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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO STRIKE PLAINTIFF'S JURY DEMAND DATED SEPTEMBER 29, 2014

Defendants/counterclaimants Fathi Yusuf and United Corporation (collectively, "Defendants") submit this reply memorandum of law in further support of their September 29, 2014, motion for an order striking the demand of plaintiff/counterclaim defendant Mohammad Hamed ("Plaintiff") for a jury trial.[1] Plaintiff's belated Response to Defendants' Motion to Strike Jury Demand is a clear attempt to radically change the Final Wind Up Plan of the Plaza

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[1] Citations in the form "Def. Mem." are to *Defendants' Memorandum in Support of Motion to Strike Jury Demand* dated September 29, 2014. Citations in the form "Pl. Mem." are to *Hamed's Response Re Jury Issues* dated September 25, 2016.

Extra Partnership (the "Plan"), which was approved by the Court after extensive proposals and comments in its Order Adopting Final Wind Up Plan dated January 7, 2015 (the "Wind Up Order"), and without any assertion by Plaintiff of purported jury trial rights. Specifically, Plaintiff now wants a jury to supplant the Master's role as the initial arbiter (by way of report and recommendation) of the competing partners' claims and ultimately this Court's role in making a final determination, all as contemplated and provided for in the Plan. *See* Plan at § 9, Step 6.

ARGUMENT

Defendants filed the instant motion on September 29, 2014. On **September 27, 2016**, Plaintiff filed his response. If the Court considers Plaintiff's response at all – it should not – the Court should reject Plaintiff's argument, which is based entirely upon a distinguishable Oregon case from 1998, and strike his jury demand.

As indicated above and argued elsewhere, the Court should reject Plaintiff's response out of hand.[2] Like other constitutional rights, a party may waive his or her right to a jury trial, in a number of different ways. *See* Fed. R. Civ. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed."); *Burgess v. Hendley*, 26 V.I. 173, 175 (Terr. Ct. 1991) (waiver not rescinded by belated claim of inadvertence or change of "trial strategy"). By waiting almost two years to file his response to Defendants' motion to strike his demand for a jury trial, and by participating in the process that resulted in the Plan without objection or assertion of any jury trial right, Plaintiff has waived his right to invoke it now.

Plaintiff fares no better on the merits.

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[2] Defendants have filed a separate motion to strike Plaintiff's response (Pl. Mem.) based on his blatant violation of Super. Ct. R. 10(a) and LRCi 7/1(e)(1) resulting from Plaintiff's inexplicable two-year delay in filing it.

Although Plaintiff's Amended Complaint is maddeningly and no doubt deliberately imprecise,[3] one thing is clear – his claims and demands for relief sound in equity. (First Amended Complaint ¶¶ 35 ("Mohammad Hamed is entitled to declaratory and equitable relief as to his rights as well as injunctive relief to protect those rights, including the return of funds or creation of a trust as to the Partnership funds improperly taken or spent by Yusuf and/or United to date in violation of the agreement between the parties."); *id.* ¶ 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."); *id.* ¶ 44 ("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 contract 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."). Equitable claims are tried to the bench, not a jury. *See Caron v. First Penn. Bank, N.A.*, 16 V.I. 169, 178 (Terr. Ct. 1979) ("The right to a jury trial guaranteed by these common-law procedures thus cannot be transplanted to the will contest procedure by the Seventh Amendment's guarantees; rather, the will contest must be regarded as one of those actions, generally equitable in nature, to which neither the Seventh Amendment nor any other constitutional provision attaches the right of jury trial. Though the right to a jury trial has been extended beyond those specific writs and actions

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[3] As the Court can see from a review of the First Amended Complaint, Plaintiff does not even label his claims, leaving the Court and Defendants to guess at their true nature.

extant at the incorporation of the Seventh Amendment in 1791, it was not intended to extend nor can this court allow it to extend to classes of cases where trial by jury had not previously existed." (citations omitted)); *Penn v. Penn*, 14 V.I. 522, 526 (Terr. Ct. 1978) ("It is clear that the Seventh Amendment does no more than preserve the right of jury trial as it existed in English history or sometime before 1791 when the Seventh Amendment was enacted."). This includes actions for an accounting. *See Efron v. Milton*, 892 So.2d 497, 499 (Fla. Ct. App. 2004) ("The right to trial by jury does not extend to equitable causes of action, such as an accounting."). Historically, claims pitting partner against partner based on partnership business have been considered equitable in nature. *See Mursor Builders, Inc. v. Crown Mountain Apartment Associates*, 467 F. Supp. 1316, 1338 (D.V.I. 1978) ("An action at law ordinarily is not maintainable between partners on any claims arising out of partnership transactions until the partnership business is wound up and the partnership accounts finally settled. Similarly, a court of equity will not interfere with internal partnership affairs except with a view to dissolution of the partnership and the effectuation of an accounting and settlement of the partnership affairs."). Plaintiff is therefore not entitled to a jury trial.

The rule expressed in *Mursor Builders* that partners are barred from suing one another at law before winding up of the partnership was relaxed by the adoption of the Revised Uniform Partnership Act ("RUPA"), V.I. Code Ann. tit. 26, §§ 1-274.[4] Under RUPA, a partner "may

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[4] RUPA was adopted by the Virgin Islands in 1998. *See* V.I. Code Ann. tit. 26, §§ 1-274. There are some differences between RUPA and its predecessor, the Uniform Partnership Act ("UPA"), but none of importance to the motion at hand. *See* James B. Porter, *Modern Partnership Interests as Securities: The Effect of RUPA, RULPA, and LLP Statutes on Investment Contract Analysis*, 55 Wash & Lee L. Rev. 955, 971 (1998) ("Until recently, the Uniform Partnership Act (UPA) provided the basic format from which states derived their partnership statutes. Adopted in 1994, the Revised Uniform Partnership Act (RUPA) is in many ways similar to UPA. There are, however, some significant differences. UPA Section 18 contains default rules that establish the rights and duties of partners in relation to the partnership and makes those rules subject to modification by the partnership agreement. Under UPA Section 18, only certain rights and duties are subject to change by the partnership agreement and other duties, such as a

maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to[, *inter alia*,] enforce the partner's rights under the partnership agreement." *Id.* § 75(b) ("Section 75(b)").

Plaintiff seems to believe Section 75(b) transmogrified equitable claims into actions at law by providing that partners may sue one another "for legal or equitable relief." (Pl. Mem. at 2-3.) Plaintiff is wrong. *See Williams v. Tritt*, 415 S.E. 2d 285, 287 (Ga. 1992) ("The rules of common law and equity govern when the partnership statutes have no applicable provision. We have previously held that a complaint seeking an accounting, dissolution, and injunction is an equity action. No provision in the Georgia Uniform Partnership Act [containing a provision identical in substance to Section 75(b)] or Georgia Limited Partnership Act changes a claim for an accounting, dissolution, or injunction into a legal action or grants a partner the right to a jury trial." (citations omitted)); *Schuetzle v. Lineberger*, No. 57352-1, 2007 Wash. App. LEXIS 325. *9-10 (Wash. Ct. App. 2007) ("Further, RCW 25.05.170(2) [which is identical in substance to Section 75(b)] explicitly states that a 'partner may maintain an action against … another partner for legal or equitable relief.' Under this provision, in cases where a partner is seeking primarily legal relief, a jury would be appropriate, but in cases where a partner is seeking primarily equitable relief, a court does not err by denying a jury trial."). Section 75(b) does nothing to alter the law distinguishing legal and equitable claims. *See also Calderoni v. Senese*, 2014 Conn. Super. LEXIS 218, * 5 (Conn. Super. 2014) ("Whether the partnership should be dissolved, and whether the defendant is liable for breach of a fiduciary duty or for conversion of partnership assets, are closely related to the claim for an accounting," and "there is no right to a jury trial in this case").

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partner's fiduciary duty, are nonwaivable. In contrast, RUPA Section 103 clearly grants broad contractual freedom followed by a short, exhaustive list of rights and duties that the partnership agreement may not modify." (footnotes omitted)).

Significantly, this Court relied upon Section 75(b) to grant Plaintiff equitable relief **in this very case**. *Hamed v. Yusuf*, 58 V.I. 117, 120 (Super. Ct.) ("This Court may grant equitable (*i.e.* injunctive) relief as Plaintiff seeks in his Renewed Motion to enforce a partner's rights regarding partnership profits and management and conduct of the partnership business pursuant to 26 V.I. Code § 75(b)."), *aff'd in part, vacated in part on other grounds*, 59 V.I. 841 (V.I. 2013). It is the height of hypocrisy for Plaintiff to argue otherwise now. At any rate, Plaintiff is wrong.[5]

Plaintiff appears to argue that the existence of the alleged partnership is a claim in and of itself. (Pl. Mem. at p. 2.) It is not, but rather a subsidiary fact upon which all three of his claims are based. That the Court "found" the partnership existed does not transform Plaintiff's equitable claims into legal ones. *See Schuetzle*, 2007 Wash. App. LEXIS 325 at *10-11 ("The Linebergers argue that other Uniform Partnership Act jurisdictions have held that the question whether a partnership exists is for the jury, but the cases they cite involve actions at law, not actions in equity. ... Further, the *Lipsig* court makes clear that "[i]n a partnership dispute, the appropriate remedy is a formal accounting of the partnership affairs," to be tried in equity by the trial court.' The Linebergers confuse the issue, citing cases for the proposition that whether a partnership exists is a question of fact, when the real issue is whether the action is legal or equitable. We affirm the trial court's decision not to impanel a jury." (citations and footnotes omitted)); *Meyer v. Lofgren*, 949 S.W.2d 80, 84 (Mo. Ct. App. 1997) ("Thus, the determination of the existence of the partnership in a suit for an accounting under § 358.220 is part and parcel

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[5] Plaintiff also argues that the Virgin Islands Supreme Court decision in *United Corporation v. Waheed Hamed*, 64 V.I. 297; 2016 V.I. Supreme LEXIS 1 (V.I. 2016) supports his jury trial argument. But that case did not address whether a partner's claims in an accounting should or should not be tried by jury. It is undisputed that Waheed Hamed was never a partner in the Plaza Extra partnership. Moreover, the jury demand in that case was never contested by either party. The Supreme Court's offhand reference to a jury resolving a discovery rule issue has no relevance whatsoever to Plaintiff's insistence that his and Mr. Yusuf's respective partnership claims must be tried by jury.

of the equitable proceeding. As a vital part of the equitable proceeding, this determination would be made by the trial court, with no right to a jury trial as claimed by Lofgren.").

Finally, as indicated above (*supra* at p. 2), the only case discussed by Plaintiff, *Thompson v. Coughlin*, 997 P.2d 191 (Ore. 2000), does not require a different outcome. In *Thompson*, the plaintiff sued the defendant after withdrawing from the partnership, labeling her claim as an action for an "accounting." *Id.* at 192-193. Based on this characterization, the trial court struck her demand for a jury trial, a decision upheld by the intermediate appellate court. Reversing, the Supreme Court of Oregon held that because the plaintiff had sued for a sum certain that required no formal review of the partnership books to establish, her claim was legal in nature despite its label as an accounting:

> [T]his court defined a partnership accounting as a "bookkeeping process whereby debits and credits are balanced or a balance of mutual accounts is struck." A formal partnership accounting includes a "complete and systematic financial review," in which "all activities related to the partnership are subject to scrutiny." Based on plaintiff's own representations, it appears that no bookkeeping, in the sense of a formal review of all partnership transactions, is necessary in this case. The accounts at issue do not appear to be "so complex that justice [could] not be done without resort to … an equity court." In addition, the record makes clear that the partnership long since had been terminated when plaintiff filed his original complaint. No decree of dissolution is required, and a full review of partnership transactions is unnecessary. At a minimum, this dispute concerns commissions on two sales to the Macdonald family; at most, it concerns any additional commission that plaintiff or defendant failed to share with one another during the two-year period following the termination of the partnership. **The gravamen of plaintiff's complaint thus is a demand for a judgment for a specified sum of money determinable without any formal equitable accounting**.

Id. at 196 (citations omitted; emphasis added).

The case at hand bears no resemblance to *Thompson*.

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This litigation involves a financial dispute so complex that the Court assigned a Master to "oversee and act as the judicial supervision of the wind up efforts of the Liquidating Partner." *See* Plan at § 2. Further, it includes a "complete and systematic financial review" of a partnership business that spanned approximately 30 years, in which "all activities related to the partnership are subject to scrutiny." *Id.* To be sure, the accounts at issue in this case are "so complex that justice [could] not be done without resort to…an equity court." *Id.* The Wind Up Order effectively constituted a decree of dissolution and the Plan expressly provides for the winding up of the partnership, which requires a full review of partnership transactions throughout the long history of the partnership. In short, the lone case discussed by Plaintiff supports the conclusion that Plaintiff has no right to a jury trial.

This Court should not accept Plaintiff's invitation to effectively overturn the Wind Up Order and the Plan by eliminating the Master's and the Court's roles in the resolution of partnership claims. For all the reasons set forth herein and in Defendants' original memorandum filed over two years ago, the Plaintiff's demand for a jury trial should be stricken.

Respectfully submitted,

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Dated: October 14, 2016 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2016, I served the foregoing **Reply Memorandum of Law in Further Support of Motion to Strike Plaintiff's Jury Demand Dated September 29, 2014**via e-mail addressed to:

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