

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

MOHAMMAD HAMED,

Plaintiff,

v.

FATHI YUSUF,

Defendant.

CIVIL NO. SX-14-CV-278

ACTION FOR DEBT
AND CONVERSION

JURY TRIAL DEMANDED

**NOTICE OF FILING FIRST AMENDED
ANSWER AND COUNTERCLAIM**

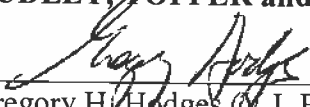
Defendants Fathi Yusuf ("Yusuf"), through his undersigned counsel, pursuant to LRCi. 15.1 and FED. R. CIV. P. 15(a)¹, respectfully file this Notice of Filing First Amended Answer and Counterclaim and represent as follows:

1. Yusuf filed an original Answer and Counterclaim on August 18, 2014.
2. Pursuant to FED. R. CIV. P. 15(a)(1)(A), "[a] party may amend its pleading once as a matter of course within: 21 days after serving it."
3. Yusuf has not previously sought to amend his Answer and Counterclaim.
4. In compliance with the LRCi 15.1, both a "red-lined" and "clean" version of the First Amended Answer and Counterclaim are attached to this Notice.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: August 27, 2014

By:


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¹ The Local Rules of the Virgin Islands District Court and the Federal Rules of Civil Procedure are made applicable to this Court through Super. Ct. R. 7.

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Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2014, I caused the foregoing **NOTICE OF FILING FIRST AMENDED ANSWER AND COUNTERCLAIM** to be served upon the following via e-mail:

Joel H. Holt, Esq.
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**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOHAMMAD HAMED,)	
)	CIVIL NO. SX-14-CV-278
Plaintiff,)	
v.)	ACTION FOR DEBT
)	AND CONVERSION
FATHI YUSUF,)	
)	<u>JURY TRIAL DEMANDED</u>
Defendant.)	
)	
)	
)	
)	

FIRST AMENDED ANSWER AND COUNTERCLAIM

Defendant Fathi Yusuf ("Yusuf"), through his undersigned counsel, answers the correspondingly numbered paragraphs of the Complaint, as follows:

1-3. Admitted.

4. Yusuf lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

5. Admitted.

6. Denied. By way of further answer, upon information and belief, a corporation named Y & S Corporation, Inc. ("Y&S"), purchased property in Estate Dorothea in 1994. As of June 15, 2000, the shareholders of Y&S were Hisham Hamed, the son of Plaintiff Mohammed Hamed ("Hamed"), Yusuf's son, Nejeah, and Hakima Salem. On June 20, 2000, Hisham Hamed and Nejeah Yusuf sold their shares to Hakima Salem. Any partnership monies that were invested in Y&S had lost their status as partnership monies when the original purchase was made.

7. Denied,

8. Denied, except it is admitted that Exhibit 1 to the Complaint was handwritten by Yusuf.

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Deleted: Investments, which is owned in equal shares by Yusuf and Mohammed Hamed ("Hamed"), purchased property in Estate Dorothea

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9. Denied, except it is admitted that Yusuf received the funds.
10. Denied, except it is admitted that Hamed has not received the funds.

COUNT ONE: DEBT

11. Yusuf realleges his responses to paragraphs 1 through 10.
- 12-14. Denied.

COUNT TWO: CONVERSION

15. Yusuf realleges his responses to paragraph 1 through 14.
- 16-19. Denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. Hamed's claims are barred by the doctrine of estoppel.
3. Hamed's claims are barred by his fraud.
4. Hamed's claims are barred by the doctrine of unclean hands.
5. Hamed's claims are barred by the doctrine of laches and the applicable statute of limitations. Formatted: Indent: Left: 0.5", First line: 0.06", Tab stops: 0", Left + Not at 0.5"
6. Hamed's claims are barred by the doctrine of waiver.
7. Hamed has failed to join necessary and indispensable parties, namely, Y & S, Hisham Hamed, and Nejeih Yusuf. Deleted: a
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8. Hamed's claims are barred or diminished by Yusuf's right of recoupment and setoff.
9. Hamed lacks standing to pursue his claims.

For all the foregoing reasons, Yusuf respectfully requests this Court to dismiss the Complaint with prejudice, award Yusuf his reasonable costs and attorneys' fees, and provide Yusuf with such further relief as is just and proper under the circumstances.

COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 13 and Super. Ct. R. 34, for his counterclaim against Hamed, Yusuf alleges:

JURISDICTION

1. This Court has subject matter jurisdiction of this counterclaim pursuant to V.I. Code Ann. tit. 4, § 76(a).

RELATED PENDING LITIGATION

2. On September 17, 2012, Hamed filed suit against Yusuf and United in this Court, Hamed v Yusuf, et al, Civil No. SX-12-CV-370 (the "370 Case"). Among the allegations in the First Amended Complaint in the 370 Case were allegations that are substantially similar to Hamed's allegations in this case.

3. Specifically, in the 370 Case, Hamed alleged, *inter alia*, the following:

From time to time, Mohammad Hamed and Yusuf have used these profits, distributed solely from these "supermarket accounts" to buy other businesses and real property – always then owning these jointly held assets, regardless of the form of ownership, on a 50/50 basis. The following assets, now owned 50/50 between the Hamed and Yusuf (or their families through them) were purchased using 50/50 distributions [of] Partnership profits from the three Plaza Extra supermarkets – from the "supermarket" accounts:

* * *

d) Y and S Corporation – ("Dorothea Property") – Land and condos located in St. Thomas, owned 50/50 between the two families, which was recently sold for \$1,600,000, even though Fathi Yusuf has refused to turn over the funds to the Partnership.

* * *

Comment [M81]: Original answer of 12/23/13 admitted Y&S owned 50/50

Upon information and belief, Yusuf has also now diverted more than \$1.6 million in partnership funds from the Partnership interest [in] the Dorothea Property. . . .

See ¶ 20, 20(d), and 32 of the First Amended Complaint in the 370 Case and compare with ¶¶ 6-8 of the Complaint in this case. Among the relief sought by Hamed in the 370 Case was the following:

- 1) A full and complete accounting to be conducted by a court-appointed Master with Declaratory Relief against both defendants to establish Hamed's rights under his Yusuf/Hamed Partnership with Yusuf, including his rights regarding the operation of the three Plaza Extra supermarkets and the withdrawal of funds from the Partnership accounts associated with these three Plaza supermarkets;

* * *

- 4) Declaratory Relief requiring Yusuf to account for and return all funds of the Partnership related to the Dorothea Beach investment and any other funds or property recently removed without a 50% distribution to Hamed;

* * *

- 6) Declaratory Relief as to the Partnership's rights in any businesses and/or assets purchased by United using partnership assets or obtained without providing the Partnership the opportunity to participate in the ownership of these newly acquired businesses and/or assets[.]

See p. 15-16 of the First Amended Complaint in the 370 Case.

4. Yusuf and United filed a First Amended Counterclaim in the 370 Case seeking, *inter alia*, rent owed to United for the use and occupancy of the premises occupied by the Plaza

Extra supermarket in Sion Farm, St. Croix (“Plaza Extra – East”), and a full and complete accounting as between Hamed and Yusuf of the monies withdrawn from the Plaza Extra Stores by their respective families.

5. As a comparison of the First Amended Complaint in the 370 Case with the Complaint in this case shows, the claims alleged and relief sought by Hamed in this case are encompassed within the 370 Case. Further, the pleadings, discovery, and sworn testimony in the 370 Case establish that the Dorothea property sales proceeds at issue in both cases were received by Yusuf under a claim of right.

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FACTS COMMON TO ALL COUNTS

6. In or around 1986, Yusuf and Hamed agreed to carry on a supermarket business that eventually grew into three locations in the Virgin Islands (the “Plaza Extra Stores”). Yusuf has conceded in the 370 Case that that their agreement to operate the supermarket business was an oral partnership agreement, in which he and Hamed were 50-50 partners.

7. The first of the three supermarkets, which is known as Plaza Extra-East, opened in April 1986 at a shopping center in Sion Farm, St. Croix known as United Shopping Plaza, which is owned by United Corporation (“United”), a Virgin Islands corporation whose shares of stock are wholly owned by Yusuf and members of his immediate family.

8. The second of the three supermarkets, Plaza Extra-Tutu Park, opened at the Tutu Park Mall in St. Thomas in October 1993. The third, Plaza Extra-West, opened in Grove Place, St. Croix in November 2000.

9. At the time they formed their business association, Yusuf and Hamed agreed that Plaza Extra-East would pay rent to United for occupying its premises, and that profits of the supermarket operations would be determined only after the deduction of rent and other expenses,

and that any 50-50 distribution of profits had to be net of rent, expenses (including insurance covering United Shopping Plaza), and taxes (including United's gross receipts taxes).

10. In order to allow the grocery store business to grow, Hamed and Yusuf further agreed that annual rent would accrue for a number of years before it was paid as part of a reconciliation of business accounts.

11. It was also agreed that Yusuf, as the person in charge of managing the business, would have the exclusive responsibility of determining when accounts would be reconciled, and would have exclusive authority to balance accounts as part of that reconciliation, and to cause rent payments to be made to United from accounts of the Plaza Extra Stores.

12. Yusuf and Hamed also agreed that initially the annual rent for Plaza Extra-East's occupancy of United's property would be at a square foot rate of \$5.55 per square foot. Plaza Extra-East originally occupied 33,750 square feet of space at United Shopping Plaza, and the rent at the \$5.55/sq. ft. rate comes to \$187,312.50 per year.

13. Yusuf determined that a reconciliation of accounts as of December 31, 1993 ought to be made, and he made that reconciliation. Both Hamed and Yusuf took advances of monies against their respective accounts, by withdrawing cash from a safe at the Plaza Extra-East store in which store revenues were kept, and documenting those withdrawals. The rent that accrued through December 31, 1993 (the "first rent payment") was paid by means of a reconciliation of accounts in which amounts Yusuf owed Hamed for advances taken in excess of Hamed's advances were credited against the rent payment.

14. Plaza Extra-East burned down in 1992, and before it reopened in 1994, Yusuf and Hamed agreed to leave the same \$5.55/sq. foot rent in place for the ten years following the re-

opening of the store, after which time the rent formula would be adjusted upward to something approximating a market rate. Plaza Extra-East reopened on May 4, 1994.

15. Hamed left the Virgin Islands in 1996 to return to Jordan, and he left his affairs as partner in the hands of his son, Waleed, who has claimed in the 370 Case that at all relevant times he acted as the authorized agent for his father in the supermarket business with Yusuf.

16. In or about ~~September or October 2001~~, Yusuf's son, Maher, and Hamed's son, Mufeed, conducted a partial reconciliation of partnership accounts at the Plaza Extra-East store. They examined receipts which they and other members of the Yusuf and Hamed family had placed in the safe at that store to reflect withdrawals of cash they had made ~~after December 31, 1993~~, Maher Yusuf and Mufeed Hamed tabulated those receipts and determined that the Hamed withdrawals exceeded the Yusuf withdrawals by \$1,600,000. The Federal Bureau of Investigation ("FBI") raid of the Plaza Extra Stores and its seizure of the financial records of the Plaza Extra Stores took place very shortly thereafter, and Yusuf determined that a full reconciliation of the partnership accounts at the other two Plaza Extra Stores, including a balancing of those accounts, could not be undertaken at that time.

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17. In late 2002 or early 2003, Waleed Hamed, on behalf of Hamed, and Yusuf, agreed to a change in rent formula to be implemented on May 5, 2004, the ten-year anniversary of the re-opening of Plaza Extra-East.

18. Specifically, Yusuf and Hamed agreed that effective May 5, 2004, rent for Plaza Extra-East would be calculated using rent as a percentage of sales at Plaza Extra-Tutu Park. For each year, the rent payments made by Plaza Extra-Tutu Park would be divided by that store's adjusted gross sales for that year to yield a percentage. That percentage in turn would be

multiplied by actual sales at Plaza Extra-East for the corresponding year to determine the amount of rent owed by Plaza Extra-East to United.

19. In 2004, at about the time the new rent formula became effective, Yusuf and Waleed Hamed, on behalf of his father, discussed a reconciliation of partnership accounts, including payment of the rent that had accrued annually at the \$5.55 per square foot rate since the first rent payment was made.

20. Hamed and Yusuf agreed that having a reconciliation and paying rent that had accrued since the first rent payment was made would not be possible, because of the FBI raid in 2001 and a criminal indictment against United, Yusuf, two of Yusuf's sons, and two of Hamed's sons, that was filed in September 2003.

21. The criminal indictment was almost immediately followed by an order freezing the accounts of United, including the accounts used for the Plaza Extra Stores, thereby making payment of rent that had accrued since the first payment impossible.

22. In addition, as part of its raid, the FBI had seized nearly all of the financial records of the Plaza Extra Stores, including those records needed to determine the date the next rent payment began accruing (January 1, 1994) and records needed to make a full reconciliation of the accounts of Hamed and Yusuf. In the absence of those records, neither Waleed Hamed nor Yusuf remembered whether the first rent payment had been paid in 1992, 1993 or 1994, let alone the debits and credits between Hamed and Yusuf in the subsequent years following the year in which the rent had been paid.

23. Yusuf therefore made the decision, to which Waleed Hamed (on behalf of Hamed) agreed, that the payment of rent that had accrued since the first rent payment was made

would have to await the unfreezing of the bank accounts and the return of financial records needed to determine the exact period covered by the first rent payment.

24. Waleed Hamed and Yusuf met in early 2012, and by then the injunction in the criminal case had been relaxed, but the records needed to determine the end date for the first rent payment (and hence the start date for the second such payment) had not been returned by the FBI. Waleed and Yusuf agreed that while rent for the second period could not be determined, rent which began to accrue on May 5, 2004 could be determined, because Waleed Hamed and Yusuf had previously agreed that the percentage-of-sales rent formula would become effective on that date.

25. Yusuf and Waleed Hamed agreed that the rent for the May 5, 2004 to December 31, 2011 period should be paid, even if a full reconciliation of accounts, going back to the date of the first reconciliation, could not be made. They also agreed, as they had before, that rent that had accrued from the first rent payment up to May 4, 2004 (the "second rent period") would have to be deferred until the financial records needed to determine the start date for the second rent period (and hence the amount of the second rent payment to be made) were returned to them by the FBI.

26. Using the percentage of sales formula that he and Waleed had agreed would become effective on May 5, 2004, Yusuf calculated the amount of rent due for the period May 5, 2004 to December 31, 2011 to be \$5,408,806.74. He presented the rent bill to Waleed Hamed for that sum and period, and Waleed, on behalf of his father, agreed that it should be paid to United. Payment in the amount of \$5,408,806.74 was then made by means of a check signed by Waleed Hamed and by Yusuf's son.

27. Later, in August 2012, Yusuf, on the basis of additional records that had been returned by the FBI, completed the partial reconciliation of the partnership accounts, as to the Plaza Extra-East store only, that had been started by Maher Yusuf and Mufeed Hamed in September or October of 2001. Yusuf determined that the Hameds had in actuality withdrawn not \$1,600,000 more than the Yusufs from the safe at the Plaza Extra East store, but approximately \$2,700,000 more than the Yusufs from the safe at that store.

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28. Since Yusuf was the partner given the sole responsibility for determining when to reconcile partnership accounts, Yusuf balanced the account for Plaza Extra-East (with the exception of the rent payment for the second period, which was still unknown) by withdrawing \$2,784,706.25 from a United account used in the operation of the Plaza Extra Stores, and placing it into another United account controlled solely by the Yusufs.

29. Yusuf's son, Maher, when reviewing records returned by the FBI, found records that would enable Hamed and Yusuf to determine the start date for the second rent payment, and hence the amount of accrued rent that was owed from that date to May 4, 2004. Maher Yusuf then presented this information to his father,

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30. Thereafter, on May 17, 2013, United's and Yusuf's counsel made demand on Hamed's counsel for, inter alia, payment of accrued rent from January 1, 1994 to May 4, 2004. By letter dated May 22, 2013, Hamed (through his counsel) repudiated his obligation to determine partnership profits net of rent by stating that any rent claim for that period was unenforceable by reason of the statute of limitations.

31. In addition to rent owed for the second rent period, rent is owed for Plaza Extra-East's occupancy of the premises at United Shopping Plaza for the time period January 1, 2012 to the present. Rent for this period includes rent at the agreed - upon percentage of sale formula,

and additional rent that has been demanded by virtue of Hamed's failure to timely vacate the premises.

32. In addition to documented withdrawals of cash from safes at each of the Plaza Extra Stores, Hamed and his sons also misappropriated monies from the Plaza Extra Stores by making withdrawals from safes that were not documented or otherwise disclosed to Yusuf.

COUNT I
ACCOUNTING

33. Paragraphs 1 through 32 of this Counterclaim are realleged.

34. Section 177(b) of the Virgin Islands Revised Uniform Partnership Act, V.I. Code Ann. tit. 26, § 1, et seq., provides that "each partner is entitled to a settlement of all partnership accounts upon winding up of the partnership business." It further provides that, as part of this settlement, the Court may order that "[t]he partnership . . . make[] a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account."

35. Because the agreement between Hamed and Yusuf provided that profits would be determined after deduction of rent, as part of the final settlement of all partnership accounts all unpaid rent for Plaza Extra-East's occupancy of the United Shopping Plaza premises, including rent for the period January 1, 1994 to May 4, 1994, and rent for the period January 1, 2012 to present, must be deducted in order to determine the profits of the partnership to be distributed to Hamed and Yusuf.

36. In addition, the final settlement should reflect that the reconciliation of all partnership accounts conducted on December 31, 1993 was correct, and the partial reconciliation of Plaza Extra-East that forms the basis for Yusuf's withdrawal of \$2,784,706.25 on August 20, 2012 was correct.

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37. In determining the excess of credits over charges in Yusuf's account, all documented withdrawals of cash by any Yusuf family member or any Hamed family member from: (1) the safe at Plaza Extra-Tutu Park for the period October 1, 1993 to the present; (2) the safe at Plaza Extra-East since October 23, 2001 to the present, and (3) the safe at Plaza Extra-West from November 1, 2000 to the present, should be tallied and charged to Yusuf's and Hamed's accounts.

38. In determining the excess of credits over charges in Yusuf's account, all undocumented withdrawals from safes (i.e., all misappropriations) by any members of the Hamed family, should be charged to Hamed's account.

39. The receipt and distribution of proceeds of the sale of the Dorothea property is a corporate issue, not a partnership issue, and therefore should not be part of any partnership accounting.

40. After making the final settlement of the account, the Court should credit Yusuf's account in the amount by which Hamed's documented and undocumented withdrawals exceed Yusuf's documented withdrawals, and then deduct from each partner's share one-half of the unpaid rent, before ordering distribution of partnership monies to Hamed and Yusuf.

COUNT II

DISSOLUTION AND WIND-UP OF PARTNERSHIP

41. Paragraphs 1 through 40 of this Counterclaim are realleged.

42. The oral partnership between Hamed and Yusuf was terminable at will as a matter of law.

43. If the partnership was not dissolved by Hamed's retirement and return to Jordan in 1996, or by Yusuf's oral notice to Hamed to vacate the premises in September 2010, it was

dissolved by Yusuf not later than his April 7, 2014 notice in the 370 Case or by Hamed in his April 30, 2014 notice in the 370 Case.

44. The Court should order that the partnership has been dissolved, and that the partnership should be wound up, pursuant to the applicable provisions of the Virgin Islands Revised Uniform Partnership Act and one of the two plans submitted by Yusuf and United on April 7, 2014 and June 16, 2014 in the 370 Case.

COUNT III

CONVERSION

45. Paragraphs 1 through 44 of this Counterclaim are realleged.

46. Hamed and his sons have taken in excess of \$7 million from the Plaza Extra Stores without authorization from Yusuf, and without disclosing to him or documenting that they were doing so and then, among other things, have used that cash to purchase and improve personal and real property for their own personal benefit.

47. This taking of partnership monies is willful misconduct that constitutes conversion for which Hamed is liable to Yusuf for damages and for the equitable relief of a constructive trust over the assets purchased with those misappropriated funds.

48. The taking of these monies is willful and wanton conduct amounting to theft, and an award of punitive damages should be made.

COUNT IV

RESTITUTION, UNJUST ENRICHMENT, AND IMPOSITION OF A CONSTRUCTIVE TRUST

49. Paragraphs 1 through 48 of this Counterclaim are realleged.

50. Hamed and his sons have taken in excess of \$7 million from the Plaza Extra Stores under such circumstances that in equity and good conscience they ought not retain and

without disclosing to Yusuf or documenting that they were doing so. Further, they used such funds to purchase and improve personal and real property for their own personal benefit.

51. Yusuf is entitled to the imposition of constructive trusts over any assets purchased with those funds, equitable liens over such assets, and disgorgement of all profits made from the use of such funds, in order to prevent Hamed and his sons from being unjustly enriched by ill-gotten money from the Plaza Extra Stores.

COUNT V

BREACH OF FIDUCIARY DUTY AND PARTNERSHIP AGREEMENT

52. Paragraphs 1 through 51 of this Counterclaim are realleged.

53. Hamed owes Yusuf a fiduciary duty to act in a manner consistent with their mutual interests and not to deal with him in a manner that promotes only Hamed's or his families' interests to the detriment of Yusuf or his family. He also owes Yusuf duties under the terms of their oral partnership agreement.

54. Hamed breached his fiduciary duties to Yusuf and his duties to Yusuf under the partnership agreement by, among other things, failing to disclose millions of dollars of Plaza Extra Stores' funds converted by Hamed or his agents; anticipatorily repudiating, in May 2013, the obligation to determine partnership profits after deducting rent owed to United for Plaza Extra-East's occupancy of the United Shopping Plaza; continuing to occupy United's shopping center without paying any rent long after notice to vacate was given; and by otherwise acting in a manner inconsistent with Yusuf's interests and welfare and subordinating Yusuf's interests in the Plaza Extra Stores to those of Hamed and his family.

55. As a result of these breaches of fiduciary duties and the partnership agreement, Yusuf has been damaged. The breaches of fiduciary duty are so wanton and willful as to entitle Yusuf to an award of punitive damages.

COUNT VI

APPOINTMENT OF RECEIVER

56. Paragraphs 1 through 55 of this Counterclaim are realleged.

57. A qualified, neutral business person should be appointed as Receiver for the partnership to operate the Plaza Extra Stores.

58. The Receiver should liquidate the assets of the Plaza Extra Stores and divide the net proceeds amongst Hamed and Yusuf according to their respective interests, as declared by this Court, after accounting for all liabilities and claims for recoupment and setoff, since Yusuf desires to immediately terminate any and all business relations with Hamed or his family members.

Accordingly, Yusuf seeks a judgment providing for the following relief against Hamed:

i. A final settlement of partnership accounts, which, inter alia:

a. _____ declares that the reconciliation that took place as of December 31, 1993 is correct, that the partial reconciliation of the Plaza Extra-East store in _____ September or October of 2001 was correct and that the payment to Yusuf of \$2,784,706.25 was proper;

b. _____ tabulates and charges to Yusuf and Hamed all disclosed withdrawals by Yusuf and Hamed for 1) the safe at Plaza Extra-Tutu Park for the period October 1, 1993 to the present; (2) the safe at Plaza Extra-East since

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October 23, 2001 to the present, and (3) the safe at Plaza Extra-West from November 1, 2000 to the present;

c. charges to Yusuf and Hamed the rent expense for Plaza Extra-East from January 1, 1994 to August 30, 2014 in the amount of \$6,603,122.23, and the rent expense from September 1, 2014 to the date of judgment, in an amount to be determined by the Court;

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d. charges to Yusuf and Hamed the additional rent expense for Plaza Extra-East from January 1, 2012 until the premises are vacated pursuant to notices provided by United in January 2012;

e. charges to Yusuf and Hamed prejudgment interest on the rent expense described in subparagraph c, above;

f. charges to Hamed all amounts taken by him or his sons from Plaza Extra-East Stores safes which were not documented or disclosed to Yusuf;

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g. directs that in distributing partnership monies, Yusuf's share be increased by the amount by which credits to his account exceed charges to his account; and

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h. declares that the receipt and distribution of proceeds from the sale of the Dorothea property is not properly part of any partnership accounting.

ii. A judgment for damages, including pre-judgment interest, for any monies owed to Yusuf under the final accounting for which there are insufficient funds in partnership accounts to pay him;

iii. A judgment for punitive damages against Hamed for his breaches of fiduciary duty, and for his conversion and misappropriation of partnership monies;

iv. The placement of constructive trusts and liens on any personalty or realty obtained by Hamed or his sons with funds that were converted or misappropriated by Hamed or his sons;

v. A judgment declaring that the partnership between Hamed and Yusuf is dissolved; and

vi. A judgment appointing a receiver to wind-up the affairs of the partnership pursuant to either of the two United/Yusuf wind up plans that were submitted to the Court in the 370 Case on April 7, 2014 and June 16, 2014.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August _____, 2014

By: _____

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Attorneys for Fathi Yusuf

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 2014, I caused the foregoing First Amended Answer and Counterclaim to be served upon the following via United States regular mail:

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**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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)	<u>JURY TRIAL DEMANDED</u>
Defendant.)	
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FIRST AMENDED ANSWER AND COUNTERCLAIM

Defendant Fathi Yusuf (“Yusuf”), through his undersigned counsel, answers the correspondingly numbered paragraphs of the Complaint, as follows:

1-3. Admitted.

4. Yusuf lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

5. Admitted.

6. Denied. By way of further answer, upon information and belief, a corporation named Y & S Corporation, Inc. (“Y&S”), purchased property in Estate Dorothea in 1994. As of June 15, 2000, the shareholders of Y&S were Hisham Hamed, the son of Plaintiff Mohammed Hamed (“Hamed”), Yusuf’s son, NejeH, and Hakima Salem. On June 20, 2000, Hisham Hamed and NejeH Yusuf sold their shares to Hakima Salem. Any partnership monies that were invested in Y&S had lost their status as partnership monies when the original purchase was made.

7. Denied.

8. Denied, except it is admitted that Exhibit 1 to the Complaint was handwritten by Yusuf.

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9. Denied, except it is admitted that Yusuf received the funds.
10. Denied, except it is admitted that Hamed has not received the funds.

COUNT ONE: DEBT

11. Yusuf realleges his responses to paragraphs 1 through 10.
- 12-14. Denied.

COUNT TWO: CONVERSION

15. Yusuf realleges his responses to paragraph 1 through 14.
- 16-19. Denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. Hamed's claims are barred by the doctrine of estoppel.
3. Hamed's claims are barred by his fraud.
4. Hamed's claims are barred by the doctrine of unclean hands.
5. Hamed's claims are barred by the doctrine of laches and the applicable statute of limitations.
6. Hamed's claims are barred by the doctrine of waiver.
7. Hamed has failed to join necessary and indispensable parties, namely, Y & S, Hisham Hamed, and NejeH Yusuf.
8. Hamed's claims are barred or diminished by Yusuf's right of recoupment and setoff.
9. Hamed lacks standing to pursue his claims.

For all the foregoing reasons, Yusuf respectfully requests this Court to dismiss the Complaint with prejudice, award Yusuf his reasonable costs and attorneys' fees, and provide Yusuf with such further relief as is just and proper under the circumstances.

COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 13 and Super. Ct. R. 34, for his counterclaim against Hamed, Yusuf alleges:

JURISDICTION

1. This Court has subject matter jurisdiction of this counterclaim pursuant to V.I. Code Ann. tit. 4, § 76(a).

RELATED PENDING LITIGATION

2. On September 17, 2012, Hamed filed suit against Yusuf and United in this Court, Hamed v Yusuf, et al, Civil No. SX-12-CV-370 (the "370 Case"). Among the allegations in the First Amended Complaint in the 370 Case were allegations that are substantially similar to Hamed's allegations in this case.

3. Specifically, in the 370 Case, Hamed alleged, *inter alia*, the following:

From time to time, Mohammad Hamed and Yusuf have used these profits, distributed solely from these "supermarket accounts" to buy other businesses and real property – always then owning these jointly held assets, regardless of the form of ownership, on a 50/50 basis. The following assets, now owned 50/50 between the Hamed and Yusuf (or their families through them) were purchased using 50/50 distributions [of] Partnership profits from the three Plaza Extra supermarkets – from the "supermarket" accounts:

* * *

d) Y and S Corporation – ("Dorothea Property") – Land and condos located in St. Thomas, owned 50/50 between the two families, which was recently sold for \$1,600,000, even though Fathi Yusuf has refused to turn over the funds to the Partnership.

* * *

Upon information and belief, Yusuf has also now diverted more than \$1.6 million in partnership funds from the Partnership interest [in] the Dorothea Property. . . .

See ¶ 20, 20(d), and 32 of the First Amended Complaint in the 370 Case and compare with ¶¶ 6-8 of the Complaint in this case. Among the relief sought by Hamed in the 370 Case was the following:

- 1) A full and complete accounting to be conducted by a court-appointed Master with Declaratory Relief against both defendants to establish Hamed's rights under his Yusuf/Hamed Partnership with Yusuf, including his rights regarding the operation of the three Plaza Extra supermarkets and the withdrawal of funds from the Partnership accounts associated with these three Plaza supermarkets;

* * *

- 4) Declaratory Relief requiring Yusuf to account for and return all funds of the Partnership related to the Dorothea Beach investment and any other funds or property recently removed without a 50% distribution to Hamed;

* * *

- 6) Declaratory Relief as to the Partnership's rights in any businesses and/or assets purchased by United using partnership assets or obtained without providing the Partnership the opportunity to participate in the ownership of these newly acquired businesses and/or assets[.]

See p. 15-16 of the First Amended Complaint in the 370 Case.

4. Yusuf and United filed a First Amended Counterclaim in the 370 Case seeking, *inter alia*, rent owed to United for the use and occupancy of the premises occupied by the Plaza

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Extra supermarket in Sion Farm, St. Croix (“Plaza Extra – East”), and a full and complete accounting as between Hamed and Yusuf of the monies withdrawn from the Plaza Extra Stores by their respective families.

5. As a comparison of the First Amended Complaint in the 370 Case with the Complaint in this case shows, the claims alleged and relief sought by Hamed in this case are encompassed within the 370 Case. Further, the pleadings, discovery, and sworn testimony in the 370 Case establish that the Dorothea property sales proceeds at issue in both cases were received by Yusuf under a claim of right.

FACTS COMMON TO ALL COUNTS

6. In or around 1986, Yusuf and Hamed agreed to carry on a supermarket business that eventually grew into three locations in the Virgin Islands (the “Plaza Extra Stores). Yusuf has conceded in the 370 Case that that their agreement to operate the supermarket business was an oral partnership agreement, in which he and Hamed were 50-50 partners.

7. The first of the three supermarkets, which is known as Plaza Extra-East, opened in April 1986 at a shopping center in Sion Farm, St. Croix known as United Shopping Plaza, which is owned by United Corporation (“United”), a Virgin Islands corporation whose shares of stock are wholly owned by Yusuf and members of his immediate family.

8. The second of the three supermarkets, Plaza Extra-Tutu Park, opened at the Tutu Park Mall in St. Thomas in October 1993. The third, Plaza Extra-West, opened in Grove Place, St. Croix in November 2000.

9. At the time they formed their business association, Yusuf and Hamed agreed that Plaza Extra-East would pay rent to United for occupying its premises, and that profits of the supermarket operations would be determined only after the deduction of rent and other expenses,

and that any 50-50 distribution of profits had to be net of rent, expenses (including insurance covering United Shopping Plaza), and taxes (including United's gross receipts taxes).

10. In order to allow the grocery store business to grow, Hamed and Yusuf further agreed that annual rent would accrue for a number of years before it was paid as part of a reconciliation of business accounts.

11. It was also agreed that Yusuf, as the person in charge of managing the business, would have the exclusive responsibility of determining when accounts would be reconciled, and would have exclusive authority to balance accounts as part of that reconciliation, and to cause rent payments to be made to United from accounts of the Plaza Extra Stores.

12. Yusuf and Hamed also agreed that initially the annual rent for Plaza Extra-East's occupancy of United's property would be at a square foot rate of \$5.55 per square foot. Plaza Extra-East originally occupied 33,750 square feet of space at United Shopping Plaza, and the rent at the \$5.55/sq. ft. rate comes to \$187,312.50 per year.

13. Yusuf determined that a reconciliation of accounts as of December 31, 1993 ought to be made, and he made that reconciliation. Both Hamed and Yusuf took advances of monies against their respective accounts, by withdrawing cash from a safe at the Plaza Extra-East store in which store revenues were kept, and documenting those withdrawals. The rent that accrued through December 31, 1993 (the "first rent payment") was paid by means of a reconciliation of accounts in which amounts Yusuf owed Hamed for advances taken in excess of Hamed's advances were credited against the rent payment.

14. Plaza Extra-East burned down in 1992, and before it reopened in 1994, Yusuf and Hamed agreed to leave the same \$5.55/sq. foot rent in place for the ten years following the re-

opening of the store, after which time the rent formula would be adjusted upward to something approximating a market rate. Plaza Extra-East reopened on May 4, 1994.

15. Hamed left the Virgin Islands in 1996 to return to Jordan, and he left his affairs as partner in the hands of his son, Waleed, who has claimed in the 370 Case that at all relevant times he acted as the authorized agent for his father in the supermarket business with Yusuf.

16. In or about September or October 2001, Yusuf's son, Maher, and Hamed's son, Mufeed, conducted a partial reconciliation of partnership accounts at the Plaza Extra-East store. They examined receipts which they and other members of the Yusuf and Hamed family had placed in the safe at that store to reflect withdrawals of cash they had made after December 31, 1993. Maher Yusuf and Mufeed Hamed tabulated those receipts and determined that the Hamed withdrawals exceeded the Yusuf withdrawals by \$1,600,000. The Federal Bureau of Investigation ("FBI") raid of the Plaza Extra Stores and its seizure of the financial records of the Plaza Extra Stores took place very shortly thereafter, and Yusuf determined that a full reconciliation of the partnership accounts at the other two Plaza Extra Stores, including a balancing of those accounts, could not be undertaken at that time.

17. In late 2002 or early 2003, Waleed Hamed, on behalf of Hamed, and Yusuf, agreed to a change in rent formula to be implemented on May 5, 2004, the ten-year anniversary of the re-opening of Plaza Extra-East.

18. Specifically, Yusuf and Hamed agreed that effective May 5, 2004, rent for Plaza Extra-East would be calculated using rent as a percentage of sales at Plaza Extra-Tutu Park. For each year, the rent payments made by Plaza Extra-Tutu Park would be divided by that store's adjusted gross sales for that year to yield a percentage. That percentage in turn would be

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multiplied by actual sales at Plaza Extra-East for the corresponding year to determine the amount of rent owed by Plaza Extra-East to United.

19. In 2004, at about the time the new rent formula became effective, Yusuf and Waleed Hamed, on behalf of his father, discussed a reconciliation of partnership accounts, including payment of the rent that had accrued annually at the \$5.55 per square foot rate since the first rent payment was made.

20. Hamed and Yusuf agreed that having a reconciliation and paying rent that had accrued since the first rent payment was made would not be possible, because of the FBI raid in 2001 and a criminal indictment against United, Yusuf, two of Yusuf's sons, and two of Hamed's sons, that was filed in September 2003.

21. The criminal indictment was almost immediately followed by an order freezing the accounts of United, including the accounts used for the Plaza Extra Stores, thereby making payment of rent that had accrued since the first payment impossible.

22. In addition, as part of its raid, the FBI had seized nearly all of the financial records of the Plaza Extra Stores, including those records needed to determine the date the next rent payment began accruing (January 1, 1994) and records needed to make a full reconciliation of the accounts of Hamed and Yusuf. In the absence of those records, neither Waleed Hamed nor Yusuf remembered whether the first rent payment had been paid in 1992, 1993 or 1994, let alone the debits and credits between Hamed and Yusuf in the subsequent years following the year in which the rent had been paid.

23. Yusuf therefore made the decision, to which Waleed Hamed (on behalf of Hamed) agreed, that the payment of rent that had accrued since the first rent payment was made

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would have to await the unfreezing of the bank accounts and the return of financial records needed to determine the exact period covered by the first rent payment.

24. Waleed Hamed and Yusuf met in early 2012, and by then the injunction in the criminal case had been relaxed, but the records needed to determine the end date for the first rent payment (and hence the start date for the second such payment) had not been returned by the FBI. Waleed and Yusuf agreed that while rent for the second period could not be determined, rent which began to accrue on May 5, 2004 could be determined, because Waleed Hamed and Yusuf had previously agreed that the percentage-of-sales rent formula would become effective on that date.

25. Yusuf and Waleed Hamed agreed that the rent for the May 5, 2004 to December 31, 2011 period should be paid, even if a full reconciliation of accounts, going back to the date of the first reconciliation, could not be made. They also agreed, as they had before, that rent that had accrued from the first rent payment up to May 4, 2004 (the "second rent period") would have to be deferred until the financial records needed to determine the start date for the second rent period (and hence the amount of the second rent payment to be made) were returned to them by the FBI.

26. Using the percentage of sales formula that he and Waleed had agreed would become effective on May 5, 2004, Yusuf calculated the amount of rent due for the period May 5, 2004 to December 31, 2011 to be \$5,408,806.74. He presented the rent bill to Waleed Hamed for that sum and period, and Waleed, on behalf of his father, agreed that it should be paid to United. Payment in the amount of \$5,408,806.74 was then made by means of a check signed by Waleed Hamed and by Yusuf's son.

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27. Later, in August 2012, Yusuf, on the basis of additional records that had been returned by the FBI, completed the partial reconciliation of the partnership accounts, as to the Plaza Extra-East store only, that had been started by Maher Yusuf and Mufeed Hamed in September or October of 2001. Yusuf determined that the Hameds had in actuality withdrawn not \$1,600,000 more than the Yusufs from the safe at the Plaza Extra East store, but approximately \$2,700,000 more than the Yusufs from the safe at that store.

28. Since Yusuf was the partner given the sole responsibility for determining when to reconcile partnership accounts, Yusuf balanced the account for Plaza Extra-East (with the exception of the rent payment for the second period, which was still unknown) by withdrawing \$2,784,706.25 from a United account used in the operation of the Plaza Extra Stores, and placing it into another United account controlled solely by the Yusufs.

29. Yusuf's son, Maher, when reviewing records returned by the FBI, found records that would enable Hamed and Yusuf to determine the start date for the second rent payment, and hence the amount of accrued rent that was owed from that date to May 4, 2004. Maher Yusuf then presented this information to his father.

30. Thereafter, on May 17, 2013, United's and Yusuf's counsel made demand on Hamed's counsel for, inter alia, payment of accrued rent from January 1, 1994 to May 4, 2004. By letter dated May 22, 2013, Hamed (through his counsel) repudiated his obligation to determine partnership profits net of rent by stating that any rent claim for that period was unenforceable by reason of the statute of limitations.

31. In addition to rent owed for the second rent period, rent is owed for Plaza Extra-East's occupancy of the premises at United Shopping Plaza for the time period January 1, 2012 to the present. Rent for this period includes rent at the agreed - upon percentage of sale formula,

and additional rent that has been demanded by virtue of Hamed's failure to timely vacate the premises.

32. In addition to documented withdrawals of cash from safes at each of the Plaza Extra Stores, Hamed and his sons also misappropriated monies from the Plaza Extra Stores by making withdrawals from safes that were not documented or otherwise disclosed to Yusuf.

COUNT I
ACCOUNTING

33. Paragraphs 1 through 32 of this Counterclaim are realleged.

34. Section 177(b) of the Virgin Islands Revised Uniform Partnership Act, V.I. Code Ann. tit. 26, § 1, et sq., provides that "each partner is entitled to a settlement of all partnership accounts upon winding up of the partnership business." It further provides that, as part of this settlement, the Court may order that "[t]he partnership . . . make[] a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account."

35. Because the agreement between Hamed and Yusuf provided that profits would be determined after deduction of rent, as part of the final settlement of all partnership accounts all unpaid rent for Plaza Extra-East's occupancy of the United Shopping Plaza premises, including rent for the period January 1, 1994 to May 4, 1994, and rent for the period January 1, 2012 to present, must be deducted in order to determine the profits of the partnership to be distributed to Hamed and Yusuf.

36. In addition, the final settlement should reflect that the reconciliation of all partnership accounts conducted on December 31, 1993 was correct, and the partial reconciliation of Plaza Extra-East that forms the basis for Yusuf's withdrawal of \$2,784,706.25 on August 20, 2012 was correct.

37. In determining the excess of credits over charges in Yusuf's account, all documented withdrawals of cash by any Yusuf family member or any Hamed family member from: (1) the safe at Plaza Extra-Tutu Park for the period October 1, 1993 to the present; (2) the safe at Plaza Extra-East since October 23, 2001 to the present, and (3) the safe at Plaza Extra-West from November 1, 2000 to the present, should be tallied and charged to Yusuf's and Hamed's accounts.

38. In determining the excess of credits over charges in Yusuf's account, all undocumented withdrawals from safes (i.e., all misappropriations) by any members of the Hamed family, should be charged to Hamed's account.

39. The receipt and distribution of proceeds of the sale of the Dorothea property is a corporate issue, not a partnership issue, and therefore should not be part of any partnership accounting.

40. After making the final settlement of the account, the Court should credit Yusuf's account in the amount by which Hamed's documented and undocumented withdrawals exceed Yusuf's documented withdrawals, and then deduct from each partner's share one-half of the unpaid rent, before ordering distribution of partnership monies to Hamed and Yusuf.

COUNT II

DISSOLUTION AND WIND-UP OF PARTNERSHIP

41. Paragraphs 1 through 40 of this Counterclaim are realleged.

42. The oral partnership between Hamed and Yusuf was terminable at will as a matter of law.

43. If the partnership was not dissolved by Hamed's retirement and return to Jordan in 1996, or by Yusuf's oral notice to Hamed to vacate the premises in September 2010, it was

dissolved by Yusuf not later than his April 7, 2014 notice in the 370 Case or by Hamed in his April 30, 2014 notice in the 370 Case.

44. The Court should order that the partnership has been dissolved, and that the partnership should be wound up, pursuant to the applicable provisions of the Virgin Islands Revised Uniform Partnership Act and one of the two plans submitted by Yusuf and United on April 7, 2014 and June 16, 2014 in the 370 Case.

COUNT III

CONVERSION

45. Paragraphs 1 through 44 of this Counterclaim are realleged.

46. Hamed and his sons have taken in excess of \$7 million from the Plaza Extra Stores without authorization from Yusuf, and without disclosing to him or documenting that they were doing so and then, among other things, have used that cash to purchase and improve personal and real property for their own personal benefit.

47. This taking of partnership monies is willful misconduct that constitutes conversion for which Hamed is liable to Yusuf for damages and for the equitable relief of a constructive trust over the assets purchased with those misappropriated funds.

48. The taking of these monies is willful and wanton conduct amounting to theft, and an award of punitive damages should be made.

COUNT IV

RESTITUTION, UNJUST ENRICHMENT, AND IMPOSITION OF A CONSTRUCTIVE TRUST

49. Paragraphs 1 through 48 of this Counterclaim are realleged.

50. Hamed and his sons have taken in excess of \$7 million form the Plaza Extra Stores under such circumstances that in equity and good conscience they ought not retain and

without disclosing to Yusuf or documenting that they were doing so. Further, they used such funds to purchase and improve personal and real property for their own personal benefit.

51. Yusuf is entitled to the imposition of constructive trusts over any assets purchased with those funds, equitable liens over such assets, and disgorgement of all profits made from the use of such funds, in order to prevent Hamed and his sons from being unjustly enriched by ill-gotten money from the Plaza Extra Stores.

COUNT V

BREACH OF FIDUCIARY DUTY AND PARTNERSHIP AGREEMENT

52. Paragraphs 1 through 51 of this Counterclaim are realleged.

53. Hamed owes Yusuf a fiduciary duty to act in a manner consistent with their mutual interests and not to deal with him in a manner that promotes only Hamed's or his families' interests to the detriment of Yusuf or his family. He also owes Yusuf duties under the terms of their oral partnership agreement.

54. Hamed breached his fiduciary duties to Yusuf and his duties to Yusuf under the partnership agreement by, among other things, failing to disclose millions of dollars of Plaza Extra Stores' funds converted by Hamed or his agents; anticipatorily repudiating, in May 2013, the obligation to determine partnership profits after deducting rent owed to United for Plaza Extra-East's occupancy of the United Shopping Plaza; continuing to occupy United's shopping center without paying any rent long after notice to vacate was given; and by otherwise acting in a manner inconsistent with Yusuf's interests and welfare and subordinating Yusuf's interests in the Plaza Extra Stores to those of Hamed and his family.

55. As a result of these breaches of fiduciary duties and the partnership agreement, Yusuf has been damaged. The breaches of fiduciary duty are so wanton and willful as to entitle Yusuf to an award of punitive damages.

COUNT VI

APPOINTMENT OF RECEIVER

56. Paragraphs 1 through 55 of this Counterclaim are realleged.

57. A qualified, neutral business person should be appointed as Receiver for the partnership to operate the Plaza Extra Stores.

58. The Receiver should liquidate the assets of the Plaza Extra Stores and divide the net proceeds amongst Hamed and Yusuf according to their respective interests, as declared by this Court, after accounting for all liabilities and claims for recoupment and setoff, since Yusuf desires to immediately terminate any and all business relations with Hamed or his family members.

Accordingly, Yusuf seeks a judgment providing for the following relief against Hamed:

- i. A final settlement of partnership accounts, which, inter alia:
 - a. declares that the reconciliation that took place as of December 31, 1993 is correct, that the partial reconciliation of the Plaza Extra-East store in September or October of 2001 was correct and that the payment to Yusuf of \$2,784,706.25 was proper;
 - b. tabulates and charges to Yusuf and Hamed all disclosed withdrawals by Yusuf and Hamed for 1) the safe at Plaza Extra-Tutu Park for the period October 1, 1993 to the present; (2) the safe at Plaza Extra-East since

October 23, 2001 to the present, and (3) the safe at Plaza Extra-West from November 1, 2000 to the present;

- c. charges to Yusuf and Hamed the rent expense for Plaza Extra-East from January 1, 1994 to August 30, 2014 in the amount of \$6,603,122.23, and the rent expense from September 1, 2014 to the date of judgment, in an amount to be determined by the Court;
- d. charges to Yusuf and Hamed the additional rent expense for Plaza Extra-East from January 1, 2012 until the premises are vacated pursuant to notices provided by United in January 2012;
- e. charges to Yusuf and Hamed prejudgment interest on the rent expense described in subparagraph c, above;
- f. charges to Hamed all amounts taken by him or his sons from Plaza Extra Stores safes which were not documented or disclosed to Yusuf;
- g. directs that in distributing partnership monies, Yusuf's share be increased by the amount by which credits to his account exceed charges to his account; and
- h. declares that the receipt and distribution of proceeds from the sale of the Dorothea property is not properly part of any partnership accounting.

ii. A judgment for damages, including pre-judgment interest, for any monies owed to Yusuf under the final accounting for which there are insufficient funds in partnership accounts to pay him;

iii. A judgment for punitive damages against Hamed for his breaches of fiduciary duty, and for his conversion and misappropriation of partnership monies;

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iv. The placement of constructive trusts and liens on any personalty or realty obtained by Hamed or his sons with funds that were converted or misappropriated by Hamed or his sons;

v. A judgment declaring that the partnership between Hamed and Yusuf is dissolved; and

vi. A judgment appointing a receiver to wind-up the affairs of the partnership pursuant to either of the two United/Yusuf wind up plans that were submitted to the Court in the 370 Case on April 7, 2014 and June 16, 2014.

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Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August 27, 2014

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2014, I caused the foregoing First Amended Answer and Counterclaim to be served upon the following via United States regular mail:

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