IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FAHTI YUSUF, *Appellant/Defendant,* vs. **MOHAMMAD HAMED, *et al,*** *Appellees/Plaintiffs.*	)	**S. Ct. Civ. NO. 2015-0001**
FAHTI YUSUF, *Appellant/Defendant,* vs. **MOHAMMAD HAMED, *et al,*** *Appellees/Plaintiffs.*	)	**S. Ct. Civ. NO. 2015-0009** (consolidated with 2015-0001)

APPELLEE HAMED'S MOTION TO DISMISS THESE CONSOLIDATED APPEALS FOR LACK OF APPELLATE JURISDICTION

Appellee, Mohammad Hamed ("Hamed"), hereby moves to dismiss the two appeals filed in this case (now consolidated) for lack of appellate jurisdiction. This Court is well aware of its jurisdictional requirements, so this motion will be brief. Indeed, Hamed does not wish to engage in a significant argument over jurisdiction, as resolving issues now rather than later always benefits the parties—but he is mindful of the fact that two parties cannot acquiesce to jurisdiction where there is none, even if they prefer to do so.[1]

[1] Hamed had considered addressing jurisdiction in the Stay Motion, as the "success on the merits" issue should perhaps include a similar analysis of jurisdiction. The Court's suggestion in its February 20th Consolidation Order that this issue could be addressed by separate motion makes sense, as the briefs will have extensive arguments on the merits of the issues raised in these appeals.

The first case (No. 2015-0001) involves the appeal of a July 22, 2014, Order below as well as a December 5, 2014 Order denying reconsideration of the June 22nd Order. Both orders dealt with a challenge to the propriety of an April 30th board meeting of Plessen Enterprises, Inc. ("Plessen") and a lease approved at that meeting between Plessen and KAC357, Inc. ("KAC"), hereinafter referred to as the "Lease Appeal." See **Exhibits 1 and 2**.

The second case (No. 2015-0009) involves the appeal of portions of the January 7, *Order Adopting Final Wind Up Plan* ("Liquidation Order") entered below, hereinafter referred to as the "Liquidation Appeal." See **Exhibit 3**.

This Court has adopted the final judgment rule. As this Court stated in *Enrietto v. Rogers Townsend & Thomas PC,* 49 V.I. 311, 315 (V.I. 2007) (citations and quotation marks omitted):

> The final judgment rule promotes efficient judicial administration and emphasizes the deference appellate courts owe to trial court decisions on the many questions of law and fact that arise before judgment. Another purpose of the rule is to avoid the delay that inherently accompanies time-consuming interlocutory appeals. Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense. It would also undermine the ability of trial court judges to supervise litigation. The rule, therefore, is intended to delay immediate review of many interlocutory trial court decisions and avoid piecemeal appellate review of trial court decisions which do not terminate the litigation.

However, as this Court noted in its February 20th Consolidation Order, these appeals are not from a final order, but are interlocutory appeals.[2]

This Court has jurisdiction to hear interlocutory appeals pursuant to 4 V.I.C. § 33(b), which provides:

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[2] Indeed, there are many tasks still to do to finalize this partnership dissolution, including resolving multiple clams and counter-claims, several of which are the subject of pending summary judgment motions.

> (b) Interlocutory review-civil. The Supreme Court of the Virgin Islands has jurisdiction of appeals from:
>
> > (1) Interlocutory orders. . . .granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions;
> >
> > (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

It is respectfully submitted that the Lease Appeal and the Liquidation Appeal both fail to meet the criteria for either exception.[3] Each appeal will be addressed separately after reviewing the applicable law regarding interlocutory appeals.

I. The Applicable Law

A. Interlocutory Injunction Orders

As for appeals involving injunctions, *Enrietto* is also instructive, holding that it is not the label a party gives an order that makes it an injunction order, but a three-part test, which *Enrietto* then described:

> The order must be (1) directed to a party; (2) enforceable by contempt; and (3) designed to accord or protect some or all of the substantive relief sought by a complaint in more than a [temporary] fashion. The provision for interlocutory review of injunctive orders should be construed narrowly so as not to swallow the final-judgment rule. *Id.* at 315 (citations and quotation marks omitted).

In *Enrietto*, this Court noted that in applying this three-part test:

> [I]n light of the rationale and strong policy considerations underlying the final judgment rule, as embodied in the Virgin Islands under 4 V.I.C. § 32, we will restrict application of 4 V.I.C. § 33(b)(1) to that narrow class of cases that squarely meet the three-part test . . . . And, we will apply the test criteria in a manner that does not violate the strong legislative policy against piecemeal appeals. *Id* at 316.

Thus, *Enrietto* establishes the test for appellate jurisdiction under § 33(b)(1).

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[3] The Appellant did not seek Rule 54 certification of any of the orders now on appeal, so this basis for appellate jurisdiction is moot.

B. Receivership Orders

Enrietto did not address §33(b)(2), nor could counsel find another Virgin Islands case on point. However, federal case law is helpful since the federal interlocutory appeal statute, 28 U.S.C. §1192(b)(2) is worded like the V.I. statute.

In *Pressman-Gutman Co., Inc. v. First Nat'l Bank et al.,* 459 F.3d 383, 393 (3rd Cir. 2006), the Third Circuit held that interlocutory appeals related to receiverships are also narrowly construed, which are limited by the express wording of the statute to "(1) orders appointing a receiver, (2) orders refusing to wind up a receivership and (3) orders refusing to take steps to accomplish the purposes of winding up a receivership."

Similarly, in *United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 671-72 (7th Cir. 2014), the Seventh Circuit warned:

> Parties in other cases have argued that this additional statutory language *authorizes* ***appeals from orders en route to winding up*** *the receivership, which could include the sale order* in the collection phase of this case. But that would both strain the statutory language and ***make anything the receiver did appealable immediately, which could flood the courts of appeals with interlocutory appeals***. We therefore agree with the courts that have held that appellate jurisdiction over interlocutory orders involving receivers is limited to the three types of order specified in section 1292(a)(2): orders appointing a receiver, orders refusing to wind up a receivership, and orders refusing to take steps to accomplish the purposes for winding up a receivership. (emphasis added)(citing *SEC v. Black,* 163 F.3d 188, 194–95 (3d Cir.1998)).

See also, S.E.C. v. Am. Principals Holdings, Inc., 817 F.2d 1349, 1351 (9th Cir. 1987) (holding that order authoring spin off of related partnerships by a receiver was not appealable, as otherwise "virtually any order of the receiver within the scope of its jurisdiction would be potentially appealable").

Thus, this limited exception seems clear as to what it permits to be appealed based on the plain wording of § 33(b)(2).

C. The Collateral Order Doctrine

Finally, as the Appellant referred to the "collateral order doctrine" in his Notice of Appeal in S. Ct. Civ. NO. 2015-0009, that issue needs to be briefly addressed as well. Again, *Enrietto* is helpful, which noted this judicially established exception in 1949 by the Supreme Court, holding in part, *supra*:

> To fall within the exception, an order must at a minimum satisfy three conditions. First, it must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the action; and third, it must be effectively unreviewable on appeal from a final judgment. *Id.* at 319 (citations and quotations omitted).

As this Court noted further:

> Furthermore, a failure to meet even one of the three factors renders the doctrine inapplicable as a basis for appeal, no matter how compelling the other factors may be. *Id.*

Regarding the third prong of this test, this Court in *Enrietto* held that if the order being challenged could still be reviewed at a later date, then the collateral order doctrine did support a finding of appellate jurisdiction even if reversing the order in question at a later date meant ordering a new trial on all issues. *Id.* at 320.

II. Argument

With this applicable law in mind, it is respectfully submitted that there is no appellate jurisdiction for either appeal, which will each be addressed separately for the sake of clarity.

A. The Lease Appeal

As for the Lease Appeal, neither Order being appealed involves an interlocutory injunction, as neither is directed to a party, nor is either enforceable by contempt. Instead, these Orders merely upheld the propriety of a Plessen Board Meeting and the

validity of the lease approved at that meeting. Finally, these Orders did not accord or protect any relief sought in the Amended Complaint or the Amended Counterclaim. See **Exhibit 4**.

The Lease Appeal also does not involve the (1) the appointment of a receiver, (2) the refusal to wind-up a receivership or (3) the refusal to take steps to wind up the receivership, so it is not an order under § 33(b)(2).

Moreover, even if the Plessen/KAC lease is set aside on appeal, the Plaza West store will just be closed at some later date after the claims are heard, as discussed in the Appellee's Opposition to the Motion to Stay, which is incorporated herein by reference, so this appeal does not meet the third prong of the "collateral order doctrine."

Thus, there is no basis for appellate jurisdiction to hear the Lease Appeal.

B. The Liquidation Appeal

As for the Liquidation Appeal, it must be first noted that both parties agreed to the dissolution of the partnership, each submitting their own proposed plan. See **Exhibit 4**. The Liquidation Appeal (on file with the Court) simply challenges two aspects of the final Liquidation Order—the handling of the partnership assets located at Plaza West store and the fee allocation related to the litigation against the landlord of St. Thomas store.[4] These challenged parts are not orders addressing injunctive relief, as they are not addressed to a party, but to the dissolution process, nor are they enforceable by contempt. Instead, these provisions are just part of a comprehensive order setting forth a process to dissolve the partnership under the *Revised Uniform Partnership Act* (RUPA), codified in Title 26 of the Virgin Islands Code.

[4] A third issue, the employment of the other partner's sons, has been resolved by the parties. See **Exhibit 4.**

While the Amended Counterclaim seeks dissolution as alternative relief if it was determined that a partnership existed (See **Exhibit 4**), the Appellant's appeal of a portion of the dissolution order, if permitted, would basically mean that every single aspect of a partnership dissolution order, as well as any decision and act of the Master in effectuating the dissolution, would be instantly appealable.[5] If the Legislature intended that result, it would have simply added an appeal of a partnership dissolution order to the list of permitted interlocutory appeals, like it did for allowing appeals of certain actions taken by receivers.

In short, transforming a partnership dissolution order involving the validity of a lease or the sale of partnership assets into an interlocutory injunction order would allow this exception to swallow the final judgment rule. It is respectfully submitted that the Liquidation Appeal is not an interlocutory injunction order.

Moreover, the Liquidation Appeal does not involve the (1) the appointment of a receiver, (2) the refusal to wind-up a receivership or (3) the refusal to take steps to wind up the receivership, so it is not an order covered by § 33(b)(2).

Finally, the Liquidation Order also fails to meet the third prong of the collateral order doctrine. In this regard, the portions of the Liquidation Order challenged by the Appellant can all be easily dealt with on appeal at the appropriate time.

Even if the Plessen/KAC lease is set aside on appeal, the Plaza West store will just be closed at some later date after the claims are heard, as discussed in the

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[5] If that view were adopted, acrimonious partnership dissolutions (like this one) would seldom proceed smoothly. *See e.g., Pemstein v. Pemstein*, No. G030217, 2004 WL 1260034, at *1 (Cal. Ct. App. June 9, 2004), *reh'g denied*, review denied, (when a partnership dissolution action is but one small piece of the underlying disputes (comprised of several consolidated complaints and cross-complaints), interim orders are not appealable as dissolution cannot be achieved by piecemeal decision-making).

Appellee's Opposition to the Motion to Stay, which is incorporated herein by reference. Indeed, even if the Appellant prevails in his novel argument that the court below erred by not appointing a receiver for Plessen and then **directing** this receiver to sever off the real property upon which the Plaza West store is located so the two partners can bid on it as a partnership asset (paying Plessen $10.00 for this purchase), that scenario can still take place, as the dissolution order does not involve Plessen selling its property as part of the dissolution process.

Since all of these issues are still reviewable later, jurisdiction under the "collateral order doctrine" is not implicated either for the Liquidation Appeal.

III. Conclusion

Thus, for the reasons set forth herein, while this Court has wide latitude in setting its appellate jurisdiction, it is respectfully submitted that these appeals do not meet any of the criteria for review of these interlocutory appeals.

Dated: February 22, 2015

/s/ Joel H. Holt

Joel H. Holt, Esq.
Bar No. 6
Law Office of Joel H. Holt, P.C.
Counsel for Appellee
2132 Company Street,
Christiansted, VI 00820
Email: holtvi@aol.com
Tele: (340) 773-8709

Carl J. Hartmann III, Esq.
Co-Counsel for Appellee
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2015, I served a copy of the foregoing pleading by this Court's ECF system on:

Hon. Edgar Ross
Special Master
edgarrossjudge@hotmail.com

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820
dewoodlaw@gmail.com

Mark W. Eckard
Eckard, P.C.
P.O. Box 24849
Christiansted, VI 00824
mark@markeckard.com

Greg Hodges
Stefan B. Herpal
Law House, 1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00804
ghodges@dtflaw.com
sherpel@dtflaw.com

Jeffrey B. C. Moorhead
CRT Brow Building
1132 King Street, Suite 3
Christiansted, VI 00820
jeffreymlaw@yahoo.com

<u>/s/ Joel H. Holt</u>

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FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATON, Defendants/Counterclaimants v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC. Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, etc.

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant/counterclaimant Fathi Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver and Brief in Support ("Motion"), filed May 20, 2014; and Plaintiff's Opposition, filed May 27, 2014. For the reasons that follow, Defendant's Motion will be denied.

FACTUAL BACKGROUND

Plessen Enterprises, Inc. ("Plessen") is a closely held corporation jointly and equally owned by the Hamed and Yusuf families. Motion, at 1.[1] Plessen owns various assets, including

[1] Fathi Yusuf states that he is personally the owner of 14% of Plessen's stock. Motion, Exhibit K, ¶1.

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the real property on which Plaza Extra-West is located. *Id.* Plessen is a Counterclaim Defendant in this case by virtue of the Counterclaim of Defendants Fathi Yusuf and United Corporation.

On April 28, 2014, Plaintiff served Defendant Yusuf with a Notice of Special Meeting of Board of Directors of Plessen Enterprises, Inc. ("Notice") to be convened at 10:00 a.m. on April 30, 2014. Motion, at 4 (Exhibit A).[2] On April 29, 2014, Yusuf responded to the Notice in writing by pointing out the deficiencies of the Notice and demanding that the meeting not take place. *Id.* (Exhibit B). Defendant Yusuf moved to enjoin the meeting by emergency motion filed at 8:19 a.m. on April 30, 2014. That motion came to the attention of the Court after the meeting had concluded and the motion had become moot.

At the special meeting, Plessen's board of directors, over director Yusuf's objection, adopted Plessen Enterprises, Inc. Resolutions of the Board of Directors ("Resolutions") (Motion, Exhibit G) wherein the board: 1) ratified and approved as a dividend the May 2013 distribution of $460,000 to Waleed Hamed; 2) authorized Plessen's president, Mohammad Hamed, to enter into a lease agreement ("Lease") with KAC357, Inc. for the premises now occupied by Plaza Extra-West; 3) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in defense of

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[2] Defendant Yusuf claims that his son Maher ("Mike") is a director of Plessen, and that failure to notify him of the special meeting renders all actions therein null and void. Motion, at 6, n.3. As proof that Mike is a director, Yusuf cites a February 14, 2013 "List of Corporate Officers for Plessen" from the electronic records of the Department of Licensing and Consumer Affairs. Motion, at 6, n.4, Exhibit D; and presents a Scotiabank account application information form wherein Mike is designated "Director/Authorized Signatory" on Plessen's account.

Plaintiff denies that Mike is a director, relying upon Plessen's Articles of Incorporation which name Mohammad Hamed, Waleed Hamed, and Fathi Yusuf as the only three directors. Opposition, Exhibit A. Plessen's By-Laws state that the number of directors can be changed only by majority vote of current directors. Opposition, Exhibit B, Section 2.2. Plessen director Waleed Hamed declares: "There have been no resolutions of the Board or votes by the shareholders of Plessen Enterprises, Inc. that have ever changed these three Directors as provided for in the articles of incorporation over the last 26 years." Opposition, Exhibit 1, Declaration of Waleed Hamed. Defendant Yusuf concurs: "Until the Special Meeting of the Board of Directors of Plessen was held on April 30, 2014, there had no meeting of the directors or shareholders of Plessen since its formation in 1988." Motion, Exhibit K ¶15.

As such, and for the limited purpose of addressing this Motion, the Court finds that Plessen has three directors: Mohammad Hamed, Waleed Hamed, and Fathi Yusuf.

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the Counterclaim filed against it in this action and in defense of the separate action (Yusuf v. Hamed, et al.) filed relative to the May 2013 distribution to Waleed Hamed; 4) authorized the president to issue additional dividends to shareholders, up to $200,000, from the company bank account; and 5) removed Fathi Yusuf as Registered Agent, to be replaced by Jeffrey Moorhead.

By his present Motion, Defendant Yusuf objects to Plaintiff's service of the Notice of the special meeting one business day in advance as "an obvious attempt to avoid judicial scrutiny of an action that... was unlawful and an end-run around pending litigation between the Hamed and Yusuf families." Motion, at 4-5. Further, Defendant argues that the Notice violated Plessen's By-Laws which require that the corporate secretary, Yusuf himself, issue notices of meetings. Motion, at 4 (Exhibit C, §§ 3.4, 7.2).

Plaintiff responds that Plessen's By-Laws require only that the meeting take place on at least one day's notice if the directors are served by hand-delivery. Opposition, at 1-2 (*citing* Exhibit B, § 2.6). Since director Yusuf was personally served with the Notice two business days prior to the special meeting, the By-Laws' notice requirement was satisfied. Plaintiff notes that the By-Laws allow the president to serve notice upon directors if the secretary "is absent or refuses or neglects to act." Opposition, Exhibit B, § 7.2.B).

Defendant Yusuf's Motion focuses on the substance of the Resolutions adopted by the board of directors at the April 30, 2014 special meeting. Primarily, he argues that the board's approval of the Lease with KAC357, Inc., a newly formed entity of the Hamed family, is not in Plessen's best interests and constitutes an act of self-dealing by the interested directors designed to position the Hamed family to benefit upon the proposed winding-up of the Hamed-Yusuf

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partnership.[3] Defendant notes that a corporate transaction involving interested directors can survive only if it meets the "intrinsic fairness test," in that "…the transaction was entirely fair to the corporation." Motion, at 11, 10.

Defendant Yusuf argues that interested directors Mohammad Hamed and Waleed Hamed cannot demonstrate that the Lease is intrinsically fair to Plessen for the following reasons: 1) The Lease does not become effective "until some unspecified date in the future," namely when the current tenant, Plaza Extra-West, ceases operations. This provision creates a "poison pill… designed to dissuade any outside investor from bidding to acquire the Plessen property that is subject to the Lease." (Motion, at 12). 2) Unlike most commercial leases, the Lease requires no personal guarantees, an omission which could jeopardize Plessen's ability to collect outstanding rent because the "Hameds can simply walk away." (*Id.* at 13). 3) The Lease's assignment clause allows KAC357, Inc. to freely assign its interest as tenant without the consent of Plessen, raising the potential of an unqualified future tenant. (*Id.* at 14); 4) The Lease contains a rent structure with increases pegged to the Consumer Price Index, which does not allow Plessen the ability to renegotiate rents in the event KAC 357, Inc. exercises its option to renew after the initial ten-year term has concluded. (*Id.*). 5) The insurance provisions of the Lease do not require the tenant to maintain hazard insurance in the amount of full replacement value, including windstorm coverage. *Id.* at 14-15.

Defendant Yusuf also challenges other actions of the Plessen board, including its retention of Attorney Jeffrey Moorhead "with absolutely no discussion at the sham meeting." Motion, at 16.

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[3] Competing proposals for the winding-up of the Hamed-Yusuf partnership are pending before the Court. One feature of Plaintiff Hamed's proposal contemplates Plaintiff continuing to operate Plaza Extra-West in its existing premises on real property of Plessen.

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Yusuf also objects to the board's authorization to pay shareholder dividends, and asks the Court to expand the scope of the April 25, 2013 Preliminary Injunction to enjoin future payment of dividends to Plessen's shareholders without vote of shareholders. *Id.* at 17.

Defendant Yusuf further notes that procedural requisites of 13 V.I.C. §§ 52-55 were not met in the board's replacement of Yusuf as Plessen's resident agent, and argues that the board action should be nullified accordingly. *Id.* at 18.

Defendant Yusef finally asks the Court to appoint a receiver to oversee the dissolution of Plessen due to the mutual distrust between the Yusuf and Hamed families and the unworkable managerial situation that is the result. *Id.*

Plaintiff responds that Plessen's Lease with KAC357, Inc., contingent on the cessation of Plaza Extra-West operations, is objectively fair and benefits Plessen in that it ensures that the corporation's property will not become vacant, and provides a continued rental income stream to Plessen. Opposition, at 4. In light of Yusuf's objection to the lack of personal guarantees by the principals of KAC357, Inc., Plaintiff has caused the Lease to be amended to provide his own personal guarantee in the event of the monetary default of KAC357, Inc. *Id.* Exhibit 2.

Plaintiff asserts that the Lease provision setting initial rent at $710,000 per year is commercially reasonable as is pegging increases, in the manner of many commercial leases, to the Consumer Price Index. *Id.* at 4. Plaintiff discounts Defendant's concern regarding the Lease's assignment clause, noting that KAC357, Inc. remains liable for performance of the Lease terms, now personally guaranteed by Plaintiff. *Id.* at 4.

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Plaintiff has responded to Defendant's concern regarding hazard insurance coverage by increasing to $7,000,000 the property insurance coverage on the premises, including as an escalator clause such that Plessen will never become a co-insurer of the property. *Id.* Exhibit 2.

In sum, Plaintiff contends that the Lease approved at the special meeting of the Plessen board, notwithstanding its benefits to interested directors, is intrinsically fair to Plessen.

Plaintiff argues that the board's decision to remove Yusuf as Plessen's registered agent was appropriate and necessary in light of Yusuf's activity to the detriment of Plessen. Specifically, Yusuf initiated legal action against Plessen, served legal process on himself as resident agent without notifying Plessen's board, and then represented to the Court that Plessen was in default. *Id.* at 4-5.

Similarly, Plaintiff submits that the board's retention of Attorney Moorhead for purposes of defending Plessen in litigation initiated against it by Yusuf in this case and by Yusuf's family in the derivative action, not as general counsel as Defendant asserts, serves the best interests of Plessen. *Id.* at 5.

Plaintiff argues that the legality of the Resolution ratifying the prior distribution to Waleed Hamed as a corporate dividend, now the subject of the derivative action pending before Judge Willocks, and of the Resolution authorizing additional dividend payments are more appropriately addressed in the shareholders' derivative litigation. *Id.*

Finally, as to Defendant's claim that the appointment of a receiver is a necessity to effectuate the dissolution of Plessen, Plaintiff argues that "a receiver is not needed… as the corporation functions just like it is supposed to" and produces "a positive cash flow." *Id.* at 6. Even

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if the Court were to appoint a receiver, Plaintiff submits that, pursuant to 13 V.I.C §§ 193-95, such appointment would not undo the board's prior actions. *Id.* at 5.

DISCUSSION

As a threshold matter, the Court considers whether Plaintiff and Plessen's board of directors followed proper procedures, in accordance with Plessen's By-Laws, in scheduling and conducting the April 30, 2014 special meeting on two days' notice.

When determining the legality of a corporation's actions, courts in the Virgin Islands examine whether the language of the corporation's bylaws "is clear and unambiguous… [and] we will follow their plain meaning and abstain from imputing language or interpretations that are not in accordance with their plain meaning." *Weary v. Long Reef Condominium Association*, 57 V.I. 163, 169-70 (V.I. 2012). A "corporation's by-laws establish rules of internal governance, which, like contracts and statutes, are construed according to their plain meaning within the context of the document as a whole." *Id. citing Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. Ct. App. 2004).

Section 2.6 of Plessen's By-Laws (Opposition, Exhibit B) states that "Written notice of each special meeting of the Board of Directors shall be given to each Director by… hand-delivering that notice at least one (1) day before the meeting." Plessen's board effectuated hand-delivered service of the Notice upon Defendant Yusuf on April 28, 2014, two days before the special meeting, clearly satisfying the plain language of Plessen's By-Laws.

As to Defendant's contention that only he, as Plessen's secretary, was authorized to give notice of corporate meetings, § 7.2(B) of the By-Laws allows Plessen's president to give such

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notice "if the Secretary is absent or refuses or neglects to act." Nothing has been presented to suggest that Defendant Yusuf, as Plessen secretary, was absent or refused or neglected to act, but it is clear that any request to Yusuf to provide notice of the meeting would have been futile. It is not necessary to determine whether the circumstances constituted a triggering of the right of the corporate president to provide notice, as the purpose of the notice provision is for all directors to be timely advised of the calling of a special meeting. That occurred here as all directors, including Yusuf, attended the special meeting. It is also noted that the By-Laws provide (§ 7.2.C) that a director may waive notice of a meeting. Yusuf's appearance and participation in the meeting may constitute a waiver of the notice requirement.

1. The Lease

More importantly, the Court must examine the "lynchpin" of Plaintiff's plan for winding-up the Hamed-Yusuf partnership, the Lease between Plessen and KAC357, Inc. Defendant argues that the Lease execution by Plessen's board, dominated by the Hamed family, with KAC357, Inc., controlled exclusively by the Hamed family, constitutes a "blatant act of self-dealing."

The general rule is that "a majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interest at the expense of the corporate interests." *United States v. Byrum,* 408 U.S. 125 (1972); *see also, Overfield v. Pennroad Corporation,* 42 F.Supp. 586 (E.D.Pa.1941). Adherence by the majority interest to a fiduciary duty of strict fairness is particularly critical in the context of a closely-held corporation.

Controlling shareholders are allowed to engage in self-dealing if the transaction is intrinsically fair to the corporation. *See Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 719-20 (Del.1971). However, "those asserting the validity of the corporation's actions have the burden of

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establishing its entire fairness to the minority stockholders, sufficient to 'pass the test of careful scrutiny by the courts.' " *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983) (*citing Singer v. Magnavox Co.,* 380 A.2d 969, 976–77 (Del.1977).

In assessing the fairness of a corporate transaction, courts consider the transaction's price or consideration involved as well as the transaction's effect on the corporation's *status quo* following the implementation of the transaction. *See In re Athos Steel and Aluminum, Inc.* 71 B.R. 52 (B.K. E.D. Pa. 1987); *Reifsnyder v. Pittsburgh Outdoor Advertising Co.,* 152 A.2d 894 (1959).

Courts in the Third Circuit are less prone to examine the suspicious circumstances surrounding the transaction or the advantage conferred on the self-dealing party. *In re Athos Steel and Aluminum, Inc.* 71 B.R. at 542 ("The real crux of Athos Steel minority shareholders' objection is their assertion that the transaction was designed primarily to give D. Wechsler control of Athos Realty. However, I conclude that the intent to control Athos Realty, by itself, was not improper as to the Athos Steel minority shareholders.")

Instead, courts examine the adequacy and fairness of the consideration when determining whether the transaction was objectively in the corporation's best interest. ("Nothing in the evidence indicated that the purchase price of the Athos Realty stock was unduly high, thus granting Ash and L. Wechsler a windfall profit.") *Id.* at 541.

After carefully scrutinizing the Lease between Plessen and KAC357, Inc., the Court concludes that the transaction is intrinsically fair to Plessen and that the transaction serves a "valid corporate purpose." *Id.* at 542. The Court looks not to the benefit conferred upon the majority directors but rather on the potential beneficial or negative effects on the corporation. Defendant's contention that the Lease is unfair because it does not become effective until "some unspecified

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date in the future" reflects Defendant's concern with the advantage the Hamed family receives in winding up the partnership.

Business decisions to maintain the status quo have passed the intrinsic fairness test in several circumstances. *Cf. Enterra Corp. v. SGS Associates,* 600 F.Supp. at 687–90 (upholding a "standstill" agreement); *Reifsnyder v. Pittsburgh Outdoor Advertising Co., supra.* In *In re Athos Steel,* the Court held that maintaining the status quo "was perfectly fair and proper as to the Athos Steel minority shareholders." *In re Athos Steel and Aluminum, Inc.* 71 B.R. at 542

The Lease states that "there is currently a partnership between Fathi Yusuf and Mohammad Hamed operating a grocery business in the Demised Premises. The Tenant shall not be granted possession of the Premises so long as the partnership is in possession…" Lease, ¶ 2.3.4. The Court does not regard this Lease provision as detrimental to Plessen. This provision maintains the status quo, protecting Plessen from the prospect of holding vacant commercial property and preserving the right of the Hamed-Yusuf partnership to continue to operate its Plaza Extra-West store, as the partnership winds up. Further, it guarantees future income stream to Plessen (for a minimum term of ten years, with options that may extend the rental income for 30 years. Lease, ¶¶ 2.1; 2.5).

By demonstrating that the corporate action effectively maintains the status quo and insures to Plessen long-term rental income, Plaintiff has met his burden to establish that the Lease is intrinsically fair to Plessen. This finding disregards any benefit to the majority directors and instead determines the intrinsic fairness of the transaction to Plessen, which benefits from a long-term guaranteed income stream notwithstanding the imminent dissolution and cessation of business of the Hamed-Yusuf partnership, which might otherwise result in Plessen facing the prospect of holding vacant its large commercial space on St. Croix's west end in a depressed economy.

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Defendant does not argue that the Lease rent ($55,000 per month) is unfair (as it comports with the rent set for the partnership's Plaza Extra-East store by United Corporation). Rather, Defendant does object to rent increases being pegged to the Consumer Price Index. However, this is a relatively common feature in commercial leases and is not deemed unreasonable. Therefore, the consideration Plessen is to receive under the Lease is deemed reasonable. *See In re Athos Steel and Aluminum, Inc.* 71 B.R. at 541

The legitimate concern of Defendant raised in reference to the lack of a personal guarantee is resolved by Plaintiff's assurance of the Lease amendment by which Hamed will personally guarantee the tenant's performance. Opposition, Exhibit 2. The Court considers such a guarantee to be a necessary component of the determination that the Lease is intrinsically fair to Plessen.

Despite the lack of civility and mutual respect demonstrated again between the partners by Plaintiff's clandestine operation to notice and conduct the Plessen special meeting and approve the Lease with the new Hamed entity, Plaintiff has met his burden to establish that the Lease is intrinsically fair, from a business standpoint, to Plessen and its minority shareholders.

2. The Distribution

Defendant objects to the board's Resolution ratifying and approving as a dividend the May 2013 distribution of $460,000 to Waleed Hamed. This distribution is part of the subject matter of a shareholders derivative action currently pending before Judge Harold Willocks (*Yusuf v. Hamed, et al.*, SX-13-CV-120). As such, the Court declines at this time to make any findings of fact or legal determinations regarding the propriety of this distribution, as the resolution of this issue is more appropriately before another judicial officer.

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3. The Retainer

In objecting to Plessen's decision to retain Attorney Jeffrey Moorhead as counsel for two matters in litigation, Defendant argues that he was not consulted, that Attorney Moorhead received a retainer check prior to the April 30, 2014 meeting, and that there was no discussion concerning Attorney Moorhead's qualifications. Plaintiff responds that the board voted to retain Attorney Moorhead to defend Plessen in the instant action and the shareholders derivative suit only, not as corporate general counsel.

In a different context, in *Cay Divers, Inc. v. Raven*, 22 V.I. 158, 165 (D.V.I. 1998), the District Court held that "…the mere fact that an insurance company retains an attorney to represent an insured against a lawsuit does not mean the attorney is also the insurance company's attorney, capable of binding the carrier" *(citations omitted).* While *Cay Divers* dealt with the question of whether a settlement agreement of an insured bound the insurance company that retained counsel to represent the insured, it also sets forth the principle that a corporation can limit an attorney's scope of representation to a particular action.

In this case, Plessen retained and authorized payment to Attorney Moorhead for the expressly defined and limited purpose of defending Defendants' Counterclaim against it in this action and in defending Plessen's interests in the derivative action brought by Defendant Yusuf's son. Clearly, it is in Plessen's best interests to have legal representation in litigation against it. Plessen's By-Laws neither address nor require that counsel retained for particular limited purpose have his qualifications extensively vetted. See Opposition, Exhibit B, § 7.3 (pertaining to board appointed general corporate counsel). As such, the Court will not interfere with the board's decision to retain Attorney Moorhead in defending Plessen in the referenced actions.

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4. The Dividends

During the April 30, 2014 special meeting, the Plessen board authorized dividend payments of $100,000 each to Hamed and Yusuf. Defendant asks the Court to expand the scope of the existing Preliminary Injunction entered in this case with respect to the Hamed-Yusuf partnership to preclude the issuance of future dividends to Plessen shareholders without prior shareholder approval. Plessen's interests and operations are not a subject of the Preliminary Injunction.

The dividend in question was paid to both Hamed and Yusuf.[4] As such, there is nothing intrinsically unfair to Plessen, Plessen's minority director or Plessen's shareholders with relation to the issuance of these dividends. The Court will not nullify the issuance of dividends to Plessen shareholders on the basis of the reasons asserted, and will not at this time extend the Preliminary Injunction to cover assets and operations of Plessen, that do not have a direct present impact on the Hamed-Yusuf partnership and the operations of the Plaza Extra Supermarkets.

5. The Resident Agent

Defendant objects to the board's decision to remove Yusuf as Plessen's resident agent, arguing that the procedures set out in 13 V.I.C. §§ 52-55 have not been followed, in that the corporate secretary did not first sign off on the removal, and the board did not obtain, file and certify the resignation of the current resident agent. Motion, at 18. Plaintiff responds by arguing that Yusuf sued Plessen, "served himself without telling anyone else..." and then argued to the Court that Plessen was in default. Opposition, at 4-5.

[4] Notwithstanding the question as to whether Mohammed Hamed and Fathi Yusuf individually each own 50% of Plessen stock, it is undisputed that the stock is owned 50% each by the Hamed and Yusuf families.

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Defendant has not replied to Plaintiff's Opposition and this allegation of Plaintiff is unrefuted. If accurate, Yusuf's actions appear to be in breach of his the fiduciary obligation owed to Plessen as a director and as Plessen's registered agent. *See In re Fedders North America, Inc.* 405 B.R. 527, 540 (Bankr. D. Del. 2009) (A breach of "the duty to act in good faith…may be shown where the director 'intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.' ")

Further, Defendant Yusuf's contention that he, as secretary, needed to first sign off on his own dismissal before being removed as resident agent, is unpersuasive, and would tie the hands of a corporate board in the face of a renegade a corporate officer who would be permitted to act with impunity, protected by a corporate procedural formality - an unworkable scenario that was clearly not intended by the Legislature.[5]

On the basis of the facts and argument of record, the Court will not rescind the board's Resolution to remove Yusuf as Plessen's resident agent. The record is devoid of information concerning the implementation of the Resolution's directive that "the President shall report to the USVI Government that henceforth, Jeffrey Moorhead shall be the Registered Agent," and no findings are made with regard to such reporting.

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[5] "Upon the filing of two copies of such resolution in the office of the Lieutenant Governor, each signed by the president or vice-president and the secretary or an assistant secretary of the corporation and sealed with its corporate seal, the Lieutenant Governor shall certify one copy under his hand and seal of office and the certified copy shall be filed in the office of the clerk of the district court in the judicial division in which the articles of incorporation are filed." 13 V.I.C. § 52

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6. The Receiver

Defendant argues that Plessen's corporate deadlock requires the appointment of a receiver to supervise its liquidation. Motion, at 18.

> Among other situations which may warrant or require a court of equity to appoint a receiver to liquidate a solvent corporation is a deadlock between contending factions seeking to control and manage a corporation, abandonment of corporate functions, failure of corporate purposes, and gross fraud and mismanagement on the part of directors and controlling stockholders involving a breach on their part of the fiduciary or quasi-fiduciary duty owed to minority stockholders.
> *Campbell v. Pennsylvania Industries,* 99 F. Supp. 199, 205 (D. Del. 1951).

Recognizing the persistent deadlock between the parties, it is nonetheless premature to appoint a receiver for Plessen at this time. The winding-up of the Hamed-Yusuf partnership must take priority over Plessen's (relatively modest) internal disputes. When the Hamed-Yusuf partnership winding-up process is established and in effect, the need for and the propriety of a Plessen receivership may be revisited as may then be appropriate.

CONCLUSION

The Court finds that Plaintiff did not violate Plessen's By-Laws in providing Notice of the April 30, 2014 special meeting of the Plessen board of directors. The Lease between Plessen and KAC357, Inc. according to its terms, with Hamed's personal guarantee of the tenant's performance, is intrinsically fair to Plessen. The May 2013 distribution to Waleed Hamed, ostensibly approved and ratified as a shareholder dividend at the April 30, 2014 special meeting, is the subject of the derivative action pending before Judge Willocks where its validity can be more appropriately determined. The board did not violate Plessen's By-Laws by retaining Attorney

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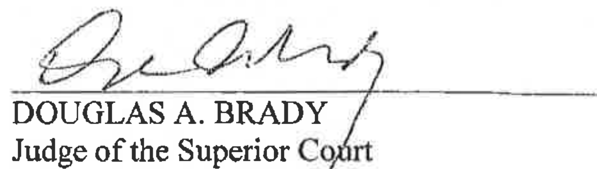
Jeffrey Moorhead to defend Plessen against Defendant's Counterclaim in the instant action and in the shareholder derivative action. The dividends authorized at the April 30, 2014 meeting, shared equally between Hamed and Yusuf, will not be disturbed. Likewise, the Court will not rescind the board's Resolution to remove Hamed as Plessen's resident agent. At this stage, the Court will not appoint a receiver to oversee the liquidation of Plessen.

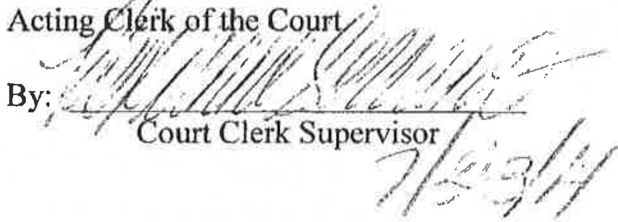
In consideration of the foregoing, an Order will enter simultaneously consistent with this Memorandum Opinion.

July 22, 2014



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court



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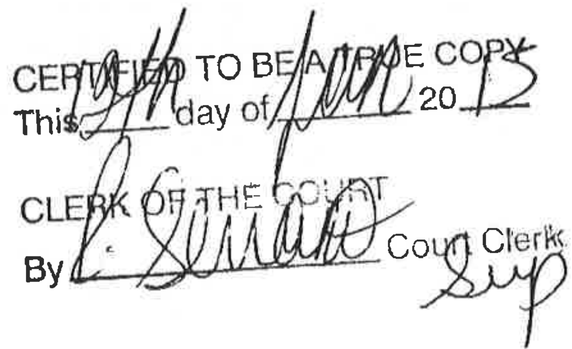

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FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

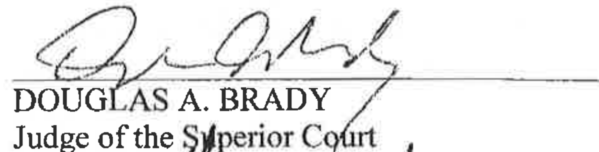
MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATON, Defendants/Counterclaimants v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC. Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, etc.

ORDER

In accordance with the Memorandum Opinion in this matter issued this date, it is hereby

ORDERED that Defendant/counterclaimant Fathi Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver and Brief in Support, filed May 20, 2014 is DENIED.

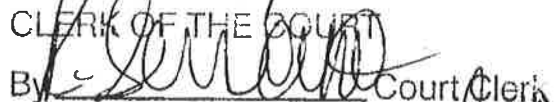
DATED: July 22, 2014.



DOUGLAS A. BRADY
Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY
This ___ day of ___ 20__

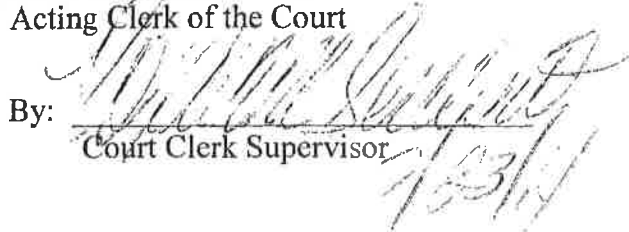
CLERK OF THE COURT



By ___ Court Clerk

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court



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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED by his authorized agent WALEED HAMED Plaintiff Vs. FATHI YUSUF and UNITED CORPORATION, ET AL Defendant	CASE NO. SX-12-CV-370 ACTION FOR: DAMAGES; ET AL

NOTICE
OF
ENTRY OF JUDGMENT/ORDER

TO: JOEL HOLT, ESQ.; CARL HARTMANN III, Esquire — HON. EDGAR ROSS (edgarrossjudge@hotmail.com)
NIZAR DEWOOD, ESQ.; GREGORY HODGES, Esquire — JUDGES AND MAGISTRATES OF THE SUPERIOR COURT
MARK ECKARD, ESQ.; JEFFREY MOORHEAD, Esquire — LAW CLERKS; LAW LIBRARY; IT; RECORD BOOK

Please take notice that on DECEMBER 5, 2014 Memorandum Order was entered by this Court in the above-entitled matter.

Dated: December 5, 2014

ESTRELLA H. GEORGE (ACTING)
Clerk of the Superior Court

By: IRIS D. CINTRON
COURT CLERK II

EXHIBIT 2

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

MOHAMMED HAMED by his authorized agent WALEED HAMED,
Plaintiff/Counterclaim Defendant,

v.

FATHI YUSUF and UNITED CORPORATON,
Defendants/Counterclaimants

v.

WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.
Counterclaim Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES, etc.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant/Counterclaimant Fathi Yusuf's Motion for Reconsideration ("Motion for Reconsideration"), filed August 6, 2014; Plaintiff's Opposition to Defendant's Motion for Reconsideration of this Court's July 22nd Opinion and Order re the Plessen April 30, 2014 Resolutions ("Opposition"), filed August 14, 2014; and Fathi Yusuf's Reply Brief in Support of Motion for Reconsideration ("Reply to Opposition"), filed August 29, 2014. Yusuf asks the Court to reconsider its July 22, 2014 Memorandum Opinion and Order ("July 22 Order") denying Yusuf's May 20, 2014 Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver ("Motion to Nullify"). For the reasons that follow, Defendant's Motion for Reconsideration will be denied.[1]

[1] For reasons unknown, Defendant's Joint Reply Brief in Support of Motion to Nullify ("Initial Reply"), filed June 16, 2014, was not entered into the Court's file and was not considered by the Court in issuing its July 22 Order. That brief is now a part of the Court's file and its substance has been considered together with his Motion for Reconsideration and Reply to Opposition in the Court's determination of whether to amend its July 22 Order.

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The July 22 Order determined, most significantly, that the new lease ("Lease") between Plessen Enterprises, Inc. ("Plessen") and KAC347, Inc. ("the New Hamed Company") is intrinsically fair to Plessen and that the transaction serves a "valid corporate purpose." Opinion, at 9. Defendant's Motion for Reconsideration suggests that the Court's lack of consideration of his Initial Reply justifies relief. ("In light of the fact that the Court did not read or consider the Reply, Yusuf requests reconsideration of the Court's July 22, 2014 Order denying his Motion…")(Motion for Reconsideration, at 2.)

Defendant's Motion for Reconsideration was timely filed within fourteen (14) days from the entry of the contested order, pursuant to LRCi 7.3, applicable per Super. Ct. R. 7. A motion to reconsider shall be based on: (1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice. The purpose of a motion to reconsider is to allow the court to correct its own errors, sparing parties and appellate courts the burden of unnecessary proceedings. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir.1986); *See also United States v. Dieter*, 429 U.S. 6, 8 (1976).

DISCUSSION

It is unnecessary to repeat in detail the factual background as the parties are intimately familiar with the history of their dispute, and as the history relevant to the issues in dispute in the Motion for Reconsideration was fully described in the July 22 Order.[2] The Court will review and

[2] Briefly, at approximately 4:00 p.m.on April 28, 2014, Plaintiff Hamed, as president of Plessen, served director Yusuf with a Notice of Special Meeting of Board of Directors of Plessen to be convened at 10:00 a.m. on April 30, 2014. Motion to Nullify, at 4 (Exhibit A). On April 29, 2014, Yusuf responded to the Notice in writing by pointing out the deficiencies of the Notice and demanding that the meeting not take place. *Id.* (Exhibit B). Yusuf moved to enjoin the meeting by emergency motion filed at 8:19 a.m. on April 30, 2014, which reached the Court after the meeting had concluded, rendering the motion moot. At the special meeting, Hamed and his son Waleed Hamed, a majority of Plessen's three-member board of directors, over director Yusuf's objection, adopted Resolutions (*Id.* Exhibit G)

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examine the analysis, reasoning and substance of its July 22 Order in light of Defendant's arguments, proffered case law and factual allegations contained in his present filings, including his previously filed Reply.

1. The Lease

The Court concluded that the newly executed Lease between Plessen and the New Hamed Company passed the "intrinsic fairness" test. The parties agree that the burden rests with Hamed, as the proponent of that transaction in which majority directors are involved, to demonstrate that the Lease is intrinsically fair to Plessen and its shareholders. Initial Reply, at 2-5; Opposition, at 7. Yusuf argues that the Lease is not intrinsically fair, a point he addressed fully in his Motion to Nullify.

As reviewed in the July 22 Order, controlling shareholders are not prohibited from engaging in self-dealing if the transaction is intrinsically fair to the corporation. *See Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 719-20 (Del.1971). However, "those asserting the validity of the corporation's actions have the burden of establishing its entire fairness to the minority stockholders, sufficient to 'pass the test of careful scrutiny by the courts.' " *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983) (*citing Singer v. Magnavox Co.,* 380 A.2d 969, 976–77 (Del.1977)).

It is well settled that "...motions for reconsideration should not be used as a vehicle for rehashing and expanding upon arguments previously presented or merely as an opportunity for

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wherein the board: 1) ratified and approved as a dividend the May 2013 distribution of $460,000 to Waleed Hamed; 2) authorized Hamed as Plessen's president to enter into the Lease with the New Hamed Company for the premises now occupied by Plaza Extra-West; 3) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in defense of the Counterclaim in this action and in defense of the separate derivative action (Yusuf v. Hamed, et al.); 4) authorized the president to issue additional dividends to shareholders, up to $200,000, from the company bank account; and 5) removed Fathi Yusuf as Registered Agent, to be replaced by Jeffrey Moorhead.

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getting in one last shot at an issue that has been decided." *Nichols v. Wyndham Intern, Inc.*, 2002 WL 32359953, at *1 (D.V.I. November 18, 2002). As such, this review will only examine new information and arguments presented subsequent to the Motion to Nullify that have not been previously considered regarding the intrinsic fairness of the Lease.

Defendant's Initial Reply restates several points it made in its original Motion to Nullify- arguments the Court reviewed and considered before issuing the July 22 Order.[3] In discussing the potential unfairness of the Lease's lack of personal guarantees, Defendant argues that "[t]he absence of appropriate guarantees from each of the principals of the New Hamed Company… not only impairs Plessen's ability to enforce its long-term rent obligations… but also impairs its ability to enforce the indemnity provision in the lease." Initial Reply, at 7. Defendant argues that intrinsic fairness requires that the principals of the New Hamed Company (Waleed, Waheed and Mufeed Hamed) personally guarantee the Lease, rather than only Mohammed Hamed, who has no actual stake in the New Hamed Company, is aged with health problems, and who has substantial assets and a residence in Jordan where he relocated after retiring from active participation in Plaza Extra in the 1990's.

Although the Lease only contains the personal guarantee of Hamed, as opposed to his three sons as principals of the New Hamed Company, in the absence of an intervening change in controlling law or the presentation of new evidence, Defendant fails to persuade the Court that it committed clear error in finding that the Lease is intrinsically fair to Plessen. Hamed's personal guarantee makes him (and his heir, administrators and successors) liable in the event of a default

[3] "Lease cannot become effective until some unspecified date…" Motion to Nullify, at 12; Initial Reply, at 6. "The rent structure in the Hamed Lease is also problematic." Motion to Nullify, at 14; Initial Reply, at 7. The Court will not reconsider its Order based upon these arguments previously made and considered.

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under the Lease by the New Hamed Company. Hamed has a 50% interest in the substantial real property and cash assets of Plessen itself, including the property that is the subject of the Lease. Together with Hamed's 50% interest in the Plaza Extra partnership and its varied and substantial assets, his personal guarantee is sufficient to protect Plessen from any potential loss in the event that the New Hamed Company defaults on its obligations. As such, the Court did not commit clear error in finding that the Lease backed by the personal guarantee of Hamed is intrinsically fair to Plessen.

Defendant also argues that the Court erred in citing case law for the proposition that "the transaction's effect on the corporation's *status quo* following the implementation of the transaction" (July 22 Order, at 9) is a consideration when assessing the fairness of a transaction. Reply to Opposition, at 9. The application of the "intrinsic fairness" test in *In re Athos Steel and Aluminum, Inc.* 71 B.R. 525 (Bankr. E.D. Pa. 1987) resulted in the approval of a more egregious example of an internal corporate takeover by majority shareholders than is present here. The *Athos* Court held, in full:

> The transaction clearly had a valid corporate purpose. Because Ash and L. Wechsler were the controlling shareholders of both corporations, Athos Realty had always functionally been controlled by Athos Steel. When they determined that they wished to sell their interest in Athos Realty, it made perfect business sense for Athos Steel to seek to purchase the stock. The transaction allowed Athos Steel to acquire a valuable asset and control of a company which leased property to the corporation which is critical to its operation. It also accomplished, in effect, the maintenance of the status quo. In the absence of a showing that there was overreaching in setting the terms of the sale or that the transaction harmed Athos Steel, the transaction was perfectly fair and proper as to the Athos Steel minority shareholders. *Id.* at 542.

The Bankruptcy Court clearly implied that maintenance of the status quo is a factor to consider when analyzing whether a particular transaction is intrinsically fair to the corporate entity and minority shareholders. Defendant's suggestion that the Court "effectively created a new test, namely 'whether the transaction was objectively in the corporation's best interest,'" is without

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merit. Defendant has not provided case law or other support rebutting the Court's reasoning or setting forth examples of how other courts have addressed similar grievances.

Yusuf argues that the Lease is not intrinsically fair, speculating that it locks up the property "in a way that will make it less valuable to outside investors who wish to purchase the property." Motion for Reconsideration, at 6. No outside potential investors are identified and no explanation is provided as to why the existence of a 30 year leasehold income stream on the property represents a disincentive to an outside investor. Yusuf states that his United Corporation is willing to purchase the property, but only absent the encumbrance of the Lease, at a price to be determined by an appraisal process. *Id.* His implicit speculation that such a purchase price may provide greater value to Plessen than the Lease does not render the Lease transaction intrinsically unfair.

Defendant further argues in a cursory manner that the Lease is unfair because it fails to require windstorm property insurance coverage. *Id.* at 7. Hazard insurance is required under the Lease for all other risks in coverage limits of $7,000.000. The Lease requires that the Tenant is obligated to restore the premises promptly in the event of casualty damage, including windstorm. Lease, ¶¶ 17.2; 17.4. By these provisions and as a whole, the Lease is not unfair to Plessen and its shareholders.

Yusuf argues that it is unfair "that a core asset of Plessen should be tied up for as many as 30 years by a sweetheart lease made with one ownership faction that is adamantly opposed by the other faction." Reply to Opposition, at 8-9. Yet, "tying up" a core asset of the corporation by means of a long-term lease with appropriate terms assuring market rents benefits all shareholders. The "sweetheart" aspect of the transaction does not relate to its terms and the benefits to Plessen and its shareholders, but rather the real crux of the adamant opposition to the transaction of the Yusuf

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shareholder faction relates to the fact that the Lease gives the tenancy to the New Hamed Company. The fact, by itself, that the transaction was designed primarily to allow the majority director shareholders to obtain the leasehold interest in Plessen's property does not make it improper as to the interests of the minority director shareholders.[4]

Here, where the terms of the Lease are shown to be intrinsically fair to Plessen and its shareholders, the Court will not reconsider and amend its July 22 Order. Nonetheless, this denial of Defendant's Motion for Reconsideration on the basis of its legal sufficiency and intrinsic fairness will be issued without prejudice to the Court's right to issue an order at some future date to nullify or otherwise alter the scope or terms of the Lease in the event that such relief appears necessary and appropriate in the process of the winding up of the Hamed-Yusuf partnership, or as otherwise may be recommended by the Master or by any receiver who may in the future be appointed to oversee the operations of Plessen.

2. The Distribution

Defendant argues that the Court did not address the case *Moran v. Edson*, 492 F.2d 400 (3d Cir. 1974), which holds that "...misappropriation of corporate money by a director for his own benefit can only be validated by 'unanimous ratification by the shareholders'" Initial Reply, at 8 (*citing Moran*, 492 F.2d at 406). Defendant objects to the Resolution adopted by the Plessen directors ratifying and approving as a dividend the May 2013 distribution of $460,000 to Waleed Hamed. Defendant disagrees with the Court's conclusion that "[t]his distribution is part of the

[4] *See Athos Steel*, 71 B.R. at 542: "The real crux of Athos Steel minority shareholders' objection is their assertion that the transaction was designed primarily to give D. Wechsler control of Athos Realty. However, I conclude that the intent to control Athos Realty, by itself, was not improper as to the Athos Steel minority shareholders."

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subject matter of a shareholders derivative action currently pending before Judge Harold Willocks (*Yusuf v. Hamed, et al.*, SX-13-CV-120). As such, the Court declines at this time to make any findings of fact or legal determinations regarding the propriety of this distribution…" Motion for Reconsideration, at 7-8.

Defendant provides no statutory support or binding case law for the argument that this Court should act on this issue, unless "…it would invade Judge Willock's exclusive province…" Motion for Reconsideration, at 8.[5] Defendant's citation to *Moran* is of no assistance to the immediate question relating to the propriety of this Court addressing the merits of a separate action now pending before another trial court.

Judge Willocks is currently presiding over a pending derivative action filed on behalf of Plessen and its shareholders, the substance of which concerns the transfer in question. Before this Court is the Hamed-Yusuf partnership dispute and impending wind-up, wherein Plessen has been recently impleaded as a third party Counterclaim Defendant. In its July 22 Order, the Court declined to make findings of fact or legal determinations relative to the issue of the alleged misappropriation pending before another Court. Nothing Defendant has presented in his Initial Reply, Motion for Reconsideration or Reply to Opposition provides a basis for the Court to reconsider its decision.[6] Under LRCi 7.3, in the absence of an intervening change in controlling

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[5] Defendant argues that "a director's misappropriation of corporate monies is plainly grounds for dissolution of a solvent company." Reply to Opposition, at 6 (citing *Zutrau v. Jansing*, 2013 Del. Ch. LEXIS 71, p. 17 (Del. Ch. 2013)). There is presently nothing before the Court seeking the dissolution of Plessen, and neither the cited case nor any other source referenced by Defendant addresses the question whether this Court is bound or permitted to take action on this issue that is the subject of the pending litigation before another trial court, an action brought by Yusuf's son.

[6] The derivative litigation appears most properly situated to address the issue of the purported misappropriation, especially in light of the fact that 50% of the amount in issue has been deposited with the Clerk of the Court in connection with that action, stipulating to the right of the Yusuf 50% shareholders to disburse those funds to themselves, with interest, apparently curing any monetary loss that might have otherwise resulted from the withdrawal.

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law, new evidence, demonstration of clear error or the need to prevent manifest injustice, the Court declines to amend its prior ruling on this matter. However, in the event that the winding up of the partnership requires addressing the subject of the Plessen withdrawal and the distribution of those funds, the Court reserves the right to issue an appropriate order at such time.

3. The Retainer

Defendant restates his argument that the appointment of Attorney Moorhead to act on behalf of Plessen should be nullified in that he "...attempted to negotiate a retainer check to be counsel for Plessen... before the Board had even authorized his retention." Initial Reply, at 9; Motion to Nullify, at 16. This argument has been raised and determined, and Defendant provides no new facts or law not already reviewed and considered in connection with the July 22 Order.

Defendant reargues that Hamed violated the "quite explicit" Plessen Bylaw §7.3, which states that "it shall be the duty of the Officers and Directors to consult from time to time with the general counsel (if one has been appointed) as legal matters arise." Initial Reply, at 9. Because this argument was raised in Defendant's Motion to Nullify and was decided by the Court, in the absence of any basis for reconsideration under Local Rule 7.3, the Court declines to reconsider its previous ruling.

Defendant argues that Attorney Moorhead is really only working for Hameds and not for the best interests of Plessen, citing Plessen's joinder with the opposition of Hamed to Yusuf's Motion to Nullify. Initial Reply, at 10. Attorney Moorhead was retained to defend Plessen against Defendants' Counterclaim in this action and to represent the corporation in the shareholder derivative action. As an officer of the Court, Attorney Moorhead is duty-bound to act in his

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corporate client's best interests (*see* VISCR 211.1.13 relating to representing an organization as a client). Defendant presents no basis in his filings justifying reconsideration of the July 22 Order in this respect, and the Court will not nullify the action of the Plessen board retaining Attorney Moorhead for the specific and limited purposes noted.

4. The Resident Agent

By his Initial Reply (at 8), Defendant argues that "... Plaintiff fails entirely to respond to Yusuf's argument that the statutory requirements for changing a registered agent were not satisfied." Defendant objects to the board's decision to remove Yusuf as Plessen's resident agent, arguing that the procedures set out in 13 V.I.C. §§ 52-55 have not been followed, in that the corporate secretary did not first sign off on the removal, and the board did not obtain, file and certify the resignation of the current resident agent. Motion for Reconsideration, at 18. Plaintiff responds by arguing that Yusuf sued Plessen, "served himself without telling anyone else..." and then argued to the Court that Plessen was in default. Opposition, at 4-5.

Defendant has refuted this, simply stating "Yusuf has never asked for entry of default as to Plessen." Initial Reply, at 9. However, simply initiating the litigation (through nominal plaintiff Yusuf Yusuf) against the corporation for which Defendant serves as registered agent may constitute a breach of fiduciary duty. *See In re Fedders North America, Inc.* 405 B.R. 527, 540 (Bankr. D. Del. 2009).

Without presentation of a basis for reconsideration under the provisions of LRCi 7.3, the Court will not reverse its prior determination and rescind the board's Resolution to remove Yusuf as Plessen's resident agent.

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5. The Receiver

Defendant's filings focus substantially on the argument that the Court should appoint a receiver to oversee the liquidation of Plessen. *See generally* Motion for Reconsideration, at 4-5; Initial Reply, at 12-15; Reply to Opposition, at 2-4; 12. Defendant emphasizes the importance of the *Moran* decision,[7] which ultimately held "...that the court upon remand will have full opportunity to consider whether, in the light of the situation as it may then exist, it will be in the interest of justice to appoint a receiver." *Moran*, 400 F.2d at 407.

The July 22 Order did not foreclose the possibility of appointing a receiver. Rather, it stated:

> Recognizing the persistent deadlock between the parties, it is nonetheless premature to appoint a receiver for Plessen at this time. The winding-up of the Hamed-Yusuf partnership must take priority over Plessen's (relatively modest) internal disputes. When the Hamed-Yusuf partnership winding-up process is established and in effect, the need for and the propriety of a Plessen receivership may be revisited as may then be appropriate. July 22 Order, at 15.

However, appointment of "a receiver is...an extraordinary remedy, and ought never be made except in cases of necessity, and upon a clear and satisfactory showing that the emergency exists." *Zinke-Smith, Inc. v. Marlowe* 8 V.I. 240, 242 (D.V.I. 1971). While Defendant presents nothing to convince the Court to reconsider its July 22 Order in this regard, it is reiterated that the appointment of a receiver may be deemed appropriate and necessary at some future time, and such a prospective future appointment remains within the Court's discretion, pursuant to 13 V.I.C. §195.

[7] Defendant argues that the Court "...overlooks both controlling authorities in this jurisdiction and persuasive authorities from other jurisdictions as to dealing with shareholder deadlock." Reply to Opposition, at 2. As noted, by the July 22 Order the Court explicitly reserved (and continues to reserve) the right to appoint a receiver at a later date if the circumstances warrant and the need arises in the partnership wind-up process.

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At this stage, the Court will not at this time revise its previous determination based upon Defendant's present filings.

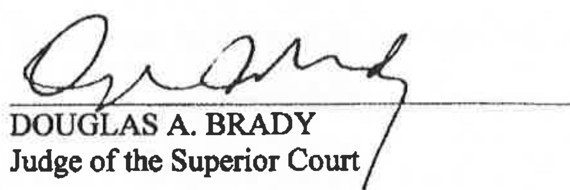
CONCLUSION

Defendant does not present as the basis for his Motion for Reconsideration of the July 22 Order any intervening changes to controlling law, or the availability of new evidence, and has not demonstrated the need to correct clear error or to prevent manifest injustice. As such, Defendant's Motion for Reconsideration will be denied.

On the basis of the foregoing, it is

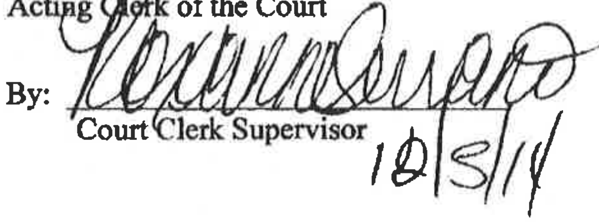
ORDERED that Defendant's Motion for Reconsideration is DENIED.

Dated: December 5, 2014



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
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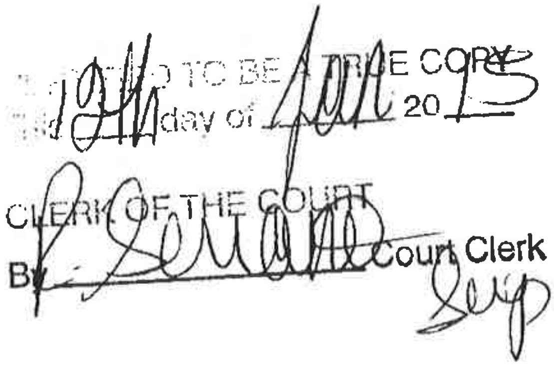

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATON, Defendants/Counterclaimants v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC. Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, etc.

ORDER ADOPTING FINAL WIND UP PLAN

By Order Soliciting Comments, Objections and Recommendations, entered October 7, 2014, the Court ordered the parties to review the Proposed Wind Up Plan ("Proposed Plan") presented therewith relative to the Hamed-Yusuf (Plaza Extra) Partnership and to present comments, objections and recommendations. Plaintiff Mohammed Hamed submitted his Comments re Proposed Winding Up Order (filed October 21, 2014); Defendant Fathi Yusuf submitted his Comments, Objections and Recommendations Concerning the Court's Proposed Plan (filed October 21, 2014). The Parties each then responded to the filing of the other: Plaintiff filed his Response to Defendant's Comments re Proposed Winding Up Order on October 28, 2014; and Defendant Yusuf filed his Response to Hamed's Comments Concerning the Court's Proposed Wind-Up Plan on October 29, 2014.

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Upon consideration of the Parties' submissions, the Court enters this Order Adopting Final Wind Up Plan of the Plaza Extra Partnership ("Order"). A complete copy of the Final Wind Up Plan of the Plaza Extra Partnership ("Final Plan") adopted by this Order is submitted with and constitutes a part of this Order. The Final Plan incorporates certain modifications to the Proposed Plan, as noted below, with revised provisions in italics, and excluded provisions stricken. These modifications, together with the provisions to which the Parties have jointly agreed, which are accepted and incorporated, are adopted by the Court and shall constitute the Final Plan. For the Parties' ease of reference, provisions of the Proposed Plan are modified by the terms of this Order and incorporated into the Final Plan, as follows:

~~PROPOSED~~ *FINAL* WIND UP PLAN

Section 1: Definitions

1.18 "Liquidating Partner" means Yusuf.

Section 3: Liquidating Partner

Yusuf shall be the Liquidating Partner with the exclusive right and obligation to wind up the partnership pursuant to this Plan *and the provisions of the V.I. Code Ann. tit. 26, § 173(c)*, under the supervision of the Master. No person other than the Liquidating Partner may act on behalf of the Partnership, represent the Partnership in any official capacity or participate in management or control of the Partnership, for purposes of winding up its business or otherwise. The Liquidation Partner's rights and obligations relative to the winding up, subject to the review and supervision of the Master, shall be deemed to have commenced as of April 25, 2013, the date of the issuance of the Preliminary

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Injunction. *All acts of the Liquidating Partner, except those customarily undertaken in the ordinary course of the ongoing business operations of the Partnership, are subject to prior notification to and approval of the Master.*

Section 8: Plan of Liquidation and Winding Up

1) Plaza Extra-East

Yusuf will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-East: the inventory at *one half of the* landed cost and the equipment ~~and leasehold improvements~~ at ~~their~~ its depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. *In the event that Yusuf is unwilling to pay the appraised depreciated value of the equipment, the same shall be sold at public auction under the direction and supervision of the Master, with net proceeds equally divided and disbursed by the Master.* Upon payment for such inventory, *and upon payment (or auction and distribution of proceeds) for the* equipment, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-East without any further involvement of Hamed or the Hamed sons, and free and clear of any claims or interest of Hamed.

For purposes of winding up the Partnership, Plot 4-H Estate Sion Farm shall not be considered partnership property and is not subject to division under this plan, but without prejudice to any accounting claim that may be presented by Hamed.

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2) Plaza Extra-Tutu Park

~~Yusuf will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-Tutu Park: the inventory at landed cost and the equipment and leasehold improvements at their depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. Yusuf will reimburse the Partnership for 50% of the reasonable costs and attorneys' fees incurred to date in the Tutu Park litigation. Upon payment for such inventory, equipment, leasehold improvements and attorneys' fees, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-Tutu Park without any further involvement of Hamed or the Hamed sons, and free and clear of any claims or interests of Hamed.~~

The Parties will be allowed to bid on Plaza Extra-Tutu Park at a closed auction supervised by the Master. The auction shall take no more than one day and should not cause any delay in implementing this Plan or disrupt the business operations of any Plaza Extra store. The Parties may discuss and jointly or individually propose the format and procedures for the auction, subject however to the Master's sole determination.

The Partnership assets sold in connection with Plaza Extra-Tutu Park shall consist of the leasehold interests, the inventory, equipment, and all leasehold improvements not a part of the real property. The value of such assets shall be determined by a qualified appraiser selected by the Master prior to the auction. Whichever Partner submits the winning bid for Plaza Extra-Tutu Park shall receive and assume all existing rights and obligations to the pending litigation with the landlord, in the Superior Court of the Virgin

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Islands, Division of St. Thomas and St. John, United Corporation d/b/a Plaza Extra v. Tutu Park Limited and P.I.D., Inc. (Civ. No. ST-01-CV-361) (the "Tutu Park Litigation"). The Partner who receives and assumes said rights and obligations to the Tutu Park Litigation shall be obligated to reimburse the other Partner 50% of the of the amount of costs and attorneys' fees incurred to date directly attributable to the Tutu Park Litigation. Additionally, the prevailing Partner at auction shall be responsible for obtaining releases or otherwise removing any continuing or further leasehold obligations and guarantees of the Partnership and the other Partner.

3) Plaza Extra-West

Hamed will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-West: inventory at *one half of the* landed cost and the equipment ~~and leasehold improvements~~ at ~~their~~ its depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. *In the event that Hamed is unwilling to pay the appraised value of the equipment, the same shall be sold at public auction under the direction and supervision of the Master.* Upon payment for such inventory, *and upon payment (or auction and distribution of the proceeds) for the* equipment, Hamed will assume full ownership and control and may continue to operate Plaza Extra-West without any further involvement of Yusuf, Yusuf's sons or United and free and clear of any claims or interests of Yusuf or United.

Hamed will be entitled to a recordable non-exclusive easement for the existing sewage line servicing Plaza Extra-West, which shall not preclude Plessen Enterprises, Inc.,

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the owner of the servient parcel, from reserving the right to tap into and to utilize such sewage line.

4) Stock of Associated Grocers

The stock of Associated Grocers held in the name of United shall be split 50/50 between Hamed and Yusuf, with United retaining in its name Yusuf's 50% share, and 50% of such stock being reissued in Hamed's name or his designee's name.

5) Plaza Extra Name

~~Yusuf shall own and have the right to use the trade name "Plaza Extra" in the operation of Yusuf's Plaza Extra stores. Hamed will operate Plaza Extra West under the trade name "Plaza West."~~

The Master will conduct and supervise a closed auction wherein the Parties alone will be allowed to bid to purchase the trade name "Plaza Extra." The prevailing Partner at the auction shall receive the right to the exclusive use of the name "Plaza Extra," to the exclusion of all others, including the other Partner, who shall be forever barred from using the name "Plaza Extra" in connection with operation of any business in the U.S. Virgin Islands.

The auction shall take no more than one day and will be conducted in a manner that will not cause any delay in implementing this Plan or any disruption in the business operations of any Plaza Extra store. The parties may discuss and jointly or individually propose the format and procedures for the auction, subject however to the Master's sole determination.

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Steps to Be Taken for the Orderly Liquidation of the Partnership

This Plan is conditioned upon the ability of Hamed and Yusuf to use the 50% interest of each in Available Cash and Encumbered Cash to purchase the non-liquid Partnership Assets. While the bid-in process may continue, actual payment of the funds shall be subject to approval of the Master, the Court and, to the extent necessary, District Court.

Step 1: Budget for Wind Up Efforts

The Liquidating Partner proposes the Wind Up Budget (Exhibit A) for the Wind Up Expenses. Such expenses include but are not limited to, those incurred in the liquidation process, costs for the continued operations of Plaza Extra Stores during the wind up, costs for the professional services of the Master, costs relating to pending litigation in which Plaza Extra and/or United d/b/a/ Plaza Extra Stores is named as a party, and the rent to be paid to the landlords of Plaza Extra-East and Plaza Extra-Tutu Park.

Step 2: Setting Aside Reserves

The sum of Ten Million Five Hundred Thousand Dollars ($10,500,000) shall be set aside in a Liquidating Expenses Account to cover the Wind Up Expenses as set out in the Wind Up Budget with a small surplus to cover any miscellaneous or extraordinary Wind Up expenses that may occur at the conclusion of the liquidation process. Such Account shall be held in trust by the Liquidating Partner under the supervision of the Master. *All disbursements shall be subject to prior approval by the Master.* The Liquidating Partner shall submit to Hamed and the Master each month a reconciliation of actual expenditures against the projected expenses set forth in Exhibit A. Unless

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the Partners agree or the Master orders otherwise, the Liquidating Partner shall not exceed the funds deposited in the Liquidated Expenses Account.

Step 3: Continued Employment of Employees

Yusuf and Hamed, and their respective successors, shall attempt to keep all employees of the Plaza Extra Stores fully employed, *not including members of the Hamed and Yusuf families.* Although approval of this plan should avoid any need to comply with the provisions of the Virgin Islands Plant Closing Act, to the extent necessary, Yusuf and Hamed, and their respective successors, shall comply with the PCA for any affected employees of the Plaza Extra Stores as a result of the winding up and closure of the Partnership business. Any severance payments due to the employees determined in accordance with the PCA shall be paid by the Master out of the Claims Reserve Account.

Step 4: Liquidation of Partnership Assets

The Liquidating Partner shall promptly confer with the Master and Hamed to inventory all non-Plaza Extra Stores Partnership assets, and to agree to and implement a plan to liquidate such assets, which shall result in the maximum recoverable payment for the Partnership. *All previous Partnership accountings are deemed preliminary. Hamed's accountant shall be allowed to view all partnership accounting information from January 2012 to present and submit his findings to the Master. The Liquidating Partner is ordered to submit an updated balance sheet to Hamed and to the Master without delay.*

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Step 5: Other Pending Litigation

The pending litigation against United set forth in Exhibit C arises out of the operation of the Plaza Extra Stores. As part of the wind up of the Partnership, the Liquidating Partner shall undertake to resolve those claims in Exhibit C, and to the extent any claims arise in the future relating to the operation of a Plaza Extra Store during the liquidation process, within the available insurance coverage for such claims. Any litigation expenses not covered by the insurance shall be charged against the Claims Reserve Account.

Step 6: Distribution Plan

Upon conclusion of the Liquidation Process, the funds remaining in the Liquidation Expenses Account, if any, shall be deposited into the Claims Reserve Account. Within 45 days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan for the funds remaining in the Claim Reserve Account. Thereafter, the Master shall make a report and recommendation of distribution for the Court for its final determination. Nothing herein shall prevent the Partners from agreeing to distribution of Partnership assets between themselves rather than liquidating assets by sale and distributing proceeds.

Step 7: Additional Measures to Be Taken

a) Should the funds deposited into the Liquidating Expenses Account prove to be insufficient, the Master shall transfer from the Claims Reserve Account sufficient funds required to complete the wind up and liquidation of the Partnership, determined in the Master's discretion.

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b) All funds realized from the sale of the non-cash Partnership Assets shall be deposited into the Claims Reserve Account under the exclusive control of the Master.

c) All bank accounts utilized in the operation of the Partnership business shall be consolidated into the Claims Reserve Account.

d) All brokerage and investment accounts set forth in Exhibit D shall be turned over to the Master as part of the Claims Reserve Account.

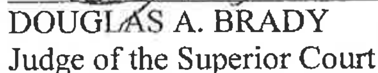
e) Any Partnership Assets remaining after the completion of the liquidation process shall be divided equally between Hamed and Yusuf under the supervision of the Master.

On the basis of the foregoing, it is hereby

ORDERED that the foregoing modifications of the Proposed Plan shall be incorporated into and form a part of the Final Wind Up Plan of the Plaza Extra Partnership, submitted herewith, which Final Plan is ADOPTED by this Order. It is further

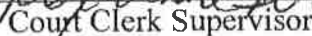
ORDERED that the Parties shall meet and confer with the Master FORTHWITH relative to the implementation of the Final Plan, which will be deemed final and effective ten (10) business days following the date of the entry of this Order.

Dated: January 7, 2015



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
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CERTIFIED TO BE A TRUE COPY
This 9th day of Jan 20 15

CLERK OF THE COURT

By Court Clerk II

FINAL WIND UP PLAN
OF THE PLAZA EXTRA PARTNERSHIP

This Plan provides for the winding up of the Partnership, as defined below. This is a liquidationg plan and does not contemplate the continuation of the Partnership's business except as may be required for the orderly winding up of the Partnership.

Section 1. DEFINITIONS

1.1 "Act" means the Uniform Partnership Act, V.I. Code Ann. tit. 26, §§ 1-274.

1.2 "Available Cash" means the aggregate amount of all unencumbered cash and securities held by the Partnership including cash realized frm any Litigation Recovery or any Liquidation Proceeds.

1.3 "Case" means *Hamed v. Yusuf, et al.,* Superior Court of the Virgin Islands (Civil No. SX-12-CV-370).

1.4 "Claim" means

(a) any right to payment from the Partnership whether or not such right is reduced to judgment, liquidated, unliquidated, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(b) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment from the Partnership whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.5 "Claimant" means the holder of a Claim.

1.6 "Claims Reserve Account" means one or more interest-bearing bank account(s), money market or securities account(s) to be established and held intrust by the Master for the purpose of holding the Available Cash until distributed in accordance with the Plan and any interest, dividends or other income earned upon the investment of such Claims Reserve Account. The Claims Reserve Account will be further funded form time to time by the Liquidating Partner with:

(i) any Liquidation Proceeds realized, plus

(ii) any Litigation Recovery realized, minus

(iii) any amounts necessary to pay Wind Up Expenses.

1.7 "Court" means Superior Court of the Virgin Islands in which the Case is pending.

1.8 "Criminal Case" means Case No. 1:05-CR-00015-RLF-GWB pending in the District Court of the Virgin Islands.

1.9 "Debt" means liability on a Claim.

1.10 "Disputed Claim" means any Claim or portion of a Claim as to which an objection to the allowance thereof has been interposed, which objection has not been withdrawn or determined by Final Order.

1.11 "District Court" means the District Court of the Virgin Islands, in which the Criminal Case is pending.

1.12 "Effective Date" means ten (10) business days following the date of entry of the Order Adopting Final Wind Up Plan in the Case.

1.13 "Encumbered Cash" means all of the cash and securities encumbered by a restraining order issued by the District Court in the Criminal Case.

1.14 "Final Order" means an order or judgment of the Court or District Court:

(i) which has not been reversed, stayed, modified or amended;

(ii) as to which the time to or the right to appeal or seek reconsideration , review, rehearing or *certiorari* has expired or has been waived; and

(iii) as to which no appeal or motion for reconsideration, review, rehearing or *certiorari* is pending.

1.15 "Hamed" means Mohammad Hamed.

1.16 "Hamed Sons" means Waleed Hamed, Waheed Hamed, Mufeed Hamed, and Hisham Hamed.

1.17 "Liquidating Expenses Account" means one or more checking account(s) to be utilized by the Liquidating Partner for Wind Up Expenses based upon the Wind Up Budget and to satisfy debts of the Partnership.

1.18 "Liquidating Partner" means Yusuf.

1.19 "Liquidating Proceeds" means any cash or other consideration paid to or realized by the Partnership or the Liquidating Partner, as applicable, upon the sale, transfer, assignment or other distribution of the Partnership Assets.

1.20 "Litigation" means the interest of the Partnership or the Liquidating Partner, as applicable, in any and all claims, rights and causes or action that have ben or may be commenced by the Partnership or the Liquidating Partner including, without limitation, any action:

(i) to avoid and recover any transfers of property determined to be avoidable pursuant to V.I. Code Ann. tit. 28, §§ 171-212 or other applicable law;

(ii) for the turnover of property to the Partnership or Liquidating Partner, as applicable;

(iii) for the recovery of property or payment of money that belongs to or can be asserted by the Partnership or the Liquidating Partner, as applicable; and

(iv) for compensation for damages incurred by the Partnership.

1.21 "Litigation Recovery" means any cash or other property received by the Partnership or the Liquidating Partner, as applicable, from all or any portion of the Litigation including, but not limited to, awards of damages, attorneys' fees and expenses, interest and punitive damages, whether recovered by way of settlement, execution on judgment or otherwise.

1.22 "Master" means Honorable Edgar D. Ross, appointed by the Court to serve as master in the Case.

1.23 "Partnership" means the association of Yusuf and Hamed carried on as co-owners of the business of the Plaza Extra Stores.

1.24 "Partners" means Yusuf and Hamed.

1.25 "Partnership Assets" means any and all property, assets, rights or interest of the Partnership whether tangible or intangible, and any Liquidation Proceeds realized therefrom, including without limitation, all Available Cash, Encumbered Cash, Litigation, and any Litigation Recovery.

1.26 "Plan" means this Final Wind Up Plan of the Plaza Extra Partnership, including exhibits, as it may be amended, modified or supplemented from time to time.

1.27 "Plaza Extra-East" means the supermarket located at Sion Farm, St. Croix.

1.28 "Plaza Extra-Tutu Park" means the supermarket located at Tutu Park, St. Thomas.

1.29 "Plaza Extra-West" means the supermarket located at Estate Plessen (Grove Place), St. Croix.

1.30 "Plaza Extra Stores" means Plaza Extra-East, Plaza Extra-Tutu Park, and Plaza Extra-West.

1.31 "Termination Date" means six months following the Effective Date, when the Liquidating Partner contemplates completing the winding up of the Partnership.

1.32 "United" means United Corporation.

1.33 "Wind Up Budget" means the budget established to satisfy the anticipated Wind

Up Expenses and to satisfy the Debts set forth in **Exhibit A** hereto.

1.34 "Wind Up Expenses" means the costs and expenses incurred by the Liquidating Partner for the purpose of:

(i) operating the Plaza Extra Stores during the period required to liquidate the Partnership Assets;

(ii) prosecuting or otherwise attempting to collect or realize upon the Litigation.

(iii) assembling and selling any of the Partnership Assets or otherwise incurred in connection with generating the Liquidation Proceeds;

(iv) resolving Disputed Claims and effectuating distributions to Creditors under the Plan; or

(v) otherwise implementing the Plan and winding up the Partnership.

1.35 "Yusuf" means Fahti Yusuf.

1.36 "Yusuf Sons" means Maher Yusuf, Nejeh Yusuf, and Yusuf Yusuf.

Section 2. APPOINTMENT OF MASTER

The Honorable Edgar D. Ross, appointed by Order Appointing Master in the Case, entered September 18, 2015, shall serve as Master to oversee and act as the judicial supervision of the wind up efforts of the Liquidating Partner.

Section 3. LIQUIDATING PARTNER

Yusuf shall be the Liquidating Partner with the exclusive right and obligation to wind up the Partnership pursuant to this Plan and the provisions of the V.I. Code Ann. tit. 26, § 173(c), under the supervision of the Master. No person other than the Liquidating Partner may act on behalf of the Partnership, represent the Partnership in any official capacity or participate in management or control of the Partnership, for purposes of winding up its business or otherwise. The Liquidating Partner's rights and obligations relative to the winding up, subject to the review and supervision of the Master, shall be deemed to have commenced as of April 25, 2013, the date of the issuance of the Preliminary Injunction in the Case. All acts of the Liquidating Partner, except those customarily undertaken in the ordinary course of the ongoing business operations of the Partnership, are subject to prior notification to and approval of the Master.

Section 4. POWERS OF LIQUIDATING PARTNER

Pursuant to the Act, the Liquidating Partner shall have authority to wind up the Partnership business, including full power and authority to sell and transfer Partnership Assets, engage legal, accounting and other professional services, sign and submit tax matters, execute and record a statement of dissolution of Partnership, pay and settle Debts, and marshal Partnership Assets for

equal distribution to the Partners following payment of all Debts and a full accounting by the Partners, pursuant to agreement of the Partners or by order of the Court.

The Liquidating Partner shall use his best efforts to complete the winding up of the Partnership on or before the Termination Date.

Section 5. DUTIES OF LIQUIDATING PARTNER

The Liquidating Partner shall devote such time as is reasonably necessary to wind up and liquidate the Partnership in the manner provided herein and as required by the Act.

The Liquidating Partner shall be required to report on a bi-monthly basis to Hamed and the Master as to the status of all wind up efforts. In addition, the Liquidating Partner shall prepare and file all required federal and territorial tax returns and shall pay all just Partnership Debts. The Liquidating Partner shall provide a Partnership accounting. Any Liquidation Proceeds and Litigation Recovery shall be placed into the Claim Reserve Account from which all Partnership Debts shall first be paid. Following payment of all Partnership Debts, any remaining funds shall continue to be held in the Claims Reserve Account pending distribution pursuant to agreement of the Partners or order of the Court following a full accounting and reconciliation of the Partners' capital accounts and earlier distributions.

Section 6. SALARIES, WITHDRAWALS

As compensation for serving as Liquidating Partner, Yusuf shall continue to receive the salary Yusuf is currently receiving as shown on the Wind Up Budget. This compensation will be considered an expense of winding up the Partnership's business. For at least one hundred twenty (120) days following the Effective Date, the Hamed Sons and Yusuf Sons shall continue to receive their current salaries in return for assisting the Liquidation Partner in the wind up of the Partnership. Thereafter, the Liquidating Partner shall have the right to terminate their services upon fourteen (14) days notice as the Partnership business operations decline and their services are no longer needed. The Hamed Sons and Yusuf Sons shall be terminated at the same time.

Section 7. CRIMINAL CASE AND ENCUMBERED CASH

There exists a plea agreement ("Plea Agreement") entered by United in the Criminal Case. Nothing in this Plan or the Partnership wind up efforts shall undermine or impair United's Plea Agreement. The President of United shall meet with the U.S. Department of Justice to see what impact, if any, the implementation of the Plan and wind up of the Partnership may have on United's compliance with the Plea Agreement.

The Encumbered Cash shall be deposited into the Claims Reserve Account immediately after it is no longer encumbered by the Restraining Order entered in the Criminal Case and, thereafter, held for distribution in accordance with this Plan.

Section 8. PLAN OF LIQUIDATION AND WINDING UP

1) Plaza Extra-East

Yusuf will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-East: the inventory at one half of the landed cost and the equipment at its depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. In the event that Yusuf is unwilling to pay the appraised depreciated value of the equipment, the same shall be sold at public auction under the direction and supervision of the Master, with net proceeds equally divided and disbursed by the Master. Upon payment for such inventory, and upon payment (or auction and distribution of proceeds) for the equipment, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-East without any further involvement of Hamed or the Hamed Sons, and free and clear of any claims or interest of Hamed.

For purposes of winding up the Partnership, Plot 4-H Estate Sion Farm shall not be considered Partnership property and is not subject to division under this Plan, without prejudice to any accounting claim that may be presented by Hamed.

2) Plaza Extra-Tutu Park

The Partners will be allowed to bid on Plaza Extra-Tutu Park at a closed auction supervised by the Master. The auction shall take no more than one day and should not cause any delay in implementing this Plan or disrupt the business operations of any Plaza Extra store. The Partners may discuss and jointly or individually propose the format and procedures for the auction, subject however to the Master's sole determination.

The Partnership assets sold in connection with Plaza Extra-Tutu Park shall consist of the leasehold interests, the inventory, equipment, and all leasehold improvements not a part of the real property. The value of such assets shall be determined by a qualified appraiser selected by the Master prior to the auction. Whichever Partner submits the winning bid for Plaza Extra-Tutu Park shall receive and assume all existing rights and obligations to the pending litigation with the landlord in the Superior Court of the Virgin Islands, Division of St. Thomas and St. John, *United Corporation d/b/a Plaza Extra v. Tutu Park Limited and P.I.D., Inc.* (Civ. No. ST-01-CV-361) (the "Tutu Park Litigation"). The Partner who receives and assumes said rights and obligations to the Tutu Park Litigation shall be obligated to reimburse the other Partner 50% of the amount of costs and attorneys' fees incurred to date directly attributable to the Tutu Park Litigation. Additionally, the prevailing Partner at auction shall be responsible for obtaining releases or otherwise removing any continuing or further leasehold obligations and guarantees of the Partnership and the other Partner.

3) Plaza Extra-West

Hamed will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-West: inventory at one half of the landed cost and the equipment at its depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. In the event

that Hamed is unwilling to pay the appraised value of the equipment, the same shall be sold at public auction under the direction and supervision of the Master. Upon payment for the inventory, and upon payment (or auction and distribution of the proceeds) for the equipment, Hamed will assume full ownership and control and may continue to operate Plaza Extra-West without any further involvement of Yusuf, Yusuf's sons or United, and free and clear of any claims or interests of Yusuf or United.

Hamed will be entitled to a recordable non-exclusive easement for the existing sewage line servicing Plaza Extra-West, which shall not preclude Plessen Enterprises, Inc., the owner of the servient parcel, from reserving the right to tap into and to utilize such sewage line.

4) Stock of Associated Grocers

The stock of Associated Grocers held in the name of United shall be split 50/50 between Hamed and Yusuf, with United retaining in its name Yusuf's 50% share, and 50% of such stock being reissued in Hamed's name or in the name of his designee.

5) Plaza Extra Name

The Master will conduct and supervise a closed auction wherein the Partners alone will be allowed to bid to purchase the trade name "Plaza Extra." The prevailing Partner at the auction shall receive the right to the exclusive use of the name "Plaza Extra," to the exclusion of all others, including the other Partner, who shall be forever barred from using the name "Plaza Extra" in connection with operation of any business in the U.S. Virgin Islands.

The auction shall take no more than one day and will be conducted in a manner that will not cause any delay in implementing this Plan or any disruption in the business operations of any Plaza Extra store. The Partners may discuss and jointly or individually propose the format and procedures for the auction, subject however to the Master's sole determination.

Section 9. Steps to Be Taken for the Orderly Liquidation of the Partnership

This Plan is conditioned upon the ability of Hamed and Yusuf to use the 50% interest of each in Available Cash and Encumbered Cash to purchase the non-liquid Partnership Assets. While the bid-in process may continue, actual payment of the funds shall be subject to approval of the Master, the Court and, to the extent necessary, the District Court.

Step 1: Budget for Wind Up Efforts

The Wind Up Budget for the Wind Up Expenses is attached hereto as **Exhibit A.** Such expenses include but are not limited to, those incurred in the liquidation process, costs for the continued operations of Plaza Extra Stores during the wind up, costs for the professional services of the Master, costs relating to pending litigation in which Plaza Extra and/or United *d/b/a* Plaza Extra Stores is named as a party, and the rent to be paid to the landlords of Plaza Extra-East and Plaza Extra-Tutu Park.

Step 2: Setting Aside Reserves

The sum of Ten Million Five Hundred Thousand Dollars ($10,500,000.00) shall be set aside in a Liquidating Expenses Account to cover the Wind Up Expenses as set out in the Wind Up Budget with a small surplus to cover any miscellaneous or extraordinary Wind Up Expenses that may occur at the conclusion of the liquidation process. Such Account shall be held in trust by the Liquidating Partner under the supervision of the Master. All disbursements shall be subject to prior approval by the Master. The Liquidating Partner shall submit to Hamed and the Master each month a reconciliation of actual expenditures against the projected expenses set forth in Exhibit A. Unless the Partners agree or the Master orders otherwise, the Liquidating Partner shall not exceed the funds deposited in the Liquidated Expenses Account.

Step 3: Continued Employment of Employees

Yusuf and Hamed, and their respective successors, shall attempt to keep all employees of the Plaza Extra Stores fully employed, not including members of the Hamed and Yusuf families. Although approval of this plan should avoid any need to comply with the provisions of the Virgin Islands Plant Closing Act ("PCA"), to the extent necessary, Yusuf and Hamed, and their respective successors, shall comply with the PCA for any affected employees of the Plaza Extra Stores as a result of the winding up and closure of the Partnership business. Any severance payments due to the employees determined in accordance with the PCA shall be paid by the Master out of the Claims Reserve Account.

Step 4: Liquidation of Partnership Assets

The Liquidating Partner shall promptly confer with the Master and Hamed to inventory all non-Plaza Extra Stores Partnership assets, and to agree to and implement a plan to liquidate such assets, which shall result in the maximum recoverable payment to the Partnership. All previous Partnership accountings are deemed preliminary. Hamed's accountant shall be allowed to view all partnership accounting information from January 2012 to present and to submit his findings to the Master. The Liquidating Partner is ordered to submit an updated balance sheet to Hamed and to the Master without delay.

Step 5: Other Pending Litigation

The pending litigation against United, set forth in **Exhibit C**, arises out of the operation of the Plaza Extra Stores. As part of the wind up of the Partnership, the Liquidating Partner shall undertake to resolve those claims in Exhibit C, and to the extent any claims arise in the future relating to the operation of a Plaza Extra Store during the liquidation process, within the available insurance coverage for such claims. Any litigation expenses not covered by the insurance shall be charged against the Claims Reserve Account.

Step 6: Distribution Plan

Upon conclusion of the Liquidation Process, the funds remaining in the Liquidation Expenses Account, if any, shall be deposited into the Claims Reserve Account. Within forty-five (45) days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan for the

funds remaining in the Claim Reserve Account. Thereafter, the Master shall make a report and recommendation for distribution to the Court for its final determination. Nothing herein shall prevent the Partners from agreeing to distribution of Partnership Assets between them rather than liquidating Partnership Assets by sale and distributing proceeds of such sale(s).

Step 7: Additional Measures to Be Taken

a) Should the funds deposited into the Liquidating Expenses Account prove to be insufficient, the Master shall transfer from the Claims Reserve Account sufficient funds required to complete the wind up and liquidation of the Partnership, determined in the Master's discretion.

b) All funds realized from the sale of the non-cash Partnership Assets shall be deposited into the Claims Reserve Account under the exclusive control of the Master.

c) All bank accounts utilized in the operation of the Partnership business shall be consolidated into the Claims Reserve Account.

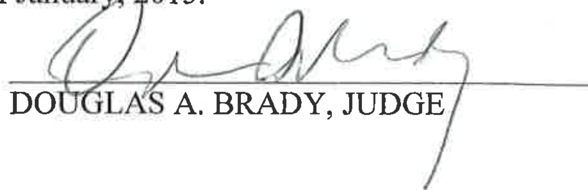
d) All brokerage and investment accounts set forth in **Exhibit D** shall be turned over to the Master as part of the Claims Reserve Account.

e) Any Partnership Assets remaining after the completion of the liquidation process shall be divided equally between Hamed and Yusuf under the supervision of the Master.

Section 10. INDEX OF EXHIBITS

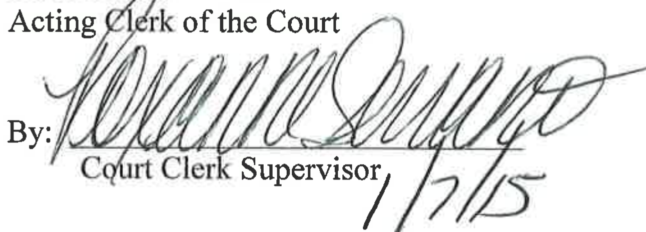
Exhibit A:	Wind Up Budget
Exhibit B:	Plaza Extra Supermarkets Balance Sheet
Exhibit C:	Pending Litigation Against United
Exhibit D:	List of Brokerage and Investment Accounts

DONE AND SO ORDERED this 7 day of January, 2015.



DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court



By: ____________
Court Clerk Supervisor 1/7/15

CERTIFIED TO BE A TRUE COPY
This 9th day of Jan 20 15

CLERK OF THE COURT

By ____________ Court Clerk

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FAHTI YUSUF.	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	**S. Ct. Civ. NO. 2015-0001**
	)	Consolidated with 2015-0009
MOHAMMED HAMED, *et al*,	)	
	)	
Appellees.	)	
	)	

DECLARATION OF JOEL H. HOLT

I, Joel H. Holt, declare, pursuant to 28 U.S.C. Section 1746, as follows:

1. I am counsel of record in this case and am personally familiar with the facts set forth in this declaration.

2. Neither party sought any relief regarding the April 30, 2014, Board meeting or the Plessen/KAC lease in their respective complaint and counterclaims (as filed or amended), which can be provided if requested and which are included in the Joint Appendix that will be filed.

3. While Hamed did not seek dissolution of the partnership in his complaint (as filed or amended), Yusuf included a count for dissolution as an alternate request if it were determined that a partnership existed. A copy of that pleading is attached to this declaration.

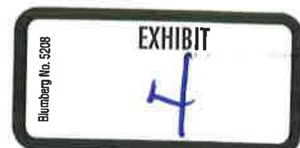
4. Both parties eventually sought dissolution of the partnership. Those pleadings can be provided if requested and are included in the Joint Appendix that will be filed (as well as filed with the Stay Motion on file).

5. The parties have resolved the issue about the sons of a partner being no longer employed once a store is in the possession of the other partner, which stipulation has been filed with the trial court. Thus, this point is moot as far as this appeal is concerned.

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

Dated: February 22, 2015

JOEL H. HOLT



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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and UNITED CORPORATION,

Defendants/Counterclaimants,

vs.

WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,

Additional Counterclaim Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

JURY TRIAL DEMANDED

SUPERIOR COURT
THE VIRGIN ISL.
ST. CROIX
14 JAN 13 P3:07

FIRST AMENDED COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 13 and Super. Ct. R. 34, for their First Amended Counterclaim ("Counterclaim") against Plaintiff Mohammad Hamed ("Plaintiff" or "Hamed") and the Additional Counterclaim Defendants named below, Defendants United Corporation d/b/a Plaza Extra ("United") and Fathi Yusuf ("Yusuf") (collectively, the "Defendants") allege as follows:

JURISDICTION

1. This Court has subject matter jurisdiction pursuant to V.I. Code Ann. tit. 4, § 76(a). Venue is proper pursuant to V.I. Code Ann. tit. 4, §78(a).

PARTIES

2. Yusuf, a citizen and resident of St. Croix, U.S. Virgin Islands, owns 36% of the outstanding stock of United and is the registered agent, treasurer and secretary of United.

3. United is a U.S. Virgin Islands corporation, which was organized on January 15, 1979 and is currently in good standing. The owners and officers of United are and always have been Yusuf and his direct family members.

4. United is the fee simple owner of certain improved real property known as 4C and 4D Estate Sion Farm, St. Croix, U.S. Virgin Islands, which is improved with buildings that comprise the United Shopping Plaza (the "Shopping Center"). This land was purchased prior to the events at issue in this case.

5. United leases retail space at its Shopping Center to commercial tenants and is the sole owner of the "Plaza Extra" trade name/trademark, under which it does business.

6. Hamed is citizen of Jordan, who resides periodically on St. Croix. Hamed, upon information and belief, has resided in Jordan for approximately the last 15 years, having retired sometime in 1996.

7. Additional Counterclaim Defendant Waleed Hamed ("Waleed") is a son of Hamed and a citizen and resident of St. Croix, U.S. Virgin Islands.

8. Additional Counterclaim Defendant Waheed Hamed ("Waheed") is a son of Hamed and a citizen and resident of St. Thomas, U.S. Virgin Islands.

9. Additional Counterclaim Defendant Mufeed Hamed ("Mufeed") is a son of Hamed and a citizen and resident of St. Croix, U.S. Virgin Islands.

10. Additional Counterclaim Defendant Hisham Hamed ("Hisham") is a son of Hamed and a citizen and resident of St. Croix, U.S. Virgin Islands.

11. Additional Counterclaim Defendant Plessen Enterprises, Inc. ("Plessen") is a U.S. Virgin Islands corporation, the outstanding stock of which is owned 50% by Hamed or his family members and 50% by Yusuf or his family members.

FACTS COMMON TO ALL COUNTS

I. The Nature Of The Relationship Between Hamed And Yusuf

12. In this Counterclaim, Defendants will plead in the alternative. Defendants deny the existence of any partnership between Hamed and Yusuf as alleged in the Complaint. In the event a partnership between Yusuf and Hamed is nevertheless found to exist, then such

partnership gives rise to various duties and claims. Likewise, in the absence of a partnership, other claims exist. Hence, Defendants have set forth alternative pleadings to allege those claims which exist in the event there is or is not a partnership between Hamed and Yusuf.

13. Three supermarket stores were opened that are the subject of this suit. In or around 1986, United opened the first Plaza Extra supermarket in Sion Farm, St. Croix ("Plaza Extra – East").

14. In 1993, United opened the Plaza Extra supermarket in Tutu Park Mall, St. Thomas ("Plaza Extra – Tutu Park").

15. In 2000, United opened the Plaza Extra supermarket in Grove Place, St. Croix ("Plaza Extra – West") (collectively, the "Plaza Extra Stores"). This Counterclaim relates to the ownership, operation and net profits of the three Plaza Extra Stores.

A. Scores Of Documents Contradict The Existence Of Any Partnership.

16. Hamed has sought, *inter alia*, a declaratory judgment as to the existence of a partnership between himself and Yusuf for the operation of the Plaza Extra Stores.

17. Specifically, Hamed contends he "is entitled to declaratory relief finding that all funds belonging to…[Hamed] held by United Corporation are held in (sic) either in the course of business as an agent, as Yusuf's alter ego or as a constructive trust for…[Hamed], which must be returned forthwith." (Complaint, ¶ 46).

18. Hamed further contends, "[i]n the alternative, Mohammad Hamed is entitled to declaratory relief finding that an amount equal to 50% of the Partnership profits and property held in United for distribution to or for the benefit of Yusuf are owed to Hamed under the Partnership Agreement or pursuant to a constructive trust for Hamed." (Complaint, ¶ 46).

19. Hamed also seeks "a judicial determination that the defendant United Corporation would be unjustly enriched if it does not disburse the Partnership funds and property belonging to the plaintiff forthwith." (Complaint, Prayer for Relief ¶ 9).

20. Despite Hamed's new-found contentions in his Complaint, the relationship between Hamed and Yusuf cannot be defined in traditional "western" legal terms as an "oral" partnership for the operation of the Plaza Extra Stores.

21. Every official document filed relating to the Plaza Extra Stores, representation made to a government agency, tax filing signed under penalty of perjury, and all taxes paid, unequivocally prove that a partnership never existed between Hamed and Yusuf.

22. In fact, these official filings demonstrate that the Plaza Extra Stores are, in fact, operated under United's corporate umbrella.

23. United has corporate officers and stockholders, none of whom are Hamed or members of his family. United owns assets and engages in businesses other than the Plaza Extra Stores.

24. United has corporate debts utilized to fund and operate the Plaza Extra Stores.

25. United has paid all the taxes on the income derived from the operation of the Plaza Extra Stores.

26. United was incorporated and operating for years before any business dealings or relationship between Hamed and Yusuf occurred.

27. Further, over the last ten years, a federal criminal investigation was conducted into the inner workings of the Plaza Extra Stores with knowledge of all allegedly involved. The conclusion of the U.S. Department of Justice was that United, which existed as represented on all official filings, was the owner of the Plaza Extra Stores as well as other assets, and that the ownership of United is as defined by its business records of stock ownership. Therefore, it has already been determined that the Plaza Extra Stores are not owned by any alleged "partnership" between Hamed and Yusuf.

28. As a result of this federal criminal investigation and case (V.I. Dist. Ct. Case No. 1:05-cr-00015-RLF-GWB) (the "criminal case"), serious criminal repercussions were looming

against United, its owners, officers and certain management employees, including two of Hamed's sons, Waleed and Waheed.

29. Not once during the decade long criminal case, did Hamed ever assert that he was a 50/50 partner in the business or enterprise under investigation for criminal conduct for failing to report taxable income from the Plaza Extra Stores. Rather, Hamed stood by quietly, out of the country, while it was determined that the corporate entity, United, would bear the entire weight of the criminal responsibility for under-reporting income from the Plaza Extra Stores.

30. United's assets were frozen pending resolution of the criminal case. For more than ten years, Hamed made no claim to the frozen assets including millions of dollars in cash.

31. Ultimately, United entered into a plea agreement with the government, filed amended tax returns for multiple years, and paid millions of dollars in taxes to true-up the under-reporting issues. Hamed did not contribute or offer to contribute anything in this entire process.

32. Now that the criminal case is coming to conclusion, the taxes and penalties have been paid, and despite the volumes of official documentation to the contrary, Hamed, through his son and purported agent, Waleed, emerges from the shadows to contend that for more than 25 years, he had an "oral" partnership with Yusuf for the operation of the Plaza Extra Stores and with it, rights as a 50/50 partner.

B. Oral Statements Are Not Sufficient To Constitute Legal Admissions Or Contradict Documentary Evidence.

33. To support his position, Hamed relies upon oral representations which, for the most part, directly contradict the wealth of documentary evidence.

34. Further, Hamed, attempts to import a "western" legal meaning to the oral statements of both himself and Yusuf.

35. This effort is problematic for a number of reasons: 1) both Hamed and Yusuf use English as a second language and, therefore, at best, their English cannot be said to reflect a

reliable level of fluency so as to constitute admissions and/or intent to attribute a "western" meaning to terms; and 2) the American legal terms that they sometimes use are understood differently in Islamic/Middle Eastern cultural and legal frameworks.

36. Both Hamed and Yusuf immigrated to the United States as adults. They were raised in a non-"western" legal system in which Islamic legal principles applied. Islamic law traditionally denotes *all* forms of associations between individuals as "partnerships." However, "partnerships" under Islamic law have no direct corollary in "western" legal terms. Rather, some aspects or elements of a traditional "western"- defined partnership may exist but certain key elements required for a partnership with enforceable legal rights do not. Hence, the comparison breaks down rather quickly.

37. Further, there are many different types of "partnerships" under Islamic law, none of which are a mirror image of a "partnership" as defined in "western" legal terms[1]. In particular, a form of partnership exists in Islamic law, which allows for receipt of profits in some proportion to the investment made but without managerial control or liability for debt. While this arrangement may be deemed a "partnership" in Islamic law, such an arrangement is not a partnership in the traditional "western" sense as it is missing essential hallmarks of a true partnership.

38. Yusuf is not a lawyer, has not studied law and has testified that he does not know the "legal definition" of the term "partner" or "partnership."

39. Yusuf has testified that to the extent he has made references to someone as his "partner" it was done casually as opposed to denoting legal significance.

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[1] Many scholarly articles in comparative law explain this phenomenon and the difficulty in translating legal relationships where no legal counterpart exists. Much has also been written as to the inability to correlate certain business relationships, duties and associations into "western" legal forms and the adverse financial impact this has had upon Islamic business relationships. Stewart, Glenn "Examining The Islamic Concepts of Ownership, Partnership and Equity Holdings from a Western Perspective." *Glenn Stewart Observer*, 7 December, 2011. Web. 7 December, 2011; Bilal, Gohar "Business Organizations under Islamic Law – A Brief Overview, Proceeding of the Third Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities." *Center for Middle Eastern Studies, Harvard University*, pp. 83-89. Web. (2011).

40. Oral statements (even if not complicated by language and cultural differences) are not dispositive of the nature of an arrangement, rather it is the actual transaction or interaction between the parties which defines the nature of their relationship.

41. Because the oral representations of Yusuf and Hamed do not constitute admissions of a traditional "western" partnership arrangement, Hamed cannot bear his burden of demonstrating he is Yusuf's "50/50 partner."

42. At best, Hamed has enjoyed an incredibly lucrative oral arrangement with Yusuf, his brother-in-law, whereby his relatively small loan/investment ($225,000) and even less significant advances (approximately $175,000) have been repaid more than a hundred fold, simply because Hamed provided funds when United needed them to complete its Shopping Center and because Hamed was "family." That arrangement provided Hamed with not only repayment of the monies he loaned on a non-recourse basis, but also repaid him on a periodic basis with 50% of the net profits of the Plaza Extra Stores, which amounts varied depending upon the profitability of the business. Unfortunately for Hamed, this agreement does not provide him with an ownership interest in the Plaza Extra Stores. Nor does it afford Hamed the ability to exert any authority over the operations of the Plaza Extra Stores, to negotiate for their leases, or to determine whether to continue or liquidate their operations.

43. While Hamed may have loaned Yusuf money so that United could open Plaza Extra - East, that loan was repaid and the investment has provided significant returns. In any event, a loan from a family member does not entitle him to an ownership interest in the business that benefited from the loan.

44. Nor can Hamed's services provide any consideration for payment of the 50% net profits, since he received payment for his labor as a salaried employee of United.

45. Thus, if United decides to end operations of the Plaza Extra Stores such that no further net profits exist or to charge a rental expense for internal accounting purposes for the

retail space occupied by Plaza Extra - East, Hamed may not protest, object or exert any influence over such decisions.

46. Other than the oral representations, which Hamed would like to serve as the linchpin for his alleged "partnership," both Hamed and Yusuf have conducted their business dealings consistent with the written documentation, owning various assets in corporate forms with properly defined stock ownership. Hence, Hamed has never had any ownership interests in the Plaza Extra Stores and, therefore, can exert no control over the operations and decisions of the business.

II. History Of The Plaza Extra Stores – The Financing and the Investors

47. Before any of the Plaza Extra Stores ever opened, Yusuf wanted to "put something together for my children to secure their future."[2]

48. United bought the real estate located at Sion Farm, St. Croix, in fee simple. In addition, United needed capital to finance the construction of the Shopping Center, which Yusuf envisioned would house a supermarket and other businesses.

49. Initially, Yusuf approached traditional bank lenders. These lenders advised that they were unwilling to provide construction loans but assured Yusuf that once the building was in place, they would provide a loan for the operations of the supermarket business.

50. However, United needed additional capital to fund the construction. At various points in time, when United needed additional resources that could not be secured fully through traditional lending, Yusuf would turn to family members and others to provide him loans or investments.

51. All of these loan/investments were handled in the same manner, to wit: a) monies were given to Yusuf as a loan or investment; b) Yusuf agreed to repay or provide a return on the

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[2] Transcript utilized by Hamed during Preliminary Injunction hearing to allegedly demonstrate his "partnership" with Hamed. (Feb. 2, 2000, Yusuf Depo, p. 11, l. 14-15, taken in Ahmed Idheileh v. United Corporation and Fathi Yusuf, Territorial Court of the Virgin Islands, Division of St. Thomas and St. John, Civil No. 156/1997).

investment, equal to a percentage of the net profit from the Plaza Extra Stores or the Shopping Center; c) the creditors/investors did not receive ownership interests in the businesses; d) the creditors/investors did not exercise control over the businesses and had no authority to make management decisions concerning the businesses; e) the creditors/investors were not liable for the debts of the Plaza Extra Stores or any mortgages or other encumbrances upon the Shopping Center; f) the creditors/investors were not obligated to make any further contributions beyond their initial investment; g) the creditors/investors were not liable for losses even though the return on their investment may vary depending upon the profitability of the business, and h) while Yusuf may discuss matters relating to the business with his creditors/investors, he retained full and complete authority to make management decisions on behalf of United as to its business operations and was not required to secure his creditor/investor's approval or permission.

52. At best, the creditors/investors had an oral agreement for repayment of their investment, which is subject to various defenses including, *inter alia*, the statute of frauds and statute of limitations.

A. Various Investors All Had Similar Investment Structures.

53. In the early 1980's, United needed additional capital to fund the construction of its Shopping Center, so Yusuf approached his brother, Ahmad Yusuf, in Kuwait, who loaned Yusuf the $1.5 million dollars needed for the construction. Yusuf originally agreed to repay his brother for the loan by giving him 40% of the net profits of the Shopping Center. As additional funds were still needed, Yusuf's brother provided more funds, in consideration of which, Yusuf agreed to repay his brother by providing him 50% of the net profits of the Shopping Center. At each point, Yusuf characterized his arrangement with his brother as his "partner."[3]

[3] Feb. 2, 2000, Yusuf Depo, p. 11, l. 14; p.12, l. 13-17; Ahmed Idheileh v. United Corporation and Fathi Yusuf, Territorial Court of the Virgin Islands, Division of St. Thomas and St. John, Civil Action File No. 156/1997.

54. After the additional funds from Yusuf's brother were exhausted, a further $300,000 was needed to complete the construction. At this point, in mid-1983, Yusuf borrowed $225,000.00 from his brother-in-law, Hamed. The loan was made on a non-recourse basis to assist Yusuf by providing funds to United so it could open Plaza Extra – East, just as Yusuf's brother had done earlier with the over $1.5 million. In recognition of Hamed's loan/investment, and other advances subsequently made by Hamed of approximately $175,000.00, Yusuf agreed that Hamed would receive a percentage of the net profits. Ultimately, it was agreed that Hamed was to receive 50% of the net profits of Plaza Extra-East as a return on this investment and repayment of the loan.

55. Hamed was to be repaid periodically and receive his return on his investment from the net profits of Plaza Extra – East on a set percentage basis. However, recovery of the return on the investment occurred upon a specific request. If Hamed sought to recover funds from his investment, he would coordinate with Yusuf and those funds would be given in cash and a notation would be made as to the amount given so as to insure an equal amount was paid to Yusuf from these net profits.

56. Hamed received no ownership interest in Plaza Extra – East. Hamed, also had no managerial control over the operations of Plaza Extra – East.

57. Hamed's risk was limited to only the amount he loaned/invested. He was not liable for debts and was not a signatory or guarantor to the loans taken by United, which Yusuf guaranteed. Hence, as Hamed had very limited resources, he was never liable for losses nor obligated to make any contributions to cover losses, even though Hamed's return fluctuated with the profitability of the business.

58. After the Shopping Center was fully built (except for the supermarket) and was approximately 80% occupied by tenants, Yusuf, on behalf of United, pursued another traditional loan. Although United applied for a $2.5 million dollar loan, it was only able to secure a $1.1

million dollar loan from Banco Popular. Yusuf personally guaranteed United's loan and collateralized it with his personal property. Neither Yusuf's brother nor Hamed were obligated under United's loan as guarantors or otherwise.

59. As additional monies were still required to open the supermarket at Plaza Extra - East, Yusuf next turned to his nephews and, likewise, offered a repayment plan that was based upon a percentage of profits. Similarly, at this point Hamed provided additional funds (the $175,000.00) and was to receive a return on that loan/investment based upon a percentage of the net profits from Plaza Extra – East.

60. While certain funds were provided by the nephews, they were unable to continue their support and requested a return of their investment. Unable to return their loan/investment immediately, Yusuf agreed to pay his nephews a set amount for both a return of their investment and his use of their investment funds calculated at 12% interest on their investment funds plus a penalty of $75,000.00 each. Yusuf offered the same option to Hamed as well. Hamed agreed to let his investment remain rather than demanding immediate repayment in exchange for a greater repayment/return arrangement. It was at this point, that it was agreed that Hamed would be entitled to 50% of the net profits of Plaza Extra – East as his return on his investment/loan.

61. In or about February 1986, Yusuf secured a loan on behalf of United from First Pennsylvania Bank for $2.5 million. From these loan proceeds, United paid the $1.1 million loan from Banco Popular. The remaining funds were used to purchase inventory and additional equipment needed to open Plaza Extra – East. Just as with the prior loan, Yusuf was the guarantor and pledged his personal assets as collateral. Neither Hamed nor Yusuf's brother were signatories to the loan or acted as guarantors.

62. Hamed did not own any real property, investments or other assets to use as security for the loan obtained by United, nor did any of his family members.

63. Other loans were guaranteed by Yusuf as well to insure the opening of the Plaza Extra – East store.

64. The business took time to develop and there were set backs. Yusuf worked around the clock to keep the business going and it eventually became profitable.

65. However, in 1992, Plaza Extra - East was destroyed in a fire.

66. As the owner, United insured Plaza Extra - East and was the sole beneficiary of the subject insurance policy, the proceeds of which were used to rebuild Plaza Extra - East.

67. Neither Hamed nor Yusuf's brother were obligated to contribute to the rebuilding efforts of Plaza Extra – East nor liable for any losses it sustained.

B. The Idheileh - $750,000 Investment

68. As Plaza Extra – East was being rebuilt, a Mr. Ahmad Idheileh approached Yusuf regarding a store in St. Thomas.

69. United entered into a Joint Venture agreement with Mr. Idheileh. Just as with Plaza Extra – East, Mr. Idheileh loaned certain monies for the opening of the store. His risk was limited to the amount he loaned/invested. He was to receive, as his return on the investment, a percentage of the net profits of Plaza Extra –Tutu Park. However, Plaza Extra –Tutu Park needed much more capital than the Idheileh loan/investment to open and operate. Hence, Yusuf secured and guaranteed the loan given to United for Plaza Extra-Tutu Park, collateralizing the loan with his own real property. Just as with Plaza Extra – East, neither Hamed nor Idheileh bore any liability for these bank loans or risks.

70. Plaza Extra – Tutu Park took time before it was profitable and faced significant competition with the opening of the Cost-U-Less store. As a result, there was financial pressure on the business and strained relations with Idheileh. While Idheileh and United attempted to resolve their differences, on January 16, 1994, they ultimately agreed to part ways. They

formalized their agreement in a written Termination Agreement, whereby Idheileh was paid a sum certain as agreed by the parties.

71. Three years later, in 1997, once Plaza Extra – Tutu Park was operating and successful, Idheileh sued both United and Yusuf. Idheileh contended he "owned" 33% of Plaza Extra –Tutu Park and that the Termination Agreement was signed under duress. Idheileh lost as the Court found that the Termination Agreement was enforceable. Further, the Joint Venture document reflected that no ownership interest was ever given. Rather, it set out the terms of the investment, which mirror the earlier investor arrangements, to wit: a) "*United* plans to open and operate a supermarket…at Tutu Park," b), "United wishes to secure further *investment* in the supermarket," c) "Idheileh agrees to *invest* $750,000 in the supermarket," d) "Idheileh will receive *33% of the net profit* of the supermarket," e) "payments are made pursuant to…*agreement*…and not made unless both parties …agree," f) "*United* shall *retain complete control* over all decisions relating to the supermarket except to the extent it may delegate…".

72. Despite efforts by Hamed to use testimony of Yusuf from the Idheileh case, the issue of a partnership between Hamed and Yusuf was not an issue for adjudication in that case and there was no such judicial finding. Lastly, Idheileh testified that he had never seen Hamed once in any of his dealings with Yusuf and did not believe him to have any interest whatsoever in Plaza Extra – Tutu Park.

III. None of the Hallmarks of a Partnership Exist.

A. Hamed Was A United Employee Without Managerial Control.

73. Hamed was employed by United as a warehouse receiving supervisor. He received a salary for his labor and services until 1996, when he retired and returned to Jordan.

74. Hamed's job was to make sure that the inventory was properly accounted for and not subject to theft. Hamed had no direct access to the safe and no signatory authority on any of the bank accounts of the Plaza Extra Stores. Hamed had no authority in the management and

operations of Plaza Extra – East. As he was not fluent in English, Hamed had no role in the management or supervision of the roughly 100 to 150 employees. He also did not place inventory orders because, as Hamed has previously testified, he cannot read English.

75. Hamed received weekly checks for his wages and, upon information and belief, has always filed his tax returns as an employee of United. Further, United employed each of Hamed's four sons, Waleed, Waheed, Mufeed, and Hisham (collectively, the "Hamed Sons") as managers. Each of the Hamed Sons was assigned to one of the three Plaza Extra Stores operated by United. Hamed has acknowledged under oath that the Hamed Sons are employees of United.

76. The Hamed Sons worked for United at the same time as Hamed. Their roles did not change following Hamed's retirement. Rather, Waleed, for example, was a manager during the period that his father worked at United and remained a manager thereafter. His duties, responsibilities and obligations did not change or increase after his father's retirement.

77. Hamed never received any ownership interest in the Plaza Extra Stores, ownership control, or stock in United, which is the actual owner of the Plaza Extra Stores. Hamed did not participate in the management and decision making of the Plaza Extra Stores. Hence, upon his retirement, Hamed had no ownership authority to provide to Waleed to act as his "authorized agent." Indeed, the September 12, 2012, power of attorney given by Hamed to Waleed makes no mention of any partnership or Hamed's authority as a partner.

78. Rather, it was Yusuf's business acumen, management, and leadership that enabled the Plaza Extra Stores to become a successful grocery business growing to three locations with over 600 employees.

79. As Hamed has admitted under oath, Yusuf was always in charge of all operations of the Plaza Extra Stores. Hamed has readily admitted that he has not worked in a management capacity but instead that "Mr. Yusuf, he is in charge for everybody" and in charge of all the Plaza Extra Stores.

B. Unlike True Partners, Hamed Was Not Responsible For Liabilities of the Plaza Extra Stores.

80. Hamed, unlike Yusuf, is not a guarantor of any loan or lease of United used to fund or operate the Plaza Extra Stores.

81. In a true partnership, each partner is responsible for the liabilities of the partnership. Joint risk, exposure and liability are essential hallmarks of an actual partnership. Over the years, various lawsuits have been initiated against United and/or Yusuf relating to events and operations at the Plaza Extra Stores. Not once has Hamed ever been named as a party or alleged to be an owner of the Plaza Extra Stores in any lawsuit. Notably, Yusuf never sought to include Hamed as a party or otherwise join him in such suits even when facing such risk and liability. Moreover, when defending the criminal case and facing the prospect of paying millions of dollars in taxes and penalties, Yusuf did not contend that Hamed was a 50% owner and, thus, 50% responsible. If ever there was a time to confirm an alleged "partnership," it is when facing serious exposure. This was never done because Hamed was not a true partner or owner of the Plaza Extra Stores.

C. Hamed Had Not Filed Taxes for Over a Decade and When He Did File, He Never Claimed a Partnership Interest.

82. Hamed has never filed (before the commencement of this litigation) a single U.S. Partnership Return (Form 1065) concerning the Plaza Extra Stores.

83. In fact, after retiring in 1996, Hamed never filed any tax returns at all. It was not until after he decided to file this suit, once the criminal case was concluding, that he decided to file a tax return.

84. For a period in excess of 25 years, Hamed never demanded a Schedule K-1 Partnership Schedule from United, Yusuf or the Plaza Extra Stores. Hamed never (before the commencement of this litigation) reported his alleged "partnership interest" in the Plaza Extra Stores to any third-party or governmental agency.

85. Additionally, since 1986, upon information and belief, Hamed never asserted in a single legal document or tax filing that he was a partner of any entity, let alone the partnership alleged in the Complaint.

86. Hamed never filed a return (before the commencement of this litigation) to show any dividends from United, nor has he ever, personally or through his purported agent, Waleed, declared any interest in United. Not a single record indicates any ownership interest by Hamed or any of his children in United.

87. Since 1986, not a single Income Tax Return, Schedule or any other tax document has identified Hamed as having any equity or shareholder interest in United or the Plaza Extra Stores.

88. In the criminal case, Hamed's sons (Waleed and Waheed) always represented to the U.S. Government that they were employees of United, with no interest in the shares of United or ownership in a partnership.

89. Since its inception in 1979, United has reported all of its tax obligations – and has filed all of its tax returns – as a *corporation* under either Subchapters "C" or "S" of the Internal Revenue Code ("IRC") – and never as a *partnership* under any partnership designation of the IRC or otherwise.

D. No Property Was Acquired in Partnership Name.

90. No properties were ever acquired in a partnership name, or any entity resembling a partnership. Rather, if an investment or property was acquired, funds from United would be paid to Yusuf, who would then purchase a property and title it either in both Hamed and Yusuf's name or purchase it in the of name a corporation which they each owned jointly.

91. Hence, Hamed and Yusuf have always demonstrated clean separation of businesses by forming separate corporations to invest in other business activities. Hamed and Yusuf formed the following corporations, owned in equal shares, as follows:

i. **Sixteen Plus Corporation,** a corporation with 1600 shares issued, owned equally between the Yusuf and Hamed families;

ii. **Y&H Investments, Inc.,** a corporation with100 shares issued, owned equally by the Yusuf and Hamed families;

iii. **Plessen Enterprises, Inc.**, a corporation with 1600 shares issued, owned equally between the Yusuf and Hamed families; and

iv. **Peter's Farm Investment Corporation,** a corporation with 1000 shares issued, owned equally between Hamed and Yusuf.

E. Hamed Was Silent As To His Alleged Partnership in the Plaza Extra Stores When United, Yusuf And His Sons Were Facing Criminal Charges And Huge Tax Liabilities.

92. On September 3, 2003, the U.S. Department of Justice indicted United, Yusuf, Maher Yusuf, Waleed, and Waheed in the criminal case.

93. Upon information and belief, Hamed was never indicted because his employment with United was terminated in 1996, and because Hamed had no other management or equity interest in United or the Plaza Extra Stores.

94. Each indicted defendant in the criminal case retained separate defense counsel.

95. In light of the fact that all parties to the criminal case were in agreement as to the corporate structure and operations of United, the parties executed a joint defense agreement, whereby all communications between the criminal defense attorneys could be shared simultaneously without waiver of confidentiality or privileges.

96. The defendants in the criminal case retained a team of Certified Public Accountants and a Tax Attorney to assist the parties in the preparation of the Federal Corporate Tax Returns to comply with the U.S. Justice Department's demand for tax returns, payment of past taxes, interest, and penalties. As of the date of this pleading, the criminal case will have been pending for more than ten years.

97. During this extended period of time, Hamed never sought to intervene in the criminal case to assert that he is a partner of United or Yusuf, or that he has any interest in the Plaza Extra Stores.

98. On March 19, 2010, the parties' defense attorneys, working pursuant to the joint defense agreement, negotiated a plea agreement. The terms of the plea agreement called for the dismissal of all criminal counts against the individual defendants in exchange for United pleading guilty to one count of tax evasion, and the payment of substantial taxes and penalties.

99. At no time, did Hamed's purported agent, Waleed, or his co-defendant, Waheed, raise the issue of a partnership as alleged in the Complaint.

100. In addition, the plea agreement called for the parties to file accurate U.S. Federal Tax Returns and Gross Receipt Returns with the Virgin Islands Bureau of Internal Revenue and the U.S. Internal Revenue Service. Nothing in the plea agreement required the filing of any partnership returns because no partnership existed as acknowledged by the attorneys of Waleed and Waheed.

101. Neither Waleed nor Waheed ever indicated to the U.S. Justice Department that the business arrangement between Hamed and United or Yusuf was anything other than an employment relationship. As such, until the filing of this action, no record existed of any purported "partnership" between Hamed and Yusuf.

IV. The Criminal Case Reveals That Hamed And Waleed Converted Monies from the Plaza Extra Stores.

102. In September of 2010, Yusuf received a partial copy of the FBI file, records, and documents, electronically reproduced and stored on a hard drive. The hard drive contained thousands of documents including bank statements and copies of cancelled checks. The documents were organized under the names of various individuals in the Hamed and Yusuf

families. In other words, whatever the FBI found for any specific person, they would scan and organize the documents under that person's name.

103. Upon review of these documents, Defendants discovered defalcation and conversion of substantial assets including cash from United by Hamed and Waleed.

104. During a search of the documents and files delivered by the U.S. Government, United reviewed documents comprising tax returns for Waleed. An examination of Waleed's tax returns revealed the following significant assets:

a. **Tax Year 1992 (Stocks & Investments) ....$ 408,572.00**

b. **Tax Year 1993 (Stocks & Investments) $7,587,483.00**

105. The detailed stock acquisitions, which were listed meticulously by date of acquisition, price and number of shares purchased, could only have been acquired by Waleed through either a) his unlawful access to monies and other properties belonging to United since Waleed never held any other employment since 1986, other than his employment with United, or, b) his misappropriation of monies which were "partnership" funds for which Waleed may be individually liable, or for which Hamed may be liable in the event that Waleed was acting as Hamed's authorized agent when removing such funds.

106. Upon information and belief, Hamed knew of or directed Waleed's misconduct and personally benefited from his agent's defalcation and conversion of millions of dollars from United.

107. For example, Waleed and Hamed misappropriated funds, which Yusuf and Hamed had agreed to send to a charity in West Bank, Palestine. The money was designated for the building of a concrete batch plant (the "Plant") in an impoverished area to provide the poor with employment opportunities.

108. In 1996, Waleed, as a managerial employee of United, was an authorized co-signatory with Yusuf on various bank accounts in St. Martin and custodian of an account in Waleed's name.

109. Yusuf authorized Waleed to send $1 million to Hamed in the West Bank as a charitable donation on behalf of United. Hamed was required to disperse the money to two local managers that were hired to set up the Plant, which was eventually formed and employed about 38 of the poor in the community.

110. Eventually, Yusuf met in the West Bank with the two managers of the Plant, which was supposed to have been purchased with the $1 million that was sent to Hamed through his agent, Waleed.

111. Yusuf inquired of the managers regarding the operations of the Plant. Yusuf was advised that they were losing sales because they had no money to buy a pump.

112. Yusuf was informed that they did not receive $1 million dollars, but had received only $662,000.00 from Hamed.

113. In fact, bank records revealed that Hamed had actually received $2 million dollars, instead of the $1 million dollars authorized by Yusuf.

114. Upon review of the records received from the U.S. Government, it was revealed that Hamed or Waleed had pocketed $1,338,000 of the $2 million dollars transferred to Hamed by his son, Waleed, and only $662,000 was actually distributed to the charitable project.

V. The Current Controversy Has Resulted in Deadlock and Inability to Operate Plessen.

115. The current controversy between the Hamed and Yusuf families has negatively impacted the ability of Plessen to function and operate.

116. The stalemate between the Yusuf and Hamed families has resulted in deadlock as to the operations of Plessen.

117. In order to preserve the assets of Plessen and insure that its obligations are timely met, Yusuf seeks to dissolve and liquidate Plessen.

VI. United Owned Investments and Businesses In Which Hamed Was Never A Part.

118. United maintains other investments and businesses separate from its operation of the Plaza Extra Stores. At no time did Hamed or any of his children ever participate, manage, or have any interest in United's other operations. Hamed has conceded under oath that he has no interest in United or any of its operations not related to the Plaza Extra Stores.

119. Other than receiving 50% of the net profits of the Plaza Extra Stores, Hamed never received any proceeds, profits, or distributions from United's other operations, which primarily consist of the rents generated by United's real estate holdings.

VII. In the Event of a Partnership, What Were Its Terms?

120. Although Yusuf contends he has no partnership with Hamed, to the extent that their relationship is determined to be a partnership (the "Alleged Partnership"), Yusuf alleges that the parties engaged in a course of conduct and possessed certain understandings as to how monies for the Alleged Partnership were accounted for and to be paid.

121. Further, in the event that the Alleged Partnership is found to exist, Hamed, as a partner owes certain fiduciary duties to the Alleged Partnership and to Yusuf as his partner. Those duties, among other things, include duties of loyalty and to act in the best interests of the Alleged Partnership.

122. Hamed's fiduciary duties to the Alleged Partnership and to Yusuf relate not only to his individual actions as a partner but also, to the extent he purports to act as a partner through his authorized agent, then Hamed's fiduciary duties and, thus, liability for breaches of any such duties, extends to the actions of his authorized agent.

123. Waleed's misappropriation of monies from the Plaza Extra Stores, if acting as an agent of Hamed or at his direction and with his knowledge constitutes a breach of Hamed's fiduciary duties to the Alleged Partnership and to Yusuf for which Hamed is liable.

124. In the event the Alleged Partnership is determined to exist, then Hamed would be responsible for any liabilities of the Alleged Partnership.

VIII. Rent

125. United is the sole owner of the Shopping Center which contains the retail premises where Plaza Extra - East is located.

126. United consistently maintained that it is entitled to rent payments as an internal accounting expense to be utilized as an offset against income from Plaza Extra- East and which thereby reduces the net profits. At present, United has a motion pending to withdraw past due rents to which it is entitled. In the event that United is unable to recover the rent it seeks for internal accounting expense purposes and/or in the event that the Alleged Partnership is deemed to exist, then United seeks to recover the past due rent from the Alleged Partnership in accordance with the manner in which rent has been collected in the past.

127. Since 1986, United and the Alleged Partnership have always agreed that the value of any rent due to United for any retail space used by Plaza Extra – East would be withdrawn from the gross sales proceeds from Plaza Extra – East from time to time. Since 1986, the parties have customarily settled all rents due upon demand by United.

128. Historically, it was determined that United was entitled to rent for the premises occupied by Plaza Extra – East. From the beginning to December 31, 1993, United was paid in full for the rent.

129. For the period of January 1, 1994 through May 4, 2004, United made demand but Hamed, on behalf of the Alleged Partnership, refused to allow United to withdraw the rent value of $3,999,679.73 (69,680 sq. ft. at $5.55 sq. ft.) from the gross revenues of Plaza Extra – East.

130. However, for the period of May 5, 2004 through December 31, 2011, the parties agreed that the rent due and owing United was $5,408,806.74, which amounts to a monthly rent of $58,791.38. The monthly rent of $58,791.38 for Plaza Extra – East was calculated based on the yearly sales of Plaza Extra – Tutu Park. The sales were divided by the square footage to arrive at a percentage amount - 2.0333%. That percentage amount then was multiplied by the sales of Plaza Extra – East. See **Exhibit 1** (percentage highlighted in yellow).

131. On or about February 7, 2012, a check in the amount of $5,408,806.74 was issued to United from the earnings of Plaza Extra - East. See Copy of Check #64866 attached as **Exhibit 2.**

132. Consistent with the parties' understanding as to payment of rent to United, Hamed, either individually or as a partner of the Alleged Partnership, never raised any issue concerning the statute of limitations or denied that rent was owed to United because it has always been the parties' practice to settle rents when United makes a demand, regardless of when such demand takes place.

133. On or about May 17, 2013, United, utilizing the same formula previously agreed upon to calculate the rent, again made demand for rent due for the period of January 1, 2012 through May 30, 2013.

134. Hamed has made clear that it is his intention not to authorize rent payments to United for the occupancy of Plaza Extra – East. As such, in the event that the Alleged Partnership is deemed to exist, the Alleged Partnership not only owes rent to United but also is an unlawful holdover tenant of the premises occupied by Plaza Extra-East.

135. Further, because the Alleged Partnership failed to pay the rent as demanded by United, in September of 2010, United, through Yusuf, orally noticed the Alleged Partnership by informing Hamed's authorized agent, Waleed, of United's intent to terminate the occupancy agreement for Plaza Extra – East effective December 31, 2011.

136. When Hamed, on behalf of the Alleged Partnership, refused to accept the termination notice or cause the premises to be vacated, United issued a written notice to vacate on January 1, 2012.

137. United's notice called for an increase in the rent, in the event the premises were not vacated, to $200,000 a month for the period of January 1, 2012 to March 31, 2012, and $250,000 for any month after April 1, 2012 should Plaza Extra – East continue occupying the premises despite such notice.

138. Therefore, for the period of January 1, 2012 through September 31, 2012, United is entitled to rent from the Alleged Partnership in the amount of $1,800,000.

139. Despite United's termination of the oral, month to month occupancy agreement for the premises occupied by Plaza Extra-East and its demand that such premises be vacated, the Alleged Partnership continues to enjoy the benefits of the operations of Plaza Extra – East store including, but not limited to, the use of valuable retail space located at the Shopping Center, without paying the outstanding rent.

140. Through December 31, 2013, the total rent due and outstanding for the premises occupied by Plaza Extra – East is $5,410,672.85. This unpaid rent is an amount certain, liquidated, and subject to immediate collection from the Alleged Partnership.

COUNT I
DEFENDANTS' CLAIM FOR DECLARATORY RELIEF THAT NO PARTNERSHIP EXISTS

141. Paragraphs 1 through 140 of this Counterclaim are realleged.

142. There exists an actual controversy as to whether there was ever a partnership formed between Yusuf and Hamed for the operation of the Plaza Extra Stores.

143. Defendants seek a declaratory judgment which confirms that United is the sole owner and operator of the Plaza Extra Stores, that United has full and complete authority over

decisions and actions taken in and for the Plaza Extra Stores, and that United has ownership of all assets held in United accounts or in United's name.

144. United is further entitled to a declaratory judgment that it has the power and authority to account for its net profits, taking into account any yet unpaid expenses, including past due rents. To the extent that Yusuf orally agreed to provide Hamed with a return on his investment in an amount equal to 50% of the net profits of the Plaza Extra Stores, which are owned and operated by United, then such net profits must net out all unpaid rent and all competing claims for recoupment and setoff.

COUNT II
DECLARATORY RELIEF

145. Paragraphs 1 through 144 of this Counterclaim are realleged.

146. In the event that the Alleged Partnership is determined to exist, there exists an actual controversy between Hamed and Yusuf as to the terms of the Alleged Partnership, its duration, their respective rights, interests, and obligations concerning the Plaza Extra Stores and the disposition of the assets and liabilities of these stores. This Court should resolve the controversy by entering an appropriate declaratory judgment.

COUNT III
CONVERSION

147. Paragraphs 1 through 146 of this Counterclaim are realleged.

148. Hamed and Waleed, acting individually and as agent for Hamed, have unlawfully defalcated and converted to their own benefit and gain substantial funds belonging to Defendants.

149. Defendants never authorized these funds to be appropriated to the personal use of Hamed or Waleed.

150. Hamed and Waleed are therefore liable to Defendants for all funds converted for their personal gain and benefit in an amount to be determined after a full accounting is completed.

COUNT IV
ACCOUNTING

151. Paragraphs 1 through 150 of this Counterclaim are realleged.

152. In the event that the Alleged Partnership is determined to exist, then Hamed owes a fiduciary duty of loyalty and care to the Alleged Partnership and to Yusuf as his partner. These fiduciary duties obligate Hamed to, among other things, account to Yusuf for all funds generated by the Plaza Extra Stores taken for his or his families' personal use without Yusuf's knowledge or consent.

153. Despite repeated demands therefore, Hamed has failed and refused to account to Yusuf for all assets of the Plaza Extra Stores taken or converted by Hamed or his agents. Accordingly, Yusuf is entitled to a full accounting of all funds taken or converted by Hamed and his agents from the assets and revenues generated by the Plaza Extra Stores.

COUNT V
RESTITUTION

154. Paragraphs 1 through 153 of this Counterclaim are realleged.

155. Hamed and his agents have obtained in excess of $7 million of the Plaza Extra Stores' monies under such circumstances that in equity and good conscience they ought not retain and the Hamed Sons participated and aided and abetted in this conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own personal benefit.

156. Defendants are, therefore, entitled to restitution in the form of a constructive trust over any assets purchased with those funds; an equitable lien over such assets; and disgorgement

of any profits made from the use of the Plaza Extra Stores' funds or assets purchased with the use of such funds.

COUNT VI
UNJUST ENRICHMENT AND IMPOSITION OF A CONSTRUCTIVE TRUST

157. Paragraphs 1 through 156 of this Counterclaim are realleged.

158. Hamed and his agents have obtained in excess of $7 million of the Plaza Extra Stores' monies under such circumstances that in equity and good conscience they ought not retain and the Hamed Sons participated and aided and abetted in the conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own personal benefit.

159. Defendants are entitled to the imposition of constructive trusts, equitable liens, and disgorgement of all profits in order to prevent Hamed and the Hamed Sons from being unjustly enriched by money ill-gotten from the Plaza Extra Stores.

COUNT VIII
BREACH OF FIDUCIARY DUTY

160. Paragraphs 1 through 159 of this Counterclaim are realleged.

161. In the event that the Alleged Partnership is determined to exist, 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.

162. Hamed breached his fiduciary duty to Yusuf by, among other things, failing to disclose millions of dollars of Plaza Extra Stores' funds converted by Hamed or his agents and otherwise acting in a manner inconsistent with Yusuf's interests and welfare, and by subordinating Yusuf's interests in the Plaza Extra Stores to those of Hamed and his family.

163. As a result of these breaches of fiduciary duties, Yusuf has been damaged.

COUNT VIII
DISSOLUTION OF ALLEGED PARTNERSHIP

164. Paragraphs 1 through 163 of this Counterclaim are realleged.

165. Although Defendants deny the existence of any partnership with Hamed, in the event the Alleged Partnership is determined to exist, then Yusuf is entitled to dissolution of the Alleged Partnership and to wind up its affairs, pursuant to the Uniform Partnership Act, in that such partnership would be an oral at-will partnership and Yusuf provided notice of his intent to terminate any business relationship (including any partnership) with Hamed in March of 2012.

166. Since Hamed has refused to consent to a dissolution of the Alleged Partnership, Defendants are entitled to a prompt and orderly dissolution of the Alleged Partnership under the Uniform Partnership Act.

COUNT IX
DISSOLUTION OF PLESSEN

167. Paragraphs 1 through 166 of this Counterclaim are realleged.

168. Because the equity of Plessen is owned equally by the Hamed and Yusuf families who have an irreconcilable disagreement on how to continue the business operations of this company, it should be dissolved and its assets liquidated according to law.

COUNT X
APPOINTMENT OF RECEIVER

169. Paragraphs 1 through 168 of this Counterclaim are realleged.

170. In the event that the Alleged Partnership is determined to exist, a qualified, neutral business person should be appointed as Receiver for the Alleged Partnership to operate the Plaza Extra Stores and as Receiver for Plessen.

171. The Receiver should liquidate the assets of the Plaza Extra Stores and Plessen 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 Hamed may have with either of the Defendants.

COUNT XI
RENT FOR RETAIL SPACE BAY 1

172. Paragraphs 1 through 171 of this Counterclaim are realleged.

173. United has historically deducted rent for Plaza Extra – East as an internal expense and is entitled to deduct same so as to arrive at a proper calculation of the net profits from Plaza Extra – East.

174. In the alternative, in the event that the Alleged Partnership is determined to exist, then United is entitled to deduct all rent currently due and owing to arrive at the proper calculation of the net profits from Plaza Extra – East.

175. Whether an internal expense or a debt of the Alleged Partnership, for the period of January 1, 1994 through May 4, 2004, United is entitled to rent in the amount of $3,999,679.73 for Bay No. 1 (69,680 sq. ft. of retail space at $5.55 sq. ft.) for the operations of the Plaza Extra – East.

176. Whether an internal expense or a debt of the Alleged Partnership, for the period of January 1, 2012 to date, United is entitled to rent for Bay No. 1 (69,680 sq. ft. of retail space at the current monthly rate of $58,791.38).

177. In the event that the Alleged Partnership is determined to exist, then Hamed is in violation of the agreement to pay rent to United in an amount exceeding $5,293,090.09.

178. United, as the fee simple owner, is entitled to all unpaid rent for the use of Bay 1, and to recover possession of its premises currently occupied by Plaza Extra – East.

COUNT XII
PAST RENT FOR RETAIL SPACES BAYS 5 & 8

179. Paragraphs 1 through 178 of this Counterclaim are realleged.

180. United provided Plaza Extra – East with retail spaces Bay 5 & 8 for various time periods to increase the storage and capacity of Bay 1 (the main retail space where Plaza Extra – East is located).

181. Bay No. 5 (3,125 sq. ft. of retail space) was utilized for storage and quick access to various inventories used in the operations of Plaza Extra – East. Whether an internal expense or a debt of the Alleged Partnership, United is entitled to rent from May 1, 1994 through October 31, 2001 at rate of $12.00 per sq. ft.

182. Bay No. 8 (6,250 sq ft. of retail space) was utilized for the operations of Plaza Extra – East. Whether an internal expense or a debt of the Alleged Partnership, United is entitled to rent from April 1, 2008 through May 30, 2013 at a rate of $6.15 per sq. ft.

183. In the event that the Alleged Partnership is determined to exist, Hamed has refused to acknowledge his obligation to pay United the outstanding rent for Bays 5 and 8.

184. United, as the fee simple owner, is entitled to all unpaid rent for the use of Bays 5 and 8 in the amount of $793,984.38.

COUNT XIII
CIVIL CONSPIRACY

185. Paragraphs 1 through 184 of this Counterclaim are realleged.

186. Hamed and the Hamed Sons agreed to perform the wrongful acts and accomplish the wrongful ends alleged in this Counterclaim, and they aided and abetted each other and acted on that agreement.

187. As a result of such conspiracy, the Defendants have been damaged.

COUNT XIV
INDEMNITY AND CONTRIBUTION

188. Paragraphs 1 through 187 of this Counterclaim are realleged.

189. To the extent that United has paid any taxes, interest and penalties with respect to the income of the Plaza Extra Stores that should have been paid by Hamed, United is entitled to

full indemnification from Hamed for such payment including interest at the legal rate from the date of such payment. Further, to the extent that any accounting and legal fees and other costs are incurred relating to any tax returns or amendments that must be prepared and filed for taxes paid by United that should have been paid by Hamed, United is entitled to full indemnification from Hamed for such fees and costs.

190. In the event the Alleged Partnership is determined to exist, then Yusuf is entitled to full indemnification from Hamed for half of any debts or obligations of the Alleged Partnership, regardless of the form of the indebtedness or whether Hamed is or was a signatory or guarantor of any such obligation.

191. In the event the Alleged Partnership is determined to exit, then Yusuf is entitled to contribution from Hamed for half of any liabilities of the Alleged Partnership, which Yusuf has paid or may become obligated to pay in the future..

Accordingly, Defendants respectfully request entry of judgment in their favor providing the following relief:

i. a declaratory judgment declaring the parties' rights and obligations with respect to the Plaza Extra Stores;

ii. a full accounting of all funds taken by Hamed or his agents from the Plaza Extra Stores without Defendants' authorization;

iii. a judgment declaring that Hamed and the Hamed Sons hold any assets purchased with funds improperly taken from the Plaza Extra Stores as constructive trustees for Defendants and imposing a constructive trust or equitable lien in favor of Defendants over all funds taken without authorization by Hamed or his agents or assets purchased with such funds;

iv. awarding compensatory, consequential, and punitive damages in an amount according to proof at trial;

v. appointing a Receiver to dissolve and wind down the affairs of any joint venture/partnership determined to exist between Hamed and Yusuf and to dissolve and liquidate Plessen;

vi. a judgment for all rent found due and owing for the premises occupied by Plaza Extra-East and ordering immediate restitution of such premises to United;

vii. a judgment for all taxes, interest and penalties paid by United that should have been paid by Hamed together with interest from the date of payment as well as all fees and costs associated with any tax returns or amendments that must be prepared and filed regarding such payment;

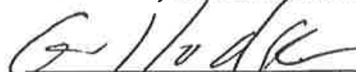
viii. a judgment against Hamed in favor of Yusuf for Hamed's portion of all debts, liabilities and obligations of the Alleged Partnership, past and present;

ix. awarding Defendants their reasonable attorneys' fees and costs in defending against the Complaint and prosecuting this Counterclaim; and

x. providing such other and further relief as the Court deems just and proper.

Pursuant to Fed. R. Civ. P. 38(b), Defendants demand a trial by jury of all issues triable by right to a jury.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: January13th, 2014 By: 

Gregory H. Hodges (V.I. Bar No. 174)
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail:ghodges@dtflaw.com

and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00820

Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2014, I caused the foregoing FIRST AMENDED **ANSWER AND COUNTERCLAIM** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

Nizar A. DeWood