**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

**MOHAMMAD HAMED**, by his authorized **)**

agent WALEED HAMED, **)**

 **)**  **CIVIL NO. SX-12-CV-370**

 Plaintiff, **)**

 **)**  **ACTION FOR DAMAGES,**

 **v.** **)**  **INJUNCTIVE AND**

 **)**  **DECLARATORY RELIEF**

**FATHI YUSUF** and **UNITED CORPORATION**, **)**

 **)**

 Defendants. **)** **JURY TRIAL DEMANDED**

 **)**

**PLAINTIFF’S REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Mohammad Hamed (“Hamed”) hereby replies to Defendants’ opposition to his motion for partial summary judgment. Several preliminary comments are in order.

First, Defendants filed a Rule 56(d) request to do discovery before having to respond to this motion, which the Court granted, giving them until September 16th to complete this discovery. However, **Defendants did no discovery, as they did not file any written discovery or take any depositions.** In short, as suggested in Plaintiff’s Rule 56(d) response, the request for discovery was just another delaying tactic.

Second, contrary to United's suggestion, Plaintiff is not attempting to pierce United's corporate veil. As stated on page 2 of his Rule 56 motion, Hamed first seeks partial summary judgment regarding the *existence* of a partnership between himself and Fathi Yusuf for the three Plaza Extra supermarkets. He then seeks a determination pursuant to 26 V.I.C. § 71 (a) and (f) that he is entitled to (1) a 50% interest in its profits and (2) the right to participate in the management of the three stores. Defendants’ opposition does not even contest this second point--that Hamed is entitled to 50% of the profits and the right to co-manage if a partnership exists.

Third, in addressing the partnership issue, Defendants simply ignore the *multiple* admissions made by Fathi Yusuf under oath in the *Idheileh* case—as well their judicial admissions in the filings in this Court.[[1]](#footnote-1) Defendants appear to think they can avoid the legal significance of these admissions by just filing new affidavits from Fathi Yusuf and Maher Yusuf generally averring that their prior admissions are now disputed matters.

However, the Supreme Court of the Virgin Islands held in *Arlington Funding Serv., Inc. v. Geigel*, 2009 WL 357944, \*7-8 (V.I. Supreme Ct. 2009) that a party is bound by his judicial admissions*,* so that an attempted “correcting affidavit” contradicting prior filings cannot create a disputed question of fact sufficient to defeat summary judgment. The Third Circuit refers to this as the “Sham Affidavit Doctrine" as noted in *In re CitX Corp., Inc*. 448 F.3d 672, 679 (3rd Cir. 2006):

That doctrine generally “refers to the trial courts' practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony.” (Citations omitted).

As the U.S. Supreme Court stated in *Scott v. Harris*, 550 U.S. 372, 380 (2007):

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Thus, as will be discussed herein, Defendants can find no safe harbor in their last minute “correcting” affidavits submitted by the Yusufs.

With these comments in mind, Plaintiff will now respond to the arguments raised by Defendants. As set forth herein, it is respectfully submitted that Defendants’ opposition fails to create a genuine issue of fact as to the existence of the partnership, so that partial summary judgment is appropriate as requested.

1. **Counterstatement of Facts**

A separate response to Defendants’ Counterstatement of Facts has been filed, as required by LCi 56.1, with references to the record where appropriate. Rebuttal exhibits referred to therein are attached to this reply (so they are easy to reference). As was done by Defendants, citation to the PI Hearing Transcripts and Exhibits will be to those documents.

While Defendants listed 157 “facts” they contend are "in dispute," most are irrelevant and dozens are simply repetitious. Those remaining are directly contrary to the evidence in this case.[[2]](#footnote-2) Most importantly, as will be discussed herein, not one of the Defendants’ “facts” is adequate to create a genuine issue of fact sufficient to defeat summary judgment.

1. **Statute of Frauds**

The statute of frauds was extensively briefed in the Preliminary Injunction pleadings, which are incorporated herein by reference. After reviewing these arguments, this Court addressed this point (with extensive relevant citations) in its April 25th PI Opinion, stating in the Conclusions of Law ¶¶ 6-7 that (1) the statute of frauds was not applicable to this issue and (2) even if it were, it would still not be applicable due to the doctrine of part performance. As the Court has already addressed and resolved this issue, no further argument will be submitted.

1. **Statute of Limitations**

Hamed’s claims are not barred by the statute of limitations, as the alleged violations of Hamed’s partnership rights all occurred in 2012—as noted in the Complaint as well as the PI hearing testimony and this Court's April 25th findings. The evidence is clear that the complaint was triggered by Yusuf’s unilateral removal of $2.7 million from the partnership’s operating account in August of 2012. Thus, the breach of Hamed’s partnership rights occurred in 2012, well within the limitations period.

Indeed, the President of United, Maher Yusuf, testified that the partnership is *still* operational at the PI hearing (*1/25 Tr, pp 214:2-13*):

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 I take it that business agreement is still in place?

A As far as I know. (Emphasis added.)

In short, there is a partnership agreement still in place to operate Plaza Extra, which is why United is also *still* sending rent notices to Mohammad Hamed addressed to him as the head of Plaza Extra Supermarkets. PEx 7 and **Exhibit A** attached. Thus, the statute of limitations has not run on Hamed’s claim.[[3]](#footnote-3)

1. **Alleged Retirement of Hamed from the Partnership**

Defendants argue that Mohammad Hamed's retirement from the 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 beginning in 1996. However, there is no evidence to support the assertion that Hamed retired from the *partnership* and withdrew from the business -- as opposed to him simply not working day-to-day—nor have the Defendants ever treated him as being retired.

In this regard, while it is undisputed that Hamed did not participate in the supermarket operations on a day-to-day basis after 1996, he still is an active partner, as can be seen in **(1) the letters sent to him regarding the proposed dissolution of partnership in 2012** (PEx. 10-12) **and (2) the rent notices sent monthly from United to Hamed as head of Plaza Extra in 2012 and 2013.** PEx 7 and **Exhibit A** attached. If Defendants really believe Hamed is a “retired employee” unrelated to a partnership, why are these letters and notices still being sent to him by United and Yusuf?

Moreover, Hamed testified at the PI hearing that after 1996 his eldest son, Wally Hamed, acted pursuant to a power of attorney to undertake his day-to-day partnership responsibilities. 1/25 Tr, pp 46:1-10; 47:5-7; 47:18-48:2 and 202:18-25. Defendants are fully aware that Wally Hamed acts as his father’s designated representative when he is away -- and have consented to it.

In this regard, Yusuf acknowledged in a verified statement (filed in the *Idheileh* case in 2000) that Wally Hamed was acting *for* his father and undertaking his father's day-to-day duties pursuant to the partnership. In that litigation, Yusuf signed an affidavit (four years after Hamed’s alleged retirement) stating in ¶¶ 2-4, as follows (Depo Exhibit 6 to PEx 1):

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

Since Yusuf’s testimony in 2000, the parties continued doing business the same way **for 13 more years**, as per Finding ¶ 31 of this Court’s April 25th opinion:

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.

In fact, fifty percent of all profits were also still regularly distributed to Hamed after 1996 until the TRO in the criminal case. *See, e.g., 1/25 Tr, pp 39-42* (detailing 50% of partnership profits *repeatedly* used to jointly buy hundreds of acres of land.)

In short, this “retirement” issue is just a “lawyer created” argument, unsupported by any competent evidence, as there are no facts to support Defendants’ argument that Hamed withdrew from the partnership in 1996 or has acted in a manner consistent with terminating his interest.

1. **Fathi Yusuf’s “Intent”**

Defendants have submitted an affidavit from Fathi Yusuf that they argue defeats summary judgment because he recants the sworn testimony he gave in the *Idheileh* case, now saying he never "*intended*" for Hamed to be his partner or for a partnership to exist. This argument is without merit for several independent reasons.

First, *subjective* “intent” to "form a partnership" is irrelevant under the UPA. Second, Yusuf admits he *did* enter into an oral agreement with Hamed which *objectively* meets all UPA criteria. Third, Yusuf’s affidavit contradicts his judicial admissions in this case, so this Court can ignore it if it choses to do so.

Regarding the first point, Yusuf admits in paragraph 5 that “[i]n1984 I entered into an oral agreement with Mohammad Hamed” to operate a business and share profits, although he never defines what he believes were the terms of that agreement. He does state in ¶ 7 that he did not "intend" for this agreement to be a partnership agreement, but in ¶ 6 he admits he did not know what the term “partnership” even meant in 1986. However, under the UPA, even assuming all of this to be true, these statements still do not defeat summary judgment.

As this Court correctly noted in Conclusions ¶¶ 2-4 of its April 25th opinion:

2. Under the UPA, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." 26 V.I. Code §22(a). In the mid-1980's when the Hamed – Yusuf business relationship began, a Virgin Islands partnership was defined as "an association of two or more persons to carry on as co-owners a business for profit." *Former* 26 V.1. Code §21(a).

3. Under the UPA, "A person who receives a share of the profits of a business is presumed to be a partner in the business ... " 26 V.1. Code §22(c)(3). Under the former Code provisions, "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 ... " Former 26 V.l. Code §22(4).

4. Evidence of "a fixed profit-sharing arrangement" and "evidence of business operation" are factors to be considered in the determination of whether the parties in a business relationship had formed a partnership. *Addie v. Kjaer*, Civ. No. 2004-135, 2011 WL 797402, at 3\* (D.V.I. Mar. 1, 2011).

In short, the lack of subjective intent to have a business agreement be called or even understood to be "a partnership" is not relevant.

To clarify this point, when the UPA was amended in 1997, it added language making it clear that subjective “intent” was irrelevant to the formation of a partnership, which the VI Legislature adopted in 1998 at 26 V.I.C. § 22 (emphasis added):

1. Except as otherwise provided in subsection (b) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, **whether or not the persons intend to form a partnership.**

Comment 1 to this new UPA section (attached hereto as **Exhibit B)** made it clear that this change just adopted the universally followed case law already in place, leaving the “substantive law” unchanged and further stating in part:

1. . . .**The addition of the phrase, “whether or not the persons intend to form a partnership,” merely codifies the universal judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be “partners.” Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so.** The new language alerts readers to this possibility. (Emphasis added).

Case law predating this new language amply supported this clarification. *See, e.g., Bass v. Bass,* 814 S.W.2d 38, 41 (Tenn. 1991) (“it is not essential that the parties actually intend to become partners”). Subsequent case law has directly and unequivocally recognized that under both versions of the UPA, it is the objective intent to form a business association that meets the UPA elements -- not subjective intent to “form a partnership” that is controlling. *See* *Hillman v. Cannon*, 2011 WL 6670657, \*2-3 (Iowa App. 2011) (Extensive discussion of the intent required as well as the effect of the 1998 changes to the UPA) and *Swecker v. Swecker*, 360 S.W.3d 422, 426 (Tenn.Ct.App. 2011) (it is “the intent to do the things which constitute a partnership that determines whether individuals are partners, regardless if it is their purpose to create or avoid the relationship.”)

Second, aside from the fact that subjective ‘intent’ is irrelevant, Yusuf never denies in his new affidavit what he has admitted *repeatedly* elsewhere -- that both men intended that Hamed split 50% of the profits from their “agreement.” Similarly, nowhere in Yusuf’s affidavit does he retract any of the other statements he made in the *Idheileh* case, which established the parameters of a partnership as follows:

* **Amount of Initial Contribution to Capital:** “my partner [plaintiff] . . .put in . . .$400,000.” (PEx1, pp 18:9-10; 18:16 to 19:10)
* **Duration of Agreement and Splitting Future Risk of Loss:**  “I’m obligated to be your [plaintiff's] 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.” Also “If you pay penalty with me [amount invested plus $150,000 plus 12% interest to the two leaving partners] and pay the interest with me, whatever they left is for me and you. But if I must pay them the one-fifty penalty and pay them 12 percent, then Plaza Extra Supermarket will stay three-quarter for Yusuf and only one-quarter for you.” (PEx 1, p 18:16-23.). . . . (PEx 1, pp 18:24-19:7.)
* **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.”* (Emphasis added). (PEx1, pp 19:8-10.)
* **Scope of business:** “his name is not in my corporation [but]. . . .whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.” (PEx 1, p 23:19-25, p 24:1)
* **Form of Agreement (Oral):**  “my partner, he never have it in writing from me.” (PEx 1, pp 23:19-25, 24:1, 4-5.)
* **Yusuf's Contribution of the use of the corporation:** “But I want you please to be aware that my partner’s with me since 1984, and up to now **his name is not in my corporation. And that -- excuse me and that prove my honesty. Because if I was not honest, *my brother-in-law will not let me control his 50 percent*.** And I know very well, my wife knows, my children knows, that **whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner***.*  But due to my honesty . . . my partner, he never have it in writing from me.” (Emphasis added). (PEx 1, pp 23:18-25, 24:1, 4-5.)
* **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.” (PEx 1, p 9: 1-2)

In short, since the existence of these specific key items are not disputed by Yusuf, all objective indicia of partnership remain undisputed.

 Third, while Yusuf does not describe the terms of the oral agreement he thought he had with Hamed in his new affidavit, the pleadings in this case contain judicial admissions as to the terms of this business arrangement (emphasis added):

* Defendants’ Rule 12 Memorandum (p. 3) (DE 29) “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**.”
* Defendants’ December 13, 2012 Rule 12 Reply Memorandum (p. 11) “[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.**”
* Counsel’s Rule 56(d) affidavit seeking additional time to respond to this motion (p. 2,¶ 8) **“**However there is a fundamental dispute between the parties as to whether Mohammed Hamed is a *bona fide* partner **or a mere joint venturer** who has no partnership rights whatsoever under the Virgin Islands Uniform Partnership Act or any other authority.”

Similarly, in another case filed by United in January, 2013 against Wally Hamed (after this Rule 56 motion was filed), United asserted in its complaint (PEx 4, ¶¶ 11, 14):

* Sometime in 1986, Plaintiff United, through its shareholder and then President, Fathi Yusuf, **entered into an oral agreement, whereby Plaintiff United and Defendant Hamed's father, Mohammed Hamed, agreed to operate a grocery store business**....In 1986, the joint venture resulted in the first supermarket store being opened. United began using the trade name "Plaza Extra" and the first supermarket **in this joint venture** was named Plaza Extra Supermarket. Since 1986, two additional stores opened in the [USVI]; the second in Tutu Park, St. Thomas; the third in Grove Place, St. Croix. [[4]](#footnote-4) (Emphasis added).

While these pleadings refer to the oral agreement as a joint venture where the profits are split 50/50, a joint venture is a form of partnership under VI law, as this Court noted in Conclusion ¶ 8 of its April 25th opinion. Thus, under the VI Supreme Court's holding in *Arlington, supra,* these pleadings create a judicial admission that prevents Yusuf’s affidavit from creating an issue of fact on the partnership issue, even if subjective “intent” were relevant, which it is not.

Thus, while Fathi Yusuf now claims not to know what the term partnership meant in 1986, it is undisputed that the profits from the three Plaza Extra Supermarkets were to be shared 50/50. When considered along with the other indicia of the partnership that even Yusuf’s “corrective affidavit” did not retract, it cannot be disputed that there is a partnership between Yusuf and Hamed. If it looks like a duck, walks like a duck and quacks like a duck, it is a duck. In short, there is a partnership under the undisputed facts and applicable law, regardless of Yusuf’s intent.

1. **The Criminal Case**

As noted by this Court in Finding of Fact ¶ 24, the Plaintiff was not a party to the criminal case. He was not indicted or even questioned. He did not appear and was not represented there. He never entered into or negotiated any plea or other agreement. Thus, the arguments as to what took place in the criminal case are not relevant to this action. Indeed, the Defendants have not identified ***any*** affirmative “representations” made by any of the individual criminal defendants in that case.

Moreover, the Government’s position in the criminal case was that the Hameds clearly were more than employees of United, as the AUSA noted recently on July 16, 2013, before the District Court (attached as **Exhibit C**, at p 145:13-23)(emphasis added):

Now, the **government's position in the criminal case was that the Hameds clearly had an interest in United** because United was paying a lot of their personal expenses, and that was what led to some of the individual income tax charges. **So they had to have some kind of relationship more than an employee, because United would not have been paying hundreds of thousands of dollars for them to build their house and do other things. So they were clearly in a separate category**.

 In any event, no such representations or “admissions” were made in the criminal proceedings (or in the PI hearings) as alleged, nor would they be binding on Hamed even if made since he was not a party to the criminal proceedings. In short, Defendants cannot create a material issue of fact based on the criminal proceedings.

1. **Plaintiff Relies on the UPA, Not on “Labels”**

 Defendants argue that summary judgment cannot be entered just because one party uses the label “partner” or “partnership.” However, Hamed is not relying “labels” to establish the partnership—the evidence supports a finding based on the UPA as codified in the VI Code--so this argument has no merit.

1. **Management Rights/Control**

Defendants argue that Hamed has never had any management rights regarding the Plaza Extra Supermarkets, allegedly negating the fact that he is a partner. While both Fathi Yusuf and Maher Yusuf submit conclusory “corrective affidavits” to this effect, these general averments are again insufficient to defeat summary judgment.

Indeed, there is no requirement that a partner equally or (or even actively) co-manage a business *on a day-to-day basis* where profits are being shared. See the Court's discussion of [*Al–Yassin v. Al–Yassin,* 2004 WL 625757, \*7(Cal.Ct.App.2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004277964&pubNum=0000999&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) in PI Opinion.

Conclusion ¶ 12 (emphasis added) (“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.")

Moreover, as this Court expressly noted in Finding ¶ 19 its April 25th opinion, Hamed had jointly managed the partnership stores, initially with Hamed in charge of the warehouse and produce while Yusuf was in charge of the office and later with Hamed's and Yusuf's sons doing much of the day-to-day work as their fathers' representatives. This finding was based on Hamed’s direct testimony as well as that of all of the sons. In ¶ 20 of its findings, this Court further noted how this joint management had continued through the years with one Yusuf son and one Hamed son being jointly in charge of each of the three stores. **Every Hamed and Yusuf witness agreed this was true.** *See* 1/25 Tr, pp 33:6-35:11; 147:11-20; 160:10-22 and 1/31 Tr. p 33:6-17. Thus, this evidence also remains undisputed, as neither Yusuf affidavit refutes this specific testimony.

Thus, at best, the Yusufs’ affidavits confirm that Hamed had no involvement in the “office” aspect of the three stores. Indeed, in trying to downplay Hamed’s role, Defendants **misquote** Hamed’s testimony to try to argue that Yusuf was the sole person in charge "of" everyone. While Defendants claim Hamed testified that Yusuf "is in charge **of** everybody," he actually testified that Yusuf was “in charge **for** everybody.”[[5]](#footnote-5) (1/25 Tr, p. 201:4.) The misquote *significantly* changes the meaning of that statement, as his actual testimony is consistent with this Court’s finding in ¶ 19, stating:

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 . . . . (Emphasis added).

In short, the statement that Yusuf was in charge “for everybody” (not “of” everybody) does not mean Hamed was not an equal partner or gave up his authority to jointly manage the store operations. As this Court held in Conclusions ¶¶ 12 and 14:

12. 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). . . .

. . . .

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.

Defendants have not offered any evidence to refute the specific facts that support these findings, as the conclusory affidavits that were submitted did not address this testimony at the PI hearing. Thus, the facts that establish that Hamed did jointly manage the partnership businesses remain undisputed.

1. **“Objective Evidence to Third Parties”**

Defendants argue that the rest of the world did not know about this partnership, so somehow it must not exist. Of course, Defendants ignore the many sworn statements of Yusuf in the *Idheileh* case, including the ones where he said, “[e]very single Arab in the Virgin Islands knew that Mr. Mohammed Hamed is my partner, way before Plaza Extra was opened.” PEx 1, p 20:10-12.

Ignoring these admissions, Defendants argue that because Yusuf used the corporate form of United to conduct some of the partnership’s business, there is no partnership. Again, Defendants forget the sworn statements of Fathi Yusuf that explained why the use of the corporate form did not mean there was no partnership, as he testified as follows in the *Idheileh* case.

But I want you please to be aware that my partner’s with me since 1984, and up to now his name is not in my corporation. . . . And I know very well, my wife knows, my children knows, that whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner. PEx1, pp 23:18 to 24:5

When Yusuf’s own attorney (also representing United which was a co-defendant) then questioned Yusuf the about Hamed’s 50% interest in the Plaza Supermarket stores, even though they were often referred to as United Corporation Plaza Supermarket, Yusuf responded (PEx1, p. 69:13-21) (emphasis added):

Q. Okay. Okay. You were asked by Attorney Adams, when it says United Corporation in this [other, unrelated] Joint Venture Agreement, **in talking about Plaza Extra, talking about the supermarket** on St. Thomas, who owned or who was partners in United Corporation **Plaza Extra** at the time before you entered into that Joint Venture Agreement?

A. **It's always, since 1984, Mohammed Hamed**.

Q. Okay. So when it says United Corporation –

A. **It's really meant me and Mr. Mohammed Hamed.**

This Court heard this same evidence at the PI hearing and held in Conclusion ¶ 11 of its April 25th opinion as follows:

11. Defendants argue that Defendant United has owned and operated the businesses known as Plaza Extra, and that Hamed's claims must fail because he concedes that he has no ownership interest in United. To the contrary, the record clearly reflects that Yusufs use of the Plaza Extra trade name registered to United, the use bank accounts in United's name to handle the finances of the three supermarkets and other participation of the corporate entity in the operation of the stores was all set up in the context of Yusefs partnership with Hamed, as Yusuf has consistently admitted. The existence of a partnership is not negated by the use of the corporate form to conduct various operations of the partnership. *McDonald v. McDonald*, 192 N.W. 2d 903, 908 (Wis. 1972). . . . .

Indeed, as this Court further noted in part in Conclusion ¶ 12:

12. 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. . . .

Thus, this Court has already addressed this issue and explained why it is insufficient to defeat the existence of the partnership.

Similarly, the 2012-2013 rent notices sent by United to Hamed *as the head of Plaza Extra* confirms it knows Plaza Extra is a different entity even if no one else knows. Indeed, Maher Yusuf, United’s President, explained in an affidavit filed in this case (PEx 2, Exhibit B, p 3) how the net profits from the partnership were calculated:

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

In fact, United keeps a separate bank account from Plaza Extra to deposits such rents, which was specifically exempted at United’s request from this Court’s PI Order otherwise preventing unilateral withdrawals from the partnership account. See **Exhibit D**. Thus, United cannot create an issue of fact about what third parties may have known when it knew Plaza Extra was a different legal entity.

Defendants' also suggest that a partnership *has* to register with the Lt. Governor’s Office. However, a partnership is not required to be registered, even though it may do so pursuant to 5 V.I.C. § 6(a). In short, “being known” to the Lt. Governor’s Office is not a requirement to be a partnership*.*

Defendants also suggest that Hamed’s partnership interest is “unknown” to the IRB because he allegedly did not file tax returns attaching K-1’s showing his partnership income. However, Mohammad Hamed met with the IRB and fully explained his interest. See ¶ 27-28 of **Exhibit E.** He has also filed tax returns reporting his partnership income, attaching K-1’s as required, which taxes the IRB has deemed to be paid in full. See ¶ 33-35 of **Exhibit E.[[6]](#footnote-6)** Thus, Hamed’s interest in the Plaza Extra partnership is known to the IRB, even though this is not a UPA requirement to be a partnership either.

In summary, even if one partner is conducting the business using elements of a corporation, that by itself is not sufficient to create a genuine issue of fact regarding the existence of the partnership. Indeed, United Corporation **regularly** sends rent notices to Plaza Extra, so it knows it is a separate entity. Thus, at best, the use of the corporate form shows that the partner in charge of the office, Fathi Yusuf, failed to file the proper partnership documentation, not that there is disputed fact as to the existence of the partnership.

1. **Partnership Distributions**

Defendants argue that no partnership profit distributions have ever been made to Mr. Hamed, so there is no partnership. However, Defendants have admitted in their pleadings in this case that Hamed is entitled to 50% of the profits. [[7]](#footnote-7) Likewise, they admit in their responses to discovery in this case that the profits from the store *were actually split* 50/50, noting as follows (**Exhibit F)**:

12. Please describe the method used to keep track of all funds withdrawn by any member of the Yusuf or Hamed families from the funds generated by the sales from the three Plaza Extra Supermarkets (**other than regular salaries paid by a paycheck**) so that these withdrawals could be accounted for.

**Answer to Interrogatory No. 12:** Hand written receipts were to be made by any family member taking funds

13. Please describe how the withdrawals of funds mentioned in the preceding interrogatory would be adjusted between the Yusuf and Hamed families.

**Answer to Interrogatory No. 13:** Subject to full accounting, **the total funds withdrawn were to be *adjusted equally* based** **on amounts taken by each family or family membe**r.

Indeed, this Court heard the undisputed testimony at the preliminary injunction on these extensive distributions of profits (1/25 Tr, pp 39-42) and found in Conclusion of Law ¶13 that Hamed and Yusuf had shared profits from the Plaza Extra Supermarket operations since the opening of the first store. As such, this argument is absurd and does not defeat summary judgment.

1. **Rent Notices**

Finally, Defendants argue that the rent notices sent by United to Hamed are not evidence that a partnership existed because United’s in-house accountant, John Gaffney, testified at the PI hearing that this “could be” just “an inter-company accounting entry” that would just be a “wash” to United. If this were true, why would United file a separate motion based on the partnership, asking this Court to allow it to remove these funds from the Plaza Extra Supermarket’s operating accounts? Similarly, why would it ask this Court to remove its “tenant” bank account from the PI Order? Defendants’ inconsistent positions in this case border on contempt.

In any event, this Court found in ¶ 23 of its April 25th findings that United 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.” Notwithstanding this finding, United continued to send rent notices to Hamed after this finding*.* Moreover, United has also submitted an affidavit of Fathi Yusuf in support of its September 9th “rent motion” stating that **rent is due and owing from Plaza Extra**. Thus, these rent notices (and the payment of rent) are not mere accounting entries, as they are evidence further supporting the finding that a partnership exists.

1. **Conclusion**

While Defendants argue that there is a genuine question of fact as to the existence of the partnership, they admit all of the UPA requisites while failing to create a genuine issue of fact to support their own contentions.

Moreover, under 26 V.I.C. § 71 (a) and (f), Plaintiff is entitled to a finding that (1) he is entitled to 50% of the profits and (2) the right to fully participate in the management the three Plaza Extra stores once a partnership is found to exist, which points were not contested by either Defendant.

Thus, for the reasons set forth in Plaintiff’s initial motion as well as set forth herein, it is respectfully submitted that Plaintiff’s motion for partial summary judgment should be granted.

**Dated:** September 26, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2013, a true and accurate copy of the foregoing was served by hand on:

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1. Indeed, United just filed a new “rent motion” on September 9, 2013, arguing Plaza Extra Supermarkets is a “partnership, joint venture or other unspecified business arrangement.” This recent judicial admission further supports the entry of partial summary judgment, as this Court has already held that a joint venture is a partnership under VI law (Conclusion ¶ 8 of this Court’s April 25th opinion.) [↑](#footnote-ref-1)
2. For example, Defendants assert that Plaintiff never received any profits from the Plaza Extra Supermarkets even though they have admitted in pleadings in this case that he is entitled to 50% of the profits and their interrogatory responses describe how these profits were divided between them. [↑](#footnote-ref-2)
3. Defendants try to confuse this issue by suggesting this cause of action accrued years ago when Yusuf allegedly divested himself of a significant part of his interest in United, triggering this limitations defense. However, that argument is misplaced, as the claims giving rise to this action, as alleged in the complaint, all occurred in 2012. [↑](#footnote-ref-3)
4. This admission demonstrates that without question United had full knowledge of, and was completely involved in the partnership's dealings with the corporation and the use of corporate resources from the very beginning—as this Court found. [↑](#footnote-ref-4)
5. The Defendants made this same error in both their appellate brief and their appellate motion to stay, which Hamed pointed out to that court in his various reply filings. Thus, it is incredible that the Defendants would **submit this same misquote again** after being corrected on the record in the V.I. Supreme Court. [↑](#footnote-ref-5)
6. If this Court wants to see the returns with the K-1’s attached, they can be submitted. [↑](#footnote-ref-6)
7. Defendants’ Rule 12 Memorandum (DE 29) (p. 3) (emphasis added): “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**.” [↑](#footnote-ref-7)