IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FAHTI YUSUF, **Appellant/Defendant,** **v.** **MOHAMMAD HAMED, et al.** **Appellees/Plaintiffs.**	**S. Ct. Civ. No. 2015-0001** **Re: Super. Ct. Civ. No. 370/2012 (STX)** **Consolidated Cases** **S. Ct. Civ. No. 2015-0001** **S. Ct. Civ. No. 2015-0009**

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

Yusuf's opposition to Hamed's motion to dismiss is clear on only one point—there is no appellate jurisdiction for the Lease Appeal other than possibly pendant jurisdiction. As for the rest of Yusuf's rambling response, one salient point is clear—Yusuf has no clear basis for asserting appellate jurisdiction over the Liquidation Appeal, so he throws the whole bowl of pasta up, hoping something sticks.[1]

One preliminary comment is in order. Yusuf begins with an unjustified attack on Hamed's "motives" in filing this motion, suggesting it "betrays" his "fear" of judicial scrutiny. However, Hamed has already undergone this scrutiny (twice) below and firmly believes his actions will be affirmed on appeal. Indeed, Hamed's explained this point—why the Plessen Board Meeting was proper and the lease was valid--in his opposition to the Stay Motion, **which Yusuf failed to even respond to in his reply to that motion**. In any event, if the test for appellate jurisdiction is what one wants this Court to hear, Hamed will gladly waive jurisdiction so these issues can be put to rest to stop Yusuf's

[1] If the Liquidation Appeal survives this motion, the exercise of pendent jurisdiction over the Lease appeal is one of appellate discretion that this Court would then have to decide whether to exercise.

endless bantering. Please, enough! It was Yusuf who asked the court to liquidate the stores and discharge 600 employees that lead to Hamed's plan to save hundreds of jobs and millions in government revenues, getting Plessen a tenant (finally) at $55,000 per month in rent, and creating competition in the grocery business on St. Croix.

None of this rhetoric has anything to do with the issue of appellate jurisdiction, however. Thus, Hamed will address the issues now being raised by Yusuf, as appellate jurisdiction is not really an adversarial issue, but one this Court addresses at the outset of every opinion it issues.

I. Interlocutory Injunction Orders

Yusuf first creatively argues that the Liquidation Order is appealable, now characterizing it as an order modifying the April 25, 2013 preliminary injunction (upheld by this Court on September 30, 2013.) However, *nowhere* in the Liquidation Order is there any reference to the preliminary injunction, much less any language modifying it as suggested. To the contrary, the preliminary injunction was issued to preserve the rights of the parties *pending* the resolution on the merits of Hamed's claim there was a partnership. While Yusuf successfully defeated summary judgment after this case was remanded, he then conceded this issue (admitting that there was a partnership), allowing the Superior Court to enter summary judgment. See **Exhibit 1**. That order made the preliminary injunction moot, as the partnership was now established, with the three stores now operating in fact as a partnership (and not just because of a court order requiring that it do so until the partnership issue was fully litigated on the merits).

The subsequent request by Yusuf to dissolve this (now established) partnership then led to the current Liquidation Order. That request, which was Hamed did not

oppose, does not transform the Liquidation Order into an appealable interlocutory order just because Yusuf did not like some (but not all) of its terms in the order he sought. Indeed, Yusuf also requested that he become the Liquidating Partner under 26 V.I.C. § 173(a) so he would be in charge of the day-to-day operations of the three stores pending dissolution, which the court also granted when it entered the Liquidation Order. Thus, Yusuf cannot bootstrap the **granting of the relief *he sought*** into a valid argument that the resulting order creates a right to appeal because it somehow modifies a preliminary injunction order mooted by his own actions months ago.

Equally important, Yusuf is not appealing any change to the preliminary injunction, suggesting that it should somehow be put back into place. Instead, he is appealing the certain specific terms of the Liquidation Order in moving forward with the dissolution of the partnership. Thus, this argument, while creative, has no substance.

As for cases cited by Yusuf in footnote 3 (which are the only ones he cites) in support of his argument that the Liquidation Order is an injunction order in and of itself, all are distinguishable as follows:

- *Carson, v. American Brands, Inc., etc., et al.,* 450 U.S. 79, 83 (1981)-The Supreme Court held that an order denying the entry of a proposed consent decree was a refusal to grant injunctive relief because the agreed upon decree would have permanently enjoined certain discriminatory practices and implemented changes to correct such past practices. In short, the proposed consent decree included language enjoining certain acts, which clearly distinguishes this case from the facts before this Court.

- *Jones–El, Et Al., v. Berge*, 374 F.3d 541, 544 (7th Cir. 2004)-The trial court was confronted with a consent order, with inmates seeking to enforce a section requiring the prison cells to be air-conditioned. The court ordered compliance and the prison appealed. The Seventh Circuit found that it had jurisdiction, as the order directing compliance was in effect a new injunction order from which an interlocutory appeal could be taken. Clearly this factual scenario is distinguishable from the facts here.

- *Rolo v. General Development Corporation*, 949 F.2d 695, 702 (3rd Cir. 1991)-In this case, the plaintiffs expressly sought injunctive relief from the trial court, seeking to enjoin two defendants from getting rid of assets to render themselves insolvent. The court declined to reach the merits of the request, postponing a decision on it. The Third Circuit found that such inaction was tantamount to denying the relief sought since the injunction request was supported by competent evidence. Thus, these facts are clearly distinguishable from the facts before this Court as well.

- *Westar Energy, Inc. v. Lake,* 552 F.3d 1215, 1222 (10th Cir. 2009)-An officer of a corporation was indicted. He requested his employer to defend him as per its articles of incorporation providing for such protection for its officers. After much delay, the court entered an order directing the employer to pay a portion of the fees expected to be incurred in the defense of the case. The employer appealed. The officer argued that the order was not an injunction order, so it was not immediately appealable. The Tenth Circuit held that the order directed the company to do something, in effect being an equitable order for specific performance of its obligation under its charter, and its order was punishable by contempt if it did not comply. Thus, the court found that the order was injunctive in nature and thus appealable (though it subsequently upheld the key portion of the order regarding the payment of future legal fees). Again, this order directing the employer to do something in the future as fees were incurred clearly distinguishes this case from the facts before this court.

In short, a partnership dissolution order disposing of fungible personal property is not an injunction. If it were, the exception under § 33(b)(1) would swallow the final judgment rule. Nor is it a modification of the prior preliminary injunction. Instead, the Liquidation Order is just part of an on-going process to dissolve the partnership. *See, e.g., Levi v. Sexton*, 439 P.2d 423, 425 (Alaska 1968) (partnership dissolution order is not a final order for purposes of appellate review).

II. The *Forgay-Conrad* doctrine

Recognizing the weakness of his first argument, Yusuf argues that this Court has jurisdiction under the *Forgay-Conrad* doctrine. This rule is based on case law and has not been expressly adopted in this jurisdiction as far as counsel can find.[2] However, as

[2] Courts have found this doctrine identical to the collateral order doctrine, which this Court has adopted. *See, e.g., In re Piperi*, 1997 WL 73798, at *4 n. 9 (5th Cir. 1997).

noted by the cases cited by Yusuf, it is a doctrine *completely* dependent on property being turned over to another party in some way that makes a later reversal on appropriate, subsequent appeal useless –i.e., where there is irreparable harm if immediate appeal is not heard. *See, e.g., SEC v Ray,* 297 F. 3d 127, 136 (2nd Cir. 2002) (doctrine applies where an order requiring the immediate delivery of property would irreparably harm a party if review of the order is delayed). All of the cases cited by Yusuf in this section discuss this doctrine in the same fashion as *Ray*, so there is no reason to analyze them further. However, none of them address facts similar to those in this case involving a partnership dissolution.[3]

In this regard, the *Forgay-Conrad* doctrine does not apply here.[4] The proposed disposition of the Plaza West property is not a transfer of property that will result in irreparable harm to Yusuf if this issue is not heard now, as it is conceded that the partnership does not have a lease for the Plaza West location. Here, if the lease for the Plaza West store is invalidated, the result is the same—liquidation of the store's assets—all personal property.

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[3] The Third Circuit has described this rule as being akin to the "practical finality rule," applying it narrowly, terming such situations as only being "ministerial". *See, e.g., Marshak v. Treadwell*, 240 F.3d 184, 190-92 (3d Cir. 2001) ("Although the practical finality rule, also known as the *Forgay–Conrad* doctrine, permits appellate review of an order that is not technically final but resolves all issues that are not purely ministerial").

[4] Indeed, *Forgay v. Conrad,* 47 U.S. (6 How.) 201, 204–05, 12 L.Ed. 404 (1848), cautioned the circuit courts against piecemeal litigation, particularly where the funds of the sale of property are being deposited into escrow (as is the case here), stating in part:

> For it may well happen, that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the Circuit Court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one. *Id.* at 206.

In short, the Liquidation Order is nothing more than **an order liquidating these assets now at their agreed upon value, with the Liquidating Partner receiving cash for them on behalf of the partners**, including Yusuf**.** Moreover, if the lease is invalidated after an appeal at the end of the case below, Yusuf's byzantine theory that the court below erred in not taking this real property from Plessen for $10 and giving it to the partnership (so the partners can bid on it to see who will then operate this store) could still be enforced if somehow deemed to be legal by the court. In short, where is the irreparable harm and why will these issues somehow become unreviewable if they are not addressed on appeal now?

An analogy is also helpful here in addressing the *Forgay-Conrad* doctrine. If every order allowing a receiver to sell property were appealable under the *Forgay-Conrad* doctrine, the "final rule" doctrine would usurp the specific language in 33 V.I.C. § 33(b)(2), as that section limits appeals in cases where receivers have been appointed. In short, that section does not allow the appeal of an order by a receiver to sell property as part of the receivership proceedings.

Similarly, if every order allowing the transfer of personal property in a partnership dissolution proceeding were appealable under the *Forgay-Conrad* doctrine, such proceedings would become unmanageable. Indeed, 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 certain actions taken by receivers.

Thus, the *Forgay-Conrad* doctrine does not justify this Court hearing the Liquidation Appeal, as Yusuf has to show irreparable harm if the appeal does not proceed, which he cannot show. Thus, this basis for appellate jurisdiction fails as well.

III. Interlocutory Receiver Orders

Yusuf also argues that § 33(b)(2) regarding receivers applies here. Hamed's initial motion addressed this section, so this reply will be limited to the cases cited by Yusuf in support of his argument that the Liquidation Appeal is a receiver order, appealable under § 33(b)(2). All are distinguishable:

- *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 77 (5th Cir. 1995)-this case involved the application of a unique Texas Turnover Statute in dealing with a take-over by the RTC as the conservator of a bank. Thus, this case compared the ordering of the turnover of the stock in question to the conservator to be akin to appointing a receiver to hold the stock, this being appealable under 28 U.S.C. § 1292(b)(2), which is clearly distinguishable from the facts in this case.

- *In re Klein*, 940 F.2d 1075, 1077 (7th Cir. 1991)-Yusuf cites this case for the proposition that a receiver identified in 28 U.S.C.§ 1292(b)(2) means "receiver or his equivalent," but that generic statement means nothing in the context of this case. First, in *Klein*, the court held that a bankruptcy trustee was not the equivalent of a receiver. Moreover, the court found that the refusal to approve a trustee was not appealable, even if a trustee were deemed a receiver. Most importantly, under the Liquidation Order entered below, it is Yusuf, not a trustee, who is in charge of the partnership dissolution as the Liquidating Partner under 26 V.I.C. § 173 (adopting *RUPA*). Thus, *Klein* has no relevance to this appeal.

- *Sriram v. Preferred Income Fund Iii Limited Partnership,* 22 F.3d 498, 501 (2nd Cir. 1994)-The court below dissolved a partnership over the objection of the remaining general partner. However, the court found that the general partner could not be the Liquidating Partner due to a conflict. Thus, the court appointed a Liquidating Trustee in that case, which the Court then found was equivalent to the appointment of a receiver under 28 U.S.C. § 1292(b)(2). However, here Yusuf requested dissolution and also expressly requested to be appointed Liquidating Partner under 26 V.I.C § 173, both of which the court below granted. Thus, there is no "liquidating trustee" in this case, distinguishing *Sriram*.

In short, no matter how Yusuf tries to contort the orders being appealed here, none fall within the plain language of § 33 (b)(2) that requires (1) an order appointing a receiver, (2) an order refusing to wind up a receivership and (3) an order refusing to take steps to accomplish the purposes of winding up a receivership.

IV. Collateral Order Doctrine

This doctrine was also previously addressed, so Hamed will only address the one case Yusuf cited in support of applying this rule, which is distinguishable as follows:

- *Norwest Bank Wisconsin, N.A., v. Malachi Corporation,* 2007 WL 2302167 (6th Cir. 2007)-In this case, the court applied the collateral order doctrine as the receiver who had been appointed (which also gave the court jurisdiction under § 1292(b)) was about to distribute funds to bondholders, which would render then unrecoverable if the order was not reviewed now. The facts before this Court are totally inapposite, as the funds being paid to purchase the inventory and equipment (**at their agreed upon value**) are being deposited into the bank account opened by the Liquidating Partner to hold for the creditors and, if anything is remaining, to be disbursed to the partners. Thus, there is no dissipation of assets here like there were in *Norwest Bank.*

In short, the collateral order doctrine is designed to protect something that cannot be recovered if the issue is reversed on appeal, such as the disclosure of documents protected by the attorney-client privilege or the disclosure of protected trade secrets. Here, as previously noted, if the lease for the Plaza West store is invalidated, the result is the same—liquidation of its assets. Thus, an order liquidating these assets now at their agreed upon value, with the partnership receiving cash for them, is not the type of order that will become unreviewable if it is not addressed on appeal now.

V. The Pragmatic Finality Doctrine

Regarding this last argument, whether this Court should adopt the "pragmatic finality doctrine" under this name or some other name already discussed, as well as whether it should be applied in this case, are strictly policy arguments that do not require an adversarial response. As described by the cases cited by Yusuf, it is somewhat subjective and is designed to address injustices that can be avoided by delayed or piecemeal appeals.

However, under 4 V.I.C. §32(d), this Court already has the authority discussed by this doctrine, as it can exercise appellate jurisdiction whenever it finds that the transfer of the case will promote the administration of justice. As noted in *In Re Julio Brady,* 51 V.I. 112 (V.I. 2009), the invocation of that section will be sparingly used in a limited set of circumstances, holding "administration of justice is promoted when a case involves purely legal questions, issues of public importance, and issues of such urgency that use of the normal appellate process would be inadequate." *Id.* at 115-116.

Interestingly, all three cases cited by Yusuf in support of applying this doctrine ultimately decided not to apply it to the facts before it as follows:

- *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1093-94 (10th Cir. 1995)-this is an ERISA action where the court refused to apply the rule, holding "the practical finality exception "has lived a checkered life in both our court and the United States Supreme Court." *Id*. at 59 F.3d 1093-94.

- *Dela Cruz Camacho v. Demapan*, 2010 MP 3, 2010 WL 997108, at *1 (N. Mar. I. Mar. 16, 2010)-the court reviewed the doctrine before concluding "we ultimately dismiss this appeal for lack of jurisdiction." *Id* at *1. It did not apply the rule because, as is the case here, there was no matter that begged immediate action.

- *Boughton v. Cotter Corp.*, 10 F.3d 746, 748 (10th Cir. 1993)-the court held the denial of a motion was *not* appealable under "pragmatic finality" doctrine. *Id*. at 752 (""pragmatic finality" invoked only in truly "unique instances.")

In any event, the invocation of jurisdiction under § 32(d) or some related equitable doctrine is solely up to this Court's discretion. Thus, no further argument from Hamed would be appropriate here, as this Court can make this determination without his help.

VI. Conclusion

While this Court has wide latitude in determining its appellate jurisdiction, it is respectfully submitted that neither appeal meets the criteria for an interlocutory appeal, despite Yusuf's meandering opposition memorandum.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2015, I served a copy of the foregoing pleading by this Court's ECF system on:

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