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.**, *Counterclaim Defendants.*	**CIVIL NO. SX-12-CV-370** ACTION FOR DAMAGES INJUNCTIVE RELIEF AND DECLARATORY RELIEF JURY TRIAL DEMANDED

HAMED'S RESPONSE RE JURY ISSUES

Yusuf has stated recently in an email exchange that that the claims asserted between the Plaintiffs and the Defendants, as well as the objections to the accounting, are all non-jury claims that can be decided by the Special Master.[1] However, the actions at law and the factual issues need to be resolved by a jury.

In making this argument, Yusuf is apparently relying on the outdated maxim that partnership accounting issues are only equitable in nature.[2] However, the Revised

[1] See email chain attached as **Exhibit 1.**

[2] Yusuf first raised the argument that the "equitable accounting" portion of the case should be non-jury in a September 14, 2014, motion to strike the jury demand, which was just prior to the stay of the litigation process in this case while the final Liquidation Order was being worked out, with the Liquidation Process and transfer of stores then taking place. Moreover, as discussed below, since that motion, the V.I. Supreme Court

Uniform Partnership Act ("RUPA"), as adopted in the Virgin Islands, makes it clear that partners can sue each other for claims in law, with or without an accounting, as set forth in 26 V.I.C. § 75(b) as follows:

> (b) **A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:**
>
> (1) enforce the partner's rights under the partnership agreement;
>
> (2) enforce the partner's rights under this chapter, including:
>
> > (i) the partner's rights under sections 71, 73, or 74 of this chapter;
> > (ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to section 141 of this chapter or enforce any other right under Subchapter VI or VII; of this chapter or
> > (iii) the partner's right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII, of this chapter or
>
> (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

As noted in the Amended Complaint, Plaintiff sought both legal relief (in the form of damages) as well as equitable relief (in the form of declaratory and injunctive relief). The damages sought include both compensatory and punitive damages. Thus, while the Plaintiff has already prevailed on the equitable issues in this case, establishing that a partnership existed and enjoining Yusuf from acting contrary to that fact, the Plaintiff is clearly entitled to a jury on the remaining legal issues.[3]

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has clarified the need for a jury as to a major issue here. To the extent a response to that motion is now appropriate, this response should be treated as an opposition to that motion.

[3] While the named Plaintiff is now deceased, a motion to substitute the Executor of his Estate, Wally Hamed, was filed on September 20, 2016.

In a decision directly on point, *Thompson v. Coughlin*, 329 Or. at 630, 997 P.2d 191 (Or. 1998), the Supreme Court of Oregon reversed a lower court finding that a claim sounded in equity because the parties had sought an accounting as part of the complaint and counterclaims filed in that case. There, the plaintiff and the defendants were partners in an insurance business and, on dissolution of the partnership, the plaintiff sought an accounting and a money judgment for commissions under Oregon's *Uniform Partnership Act*. In deciding whether the parties had a right to jury trial in that RUPA proceeding, the court first noted that, *historically*, jurisdiction for partnership accountings had been in equity as a matter of convenience because of the examination of complicated, long-standing accounts, the confidential relationship between the partners, and the necessity of discovery. Also, critically, it was generally established historically that an equitable accounting was a condition precedent to an action in law between partners.

But, as noted above, the newer statutory partnership framework specifically and explicitly changed that. The court made it very clear that, "[a]lthough an action such as an accounting was 'originally only cognizable in equity,' an action nonetheless could be maintained in law 'if the relief sought can adequately be given at law.'" 329 Or. at 637, 997 P.2d 191 (quoting Carey, 243 Or. at 77, 409 P.2d 899). Thus, the court concluded that the determination whether jurisdiction of an action lay in law or equity required an examination of the nature of the relief sought in the complaint, stating:

> In summary, at the time when he filed his original complaint, plaintiff had a right, under [UPA] to bring an action for an accounting. In this case, however, the record indicates that following discovery, before trial, plaintiff knew the amount of his specific money damages and could have moved to amend his complaint at the appropriate time to reflect those damages. Consequently, because the relief

> sought in the present case is a judgment for a specified sum of money determinable without any accounting, the need for an accounting is obviated. We conclude that the nature of plaintiff's actual claim for relief is legal and that the trial court erred in denying defendant's demand for a jury trial. *Id.* at 640, 196.

In short, because the plaintiff first sought a judgment for common law relief, a specified sum of money, the court decided that the plaintiff sought legal relief, holding that the trial court had erred in denying the defendants' demand for a jury trial. Id. at 640, 997 P.2d 191. *See also M.K.F. v. Miramontes*, 287 P.3d 1045, 1056, 2012 WL 4128820 (2012). As discussed below, here the initial wrong and the entire thrust of the case was triggered by the conversion of $2.7 million dollars by Yusuf.

One final comment is in order before addressing the Amended Complaint filed in this case. In addition to the RUPA section quoted above, 26 V.I.C. § 75(c) provides as follows:

> (c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

This section makes it clear that just because a party may become entitled to an accounting because of a "winding up" order, as has occurred since the filing of this suit, **does not mean the <u>entire action is now</u> only equitable in nature.**

Consistent with this view that certain legal issues MUST be submitted to a jury to resolve on factual issues that are raised, on January 12, 2016, the V.I. Supreme Court held that any statute of limitations issue that involves an issue of fact cannot be decided summarily – and MUST be heard by the jury if one has been demanded:

> We further note that because proof that United had mere access to these documents was not enough to prevent the statute of limitations from being tolled, the Superior Court erred in ordering United to submit "proof by affidavit from the United States Attorney's Office that it no longer has

> access to review documents held by the federal government." While there is no excuse for simply ignoring a Superior Court order—an error United admitted during oral arguments before this Court—even if access to these documents had been relevant to the summary judgment analysis, the nonmoving party cannot be required to definitively prove its case at summary judgment, or to even provide the most convincing evidence supporting its case. **Its only burden is to submit sufficient evidence to create a genuine issue of material fact *for a jury to resolve***. Machado, 61 V.I. at 379. (Emphasis added.)

*United Corporation v. Waheed Hamed, 2016 WL 154893, at *7 (Jan. 12, 2016).* The decision is in a related case and involves the same parties.[4] That should end this inquiry now, as it is clear that a jury must be empaneled and the question of what issues should be submitted to it can be left until then.

However, with this applicable law in mind, the *Amended Complaint* filed in this case specifically demands a trial by jury "as to all issues triable by a jury." It then lists a number of specific damages – the removal and tortious conversion of the $2.7 million in partnership funds (¶29), as well as the conversion of $1,600,000 in partnership funds from the sale of the Dorothea property in St. Thomas (¶32).[5] This was purely a damages claim.

Moreover, the Amended Complaint specifically seeks these additional, non-accounting damages, in ¶38:

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[4] This case involved United Corporation's action against Willie Hamed for the same issues presented here – and is virtually identical to the same case brought against Wally Hamed that this Court recently dismissed because it was already subsumed in the main case here.

[5] Like the *Thompson* case above, after discovery began in this case, additional claims arose, like the conversion of legal fees previously mentioned in this Court's TRO opinion, *See Hamed v Yusuf,* 56 V.I. 117, 137, 2013 WL 1846506 at *6 (2013, which reached a total of $504,591.03 before the TRO finally stopped Yusuf from converting more funds.

> 38. Mohammad Hamed is also entitled to compensatory damages for all financial losses inflicted by Yusuf on the Partnership and /or his partnership interest. . . .

Damages inflicted on the partnership are not claims that can be placed into an accounting – they are the monetary effects of the conversion and wrongful dissolution. Similarly, paragraph 41 alleges tortious conversion and breach of duty against another party, United Corporation, which is not a "partner," which also involves separate factual issues for the jury to resolve:

> 41. United was at the time of the formation of the Partnership, controlled by Yusuf, who, as the partner making such financial arrangements for the Partnership, committed it to do acts and hold funds and property for the Partnership either as an agent, or, alternatively under an agreement or under a trust. United, which is also an alter ego of Yusuf, now refuses to pay over said funds -- which breaches the agreement and the duties due to the Partnership and his Partner.

There can be no "accounting" claims against United as it was not a partner.

Finally, the Amended Complaint seeks (at item 7 of relief), an "award of compensatory damages against the defendants" as well as (at item 12 of relief) an "award of punitive damages against Yusuf."

Thus, it is clear from the pleadings in the Amended Complaint, based on the applicable statutory and case law, that the Plaintiff is entitled to a jury on many, if not all, of the remaining damage claims asserted by the parties in this case. Indeed, it would be extremely awkward (if not improper) to present some of these claims to the Special Master, who has authorized certain payments to Yusuf, without consultation with Hamed, only to then inform Hamed that the payment of these claims are without prejudice to subsequently object to them. See **Exhibit 2.** Such claims include the payment of additional rent in the form of taxes and percentage rent for the St. Croix

store (even though there is nothing in writing addressing such "additional rent"), the payment of legal fees in the amount of $504,591.03 to Yusuf's civil lawyers for this matter and the payment of 100% of John Gaffney's salary by the partnership through the current date, even though he also works full time for Yusuf's new supermarket, Plaza East.[6]

As such, for the reasons set forth herein, it is respectfully submitted that the remaining damage claims and described issues raised in this case must be resolved by a jury, as requested by the Plaintiff.

Dated: September 27, 2016

Joel H. Holt, Esq.
Counsel for Plaintiff
Law Offices of Joel H. Holt
2132 Company Street,
Christiansted, VI 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-8677

Carl J. Hartmann III, Esq.
Co-Counsel for Plaintiff
5000 Estate Coakley Bay, L6
Christiansted, VI 00820
Email: carl@carlhartmann.com
Tele: (340) 719-8941

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[6] Asking the Master to reverse payment he has authorized seems unproductive at best, and certainly unfair to the Plaintiff. Indeed, the Master has spent far more "ex-parte" time with the Defendants than the Plaintiff, so it is unknown what opinions he may have developed during that process.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2016, I served a copy of the foregoing by email, as agreed by the parties, on:

Hon. Edgar Ross
Special Master
% edgarrossjudge@hotmail.com

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

Gregory H. Hodges
Law House, 10000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00802
ghodges@dtflaw.com

Mark W. Eckard
HAMM Eckard, LLP
5030 Anchor Way
Christiansted, VI 00820
mark@markeckard.com

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

From: Joel Holt <holtvi@aol.com>
To: ghodges <ghodges@dtflaw.com>; edgarrossjudge <edgarrossjudge@hotmail.com>
Cc: carl <carl@carlhartmann.com>
Subject: Re: Objections and Disagreements to the Partnership Accounting
Date: Thu, Sep 22, 2016 1:31 pm

Dear Judge Ross:

We disagree with several of the premises of Attorney Hodges email to you. First, there has been no final partnership accounting, much less one that complies with RUPA. Second, there can be no determinations regarding the proposed distributions until all outstanding issues are resolved, nor did you request one. Thus, the provisions of the Plan referenced by Attorney Hodges are not in play. Moreover, we believe and have repeatedly pled that we have a right to a jury trial on the remaining fact issues, including statutes of limitations, claims of malfeasance in the disassociation and contested factual issues about claims. This both obviates any non-jury summary determination – and a determination by the a master without the agreement of both parties. Finally, because it is absolutely critical that these documents be part of the official record of this case for any appeal, the claims must be filed with Court, as instructed by you.

Joel H. Holt, Esq.
2132 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340) 773-8709

-----Original Message-----
From: Gregory H. Hodges <ghodges@dtflaw.com>
To: 'Edgar Ross' <edgarrossjudge@hotmail.com>
Cc: JOEL HOLT <holtvi@aol.com>
Sent: Thu, Sep 22, 2016 12:11 pm
Subject: RE: Objections and Disagreements to the Partnership Accounting

Dear Judge Ross,
It is my understanding that your directive below for each partner to file his claim against the partnership or the other partner by September 30 essentially implements the following provisions set forth at § 9, Step 6, of the Plan: "Within forty-five (45) days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan for the funds remaining in the Claim Reserve Account. Thereafter, the Master shall make a report and recommendation for distribution to the Court for its final determination." In anticipation of complying with your directive, it would be appreciated if you would confirm that the competing accounting claims/distribution plans need only be submitted to you and served on counsel, rather than filed with the Court. Not only is this consistent with the quoted language, but it is consistent with past practice. For example, while the Liquidating Partner has been filing his bi-monthly reports with the Court, the detailed financial information referenced in those reports (e.g. balance sheets and income statements) is submitted by John Gaffney only to you and counsel. The document(s) we contemplate submitting to you on September 30 likewise include detailed financial information that need not be a matter of public record, unless you subsequently determine otherwise. Accordingly, I request your authorization to submit Yusuf's accounting claim/distribution plan only to you with service on counsel. I would plan to file with the Court an

appropriate notice of the submission.
Regards,

Gregory H. Hodges
Dudley, Topper and Feuerzeig, LLP
Law House, 1000 Frederiksberg Gade
St. Thomas, VI 00802
Direct: (340) 715-4405
Fax: (340) 715-4400
Web: www.DTFLaw.com

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From: Edgar Ross [mailto:edgarrossjudge@hotmail.com]
Sent: Wednesday, August 31, 2016 6:49 PM
To: Gregory H. Hodges; JOEL HOLT
Cc: Douglas A. Brady; Fathi Yusuf; John Gaffney
Subject: Objections and Disagreements to the Partnership Accounting

Now that the Partnership Accounting is more than 99% completed and have been distributed to the partners, I am giving the partners thirty (30) days, i.e., until September 30, 2016, to file any objection or disputes any item in the accounting. Failure to object or dispute the accounting within said time is a waiver of the right to object or dispute any item contained therein.
Additionally, any partner who has a monetary or property claim against the partnership or a partner must file such claim in writing on or before September 30, 2016. Each claim shall include the date of the activity giving rise to the claim, its factual and/or legal basis, and the relief requested. Failure to file a claim may result in a waiver of the right to make a claim.
The fact that a claim is the subject of a pending civil action does not excuse a partner from raising it in the liquidation process and the failure to raise it in the liquidating process may affect the outcome of the civil action.
EDR, Master.

From: Edgar Ross <edgarrossjudge@hotmail.com>
To: Joel Holt <holtvi@aol.com>
Subject: RE: Plaza
Date: Thu, Feb 25, 2016 1:24 pm

There is no conclusive presumption of correctness . I indicated and hold firm to what I said to you about challenging any decision I make. I adopted this process to speed up payments and the liquifation process.Adjustments can be made to partners' draws at a later date if necessary. I do not consult with nor seek the approval of any attorney before I make a decision. You have the right to seek reconsideration of any decidion I make.

Sent via the Samsung GALAXY S®4, an AT&T 4G LTE smartphone

-------- Original message --------
From: Joel Holt <holtvi@aol.com>
Date:02/25/2016 12:24 PM (GMT-04:00)
To: edgarrossjudge@hotmail.com
Cc:
Subject: Plaza

Judge Ross-yesterday I received the opposition to my objection to the Liquidating Partner's Six Bi-Monthly Report. That pleading contained several surprises that I want to raise with you.

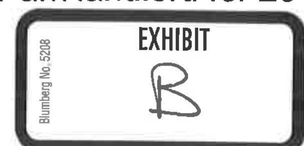
At the outset, I should note that their pleading included several checks that I had asked John Gaffney to produce weeks ago, but never received, The fact that those checks are readily accessible to Mr. Yusuf, but not my client, highlight the accounting problem we have discussed. However, that is not the point I want to address in this email, as I will discuss later it in response to your email sent yesterday.

The pleading as filed suggests that since you signed several specific checks, which I have attached to this email, these are resolved claims, not subject to further review. It was my understanding from conversations with you that this is not the case, but I guess I need clarification from you on this point.

For instance, there is a check for $79,009.37 payable to the Tutu Park landlord for 2012 and 2013 real estate taxes that my client does not dispute. However, there is then a check for $89,442.92 payable to United Corporation (marked #1) with an email from John Gaffney (also attached) **that I had never seen**, explaining that somehow this is additional rent owed United "Since Plaza East rent is based upon St. Thomas rent ...." Aside from the fact that I do not even understand the calculations attached to that email that supposedly explains how this "additional rent" was calculated, my client completely disagrees with the statement that the "Plaza East rent is based in the St. Thomas rent," thus warranting a new rent payment. Indeed, it is contrary to Judge Brady's April 27, 2015, opinion that determined the rent due for this time period and then ordered it to be paid, which did not include any such finding, which I am glad to send it you want to see it.

My first question is whether this payment of $89,442.92 to United is now a resolved claim or is it still subject to my client's challenge that it is not due?

As another example, there is a check for $43,069.56 payable to the Tutu Park landlord for 2014



real estate taxes that my client does not dispute. However, there is then a check for $46,990.45 payable to United Corporation (marked #2). This one does not have an email from John Gaffney explaining this payment, but presumably it is also being claimed as additional rent owed United for 2014, which my client also completely disagrees with.

My second question is whether this payment of $46,990.92 to United is also now a resolved claim or is it still subject to my client's challenge that it is not due?

Likewise, there is a check for $41,462.28 payable to the Tutu Park landlord for 2014-2015 percentage rent, that my client does not dispute, even though the partnership only owed 50% of this amount. However, there is then a check for $41,462.28 payable to Fahti Yusuf (marked #3). This one does not have an email from John Gaffney explaining this payment, so I am not sure what the justification is for this check.

My third question is whether this payment of $41,462.28 to United is also now a resolved claim or is it still subject to my client's challenge that it is not due?

Finally, there is a check to DTF for $57,605. As you know, you sent me this bill on December 24th. We then discussed this bill. My understanding was that this bill would not be paid until I had time to respond to it, which understanding is set forth in my January 23rd email to you, which begins with me thanking you for giving me time to respond to this issue. I then question the bill, **including the reasonableness of the amount of the bill.** However, I apparently misunderstood you, as I now see this check (marked #4) was paid to DTF on January 6th.

My fourth question is whether the amount of this payment to DTF is also now a resolved claim or is the amount still subject to my client's challenge?

In summary, are claims you allowed to be paid now "FINAL" – or are they still subject to being challenged in the claims process without any presumption of correctness being created by your signing the checks?

Joel H. Holt, Esq.
2132 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340) 773-8709