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

YUSUF YUSUF, derivatively on behalf of **PLESSEN ENTERPRISES, INC.,** *Plaintiff,* **v.** **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED** and **FIVE-H HOLDINGS, INC.,** *Defendants,* and **PLESSEN ENTERPRISES, INC.,** *Nominal Defendant.*	**Case No. SX-13-CV-120** CIVIL ACTION FOR DAMAGES AND INJUCTIVE RELIEF JURY TRIAL DEMANDED

DEFENDANTS' JOINT OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

On April 29, 2015, Plaintiff moved to amend the Complaint he had filed two years earlier. Both Plessen Enterprises, Inc. ("Plessen") and the "Hamed Defendants" jointly oppose this motion, which should be denied for the reasons set forth herein.

I. FACTUAL BACKGROUND

This case arises out of the removal of $460,000 from Plessen's account by its Vice-President, Wally Hamed, who did so to protect these funds. See **Exhibit 1**. Because Plessen is owned 50/50 by the Hamed and Yusuf families, Hamed placed 50% of the removed funds with the Court, tendering a stipulation to Yusuf's counsel so they could immediately and unconditionally remove their half of the funds. See **Exhibit 1**. However, Yusuf did not withdraw these funds. Thus, Wally Hamed has now also tendered the balance of the funds into the Court

treasury, so that 100% of the removed funds ($460,000) are in this Court's treasury. See **Exhibit 1.**

During the interim, the Plessen Board met on April 30, 2014, and declared a dividend of these funds *nunc pro tunc* to try to end this dispute. See **Exhibit 2.** In fact, Plessen did not need the funds, as it issued a $280,000 dividend to the shareholders after the $460,000 withdrawal. It currently has in excess of $260,000 on hand, with a monthly income of $87,000 per month--with no debt or expenses. See **Exhibit 1.**

Thus, the facts giving rise to this lawsuit have long since become a non-issue.

II. PROCEDURAL BACKGROUND

On April 16, 2013, Yusuf's son, Yusuf Yusuf, filed this suit against Plessen after Wally Hamed removed the $460,000 from the Plessen account. The seven-count complaint only sought the return of the removed funds, plus any related damages.

However, this derivative action was filed well after another suit had been filed in 2012 by Mohammad Hamed against Fathi Yusuf involving their partnership. That case, assigned to Judge Brady, is still pending at Civ. No. SX-12-CV-370 ("370").

The "370" complaint is relevant to the current motion to amend filed in this case, as Yusuf filed a counterclaim in case 370, which included two counts (Count IX and X) against Plessen, seeking to dissolve Plessen and appoint a Receiver for it. See **Exhibit 3** at ¶¶ 167-171.

Moreover, as part of the "370" proceedings before Judge Brady, Yusuf also attacked the validity of the same April 30th Plessen Board meeting mentioned above as well as challenging

the validity of a lease that Plessen has entered into with KAC357, Inc.[1] On July 22, 2014, Judge Brady determined in the "370" proceeding (1) that the April 30th Plessen Board meeting had been properly called and (2) that the PLessen-KAC357 lease was both fair to Plessen and valid. *See Hamed v Yusuf,* 2014 WL 3697817 (Super. 2014) ("Plaintiff has met his burden to establish that the Lease is intrinsically fair, from a business standpoint, to Plessen and its minority shareholders").[2]

As will be noted herein, that ruling is also highly relevant to the motion to amend before this Court. While Judge Brady was entering these rulings in case 370, a scheduling order was entered in this case, Under that order, all discovery has been done except for the depositions of the Hamed Defendants.

On April 1, 2015, the Hamed Defendants filed a partial motion for summary judgment in this derivative action as to the three equitable counts in the Complaint, which is now ripe for disposition. Defendants' Rule 56 motion explained why the deposit of the entire $460,000 mooted the three equitable claims, as one is not entitled to equitable relief where there is an adequate remedy at law. *See Cacciamani & Rover Corp. v. Banco Popular De Puerto Rico*, 2014 WL 4262098, at *2 (V.I. Aug. 29, 2014).

In response to the obvious effects of the motion for partial summary judgment and despite the fact that this case is now almost ready for final disposition, on April 29th, 2015,

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[1] Yusuf claimed he had filed a similar motion challenging the April 30th Plessen Board meeting and the KAC357 lease in this case, but was directed to re-file it on February 3, 2015, as the Court did not have a copy. Yusuf re-filed it on March 3, 2015.

[2] He also denied a motion for reconsideration of that opinion. See **Exhibit 3**.

Plaintiff filed a motion to amend the Complaint to add more plaintiffs, another defendant and new, unrelated issues.

III. THE MOTION TO AMEND

In his motion to amend the Complaint, Plaintiff seeks to add numerous new counts and parties as follows:

- Plaintiff proposes to add 4 new Yusuf's as named co-plaintiffs;
- Plaintiff proposes to add one new defendant, Mohammad Hamed, even though there are already multiple claims filed by the Yusuf's against Mohammad Hamed in the pending counterclaim filed in Civ. No. STX-12-cv-370. See **Exhibit 3**;
- Plaintiff proposes to alter and substantially expand the relief sought in five of the existing seven counts;
- Plaintiff proposes three totally new counts seeking the dissolution of Plessen and the appointment of a Receiver, which is the same relief already being sought in Counts IX and X of the existing counterclaim against Plessen in Civ. No. SX-12-CV-370.

Thus, the proposed amended complaint is really a request *to admit the old case was lost without having to accept a partial summary judgment* and move past that by starting a totally new case from scratch after two years of litigation have already passed.

IV. THE APPLICABLE RULE 15 STANDARD

In *Lorenz v. CSX Corp*, 1 F.3d 1406 (3rd Cir. 1993), the Third Circuit quoted from the Supreme Court holding in *Forman v. Davis,* 371 U.S. 178 (1962) regarding the allowance of amendments to the pleadings and then stated as follows:

> We have interpreted these factors to mean that "prejudice to the non-moving party is the touchstone for the denial of an amendment." In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment. *Id.* at 1413-1414 (Citations omitted).

Thus, the standard for determining whether to grant a motion to amend is clear. However, as will be seen, there are good grounds for denying the motion filed by Plaintiff here based on this standard.

V. ARGUMENT

There are several reasons why the motion to amend should be denied.

A. The Equitable Counts

Counts I, V and VII of the current complaint involve claims for equitable relief that are subject to a pending motion for partial summary judgment, as noted. Despite this fact, the new proposed Amended Complaint still contains two of these equitable counts, a claim for Unjust Enrichment (new Count IV) and Accounting (new Count VI).[3] Thus, the motion to amend this Complaint to still include these two counts seeking equitable relief should be denied as futile, as equitable relief is not appropriate if there is an adequate remedy at law, as recently noted by the Supreme Court in *Cacciamani & Rover Corp. v. Banco Popular De Puerto Rico*, No. S.CT.CIV. 2013-0063, 2014 WL 4262098, at *2 (V.I. Aug. 29, 2014):

> Because unjust enrichment is an equitable remedy, **it—like all equitable remedies—is inappropriate where a legal remedy is available.** *See Mitsubishi Int'l Corp. v. Cardinal Textile Sales,* 14 F.3d 1507, 1518 (11th Cir.1994) ("It is axiomatic that equitable relief is only available where there is no adequate remedy at law."); *see generally* 1 DAN DOBBS, REMEDIES 750–52, 807–11 (2d ed.1993). **Due to the unavailability of equitable remedies when a legal remedy is available,** "[t]he general rule is that no [equitable] quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests," since legal remedies are available to a plaintiff in a breach of contract action. (Emphasis added).

[3] The proposed Amended Complaint drops Count I of the existing Complaint, which is the equitable claim seeking a constructive trust, confirming that the pending partial motion for summary judgment as to this Count should be granted.

Thus, clearly the motion to amend must be denied as to these two new proposed counts that seek equitable relief, as there are still several proposed counts that give the Plaintiffs an adequate remedy at law, such as Count I (conversion) and Count II (Breach of Fiduciary Duty).

B. The Claims Already Addressed By Judge Brady

Several of the **expanded** Counts in the proposed Amended Complaint involve claims already resolved by Judge Brady, which makes this aspect of the proposed Amended Complaint nothing more than forum shopping. In this regard, paragraph 59 of proposed Count II, paragraphs 65-66 of proposed Count III, paragraphs 72-73 of proposed Count V and paragraph 78 of Count VI all add claims challenging the validity of the Plessen-KAC357 lease, which Judge Brady has already addressed and resolved. *See Hamed v Yusuf,* 2014 WL 3697817 (Super. 2014) and denial of motion for reconsideration, attached hereto as **Exhibit 2**.

Clearly attempting to re-litigate claims already resolved by another Judge of this Court constitutes bad faith, as a party should not be allowed to lose a case in front of one Judge and then seek the a different result from another Judge of the same Court. Moreover, to allow this issue to be re-litigated again in another pending case in the same court would result in undue prejudice to the new proposed defendant, Mohammad Hamed, as he would be forced to litigate this case twice. The Plaintiff will have the right to appeal Judge Brady's decision at some point, so the final resolution of those issues should be addressed in the V.I. Supreme Court, not in another Superior Court case.

As noted in by the District Court of the Virgin Islands *Georgia Fed. Bank, FSB v. Great Cruz Bay Dev. Co.*, 1995 WL 18099798 (D.V.I. 1995) when presented with this identical situation of a party filing suit in two different cases before it:

> The Supreme Court's analysis in Kerotest, 342 U.S. at 183–184, and its language in Colorado River, 424 U.S. at 817, suggest strongly that this court has the discretionary power to stay or dismiss actions which are duplicative of other actions pending before another federal judge sitting within the same district. Further, public policy favors a finding that district courts have such discretionary powers in the circumstances presented by this case. Where, as here, a party has filed two identical actions before two judges sitting within the same district, a court should have the power to quickly and easily dispose of such duplicative actions. Further, where one party has filed two identical actions, that party should not be heard to complain when a court has dismissed one of the two actions as administratively burdensome. Skopbank argues that the appropriate response to duplicative litigation is to consolidate the two actions. But, limiting a court's power merely to consolidation of duplicative suits would undoubtedly lead to "judge-shopping" or other attempts to circumvent the procedural rules. *Id.* at *2. (Footnotes omitted.)

Thus, this aspect of Plaintiff's motion to amend should be denied as to the issues already decided by Judge Brady under the rule set forth in *Georgia Fed. Bank, FSB, supra*. In short, even if this Court allows an Amended Complaint to be filed, paragraph 59 of proposed Count II, paragraphs 65-66 of proposed Count III, paragraphs 72-73 of proposed Count V and paragraph 78 of Count VI all add claims challenging the validity of the Plessen-KAC357 lease should all be disallowed and ordered to be stricken first.

C. The Issues still pending before Judge Brady

Finally, the relief being sought in the **new** proposed counts against Plessen, dissolution and the appointment of a receiver, are already pending before Judge Brady as well, as noted in the Counts IX and X of the pending counterclaim filed in SX-12-CIV-370. While Judge Brady has not yet addressed those issues, deferring his rulings on that relief until after the sale of the partnerships assets, the Plaintiff should not be able to seek that relief in this case unless Counts IX and X in the counterclaim before Judge Brady are dismissed without prejudice.

It would also be unduly prejudicial to Plessen to have to address this claim in both courts at the same time under the doctrine set forth in *Georgia Fed. Bank, FSB, supra*. As such, the request to add these three new Counts in this case should be denied. Alternatively, any Order granting the motion to amend in this case should be premised on the requirement that the claims against Plessen in SX-12-CIV-370 be withdrawn. Indeed, it is a waste of valuable judicial resources for two identical claims to be litigated in this Court in two different cases at the same time.

VI. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Plaintiff's *Motion To Amend the Complaint* should be denied in whole, or at least in part as to (1) the two equitable claims (Counts IV and VI), (2) the claims related to the Plessen-KAC357 lease in paragraphs 59, 65-66, 72-73 and 78 and (3) the claims still pending in SX-12-CV-370 (Counts IX and X), unless those counts are dismissed in that case.

Date: May 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2015, I served a copy of the foregoing answer by hand on:

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

YUSUF YUSUF, derivatively on behalf of **PLESSEN ENTERPRISES, INC.,**

Plaintiff,

v.

WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED and **FIVE-H HOLDINGS, INC.,**

Defendants,

and

PLESSEN ENTERPRISES, INC.,

Nominal Defendant.

Case No. SX-13-CV-120

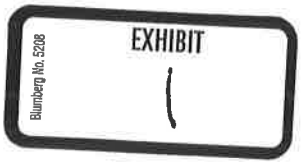
CIVIL ACTION FOR DAMAGES AND INJUCTIVE RELIEF

JURY TRIAL DEMANDED

DECLARATION OF WALEED HAMED

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

1. I am one of the named defendants herein and have personal knowledge of the facts set forth herein.
2. I am the vice-president of Plessen Enterprises, Inc. ("Plessen").
3. On March 27, 2013, I removed $460,000 from the Plessen account, which was an account for which Fathi Yusuf also had signatory authority. Doing so prevented Fathi Yusuf from wrongfully removing these funds, as he had unilaterally done from the partnership bank account he had with my father during the seven months prior to my removal of these funds.



4. As Plessen is owned 50/50 by the Yusuf and Hamed families, I then caused the Yusuf's half of these funds ($230,000) to be placed into the treasury of this Court.
5. I then had my attorney provide Yusuf's counsel with a stipulation that allowed the Yusuf's to immediately and unconditionally remove these funds that totaled $230,000.
6. Since the Yusuf's did not use the stipulation to remove their half of the removed funds, I tendered another $230,000 into the treasury of this Court, so that the entire $460,000 removed by me is now in the treasury of this Court.
7. Plessen has always had ample funds on hand to pay its bills and did not need the $460,000 that was removed. Indeed, Plessen disbursed a dividend of $280,000 after the $460,000 was removed.
8. On April 30, 2014, the Plessen Board also approved the removal of the $460,000 as a dividend.
9. Plessen still has no need for these funds, as it has more than $260,000 in its bank account with a monthly income of $87,000 per month—with no debt or operating expenses.

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

Dated: May 4, 2015

Waleed Hamed

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.

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)

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.

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.

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

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

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."

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

[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.

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

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.

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.

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[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.

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 [redacted]

ATTEST:

[redacted]

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**

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: _____

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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:

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