Proposed Partnership Dissolution Agreement to Hamed. . . .

The court only found that there was a "proposed" notice of dissolution, followed by unsuccessful negotiations to reach an agreement as to how to dissolve the partnership.[26] The "notice" exhibits (JA 1023-33) support the court's finding. Indeed, the court heard testimony at length about the continued, current operations of the three supermarkets, so winding-up and dissolution of the partnership has not yet begun.

As such, *Browne* is easily distinguishable, as the withdrawing partner there had given notice that he was terminating his business and dissolving the partnership. When his partner sued him to enjoin him from doing so, the court held that a partner cannot be

[26] The exhibits referenced by the court in ¶ 30 (Exhibits 10, 11 and 12) do not state "this partnership is dissolved." JA 1023,1024,1025. For example, Exhibit 11 (JA 1024) states Yusuf's "desire" to terminate the partnership, followed by an analysis of what "will" need to be done to reach a "well-executed agreement" to effectuate such a termination. Similarly, Exhibit 12 (JA 1025) uses the word "proposed" in outlining the partnership dissolution, as noted by the court below in ¶ 30, so this finding is not clearly erroneous.

forced to continue the partnership against his wishes. *Browne, supra* at 141-142. Here, Yusuf did not give notice that he intended to immediately cease and desist all operations, nor did Hamed file suit to keep Yusuf from withdrawing from the partnership. To the contrary, after receiving the "proposed notice," the parties began to negotiate while continuing to jointly operate the business.

Equally important, even if an unequivocal dissolution notice had been given, a partnership that is "winding up" pursuant to the UPA can clearly still seek court 'assistance' regarding this process pursuant to 26 V.I.C. § 173(a).[27] Thus, even if Yusuf *had* formally given notice of dissolving the partnership, Hamed could clearly seek judicial relief under Title 26, which contains multiple, possible judicial remedies.[28]

III. <u>The Bond is proper</u>

Hamed addressed the bond issue in his *Proposed Findings* (JA 1607 at ¶ e), but Appellants, for tactical reasons or because they simply did not believe they could lose, chose not to do so. JA 1523 *et seq*. Appellants now raise two issues on appeal regarding the bond that will be addressed in the order raised by the Appellants.

A. A separate bond hearing is not required

The argument that the court was required to hold a separate hearing on the bond is without any legal support whatsoever. No such requirement exists under Rule 65, nor has *any* court ever held that such a requirement exists. None of the cases cited by Appellants for this proposition hold that a *separate* hearing *is <u>required</u>* before setting the

[27] It would be an absurd result if a party who is violating the partnership rights of his partner could avoid judicial scrutiny simply by saying "I dissolve this partnership."

[28] In fact, Hamed asked that the court find that he is entitled to "buy out Yusuf" and operate the businesses without him pursuant to 26 V.I.C § 121(5) and §§ 121-123 as part of the relief sought in the Amended Complaint. JA 191.

bond, even though some courts decided to hold a separate hearing on the bond issue. *See, e.g., Deborah Heart and Lung Center v. Children of the World Found.*, Ltd., 99 F.Supp.2d 481, 495 (D.N.J. 2000); *EH Yacht, LLC v. Egg Harbor, LLC*, 84 F.Supp.2d 556, 573 (D.N.J. 2000). Even the Seventh Circuit decision upon which Appellants rely so heavily, *Mead Johnson & Co. v. Abbott Labs.,* 201 F.3d 883 (7th Cir. 2000), does not stand for the proposition that a separate hearing is required—the court reversed because it found the bond insufficient, not because of the lack of a separate hearing.[29]

Indeed, Appellants did not seek to sever the bond issue from the other PI issues prior to the court's ruling below.[30] They raised this issue for the first time in their post-hearing "bond" motion. JA 1933 *et seq*. As the Third Circuit noted in *Hoxworth v. Blinder, Robinson & Co.,* 903 F. 2d 186, 210 (3d Cir. 1990), while Rule 65(c) requires a bond to be posted, "the amount of the bond is left to the discretion of the court." Here, contrary to the Appellants' assertions, there was extensive testimony and evidence over two days of hearings regarding Plaza Extra's financial records and business operations submitted by both parties. The court then required Hamed to post a substantial bond of $25,000 plus his 50% interest in the $43 million of escrowed store profits, clearly "erring on the high side." In short, the setting of the bond in this case fully complied with the procedural requirements of Rule 65(c).

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[29] Indeed, the Third Circuit cases cited by the Appellants are easily distinguishable as they all involved cases where no bond was set, so a remand was required to address the posting of a bond. *See, e.g., Howmedica Osteonics v. Zimmer, Inc.*, 461 Fed. Appx. 192, 198 (3d Cir. 2012) (court erred in not setting bond after converting TRO--where a bond had been set--to a preliminary injunction with no bond requirement); *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (court erred in not requiring bond just because defendant did not ask for one); *Hoxworth,* 903 F. 2d at 210 (3d Cir. 1990) (court erred in not requiring a bond).

[30] Hamed understood the hearings included the bond, as would be normal, and submitted a section on this in his proposed findings and conclusions. (JA 1607)

B. The escrowed profits were properly used as part of the Bond

As already noted, the court found $43 million in profits have been escrowed for the past 10 years as part of an injunction issued in District Court criminal proceedings. JA 015. Appellants raise two arguments regarding the use of these funds for the bond.

First, Appellants _argue_ that it is not an established fact that Hamed is entitled to 50% of these escrowed profits since they have not conceded this in an answer to the complaint, as they filed a Rule 12 motion instead. However, in their Rule 12 reply and elsewhere, they repeatedly admitted this point, stating: "**The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is.**" JA 971. These judicial admissions (along with the multiple other admissions and witness testimony) confirm that it was not an abuse of discretion for the court to find that Hamed was entitled to 50% of these profits.

Second, Appellants argue that these escrowed funds are not "cash" so they cannot be used as part of the bond. However, it was certainly proper for the court to use such escrowed funds as part of a bond. *See*, *e.g.*, *Scarcelli*, 2012 WL 1430555, at *5 ("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.") Nor have Appellants cited any cases to the contrary, even though *Scarcelli* was (twice) cited below by Hamed. JA 1607, JA 1937.

Indeed, Appellants have abandoned their original position, raised in their post-hearing motion, that the amount of the bond was insufficient, making only a passing

reference to this "evidence" in footnote 6 of their brief.[31] Since Appellants have not asserted here that the bond was insufficient, as they did below (limiting their arguments to the use of the escrowed profits as part of the bond), there is nothing before this Court to suggest $25,000 is insufficient even without the escrowed profits being used.

As Appellants noted in their *Standard of Review*, "the amount of the bond is left to the discretion of the court," citing *Hoxworth, supra.* No such abuse occurred here.

IV. <u>§ 341 of Chapter 13 of Title 24 has nothing to do with this case</u>

24 V.I.C. § 341 does not bar the entry of the PI in this case, as it is part of Chapter 13 of Title 24 dealing with protecting workers during labor disputes. The term "labor disputes" in § 341 is defined in § 349(c) as follows:

> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee.

It is respectfully submitted that § 341 has nothing to do with the Title 26 partnership issues in this case and can be summarily disposed of by this Court.

CONCLUSION

In conclusion, it is respectfully requested that this Court affirm the trial court's April 25th Order granting the preliminary injunction in all respects.

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[31] In his opposition memorandum below, Hamed explained why all of these perceived losses were illusory (JA 1938-1941), such as the loss of "net equity," which explains why the Appellants abandoned this argument on appeal. A review of the proffered losses by the Appellants (JA 1792 *et. seq.*) and Hamed's response to them (JA 1938-1941) confirms that the bond set in this case is more than adequate.

Dated: June 27, 2013

<u>/s/ Joel H. Holt</u>
Joel H. Holt, Esq. (Bar # 6)
Counsel for Appellee
2132 Company Street
Christiansted, St. Croix
USVI, 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-8677

<u>/s/Carl J. Hartmann, III, Esq.</u>
Carl J. Hartmann III, Esq. (Bar # 48)
Co-Counsel for Appellee
5000 Estate Coakley Bay, Unit L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820
Email: carl@carlhartmann.com
Tele: (340) 719-8941

CERTIFICATE OF GOOD STANDING

We certify that we are members in good standing of the Virgin Islands Bar.

Dated: June 27, 2013

<u>/s/ Joel H. Holt</u>
Joel H. Holt, Esq. (Bar # 6)
2132 Company Street
Christiansted, St. Croix
USVI, 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-8677

<u>/s/Carl J. Hartmann, III, Esq.</u>
Carl J. Hartmann III, Esq. (Bar # 48)
Co-Counsel for Appellee
5000 Estate Coakley Bay, Unit L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820
Email: carl@carlhartmann.com
Tele: (340) 719-8941

CERTIFICATE OF COMPLIANCE REGARDING PAGE LIMITS

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

Dated: June 27, 2013

/s/ Joel H. Holt
Joel H. Holt, Esq. (Bar # 6)
2132 Company Street
Christiansted, St. Croix
USVI, 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-8677

/s/Carl J. Hartmann, III, Esq.
Carl J. Hartmann III, Esq. (Bar # 48)
Co-Counsel for Appellee
5000 Estate Coakley Bay, Unit L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820
Email: carl@carlhartmann.com
Tele: (340) 719-8941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 27, 2013, I electronically filed the foregoing **APPELLEE'S BRIEF** with the Clerk of the Court using the VISCEFS system, which will send a notification of such filing (NEF) and I caused two true and exact copies of the foregoing to be served by mail to:

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131
305-350-5690
Email: jdiruzzo@fuerstlaw.com

Dated: June 27, 2013

/s/ Joel H. Holt