

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED **Plaintiff** )  
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vs )  
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FATHI YUSUF )  
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\_\_\_\_\_  
**Defendant**

CASE NO. SX-14-CV-0000278

ACTION FOR: DEBT - CIVIL

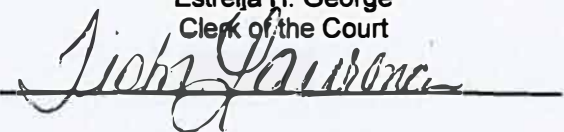
**NOTICE OF ENTRY OF  
ORDER**

TO: GREGORY HODGES, ESQ.  
JOEL HOLT, ESQ.  
CARL J. HARTMANN, ESQ.  
MARK W. ECKARD, ESQ.  
JEFFREY B.C. MOORHEAD, ESQ.  
HONORABLE EDGAR ROSS, ESQ, VIA EMAIL

Please take notice that on November 15, 2017 a(n) ORDER dated  
November 13, 2017 was entered by the Clerk in the above-entitled matter.

Dated: November 15, 2017

Estrella H. George  
Clerk of the Court



TISHA LAURENCIN-ORTIZ  
COURT CLERK II



### **Motion for Reconsideration**

Defendant moves the Court to reconsider its Opinion pursuant to V.I. R. Civ. P. 6-4(b)(3), based upon “the need to correct clear error of law.” Defendant asserts that the Court, in issuing its Opinion, committed the following clear errors of law:

1. The Court granted “partial summary judgment in favor of Plaintiff... 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,” in violation of V.I. R. Civ. P. 56(f). Motion, at 1.
2. In granting partial summary judgment, the Court impermissibly relied on the testimony of Lawrence Shoenbach, Plaintiff’s purported expert in “white collar crime.”
3. The Court erred substantively in its laches analysis in finding both that Yusuf’s delay in bringing his accounting claim was inexcusable and that Hamed suffered prejudice as a result of this delay.

As an initial matter, it is necessary to clarify that despite Defendant’s characterization of the Opinion as a grant of partial summary judgment in favor of Plaintiff on the basis of the affirmative defense of laches, the Court, in fact, denied Plaintiff’s Motion for Summary Judgment Re Statute of Limitations. Rather, as part of the administration of winding up the partnership, over which this Court “possesses considerable discretion,”<sup>1</sup> the Court, upon consideration of the principles underlying the doctrine of laches, as well as the express policy goals of the Legislature as embodied in the Revised Uniform Partnership Act (RUPA), imposed an equitable limitation upon the scope of the accounting process. Pursuant to the Court’s Opinion, the submission of the partners’ §71(a) claims to the Master in the accounting and distribution phase of the Final Wind Up Plan is limited to those §71(a) claims based upon transactions occurring no more than six years prior to the September 17, 2012 filing of Hamed’s Complaint.<sup>2</sup>

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<sup>1</sup> See *Yusuf v. Hamed*, 62 V.I. 565, 569 (2015).

<sup>2</sup> “§71(a) claims” refer to the parties’ respective assertions of credits and charges to be applied in ascertaining the balance of each partner’s individual partnership account during the accounting and distribution phase of the Final Wind Up Plan as outlined in 26 V.I.C. §71(a). For further explanation, refer to the Court’s Opinion, at 11.

Although the Court's ruling bears certain similarities to a grant of partial summary judgment in its effect, there are critical, if subtle, differences. As discussed in detail in the Opinion, affirmative defenses, such as laches and the statute of limitations, are generally invoked as a bar to causes of action in their entirety. By contrast, in this matter, Plaintiff sought to bar Yusuf not from pursuing his accounting action as a whole, but rather from presenting to the Master certain claimed credits and charges to partnership accounts in the accounting and distribution phase of the Final Wind Up Plan.<sup>3</sup> Thus, neither the affirmative defense of statute of limitations nor laches, as generally understood, has direct applicability in the context of limiting the submission of the partners §71(a) claims. However, as an accounting in this context is both an equitable cause of action and an equitable remedy in itself, the Court, upon consideration of the general principles underlying the affirmative defense of laches, together with the express policy goals of RUPA, exercised its considerable discretion in fashioning equitable remedies, to limit the scope of the partnership accounting. Additionally, and perhaps most obviously, a grant of partial summary judgment in favor of Plaintiff would have limited only Yusuf's §71(a) claims, while the equitable limitation imposed by the Court equally limits the claims of both partners.

#### Assignment of Error #1

Defendant's first assignment of error is essentially an assertion that Defendant had no notice of the Court's intention to consider the issue of laches, and was unfairly deprived of the opportunity to submit evidence and argument on this issue. While it is true that the Court did not specifically order briefing on the issue of laches, both parties had already submitted voluminous briefing and argument on the issues central to the laches analysis — length of delay in bringing claims, reasons for delay, knowledge of wrongdoing, prejudice — in the context of Plaintiff's Motion for Summary Judgment Re Statute of Limitations, and in many peripheral supplemental briefs. Additionally, as Plaintiff points out, "Yusuf can hardly claim to be surprised by discussion of laches, an affirmative defense raised by both parties, as his post-March 6<sup>th</sup> 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."<sup>4</sup> Response, at 3 n.3. Thus, to the extent that V.I. R.

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<sup>3</sup> For a more detailed discussion of the nature of the partners' respective causes of action, as compared to the nature of the "claims" Plaintiff sought to limit by his Motion for Summary Judgment, refer to the Opinion, at 10-11.

<sup>4</sup> *Fike v. Ruger*, 752 A.2d 112 (Del. 2000).

Civ. P. 56(f) is at all applicable in this context, Defendant cannot reasonably claim that he lacked notice of the laches issue, and further cannot claim that he was deprived of the opportunity to submit briefing on those issues central to the laches analysis including inexcusable delay and prejudice, as those issues were, in fact, discussed by both parties in several rounds of briefing prior to entry of the Court's Opinion.

Assignment of Error #2

Defendant's second assignment of error contends that the Court impermissibly relied on the testimony and report of Plaintiff's purported expert Lawrence Shoenbach in issuing the Opinion. Specifically, Defendant argues that the Court "rel[ied] 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." Motion, at 6. Defendant cannot reasonably claim that he was not granted the opportunity to present testimony of his accounting expert. To the contrary, the Court's February 7, 2017 Order Scheduling Hearing for March 6, 2017 explicitly directed that Plaintiff's fully briefed Motion to Strike Accounting Expert (BDO) would come on for hearing. Although Plaintiff utilized this hearing to present testimony and other evidence in support of his Motion challenging the BDO report as unreliable, Defendant offered no witness testimony at the hearing and objected to the Court taking evidence.

However, even if Defendant's objection at the hearing may be considered meritorious, the Opinion does not directly rely on any testimony offered by Mr. Shoenbach at the March 6, 2017 hearing. Rather, the Opinion considered Mr. Shoenbach's opinion letter, attached as an exhibit to Plaintiff's Revised Notice of Partnership Claims, filed nearly five months earlier on October 17, 2016. The Opinion merely noted that the written opinions of Mr. Shoenbach were corroborated by the testimony of several witness at the hearing. Defendant cannot reasonably claim either that he was deprived of any opportunity to respond to the substance of Mr. Shoenbach's opinion, or to put on testimony of his own expert.

Defendant also argues that reliance on Mr. Shoenbach's opinion regarding the reliability of any potential accounting is substantively inappropriate as he is not an accountant. Instead, Defendant contends that the Court should credit the Declaration of Fernando Scherer, drafted and submitted after the Court issued its Opinion, stating that "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.” Declaration ¶ 5(c). While there is little doubt that a respected accounting firm such as BDO is capable of rendering an accurate accounting *based upon the records provided*, the Court’s decision to impose an equitable limitation upon the scope of the partnership accounting is premised, not on the many tens of thousands of records that are available — to be expected in the context of a partnership spanning three decades — but rather on the many hundreds, if not thousands of records that are demonstrably unavailable, such as any bank records predating 2007 (*see* BDO Report, at 22), and the unknown number of cash transactions left unrecorded that must be inferred from the known historical behavior and highly informal, if not deliberately misleading, accounting practices of the partners.

Additionally, taking issue with Mr. Shoenbach’s opinion that the partners’ documented scheme to obfuscate gross receipts of the partnership renders any accounting between the partners unreliable, Mr. Scherer’s Declaration further asserts that “knowledge of total gross receipts of the Partnership (reported or unreported) is simply not necessary to quantify what each partner has withdrawn.” Declaration ¶ 7. While it is true that each partner’s respective withdrawals may be tabulated without establishing the gross receipts of the partnership, in order to determine the amount owed on a successful action for partnership accounting, the Court must, under the statutory framework presented by RUPA, determine the overall profits of the partnership.<sup>5</sup>

The Court referred to Mr. Shoenbach’s letter in its Opinion, not in reliance upon his expertise in accounting, but in order to illustrate the general proposition that where, as here, business partners have schemed to deliberately omit large sums of money from their accounting, have intentionally destroyed existing records of cash withdrawals, and have, even at their best, engaged only in loose, informal accounting practices, any attempt to accurately reconstruct

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<sup>5</sup> The general framework for conducting a partnership accounting in the Virgin Islands is outlined at 26 V.I.C. § 177(b): “Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner’s account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner’s account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under section 46 of this chapter.” In turn, the “partners’ accounts” referenced in § 177(b) are described at 26 V.I.C. § 71(a): “Each partner is deemed to have an account that is: (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner’s share of the partnership profits; and (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner’s share of the partnership losses.”

partnership records will necessarily involve some element of unreliability, as that is the very point of such a scheme. Moreover, such a reconstruction will only become proportionately more difficult and less reliable the farther back in time one goes. As summarized in Plaintiff's Response, the main import of Mr. Shoenbach's opinion letter is that both partners knew "that this was a criminal enterprise whose very nature was to have people take funds in a manner that would avoid detection." Response, at 9.

Assignment of Error #3

Defendant's third assignment of error contends that the Court erroneously concluded both that Yusuf inexcusably delayed in bringing this action, and that Hamed was prejudiced by the delay. Defendant begins his argument by misstating the Court's Opinion, noting that "[t]he Court correctly held that an equitable claim for an accounting accrues 'upon dissolution of the partnership,' and can 'only be presented' when dissolution occurs." Motion, at 12. What the referenced footnote actually stated is that actions for partnership accounting could only be presented upon dissolution of the partnership *prior to the enactment of RUPA in the Virgin Islands in 1998*. Opinion, at 9 n.6.

Additionally, Defendant's argument is premised upon a significant mischaracterization of the nature of the Court's holding. The Court did not find that Defendant delayed inexcusably in pursuing his right to an accounting as an element of his tripartite cause of action for equitable partnership dissolution, wind up, and accounting under 26 V.I.C. § 75(b)(2)(iii). Indeed, §177(b) of the same title unequivocally establishes that "each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business." Rather, the Court found that both partners inexcusably delayed, specifically in bringing their respective §71(a) claims based upon transactions predating September 17, 2006, as according to the manifest intent of the Legislature in enacting RUPA, each partner statutorily could have and should have brought his claims concerning these 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 26 V.I.C. § 75(b)(1). *See* Opinion, at 32.

Defendant also argues that there can be no inexcusable delay on the part of Yusuf as he "had no reason to know that the Hameds were acting dishonestly until he reviewed the seized FBI documents" following partial return of those documents in 2010. Motion, at 14. As outlined in the

Opinion, this assertion is fatally belied by the history of the partnership as established in the 2003 Third Superseding Indictment in the criminal matter captioned *United States of America and Government of the Virgin Islands v. Fathi Yusuf, Mohamad Yusuf, et al.* and United's plea of guilty to Count 60 (tax evasion) thereof. This, in addition to the pleadings and other evidence of record compels the conclusion that by the time of the filing of the indictment in the criminal case recounting the cash diversion scheme implemented by the officers of United, "even the most trusting individual would have sufficient reason to suspect malfeasance, thereby putting both partners on inquiry notice." Opinion, at 29.

Defendant takes issue with the Court's observation in footnote 30 on page 28 of the Opinion, that affidavit evidence "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 multiple occasions." Defendant contends that the affidavit cannot be considered evidence of knowledge of wrongdoing sufficient to put Yusuf on inquiry notice because the Supreme Court, in *United Corp. v. Hamed*, 64 V.I. 297 (V.I. 2016), overturned the Superior Court's grant of summary judgment on the same issue, holding that "more than bare access to necessary information is required to start the statute of limitations running... there must also be a suspicious circumstance to trigger a duty to exploit the access." *Id.* at 310. But, whereas the Superior Court in that case expressly based its ruling only upon "unfettered access" to information, the Court here instead found inexcusable delay on the basis of evidence that Yusuf, through his lawyers, *had actually reviewed* the documents in question. Additionally, the consideration of the affidavit in this matter is distinguishable from its consideration in *United* as the Court here did not find the affidavit to be dispositive of the question of knowledge, but rather considered the affidavit as supplemental support for drawing the inference of knowledge of wrongdoing based on the more general history of the partnership as established by the pleadings of the partners and other evidence of record.

As to the Court's finding of prejudice, Defendant asserts that none of the "classic elements' of prejudice in the laches context" are present in this case, such as unavailability of witnesses, changed personnel, or the loss of pertinent records. This assertion is simply incorrect. Most obviously, Mohammad Hamed, one of the two partners in the Hamed-Yusuf partnership and the original named Plaintiff in this matter, is now deceased and consequently unavailable to testify.



Additionally, as discussed above, Defendant's own BDO Report attests to the loss of any bank records predating 2007. It is also worth noting that while some of the "classic elements" of prejudice in the laches context are plainly present, the Opinion does not represent a classic application of the doctrine of laches. Rather, the Opinion looks to the principles of inexcusable delay and prejudice underlying the doctrine of laches, as well as the express policy goals of the Legislature as embodied in RUPA, in order to establish an equitable limitation on the scope of the accounting phase of the Final Wind Up Plan.

However, the Court's finding of prejudice suffered by both partners is also based upon the simple truth that memories of events, particularly of numerous routine individual financial transactions spanning decades, necessarily fade and become less reliable with the passage of time. Specifically, the Court found that in light of the known unavailability of a substantial body of relevant financial records, "'because many of [the] claims involve how transactions were or were not recorded... an analysis of those claims would likely involve testimony' from the partners and their sons, yet, how much they might remember concerning the details of a transaction completed a decade earlier 'is questionable, at best.'" Opinion, at 30.

#### **Motion to Certify**

4 V.I.C. §33(c) provides:

Whenever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order. The Supreme Court of the Virgin Islands may thereupon, in its discretion, permit an appeal to be taken from the order, if application is made to it within ten days after the entry of the order; except that application for an appeal hereunder may not stay proceedings, in the Superior Court unless the Superior Court judge or the Supreme Court or a justice thereof orders a stay of the proceedings.

Because the six questions of law presented by Defendant in his Motion to Certify are all premised upon an apparent misreading and mischaracterization of the Opinion as detailed above,

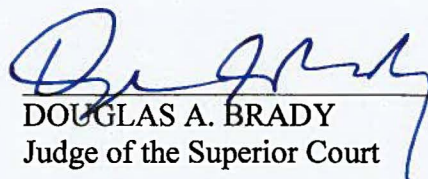
the Court will not, in its discretion, certify those questions for appeal. However, even if Defendant or the Court were to reformulate the questions to more accurately reflect the substance of the Opinion, such questions still would not present appropriate grounds for certification under 4 V.I.C. §33, as the Court does not find that certification would “materially advance the termination of litigation.” Under the Court’s present Order, this matter continues to move forward with the claims resolution process in the accounting and distribution phase of the Final Wind Up Plan as to all claims related to transactions occurring on or after September 17, 2006. Should Defendant file an appeal after final judgment is entered in this matter, and should such an appeal prove successful, the claims resolution process could then recommence as to claims based upon pre-2006 transactions, and the total amount owed pursuant to the final accounting could be adjusted accordingly. Therefore, because it is not apparent that an immediate appeal would materially advance the ultimate termination of the litigation, Defendant’s Motion to Certify will be denied.

In light of the foregoing, it is hereby

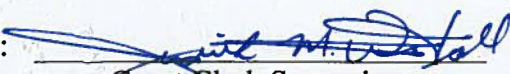
ORDERED that Defendant’s Motion for Reconsideration of Ruling Limiting Period of Accounting Claims is DENIED. It is further

ORDERED that Defendant’s Motion to Certify Questions in Order Limiting Period of Accounting Claims for Immediate Review is DENIED.

DATED: November 13, 2017.

  
DOUGLAS A. BRADY  
Judge of the Superior Court

ATTEST:  
ESTRELLA GEORGE  
Clerk of the Court

By:   
Court Clerk Supervisor  
11/14/17