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
MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

MOTION TO STRIKE

Pursuant to Super.Ct.R. 10(a) and LRCi 7.1(e)(1), applicable to these proceedings pursuant to Super.Ct.R. 7, defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, the "Defendants") respectfully move for an order striking the document entitled *Hamed's Response Re Jury Issues* dated **September 27, 2016**, which purports to respond to Defendants' *Motion to Strike Jury Demand* filed and served on **September 29, 2014**. A memorandum of law and proposed order accompany this motion.

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Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: October 14, 2016 By: _____

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Attorneys for Fathi Yusuf
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2016, I served the foregoing via e-mail addressed to:

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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**
MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

ORDER

This matter having come before the Court on the motion of defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, the "Defendants") for an order striking the document entitled *Hamed's Response Re Jury Issues* dated September 27, 2016, and the Court being advised of the premises, it is hereby

ORDERED that Defendants' motion is **GRANTED**; and it is further

ORDERED that the above-referenced document is **STRICKEN** from the Court's record and shall not be considered in connection with Defendants' pending *Motion to Strike Jury Demand*; and it is further

ORDERED that copies of this Order shall be directed to all counsel of record.

DATED: _____, 2016

_____
HON. DOUGLAS A. BRADY
Judge of the Superior Court of the Virgin Islands

ATTEST:

Estrella H. George
Acting Clerk of the Court

By: _____
Deputy Clerk

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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
MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

Defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, "Defendants") respectfully move for an order pursuant to Super. Ct. R. 10(a) and LRCi 7.1(e)(1), applicable to these proceedings pursuant to Super. Ct. R. 7, striking the document entitled *Hamed's Response Re Jury Issues* dated **September 27, 2016** (the "*Response*"), filed by plaintiff/counterclaim defendant Mohammad Hamed and which purportedly responds to

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Defendants' *Motion to Strike Jury Demand* filed and served on **September 29, 2014** (the "*Motion*").

ARGUMENT

The present circumstances demand that Court send a clear message to Plaintiff – indeed, to all parties – that playing fast and loose with its rules will not be tolerated. The *Response* must be stricken from the record as grossly out of time.

As stated above, the Motion was filed and served on September 29, 2014. (Declaration of Gregory H. Hodges ¶ 2.)[1] Under LRCi 7.1(e)(1), Super. Ct. R. 9, and Fed. R. Civ. P. 6(d), Plaintiff had until **Monday, October 16, 2014**, to file his opposition papers, if any (i.e., fourteen (14) days plus three (3) days for delivery, even though it was served via e-mail as previously stipulated by all parties).[2]

Almost two years passed between the date the *Response* was due and when it was actually filed.

In the interim, the parties vigorously litigated this matter. Dozens of orders were entered by the Court, including an Order dated January 7, 2015 Adopting Final Wind Up Plan. None of these orders included a stay or extension of time to respond to Defendants' motion. And at no

[1] Citations to "Hodges Decl." are to the Declaration of Gregory H. Hodges dated October 14, 2016, attached to this memorandum as Appendix A.

[2] LRCi 7.1(e)(1) provides: "A party shall file a response within fourteen (14) days after service of the motion. For good cause shown, parties may be required to file a response and supporting documents, including brief, within such shorter period of time as the Court may specify, **or may be given additional time upon request made to the Court**." (Emphasis added)). Plaintiff made no such request.

Rule 9 of the Rules of the Superior Court establishes the date of commencement and termination applicable to motions and other filings. Applying Rule 9, the Response was due on Monday, October 13, 2014. Fed. R. Civ. P. 6(d) provides: "When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)." While it is not completely clear that Hamed would otherwise be entitled to the benefit of these additional three days, what is **completely** clear is that it would not make the slightest bit of difference.

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time did Plaintiff seek Defendants' consent to an extension of the October 16, 2014 deadline. (Hodges Decl. ¶¶ 3-5.)

Seven hundred and fourteen (714) days after it was due, Plaintiff filed and served the *Response* without seeking or obtaining leave of this Court, as required by Super. Ct. R. 10(a)(2).

Enough is enough. The *Response* should immediately be stricken from the record as filed out of time. *See Miller v. Karr*, 50 V.I. 431, 436 n.1 (D.V.I. 2008) ("Pursuant to [predecessor] Local Rules of Civil Procedure 7.1(j) and 56.1(d) …, the Court will strike the Plaintiff's untimely response and consider the summary judgment motion of Padgett and Wingmark to be unopposed."); *Thomas v. Rijos*, 780 F. Supp. 2d 376, 389 n.17 (D.V.I. 2011) (whether papers were three days late, as plaintiffs argued, or eleven days late, as found by the magistrate, was irrelevant, as both violate LRCi 7.1(a)(2)); *Abednego v. Alcoa, Inc.*, Civ. Action No. 10-009, 2010 U.S. Dist. LEXIS 134170, *11 (D.V.I. Dec. 16, 2010); *Bryant v. Thomas Howell Group*, Civ. No. 1996-121, 2000 U.S. Dist. LEXIS 9946, *7-9 (D.V.I. July 10, 2000). The Virgin Islands Supreme Court has clearly indicated that a motion to strike is the appropriate procedural mechanism to address untimely motions and responses. *See Destin v. People of the Virgin Islands*, 2016 V.I. Supreme LEXIS 10, * 3 n. 1 (V.I. 2016) ("Although the Superior Court failed to provide an explanation for considering the defendants' untimely motion, the record reflects that the People did not move to strike Destin's motion as being untimely, and therefore it waived any objection to its timeliness." (citations omitted)).

It is apparently Plaintiff's position that he has an inalienable right to file responsive documents at the time of his own choosing. Not so. Under the applicable rules, he has no absolute right to file a response at all. *See Jerome v. Watersports Adventure Rentals & Equip., Inc.*, Civil No. 2009-092, 2013 U.S. Dist. LEXIS 93789, *4 (D.V.I. July 3, 2013) ("Plaintiff's

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argument completely ignores the fact that LRCi 7.1(e)(3) provides – in unmistakable terms – that nothing regarding the general scheduling of briefing 'shall prohibit the Court from ruling without a response or reply when deemed appropriate.' Thus, contrary to Plaintiff's contention, there is no "absolute right" under the Local Rules to have the opportunity to file a response."). Plaintiff should at least follow the Court's rules if he wants to file his incredibly tardy Response. He did not. Not by a long shot.

Rule 10(a)(2) of the Rules of this Court provides: "When an act is required or allowed to be done at or within a specified time . . . [t]he court for cause shown may at any time in its discretion . . . [o]n motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of **excusable neglect**." Super. Ct. R. 10(a)(2) (emphasis added).

First, Plaintiff has filed no such motion. This failure is fatal in and of itself. *See In re Catalyst Litig.*, Master Docket SX-05-CV-799, 2015 V.I. LEXIS 145, *14 (Super. Ct. Dec. 16, 2015) ("Here, HTI was served on July 17, 2015 but HTI did not file its Motion to Dismiss until August 14, 2015, outside of the 21-day time frame permitted under Rule 12(a). HTI did not file a motion for leave to file out of time with a satisfactory showing of excusable neglect as required by Virgin Islands Superior Court Rule 10(a). At that juncture, similar to the defendant in *Martinez*, absent the Court granting a proper motion by HTI to plead out of time with the requisite showing of excusable neglect, no further pleading was permitted by HTI. HTI's Motion to Dismiss was thereby not permitted." (citation and footnotes omitted)).

Second, even if he had, Plaintiff cannot possibly show that his two-year failure to act was the result of excusable neglect. So, even if Plaintiff had filed a motion under Rule 10, it would have been denied, and rightfully so. *See V.I. Water & Power Auth. v. Sound Solutions, LLC*, Case No. ST-14-CV-558, 2015 V.I. LEXIS 54, *5-6 (Super. Ct. May 27, 2015) ("None of this is

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'excusable' under Rule 10 or otherwise. WAPA has cited no precedent in which any court has allowed extensions of time for a party's alleged confusion over another litigant's strategy. Nor has the Court ever heard of a case where a party decided on its own that it could just 'reserve[ ] responding' without leave of the Court and then claim it was actually doing the Court a favor. If WAPA truly believed that there was a procedural problem that prevented it from responding, it should have alerted the Court before the deadline. WAPA has identified no problem it could not have brought to the Court's attention before the original deadline expired. Therefore, the Court will deny the Motion for Extension of Time." (footnote omitted)).

The words of the District Court in *Abednego v. Alcoa, Inc.* have particular resonance here:

> The history of plaintiffs' counsel in this case has been a history of non-compliance with the deadlines established by this court's orders. The court will not excuse yet another failure by plaintiffs' counsel to comport with court rules and orders. The Federal Rules of Civil Procedure and U.S. Virgin Islands Local Rules are clear that parties have 14 days in which to file a response in opposition to a motion, with the exception of motions filed under Rules 12 and 56 of the Federal Rules of Civil Procedure for which they have 21 days. See V.I. LOCAL R. 7.1(e). The motion here concerned Rule 17 and Rule 21. Although it is regrettable that plaintiffs' counsel has not made timely responses a priority for her law firm, such neglect is not a proper basis on which to grant reconsideration.

Abednego v. Alcoa, Inc., Civil Action No. 10-009, 2010 U.S. Dist. LEXIS 134170, *11 (D.V.I. Dec. 16, 2010). Here, as is *Abednego*, Plaintiff's dilatory tactics call for a stern response.

Litigants have been repeatedly warned that they must "strictly adhere to the rules that govern the practice and procedures before this Court. This Court will not tolerate…flagrant disregard of the rules, and continued failure to abide by the rules may be a basis for sanctions." *The Nature Conservancy, Inc. v. Louisenhoj Holdings, LLC*, 2014 V.I. LEXIS 42, *12 (Super. Ct

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July 8, 2014) quoting from *Faulknor v. V.I.*, 2014 V.I. LEXIS 6, * 11 (Super. Ct. Feb. 19, 2014). By unilaterally filing his Response 714 days after it was due without seeking or obtaining leave of Court, Plaintiff has flagrantly violated the rules of this Court and should be appropriately sanctioned.

Accordingly, Defendants' motion to strike should be granted.[3]

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: October 14, 2016 By: _____

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[3] In the event this Court denies the motion to strike for any reason, in an abundance of caution Defendants are separately filing a Reply Memorandum addressing the merits of the issues raised in the Response.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2016, I served the foregoing via e-mail addressed to:

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

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MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

APPENDIX A

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
	Consolidated With
MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

DECLARATION OF GREGORY H. HODGES

GREGORY H. HODGES declares, pursuant to 28 U.S.C. § 1746 and Super. Ct. R. 18, as follows:

1. I am a partner at Dudley, Topper and Feuerzeig, LLP, counsel to defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, the "Defendants") in the above-captioned matter. I submit this Declaration in support of

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Defendants' *Motion to Strike* dated October 14, 2016.

2. I filed and served on all counsel of record Defendants' *Motion to Strike Plaintiff's Jury Demand* on September 29, 2014. A copy of the associated *Memorandum of Law* is attached as **Exhibit 1** for the Court's convenience.

3. I did not receive a response to Defendants' motion for approximately the next two years. During that time, no stay of these proceedings was entered, although a stay of discovery was orally ordered by the Court at a status conference on October 7, 2014.

4. I did not receive a request from any party seeking consent to a stay or an extension of time to respond to Defendants' motion.

5. In the interim, the parties vigorously litigated this matter. Dozens of orders were entered by the Court, including an Order dated January 7, 2015 Adopting Final Wind Up Plan. None of these orders included a stay or extension of time to respond to Defendants' motion.

6. On September 27, 2016, I received a document entitled *Hamed's Response Re Jury Issues* (the "Response"). A copy is attached for the Court's convenience as **Exhibit 2**.

7. Defendants were never contacted by plaintiff/counterclaim defendant Mohammad Hamed concerning the filing of the Response or offered an excuse for the twenty three month delay in filing it.

I declare under the penalties of perjury that the foregoing is true and correct. Executed this 14th day of October, 2016.

GREGORY H. HODGES

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MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

EXHIBIT 1

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX 14 SEP 29 P3:45

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**

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE JURY DEMAND

Defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, the "Defendants"), through their undersigned attorneys, Dudley, Topper and Feuerzeig, LLP, respectfully submit this Memorandum in Support of Motion to Strike Jury Demand. In support, the Defendants state as follows:

I. ARGUMENT

A. THE AMENDED COMPLAINT ASSERTS ONLY EQUITABLE CLAIMS THAT ARE NOT TRIABLE BY JURY.

Section 3 of the Revised Organic Act of 1954 makes the Seventh Amendment right to a jury trial applicable to the Virgin Islands. However, the Seventh Amendment "protects a litigant's right to a jury trial only if a cause of action is legal in nature and involves a matter of 'private right.'" Granfinanciera, S.A. v. Norberg, 492 U.S. 33, 42 n.4 (1989); see also Ross v. Bernhard, 396 U.S. 531, 538 (1970). The Third Circuit, discussing Granfinanciera, has explained that the Supreme Court views the Seventh Amendment's invocation of the phrase

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"suits at common law" to encompass actions at law, and not those in equity, and thus, "no jury right attaches to equitable claims." Billing v. Ravin Greenberg & Zackin, P.A., 22 F.3d 1242, 1245 (3d Cir. 1994); see also Hatco Corp. v. W.R. Grace & Co. – Conn., 59 F.3d 400, 411-412 (3d Cir. 1995) (holding that a plaintiff seeking restitution was not entitled to a jury trial because "[r]estitution is based on substantive liability having its origins in unjust enrichment or the restoration to a party in kind of his lost property or its proceeds").

As this Court has already determined, "Plaintiff maintains this action seeking equitable relief, and this Court may grant such equitable (i.e. injunctive) relief to enforce Plaintiff/partner's rights to an equal share of the partnership profits and equal rights in the management and conduct of the partnership, pursuant to 26 V.I. Code §75(b)(1) and (2)(i)." Hamed v. Yusuf, 58 V.I. 117, 134 (V.I. Super. Ct. 2013). This Court's finding that Plaintiff's claims are equitable is in line with numerous other decisions holding that "historically an accounting between partners has been exclusively an equity action." Kline Hotel Partners v. Aircoa Equity Interests, Inc., 729 F. Supp. 740, 743 (D. Colo. 1990) citing Kirby v. Lake Shore & Mich. So. R.R. Co., 120 U.S. 130, 134 (1887); see also Phillips v. Kaplus, 764 F.2d 807, 813 (11th Cir. 1985) ("It has been said that a court of equity is the only forum in which partnership affairs can be settled"); Swift Bros. v. Swift & Sons, 921 F. Supp. 267, 272 (E.D. Pa. 1995) (Pennsylvania courts "routinely treat claims of partners' breach of partnership obligations as matters to be resolved in equity").

While Plaintiff cites a few statutes in his Amended Complaint, this does not transform his claims into "legal" claims. See, e.g., Tranberg v. Maidman, 18 V.I. 556, 558 (D.V.I. 1981) ("It seems that the basis for this claim is that the cause of action here has a statutory basis, 28 V.I.C. § 209. It is not made clear why this should affect the equitable nature of the relief; and in fact it does not"). Indeed, each claim seeks relief based on the existence of a partnership and/or the

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accounting of funds held by a partnership. See, e.g., Am. Comp. at ¶¶35-37, 41-42, 44-46. Thus, it is clear that these claims can only be adjudicated in a bench trial.

II. CONCLUSION

Since the Amended Complaint seeks equitable relief, this Court should strike Plaintiff's demand for a jury trial and grant such further relief as is just and proper.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: September 29, 2014 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2014, I caused the foregoing **Memorandum in Support of Motion to Strike Jury Demand** to be served upon the following via e-mail:

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EXHIBIT 2

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 entire action is now 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

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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

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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.

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-----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,

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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

EXHIBIT B

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?

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