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.

S. Ct. Civ. No. 2013-CV-0040

Re. Super. Ct. Civ. No. 2012/370

OPPOSITION TO APPELLANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Appellants seek a stay of the Superior Court's April 25th Preliminary Injunction ("PI") pending appeal pursuant to V.I. S. Ct. R. 8(b). This Court discussed the applicable standard for ruling on a motion to stay in *Rojas v. Two/Morrow Ideas Enterprises, Inc.*, S.Ct. Civ. No. 2008–071, 2009 WL 321347, at *2 (V.I. Jan. 22, 2009) (unpublished opinion, but citing *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987) and two federal circuit cases for this language):

> To determine whether a litigant is entitled to a stay pending appeal, this Court considers: (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *See* Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). The first of these factors is ordinarily the most important. *See* Garcia–Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir.1986). However, a movant may also have his motion granted upon a showing of a "substantial case on the merits" when "the balance of equities, as determined by the other three factors, clearly favors a stay." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir.1977). In particular, an appellate stay maintaining the status quo "is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Id.* at 844.

Rule 8(b) also provides: "if the facts are subject to dispute, the motion **shall** be supported by affidavits, other sworn statements . . . and availability of resources offered as security." (emphasis added). Appellants did not submit any such affidavits, even though the facts are in dispute, nor did they provide any information about security under Rule 8(c). Thus, the motion can be summarily denied due to these omissions.

A review of Appellants' arguments reveals two points in support of the motion to stay. First, after discussing the standard applicable to issuing a preliminary injunction, they argue (1) that they presented a substantial case on the merits, and thus, the balance of equities weighs heavily in their favor and (2) that the setting of the bond was procedurally flawed and the amount is insufficient.

These issues will be addressed separately, but it should be noted that the issues raised are essentially no different than what the Appellants addressed in their opening brief filed on June 13th, as noted on page 8 of Appellants' motion. As such, much of Hamed's response is also the same as the argument contained in his opposition brief, which is filed simultaneously with this opposition memorandum.

One final comment is in order. The facts in the record are important in addressing this motion to stay. The court below entered extensive findings in this regard. JA 007-017. Hamed discussed these at length in his opposition brief. While time does not allow a repeat of that full discussion, it is respectfully requested that the facts as discussed in Hamed's opposition brief be incorporated herein by reference.

With these comments in mind, it is respectfully submitted that the Appellants' motion to stay fails to meet the Rule 8 standard, so the motion should be denied.[1]

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[1] References will be made to the Joint Appendix, as was done by the Appellants.

I. Appellants are not likely to succeed on the merits

Appellants must first show they are likely to succeed on the merits below. As this Court noted in *Rojas,* this is the most important factor in considering a stay, requiring an analysis of the four preliminary injunction factors set forth in *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548 (V.I. 2012). Each will be discussed separately.

A. Success on the merits of whether a partnership exists

The evidence regarding the merits of whether a partnership exists is overwhelming due to Appellants' multiple, unequivocal admissions. The court below made two *uncontested* findings based on these admissions by both Appellants—in the past *and in this case*—as follows (JA 008-009):

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 admissions under oath in 2000 -- in a case in the Superior Court, *Idheileh* (emphasis added where bolded):[2]

- Yusuf testified under oath (in a deposition where United was the co-defendant and they were represented by counsel), 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.
- 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.

[2] *Idheileh v. United Corp. and Yusuf*, Case No. 156/1997, Terr. Ct., (Div. St. Thomas and St. John) (where Yusuf and United were defendants).

> 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.

- 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.

Appellants suggest that the admissions made in the *Idheileh* litigation are not binding as they are "fact findings" from another case. But these are these sworn statements, not "fact findings." They are sworn statements of direct personal knowledge and are admissible as party admissions. *See* F.R.Evid. 801(d)(2). Admissions of a party opponent have "always been and continue to be regarded as substantive evidence." 30B *Graham, Federal Practice and Procedure, § 7011* at p.116 (2011 ed.).

Appellants made these admissions again in 2012 before this litigation began. This time it was done through counsel -- 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. JA1023-JA1033.

More importantly, Appellants have made *multiple* judicial admissions **after** this case was filed, which **are binding** on them in this case as follows:

- 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-JA 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.)

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).

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

> 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.

Moreover, 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 and his father.[3] JA 696:10-697:5.

More judicial admissions were made *after the PI 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 in this Court, *United* filed pleadings in another Superior Court case seeking to disqualify opposing counsel, stating that Plaza Extra was a partnership, not a corporation, relying on Judge Brady's decision. JA 1979-1980.

Thus, there are extensive admissions, including binding judicial admissions,

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[3] 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 1973. 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. How can United argue that Plaza Extra is not a separate entity with Hamed as an owner when it accepted $5.4 million in back rent and still sends rent notices as the landlord to Hamed as the head of Plaza Extra Supermarkets?

which support the court's finding of a partnership, making it unlikely that Appellants will prevail in this appeal regarding the existence of the partnership. However, the court below did not stop with just these admissions, as 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 Conclusion ¶¶ 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. § 22(4) or the current version (26 V.I.C. § 22(c)(43)).[4]

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 <u>any</u> 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.*

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[4] 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 "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 is does not really matter which version of the UPA is applied to the facts in this case. JA 022.

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).

In the 2000 *Idheileh* deposition, where Appellants were the sole defendants, the detailed terms of the partnership were fully explained under oath by Yusuf:

> **1. Initial Capitalization:** "my partner [plaintiff]. . .put in. . .$400,000." JA 832:16.
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> **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.
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> **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.)
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> **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.)
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> **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.
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> **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.)
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> **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 credible evidence to rebut the presumption that arises once the sharing of profits was shown. Thus, the court found in ¶ 14 (JA 022) that a consideration of these other "traditional factors" independently supported a finding that there was a partnership in addition to the presumption created by the sharing of profits. As Conclusion ¶ 15 (JA 022) notes, that Hamed was likely to prevail on the merits of his claim as to the existence of the partnership is supported by the record, and it is unlikely the Appellants will prevail on the partnership issues on appeal, nor do they have a "substantial case on the merits."[5]

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 the management of the business this way. JA 020-021. The court 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).

[5] 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.

This finding is amply supported by the record. The cases cited by the court below in support of this conclusion, *Health & Body Store v. JustBrand Ltd.*, 2012 WL 4006041 (E.D. Pa. Sept. 11, 2012) and *Al–Yassin,* are directly on point.

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. 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. Equally important, like United, Hamed has just filed all of his tax returns. He reported 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 from the profits account that was generated by the operations of the Plaza Extra supermarkets.[6]

Finally, in item 6 of their motion, the Appellants misquote Hamed's testimony (as they did on p. 10 of their brief) to try to argue that Yusuf was the sole person in charge of the partnership. While Appellants claim Hamed testified that Yusuf "is in charge ***of*** everybody," he actually stated Yusuf was "in charge *for* everybody." (JA 533) The misquote *significantly* changes the meaning of that statement. To understand this statement, one has to go back to the court's Finding ¶ 19 that stated in part as follows:

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[6] Appellants' argument that Hamed is a "criminal tax evader or non-filer" is completely false. **Indeed, United and Yusuf were indicted for tax fraud, not Hamed**. United was convicted. See Exhibit 1 attached. In any event, the IRB has now 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 income. See Exhibit 1. As for United's insistence on filing tax returns claiming 100% of Plaza Extra's profits despite its admission that 50% of these profits belong to Hamed, 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.**

> 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. 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. Mr. Yusuf the one he sign the loan, the first one and the second one." (Citations to the record omitted). JA 010-011)

Once it is understood that Yusuf ran the office, Hamed's statement can be put into proper perspective: Yusuf ran the office "*for* everybody" while Hamed ran the warehouse. In short, this statement 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.

The Appellants have failed to show that they are likely to proceed on the merits of the partnership issue or that there is even a "substantial case" on this point.

B. Irreparable Harm

As for the issue of irreparable harm, 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 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.[7] 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 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 fully 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 manage the stores, the right to have access to the partnership's bank accounts and related management rights. 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.[8]

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[7] 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. . . .

[8] 26 V.I.C. § 75 provides in relevant part (emphasis added):

> (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:

Appellants 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. The case law in the court's opinion supports its conclusion. In *Health & Body Store*, where the parties had a similar, long personal and family history (who also disputed whether what was formed was a partnership or joint venture), the court first 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 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.

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,* 2012 WL 3525384 (Tex. App.-Houston [1 Dist.] Aug. 16, 2012) (management rights are unique and irreplaceable, which cannot be adequately compensated by damages).

While Appellants did not discuss either of these two 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 the Court cited to several Third Circuit cases where such

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(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;

relief had been granted when a statutory right (under the Dealer's Day in Court Act) 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) 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, as noted, but 26 V.I.C. § 75(b) expressly states equitable relief is available if needed to protect those rights.[9]

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.[10]

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[9] While Appellants' argue that "loss of good will and customers" alone 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.

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

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 ¶¶ 35-38 (JA 014-JA 015), there were significant diversions of funds by the Appellants in excess of $2.7 million from the partnership operating accounts by the time of the January hearing.[11] As the court noted, United's president lied about the use *and location* – which is still not known. The court also found in Findings ¶ 39-40 (JA 015) that Yusuf had threatened to fire the Hamed family members and close the stores. He also interfered with and threatened a store manager and key employee. Both of these acts can independently both support the entry of injunctive relief. As noted in *Health & Body Store,* 2012 WL 4006041 at *4-6, concerns about being able 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, Hamed was subsequently denied access to these accounts, which the court found particularly disturbing in footnote 10 to Conclusion ¶ 22.[12] JA 025.

Indeed, unwarranted interference with employee relationships by itself, as described in Conclusion ¶ 21 (JA 024), can independently support the entry of injunctive

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[11] Almost $500,000 has been unilaterally removed since the beginning of the year and before the PI was entered (JA 015, JA 1520-1522, 1671-1675, 1678-1683), further demonstrating the continuing need for the PI.

[12] 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 lingered while being removed, remanded and then waiting for a hearing.

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, threatening to accuse them of crimes should they testify and threatening to close the stores -- as found by the court in Finding ¶ 40 -- certainly satisfies this standard. JA 015-JA016.

Thus, Appellants have failed to show that they are likely to succeed on the merits of the irreparable harm issue either.

C. Harm to the non-moving party and Public Interest

The final two prongs for granting a preliminary injunction—harm to the non-moving party and public interest—were also properly addressed by the court in Conclusion ¶¶ 23 - 27. 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....

In reaching this conclusion, 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") by making specific findings in Findings ¶¶ 18-20 (JA 010-011) as to how the business operated before the current dispute, which were amply supported by the record.

The public's interest was addressed in the court's discussion of the importance to the public of (1) a continuing successful business that employees over 600 people and (2) orderly dissolutions of partnerships. In reaching this conclusion, the court noted "it is in the public interest to ensure that the management of [Plaza Extra Supermarkets] be

properly maintained and the premises remain available for public use–they being an integral part of the St. Croix economy," citing *Kings Wharf Island Enterprises, Inc. v. Rehlaender*, 34 V.I. 23, 29 (Terr.Ct.1996).

D. "Substantial Case on the Merits" and "Balance of Equities"

Recognizing the weakness of their case on the partnership issue, Appellants resort to the alternate standard under *Rojas* that states: "a movant may also have his motion granted upon a showing of a 'substantial case on the merits' when 'the balance of equities,' as determined by **the other three factors**, clearly favors a stay." *Id.* at *2 (emphasis added). In this regard, the other three factors, as set forth in *Rojas*, are:

> (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Id.*

As for this first point, the Appellants did not offer **any evidence** of any irreparable harm they would suffer if a stay is not issued. They provided only an argument. As noted, they did not offer any affidavits that would assist this Court in finding that such harm will occur if the stay request is denied. Thus, there is no evidence to support any findings by this Court regarding this factor. Moreover, a party cannot raise a new matter in a reply memorandum. *See Embroidery Worker's Pension Fund v. Ryan, Beck &Co.*, 869 F. Supp. 278, 281 n.1 (D.N.J. 1994). Thus, this factual issue is now closed.

As for the second factor, Appellants also failed to offer *any* evidence that the issuance of the stay would not substantially injure Hamed, the other party here. However, Hamed does face irreparable harm if the stay is removed as noted in the declaration of Waleed ("Wally") Hamed, attached as Exhibit 1. Thus, in addition to the court's conclusions in this case that Hamed would be exposed to injury if the PI were

not entered, Hamed has offered additional evidence as permitted by S. Ct. R. 8(b) that such harm is likely to occur if the stay of the PI is granted.

As for the third factor, the Appellants only mentioned the "public interest" factor in item #11 on page 11 of their memorandum, suggesting *inter alia* that no employees have been fired and business is proceeding as usual, so that this public interest factor weighs in its favor. However, the court found that there were events taking place between the parties as well as in the operation of the business that warranted the PI, as noted by Findings ¶¶ 33-41. JA 014-016. It is respectfully submitted that the Court did not commit clear error in making those findings. As such, the record does not support Appellants arguments regarding this last factor.

In summary, there is overwhelming evidence that a partnership existed based on Appellants' admissions (including judicial admissions), so they cannot establish a "substantial case on the merits" in order to invoke the alternate standard under *Rojas*. Even if they had, they have failed to show the "balance of equities, as determined by the other three factors **clearly** favors a stay" under this alternate Rule 8 standard.

II. The bond was proper

Appellants have raised two bond arguments in their motion to stay. Both are addressed in this section. They first argue a separate hearing on the bond is required based on 17 cases they cited to the court.[13] Not one of the cases cited held that such a requirement for a separate bond hearing exists under Rule 65, nor has *any* court ever

[13] Appellants did not seek to sever the bond issue from the other PI issues prior to the court's ruling below, as they raised this issue for the first time in their post-hearing "bond" motion. JA 1933 *et seq*. Moreover, Hamed certainly believed the hearings covered the bond issue and submitted a proposed section on this issue in his proposed findings and conclusions of law. (JA 1607)

made such a ruling, 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.[14] Thus, this argument can be summarily rejected.

Appellants next challenge the sufficiency of bond. 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).

Appellants have two objections to the use of the escrowed profits. First, they <u>argue</u> that it is not an established fact that Hamed is entitled to 50% of these escrowed

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[14] 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).

profits -- since they have not conceded the point. 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.[15] This judicial admission is binding on the Appellants. *Berckeley,* 455 F.3d at 211. Thus, the court did not err in holding that Hamed was entitled to 50% of these profits, which serve as additional protection to Appellants under Rule 65(c) if Appellants were incorrectly enjoined and can show any damages as a result thereof.

Appellants argue next 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 v. Gleichman*, 2012 WL 1430555, at *5 (D. Me. Apr. 25, 2012) ("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. . .was wrongfully enjoined or restrained by this Order.") Appellants have not cited any cases to the contrary. Likewise, the Appellants try to distinguish this case based on the procedural posture of that case, but those differences do not distinguish the court's holding—that escrowed funds belonging to the plaintiff can be used for the bond.

Finally, Appellants appear to suggest here, as they did in their post-trial motion, that the bond was insufficient as the court failed to consider certain evidence that they

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[15] As already noted, in one of their post-PI motions, Appellants <u>*continued*</u> 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. . . .*

proffered for the first time in that post-trial motion. JA 1792 *et. seq*. Hamed explained in his response why all of these perceived potential losses were illusory (JA 1938-1941), such as the loss of "net equity." This explains why Appellants abandoned this argument on appeal. A review of the proffered losses by the Appellants (JA 1792 *et. seq*.) and Hamed's responses to them (JA 1938-1941) confirms that the bond set in this case is more than adequate. Indeed, based on these alleged potential losses and Hamed's response to them, there is nothing before this Court to suggest $25,000 is insufficient by itself to protect Appellants if they were improperly enjoined, even without the escrowed profits being used. Thus, the "bond" issues do not warrant any relief either.

III. Conclusion

For the reasons set forth herein, it is respectfully submitted that the Appellants' motion to stay should be denied. The Appellants have failed to make a strong showing that they are likely to succeed on the merits or that the equities are balanced in their favor. Moreover, the Appellants have failed to demonstrate by affidavits or otherwise that they will suffer any harm if a stay is not issued. In short, the Appellants have failed to carry their burden in seeking a stay under S. Ct. R. 8. They also failed to comply with the mandatory requirement in Rule 8 to submit affidavits regarding disputed facts and to submit any information on the "availability of resources offered as security." Thus, the relief sought should not be granted.

Dated: June 27, 2013

/s/ Joel H. Holt
Joel H. Holt, Esq. (Bar # 6)
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/s/Carl J. Hartmann, III, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June 2013, the foregoing was filed on VISCEFS and a trued copy was served via VISCEFS 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

/s/ Joel H. Holt

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.	**S. Ct. Civ. No. 2013-CV-0040** **Re. Super. Ct. Civ. No. 2012/370**

DECLARATION OF WALEED HAMED

I, Waleed Hamed a/k/a Wally Hamed, declare, pursuant to 28 U.S.C. Section 1746, as follows:

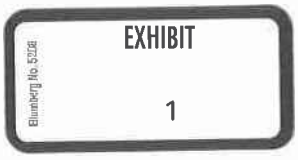
1. I have personal knowledge of the facts set forth herein as a manager of the Plaza Extra Supermarkets and in my capacity acting as my father's representative under a power of attorney in the Plaza Extra operations, which I deal with on a day-to-day basis.

2. Since I first began to work in the late 1980's in the Plaza Extra Supermarket at Sion Farm, St. Croix, it was always understood that Plaza Extra was a partnership between my father, Mohammad and Fathi Yusuf.

3. It was also understood that United Corporation owned the shopping center at Sion Farm, which was solely owned by Yusuf and his family, as my father had no interest in that corporation. United Corporation was the landlord for the Plaza Extra Supermarket at Sion Farm. United charges Plaza Extra rent for the space used by the supermarket.

4. When Plaza Extra expanded to St. Thomas in the early 1990's and then to the west end of St. Croix in the early 2000's, these stores were also part of the partnership.

5. The three Plaza Extra Supermarkets have always been jointly managed by Yusuf and Hamed, eventually with one member from each family acting as a co-manager for each of the three stores. This joint management has been critical to the success of these three stores



6. This joint management has been very successful, as evidenced by the fact that the stores generated over $43,000,000 in net profits (after estimated taxes and all expenses) between 2003 and 2010, which was escrowed with Banco Popular Securities under an order entered in the criminal proceedings pending in the District Court.

7. Indeed, the three stores now employ approximately 600 people and service both St. Croix and St. Thomas.

8. A criminal case for tax fraud was filed in the District Court of the Virgin Islands in 2003 against United Corporation and several members of the Yusuf and Hamed families, including myself and Fathi Yusuf. My father, Mohammad Hamed, was not charged (and never has been charged).

9. Prior to the filing of the criminal case, all profits from the three Plaza Extra Supermarkets had been distributed equally between my father and Fathi Yusuf. As I testified at the hearing in this matter, they had primarily used the funds to buy properties throughout the Virgin Islands, placing the properties in the names of various corporations that were owned 50/50 by the Hamed and Yusuf families.

10. As I already noted, after the criminal case was filed, the net profits of the three Plaza Extra Supermarkets have been escrowed and still have not been distributed.

11. After a plea agreement was reached in the criminal case in 2010, the charges against the individual defendants were dismissed, but United Corporation pled guilty and is still awaiting sentencing. In this regard, United Corporation was required to do several things before sentencing, including the filing of true and accurate tax returns for the time period between 2002 and 2010, as no returns were filed while the criminal charges were pending, although estimated tax payments were made quarterly.

12. After the plea, the three Plaza Extra Supermarkets continued to operate as before, with one member of each family acting as a co-manager in each store.

13. In early 2012, Fathi Yusuf had his lawyer contact me pursuant to the power of attorney I have for my father, who informed me that Fathi Yusuf wanted to break up the partnership.

14. Discussions then followed as to what to do with the three Plaza Extra Supermarkets.

15. In June of 2012, when negotiations broke down, Fathi Yusuf's lawyer sent a letter taking over the partnership -- threatening to fire all of the Hameds.

16. By that time, tensions had developed between the Hamed and Yusuf families, which began to severely affect the day-to-day management of the three Plaza Extra Supermarkets.

17. In August of 2012 Yusuf unilaterally removed $2.7 million from the supermarket account, something that had never been done in the past, absent the mutual consent of the two partners. Yusuf was specifically told that this should not be done and a demand was made to return them after they were removed. When the funds were not returned, this litigation was filed.

18. As noted by the court in its findings, tensions continued in the day-to-day management of the Plaza Extra Supermarkets resulting in (1) the police being called by Yusuf to the store, (2) repeated threats by Yusuf to remove all Hamed family members, (3) attempts by Yusuf to fire key managerial employees and (4) repeated statements by Yusuf that he would close the stores.

19. This tension had a direct negative effect on the day-to-day management of the business

20. However, now that the preliminary injunction has been issued, the business operations of the three Plaza Extra Supermarkets have been able to operate without threats and intimidation by Fathi Yusuf, which was occurring on almost a daily basis before the preliminary injunction was issued.

21. Thus, if the preliminary injunction is stayed, chaos will return to the Plaza Extra Supermarkets which would harm my father's interest in the three Plaza Extra Supermarkets.

22. As discussed, one open issue in the criminal case involves the filing of true and accurate tax returns by United Corporation and payment of taxes not covered by the estimated taxes that were paid during this time period.

23. United Corporation has insisted on filing tax returns for this time period claiming 100% of the profits of the Plaza Extra Supermarkets, even though it has repeatedly acknowledged here that 50% of these profits belong to my father, Mohammad Hamed.

24. As the plea agreement contemplated clearing up these tax issues, I became quite concerned about this process, as my father had not filed his taxes since 1997 (although taxes on his share of the Plaza Extra profits

had been paid), which I had presumed would be cleared up as part of the tax filings still due in the criminal case.

25. In this regard, an opportunity was provided to clear up all of its tax issues from the beginning of Plaza Extra's existence as part of the plea agreement, including interest and penalties. For example, a lump sum payment of $10,000,000 was made in 2011 to satisfy all tax obligations occurring before 2002 for the three Plaza Extra stores.

26. It was subsequently calculated that $6.5 million in taxes was still due for the time period between 2002 and 2010, even though estimated taxes has been paid quarterly.

27. As my father had not filed tax returns since 1997 and it was becoming clear that United Corporation might not include him in satisfying the tax obligations owed on the profits from the three Plaza Extra Supermarkets, my father filed all of his tax returns for the time period from 1997 to 2011 on May 16, 2013, as part of the IRB's amnesty program known as "Operation Last Chance." He reported 50% of the profits from the Plaza Extra partnership as his income. He also reported to the IRB that the taxes due on this income had been paid in full by prior payments made by Plaza Extra from the partnership accounts held by United Corporation, including the $10,000,000 payment for additional taxes owed on the profits of the Plaza Extra Supermarket prior to 2002. Finally, he pointed out that significant taxes were still due on the income reported for the time period between 2002 and 2010, which was in the process of being paid as part of the closure of the criminal case.

28. My father also submitted documents to the IRB demonstrating that the three Plaza Extra Supermarkets were operated by a partnership (including all of the admissions submitted to the court in this case) and not by a corporation, even though United Corporation was now claiming 100% of the profits on its tax returns for this same time period.

29. On June 19, 2013, as part of the closure of the criminal case, a check for approximately $6.5 million was submitted to the IRB for taxes owed primarily on the profits of the Plaza Extra Supermarkets.

30. While I did not know it at the time, I have since learned that these funds were removed from the escrowed profits at Banco Popular Securities at the request of the lawyer for the defendants in this case, as per the attached letter.

31. As the escrowed profits belong equally to my father, I was upset that they would be removed without his knowledge or consent, although we had all

agreed these funds would be used for the taxes owed on the profits made by the Plaza Extra Supermarket for the 2002 to 2010 time period.

32. As such, my father agreed to ratify the withdrawal of these funds so long as they were used to pay taxes due on the profits of the three Plaza Extra Supermarkets -- both those of Yusuf and those of Hamed.

33. The IRB accepted these funds as payment of taxes due from the profits of the Plaza Extra Supermarkets, including taxes owed by Yusuf and his family members -- and my father on these profits.

34. The IRB has now confirmed that all income taxes owed by my father for this time period have been paid in full, as per the attached letter.

35. The IRB sent a similar letter for the time period between 1997 and 2002, which is also attached.

36. Thus, the assertions that my father is a "criminal tax evader or non-filer" are untrue.

37. As for the characterization that my father is a "criminal tax evader" and its insistence on filing tax returns claiming 100% of Plaza Extra's profits (despite its repeated admissions that 50% of these profits belong to Hamed), it is clear that United (with Yusuf's help) intends to remove all of these remaining escrowed profits (now reduced to $37,000,000 by its unannounced withdrawal of the $6.5 million) and claim them as its own once the District Court restraining order is lifted.

38. Thus, if the preliminary injunction is stayed, I am also fearful that more funds will be diverted and that my father will not be able to recover these funds, as Yusuf and United have already removed funds out of the Virgin Islands.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2013

Waleed Hamed a/k/a Wally Hamed

U.S. Department of Justice

United States Marshals Service

Asset Forfeiture Division

Alexandria, VA 22301-1025

June 14, 2013

Joseph DiRuzzo
Fuerst Ittleman David and Joseph PL
1001 Brickell Bay Dr
32nd Floor
Miami, FL 33131

Dear Mr. DiRuzzo:

Per your letter dated May 24, 2013, the United States Marshals Service authorizes you to request the release of $6,586,132 from the Banco Popular Securities account so that payment of taxes due to the Virgin Islands may be remitted.

If you have any questions please feel free to contact me at Maggie.Doherty@usdoj.gov and by phone at (202).353.8333.

Sincerely,

Maggie Doherty
Case Manager
Complex Assets Unit
Asset Forfeiture Division

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE

6115 Estate Smith Bay - Suite 225
St. Thomas VI 00802
Phone: (340) 715-1040
Fax: (340) 774-2672

4008 Estate Diamond Plot 7B
Christiansted VI 00820-4421
Phone: (340) 773-1040
Fax: (340) 773-1006

June 20, 2013

Mohammad & Khiereih Hamed
P. O. 2926
Frederiksted, Virgin Islands 00841-2926

Dear Mr. & Mrs. Hamed:

As Director of the Virgin Islands Bureau of Internal Revenue, I have received payment in full for income taxes for tax years 2002 through 2010.

Sincerely,

Claudette Watson-Anderson, CPA
Director

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
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VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE

6115 Estate Smith Bay - Suite 225
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Phone: (340) 715-1040
Fax: (340) 774-2672

4008 Estate Diamond Plot 7B
Christiansted VI 00820-4421
Phone: (340) 773-1040
Fax: (340) 773-1006

June 20, 2013

Mohammad & Khiereih Hamed
P. O. 2926
Frederiksted, Virgin Islands 00841-2926

Dear Mr. & Mrs. Hamed:

As Director of the Virgin Islands Bureau of Internal Revenue, I have received payment in full for income taxes for tax years 1997 through 2001.

Sincerely,

Claudette Watson-Anderson, CPA
Director