IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

NOTICE OF FILING DOCUMENTS IN THE OTHER DIVISION

I. Caption of case including proper division:

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. Fathi Yusuf, et al. - Case No. SX-12-CV-370

Consolidated with:

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. United Corporation - Case No. SX-14-CV-287

Waleed Hamed, as Executor of the Estate of Mohammad Hamed v. Fathi Yusuf Case No. SX-14-CV-278

II.

Description of Document(s):	**No. of Pages**	**Document No.** (Clerk's office only)
Fathi Yusuf's Motion for Reconsideration of Ruling Limiting Period of Accounting Claim	22	
Proposed Order	2	

III. Certification of mailing or delivery to each of the following:

Name of Attorney	**Type of Service** Faxed/Mail Hand Delivery/E-Mail	**Date Mailed**
Joel H. Holt, Esq.	E-Mail	August 11, 2017
Carl J. Hartmann, III, Esq.	E-Mail	August 11, 2017
Mark W. Eckard, Esq.	E-Mail	August 11, 2017
Jeffrey B.C. Moorhead, Esq.	E-Mail	August 11, 2017
The Honorable Edgar D. Ross	E-Mail	August 11, 2017

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: August 11, 2017 By: _____

STEFAN B. HERPEL (V.I. Bar No. 1019)
Law House
1000 Frederiksberg Gade (P.O. Box 756)
St. Thomas, U.S.V.I. 00804-0756
Telephone: (340) 715-4422
Facsimile: (340) 715-4400
E-Mail: sherpel@dtflaw.com

Attorneys for Fathi Yusuf and United Corporation

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

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

WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff/Counterclaim Defendant, v. **FATHI YUSUF** and **UNITED CORPORATION**, Defendants/Counterclaimants, v. **WALEED HAMED**, **WAHEED HAMED**, **MUFEED HAMED**, **HISHAM HAMED**, and **PLESSEN ENTERPRISES, INC.**, Additional Counterclaim Defendants.	**CIVIL NO. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION**, Defendant.	**Consolidated With** **CIVIL NO. SX-14-CV-287** **ACTION FOR DAMAGES AND DECLARATORY JUDGMENT**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **FATHI YUSUF**, Defendant.	**CIVIL NO. SX-14-CV-278** **ACTION FOR DEBT AND CONVERSION** **JURY TRIAL DEMANDED**

FATHI YUSUF'S MOTION FOR RECONSIDERATION OF RULING LIMITING PERIOD OF ACCOUNTING CLAIMS

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

The Court's July 21, 2017 memorandum opinion and order (the "Opinion") granting partial summary judgment to Plaintiff on the accounting claim of Fathi Yusuf ("Yusuf") guts the heart of his accounting claim, by limiting it to the period from September 17, 2006, instead of the period from January 1, 1994, which is the undisputed date of last reconciliation or true-up of the partnership. The period from the date of the FBI raid in October 2001 to the present is the least important period from an accounting perspective, because the partners were extremely reticent about making cash withdrawals from store safes after the raid, because most of the cash in store safes was seized at the time of the raid, and because when the indictment was handed down a federal monitor was put in place to supervise all payments made from revenues generated by the three Plaza Extra stores operated by the partnership.

The Court's grant of partial summary judgment to Plaintiff was made on the basis of an issue – laches – that was never raised by Plaintiff in his motion for partial summary judgment or even mentioned at the hearings held on March 6 or 7 to address the motion. Plaintiff sought to limit the accounting claim to the same period the Court has limited it to, but solely on the ground that the Revised Uniform Partnership Act (R.U.P.A.) altered pre-existing law and rendered the claim time-barred as to any charges or credits preceding September 17, 2006. The Court denied Plaintiff's motion for partial summary judgment on statute of limitations grounds, holding that the accounting claim accrued upon the date of dissolution, and that "the statute of limitations, by its plain language, has no direct applicability to individual, claimed credits and charges presented within the accounting process." *See* Opinion at pp. 12, 18. But then, without notice to any of the parties that it intended to decide the issue on a ground neither party had briefed, the Court held that the doctrine of laches compelled the same result sought by Plaintiff under his legally

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

meritless statute of limitations argument, and entered partial summary judgment for Plaintiff limiting the period covered by the accounting in this matter to September 17, 2006 to the present.

As explained more fully below, Yusuf respectfully submits that the Court committed "clear error" under V.I. R. CIV. P. 6-4, both procedurally and substantively, in granting summary judgment to Plaintiff excluding from the accounting process all transactions occurring between the date of last reconciliation, which was January 1, 1994, and September 17, 2006, which is six years from the date Plaintiff chose to file his Complaint. Yusuf respectfully requests this Court to grant reconsideration of its ruling limiting the reach of the accounting claim, pursuant to V.I.R. Civ. P. 6-4(b)(3), and to rule on reconsideration that the claim may look back to any credits and charges made against partnership funds by either partner since January 1, 1994.[1]

ARGUMENT

I. Granting Partial Summary Judgment on Laches was Procedurally Improper.

A. Since the Court relied *Sua Sponte* on Laches in Granting Partial Summary Judgment for Plaintiff on the Accounting Claim, it Erred by Not Giving Yusuf advance Notice and an Opportunity to Brief and Provide Affidavit Evidence on that Issue.

As the Virgin Islands Supreme Court stated in *United Corporation v. Hamed*, 64 V.I. 297, 307 (V.I. 2016), before granting summary judgment to a party, the Superior Court must, "at an absolute minimum provide the opposing party with an opportunity to be heard with respect to any grounds for summary judgment being raised by the Superior Court *sua sponte*." (internal marks omitted) (citing to *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 711 (V.I. 2011). The failure of this Court to notify the parties that it was considering granting summary judgment on a ground not raised by a party is grounds for reversal, so that the parties may be given an

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[1] Alternatively, Yusuf requests this Court, pursuant to V.I. Code Ann. tit. 4, §33(c), to certify its ruling on the accounting claim for immediate appellate review by the Virgin Islands Supreme Court. That relief is addressed in a separate motion being filed concurrently with this one.

opportunity to brief and provide evidence on the issue sufficient to create a triable issue of fact. *See Hamed, supra*, at 307.

The rule enunciated by the Supreme Court in *Hamed* and *Tutu Park, Ltd.* is grounded in procedural fairness, judicial economy, and the belief that judicial decisions should be rendered on the basis of arguments that have been tested by the adversarial process. The rule is set forth clearly in both V.I. R. CIV. P. 56(f) and Fed. R. Civ. P. 56(f),[2] and it has been enforced strictly on appeal not only by the Virgin Islands Supreme Court, but also by numerous other federal circuit courts. *See, e.g., Williams v. City of Chicago*, 733 F.3d 749, 755 (7th Cir. 2013) (reiterating what it characterized as the frequently cited rule that "district courts may not grant summary judgment on grounds not argued by the moving party, at least not without giving notice so that the non-moving party has a full opportunity to present relevant evidence and argument," and reversing trial court on this ground); *Karlson v. Red Door Homes, LLC*, 533 Fed. Appx. 875, 877 (11th Cir. 2014) (reversing district court's grant of summary judgment on a ground not raised by movant (implied-license), where the district court "failed to provide adequate notice to the parties that it intended to address the implied-license question when deciding whether to grant summary judgment").[3]

---

[2] V.I. R. CIV. P. 56(f), Judgment Independent of the Motion, provides, in pertinent part, "After giving notice and a reasonable time to respond, the court may . . . grant the motion [for summary judgment] on grounds not raised by a party . . .." Fed. R. Civ. P. 56(f) contains identical language.

[3] *See also Citizens for Pennsylvania's Future v. Pittsburgh Water & Sewer Authority*, 620 Fed. Appx. 96, 97 (3d Cir. 2015) (reversing grant of summary judgment where the court resolved a question that the parties had not focused on in their briefs and oral argument, without first providing the losing party "the required notice and an opportunity to respond"); *Coward v. Jabe*, 474 Fed. Appx. 961, 963 (4th Cir. 2012) (holding that "the district court erred in granting summary judgment on different grounds than those raised in the motion for summary judgment without notice and a reasonable opportunity to respond," and vacating lower court's order); *Wholesale Grocery Products Antitrust Litigation, D & G v. SuperValu, Inc.*, 752 F.3d 728, 735 (8th Cir. 2014) (reversing grant of summary judgment because, *inter alia*, the district court

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

In *Pactiv Corporation v. Rupert*, 724 F.3d 999, 1001 (7th Cir. 2013), the Court recognized that "[m]any decisions in this circuit hold that a district judge must notify the litigants, and invite the submission of evidence and legal arguments, before resolving a case on a ground parties have bypassed or using a procedure they did not propose." The Court in *Pactiv* then proceeded to explain cogently the reasons underlying the "norm . . . that judges must not take litigants by surprise":

> If judges could decide suits without warning on the basis of considerations the litigants were not contesting, litigation would be even less manageable than it is already. Lawyers would need to submit evidence and legal arguments on issues that appeared to be irrelevant, on the off chance that the judge would second-guess the parties' litigation strategies. That would produce delay, bloat, and expense.

Id. at 1001. The rule also reduces the possibility of judicial error by ensuring that judges resolve only those issues that have first been tested by the adversarial process. *See Williams, supra*, 733 F.3d at 755 ("As can happen often when a court ventures beyond the parties' arguments . . . the court apparently overlooked the conflicting evidence" in resolving a summary judgment motion on a ground raised *sua sponte* by the Court).

B. This Court Also Erred by Permitting Plaintiff to Offer Testimony at the Summary Judgment Hearing and Relying on It in Making its Laches Ruling.

Besides failing to provide the required advance notice that it was considering whether summary judgment on laches grounds ought to be granted, and then inviting Yusuf to brief this issue, the Court also erred by relying on testimony offered at that hearing. Over the repeated objections of counsel for Yusuf made at the hearing, the Court permitted Plaintiff to offer the testimony of numerous witnesses, including a purported expert witness, Lawrence Shoenbach.

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

granted summary judgment "for a reason not addressed by the wholesaler's summary judgment motion," without first "giving notice and a reasonable time to respond" to the non-movant).

The Court's Opinion relies on the testimony and report of Mr. Shoenbach in support of its ruling that Yusuf is barred by laches from seeking an accounting for the period January 1, 1994 to September 17, 2006.

Rule 56 does not contemplate the taking of testimony at a hearing on a motion for summary judgment. *See Smith v. City of Pittsburgh*, 764 F.2d 188, 191 (3d Cir. 1985) ("[t]he procedure followed in this case by which the court directed a hearing and made factual determinations on which the summary judgment was predicated was unauthorized and improper"). As Court in *City of Pittsburgh* explained, "Rule 56(c) is explicit as to the matters that can form the basis of [summary] judgment," and it limits those matters to "pleadings, depositions, answers to interrogatories, and admissions, [and] . . . affidavits." *Smith v. City of Pittsburgh*, 764 F.2d 188, 191 (3d Cir. 1985). "There is no reference to any evidentiary hearing, for obvious reasons," and "[i]f there is a dispute as to a fact that can only be determined after a hearing, then the issue may not be resolved by summary judgment." *Id.* at 191. *See also Howard v. Klicka*, 242 Fed. Appx. 416, 418 (9th Cir. 2007) (Federal Rule of Civil Procedure 56 does not "contemplate[] that an evidentiary hearing will be held to resolve credibility issues in deciding a motion for summary judgment").

The Court's Order scheduling the March 6, 2017 hearing on Plaintiff's Motion for Partial Summary Judgment states that "[i]n light of *United Corp. v. Hamed*, 64 V.I. 297, 310 (2016), Plaintiff may present evidence of Defendant Yusuf's knowledge of any suspicious circumstance relating to information in his possession to trigger a duty to exploit his access to such information, as required to commence the statute of limitations."[4] Since Rule 56 summary

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[4] The March 6 Order also scheduled hearing on Yusuf's Motion to Strike Jury Demand and his Motion to Strike Hamed's Revised Notice of Partnership Claims, as well as Hamed's Motion to Strike Business Valuation Report (Integra), his Motion to Strike Accounting Expert (BDO), and

judgment motions cannot be decided on the basis of testimony at a hearing, insofar as the Court's Order contemplated the use of testimony at the March 6 hearing regarding any aspect of the summary judgment motion on the statute of limitations issue, it was improper. Indeed, Yusuf's counsel objected on a number of occasions to the calling of witnesses by Plaintiff in connection with a summary judgment motion. *See, e.g.*, transcript of March 6, 2017 hearing (the "Transcript")[5] at pp. 23-25, 26-28, 36-38, 47-49, 53-54, 59, 87, 116-119, 135-137 and 297-298, attached as **Exhibit 1**. The Court compounded that error by relying on Mr. Shoenbach's testimony, in substantial part, in granting summary judgment for Plaintiff on the laches issue.

The dangers of relying on one party's expert testimony and report to resolve a summary judgment motion, without inviting, let alone considering, testimony and argument from the other side rebutting that testimony, are readily apparent in this case. The Court concluded on the basis of Mr. Shoenbach's report that:

> According to his deposition testimony, Maher Yusuf, together with Mufeed Hamed, "pulled out a good bit of receipts from the safe in Plaza East," and after roughly estimating the amounts of withdrawals attributable to the Hameds and Yusufs, each family destroyed their own receipts.

Opinion at 26. This characterization mistakenly intimates that the receipts were destroyed without first making an exact tabulation of them. In fact, Maher Yusuf testified in deposition that they culled receipts from the Plaza Extra-East safe, and divided those into Hamed receipts and Yusuf receipts. Mufeed Hamed then used a calculator with a tape to tabulate the total withdrawals reflected by the Hamed receipts, and Maher Yusuf did the same with respect to

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

his Motion for Further Instructions and Discovery Schedule. The Order made no provision for presenting additional evidence on any of these Motions, and the Court should not have entertained any testimony offered in support.

[5]All subsequent references in this Motion to pages from the Transcript will be included in Exhibit 1.

Yusuf receipts. Maher did not testify that this was a "rough estimation," as the Court's summary of his purported testimony states; rather, he said, it was a calculation "to the penny." The two of them rounded the respective withdrawals to $2.9 million for the Hameds, and $1.3 million for the Yusufs, which meant that the Hameds were short $1.6 million. Maher Yusuf testified that the receipts used in these calculations were later destroyed by Waleed Hamed and him, but this was only after they had tabulated each of their respective family members' withdrawals to the penny and double-checked the other's calculations. *See* the Shoenbach Report, admitted as Exhibit 34 at the March 6 hearing, at n.5, where the deposition testimony of Maher Yusuf is quoted in part.

Yusuf's expert witness, Fernando Sherrer, an accountant with the BDO firm, would have testified that contrary to Mr. Shoenbach's opinion, Maher Yusuf's testimony about the partial reconciliation performed in 2001 is a sufficient basis for incorporating the dollar amounts of charges to the Hamed side and the Yusuf side, that were obtained from the tabulation. *See* **Exhibit 2**, Sherrer Declaration, ¶¶ 5(e), 10. Mr. Shoenbach acknowledged that he has no accounting background whatsoever, which means that his opinions regarding how this partial reconciliation should be treated in any partnership accounting undertaken by an accountant are entitled to no deference by this Court.[6] And even if his testimony were given any weight, this

[6]Mr. Shoenbach's testimony shows that he is at most an expert in white-collar criminal law, not an expert for the purposes of performing or analyzing partnership accountings. *See* Transcript at p. 174. The Court's ruling expressly leaves open whether Mr. Shoenbach qualifies as an expert on any subject matter under Virgin Island Rule of Evidence 702. *See* Opinion at p. 25, n.26. Absent any ruling that Shoenbach is an accounting expert under Rule 702, it was impermissible for the Court to rely on his report or testimony in any way in rendering its summary judgment ruling. *See, e.g., Lewis v. CITGO Petroleum Corporation*, 561 F.3d 698, 703 (7th Cir. 2009) (stating that "expert testimony must be admissible to be considered in a motion for summary judgment") (citation omitted); *Cacciola v. Selco Balers, Inc.*, 127 F.Supp.2d 175, 179 (E.D. N.Y. 2002) (because a court may only consider "evidence that would be admissible at trial" in ruling on a motion for summary judgment, "[e]vidence contained in an expert's report . . . must be evaluated under Fed. R. Evid. 702 before it is considered in a ruling of the merits of a summary judgment motion").

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

would mean, at most, that there is a genuine issue of material fact regarding the accuracy of the dollar amounts yielded by that partial reconciliation that should be resolved by the Master during the claims resolution process.[7]

The Court also relied on Mr. Shoenbach's opinion that in light of the money-laundering scheme for which the Hameds and Yusufs were criminally charged, "[n]o proper accounting can be determined from the [partnership's] financial records because the gross receipts have been intentionally misapplied and documented." *See* Opinion at 25-26 (quoting from Shoenbach's Opinion Letter). Again, Mr. Shoenbach is not an accountant, let alone an expert in partnership accounting. By contrast, Yusuf's expert, Mr. Sherrer, of the BDO accounting firm, is an accountant and expert in partnership accounting. As his declaration reveals, Mr. Shoenbach's opinion is mistaken. The focus of a reconciliation of partnership accounts in on the documented withdrawals each partner made, and knowledge of the overall gross receipts of the partnership is not necessary to conduct that analysis. Hence, it is legitimate to ignore it for purposes of conducting an accounting, and BDO has in fact ignored it in the preliminary partnership accounting that was embodied in the BDO Report. *See* Exhibit 3, Sherrer Declaration, ¶ 5(b), 7 and 8.

Even assuming *arguendo* that Mr. Shoenbach were qualified to render opinions on whether a partnership accounting is or is not legitimate, the competing opinions of Mr. Sherrer

---

[7]From this single instance of destruction of a discrete set of safe receipts, the Court makes the *non sequitur* inference that this "suggests a general pattern of negligent, if not willful, failure to record withdrawals throughout the history of the partnership." Opinion at 27. The Court also suggests that the partners "deliberately determined not to keep accurate records in the first place," *id.* at 32, but here appears to be confusing records of gross receipts earned by the three supermarkets with records of withdrawals. There is an abundance of evidence of partnership withdrawals (i.e., many thousands of documents) in the form of receipts placed in the safe and checks written on partnership bank accounts. *See* Exhibit 3, Sherrer Declaration, ¶ 5(a) and 6.

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

make it clear that there is a conflict of opinions about whether the laundering of money renders any partnership accounting impossible, and also as to the accuracy of the charges to the Hameds and Yusufs that were tabulated in the partial reconciliation. It is well settled that a court may not "resolve disputed and relevant factual issues on conflicting affidavits of qualified experts." *Federal Laboratories, Inc. v. Barringer Research Limited*, 696 F.2d 271, 274 (3d Cir. 1982). "Nor is at liberty to disbelieve the good faith statements of experts contained in depositions or affidavits and presented by the non-moving party." *Id.* at 274. The Court's reliance on the Shoenbach report and his testimony in finding that there were no genuine issues of material fact regarding the applicability of laches to the accounting claim was improper. The declaration of Mr. Sherrer offering conflicting opinions compels the conclusion that any disputes regarding the legitimacy of BDO's future final report containing a partnership accounting from January 1994 to the present should be resolved by the Master after completion of discovery and, if necessary, the presentation of live testimony to the Master by lay and expert witnesses for both parties. [8]

C. Because of its Fact Specific Nature and the Existence of Genuine Issues of Material Fact, Summary Judgment on the Laches Issue is Not Permissible in this Case.

Plaintiff's summary judgment argument regarding the statute of limitations, while flawed, was based on his reading of R.U.P.A., and thus required little in the way of factual analysis by the Court. The Court properly rejected Plaintiff's statute of limitations argument, but then

[8] The Court appears to fault Yusuf for conducting the last full partnership reconciliation in January 1994, but overlooks evidence of why the next reconciliation did not happen sooner. As Yusuf explained, the FBI seized records needed for a partnership reconciliation in the raid that took place in October 2001. *See* **Exhibit 3**, Declaration of Fathi Yusuf dated August 12, 2014, ¶¶ 8, 9, attached as Exhibit 3 to his Motion for Summary Judgment Regarding Rent. In addition, the criminal defense attorneys for the Hameds and Yusufs in the criminal case "did not want us to take any action that supported the existence of a partnership." *See id.* at ¶ 8. Finally, Plaza Extra accounts were frozen by an injunction, *see id.* at ¶ 8, which meant that store funds were not available for a true-up of partnership accounts.

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

proceeded to award the very same relief he sought on the basis of a defense (laches) that is inherently very fact-laden. Because laches rulings depend heavily on the facts, courts here and elsewhere have consistently recognized that "[l]aches is rarely subject to summary judgment." *Montgomery v. Estate of Griffith*, 2008 WL 2769180 (V.I. Super. 2008) (citation omitted). *See also Country Floors, Inc. v. Partnership of Gepner and Ford*, 930 F.2d 1056, 1066 (3d Cir. 1991) (because the disposition of a laches defense can only be made "by a close scrutiny of the particular facts and a balancing of the respective interests and equities of the parties . . ., it usually requires the kind of record only created by full trial on the merits"); *Township of Piscataway v. Duke Energy*, 488 F.3d 203, 214 (3d Cir. 2007) ("[w]here a defendant asserts the laches defense, a full hearing of testimony on both sides of the issue is required") (citation and internal quotation marks omitted); *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1041 (9th Cir. 2000) ("because a claim of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary judgment"); *Axcan Scandipharm Inc. v. Ethex Corporation*, KV, 585 F. Supp.2d 1067, 1081 (D. Minn. 2007) ("[b]ecause a court asked to apply laches must determine the reasonableness of – and, hence, the reasons and excuses for – the plaintiff's delay in filing suit, as well as the resulting prejudice suffered by defendant, laches generally cannot be decided on a motion for summary judgement…").

In those unusual cases where a lower court grants summary judgment on a laches issue, and an appellate court affirms the ruling, it is because "the facts necessary for determining whether the defendant suffered material prejudice are not genuinely disputed." *See Jeffries v. Chicago Transit Auth.*, 770 F.2d 676, 679 (7th Cir. 1985). The declaration of Mr. Sherrer that is attached to this motion and discussed above leaves no doubt that there are, at the very least,

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

genuine issues of material fact regarding whether Plaintiff can satisfy his burden of proving laches with respect to any part of Yusuf's accounting claim.

Most of the Court's analysis of laches in its Opinion is little more than an uncritical acceptance of Mr. Shoenbach's opinion that the partnership accounting that is part of BDO's preliminary report is based on incomplete records and is inherently unreliable.[9] Yusuf submits that the questions raised by the Court regarding the BDO report go to the weight of the evidence to be considered by the Master when he evaluates Yusuf's partnership claims, and is best left to the Master. They have nothing to do with the doctrine of laches.

II. There are Substantive Errors in the Court's Analysis of Laches.

The Court acknowledged that the Virgin Islands Supreme Court has adopted the rule that laches is an affirmative defense and that a party who has been sued must prove two elements in order to satisfy the defense: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *St. Thomas-St. John Board of Elections v. Daniel*, 49 V.I. 322, 330 (V. I. 2007) (citation to U.S. Supreme Court case omitted). The lack of diligence must be such that the delay in bringing the claim is not only unreasonable, but also "inexcusable." *See Saraw v. Fawkes*, 2017 WL 36299, * 3 (V.I. 2017) (laches bars a plaintiff's claim "where there has been an inexcusable delay in prosecuting the claim ...") (citation and internal quotation marks omitted); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 803 (8th Cir. 1979) ("[f]or the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant") (citation to U.S. Supreme Court cases omitted). If the statute of limitations does

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[9]The fact that the Court ruled on the same date it issued its laches Opinion that the BDO Report should not be excluded on *Daubert* grounds. It is impossible to reconcile that ruling with the Court's acceptance of Mr. Shoenbach's criticism of the reliability of that report in the context of its laches analysis.

not bar a claim, then "the equitable defense of laches is presumptively inapplicable." *Mantilla v. U.S.*, 302 F.3d 182, 186 (3d Cir. 2002).

In addition to ignoring the presumption against the applicability of laches, the evidence that the Court relied on in finding that there was inexcusable delay was insufficient to warrant entry of summary judgment for Plaintiff on this affirmative defense for which he had the burden of proof. In addition, the Court failed to show that Plaintiff was prejudiced by the assertion of a counterclaim asserting claims for dissolution and accounting in 2013, rather than some earlier date. Indeed, the Court concluded that "neither partner truly knows what he might uncover upon investigation" and completion of a comprehensive accounting of charges and credits made by each partner since the date of last reconciliation in January 1994. *See* Opinion at 22.

A. The Court Erroneously Concluded that Yusuf Inexcusably Delayed in Bringing His Claim for an Accounting.

The Court correctly held that an equitable claim for an accounting accrues "upon dissolution of the partnership," and can "only be presented" when dissolution occurs. *See* Opinion, p. 9, n. 6. In doing so, the Court necessarily accepted Yusuf's argument that R.U.P.A. did not change the longstanding common law that an accounting claim accrues upon dissolution. From that conclusion, the Court had to reject Plaintiff's argument that the accounting claim was time-barred by the statute of limitations, because Plaintiff could not seriously argue (and had never argued) that Yusuf waited too long after dissolution to bring his claim for an accounting. *See id.* at p. 12. Indeed, the date Yusuf filed his original counterclaim, December 23, 2013, is probably the most logical date to assign as the date of dissolution of the partnership, inasmuch as Yusuf asserted a claim for dissolution (in Count VIII),[10] as well as a claim for an equitable

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[10]Neither the original Complaint filed by Plaintiff on September 17, 2012, nor the First Amended Complaint filed (in the District Court) on October 19, 2012 sought dissolution of the partnership.

accounting (Count IV) in that pleading. Since the Court has ruled that the statute of limitations does not bar Yusuf's accounting claim, laches is presumptively inapplicable as a bar (or partial bar) to Yusuf's claim for an accounting. The Court's opinion fails to recognize that its rejection of Plaintiff's statute of limitations defense created an even heavier burden on Plaintiff to show that laches barred any part of Yusuf's accounting claim.

"[T]he general rule is that as long as the partnership exists [the] failure to demand a partnership accounting does not amount to laches." *Brand v. Elledge*, 101 Ariz. 352, 361 (Ariz. 1966) (citing to Illinois, Wisconsin and Maryland appellate court decisions). If there is an inexcusable delay in bringing an accounting claim following the dissolution of the partnership, that delay has to be measured from the date of dissolution. *See Berk v. Sherman*, 682 A.2d 209 217 (D.C. App. 1996) (holding that laches did not bar an accounting claim that was brought "two years and four months after dissolution," and citing a prior decision of that court holding that an accounting claim brought "four years after dissolution of a partnership was not barred by laches"). Here, as discussed above, Yusuf brought his accounting claim at the same time he sought the remedy of dissolution. If the filing of the counterclaim (December 23, 2013) marks the date of dissolution, then there was zero delay in bringing the accounting claim. Certainly, neither Plaintiff nor the Court in its Opinion suggests that dissolution occurred earlier than that date. *See* Opinion at p. 6 (stating that "the partnership was not dissolved by the time the litigation commenced [September 17, 2012]").[11] Pursuant to V.I. Code Ann. tit. 5, §32(a), the

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

At page 2 of his Response to Motion to Appoint Master filed on April 30, 2014, Plaintiff claimed that only he was entitled to dissolve the partnership, which he purposed to do via his Notice of Dissolution attached as Exhibit 1 to that Response.

[11]The Court's Opinion references the view of some courts that laches should be informed by the analogous statute of limitation for an accounting claim. *See* Opinion at pp. 16-17. Contrary to the Court's assumption, however, the analogous statute of limitations is properly examined from

statute applicable to actions for an accounting here appears to be the catch-all statute of ten years for "any cause not otherwise provided for in this section." *See* V.I. Code Ann. Tit. 5, §32(2). Since the Court agrees that an action for a partnership accounting accrues upon dissolution, that ten-year statute would not begin running until the date of dissolution.

Inasmuch as the Court agrees with Yusuf that an accounting claim accrues upon dissolution, and that Yusuf's accounting claim was brought at or even before dissolution, the Court cannot tenably say that Yusuf delayed inexcusably in bringing his accounting claim after it had accrued. The Court did not rule that Yusuf should have sought dissolution earlier, and Yusuf is not aware of any cases that base a finding of laches on an inexcusable delay in seeking dissolution, with resulting prejudice to the other party. But even if this kind of delay could give rise to laches, Yusuf had no reason to know of any basis for seeking dissolution until after 2010, when the FBI records were returned in part. As Yusuf has asserted in declarations filed previously in this case, he had no reason to know that the Hameds were acting dishonestly until he reviewed the seized FBI documents and saw a tax return of Waleed Hamed that revealed

---

the date of dissolution, not from the date that a particular credit to or charge against either partner's account was made. *See Fontana v. Steenson*, 145 Or. App. 229, 232 (Or. App. 1996) (treating the analogous statute of limitations as the 6-year statute for breach of contract actions, and measuring the 6-years from the date of dissolution of the partnership to determine whether the presumption against a finding of laches applied). Moreover, there is only a need to look at an "analogous" statute of limitations in those relatively few jurisdictions, such as Delaware, Oregon, and Connecticut, where its legislature has created no statute of limitations for equitable actions such as an accounting. This is a remnant of the division between equity and law that existed in the old English and early American law, but which has now been abolished for most purposes everywhere. The majority of jurisdictions, including the Virgin Islands, enacted statutes of limitations for equitable actions many years ago, and there is no need for a court to determine the analogous statute of limitations for an equitable action in those jurisdictions. *See, e.g., Foster v. Walker*, 203 Okla. 3, 5 (Okla. 1950) (stating that in 1864 the Kansas Supreme Court ruled that "[t]he distinction between actions at law and suits in equity is abolished; and the statute of limitations apply equally to both classes of cases"); *Shriner v. Sheehan*, 773 N.E.2d 833, 845 (Ind. 2002) ("Long ago, the Indiana legislature abolished the distinction between 'actions at law' and 'suits in equity' and further provided that statutes of limitation would apply to both").

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

earnings far in excess of his salary at the Plaza Extra supermarket business. *See*, e.g., Exhibit 3 at ¶ 12.

The Court in a footnote discounts Yusuf's sworn statements by accepting Plaintiff's contention that "affidavit evidence," in the form of an affidavit of an FBI agent, Thomas Petri, "shows that all documents seized by the FBI were not only available to the defendants in the criminal matter, including Yusuf, but were, in fact, thoroughly reviewed by them, through their lawyers on many occasions." Opinion at 28, n.30 (citing to Plaintiff's Reply re Statute of Limitations). The Superior Court in a related case involving disputes between the Hameds and the Yusufs relied on the same argument to establish that Yusuf or his corporation, United, knew of claims, and it was reversed on that point by the Virgin Islands Supreme Court.

The related case is *United Corp v. Hamed*, Case No. ST-13-CV-101, and it involved claims that a son of Plaintiff, Waheed Hamed, had misappropriated funds owned by Yusuf's corporation, United. In deciding a Motion for Summary Judgment filed by Hamed, the Superior Court found "the Declarations of Special Agent Thomas L. Petri and Special Agent Christine Zieba" to be "dispositive" on the question of knowledge of a claim by United, because "both declarations demonstrate that Plaintiff's defense team was granted 'unfettered' access to discovery . . .." *See* **Exhibit 4**, September 2, 2014 Memorandum Opinion of Superior Court in *United Corp v. Hamed*, Case No. ST-13-CV-101, pp. 5-6. On the basis of the FBI affidavits, the Superior Court concluded that there were no genuine issues of material fact that Plaintiff had access to the tax return in 2003, which meant that United should be deemed to have known of the conversion claim by then. Because the claim was brought eleven years later, it was therefore time-barred. *See id.* at p. 9 (granting summary judgment).

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

On appeal, the Virgin Islands Supreme Court reversed the Superior Court's grant of summary judgment on this point. The Supreme Court ruled that, even if true, the FBI affidavits stating that United's criminal attorneys "had access to all of the financial documents in the prosecution's possession" could not as a matter of law establish knowledge of a claim that was revealed in one of those documents. *See United Corporation v. Hamed*, 64 V.I. 297, 310 (V.I. 2016). The Supreme Court held that "more than bare access to necessary information is required to start the statute of limitations running," and specifically that "[t]here must also be a suspicious circumstance to trigger a duty to exploit the access." *Id.* at 310. Since "Hamed presented no evidence that "would have triggered a duty to exploit the access United gained to Hamed's financial records during the federal prosecution in 2003," the Supreme Court reversed the order granting summary judgment on statute of limitations grounds. *See id.* at 310 (internal marks omitted). The Supreme Court's ruling in this related case necessarily means that this Court erred by relying on the same FBI affidavit and its assertion that the defense attorneys had "complete access" to those documents, as a basis for concluding that Yusuf had knowledge that Plaintiff was acting dishonestly as far back as 2003.[12]

B. The Court Erred in Finding Prejudice to Hamed.

Besides having failed to show any inexcusable delay on the part of Yusuf in bringing his equitable accounting claim, the Court also failed to show how Plaintiff has been prejudiced by

[12] The Court implies in passing on page 29 of its Opinion that because members of the Hamed and Yusuf families jointly engaged in tax evasion, each was therefore placed on notice that the other might engage in malfeasance as to him. This is very similar to the position taken by the Superior Court in *United Corp. v. Hamed* when it dismissed one of the claims in that case on a motion for judgment on the pleadings. *See* **Exhibit 5**, June 24, 2013 Memorandum Opinion of Superior Court in *United Corp v. Hamed*, Case No. ST-13-CV-101, p. 8. The Virgin Islands Supreme Court reversed this Order as well as the aforementioned summary judgment Order, and in so doing necessarily rejected this argument. *See United Corporation v. Hamed*, *supra*, 64 V.I. at 307.

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

the assertion of the claim on December 23, 2013, as opposed to some earlier date. The "classic elements" of prejudice in the laches context "include unavailability of witnesses, changed personnel, and the loss of pertinent records." *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982) (citation and internal marks omitted). *See also Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1227 (9th Cir. 2012) ("Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded, or who have died"); *Whitefield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 245 (8th Circ. 1987) ("The prejudice that will support a defense of laches includes loss of evidence in support of the defendant's position or the unavailability of witnesses").

The Court's lengthy opinion contains only a single cursory paragraph addressing prejudice to the Plaintiff. The Court implies in this paragraph that many of the charges that make up the BDO accounting were not in writing, *see* Opinion at 30, but as the declaration of Mr. Scherrer makes clear, that is incorrect. Virtually every charge recorded to either the Hamed or Yusuf side in the BDO report is based on a check, safe receipt or other supporting document. *See* **Exhibit 3**, Sherrer Declaration, ¶ 6. The testimony at the March 6 hearing revealed no memory difficulties on the part of the Hameds in remembering the purpose of checks that they argued should be in the Yusuf column rather than their own. Prejudice has simply not been shown on this record.[13]

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[13]Yusuf submits that Plaintiff has not met his burden of showing even a genuine issue of material fact regarding the existence of prejudice. If the Court disagrees, and decides on reconsideration that there are genuine issues of material fact regarding laches, the proper way to resolve them would be for the Court to either conduct a full evidentiary hearing on that matter (pursuant to notice and an opportunity for each side to submit briefs and present witnesses), or to instruct the Master to conduct such a hearing and then make a report and recommendation on that issue that will be subject to final determination by this Court.

The Court's opinion also includes a great deal of discussion of the state of the accounting records that has nothing to do with a laches analysis, and which in any event is unsupported by the evidence and contradicted by the declaration of BDO's Mr. Scherrer. The Court states that any reconciliation would be created "out of whole cloth," because there is "scant documentary evidence" to support the tabulation of withdrawals by each partner. Court's Opinion at p. 15. In fact, there are many thousands of documents evidencing withdrawals by one or the other partner. *See* Exhibit 3, Sherrer Declaration, ¶ 5(a) and 6. The Court also states that the BDO report includes a statement describing "substantial 'limitations'" resulting from the absence or inadequacy of records," and that this statement thereby "acknowledges the insurmountable difficulties" of preparing a partnership reconciliation. Opinion at 23-24. In fact, statements of limitation are routine in accounting analyses, and BDO's professional opinion is that there are sufficient records to perform a reliable partnership accounting. *See* Exhibit 2, Sherrer Declaration, ¶ 9.

C. The Connecticut Trial Court Opinion in *Williams* is Distinguishable.

In making its laches ruling limiting Yusuf's accounting claim to transactions post-dating September 17, 2006, the Court relied heavily on *Williams v. Williams*, 2010 WL 4075277 (Super. Ct. Conn. 2010), a case involving a partnership (known as "Sugar Hill Associates" or "SHA") between two brothers, Stephen and Alan Williams. *Williams* is an unpublished Connecticut trial court decision and ranks very low as persuasive authority. But even if *Williams* were a Connecticut appellate decision and hence entitled to some persuasive weight, the case is distinguishable on its facts. First, the decision in *Williams* was rendered after a full trial on the merits, and not by way of summary judgment based on an issue not raised by either party and the (inadmissible) testimony and report of only one side's purported expert. Moreover, in *Williams*,

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

in contrast to this case, the partners engaged in annual reconciliations of their capital accounts from the inception of the partnership, and both parties assented to those reconciliations as they were made. The defendant, Alan Williams, sought to adjust in his favor a number of the capital account reconciliations going back more than 20 years that he and his brother had previously agreed to. In the instant case, the last full reconciliation or true-up of the Hamed/Yusuf partnership was conducted in January 1994, and Yusuf is not attempting to alter that reconciliation in his accounting claim. It is therefore difficult to understand why this Court believes that the *Williams* Court's suggestion that a partner cannot reasonably ask for "a do over" of prior reconciliations has any relevance to the instant case. Opinion at p. 28.

Moreover, in *Williams*, most of the adjustments to prior annual capital account reconciliations that Alan was seeking flowed from various business investments made by Stephen, the fruits of which, Alan argued, belonged to the partnership. The Court in *Williams* found that Alan had "actual or constructive knowledge" – i.e., that he knew or should have known – "of every transaction of which he now complains." *Id.* at *13. Alan "acknowledged during the trial that he could not identify a single instance where money going to Stephen was not accounted for on [the partnership] books." *Id.* at *13. The Court found that "Alan knowingly and willingly participated in transactions which he now takes issue with," and they "were for the most part recorded by SHA's accountants" on the books and records of the partnership. Those not recorded were "a matter of public record." *Id.* at *13.

D. The Court Improperly and Arbitrarily Shortened the Time Period for Conducting an Accounting.

The Court's Opinion acknowledged that the rule at common law (and hence the law in the Virgin Islands) is that an action for a partnership accounting looks back to the date of inception of a partnership or the date of last partnership reconciliation or true-up, which Plaintiff

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

and Yusuf agree took place in this case on January 1, 1994. Opinion at 5, 15. For that reason, and because the Court also acknowledged that a suit for an acounting accrues upon dissolution of the partnership and that Yusuf's accounting claim was brought within the applicable statute of limitations for such actions, the doctrine of laches does not apply. The Court cites not even a single case which applies laches for the purpose of modifying the time period covered by an accounting claim, and thus offers no cases supporting its truncation of Yusuf's accounting claim to cover only transactions that post-date September 17, 2006.[14]

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the Court should vacate its Order limiting Yusuf's accounting claim to transactions post-dating September 17, 2006, and should direct the Master to initially address any arguments that any part of Yusuf's accounting claim or BDO's final reconciliation of partner accounts is based on incomplete or inaccurate data.

Respectfully submitted,

DATED: August 11, 2017 By: **DUDLEY, TOPPER AND FEUERZEIG, LLP**

GREGORY H. HODGES (V.I. Bar No. 174)
STEFAN B. HERPEL (V.I. Bar No. 1019)
CHARLOTTE K. PERRELL (V.I. Bar No. 1281)
1000 Frederiksberg Gade (P.O. Box 756)
St. Thomas, VI 00804
Telephone: (340) 715-4405 / Fax: (340) 715-4400
E-Mail: ghodges@dtflaw.com
sherpel@dtflaw.com
cperrell@dtflaw.com

Attorneys for Fathi Yusuf and United Corporation

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[14]The Court also suggests that Yusuf's accounting claim should be limited because it imposes undue burdens on the judiciary and ultimately the taxpayer to evaluate an accounting claim dating back to 1994. *See* Opinion at 32. This is not a proper reason for limiting relief. Furthermore, it is the parties, and not the taxpayers, who are paying for their respective experts and for the Master to examine the charges and debits that make up the accounting claims.

CERTIFICATE OF SERVICE

It is hereby certified that on this 11th day of August, 2017, I served a true and correct copy of the foregoing **FATHI YUSUF'S MOTION FOR RECONSIDERATION OF RULING LIMITING PERIOD OF ACCOUNTING CLAIMS**, which complies with the page and word limitations set forth in Rule 6-1(e), via e-mail addressed to:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
Quinn House - Suite 2
2132 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820

E-Mail: holtvi@aol.com

Carl J. Hartmann, III, Esq.
5000 Estate Coakley Bay – Unit L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820

E-Mail: carl@carlhartmann.com

Mark W. Eckard, Esq.
ECKARD, P.C.
P.O. Box 24849
Christiansted, St. Croix
U.S. Virgin Islands 00824

E-Mail: mark@markeckard.com

Jeffrey B.C. Moorhead, Esq.
JEFFREY B.C. MOORHEAD, P.C.
C.R.T. Brow Building – Suite 3
1132 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820

E-Mail: jeffreymlaw@yahoo.com

The Honorable Edgar A. Ross
E-Mail: edgarrossjudge@hotmail.com

Stefan B. Herpel

R:\DOCS\6254\1\PLDG\17G4279.DOC

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S.V.I. 00804-0756
(340) 774-4422

EXHIBIT 1

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

MOHAMMAD HAMED, by his authorized agent WALHEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATION, Defendants/Counterclaimants, v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC., Additional Counterclaim Defendants.	) SX-12-CV-370

EXHIBIT 1

March 6, 2017
Kingshill, St. Croix

The above-entitled action came on for MOTIONS HEARING before the Honorable Douglas A. Brady, in Courtroom Number 211.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

TRACY BINDER, RPR
Official Court Reporter
(340) 778-9750 Ext. 7151

members' names and we would deposit checks in those accounts, and checks would be written off of those accounts to be taken over to Jordan or mailed to Jordan. We would also have cash transported to St. Maarten.

MR. HODGES: Your Honor?

THE COURT: Yes.

MR. HODGES: I'd like to put an objection on the record. We're here -- as I understand, this testimony relates to a motion for summary judgment on the statute of limitations. As Your Honor is well aware, discovery has been stayed in this case since October of 2014. We have not deposed Mr. Hamed before or had a -- that is still an open issue.

While the order allowed the plaintiff to submit evidence, the evidence was limited to Mr. Yusuf's knowledge of any suspicious circumstances relating to information in his possession to trigger a duty to exploit his access to such information relating to the Hameds' fraud, conversion, breach of fiduciary duty. The testimony that we're hearing right now apparently relates to a cash diversion scheme that Mr. Hamed participated in.

But the bottom line is, we're here on a

summary judgment motion, and we're hearing evidence for the first time without the opportunity for discovery, and it -- I would object, quite frankly, to having any evidence at a hearing on a summary judgment motion. Either they have put a record in the form of an affidavit -- none of this information has been submitted by way of affidavit, ever, by Mr. Hamed. Certainly not in support of their motion for summary judgment. So if they want to withdraw their summary judgment motion, they can, but they can't effectively ask us to respond to an affidavit that is in the making here at this hearing this morning. It's simply not fair.

THE COURT: As you say, so far we haven't gotten to the operative issue of the type of --

MR. HODGES: Your Honor, right now, he's -- Exhibit 3, he's not dealing with the statute of limitations. Effectively, he's attacking the BDO report.

MR. HOLT: Oh, no, no. That's a statute of limitations question.

THE COURT: All right. I assume we're on our way to get there.

MR. HOLT: We are. And that $62,000 is listed in the BDO report, and we think it's barred by the

statute of limitations because Fathi Yusuf knew about it. So at the appropriate time, we'll total all those up and we'll present you an itemization of each one of those.

THE COURT: All right. So your objection is noted, Attorney Hodges.

BY MR. HOLT:

Q So I want to go back. When you wanted to divert cash, hard currency, how would that be done?

A Hard currency would be taken -- we would take it to St. Maarten.

Q And how would you take it to St. Maarten?

A Fathi Yusuf would arrange, or he would direct me to go ahead and take money to St. Maarten or one of the family members to take money over, or he would take it himself over.

Q And generally speaking, what amount of cash would be taken to St. Maarten?

A Thousands.

Q Okay. If you wanted to divert money by cashier's checks like we just saw, how would that take place?

A Cashier's checks would be done similar to what this report shows right here. The monies would be given to family members, and they would go to different bank

accounts or different banks and they would buy cashier's checks in lieu of cash.

MR. HODGES: Your Honor, may I object again? Again, these issues are apparently attempting to create an issue of fact regarding what Mr. Yusuf knew or should have known regarding --

MR. HOLT: (Shaking head.)

MR. HODGES: -- certainly that's the issue that's addressed in Item Number 1.

THE COURT: Right.

MR. HODGES: If they're going to effectively create a declaration on the fly, I would respectfully submit that Mr. Yusuf ought to be here to hear this. I would like to ask for a recess to see if he can get down here.

This has never been heard before. We've never had the opportunity to depose Mr. Hamed. And, quite frankly, I've never, in my 35 years of experience here in the Virgin Islands, had a summary judgment hearing where we have evidence that we're hearing for the first time being put on in support of a motion for summary judgment that they didn't bother to put in a declaration to support that motion. I would respectfully submit that they shouldn't be entitled to put on any

evidence, if they couldn't put it on in connection with their moving papers.

MR. HOLT: Your Honor, you put in the order that we could put on evidence. You put the burden on us, and we're prepared to proceed on that evidence as well as on the BDO report by testimony today. And we put one witness in, we have one witness who is here because -- he doesn't want to be here because it's tax season, but he's taking the time. And it's not going to take that long if we just go through and put it on the record. But I believe the plaintiff is entitled to put it on the record. I don't believe any of this is really a surprise to them. And you will see, as we go through it, most of the evidence is going to come from documents exchanged between the parties.

THE COURT: Very well.

MR. HODGES: Your Honor, but we're -- if all this testimony is used for is to create an issue of fact regarding whether Mr. Yusuf knew or should have known, we'll concede there's an issue of fact. He has a declaration that's on file in opposition to their motion for summary judgment that says when he discovered the information.

THE COURT: But he said it was 2011; correct?

MR. HODGES: That's correct, Your Honor. So at the most, this testimony is going to say he knew or should have known about it earlier. There's a contested issue of fact. Motion denied. So, you know, I don't understand the purpose of this testimony if all it's doing is to attempt to create the issue of fact that they didn't bother to create in their moving papers. We concede there's an issue of fact.

MR. HOLT: Your Honor, we're trying to show that there is not an issue of fact. We're the ones who moved for summary judgment.

THE COURT: Okay. I'm not going to stop the hearing. If you want to have Mr. Yusuf participate, you can try to get him here. Looks like we're going to go a little while.

BY MR. HOLT:

Q Okay. Now, going to -- you mentioned taking American Express checks. Tell me how that would happen.

A American Express checks, well, cash was given and employees or family members would go and buy American Express checks --

Q Okay.

A -- and bring them back.

Q And then you testified that funds would be

generally barred. But we're just looking for the order that anything he knew about prior to that date were barred, and that will include all of these claims. And, you know, this is -- it's not really that painful because we've really tried to organize our presentation, but this is a step in this case that needs to be made. I mean, we didn't submit the BDO report. We think when we finish today, you're going to find that it's unreliable and throw it out, but you need to hear why I think that. You can't just take my argument.

THE COURT: Very well.

MR. HODGES: Your Honor, again, this is a summary judgment hearing. If testimony is required, summary judgment should be denied, period. But at a minimum, we're entitled to discovery before the Court enters summary judgment on a disputed issue. I note the Master is not even here. It's -- I will argue, and I think it's crystal clear from the plan provisions, that he is the person that should determine claims in the first instance. And he's not even here to hear the testimony. This is absolutely --

THE COURT: Okay. But I'm not here to hear any claims, that's why my questions to Attorney

Holt. But Attorney Holt suggests that to determine the answer to the operative question of were there suspicious circumstances that gave rise to a duty on Fathi Yusuf to examine documents that were in his possession, that somehow he says he needs to go through all this.

So you're correct that all of this surplusage is not going to be determined by me, any specific claims -- or at least not going to be determined by me today. We're not here to determine claims. We're here to determine what is the date from which claims may be presented.

MR. HODGES: But Mr. Holt has already argued on several occasions that only a jury can make that determination. Now, he's falling back and said well, wait a minute, I want you to make that resolution today after hearing testimony from these witnesses that we've never been able to depose.

THE COURT: All right. Well, he says that this is -- this precedes the jury issue, because if there's no questions of fact in dispute, then there's nothing for a jury to decide.

MR. HODGES: But we've already submitted a declaration from Mr. Yusuf as to when he discovered the defalcation, the breach of fiduciary duty and

so forth.

THE COURT: And perhaps because of what Mr. Yusuf's declaration says, that's why all of this detail is necessary to show that, notwithstanding the declaration of Mr. Yusuf, there -- the plaintiff is trying to establish that there is no --

MR. HODGES: But, Your Honor, I would respectfully submit, you can't take this live, fresh testimony that we've never had an opportunity to discover before and put it against Mr. Yusuf's declaration that's been on record since 2014 and say, well, I'll take the fresh versus the declaration. That's not the summary judgment process.

THE COURT: All right. Well, we're going to continue. There's no surprise as to what -- there shouldn't be a surprise as to the scope of what we're hearing today, although I must agree that I'm surprised at the extent of it.

But go ahead, Attorney Holt, but let's do it as expeditiously as you can.

MR. HOLT: And, Your Honor, I might just point out, some of this testimony will eventually start overlapping into the BDO issue, the reliability

MR. HOLT: Your Honor, it's argumentative.

THE COURT: It's beyond the scope of this inquiry.

MR. HODGES: Your Honor, I would respectfully submit that this exhibit, A, is not admissible, but, more importantly, it can't be considered in connection with a motion for summary judgment that is supposed to be supported by affidavits that we have an opportunity to address. As you can see, we're dealing with this chart, effectively, for the first time today. I've never had an opportunity to depose Mr. Hamed. And, you know, again, I would respectfully submit it's unfair for the defendants to have to deal with summary judgment on the fly like this. It's -- it's not consistent with the rule and it's certainly not fair.

THE COURT: Very well. Your objection is noted. Let's just see where it leads us and to what extent you're going to need an opportunity to present contrary evidence.

MR. HOLT: Your Honor, I guess for the record, I should move to -- I was just going to move at the end all of my exhibits, but I guess I should do it one by one. I would move Exhibits 1 through 4 into evidence.

MR. HODGES: Objection, Your Honor. There's been no foundation laid for any of them.

THE COURT: Well, the -- let's take -- start with Number 1. That's the Pru-Bache accounts. When you say no foundation laid, Mr. Hamed identified what that exhibit was. I'll admit Number 1.

Number 2 is the tax return, I'll admit Number 2.

Number 3 is a portion of the BDO report, so I'll admit that.

MR. HODGES: Your Honor, may I be heard on that just briefly?

THE COURT: Yes.

MR. HODGES: This is one page out of the BDO report that was submitted to the Master in support of our claim pursuant to the Master's directive that all parties submit their competing claims by September 30th. It was not -- the BDO report was not a report of a testifying expert that you would ordinarily see in the pretrial context that ordinarily gives rise to Daubert motions. It was effectively the best report that BDO could submit based on the information available at that time, given the stay of discovery since October of 2014,

and it was not even filed with this Court. So the fact that they have attached exhibit -- one portion of it, I don't know what page of the report it is, and several checks that attached to it, it simply makes no sense. Particularly since the BDO report has never been properly before this Court.

MR. HOLT: Your Honor, if I may briefly explain. The witness testified about the checks attached to it. The checks are from a subfile in the BDO report of which this is just one of the files. We will introduce the BDO report, but his testimony is more relevant to going to the specific checks that he discussed and he said he knew about and talked about.

THE COURT: Very well. For the purposes of this motion and the hearing on this motion, I will accept all four of the exhibits.

(Plaintiff's Exhibits 1 - 4 admitted into evidence.)

DIRECT EXAMINATION (Cont'd)

BY MR. HOLT:

Q Okay. So can you go back with the chart and explain how the money flowed. I think you've gotten all the way to the French bank where the cash was going. How many accounts were there in the French bank in

Park Mall.

Q Okay. And so this chart is basically how the funds would flow from the Virgin Islands to the different mediums you talked about into that final account in Amman, Jordan?

A Yes, sir.

Q And then the money in Amman, Jordan, would eventually be spent?

A Yes, it would be.

Q Okay.

MR. HOLT: Your Honor, I'm done with that chart. I'd like to show the witness Exhibit Number 5.

THE COURT: He may be shown.

You know, just to help me direct my focus, so far everything has been directed to this elaborate scheme that is, as the witness has said, to money laundering. But it's also presented as a joint venture and part of the efforts of the partnership, but the operative question for this motion and hearing is not what did Fathi Yusuf know about what was going on with the partnership, but rather at what point in time did Fathi Yusuf have information that should have made him suspicious to start looking at Mohammad Hamed to say, hey, you are

stealing from me.

MR. HOLT: Okay. Well --

THE COURT: We're going to get there?

MR. HOLT: They have listed a whole bunch of checks that they say they didn't know about, and we're going to start marking individual checks to show two things: one, they knew about them, and, two, to show that the BDO report is unreliable.

THE COURT: But then aren't we just -- we're not really answering the question that has to be answered, are we? Aren't we just trying to knock down claims that have already been presented as opposed to the question I just posed, and that is, when did Fathi Yusuf become suspicious that he was being cheated by his partner?

MR. HOLT: Well, Fathi Yusuf feels like he's cheated. Where were you cheated? And he lists 3,000 claims. So we're going to have to look at each one of those claims to see if he was cheated.

THE COURT: We're not doing that today.

MR. HOLT: I understand that. But we're going to show you a process where you can eliminate most of those claims that predate a certain time period, so that's what we're doing.

submitted.

THE COURT: Understood. And it's -- just to reiterate, we're not here to evaluate claims; and the operative question we haven't reached yet, so . . .

MR. HODGES: We still haven't reached it.

THE COURT: Correct.

MR. HOLT: And by the way, this question goes to two points: one, statute of limitations showing that Fathi Yusuf obviously knew about these two checks; also goes to the reliability of the BDO report, which we will start -- you'll start seeing a lot of these coming in.

BY MR. HOLT:

Q So, Exhibit Number 8 is the bank -- is the deposit into the accounts?

A Yes, sir.

Q Okay.

MR. HOLT: Your Honor, we move Exhibit Number 8 into evidence.

THE COURT: It's admitted.

(Plaintiff's Exhibit No. 8 admitted into evidence.)

Q And then can you tell me what Exhibit Number 9 is?

A They will be held in the safe until we accumulate enough to put together. Fathi Yusuf would call and say, "Hey, we need to go ahead and send this out." Me and Mike will get together, make copies of the checks, add them up, verify that they're all endorsed, they're all -- verify the amounts that we're going to send over, keep a copy of them, they would be put in an Express Mail envelope and mailed out.

Q Okay. And --

MR. HODGES: Your Honor, if I -- again, we're not addressing the issue that we're here for on the summary judgment motion.

THE COURT: I guess this is trying to get to show the unreliability of BDO, so . . .

MR. HOLT: Yes, sir.

MR. HODGES: Well, I thought we were dealing with the --

THE COURT: We are, but I'm not going to take testimony twice.

BY MR. HOLT:

Q All right. Showing you exhibit number --

MR. HOLT: Your Honor, first of all, I believe I need to move Exhibits 11 through 16 into evidence.

THE COURT: Noting the standing objection,

asked, Mr. Hodges, would you prefer to take a break right now and then have an opportunity to cross-examine after our break?

MR. HODGES: Yes, Your Honor.

THE COURT: All right. Is an hour enough time?

MR. HODGES: Yes, Your Honor.

THE COURT: All right. Let's come back at 1:15.

MR. HOLT: Your Honor, I'm reminded I didn't move 30 and 31 into evidence.

THE COURT: I'll admit it with the same objection noted.

(Plaintiff's Exhibit Nos. 30 - 31 admitted into evidence.)

THE COURT: Okay. Anything else to accomplish before we take this break?

MR. HODGES: Your Honor, quite frankly, I'd like to effectively argue that we haven't had any testimony effectively dealing with the issue that was on the summary judgment motion that was first out of the box.

THE COURT: I mean, I guess that this Number 29, that the red is supposed to -- we're supposed to be able to glean, from what we heard,

that knowledge of Mr. Yusuf predated a certain date.

MR. HODGES: They allege -- and you know, at this point in time we haven't contested it, but they allege that we knew of these transactions that are identified that he's been testifying to that are part of our --

THE COURT: Which go to striking specific claims.

MR. HODGES: That go to their attack on the reliability of the BDO report.

THE COURT: Right, right. Through an attack on specific claims.

MR. HODGES: That's correct, Your Honor.

THE COURT: Yeah.

MR. HODGES: They do not address when they claim my client, Mr. Yusuf, should have known -- knew or should have known of untoward conduct by Mr. Hamed and his sons.

THE COURT: Of course he promised us seven witnesses and we're only halfway through the first one, so maybe we'll get to it.

MR. HODGES: But, Your Honor, what I'm getting to is that, quite frankly, this could turn into a discovery exercise more than anything else.

Because right now, you know, I can certainly -- I won't pass up an opportunity to cross-examine Mr. Hamed, but we're dealing with, effectively, through his testimony, the BDO report, they haven't addressed the Integra report, but the bottom line is the BDO report was submitted to the Master because we were directed to submit all our claims. The BDO report, as you see on the summary that's attached as -- excuse me, that's Exhibit 23, it says at the end of it, "This represents the amount known as of September 30, 2016, based upon the information available, not including any punitive damages to which Yusuf may be entitled. It is subject to further revision following the reopening of discovery." So, effectively -- and we have submitted this accounting and proposed distribution report. They have not. There is no such thing as an effort to account, like we did, on the part of Mr. Hamed. We haven't moved to strike their report for reasons that are quite clear, that it's a, we assume, a preliminary report subject to discovery.

Why are we taking up Your Honor's time today dealing with testimony that effectively relates to a preliminary report that was submitted to the Master, pursuant to his directions to submit our

claims, that are going to be determined by the Master pursuant to the plan that they agreed to. It -- I don't see that it makes sense. If the issue on the summary judgment is what my client knew or should have known within the statute of limitations, they haven't even addressed it with this witness. And I think that that's important. Because we could be here all day long cross-examining witnesses about things that really shouldn't be relevant to the issues that are before this Court.

THE COURT: All right. Let's take our break. Why don't -- let's talk informally in chambers. I'll speak to counsel, any counsel that want to come in and talk about it, and then we'll put on the record what needs to be put on the record. Okay? Thank you.

(Lunch recess was taken from 12:15 - 1:40 p.m.)

THE COURT: Okay. Mr. Hamed, retake the stand.

What's the pleasure of defendants?

MR. HODGES: Your Honor, as we indicated in chambers, we have a flight back today at 3:20.

THE COURT: We can do -- either keep going

A There come a time where I told him I don't want to live on Skyline, you can have the Skyline and I'll take the Estate Tabor & Harmony. I built my house; he built his house.

Q And you built it on this land in Harmony?

A Yes.

Q So if the BDO report said that Hisham Hamed took $250,000 for himself, that would be incorrect, wouldn't it?

A That is totally incorrect.

Q And those funds were split fifty-fifty between Yusufs and Hameds; correct?

A Yes, sir.

MR. HOLT: No other questions.

THE COURT: Cross?

MR. HODGES: Your Honor, I would waive in order to --

MR. HOLT: No. If you're going to cross him, you gotta cross him now because he's flying back to St. Thomas. I mean, I've limited my direct, so there's not much to --

MR. HODGES: Your Honor, subject to our objection that we shouldn't be required to do any of this today, I respectfully -- this clearly has nothing to do at all with the statute of

limitations. Nothing.

THE COURT: Ah --

MR. HOLT: I respectfully disagree, but --

THE COURT: Here's why I disagree. To the extent that there are claims that are presented that suggest that Fathi Yusuf is saying in this action that these are situations where money was wrongfully taken from the partnership, and this testimony goes to the fact that at the time it occurred, that Fathi Yusuf knew about it, then it goes to whether or not he had an obligation at that time to review the documentation available to him.

MR. HODGES: Understood, Your Honor. With the proviso that we're entitled to discovery from Mr. Hamed, who we've never deposed, I'm prepared to do the best I can. I respectfully submit that we're -- by proceeding in this fashion, the Court is assisting Counsel to effectively tie our hands behind our back as far as our ability to effectively cross-examine these witnesses.

THE COURT: Until today, there's never been a suggestion that the motion for summary judgment can't be ruled upon until we complete discovery. There's not -- whatever it is now, Rule 56(f), I

guess now, the operative section. As a matter of fact, to the contrary, both sides have said these motions are ripe for determination now. Both sides have argued in briefing about the United versus Hamed case and the Supreme Court's decision in that case and the effect that -- of the discovery rule on the tolling of the statute of limitations or the date on which the statute of limitations begins to run. So all of this seems in line with that.

MR. HODGES: I would tend to concur with Your Honor, if Your Honor put the parties on notice and said, "I think the summary judgment papers may be deficient. I'm going to give the plaintiff an opportunity to submit further affidavits and the defendant to submit their affidavits." That's not what has occurred here. The plaintiff has effectively been able to put on testimony today that has not been tested by discovery whatsoever. And that is unfair.

THE COURT: Okay. All right. Do you want to cross or not?

MR. HODGES: Yes, Your Honor.

THE COURT: All the papers that were just discussed, that's all one exhibit; right?

MR. HOLT: Yes.

THE COURT: Okay. How are we going to handle the remainder of the evidence?

MR. HODGES: Your Honor?

THE COURT: Have you agreed between yourselves?

MR. HODGES: Good evening. Greg Hodges on behalf of the defendants' counterclaim against plaintiffs. Your Honor, I would submit that we should finish the testimony tonight, if the Court is prepared to do that, with our reservations in mind.

THE COURT: You say "reservations", you mean plane reservations or reservations about going forward?

MR. HODGES: No, no, no. Reservations about the whole process that's being sprung on us. The bottom line is, we have -- we didn't make -- certainly had no clue that we were going to have seven witnesses today, that the hearing would be going on to tomorrow. One of my counsel has to get on a plane to go for medical issues tomorrow. I would -- the reason I would like to complete the testimony tonight, with the reservation of all of rights is that at least we can get that knocked out, and it would be our suggestion that the oral

argument on all the motions be held telephonically so that we don't have to come back here, and that, you know, we actually do it telephonically so that, you know, we don't feel like we have to come back here.

THE COURT: Okay. Attorney Holt, do you want to respond to that?

MR. HOLT: I'm willing to go forward tonight, Your Honor. You do have court personnel and I'm sympathetic to not wanting to stay. I can do it tomorrow morning as well.

THE COURT: All right. Let's forge ahead. Go ahead.

MR. HOLT: I'll call Mafi Hamed.

MUFEED HAMED,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLT:

Q Can you state your name for the record, after you're seated?

A Mufeed Hamed.

Q Excuse me?

A I'm sorry. What was --

Q Please state your name for record.

EXHIBIT 2

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

WALEED HAMED, as Executor of the Estate of MOHAMMAD 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 INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING
	Consolidated With
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF
WALEED HAMED, as Executor of the Estate of MOHMMAD HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	CIVIL NO. SX-14-CV-278 ACTION FOR DEBT AND CONVERSION

DECLARATION OF FERNANDO SCHERRER

I, Fernando Scherrer, CPA, CIRA, CA, MBA, pursuant to 28 U.S.C. § 1746 and V.I. R. Civ. P. 84(b), declare under penalty of perjury under the laws of the United States Virgin Islands that the following is true and correct:

1. I make this declaration based upon my personal knowledge and my professional expertise, as described below.

2. My firm, BDO Puerto Rico, PSC, was engaged by Fathi Yusuf ("Yusuf") to identify, through the use of forensic accounting, the amounts withdrawn by the partners and their families from the Partnership, as that term is defined and used in the report I signed on August 31, 2016 (the "BDO Report"). The BDO Report, which included voluminous supporting tables, appendices, and exhibits, was attached as Exhibits J and J-1 to Yusuf's Accounting Claims and Proposed Dissolution Plan submitted to the Master on September 30, 2016. A copy of the BDO Report without any of the supporting material was admitted as Exhibit 12 at the hearing in this case on March 6, 2017 (the "Hearing"). The Court extensively referred to Exhibit 12 in its Memorandum Opinion and Order dated July 21, 2017 (the "Court's Opinion").

3. BDO is a well-known and respected international network of accounting firms with offices worldwide. I am a partner at the member firms located in Puerto Rico and U.S.V.I. My background, education, experience and training as a certified public accountant in the U.S. Virgin Islands, Puerto Rico and other jurisdictions, is set forth in great detail in Exhibit 12 and qualifies me to render opinions as an expert in accounting and, in particular, the partnership accounting and reconciliation of partnership capital accounts addressed in the BDO Report, as well as opinions about the BDO Report and the adequacy of records to perform a partnership reconciliation that are set forth in the Court's Opinion. The work for this engagement, which culminated in the

preparation of the BDO Report, was performed by a team of up to nine (9) BDO professionals, led by me, over a period of more than two (2) years. We identified, through the use of forensic accounting, the amounts withdrawn by Mohammad Hamed ("Hamed") and Yusuf (collectively, the "Partners") and their family members from the Partnership, which should be categorized as partnership withdrawals and distributions for the defined period set forth in the BDO Report, from January 1, 1994 through December 31, 2012. We adopted the accountings prepared by John Gaffney for the Partnership from January 1, 2013 to the date of the BDO Report (Exhibit 12), with adjustments to avoid double counting. *See* pp. 2-3 of Exhibit 12.

4. I have reviewed the testimony of Lawrence Shoenbach at the March 6, 2017 Court hearing, his Opinion Letter, which was designated as Exhibit 34 at the hearing, as well as the Court's Opinion, which relies in part upon that testimony and Letter.

5. In its Opinion, the Court appears to rely upon Mr. Shoenbach's characterizations as to the state of the Partnership's financial records, as well as his opinions criticizing the conclusions in the BDO Report, as support for its decision to limit the review period for the accounting from September 17, 2006 forward. Based upon my extensive review and knowledge of the documentary evidence supporting the BDO Report's conclusions regarding the historical partnership withdrawals between the Partners, it is my expert opinion that:

a) There are voluminous records (i.e., in excess of eighty thousand) that were reviewed to identify the Partners' withdrawals documented in the BDO Report. As Mr. Shoenbach acknowledged at the Hearing, *see* Transcript at page 174, he has not seen any of the supporting documents to the BDO Report. Nothing in the Court's Opinion suggests that the Court has reviewed this extensive information either. Accordingly, any characterization of these records as

"scant" or "patchwork" is misleading, as is any implication that the reconciliation of the Partners' accounts in the BDO Report was made "out of whole cloth."

b) Mr. Shoenbach's unsupported opinion that "[n]o proper accounting can be determined from the Company's financial records because the gross receipts have been intentionally misapplied and documented . . . ," *see* Court's Opinion at p. 25, upon which the Court relied, is erroneous because a partnership accounting to establish the historical withdrawals can properly be accomplished without analyzing or even considering the overall gross receipts of the grocery store operations or whether those gross receipts were disclosed or hidden from the taxing authorities.

c) The disclosed gaps in the currently available Partnership records do not render the partnership accounting contained in the BDO Report, which is supported and well-documented, unreliable.

d) Nowhere does the BDO Report "acknowledge the insurmountable difficulties inherent in any attempt to accurately reconstruct the partnership accounts[,]" as suggested at page 24 of the Court's Opinion. We could not have and would not have prepared the BDO Report had we believed that to be the case.

e) The Shoenbach Opinion Letter refers to Maher Yusuf's deposition testimony describing the partial reconciliation conducted by a Hamed and a Yusuf in 2001, whereby receipts from a safe at the Plaza East store were tabulated precisely with calculators and double-checked, and the tabulation showed that the Hameds had withdrawn $1.6 million dollars more than the Yusufs. The fact

> that both parties agreed to destroy the receipts used in that calculation does not mean that we are precluded by any accounting standard or rule from accepting that $1.6 million dollars tabulation as accurate, based on the deposition testimony of Maher Yusuf and a letter from Fathi Yusuf dated August 15, 2012. The BDO Report allocates that $1.6 million dollars amount to the Hameds, and the BDO Report was justified in making that allocation.

Some additional elaboration of the points set forth in paragraph 5(a)-(e) follows.

6. The Court's characterization of the financial records available to assess the historical withdrawals between the Partners as "scant" or "patchwork" is misleading. To the contrary, there is a massive volume of documents that were reviewed to identify withdrawals or distributions of Partnership funds that were provided to BDO. More than eighty thousand documents were reviewed, sorted, allocated, cross-referenced and then noted for each family member, according to the parameters set forth in the BDO Report. Every single allocation in the BDO Report has documentary support. Indeed, supporting evidence is so voluminous that it is impractical to access it in hard copy. The BDO Report is only preliminary. To the extent that additional information is learned through discovery, or otherwise which would require a change or alter a particular allocation, the conclusions in the BDO Report will be revised accordingly, prior to final submission to the Master.

7. Mr. Shoenbach's claim that because some unknown amount of the gross receipts from the Partnership's grocery store operations were not reported to the taxing authorities – and according to the criminal indictment were laundered – it is impossible to determine the withdrawals and distributions between the Partners, is false and unsupported by any accounting standard or rule. Knowledge of total gross receipts of the Partnership (reported or unreported) is

simply not necessary to quantify what each partner has withdrawn. Rather, the amount of the distribution is calculated based upon evidence of the withdrawal. In this case, evidence of the withdrawals took various forms such as checks, receipts, and ledger entries. To the extent that there are gross receipts of the Partnership which were not reported to the taxing authorities, they remain Partnership assets owned equally by the Partners until such time as they are withdrawn from the Partnership. Whether the source of a Partnership asset is unreported or reported gross receipts, it remains a Partnership asset subject to 50/50 ownership. If, for example, the Partners used unreported gross receipts to hold in foreign accounts or acquire real estate in the Middle East, there would be no purpose served in accounting for these amounts in the BDO Report. Regardless of the form in which that subset of gross receipts is held, it remains a jointly owned partnership asset.

8. Contrary to Mr. Shoenbach's opinion, which is not informed by any accounting expertise, BDO was not required under any accounting standard to determine gross receipts of the Partnership in order to determine the aggregate amount of each Partner's withdrawals, and his critique of the BDO Report on that basis is mistaken. Gross receipts are not needed to document withdrawals. In a partnership accounting, the gross receipts or revenues are used to cover the operational costs and expenses of the business, and when revenues and expenses are closed out at the end of the year, the net profit or loss is assigned to the partners' capital accounts. If a partner withdraws money from the company, this amount is recognized in the accounting against the partner's capital account, reducing the capital of the partner. This happens year over year and by the time the partnership is liquidated and all payments are made, the balance in each capital account is distributed to the corresponding partner. In this case, that did not happen. Both gross receipts and withdrawals were not recognized in the books. For that reason, our assignment was to account

for those withdrawals, independently on the balances of the partners' capital accounts that may or may not include the gross receipts.

9. Statements of limitation, as set forth at page 22 of Exhibit 12, are standard in all accounting analyses. The stated limitations in the BDO Report and quoted in the Court's Opinion are simply a disclosure that less than 100% of all records were available. They were categorically not a statement that the absence of these records affected in any significant way the reliability and validity of the allocations in the BDO Report. It is also important to note that the limitation in item 1 on page 22 of the BDO Report regarding the lack of records preceding January 1, 1994 is immaterial to the BDO Report. As noted on page 2 of the BDO Report, the parties have agreed that a full reconciliation of partnership accounts occurred at the end of 1993, and BDO's engagement was therefore limited to the period beginning January 1994, except for the investments identified in Hameds tax returns that, as per Mr. Yusuf's were not included in the 1993 reconciliation.

10. Mr. Shoenbach's Opinion Letter and the Court's Opinion place great significance on the destruction of safe receipts after the 2001 partial reconciliation by both parties, and both conclude that this one instance of destruction renders an accurate accounting impossible. *See* Court's Opinion at pp. 26-27, 29; Shoenback Opinion Letter at p. 6. This conclusion is incorrect and not supported by any accounting standard. My review of the evidence revealed that the destruction of certain safe receipts around October of 2001 was an isolated act. Further, it was done mutually by the parties after a full tabulation of the receipts took place between the parties with each double-checking the other's tabulations. In addition to the deposition testimony of Maher Yusuf, there is documentary evidence in the form of a letter dated August 15, 2012, which further supported the allocation of $1.6 million to Hamed.

11. In light of the volume of evidence available which has been chronicled and painstakingly reviewed and analyzed in the BDO Report, it would be arbitrary to limit the Partnership reconciliation to transactions occurring after September 17, 2006, because there is voluminous documentation of withdrawals by each Partner for the period January 1, 1994 to the present.

Dated: August 11, 2017

Fernando Scherrer, CPA, CIRA, CA, MBA

EXHIBIT 3

EXHIBIT 3

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

DECLARATION OF FATHI YUSUF

I, Fathi Yusuf, pursuant to 28 U.S.C. §1746 and Super. Ct. R. 18, declare under the penalty of perjury, that:

1. Mohammad Hamed ("Hamed") and I agreed to carry on a supermarket business (the "Plaza Extra Stores") that eventually grew into three locations, including the first of three stores, Plaza Extra-East, which opened in April 1986. Plaza Extra-East was and is located in United Plaza Shopping Center owned by United Corporation ("United"), of which I am the principal shareholder. Under the business agreement between Hamed and me that I now describe as a partnership, profits would be divided 50-50 after deduction for rent owed to United, among other expenses. Under our business agreement, we also agreed that rent would accrue until such time as I decided that our business accounts should be reconciled. The reconciliation of business accounts would not only involve payment of accrued rent, but also advances that each of us had taken by withdrawing money from the store safe(s). Under our agreement, I was the person

responsible for making all decisions regarding when the reconciliation would take place and hence when the rent would be paid. Hamed and I agreed at the outset that the rent would be calculated at a rate of $5.55 per square foot for what is referred to as Bay 1, the primary space comprising the Plaza Extra-East store, which originally covered 33,750 square feet

2. Our decision to allow rent to accrue for some number of years before paying it was intended to enable the business to retain capital needed to grow the business.

3. This method of allowing rent to accrue for a number of years before being paid was important for the growth of the supermarket business for a number of reasons. First, at the time of the formation of the business agreement, the initial store, Plaza Extra-East, in St. Croix, was still in development. We thereafter made plans to open a second supermarket in St. Thomas (the store now known as Plaza Extra-Tutu Park), and it opened in October 1993. Later, we made plans to open a third grocery store in St. Croix (the store now known as Plaza Extra-West), and it opened in 2000. Construction began in 1998 and finished in 2000. Keeping money in the business for multi-year periods, rather than paying rent to United in monthly or even annual rent payments, ensured that the business would have the capital to establish and grow the stores in very challenging economic conditions.

4. For reasons discussed in more detail below, there has been only one reconciliation of accounts since our business agreement was formed, and it occurred at the end of 1993. The rent payment due from 1986 through December 31, 1993 was paid by means of a setoff on an account that reflected credits and debits made between Hamed and me. Specifically, Hamed's one-half portion of the rent was paid by means of a setoff against amounts I owed him by virtue of some large withdrawals I had made in preceding years.

5. In 1992, the Plaza Extra-East store burned down. As with all tenants in the United Shopping Plaza, the insurance policy on Bay 1 was paid to the property-owner, United. United decided to expand Bay 1 by purchasing an adjacent acre of land for $250,000. I used $100,000 of my personal funds and the balance was paid with insurance proceeds United received as the insured under a policy of insurance, which is required of all tenants of United Shopping Plaza. At that time, I agreed with Hamed, through his son, Waleed, to continue operating the Plaza Extra – East supermarket in Bay 1 of United Shopping Plaza. I further agreed to keep the rent at the much lower-than market rate of $5.55 per square foot for a ten-year period. Specifically, I told Hamed that we would keep that rate in place for the ten years following the date the rebuilt store opened for business.

6. The Plaza Extra-East store was reopened in May 1994. The Plaza Extra-Tutu Park store had just opened in October 1993. Around the time that the Plaza Extra-East store reopened, I was arranging a Scotiabank loan to United for approximately $5,000,000 for the benefit of the partnership. The loan was guaranteed by my wife and me, and it was secured by our home on St. Croix and by United's shopping center in St. Croix. Because money was short, Hamed and I agreed not to have the rent withdrawn, and to simply continue to accrue rent until such time as I made a demand.

7. Some time in 2002 or 2003, I began discussions with Waleed Hamed regarding how the rent would be calculated for Plaza Extra-East after the expiration of the ten-year period during which the $5.55/square foot rent formula was in place. During those discussions, we recognized, as before, that the prior rent was far below fair market value, and the decision was made to set the rent based on a percentage of sales formula using the yearly sales of Plaza Extra-Tutu Park. Total payments made to that store's landlord, Tutu Park, Ltd., for a given year were to

be divided by sales for the same year at that store to determine a percentage, and that percentage was then applied to the sales at Plaza Extra-East to determine the rent to be paid by Plaza Extra-East to United for that year. There is no dispute concerning the formula for calculating the rent for Plaza Extra-East from May 2004 forward, since rent based upon that agreed formula was paid via a check signed by Waleed Hamed on February 7, 2012 in the amount of $5,408,806.74, covering the period from May 5, 2004 to December 31, 2011. A calculation of the rent based on this formula and a copy of the check in the amount of $5,408,806.74 is attached as **Exhibit A**.

8. Between 1994 and 2004, we discussed the rent issues on several occasions. We both agreed to continue accruing the rent because of the need for more capital for the then new St. Thomas store, and for the construction of the Plaza Extra – West store between 1998 and 2000. Between 2002 and 2003, I discussed with Hamed the new rental rate for the Plaza Extra – East store beginning May 5th, 2004. Also, in 2004, at about the time the new agreed-upon rent formula became effective, Waleed Hamed, acting on behalf of his father, and I discussed payment of the rent that had accrued since May 1994 at the $5.55 per square foot rate. At the time, we were then embroiled in the criminal case, and all of the Plaza Extra accounts were frozen by an injunction. As a result, I made a decision and Waleed Hamed, on behalf of Hamed, agreed, that there was no prospect for the payment of the rent owed for the period since the last payment of rent and that payment of that rent would continue to be deferred. In addition, even if the ability to collect the rent had not been not blocked by the injunction, I was unable to calculate the rent for the second rental period and to do a full reconciliation of the partnership accounts, as I did not have the book of accounting entries called the "black book," and also did not have the comprehensive, larger ledger showing advances against the partnership that Hamed and I had taken by means of withdrawals from store safes. The FBI had seized substantially all of the financial and accounting

records of the Plaza Extra Stores, including these items, when it conducted its raid on the stores in October 2001. Among other things, the black book reflected the exact date of the last rent payment, information I needed to accurately determine when the rent for the second period had begun accruing. And the larger ledger reflected the debits and credits between the two partners (for the funds taken by them and members of their families from the store safes in the form of advances against partners' accounts). I had no recollection (and neither did Hamed) of exactly what dates the rent for the preceding period had covered, and indeed was not sure whether it ended in 1992, 1993 or 1994. We therefore needed to consult the black book to determine the start date for the subsequent rental period, which in turn would affect the amount of rent that had accrued since the last payment. Waleed Hamed and I agreed that rent would be allowed to continue to accrue until it was possible to calculate the amount of rent due and make the payment. Another consideration that counseled in favor of letting the rent continue to accrue, rather than paying it, is that our criminal defense lawyers did not want us to take any actions that supported the existence of a partnership as the owner of the Plaza Extra Stores.

9. In the latter part of 2011 and early 2012, the injunction in the District Court criminal proceeding had been relaxed sufficiently to permit a payment for rent that had accrued to that date from the date of the last payment. However, the original problem regarding the absence of the records to accurately calculate the rent for the period ending in 2004, and to conduct a full reconciliation of the rents from the date of the last reconciliation, remained unresolved because of the absence of the black book and the ledger. Neither of these items had been returned. I did not want to either understate or overstate the rent amount, but wanted the dollar amount of rent to be exactly correct. By contrast, we did not need the black book to pay the rent covering the period

from May 5, 2004 to December 31, 2011, as we knew that the new rent rate was in effect for that time period.

10. In early 2012, I discussed with Waleed Hamed the payment of accrued rent, and we agreed that the May 5, 2004 to December 31, 2011 portion of the accrued rent should be paid, while the potion preceding that would be deferred. Waleed acknowledged that we could not pay all of the rent that had accrued from the date of last payment in 1993 to May 5, 2004, as we still had not recovered the black book to determine the exact starting point for that period, and there also were insufficient funds in the operating account to pay the rent due for the ten year period of January 1, 1994 to May 5, 2004. During that conversation in 2012, Waleed Hamed agreed that rent was owed for that period, and agreed that it would be paid once the black book was recovered and a proper calculation could be made, and when sufficient funds are available. Shortly after that discussion, the rent for the period May 5, 2004 to December 31, 2011 in the amount of $5,408,806.74 was paid by a check signed by Waleed. See Exhibit A. The reason why the rent for the May 5, 2004 to December 31st, 2011 paid was paid before the rent for the January 1994 to May 5, 2004 period was that information regarding the exact starting date for that prior period was not available, while the period of May 5, 2004 to December 31, 2011 was certain as to start and end dates.

11. My son, Yusuf, found the black book in early 2013, among a large number of documents that were returned to us by the FBI. After receipt of the black book, at my instruction, the attorney for United and me sent a letter dated May 17, 2013 to Hamed's attorney requesting payment of the past due rent, as we then were able to properly calculate the dollar amount. See letter attached as **Exhibit B**. This letter contained errors in the amount of the outstanding unpaid rent that are corrected by the calculations set forth in this declaration. On May 22, 2013, counsel

for Hamed wrote a letter to my and United's counsel in which he advised that his client was now taking the position that because of the statute of limitations, profits did not have to be determined by deducting the unpaid rent for the 1994 to 2004 period. See letter attached as **Exhibit C**. Until receipt of this letter, nobody on the Hamed side had ever challenged or otherwise disputed this rental obligation or the terms of our partnership agreement that required rent to be deducted in order to determine profits.

12. I received a partial copy of the FBI file, records, and documents electronically produced and stored on a hard drive in approximately mid-2010. When these documents were initially returned, I had no reason to suspect any wrongdoing by Hamed, Waleed Hamed or any other members of the Hamed family. Later in 2010, as I reviewed these documents, I discovered certain documents that led me to believe that Hamed and his son, Waleed, may have taken monies without my knowledge. In 2012, I discovered the tax returns for Waleed Hamed for various years, which reflected more than $7,500,000 in stocks and securities owned by Waleed Hamed. I knew Waleed's salary as a Plaza Extra store manager, and knew that he had no other employment or source of income. I believed there was no way he could have legitimately accumulated that much wealth, but for having taken money from the partnership without telling me or making a record of it.

13. As to the primary space occupied by the Plaza Extra-East store, Bay 1, rent is due for two basic periods: a) 1994 – 2004, and b) 2012 through the present. Additional rent is due for limited periods when Plaza Extra-East used additional space for extra storage and staging of inventory.

14. The rent as to Bay 1 can be divided into four periods, two of which have been paid and two of which remain unpaid: 1) 1986 through December 1993 was paid as of December 31, 1993;

2) January 1, 1994 through May 4, 2004 has *not* been paid; 3) May 5, 2004 through December 31, 2011 was paid as of February 7, 2012; and 4) January 1, 2012 to date has *not* been paid.

15. The rent for Bay 1 from January 1, 1994 to May 4, 2004 ("Past Due Rent") is due and owing. The Past Due Rent is $3,999,679.73.

16. The rent for Bay 1 from January 1, 2012 to the present is due and owing. Although beginning in 2004 rent for Bay 1 was calculated on the basis of percentage of sales formula discussed above, once the disputes between the parties intensified, United sent a termination notice and requested the premises to be vacated. When Hamed refused to vacate despite receiving more than 1 year's notice to vacate, United provided written notice of rent increases. Beginning on January 1, 2012 through March 31, 2012, rent was increased to $200,000.00 per month plus 1% per month interest on the unpaid balance. Copies of the three Notice Letters from United are attached as **Exhibit D.** Beginning on April 1, 2012, rent was further increased to $250,000.00 per month plus 1% per month interest on the unpaid balance. See Exhibit D. The total amount of the increased rent from January 1, 2012 through August 30, 2014 is $9,155,371.52, as set forth in the latest notice letter. See **Exhibit E.**

17. While United claims the authority to require payment of the increased rent as set forth in the preceding paragraph, there is no dispute that rent is due from January 1, 2012 to date at least in the amount based on the same percentage of sales formula used to calculate the rent payment covering the period May 5, 2004 to December 31, 2011 that was made on February 7, 2012. Although United reserves its right to pursue its claims for the increased rent as to Bay 1 at trial, it is seeking summary judgment only for the undisputed rent calculated according to the same formula used for the previous payment of rent on February 7, 2012 of $5,408,806.74, which is the

formula used at Plaza Extra – Tutu Park. See **Exhibit F,** which are the rent calculations that I prepared. See Exhibit F.

18. For 2012, the undisputed rent due is $702,908. See Exhibit F, p.1.

19. For 2013, the undisputed rent due is $654,190.09. See Exhibit F, p. 2.

20. For the period from January 1, 2014 through August 30, 2014, the undisputed rent due is $452,366.03. This amount was calculated by adding the rent for 2012 and 2013 and dividing that sum by 24 months in order to determine an average monthly rent, which is then multiplied by 8, representing the eight months from January through August 30, 2014 ($702,908 + 654,190.09 = $1,357,098.09 ÷ 24 = $56,545.75 x 8 = $452,366.03). The total undisputed Current Rent is the sum of $702,908, $654,190.09 and $452,366.03, which is $1,809,464.12.

21. At periodic points in time, additional space was used by Plaza Extra-East for extra storage and staging of inventory. United has made demand for the rent covering the additional space actually occupied by Plaza Extra-East, but no payment has been received to date.

22. For the period from May 1, 1994 through July 31, 2001, Plaza Extra-East has occupied and owes rent for Bay 5 ("Bay 5 Rent"). The Bay 5 Rent is calculated by multiplying the square feet actually occupied (3,125) by $12.00 for 7.25 years. The total due for Bay 5 Rent is $271,875.00.

23. For the period from May 1, 1994 through September 30, 2002, Plaza Extra-East has occupied and owes rent for Bay 8 ("First Bay 8 Rent"). The First Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 for 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63.

24. For the period from April 1, 2008 through May 30, 2013, Plaza Extra-East has occupied and owes rent for Bay 8 ("Second Bay 8 Rent"). The Second Bay 8 Rent is calculated by

multiplying the square feet actually occupied (6,250) by $6.15 for 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75.

25. The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38.

26. The total outstanding, unpaid rent for all the space used by Plaza Extra-East from January 1, 1994 through August 30, 2014 is $6,603,122.23, excluding the "disputed" increased rent from January 1, 2012 through the present. **Exhibit G** is a Chronology of Rents, which accurately reflects the history of the rents that were paid and remain unpaid.

Dated: August 12, 2014

Fathi Yusuf

EXHIBIT 4

EXHIBIT 4

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED CORPORATION, **Plaintiff,** **vs.** **WAHEED HAMED, a/k/a WILLY OR WILLIE HAMED** **Defendant.**	**CASE NO. ST-13-CV-101**

MEMORANDUM OPINION

Pending before the Court is Defendant's February 5, 2014, Motion for Summary Judgment[1] and Defendant's April 28, 2014, Motion to Dismiss for Lack of Standing.[2] For the following reasons, Defendant's Motion for Summary Judgment will be granted and Defendant's Motion to Dismiss for Lack of Standing will be denied as moot.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, amended on July 14, 2013, alleging that during Defendant Waheed Hamed's employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets by secretly operating a separate wholesale grocery business called "5 Corner's Mini Mart" from at least some time in 1992.

[1] Plaintiff responded on April 7, 2014. Defendant replied on April 23, 2014.
[2] Despite an Order directing Plaintiff to respond by May 23, 2014, Plaintiff has failed to respond to date.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, provides that summary judgment is appropriate only

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[3]

In considering a motion for summary judgment, a court must "draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party."[4] Once the movant demonstrates that no genuine issue of material fact exists, the burden shifts to the non-moving party to demonstrate that a genuine issue of material fact exists.[5] Nevertheless, in some instances where a nonmoving party has not had adequate time for discovery, a Court may find the motion premature and defer ruling on the motion until further discovery may be conducted.[6]

ANALYSIS

Defendant submits that Plaintiff's Amended Complaint should be dismissed in its entirety because the statutory periods for Plaintiff's claims have expired. Specifically, Defendant argues that Plaintiff had notice of Defendant's alleged conduct by at least 2003

---

[3] FED. R. CIV. P. 56. *See V.I. Housing Auth. v. Santiago*, 57 V.I. 256, 264 (V.I. 2012).
[4] *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000); *see Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 127 (V.I. 2009).
[5] *See, e.g., Galloway v. Islands Mechanical Contractor, Inc.*, 2012 WL 3984891 (D.V.I. Sept. 11, 2012); *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (noting an issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue).
[6] *See* FED. R. CIV. P. 56(c)(d); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

when Defendant had access to discoverable documents - including Defendant's 1992 tax returns - in a federal criminal investigation in *U.S. v. United Corporation, et al.*, Crim. No. 2003-147.[7] Plaintiff claims that the statute of limitations was tolled until October 2011 when some of the documents seized by the Federal Bureau of Investigation related to *U.S. v. United Corporation, et al.* - including Defendant's 1992 tax returns - were turned over to Plaintiff. While Plaintiff does not dispute that it had access to documents related to its prosecution in *U.S. v. United Corporation, et al.* in 2003, Plaintiff argues that at this stage of litigation Plaintiff does not have sufficient information to demonstrate whether Defendant's 1992 tax returns were included in those discoverable documents. As a result, Plaintiff requests the Court to either deny Defendant's Motion or defer judgment on the Motion pursuant to Fed. R. Civ. P. 56(d).

I. Plaintiff fails to satisfy its burden to demonstrate the Court should defer judgment on Defendant's Motion for Summary Judgment.

The Court finds that Plaintiff has failed to show that the Court should further delay its decision in this matter pending additional discovery. Pursuant to Fed. R. Civ. P. 56(d), the Court may "defer considering the motion or deny" the motion if the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

[7] Defendant failed to provide this Court with a separate statement of undisputed material facts in accordance with Loc. R. Civ. P. 56.1(a)(1), which is sanctionable conduct pursuant to Loc. R. Civ. P. 11.2. The Court strongly cautions counsel in this regard. Despite the parties' failure to abide by the rules of procedure that govern practice before this Court, the Court finds the briefs sufficiently clear – particularly regarding which facts are in dispute - in order to make a determination on the merits of the summary judgment motion. *See* FED. R. CIV. P. 56(f)(3).

justify its opposition."[8] To satisfy Fed. R. Civ. P. 56(d), the Plaintiff must make a showing of the following three elements by affidavit or declaration:

> (1) what particular information is sought;
> (2) how, if uncovered, it would preclude summary judgment; and
> (3) why it has not previously been obtained.[9]

If these elements are met, it is commonly accepted that, if the information needed to defend against the summary judgment motion is solely in the possession of the movant, a continuance should be granted as a matter of course. However, that is not necessarily the case where a party seeking discovery can obtain the information from a source other than the movant.[10]

Here, the Court finds that Plaintiff did not demonstrate compliance with the third element. The Affidavit of Fathi Yusuf, the treasurer and secretary of United Corporation, simply establishes that Plaintiff had no *actual* knowledge of Defendant's 1992 tax returns until 2011. The Affidavit does not establish that Defendant's 1992 tax returns were not among the discoverable documents to which Plaintiff's defense team had access in 2003 in *U.S. v. United Corporation, et al.* On April 25, 2014, without deciding the Motion, the Court ordered Plaintiff to supplement its Response "with proof by affidavit from the United States Attorney's Office that it no longer has access to review documents held by the federal government, as opposed to the facts set forth in Special Agent Thomas L. Petri's July 8, 2009, Declaration." While the deadline for this supplement was May 12, 2014, the

---

[8] FED. R. CIV. P. 56(d).
[9] *Pennsylvania, Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (citing *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir. 1988)).
[10] *See, e.g., Contractors Ass'n of E. Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1263 (3d Cir. 1991).

Court received no response from Plaintiff. Considering it has been over six months since Defendant's Motion for Summary Judgment was filed and the Court has received no indication that Plaintiff may not obtain the necessary information from the U.S. Attorney's Office in order to respond to Defendant's Motion for Summary Judgment on the merits, the Court finds that Plaintiff has failed to demonstrate why the information was not previously obtained. As a result, the Court shall make a determination on the merits of Defendant's Motion for Summary Judgment.

II. The Court finds it undisputed for the purposes of Defendant's Motion for Summary Judgment that Defendant's 1992 tax returns were included in the documents to which Plaintiff had access during discovery in 2003 in *U.S. v. United Corporation, et al.*

Pursuant to Fed. R. Civ. P. 56(e), the Court gave Plaintiff "an opportunity to properly support or address the fact" of whether Plaintiff has access to the necessary information to determine whether Defendant's 1992 tax returns were among the documents available for review in 2003 in *U.S. v. United Corporation, et al.* by Plaintiff's defense team. Plaintiff failed to respond. While Plaintiff's failure to respond is insufficient for the Court to conclude that the 1992 tax returns were among the documents available for review in 2003,[11] the Court finds the Declarations of Special Agent Thomas L. Petri and Special Agent Christine Zieba, both filed July, 8, 2009 in *U.S. v. United Corporation, et al.*,

[11] *See* FED. R. CIV. P. 56, 2010 Advisory Committee Notes ("Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.")

dispositive. Neither Declaration specifically states that Defendant's 1992 tax returns were among the documents. However, both Declarations demonstrate that Plaintiff's defense team was granted "unfettered" access to discovery, although the access and the nature of the access was closely regulated and monitored by the FBI for security reasons.[12] Considering the indictment in *U.S. v. United Corporation, et al.* charged both Plaintiff and Defendant with conspiring to defraud the Virgin Islands by filing false personal income tax returns, territorial gross receipts taxes, and corporate income taxes for a period from approximately 1996 to 2001 and thereby Defendant's tax returns would be essential in the prosecution of that matter,[13] the Court may logically conclude that Defendant's 1992 tax return, only four (4) years prior to 1996, was among the discoverable documents available in 2003. In fact, while Plaintiff argues the sequential *Bates* numbers of the collected documents is not evidence that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review, the Court finds that this stamp is relevant and provides corroborating support that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review. Furthermore, Plaintiff concedes that it obtained Defendant's tax return in 2011 from the FBI as a *part* of the records collected for the purposes of the United States' prosecution of Plaintiff and Defendant in *U.S. v. United Corporation, et al.*, also suggesting the 1992 tax

---

[12] *See* Defendant's Motion for Summary Judgment, Feb. 5, 2014, at Exhibits 1 ¶9, 2 ¶9. Plaintiff argues that these "Declarations are not evidence, and *could* be false, inaccurate, and/or erroneous." However, Plaintiff has not provided the Court with any evidence that these Declarations are inaccurate representations of the Declarations filed in *U.S. v. United Corporation, et al.*, and thus, the Court accepts them as true representations of the FBI's original Declarations filed on July 8, 2009.

[13] *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004.

returns were part of the documents available for review in 2003. Considering all the above evidence, the Court finds no genuine issue of material fact exists because, even construing the facts in a light most favorable to Plaintiff, no reasonable jury could find that Defendant's 1992 tax returns were not among the documents available for review in 2003 in *U.S. v. United Corporation, et al.*, as asserted by Defendant in his Motion for Summary Judgment.[14] It appears that no other material fact necessary to the Court's determination on the merits here is in dispute.

As the Court previously stated in its June 24, 2013, Opinion, ordinarily "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.[15] Here, Plaintiff argues that both the discovery rule and the doctrine of equitable tolling apply. Specifically,

> Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.[16] (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.[17] However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

---

[14] *See* FED. R. CIV. P. 56(e)(2)(3).
[15] *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 81 (Terr. V.I. Apr. 21, 1997).
[16] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) (*quoting Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) *and Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I 2002)) (internal citations and quotations omitted).
[17] *Id.* at *6.

"that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim."[18] (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."[19]

Here, the Court finds that under both the discovery rule and doctrine of equitable tolling, Plaintiff should have discovered Defendant's alleged conduct by at least 2003 by exercising reasonable diligence, when all documents – including Defendant's tax returns from 1992 and later – related to the United States' prosecution in *U.S. v. United Corporation, et al.* were made available to Plaintiff for review.

III. The statutes of limitations on all Counts alleged in Plaintiff's Amended Complaint have expired.

Considering the Court finds that Plaintiff knew or should have discovered Defendant's alleged conduct around 2003, the statute of limitations for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) alleged in Plaintiff's Amended Complaint have long expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is "based on a breach of a legal duty imposed by law that arises out of the performance of the contract" or otherwise carries a six (6) year statute of limitations if it is "based upon a breach of specific provisions in the

[18] *Id.* (*citing In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (*quoting Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).
[19] *Id.; see also Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ("[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.") (internal citations and quotations omitted).

contract."[20] Under 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations,[21] and a breach of contract claim carries a six (6) year statute of limitations pursuant to 5 V.I.C. § 31(3)(A).[22] While Plaintiff lists "accounting"[23] and "constructive trust or recoupment" as separate counts, those are equitable remedies and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.[24] As a result, considering over ten (10) years has passed between the time Plaintiff knew or should have known of Defendant's alleged conduct and the date Plaintiff filed the Complaint in 2013, Plaintiff's Amended Complaint shall be dismissed in its entirety.

For the foregoing reasons, the Court will grant Defendant's Motion for Summary Judgment and will deny Defendant's Motion to Dismiss for Lack of Standing as moot. An Order consistent with this Opinion shall follow.

Dated: September 2, 2014

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court ___/___/___

by: Paula Clayton
Lori Boynes-Tyson
Court Clerk Supervisor 9/4/2014

CERTIFIED A TRUE COPY
Date 9/4/14
Estrella H. George
Clerk of the Court
BY
Deputy

[20] *Whitaker*, 36 V.I. at 79.
[21] *Id.* at 84 ("[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.")
[22] *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).
[23] *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I. 1997).
[24] *See generally* 1A C.J.S. Accounting § 6.

EXHIBIT 5

EXHIBIT 5

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED CORPORATION, **Plaintiff,** **vs.** **WAHEED HAMED, a/k/a WILLY OR WILLIE HAMED** **Defendant.**	**CASE NO. ST-13-CV-101**

MEMORANDUM OPINION

Pending before the Court is Defendant Waheed Hamed's April 15, 2013, Motion for Judgment on the Pleadings.[1] For the following reasons, Defendant's Motion will be granted in part and denied in part without prejudice.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, alleging that during Defendant Waheed Hamed's employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets of Plaintiff in two separate instances. Specifically, Plaintiff alleges (1) that on October 7, 1995, Defendant converted Seventy thousand dollars ($70,000.00) by conveying it to a third party through a certified check without Plaintiff's approval; and (2) that in at least 1992 and for a following unknown period of time, Defendant operated a wholesale grocery business called "5 Corner's Mini Mart," converting Plaintiff's inventory and personal property without Plaintiff's knowledge.

[1] Plaintiff responded on May 1, 2013. Defendant replied on June 4, 2013.

STANDARD

Pursuant to Fed. R. Civ. P. 12(c), made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, a party may move for judgment on the pleadings, "[a]fter the pleadings are closed – but early enough not to delay trial."[2] The standard applied under Fed. R. Civ. P. 12(c) mirrors that of Fed. R. Civ. P. 12(b)(6),[3] under which a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."[4] In considering the motion, the Court must first liberally construe the pleadings,[5] and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.[6] While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation."[7] Second, once the legal and factual allegations have been distinguished, the Court must decide whether "the plaintiff

---

[2] Fed. R. Civ. P. 12(c).
[3] *See, e.g., Sanders v. Gov't of the V.I.*, 2009 WL 649888, at *2 (D.V.I. Mar. 9, 2009); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011). An essential difference between a motion under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) is that a motion under Fed. R. Civ. P. 12(b)(6) must be made before a responsive pleading is allowed, while Fed. R. Civ. P. 12(c) applies after a responsive pleading has been filed.
[4] Fed. R. Civ. P. 12(b)(6).
[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
[6] *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) ("[I]n considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations in the complaint. . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a) . . . .") (internal citations omitted).
[7] *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. 2012) (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

pleads factual content that allows the court to draw the reasonable inference"[8] that the claim is plausible on its face.

Considering that a motion to for judgment on the pleadings challenges the sufficiency of the pleadings rather than disputed factual allegations, a Court will not generally grant a motion to dismiss based on either Fed. R. Civ. Pro. 12(c) or Fed. R. Civ. P. 12(b)(6) that solely asserts an affirmative defense.[9] However, a Court may consider such a motion to dismiss where "the relevant facts are . . . readily apparent on the face of the complaint."[10] For instance, while "the expiration of the [s]tatute of [l]imitations often presents a question of fact [for the jury], where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law."[11] When conducting such an analysis the Court primarily relies on the factual allegations plead in the Complaint, but may also consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint . . . ."[12] For instance, in *Burton v. First Bank of Puerto Rico*, the court considered the plaintiff's

---

[8] *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 446).
[9] *See, e.g., Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008) ("Where a court grants a Rule 12(b)(6) or Rule 12(c) motion based on an affirmative defense, the facts establishing that defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude.")(internal quotations omitted)(*citing Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir.2006)).
[10] *Burton v. First Bank of Puerto Rico*, 49 V.I. 16, 20 (V.I. Super. 2007)(applying the pre-*Twombly* standard to a Fed. R. Civ. P. 12(b)(6) motion); *see Charleswell v. Chase Manhattan Bank*, 45 V.I., 495, 506 (D.V.I, 2004).
[11] *Burton*, 49 V.I. at 20 (internal citations and quotations omitted) (*citing Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005)).
[12] *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (*citing Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001)); *see generally Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). If other extrinsic evidence is considered, a court may convert the motion into Fed. R. Civ. P. 56 motion at its discretion. *See generally* STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK, at 470 (2012).

billing statements because they were "indisputably authentic documents" that were explicitly referred to in the complaint.[13]

ANALYSIS

Defendant argues that Plaintiff's Complaint should be dismissed because the statute of limitations period for Plaintiff's claims for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) have expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is "based on a breach of a legal duty imposed by law that arises out of the performance of the contract" or otherwise carries a six (6) year statute of limitations if it is "based upon a breach of specific provisions in the contract."[14] Pursuant to 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations.[15] Pursuant to 5 V.I.C. § 31(3)(A), a breach of contract claim carries a six (6) year statute of limitations.[16] While Plaintiff lists "accounting"[17] and "constructive trust or recoupment" as separate counts, they are equitable remedies, and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.[18]

---

[13] 49 V.I. at 20.
[14] *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 79 (Terr. V.I. Apr. 21, 1997)
[15] *Id.* at 84 ("[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.")
[16] *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).
[17] *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I. 1997)(" equitable accounting is a remedy of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiff's property or entitlements. The plaintiff makes a prima facie case by showing a breach of fiduciary duty plus gross receipts resulting to the fiduciary, and the defendant must prove what deductions are appropriate to figure the net profit.")(internal quotations and citations omitted)(*quoting* 1 Dan B. Dobbs, Law Of Remedies § 4.3(5), at 610 (2d ed.1993)).
[18] *See generally* 1A C.J.S. Accounting § 6 ("An accounting is essentially an equitable remedy, which arises from an obligation to account for the plaintiff's money or property."); 90 C.J.S. Trusts § 176

Plaintiff argues that, while the alleged acts if misconduct occurred as early as 1992 and in 1995, the statutory period was tolled because Plaintiff had no way of knowing of the misconduct until Plaintiff received certain documents in October 2011 that had been gathered pursuant to a 2003 federal criminal investigation in *U.S. v. United Corporation, et al.*

Ordinarily, "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.[19] While Plaintiff's reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant argues that Plaintiff's argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

> Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.[20] (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.[21] However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

---

("[Constructive trusts] are remedial in character and are classified as belonging to remedial rather than substantive law, and it is not itself a substantive right.")(internal citations omitted).

[19] *Whitaker*, 36 V.I. at 81.

[20] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) (*quoting Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) *and Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I 2002)) (internal citations and quotations omitted).

[21] *Id.* at *6.

"that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim."[22] (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."[23]

Applying the "reasonable diligence" standard of the discovery rule and doctrine of equitable tolling, the Court will discuss in turn the 1992 and 1995 allegations of wrongful conduct to determine whether recovery on the Complaint on its face, construed liberally in a light most favorable to Plaintiff, is barred on statute of limitations grounds.

I. Claims relying on facts alleging Defendant converted Seventy thousand dollars ($70,000.00) via a certified check to a third party on October 7, 1995.

Plaintiff's Complaint alleges that

> In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted $70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations.[24]

Further, in his response to Defendant's Motion, Plaintiff argues that the "statute of limitations could not accrue and was tolled because Plaintiff could not have possibly known of Defendant's misconduct until a federal investigation revealed this

---

[22] *Id.* (*citing In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (*quoting Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).
[23] *Id.; see also Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ("[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.")(internal citations and quotations omitted).
[24] Complaint, ¶ 14.

misconduct."[25] Defendant argues that the statute of limitations period was not tolled because under either the discovery rule or doctrine of equitable tolling Plaintiff failed to exercise "reasonable diligence" in reviewing the basic accounting records of the company before the records were seized by the government in *U.S. v. United Corporation, et al.*

The Court agrees with Defendant, albeit on different grounds. Specifically, the Complaint states that in 2003 Plaintiff United, along with Defendant and others, were indicted in "*U.S. v. United Corp.*, ST-15-CR-2005."[26] Upon a review of public records, it appears that Plaintiff is referring to *U.S. v. United Corporation, et al.*, Crim. No. 2003-147 in the District Court. The original indictment, issued and unsealed on September 18, 2003, in *U.S. v. United Corporation, et al.*, Crim. No. 2003-147, and any subsequent superseding indictments may be considered by the Court in its analysis to determine whether Plaintiff exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling because Plaintiff explicitly refers to that case on the face of the Complaint, and further, these indictments are indisputable public records.[27] The third superseding indictment, issued on September 9, 2004, charged Defendant Waheed Hamed, among others, with

> purchas[ing] and direct[ing] and caus[ing] Plaza Extra employees and others to purchase cashier's checks, traveler's checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the case as legitimate-appearing financial instruments.[28]

---

[25] Plaintiff's Response in Opposition to Defendant's Motion for Judgment on the Pleadings, May 1, 2013, at ¶ 7.
[26] Complaint, ¶ 14.
[27] *Barany-Snyder*, 539 F.3d at 332; *See* Fed. R. Evid 902.
[28] *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004, at ¶ 15.

While the third superseding indictment largely alleges that Defendant Waheed Hamed, among others, used cashier's checks and other methods to conceal illegal money transfers abroad, the third superseding indictment, although only containing allegations, would have *at least* put a reasonable person in Plaintiff's position,[29] as Defendant's employer, on notice[30] that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties, as alleged in Plaintiff's Complaint at Paragraph 15. Plaintiff does not contend any efforts were made after this point to review United's business and accounting records to investigate the government's allegations against Defendant.[31] Instead, the Complaint clearly states on its face that the discovery was only made in October 2011 upon a review of the government's records and documents. Thus, here, "the facts are so clear that reasonable minds cannot differ," on the face of the Complaint that the commencement period for the statute of limitations began *at least* by September 9, 2004.[32] As such, all claims relying on facts alleging

---

[29] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *6 (noting that while reasonable diligence is an objective test based on a reasonable person standard, the test is flexible to take into account certain situations and circumstances).

[30] *See Whitaker*, 36 V.I. at 81 ("the . . . crucial question in determining the accrual date for statute of limitations purposes is whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him.")(*quoting Zeleznik v. U.S.*, 770 F.2d 20, 23 (3d Cir. 1985)).

[31] *See, e.g. Zafarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 553 (E.D. Pa. 2010) ("Once a plaintiff becomes aware of an injury and who caused it, he is under a duty to investigate and promptly file his suit.") Plaintiff primary argument is that Plaintiff did not have access until October 2011 to many of the records, particularly Defendant's 1992 tax return, which lead to the discovery of Defendant's alleged misconduct. Here, Plaintiff, a corporation, has access to its own accounting and other record-keeping files, a review of which may have revealed Defendant's alleged misconduct. Even if the government had confiscated Plaintiff's business records, an objectively reasonable individual would have retained copies, particularly if an indictment was pending, and have inquired into the wrongdoing suggested by the September 9, 2004, third superseding indictment. Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendant's misconduct is without merit.

[32] As the Court relied on the third superseding indictment, the Court does not hold or address whether the original indictment may have also placed Plaintiff on notice of Defendant's alleged misconduct.

Defendant converted Seventy thousand dollars ($70,000.00) via a certified check to a third party on October 7, 1995, are barred on statute of limitations grounds. All of Plaintiff's claims carry a six (6) year statute of limitation or less, meaning the statutory period expired by *at least* September 9, 2010.

II. Claims relying on facts alleging Defendant operated a wholesale grocery business called "5 Corner's Mini Mart" and converted Plaintiff's inventory and personal property without Plaintiff's knowledge in 1992 for an unknown period of time.

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory . . . belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."[33] Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in *U.S. v. United Corporation, et al.*, were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.[34]

---

[33] Complaint, ¶¶ 16-20.

[34] Plaintiff's Response in Opposition to Defendant's Motion for Judgment on the Pleadings, May 1, 2013, at ¶¶ 4, 7. Defendant argues that because Plaintiff fails to specifically reference the alleged 1992 misconduct in their response to Defendant's Motion that "[P]laintiff concedes the limitation issue as to the 1992 act." Defendant Hamed's Reply to Plaintiff's Opposition to the Motion for Judgment on the Pleadings, June 4, 2013, at 3. The Court agrees that Plaintiff's counsel failed to cite to any relevant authority in violation of Local Rule of Civil Procedure 11.1 which provides that, "[b]y signing a motion or supporting memorandum or brief, an attorney certifies to the Court that: (a) the applicable law in this jurisdiction has been cited, including authority for and against the position being advocated by counsel . . . ." The Court strongly cautions Plaintiff's counsel to cite to relevant authority and applicable legal standards in any future representations before this Court. However, the Court in its discretion, and in viewing the Complaint in a light most favorable to Plaintiff, has considered Plaintiff's general argument that Plaintiff had no way of discovering Defendant's alleged misconduct until October 2011 to both the alleged misconduct that occurred in 1992 and 1995.

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determine as a matter of law and is rather a question of material fact.[35] Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in *U.S. v. United*, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, here, Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which Plaintiff previously did not have access. As such, Defendant's motion is premature with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011.

For the foregoing reasons, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings. An Order consistent with this Opinion shall follow.

Dated: June 24, 2013

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: _____
Lori Boynes-Tyson
Court Clerk Supervisor 6/25/13

[35] *See, e.g. In re Mushroom*, 383 F.3d at 338.

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

WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff/Counterclaim Defendant, v. **FATHI YUSUF** and **UNITED CORPORATION**, Defendants/Counterclaimants, v. **WALEED HAMED**, **WAHEED HAMED**, **MUFEED HAMED**, **HISHAM HAMED**, and **PLESSEN ENTERPRISES, INC.**, Additional Counterclaim Defendants.	**CIVIL NO. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING** **Consolidated With**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION**, Defendant.	**CIVIL NO. SX-14-CV-287** **ACTION FOR DAMAGES AND DECLARATORY JUDGMENT**
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. **FATHI YUSUF**, Defendant.	**CIVIL NO. SX-14-CV-278** **ACTION FOR DEBT AND CONVERSION**

ORDER

The Court having read Fathi Yusuf's Motion for Reconsideration of Ruling Limiting Period of Accounting Claim (the "Motion"), and being otherwise fully advised in the premises, it is hereby

ORDERED that the Motion is **GRANTED**, and the Court's July 21, 2017 Memorandum Opinion and Order Re Limitations on Accounting is hereby **VACATED**.

DATED: August ____, 2017

_____
DOUGLAS A. BRADY
Judge of the Superior Court

A T T E S T:

Estrella H. George
Clerk of the Court

By:_____
Deputy Clerk

R:\DOCS\6254\1\PLDG\17G402002.DOCX