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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, *Plaintiff/Counterclaim Defendant*, vs. **FATHI YUSUF** and **UNITED CORPORATION,** *Defendants and Counterclaimants*. vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,** *Counterclaim Defendants*,	Case No.: SX-2012-cv-370 **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** JURY TRIAL DEMANDED
MOHAMMAD HAMED, *Plaintiff*, vs. **FATHI YUSUF,** *Defendant*.	Case No.: SX-2014-CV-278 **ACTION FOR DEBT AND CONVERSION** JURY TRIAL DEMANDED

HAMED'S RESPONSE TO YUSUF'S MOTION FOR RECONSIDERATION

On August 11th, Fathi Yusuf filed a motion for reconsideration of this Court's July 21st Order regarding the accounting issues going forward. Motions for reconsideration are governed by V.I. R. Civ. P. 6-4. Yusuf cites subsection (b)(3) as the basis of his

motion, which requires a showing of a "clear error of law." For the reasons set forth herein, it is respectfully submitted that the motion be denied.

I. There was nothing *procedurally* improper regarding the Court's Order

Yusuf raises three sub-arguments in this section of his motion, none of which supports a finding of clear error of law.

A. There was no granting of 'summary judgment' on laches

Yusuf has mischaracterized this Court's Order regarding the accounting as being an "order granting partial summary judgment to Plaintiff on the accounting claim of Fathi Yusuf . . . " See p. 1 of Yusuf's motion. To the contrary, the Order being challenged was **not a summary judgment order.** It was an exercise of this Court's broad powers related to "the administration of winding up the partnership," over which this Court "possesses considerable discretion." See *Yusuf v Hamed,* 2015 WL 877879 at *2 (V.I. 2015). In this regard, the Order specifically denied the two summary judgment motions and then stated as follows:

> ORDERED that the accounting in this matter, to which each partner is entitled under 26 V.I.C S 177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C $ 71(a), based upon transactions that occurred on or after September 17, 2006.

Despite Yusuf's belief this Order only favored the Plaintiff, **the Order applied to both parties equally**, eliminating claims for Hamed prior to September 17, 2006, as well.[1]

Moreover, this Order was entered in conjunction with other orders streamlining the accounting and other aspects of the case, such as directing that this matter proceed

[1] The Plaintiffs' own submission of claims included claims in excess of $20,000,000 that are now barred under this Court's Order, even though Yusuf had not moved to strike them.

without a jury, before a Master and denying the Rule 702 Daubert motions without prejudice, in part because this was no longer a jury matter.[2]

Clearly the exercise of this Court's equitable powers was explained throughout the July 21st opinion, which did not simply rest on the laches issue.[3] Indeed, the Court discussed the equitable doctrine of unclean hands, the public policy issues based upon the adoption of RUPA by the Legislature and the burden on the taxpayers and the Court created by the parties. After a full discussion of all of these points, the Court concluded as follows:

> Therefore, the Court exercises the significant discretion it possesses in fashioning equitable remedies to restrict the **scope of the accounting** in this matter to consider only those § 71(a) claims that are based upon transactions occurring no more than six years prior to the September 17, 2012 filing of Hamed's Complaint.

Thus, the procedural basis for the Order was the Court's broad discretion in determining how the claims in this case will proceed **for both parties**, not a Rule 56 summary judgment Order in favor of just one party, negating this basis for seeking reconsideration.

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[2] As the Court stated on page 2 of that Order:

> The primary purpose of conducting a Daubert hearing pursuant to V.I. R. Evid. 104 is to permit the trial court to act as gatekeeper to prevent a jury from hearing inadmissible testimony. Because the Court, by Memorandum Opinion and Order entered contemporaneously herewith, strikes both Plaintiff's and Defendants' demands for trial by jury, that concern is not present.

[3] Yusuf can hardly claim to be surprised by the discussion of laches, an affirmative defense **raised by both parties**, as his post-March 6th Hearing memorandum addressed the fact that the *Fike* decision, a key case briefed by both parties, applied laches (as opposed to the SOL) under RUPA. See page 7 of Yusuf's March 21, 2017, memorandum.

B. The taking of testimony was proper

Yusuf argues next that it was improper for the Court to hear evidence at the March 6th hearing. There were five motions set to be heard that day, including a motion on the SOL issues, a motion to strike the BDO report and a motion for further instructions on how the case should proceed. It is certainly not improper, much less a "clear error of law" to hear testimony on these motions.[4] In short, this was more than just a summary judgment hearing.

Yusuf's suggestion that evidence is never admissible in a summary judgment hearing is simply wrong. Summary judgment can still be based on facts that are not in dispute, as both parties urged the Court to find in arguing their respective motions. In any event, this argument in support of its motion for reconsideration is moot, as both SOL motions were denied.

As to the criticisms of this Court's discussion of the testimony of Larry Schoenbach, this Court made it clear it was not addressing whether Shoenbach was being recognized (or not) as an expert. Instead, this Court merely took note of the facts of record Schoenbach discussed—the details of the criminal case against Yusuf and others in conducting partnership business—which are not in dispute. There is certainly no clear error in taking note of such facts, which Schoenbach was tasked by Hamed to present to the Court. In short, the Court referenced those facts, not any expert opinion.

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[4] Indeed, the Court invited testimony on one aspect of the SOL motion, which is certainly proper if the Plaintiff can establish that there is no genuine issue of fact about some of the claims presented. Thus, Yusuf's suggestion that evidence is never admissible in a summary judgment hearing is simply wrong. Summary judgment can still be based on facts in the record that are not in dispute. In any event, this argument is moot, as both SOL motions were denied.

Moreover, Yusuf's claim that he did not know he could present evidence is absurd. In fact, there were two *Daubert* motions set, which almost always require some testimony. As for the "testimony" it now wants to proffer in the form of a declaration from BDO, that proffer is a little late at this juncture. In this regard:

- BDO never submitted a declaration in response to the *motion in limine* to strike its report.
- BDO did not attend the hearing on the motion, something quite unusual.
- Finally, no declaration was submitted from BDO when Yusuf filed his post-hearing brief on this issue.

Thus, at best, BDO's belated declaration constitutes evidence that could easily have been previously submitted.

Even if this Court choses to now consider this belated declaration, it hardly supports a finding of any error on this record, much less "clear error of law." In this regard, BDO has still not found any of the records it admitted were missing, nor has it explained why it did not mention, much less consider reviewing, the multiple bank and accounting records identified by the Plaintiff as being partnership records. In short, this new declaration fails to address any of the multiple deficiencies in its report that were made on the record at the March 6th hearing.[5]

In summary, the taking of testimony at a hearing on multiple motions was proper. Likewise, the analyzing of the testimony in this case was not a "clear error of law," even it Yusuf disagrees with what the Court found.

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[5] While BDO now claims it looked at over 80,000 entries, it also admitted it did not have many key items. As the Plaintiff proved at the hearing, there were even more accounting and bank records that BDO did not even identify, much less review, all of which was addressed in the Plaintiff's March 27th post-hearing response re the BDO report.

C. There is no clear error in applying Laches

The fallacy of Yusuf's argument here is that it again begins with the premise that this Court's order limiting the claims process was a summary judgment order. As noted above, the laches discussion was just part of a series of reasons that lead the Court to determine that claims *of both parties* prior to 2006 would not be considered further, entered pursuant to its broad equitable powers. Thus, every case cited by Yusuf involved summary judgment findings, as opposed to determining how to proceed to the claims process (without a jury), they need not be discussed further.

In short, it was not a "clear error of law " to rely in part on the laches analysis here before reaching a determination that claims before 2006 need not be considered.

II. There were no clear errors of law in addressing the laches issue

Yusuf raises four arguments in support of its claim that there was clear error in making the determination that the application of the equitable defense of laches should be applied here. There are three central problems with Yusuf's entire argument. First, it again assumes that the laches analysis was the *only* basis for the Court's Order. Second, it ignores the fact that the Court took note of the conduct of both parties as well as the prejudice to both parties, not just that of Yusuf. Third, it overlooks the fact that the Court struck the jury demand, which negates the need to preserve issues for a jury to address as the finder of fact. With these comments in mind, the Plaintiff will address each of these four issues.

A. The Court's finding of delay

Yusuf's basis his motion for reconsideration on the faulty premise that the filing of a partnership dissolution is the date that the SOL starts to run on all partnership claims,

even those asserted as part of an accounting. However, as this Court held in its June 24th Order:

> Moreover, imposing such a limitation furthers the clear policy goals of the legislature as embodied by RUPA. In *Fike v. Ruger*, the Delaware Chancery Court examined statutory language identical to 26 V.I.C. § 75, and determined that "it is clear under RUPA that a right of action arising during the life of a partnership is not revived merely because dissolution occurs and a separate right to an accounting on dissolution arises." Id. at 263. While the common law and prior statutory scheme "placed partners in the predicament of either causing a dissolution to resolve disputes or continuing the partnership despite a cloud of conflict and uncertainty hanging over it, the drafters of [RUPA] included Section 22 [26 V.I.C. § 75], specifically authorizing actions prior to dissolution." *Id.* "The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them." National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act; Section 405(c) comment 4.
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> **Both partners' claims, as presented in this matter, must be construed as actions for dissolution, wind up, and accounting under § 75 (b)(2) (iii) Yet, each partner could have, and under the policy considerations undergirding RUPA, should have, brought his claims concerning individual withdrawals of partnership funds or other transactions, with or without an accompanying action for accounting, as each partner became aware or should have become aware of those transactions pursuant to § 75(b).** (Emphasis added).

Thus, each of the pre-RUPA cases cited by Yusuf are no longer good law. In short, there is no "clear error of law" in determining that the pre-2007 claims are barred in part under the doctrine of laches, as well as in part due to the other factors discussed by this Court.

One final comment is in order here. Yusuf is quick to raise the comments of the Virgin Islands Supreme Court in *United Corp. v. Hamed,* 64 V.I. 297, 310 (V.I. 2016). However, those comments are not applicable here to this Court's discussion of the affidavit of the U.S. Attorney in the criminal case for two reasons. First, that case involved a summary judgment motion, which is not the same context in which the

affidavit is discussed here, as already noted. Second, that case was one where a jury, not the Court, needed to resolve questions of fact. In any event, the comments about this affidavit in one footnote of a 34-page opinion does not obviate the following finding that preceded this footnote on page 28:

> And though Yusuf was content to dispense with the standard business accounting formalities for nearly the entire life of the partnership, upon Hamed's filing his Complaint in this matter, **Yusuf changed course and now seeks to vindicate his right to a thorough and methodical partnership accounting**. (Emphasis added.)

In short, the reference to this affidavit in a footnote does not make the Court's entire opinion to be a "clear error of law."

In summary, Yusuf based his argument that there was no delay in pursing his claims on the mistaken premise that his cause of action for an accounting on all claims only began when the partnership was dissolved. As this Court held, that view is contrary to the Legislature's adoption of RUPA [26 V.I.C. § 75]. Thus, this argument seeking reconsideration is also without merit.

B. The Court's finding of prejudice

Yusuf argues next that this Court's finding of prejudice was "cursory," based in large part on an improper assumption that many accounting records no longer existed. It is clear this Court's analysis was neither "cursory" nor based on the improper assumption regarding the lack of full, reliable records. Indeed, **the BDO report repeatedly admitted that it did not have many key records prior to 2006**. Moreover, the Plaintiff demonstrated at the March 6th hearing that there were many more accounting and bank records that BDO did not even identify, much less review, as

noted in his March 27, 2017, post hearing memorandum on the defects in the BDO report, incorporated herein by reference.

Yusuf's arguments raised in this section depend primarily on the new declaration from BDO, but this declaration is not only too late, it is completely contrary to the record in this case as to the lack of adequate accounting and bank records before 2007. In short, this Court's finding of prejudice is not only supported by the record, but it is certainly not based on a clear "error of law."

C. The *Williams* decision

Yusuf's attempt to distinguish *Williams* intentionally ignores the principal finding of the Court in this case -- a point so obvious that it is inarguable: While Mr. Hamed and Mr. Yusuf may not have known of every specific withdrawal over 30 years, they did know that this was a criminal enterprise whose very nature was to have people take funds in a manner that would avoid detection. Indeed, even Yusuf acknowledges that the *Williams* court relied, ***exactly*** as this Court did, on the obvious "actual or constructive knowledge" of what was occurring. Similarly, like the *Williams* court, this Court found that the task to accurately reconstruct the partnership records was simply not possible.

Thus, this Court's reliance in part on *Williams* was neither misplaced nor a "clear error of law."

D. The shortening of the accounting process

Yusuf ends his motion with a one paragraph argument that the Court's limiting of the accounting period was arbitrary and improper, as an accounting looks back to the last date of the partnership reconciliation. However, once again, Yusuf ignores this

Court's finding (outlined in section II (A) above) that the filing of an accounting does not automatically revive every prior claim.

In any event, as noted at the outset of this response, the Court made it clear that this is now an *equitable* exercise in winding up a partnership, for which this Court has broad powers related to "the administration of winding up the partnership" and for which it "possesses considerable discretion" in doing so. See *Yusuf v Hamed,* 2015 WL 877879 at *2 (V.I. 2015). Thus, while Yusuf argues the Court acted arbitrarily and improper, that argument does not rise to the level of a "clear error of law" under the powers granted the Court in the administration of this winding up process.

III. Conclusion

The crux of what Yusuf is doing now is to complain about this actually being an *equitable* accounting, which he has always sought. For the reasons set forth herein, it is respectfully submitted the motion for reconsideration be denied, with the parties being directed to proceed with resolving the remaining claims forthwith.

Dated: August 15, 2017

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