

**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,
MUFEEED 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 MOTION FOR FURTHER INSTRUCTIONS
AND FOR AN INTERIM DISCOVERY SCHEDULING ORDER**

The Master required both sides to file all partnership claims by September 30, 2016 – which also triggered a flurry of papers from both sides as to the underlying question: “what should happen next?” In his September 30, 2016¹ filings, Hamed

¹ The September 30th filings were re-filed October 17, 2016, with redactions.

objected to proceeding with the claims process before a full accounting of the value of his partnership shares for the years 1986-2012 is provided, as required by RUPA. For his part, Yusuf has argued that Hamed is trying to change the claims process.

However, ~~while both~~ parties are trying to convince the Court that the claims process should continue along different procedural paths, **oddly they are in total agreement that discovery is necessary.**² Since such discovery may significantly narrow and reduce the issues, a discovery schedule should be entered as to the issues ripe for discovery.

Additionally, a ruling on (1) the two pending *Daubert* motions (now fully briefed) and (2) the Plaintiff's statute of limitations ("SOL") motion on all pre-2006 claims, may significantly narrow the issues for which any discovery is needed.

Thus, the Plaintiff seeks instructions from this Court on how to proceed next, including the setting a partial discovery order, based on the current status of this case.

I. Where we are and how we got here

On October 7, 2014, this Court stayed all pending discovery and motions practice in this case. Soon thereafter, on January 9, 2015, it entered the Partnership dissolution and final wind-up plan ("Winding Up Order") that included the following requirements:

² See, e.g., page 17 of Yusuf's September 30, 2016, claims filing:

Yusuls proposed distribution in this matter (Hamed v. Yusuf, SX-12-CV-370, the "Main Case") is based upon the discovery that had been conducted prior to the imposition of the discovery stay in October of 2014. Additional information which has been or will be sought from Hamed's estate and his agents or representatives reflecting their personal finances is expected to reveal additional undisclosed withdrawals or personal expenses paid with Partnership funds. Hence, **additional discovery is needed** to determine if such additional undisclosed withdrawals occurred which would result in a revised proposed distribution as to the historical withdrawals. (Emphasis added.)

- In section 4 of the Order (pp. 4-5), the Court gave Yusuf the sole power to liquidate the assets and to do a distribution **after a full accounting was done**.
- Section 5 (p. 5) permitted a distribution **only after** that full accounting was done.
- Section 9, Step 4 (p. 8) Allowed Hamed to review all partnership accounting information **from 2012 to present**.
- Section 9, Step 6 (pp. 8-9) The Liquidation Process can **only take place after all other steps have been completed**. That section then provides as follows:

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 FINAL WIND UP PLAN OF THE PLAZA EXTRA PARTNERSHIP 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.

It should be noted that at no point does that Order does it say that disputed claims are merely “accounting issues” that will be submitted to the Master to resolve or that he will address and resolve any such disputed claims. Indeed, there is a jury demand which requires factual disputes to be resolved by a jury on numerous issues: claims against third parties (United), statute of limitation defenses, non-accounting claims for wrongful dissolution, etc.

Since the Winding Up Order was issued on January 15, 2015, no true RUPA final accounting for the Partnership has been filed, as also required by the Court.³ Instead, only the partial accounting from January 1, 2012 to the present has been submitted -- as no accounting for the period from 1986 to 2012 has even been attempted -- much less submitted. What Yusuf has submitted are his “claims” not any attempt at the sort of calculation RUPA demands to ascertain the value of each partner’s partnership

³ Of course, pursuant to Section 6 of the Winding Up Order (p. 5), Yusuf still continues to draw a full salary of \$300,000 annually during this process, even though he has many other businesses and the three Plaza stores have been closed since May 1, 2015.

accounts, as noted in *Laurence v. Flashner Medical Partnership*, 565 N.E. 2d 146, 152 (Ill. App. Ct. 1990), which reversed a finding of such an accounting by just producing boxes of documents:

The Uniform Partnership Act provides that a partner has a right to have an accounting as to his interest when he leaves the partnership. . . . **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. . . .

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 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 152.

Moreover, despite the directive in the Winding Up Order that Hamed was supposed to be allowed to review the post-2012 partnership information, that did not happen. Indeed, the Liquidating Partner refused to allow the partnership accountant, being paid from the partnership funds, to answer most of the very detailed and specific questions that Hamed's accountant presented through the Master – at the Master's direction.⁴

⁴ John Gaffney has also been paid full his full salary (and a bonus!) from the partnership funds, even though he has a full time job doing the accounting for Yusuf's other businesses, including the new Plaza East store.

Finally, even though such a final accounting including the 1986-2012 period has never been completed, the Master suddenly ordered the parties to file their 1986-2012 claims -- *in addition* to objections to the post 2012-accounting submitted by Gaffney by September 30, 2016. In response, Hamed filed his extensive objections to having to meet this deadline, along with his claims and objections as best he could without a RUPA accounting of partnership share or discovery. To date, Yusuf has never responded to these very specific objections, nor has he explained why he never did a full accounting, as required by RUPA and specifically ordered by this Court.

II. The Next Step -- Why partial discovery as to the period from January 1, 2012 to the present is now appropriate and needed, while full discovery cannot be done yet.

Yusuf stated, in section IX on page 16 of his September 30, 2016 filing, and Hamed agrees:

To fully and formally complete the dissolution of the Partnership and accomplish a final distribution to the Partners, **further discovery will be required in this case and related litigation.** (Emphasis added.)

Thus, it is clear that completing the dissolution of the partnership involves the consideration of "what discovery to do." In this regard, there are two distinct time periods that require such discovery: (1) 1986 to January 1, 2012 and (2) January 1, 2012 to the present. Each time period will be discussed separately.

A. Discovery as to the period from 2012 to the present is relatively simple.

Yusuf, as the liquidating partner, has submitted an accounting by his bookkeeper, John Gaffney, covering January 1, 2012 to the present. Addressing that accounting, Hamed has submitted an expert CPA Report with a series of *highly specific*,

point-by-point objections. This makes the post-2012 situation simple. Discovery by both parties as to the accounting and Hamed's objections should take place now.

Moreover, there are no motions pending that would shorten this process. In fact, written discovery, which was stayed by the Court, and depositions regarding the post 2012 time period will *vastly* narrow the remaining post 2012-accounting issues, as that process should answer the many questions that Hamed has raised.

B. Discovery for the 1986 to 2012 is premature, as more work is still needed before discovery is appropriate

There are two reasons why discovery as to the pre-2012 claims is still not appropriate just yet.

First, as noted above, for 1986 to 2012 there has been no RUPA accounting of the value of the partnership accounts. While Yusuf states that *he is the one that wants* to follow the *Winding Up Order*, arguing that Hamed is irrationally suggesting some "other" process, Section 4 of that Order clearly requires a "full accounting" **before** any final decisions on claims regarding distribution to the partners, (exactly as RUPA requires):

Pursuant to the Act, the Liquidating Partner shall have authority to wind up the Partnership business , , , and marshal Partnership Assets for *equal distribution to the Partners following* [1] payment of all Debts and [2] **a full accounting by the Partners**, pursuant to agreement of the Partners or by order of the Court. *Id.* at pages 4-5.

Simply put, Hamed submits that Yusuf is seeking to submit his cherry-picked, random "claims" (plucked from whatever pre-2012 records he selects as most beneficial to him) to the Master for a 'quick' decision without doing the pre-2012 partnership accounting, ***as ordered by this Court. If such an accurate accounting is not possible for the***

period 1986 to 2012, Yusuf as the liquidating partner should just say so.⁵

Otherwise, that full accounting must be done first before discovery commences for this pre-2012 time period.⁶

Second, the pre-2012 discovery process would be far easier to do if this Court addressed the pending *Daubert* and SOL partial summary judgment motions first, which could conceivably result in a **drastic** reduction of the scope of discovery and the claims process generally.

Thus, both sides should be able to do discovery on these pre-2012 claims after (1) the pre-2012 RUPA accounting of the partnership accounts is completed (or conceded it cannot be done) and (2) certain motions are ruled upon, as noted, which may significantly limit the scope of discovery needed for this vast time period.

III. Conclusion

For the reasons set forth herein, it is requested that this Court (1) order discovery to commence on the post 2012-accounting, (2) direct the Liquidating Partner to complete the pre-2012 accounting (or certify he cannot do it) and (3) rule on the pending two *Daubert* motions as well as the pending statute of limitations motion so that discovery on the pre-2012 claims can proceed once the accounting for that period is done (or conceded to be impossible).

⁵ BDO's report specifically states that records for entire swaths of partnership years are missing – and that no bank records are available before 2007 – which is also the critical year under the statute of limitations.

⁶ If a full accounting cannot be done, the Plaintiff believes there is a clear process that then must be followed, which will move this matter forward. However, it is premature to address that process now, as a full accounting must be done if that is possible.

Dated: October 28, 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 28th day of October, 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


