

**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 and Counterclaimants.

vs.

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

Counterclaim Defendants.

Case No.: SX-2012-cv-370

**ACTION FOR DAMAGES,
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF**

JURY TRIAL DEMANDED

MOHAMMAD HAMED,

Plaintiff,

vs.

FATHI YUSUF,

Defendant.

Case No.: SX-2014-CV-278

**ACTION FOR DEBT AND
CONVERSION
JURY TRIAL DEMANDED**

**HAMED'S NOTICE OF PARTNERSHIP CLAIMS
AND OBJECTIONS TO YUSUF'S POST-JANUARY 1, 2012 ACCOUNTING**

On August 31, 2016, the Special Master notified the parties by email that by September 30, 2016, they must: (1) "file any objection or disputes any item in the [Yusuf post-2012] accounting" and that (2) "any partner who has a monetary or property claim against the partnership or a partner must file such claim in writing," stating:

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 [1] 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, [2] 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.

Although Plaintiff objects to both of these directions at this time, the following attachments are submitted to comply with the Master's Order to the extent possible:

1. An itemized statement of pre-January 1, 2012 partnership claims (**Exhibit A**):
and
2. An itemized statement of accounting disputes or objections to the November 16, 2015, post-January 1, 2012 accounting (as supplemented by the bi-monthly reports) submitted by Yusuf (**Exhibit B**) along with Hamed claims for the period as to items not listed in the accounting.

However, Plaintiff has specific objections to (1) the requirement that all 1986 to January 1, 2012 partnership claims be filed now, and (2) the requirement that all accounting disputes or objections for Yusuf's post-January 1, 2012 accounting be filed now. Both objections will be first discussed so that the record is clear on these two points.

I. Objections to the requirement that all 1986-2012 partnership claims be filed now.

This case breaks neatly into two time periods based upon Step 4 of this Court's January 7, 2015, *Winding Up Order*,¹ as follows:

- The 1986 to January 1, 2012, time period – from the founding of the partnership to January 1, 2012 (for which no accounting at all has been submitted); and,
- the period from January 1, 2012 to the present (this being the only period for which an accounting, albeit insufficient, has been submitted).

While the Master ordered the parties to note their respective objections to "**the Partnership Accounting**," the only accounting that has been provided covers just the period from January 1, 2012, to the present. Thus, Plaintiff objects to having to detail all "partnership claims" from 1986 to 2012, *at this time*, for the following reasons:

1. As a *sine qua non* of final distribution of remaining partnership assets in dissolution, RUPA² first requires an accounting to which contests are then made. There has been no 1986-2012 accounting done yet. Thus, there has been no analysis of the value of the partnership shares with itemized statements of contributions, distribution and claims to which Hamed can respond. It is improper to make the non-accounting partner respond first or even simultaneously;

¹Step 4: Liquidation of Partnership Assets

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

² *Revised Uniform Partnership Act* ("RUPA") as enacted at 26 V.I.C. §§ 1 *et seq.*

2. Discovery was halted by the Order of this Court before the Plaintiff could complete discovery on the 1986-2012 claims;³
3. No notice was previously given that the 1986-2012 claims would have to be submitted at this time, prior to a partnership accounting – as Hamed was simply required to respond to the post-2012 accounting that has been submitted or that the Master would be involved in those claims;⁴
4. Disputed partnership claims and any factual issues involving statutes of limitations must be decided by a jury under the VI Supreme Court's ruling in the related case of *United Corporation v. Waheed Hamed*, 2016 WL 154893, at *7 (Jan. 12, 2016),⁵ and cannot either be decided summarily, or left to the Master rather than the Court without an agreement of the parties. Indeed, the Plaintiff has filed several outstanding motions, including the critical motion as to the statute of limitations that would obviate all pre-2007 claims;⁶ and

³ The claims from 1987 to January 1, 2012 require payment of more than \$19 million to Hamed plus interest, as detailed in Exhibit A. In addition, 26 V.I.C. § 5 provides: "If an obligation to pay interest arises under this chapter [RUPA] and the rate is not specified, the rate is that specified in Title 11, section 951, Virgin Islands Code." If Yusuf does not contest those claims, then no additional discovery is necessary.

⁴ Indeed, *Step 4* of the Court's *Winding Up Order* (cited above) explicitly limited Hamed's ability to address this 2012-present time period, stating "Hamed's accountant shall be allowed to view all partnership accounting information **from January 2012 to present** and submit his findings to the Master." (Emphasis added.)

⁵ The V.I. Supreme Court has determined that any disputed statute of limitations issue that involves a question of fact, cannot be decided summarily – and *must* be heard by a jury:

. . . 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.** (Emphasis added.)

⁶ On April 27, 2015, this Court issued an Order allowing the Liquidating Partner to distribute \$3,999,679.73 of the partnership's funds to the Liquidating Partner's corporation – United Corporation -- as back rent. This Order was predicated solely on factual determinations by the Court regarding the applicable V.I. statute of limitations. In light of the recent decision of the V.I. Supreme Court specifically prohibiting exactly this type of factual determinations regarding statutes of limitations, that must be submitted to a jury.

Plaintiff also has substantial claims related to the non-equitable, non-accounting issues such as breach of duty and wrongful dissolution of the partnership by Fathi. The attempt by Yusuf/United to convert all of the partnership was abject, unadulterated conversion – and additional, non-accounting monetary damages were pleaded. Hamed believes that these are *a priori* fact issues, and must be decided by a trier of fact before final distribution of the remaining assets can take place. The Amended Complaint lists a number of non-accounting damages – and specifically asked, at item 7 of relief, for “[a]n award of compensatory damages against the defendants.” Fees for the litigation occasioned by the breach of the partnership agreement and for wrongful dissolution are not accounting damages and require a jury. See, e.g., *Meyer v. Christie*, No. 07-2230-CM, 2009 WL 3294001, at *1 (D. Kan. Oct. 13, 2009); same on appeal *Meyer v. Christie*, 634 F.3d 1152, 1160–61, 2011 WL 873437 (10th Cir. 2011 same on remand *State Farm Fire & Cas. Co. v. Christie*, No. 10-CV-2699, 2015 WL 751808, at *3 (D. Kan. Feb. 23, 2015); see also *Cratte v. Estabrook*, No. 1 CA-CV 09-0239, 2010 WL 2773372, at *3 (Ariz. Ct. App. July 13, 2010); and *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 489, 224 P.3d 1068, 1078, 2009 WL 5252829 (2009). Paragraph 38 seeks these additional, non-accounting damages:

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

Similarly, paragraph 41 alleges breach of duty – also a factual issue:

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.

Indeed, the critical issue here is that prior to the final distribution of remaining partnership assets, RUPA requires that an actual, detailed accounting for the period from 1986 to January 1, 2012 either be done.

Moreover, if that accounting is impossible, the presumptions with regard to any accounting deficiencies requires disputed issues in such an accounting be

decided for the benefit of the non-accounting partner. See, *Frett v. Benjamin*, 2 V.I. 516, 524, 187 F.2d 898, 901 (3d Cir. 1951) (decided when the *Uniform Partnership Act* was in effect here, that in a U.S. Virgin Islands partnership accounting “when accounts are so muddled as to defy straightening out, the court will have to resort to the best evidence available, and the partner to blame for the situation will be penalized by having discrepancies resolved against him”) and see, e.g., *Laurence v. Flashner Medical Partnership*, 206 Ill.App.3d 777 (1990).

Hamed believes it is clear that because of the state of the partnership records, Yusuf's acts and his failures to act, no such 1986-2012 accounting is even arguably possible.⁷ In *Laurence v. Flashner*, the court stated the general rule in rejecting an “accounting” similar to the one suggested by Yusuf here:

The Uniform Partnership Act provides that a partner has a right to have an accounting as to his interest when he leaves the partnership. (Ill.Rev.Stat.1987, ch. 106½, par. 43.) **An accounting is a statement of receipts and disbursements which should show all of the detailed financial transactions of the business** including a listing of the original contributions and current assets and liabilities of the partnership. [citations omitted]. . . .

The evidence in the instant case does not reveal or suggest that **defendants' production of documents was anything more than an invitation to rummage through selected files. The record fails to establish what the boxes” of documents actually contained. Whether those boxes contained a list of all receipts and disbursements made, the original vouchers, bills, cancelled checks, and a listing of original contributions and current assets and liabilities is not known.** The record does not reveal that defendants prepared or commissioned audits or otherwise explained or documented the manner and method by which

⁷ See, *Expert Report of Lawrence Schoenbach*, attached as **Exhibit C**. This is a report done pursuant to the Court's scheduling order – as was the *Expert Report of David Jackson* filed on August 1, 2014. See also the extensive averments of the parties and detailed findings of this Court of record as to Yusuf's exclusive control of the business accounting recited in that Expert Report at footnote 7, pages 8-9.

the value or allocation of plaintiffs' unit interests in the partnership were determined. **In an action for an accounting, the defendant has the burden to prove that he has been completely frank and honest with his partner, and has made full disclosure.** (Bakalis v. Bressler (1953), 1 Ill.2d 72, 115 N.E.2d 323.) Here, defendants argued and the circuit court [incorrectly] concluded that, since many boxes of documents were made available for inspection by plaintiffs, an accounting had been given. (Emphasis added.)

Id. at 565 N.E.2d 146, 1990 WL 186700 (App. Ct. 1990)

Thus, for the foregoing reasons, the Plaintiff objects to having to file the 1986-2012 "partnership claims" now as ordered by the Master.

II. Objections to the requirement that an itemized statement of all accounting disputes or objections to the post-2012 accounting be filed now.

As for the post-January 1, 2012 Yusuf accounting, Hamed objects to the requirement that he submit a full statement of disputes and objections to that accounting *at this time* for two simple reasons:

1. The Court's winding up order of January 7, 2015, required at Step 4, that:

All previous Partnership accountings are deemed preliminary. Hamed's accountant shall be allowed to view all partnership accounting information from January 2012 to present and submit his findings to the Master.

Notwithstanding this directive, the partnership's accountant was unwilling or unable to provide access to or supply "all partnership accounting information." Basic information such as vendor invoices, cancelled checks and accounting statements were not available. In a meeting with the Master, this was discussed and Hamed was given the opportunity to *attempt* to secure such information from the banks and vendors. Only 30% of this material has been supplied, and Yusuf's counsel has actively been involved in Hamed not getting information from banks and the vendor subpoenas have not been issued for that reason. See **Exhibit D** (Affidavit of Joel H. Holt with attached subpoenas and correspondence with bank), and;

2. The accountant being paid full-time for the partnership has refused to answer just 130 very specific questions posed by Hamed's CPA's, without which no accurate response to the proposed accounting can be completed. See **Exhibit B-2, Expert Report of Jackson Vizcaino Zomerfeld, LLP.**

Indeed, the failure to answer these 130 questions is not only contrary to the spirit of what this Court ordered so that Hamed could understand the "accounting" being submitted by the Liquidating Partner, it is also **required to be provided pursuant to 26 V.I.C. § 73(c), which provides that each partner is required to provide the other (or his estate) with all information related to the partnership affairs.**

Despite this inability to "view" many of the partnership's accounting, as ordered by this Court, Hamed *has* attempted to detail his disputes and claims as well as the failures of this 2012-present accounting as best as possible in Exhibit B. This list includes the accounting claims,⁸ but also lists *inter alia* several partnership assets in United's or third-parties' possession that Yusuf, as the Liquidating Partner, made no effort to recover, as it was not in his or United's interest to do so:

- The \$2.7 million and \$.5 million taken by United and Yusuf in 2012-13 from the partnership account (as documented in this Court's prior findings.)
- The half-million dollar withdrawals by Yusuf to pay his own civil lawyers during this case.
- Land in Estate Tutu, St. Thomas, purchased with partnership funds but titled in United's name; and
- Land located at and behind the Plaza East Store purchased with partnership funds

⁸ Hamed also has claims at law for monetary damages relating to conversion, breach of duty and wrongful dissociation which are not included in this list, as they are not accounting claims.

However, the Plaintiff must note his objection to having to submit this list of disputes and objections without the full benefit of being able to get answers that would have possibly made such a complete review possible.

III. Conclusion

As noted, attached as Exhibits A and B are the itemized, detailed statements that the Master directed to be filed, which are filed subject to the objections noted herein.

Dated: September 30, 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

CERTIFICATE OF SERVICE

I hereby certify that on this 30th 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

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

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be 'J B C Moorhead'.

LIST OF EXHIBITS

- Exhibit A** Hamed's 1986 to January 1, 2012 claims
- Exhibit A-1** Spreadsheet of Hamed's 1986 to January 1, 2012 Claims w/ exhibits
- Exhibit B** Hamed's January 1, 2012 to present claims
- Exhibit B-1** Spreadsheet of Hamed's January 1, 2012 to present claims
- Exhibit B-2** Expert Report of Jackson Vizcaino Zomerfeld, LLP, a licensed Certified Public Accountant firm in the U.S. Virgin Islands
- Exhibit C** Expert Report of Lawrence Schoenbach, Esq.
- Exhibit D** Declaration of Joel H. Holt, Esq.