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

UNITED CORPORATION, Plaintiff, v. **WADDA CHARRIEZ,** Defendant.	**CIVIL NO.:** SX-13-CV-152 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED
WADDA CHARRIEZ, Counter-Claimant, v. **UNITED CORPORATION,** Defendant.	**CIVIL NO.:** SX-13-CV-152 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED
WADDA CHARRIEZ, Third-Party Plaintiff, v. **FATHI YUSUF,** Third-Party-Defendant.	**CIVIL NO.:** SX-13-CV-152 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

UNITED CORPORATION AND THIRD-PARTY DEFENDANT FATHI YUSUF'S NOTICE OF PENDING MOTIONS

Plaintiff /Counterclaim Defendant UNITED CORPORATION ("United") and Third-Party Defendant FATHI YUSUF ("Yusuf") file this their Notice of Pending Motions pursuant to the Order of the Court dated December 22, 2017 and show as follows:

I. Historical and Procedural Background

This suit relates to claims by United, as operator of the Plaza Extra East Store, against former employee, Defendant Wadda Charriez ("Defendant Charriez") for falsifying her work hours and, therefore, receiving compensation to which she was not entitled. Defendant Charriez counterclaimed against United and filed a Third-Party Complaint against Yusuf for intentional infliction of emotional distress, tortious interference with contract, civil extortion, civil conspiracy, and defamation. The current status of the pending motions necessarily involves a discussion of the extensive litigation pending between Yusuf and Mohammad Hamed ("Hamed") relating to ownership and operations of the Plaza Extra Stores.

A. Operation of the Grocery Store Businesses

Since the inception of the grocery store businesses at the Plaza Extra Stores, United has operated them. Hence, Defendant Charriez has always been an employee of United as United has always paid her wages, taxes, workers compensation insurance, etc. In 2003, a federal indictment was brought against United and various members of the Yusuf and Hamed families for tax evasion resulting from alleged underreporting of taxable income from the grocery store operations. *Yusuf v. Hamed*, 59 V.I. 841, 844, 2013 WL 5429498, at *1 (V.I., 2013).

At the time of the pending federal indictments, the Hameds indicated that they were simply "employees" of United and that it was United, who operated the grocery store business. No mention was made of any partnership or other agreement between Mohammad Hamed and Yusuf. United agreed to plead guilty to tax evasion and the charges against the individual members of both families were dismissed. *Id.*

After United pled guilty to one count of tax evasion and paid upwards of $16 million, relations between the Hameds and Yusufs began to break down. *Id.* at *2. Yusuf contended that a review of the financial records indicated that the Hameds had been withdrawing funds without disclosing it to the Yusufs. *Id.* Hamed then claimed, for the first time, that he was partner in the grocery store operations filing suit against Yusuf and United to wit: *Hamed v. Yusuf et al*, SX-2012-cv-370 (the "Main Case"). Despite the fact that the grocery store operations were conducted in the name of United for decades, Hamed claimed he was a 50/50 partner in the grocery store operations.

Although, Yusuf did not dispute that he and Hamed entered into an agreement whereby they would split 50% of the net proceeds from Plaza Extra Supermarkets, there were a number of material facts in dispute as to whether this constituted a partnership. For example, it was disputed as to whether net profits were ever actually distributed to Hamed or whether Hamed exercised joint management control.[1] Yusuf cited to the February 26, 2010 Plea Agreement, wherein all concerned parties adopted the position that the Hamed co-defendants were "employees" of United as opposed to individuals who exercise concurrent control with United. Although Judge Brady issued a preliminary injunction in the Main Case to maintain the *status quo* relating to the possible removal of funds and continued employment of various employees of the Plaza Extra Stores (which Defendant Charriez cites as dispositive),[2] Judge Brady, thereafter,

[1] *See* **Exhibit A,** Judge Brady Order dated December 5, 2013 in the Main Case, denying Hamed's Motion for Summary Judgment as to the existence of a partnership as a result of disputed material facts.

[2] In its affirmation of the issuance of the preliminary injunction, the V.I. Supreme Court noted that Judge Brady's preliminary findings as to the preliminary injunction were not ultimately

denied Hamed's Motion for Summary Judgment seeking a determination that a partnership existed between Hamed and Yusuf because he found there to be sufficient disputed material facts precluding summary judgment on that issue.[3]

Nonetheless, in April of 2014, Fathi Yusuf (for the purposes of ending his business entanglements with Mohammad Hamed and to proceed with dissolution) conceded the existence of an oral "partnership" (the "Partnership") with Mohammad Hamed for the operation of the

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binding. *Yusuf v. Hamed*, 59 V.I. 841, 853, 2013 WL 5429498, at *6 (V.I., 2013), *citing Univ. of Texas v. Camenisch, 451U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).* "These findings are only for the purposes of the injunction, and do not bind the jury. *Id.* ('the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits')." *Id.*

[3] By way of example, Judge Brady noted:

> In addition to the genuine issues of material fact referenced above, the Parties present a litany of other factual disputes which may require further discovery and which, in the light most favorable to the non-moving party, may require determination by the finder of facts. These disputes include, among others: (l) what did Plaintiff and Defendant Yusuf mutually intend by the use of the term "partner" in reference to Defendant Hamed when they associated by their oral agreement to carry on the Plaza Extra business? See Defendants' Response, at 23; (2) did Plaintiff assume any personal liability as a partner, notwithstanding, for example, the fact that Defendant Yusuf solely guaranteed loans to the business?; (3) what is the significance of the Hamed family's signatory authority on Plaza Extra bank accounts-did it originate from Plaintiff's 50% interest in the Partnership business or is it simply a feature of the managerial positions of Plaintiffs sons?; (4) did Plaintiff's sons become Plaza Extra store managers, as agents of their father, pursuant to his assertion of his partnership rights of joint control, or were they hired as managerial employees because they were nephews of Defendant Yusuf s wife?

See **Exhibit A** - Judge Brady Order dated December 5, 2013 in the Main Case, denying Hamed's Motion for Summary Judgment as to existence of partnership.

grocery store business at the Plasa Extra Stores. This concession made so as to proceed with the dissolution of the Partnership has spawned the various motions filed by Defendant Charriez in this case.

B. Current Status

At present, the dissolution of the Partnership is proceeding with specially appointed Master-Judge Ross, who will render a report and recommendation as to the various claims for charges and credits between the partners as well as marshal the assets of the Partnership and determine appropriate reserves for potential liabilities of the Partnership.

Contrary to Defendant Charriez's assertion, Yusuf has maintained in the Main Case that this matter involves a potential asset of the Partnership – i.e. those funds that were improperly removed by Defendant Charriez would be due to the Partnership and subject to distribution. Likewise, the Counterclaims and Third-Party claims made by Defendant Charriez are all potential liabilities of the Partnership, for which reserves should be allocated. In Yusuf's various submissions to the Master in the Main Case, he has maintained that:

> The suit captioned United Corporation v. Wadda Charriez, SX-13-CV-152, relates to claims by United that Ms. Charriez falsified her work hours and therefore received compensation to which she was not entitled. Ms. Charriez counterclaimed against United and filed a third party complaint against Yusuf for intentional infliction of emotional distress, tortious interference with contract, civil extortion, civil conspiracy, and defamation, all of which are essentially claims against the Partnership. Yusuf contends that the claim is a potential asset of the Partnership and that the counterclaim/third party complaint is a potential liability of the Partnership, which requires the establishment of appropriate reserves. Further, Yusuf proposes that, as the Liquidating Partner, he be allowed to pursue efforts to resolve the claims and counterclaims involving the Partnership.

See **Exhibit B** - Excerpts from Original Accounting and Proposed Distribution submission on September 30, 2016 at p.18 and from Amended Accounting and Proposed Distribution submission on October 31, 2017 at p. 22.

Defendant Charriez seeks to create a subterfuge to deflect attention from her wrongdoing for falsifying the hours she worked at the Plaza Extra East Store and for receiving substantial pay to which she was not entitled. Defendant Charriez has seized upon the dichotomy between the Partnership—which has been deemed to exist and United—the original corporate form used to conduct the grocery store operations, as some type of procedural loophole that exonerates her from liability.[4]

As Judge Brady explained, the Partnership and the accounting operated through United. The dissolution of the Partnership and settlement of:

> …these individual partner accounts, are deemed to exist, regardless of whether any such accounts are in fact maintained, and irrespective of the actual accounting practices of the partners. In this case, these § 71(a) accounts exist *purely as a creation of equity*, as Hamed and Yusuf, and their sons, withdrew partnership funds at will over the lifetime of the partnership with no formal system of accounting… these implied partnership accounts, particularly in this case, exist solely to facilitate the efficient settlement of accounts between the partners…

See **Exhibit C** - Judge Brady Order, dated July 21, 2017 in the Main Case, p. 15 (emphasis added).

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[4] Although, Wadda Charriez testified that she had in fact falsified or overstated her hours, her termination was stayed as a result of the stay entered in the Main Case. *See* **Exhibit D**, January 25, 2013, TRO Hearing in the Main Case, Tr., p. 193.

Hence, the accounting and formal aspects of the operations always operated through United, but now has been deemed to be owned by the Partnership. The claim against Defendant Charriez is a possible asset of the Partnership and, likewise, Defendant Charriez's claims are potential liabilities of the Partnership. Said claims should either be consolidated into the Main Case (as requested in the Motion to Consolidate) or Yusuf should be allowed to substitute into this matter in his capacity as the Liquidating Partner of the Partnership to continue the pursuit of these claims (as requested in the Motion to Substitute a Necessary Party).

II. Pending Motions

All of the pending motions focus on the dichotomy created by the United versus Partnership ownership and operation of the grocery store business.

1. Plaintiff's Motion to Join Fathi Yusuf As a Necessary Party, dated February 24, 2016
2. Plaintiff's Motion to Consolidate Cases, dated March 17, 2016
3. Defendant's Motion for Summary Judgment, dated March 30, 2016
4. Plaintiff's Motion to Substitute a Necessary Party, dated July 13, 2016
5. Plaintiff and Third-Party Defendant Yusuf's Motion to Dismiss All Counts of the Counterclaim and Third-Party Complaint, dated August 20, 2013

Should the Court require any further information, Counsel will be happy to provide same.

Date: January 9th, 2018

Respectfully submitted,
Law Offices of K. G. Cameron

By: ____________________

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Attorneys for United Corporation and Fathi Yusuf

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2018, I caused the foregoing **"UNITED CORPORATION AND THIRD-PARTY DEFENDANT FATHI YUSUF'S NOTICE OF PENDING MOTIONS"** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

____

EXHIBIT A

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

MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff,	CIVIL NO. SX-12-CV-370
v.	ACTION FOR DAMAGES, *et al.*
FATHI YUSUF and UNITED CORPORATON, Defendants.	

ORDER DENYING PARTIAL SUMMARY JUDGMENT

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment; Plaintiff's Memorandum in Support of his Motion for Partial Summary Judgment (jointly "Plaintiff's Motion"); Plaintiff's Rule 56.1 Statement of Undisputed Facts in Support of Plaintiff's Motion for Partial Summary Judgment on Count I; ("Plaintiff's Undisputed Facts"), all filed November 12, 2012; and Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendants' Response"); Defendants' Response to Plaintiff's Statement of Material Facts & Defendants' Statement of Additional Facts in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendants' Additional Facts"), both filed September 16, 2013; Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment, filed September 26, 2013 ("Plaintiff's Reply"); and Plaintiff's Motion to Supplement the Partial Summary Judgment Record, filed October 18, 2013.

Plaintiff's Motion to Supplement the Partial Summary Judgment Record will be granted. For the reasons that follow, Plaintiff's Motion for Partial Summary Judgment will be denied.

PROCEDURAL HISTORY

The Court has previously made extensive findings of fact (see Memorandum Opinion, April 25, 2013) that will not be repeated or revisited here. The Parties have been actively engaged in discovery, jointly submitted a Proposed Stipulated Discovery Order on August 5, 2013, approved by Scheduling Order entered August 15, 2013, which, among other things, set a December 15, 2013 deadline for the completion of factual discovery (including witness depositions). On November 27, 2013, Defendants filed an Emergency Motion to Extend Scheduling Order Deadlines (opposed by Plaintiff's Response, filed December 3, 2013), wherein Defendants cite copious amounts of untendered documents which need to be exchanged, including certain tax records which have not yet been completed.[1]

In multiple voluminous filings relating to Plaintiff's Motion and otherwise, the Parties continue to dispute many facts at every turn, as well as the legal effect of the factual history of the Parties' relationship. By Plaintiff's Motion as to Count I of his First Amended Complaint, Plaintiff asserts a lack of dispute as to facts that he states establish the existence of a partnership and his entitlement to legal and equitable relief to enforce his partnership rights.

DISCUSSION

A moving party will prevail on a motion for summary judgment where the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). The Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Such a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* In analyzing the evidence, the Court must consider the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing there is no genuine issue of material

[1] Defendants' motion is partially granted by separate Order entered this date, granting the Parties an additional three (3) months to complete discovery.

fact. *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A party opposing a motion for summary judgment may not rest upon the allegations or denials within its pleadings, but must set forth specific facts showing there is a genuine issue for trial, such that the jury or judge as fact finder could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

Pursuant to LRCi 56.1, Plaintiff has submitted Plaintiff's Undisputed Facts to which Defendants have submitted Defendants' Response and Defendant's Additional Facts. In order to prevail on Plaintiff's Motion, he must prove that there is no genuine dispute as to any material facts relative to the assertions contained within Count I and that Plaintiff is entitled to judgment as a matter of law.

Count I of Plaintiff's First Amended Complaint alleges that "A partnership was formed between the two parties" (First Amended Complaint, ¶35). Plaintiff claims, among other things, that he is entitled to 50% of the Partnership profits, joint management of the Plaza Extra supermarkets, and joint control over the Partnership funds. As such, Plaintiff asks this Court to award him "legal and equitable relief… to protect and preserve his partnership rights" as well as "compensatory damages for all financial losses inflicted by Yusuf on the Partnership" (First Amended Complaint, ¶¶ 35-38).

As to Count I, the Court finds that significant genuine issues of material fact exist that at this stage prevent granting the "drastic remedy" of summary judgment. "When reviewing the record, this Court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and we must take the non-moving party's conflicting allegations as true if supported by proper proofs." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008), internal quotation omitted.

While the Parties do not dispute that Plaintiff and Defendant Hamed entered into an agreement whereby they would split 50% of the net proceeds from Plaza Extra Supermarkets, multiple factual disputes do exist, including whether net profits were ever actually distributed to Plaintiff. *See* Defendants' Additional Facts, at 5. Plaintiff cites Defendants' admission of an oral agreement that "called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets." *See* Plaintiff's Undisputed Facts, at 1.

However, Defendants claim that "Hamed has not provided any written evidence or documentation establishing that he received a share of the supermarket's profits at any time over the past 26 years." *See* Defendants' Additional Facts, at 5, 16. Plaintiff responds to this contention by reference to Defendants' Answer to Interrogatory No. 6 in another pending action (*United Corporation v. Waleed Hamed, et al.*, SX-13-CV-003), wherein Defendants stated that "Net Profits were not distributed. Net proceeds from the operations of Plaza Extra were used to make investments in Real Estate and other businesses in which the Hamed Family were given a 50% interest." *See* Plaintiff's Motion to Supplement the Partial Summary Judgment Record, at 2; Plaintiff's Reply, at 3.

Additionally, Defendants argue that "Plaintiff retired from the alleged partnership in or about 1996" and, as a result, is "an ordinary creditor." *See* Defendants' Response, at 6. Defendants claim that any previous right to profit sharing to which Plaintiff may have been entitled on account of his 1986 financial contributions was extinguished when Plaintiff later "retired from United Corporation d/b/a Plaza Extra – and thus from any alleged partnership interest therein." Defendants' Additional Facts, at 15. (See 26 V.I.C. §171(1)).

These disputed facts constitute a genuine issue of material fact concerning whether Plaintiff Hamed actually received "a share of the profits of a business," which would raise the presumption that he was a partner, per 26 V.I.C. §22(c)(3).[2] Further, Defendants raise a genuine issue of fact disputing the continuation of the alleged partnership following Plaintiff Hamed's retirement.

The Court is obligated to "take the non-moving party's conflicting allegations as true if supported by proper proofs." *Williams,* 50 V.I. at 194. Defendants cite to testimony elicited at the preliminary injunction hearing which rendered multiple (conflicting) accounts of the alleged partnership's origins, structure, scope and longevity. *See, e.g.* Jan. 25, 2013 Hrg. Tr. 202:10-13; 207:4-5. The Court must consider the foregoing evidence as proper proofs that support the non-moving party's conflicting allegations. *See Williams,* 50 V.I. at 194. As such, regarding the issue of profit sharing, the Court finds that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *See Anderson*, 477 U.S. at 248.

Plaintiff contends that "the existence of this partnership is further confirmed by the numerous eviction and rent notices sent by United – to Mohamed Hamed as Plaza Extra" (internal quotations omitted). *See* Plaintiff's Motion, at 10. However, Defendants submit evidence from Defendant United's controller, John Gaffney, stating that these rent notices were "intra company internal accounting transactions" whereby "income is offset by expenses" and "washed" in United Corporation's final tax return. *See* Defendants 'Additional Facts, at 21. Defendants contend that this standard business practice does not amount to evidence of a partnership between Plaintiff and Defendants, but rather that Defendant United ultimately manages a joint supermarket venture between Plaintiff Hamed and Defendant Yusuf. This evidence presents additional sufficient factual

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[2] The Court notes that Defendants have previously admitted that "Hamed received 50% of the net profits thereafter." *See* Defendants' Renewed Motion to Dismiss, and in the Alternative for a More Definite Statement, and Motion to Strike Pursuant to Rules 12(b)(6), 12(e), and 12(f) Respectively of the Federal Rules of Civil Procedure, at 3, filed November 5, 2012. However, this conclusory statement is contradicted by a variety of Defendants' other submissions, including Defendants' Additional Facts. There are multiple questions of fact which ultimately need to be decided by the ultimate fact finder as to the sharing of "partnership" profits and whether any profit sharing agreement was altered by the alleged withdrawal of Plaintiff Hamed in 1996. *See* Defendants' Response, at 6.

discrepancies which preclude at this juncture the entry of summary judgment on the issue of whether a partnership exists.

Furthermore, through Count I and in Plaintiff's Motion, Plaintiff seeks declaratory relief entitling him to "joint management" and "joint control" as part of his partnership rights pursuant to law and to the Parties' partnership agreement. *See* First Amended Complaint, ¶¶ 35-37. Defendants have put forward multiple factual assertions directly contradicting Plaintiff's claims that Hamed ever exercised joint management and control. For example, Defendants cite the February 26, 2010 Plea Agreement in the pending criminal action between the U.S. Government and United Corporation d/b/a Plaza Extra (including Waleed and Waheed Hamed) where all concerned parties adopted the position that the Hamed co-defendants were employees as opposed to individuals who exercise concurrent control with United. Defendants' Additional Facts, at 7.

Plaintiff Hamed himself testified at the preliminary injunction hearing that "Mr. Yusuf be in charge of everybody... [in] all the three stores." *See* Defendants' Additional Facts, at 7; Jan. 25, 2013 Hrg. Tr. 201:4; 210:22-23. Therefore, Defendants have offered proper proof that tends to rebut Plaintiff's assertions that Plaintiff has exercised joint control over Plaza Extra supermarkets.[3]

As set out above, there exist sufficient disputes as to material facts which at this stage of the proceedings preclude the award to Plaintiff of the drastic remedy of summary judgment on Count I of Plaintiff's First Amended Complaint.

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[3] In addition to the genuine issues of material fact referenced above, the Parties present a litany of other factual disputes which may require further discovery and which, in the light most favorable to the non-moving party, may require determination by the finder of facts. These disputes include, among others: (1) what did Plaintiff and Defendant Yusuf mutually intend by the use of the term "partner" in reference to Defendant Hamed when they associated by their oral agreement to carry on the Plaza Extra business? See Defendants' Response, at 23; (2) did Plaintiff assume any personal liability as a partner, notwithstanding, for example, the fact that Defendant Yusuf solely guaranteed loans to the business? *Id.*; (3) what is the significance of the Hamed family's signatory authority on Plaza Extra bank accounts – did it originate from Plaintiff's 50% interest in the Partnership business or is it simply a feature of the managerial positions of Plaintiff's sons?; (4) did Plaintiff's sons become Plaza Extra store managers, as agents of their father, pursuant to his assertion of his partnership rights of joint control, or were they hired as managerial employees because they were nephews of Defendant Yusuf's wife? *Id.*, at 27.

On the basis of the foregoing, it is hereby

ORDERED Plaintiff's Motion to Supplement the Partial Summary Judgment Record is GRANTED. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

December 5, 2013

Douglas A. Brady
Judge of the Superior Court

ATTEST:
VENETIA H. VELASQUEZ
Clerk of the Court
By: Court Clerk Supervisor 12/5/13

CERTIFIED TO BE A TRUE COPY
This 5th day of Dec 2013
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By ________ Court Clerk

EXHIBIT B

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and UNITED CORPORATION,

Defendants/Counterclaimants,

vs.

WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,

Additional Counterclaim Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF

Consolidated With

MOHAMMAD HAMED,

Plaintiff,

v.

UNITED CORPORATION,

Defendant.

CIVIL NO. SX-14-CV-287

ACTION FOR DAMAGES AND DECLARATORY RELIEF

YUSUF'S ACCOUNTING CLAIMS AND PROPOSED DISTRIBUTION PLAN

Pursuant to the "Final Wind Up Plan Of The Plaza Extra Partnership," entered on January 9, 2015 (the "Plan"),[1] §9, Step 6, and the August 31, 2016 directive[2] of the Master, as clarified

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[1] Unless otherwise defined, all capitalized terms have the same meaning as provided in the Plan.
[2] That directive required the Partners to submit any objection to the previously submitted Partnership Accounting and any claims against the Partnership or a Partner by September 30, 2016. It is undisputed that since the inception of the Partnership, the only Partners were Yusuf and Hamed, who died on June 16, 2016. On September 20, 2016, a Motion And Memorandum For Substitution Of Named Plaintiff was filed seeking an Order substituting Waleed M. Hamed, as Executor of the estate of Hamed, as Plaintiff.

B. Additional Suits Which Should Be Consolidated with the Main Case

The case captioned United v. Waheed Hamed, ST-13-CV-101 relates to actions of Waheed for improper removal of funds of the Partnership prior to recognition of the Plaza Extra Stores' operations as a "partnership."[19] These claims relate to specific withdrawals of funds or use of Partnership funds that are included in the accounting and reconciliation in Section IV of Exhibit J. To the extent that any additional discovery is necessary concerning these claims or defenses, they can be addressed in the Main Case. As a result, Yusuf also seeks to have this case consolidated into the Main Case, if it is not dismissed.

The suit captioned United Corporation v. Wadda Charriez, SX-13-CV-152, relates to claims by United that Ms. Charriez falsified her work hours and therefore received compensation to which she was not entitled. Ms. Charriez counterclaimed against United and filed a third party complaint against Yusuf for intentional infliction of emotional distress, tortious interference with contract, civil extortion, civil conspiracy, and defamation, all of which are essentially claims against the Partnership. Yusuf contends that the claim is a potential asset of the Partnership and that the counterclaim/third party complaint is a potential liability of the Partnership, which requires the establishment of appropriate reserves. Further, Yusuf proposes that, as the Liquidating Partner, he be allowed to pursue efforts to resolve the claims and counterclaims involving the Partnership.

C. Conclusion

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[19] A similar suit was filed by United against Waleed Hamed (ST-13-CV-3). On motion of United, it was dismissed by Order dated August 5, 2016. United filed a similar motion to dismiss its case against Waheed Hamed on September 13, 2016.

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

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YUSUF'S AMENDED ACCOUNTING CLAIMS
LIMITED TO TRANSACTIONS OCCURRING ON OR AFTER SEPTEMBER 17, 2006

the Original Claims at p. 14. Yusuf's entitlement to this payment is disputed and discovery will be required before the matter is ready for determination by the Master.

B. Additional Suits Which Should Be Consolidated with the Main Case

The suit captioned United Corporation v. Wadda Charriez, SX-13-CV-152, relates to claims by United that Ms. Charriez falsified her work hours and therefore received compensation to which she was not entitled. Ms. Charriez counterclaimed against United and filed a third party complaint against Yusuf for intentional infliction of emotional distress, tortious interference with contract, civil extortion, civil conspiracy, and defamation, all of which are essentially claims against the Partnership. Yusuf contends that the claim is a potential asset of the Partnership and that the counterclaim/third party complaint is a potential liability of the Partnership, which requires the establishment of appropriate reserves. Further, Yusuf proposes that, as the Liquidating Partner, he be allowed to pursue efforts to resolve the claims and counterclaims involving the Partnership. These claims are disputed and will require discovery before they are ready for determination by the Master.

C. Conclusion

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EXHIBIT C

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

WALEED HAMED, as Executor of the Estate of MOHAMMED 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., 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 MOHAMMED 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 MOHAMMED HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	Civil No. SX-14-CV-278 ACTION FOR DEBT and CONVERSION

MEMORANDUM OPINION AND ORDER RE LIMITATIONS ON ACCOUNTING

This matter came on for hearing on March 6 and 7, 2017 on various pending motions, including Hamed's fully briefed Motion for Partial Summary Judgment re the Statute of Limitations Defense Barring Defendants' Counterclaim Damages Prior to September 16, 2006, filed May 13, 2014.[1] Because the Court concludes that Defendant Yusuf has not, in fact, presented

[1] Hamed's Motion was followed by: Defendants' Brief in Opposition, filed June 6, 2014; Hamed's Reply, filed June 20, 2014; Hamed's Notice of Supplemental Authority, filed November 15, 2016; Yusuf's Brief in Response, filed December 3, 2016; Yusuf's post-hearing Supplemental Brief, filed March 21, 2017; and Hamed's Response, filed March 27, 2017. Also pending is Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, which is addressed herein.

any legal claims for damages, but has rather presented a single, equitable action for a partnership accounting,[2] and because the parties do not assert that the action for accounting is itself barred by the statute of limitations, Plaintiff's Motion will be denied as to Yusuf's claim for accounting. Additionally, as to Defendant United's claim for rent presented in Count XII of the Counterclaim, the Court finds that there exist genuinely disputed issues of material fact such that summary judgment is inappropriate.

Nonetheless, in light of the arguments presented by the parties, as well as the general complexities and difficulties inherent in addressing the peculiar questions of fact necessary for the resolution of this matter, the Court finds that the interests of the parties in the just and fair disposition of their claims, as well as the overarching interest of the judiciary in the efficient resolution of disputes before it, are best served by utilizing the broad powers conferred upon the Court sitting in equity to fashion remedies specifically tailored to the circumstances presented in order to establish an equitable limitation upon claimed credits and charges submitted to the Master in the context of the Wind Up process.

Background

Hamed's Complaint was filed September 17, 2012, followed by his First Amended Complaint (Complaint), filed in the District Court following removal and prior to remand, on October 19, 2012, seeking, among other relief, "A full and complete accounting... with Declaratory Relief against both defendants to establish Hamed's rights under his Yusuf/Hamed Partnership with Yusuf..." Complaint, at 15, ¶1. Defendants filed their First Amended

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[2] Count IX of the First Amended Counterclaim, seeking the dissolution of Plessen Enterprises, Inc., constitutes the sole claim presented by Yusuf that is unrelated to, and therefore not incorporated into, his equitable claim for accounting. However, Plaintiff's Motion, by its own terms, concerns only "monetary damage claims," and therefore Yusuf's Count IX is excluded from consideration in this Opinion.

Counterclaim (Counterclaim) on January 13, 2014, seeking relief as follows: Count: I— Declaratory Relief that No Partnership Exists; Count II— Declaratory Relief, in the event that a partnership is determined to exist to determine, among other relief, "their respective rights, interests, and obligations concerning the Plaza Extra Stores and the disposition of the assets and liabilities of these stores;" Count III— Conversion; Count IV— Accounting, alleging that "Yusuf is entitled to a full accounting…;" Count V— Restitution; Count VI— Unjust Enrichment and Imposition of a Constructive Trust; Count VII— Breach of Fiduciary Duty; Count VIII— Dissolution of Alleged Partnership, stating: "Although Defendants deny the existence of any partnership with Hamed, in the event the Alleged Partnership is determined to exist, then Yusuf is entitled to dissolution of the Alleged Partnership and to wind up its affairs, in that such partnership would be an oral at-will partnership and Yusuf provided notice of his intent to terminate any business relationship (including any partnership) with Hamed in March of 2012;" Count IX— Dissolution of Plessen; Count X— Appointment of Receiver; Count XI—Rent for Retail Space Bay I;[3] Count XII— Past Rent for Retail Spaces Bay 5 & 8; Count XIII— Civil Conspiracy; Count XIV—Indemnity and Contribution. Counterclaim ¶¶ 141-191.

Legal Standard

By his Motion, Plaintiff is entitled to entry of summary judgment barring certain relief sought by Defendants' Counterclaim pursuant to the applicable statute of limitations if he "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. Civ. P. 56(a).

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[3] This Count was the subject of Memorandum Opinion and Order entered April 27, 2015, denying, in part, Plaintiff's present Motion and granting United's Motion to Withdraw Rent. United's claim in Count XII and other monetary claims of United were unaffected by that Order.

"A party is entitled to judgment as a matter of law when, in considering all of the evidence, accepting the nonmoving party's evidence as true, and drawing all reasonable inferences in favor of the nonmoving party, the court concludes that a reasonable jury could only enter judgment in favor of the moving party." *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, at *6-7 (V.I. 2016). The nonmoving party in responding to a motion for summary judgment has the burden to "set out specific facts showing a genuine issue for trial." *Williams v. United Corp.*, 50 V.I. 191, 194-95 (V.I. 2008). A dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014).

Discussion

There can be no more appropriate introduction to this matter than the lucid observations of Judge Herman E. Moore of the District Court of the Virgin Islands who remarked of another matter involving a dispute between business partners more than half a century ago:

> This case illustrates the pitfalls open to friends going into business. When two strangers go into business, you usually have each one requiring formal contracts, formal statements, formal deposits, and everything of the kind; but usually when two friends go into business, and where it becomes one happy family, so many of these things are omitted; and when they do fall out, as happened in this case, there arises bitterness and difficulties which make it the most difficult type of case to try.

Stoner v. Bellows, et al., 2 V.I. 172, 174-75 (D.V.I. 1951).

Hamed's Motion seeks to bar Defendants' unresolved monetary claims, as alleged in their Counterclaim, for "debt, breach of contract, conversion, breach of fiduciary duty, recoupment/ constructive trust and accounting" that accrued more than six years prior to the September 17, 2012 commencement of this action, citing *James v. Antilles Gas Corp.,* 43 V.I. 37 (V.I. Terr. Ct.

2000).[4] Defendants respond to Hamed's assertion that Defendants' monetary claims are governed by the six-year limitation period set out in 5 V.I.C. § 31(3) (Motion, at 3) by asserting that Yusuf's monetary claims constitute a cause of action for an accounting which, consistent with longstanding common law precedent, accrues upon dissolution of the partnership, and examines the entire period of the partnership, or the period from the last accounting. Opposition, at 9; Supplemental Brief, at 1. Defendant United has not denied the applicability of a six-year limitation period to its third-party claims against Hamed and/or the partnership, but rather argues that the limitation period should be equitably tolled.

"Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business." 26 V.I.C. § 177(b). "A partnership is dissolved, and its business must be wound up... upon... in a partnership at will, the partnership's having notice from a partner... of that partner's express will to withdraw as a partner." 26 V.I.C. § 171(1).

By their pleadings in this litigation, Hamed alleged and Yusuf denied the existence of a partnership at will. Although Yusuf had previously acknowledged the existence of a partnership during pre-litigation negotiations in February and March 2012, and his intention that the partnership be dissolved, by the time litigation ensued, Defendants sought "declaratory relief that no partnership exists." Counterclaim, Count I. By his Motion to Appoint Master, filed April 7, 2014, Yusuf "now concedes for the purposes of this case that he and Hamed entered into a partnership to carry on the business of the Plaza Extra Stores and to share equally the net profits

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[4] While acknowledging a split of authority, the Territorial Court in *James* found "compelling" the majority view, as described by Professors Wright and Miller: "although there is some conflict on the subject, the majority view appears to be that the institution of *plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.*" *James v. Antilles Gas Corp.*, 43 V.I. at 44, 46, citing 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1419, at 151 (2d ed. 1990) (emphasis in original).

from the operation of the Plaza Extra Stores." The Court granted in part Plaintiff's May 9, 2014 Renewed Motion for Partial Summary Judgment as to the Existence of a Partnership by Order entered November 7, 2014, finding and declaring the existence of a 50/50 partnership between Yusuf and Hamed based upon their 1986 oral agreement for the ownership and operation of the Plaza Extra Stores.

Yusuf has argued that, to the extent a partnership existed, it was dissolved by Hamed's retirement in 1996 which constituted his withdrawal from the partnership. However, the Court has already found that Hamed's participation in the operation and management of the three Plaza Extra Stores continued after his withdrawal from day-to-day operations through his son Waleed Hamed, acting pursuant to powers of attorney. *Hamed v. Yusuf*, 58 V.I. 117, 126 (V.I. Super. Ct. 2013). As noted, Yusuf's pre-litigation negotiations seeking an agreement to dissolve his business relationship with Hamed never resulted in an agreement, such that the partnership was not dissolved by the time the litigation commenced. Within his April 7, 2014 Motion to Appoint Master, Yusuf states his "'express will to withdraw as a partner,' thus dissolving the partnership," quoting 26 V.I.C. § 171(1). In his Response to that Motion, Hamed submitted his April 30, 2014 "Notice of Dissolution of Partnership." Hamed and Yusuf concur that the partnership is dissolved, and both concur that the right of each partner to an accounting has accrued upon dissolution. Both also concur that the monetary claims set forth in Hamed's Complaint and the monetary claims of Yusuf set forth in Defendants' Counterclaim relate back to September 17, 2012, the date Hamed filed his original Complaint.

MOTION FOR PARTIAL SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS

As discussed in detail in the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith, despite the misleading form of both Hamed's Complaint and

Yusuf's Counterclaim, each partner has presented in this matter only a single, tripartite cause of action for the dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). However, Count XII of Defendants' Counterclaim also presents a separate cause of action on behalf of United for debt in the form of rent. The Court first considers Hamed's Motion for Partial Summary Judgement Re: Statute of Limitations as it applies to United's action for rent, and then as it applies to the partners' competing claims for dissolution, wind up, and accounting.

United's Cause of Action for Debt (Rent)

By Memorandum Opinion and Order entered April 27, 2015, the Court denied Plaintiff's Motion for Partial Summary Judgment Re: Statute of Limitations as to United's Count XI for debt in the form of rent owed with respect to "Bay 1" and granted United's Motion to Withdraw Rent, filed September 9, 2013; authorizing the Liquidating Partner, under the supervision of the Master, to pay to United from partnership funds the total amount of $5,234,298.71 plus additional rents that have come due from October 1, 2013 at the rate of $58,791.38 per month. That Memorandum Opinion and Order also effectively, though not explicitly, granted in part Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, as to Count XI, and entered judgment thereon in favor of United.

In Count XII of Defendants' Counterclaim, United seeks an award of $793,984.38 for rent owed with respect to "Bay 5" and "Bay 8," which the partnership allegedly used for storage space in connection with the Plaza Extra-East store during various periods between 1994 and 2013. Counterclaim ¶¶ 179-84. United's arguments against the applying the statute of limitations to bar its claims for rent generally fail to distinguish between the rent owed for Bay 1 (Count XI) and the rent owed for Bays 5 and 8 (Count XII). Thus, the Court must infer that United opposes Hamed's statute of limitations argument as to Count XII on the same grounds as it opposed the argument with respect to Count XI. In denying Hamed's Motion for Partial Summary Judgment Re Statute of Limitations as to Count XI, the Court found that the limitations period had been tolled on the basis of Hamed's undisputed acknowledgement and partial payment of the debt.

However, in his August 24, 2014 Declaration, attached as Exhibit 1 to Plaintiff's Response to Defendants' Rule 56.1 Statement of Facts and Counterstatement of Facts, Waleed Hamed expressly states that "there was no agreement to use [Bays 5 and 8] other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost." Declaration of Waleed Hamed ¶¶ 19-20. Mohammed Hamed's comments acknowledging the debt, which formed the basis of the Court's judgment as to Count XI, do not explicitly distinguish between the rent owed for Bay 1 and the rent owed for Bays 5 and 8. Yet, considered in light of the declaration of his son, the Court is compelled to conclude that a genuine dispute of material fact exists as to whether Hamed ever acknowledged any debt as to rent owed for Bays 5 and 8, and more basically, whether the partnership ever agreed to pay any rent for the use of Bays 5 and 8 in the first place. Accordingly, both Hamed's Motion for Partial Summary Judgment Re: Statute of Limitations and Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must be denied as to Count XII of Defendants' Counterclaim.[5]

[5] Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must also be denied as to Count IV (Accounting). While Hamed and Yusuf are each entitled to an accounting of the partnership pursuant to 26 V.I.C. § 177, United's cause of action for rent is entirely unrelated to the partners' respective actions for accounting except insofar as each partner will ultimately be liable in the final accounting for 50% of whatever debt is found to be owing from the partnership to United.

Partners' Causes of Action for Partnership Dissolution, Wind Up, and Accounting

26 V.I.C. § 75(b) and (c) provide:

> (b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:
>
> (1) enforce the partner's rights under the partnership agreement;
> (2) enforce the partner's rights under this chapter... or
> (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.
>
> (c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

By Act No. 6205, the Revised Uniform Partnership Act (RUPA) was adopted in the Virgin Islands, effective May 1, 1998.[6] The amended statute changed the common law and predecessor statute by, among other things, linking the accrual and limitations of actions brought by a partner against another partner or the partnership to the periods provided "by other law," such that claims accruing during the life of the partnership are not revived upon dissolution.[7]

"The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *Brady v. Gov't of the V.I.*, 57 V.I. 433, 441 (V.I. 2012) (citations omitted). By its plain language, Section 75 unambiguously provides

[6] Yusuf argues that the RUPA savings clause (26 V.I.C. § 274) preserves his claims against Hamed that predate May 1, 1998, the effective date of RUPA in the Virgin Islands. That is, Yusuf contends that RUPA does not apply to claims that accrued before that date, which are instead governed by the limitations period then in effect. His argument fails in that claims in the nature of an accounting of one partner against another could only presented upon dissolution of the partnership. Here, since the partnership had not been dissolved by the date of the enactment of RUPA in the Virgin Islands, and since all his monetary claims against Hamed could only be brought on dissolution, no claims of Yusuf had accrued by May 1, 1998.

[7] See National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act (1997); Section 405(c) [26 V.I.C. § 75(c)], comment 4: "The statute of limitations on such claims is also governed by other law, and claims barred by a statute of limitations are not revived by reason of the partner's right to an accounting upon dissolution, as they were under the UPA." http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.

that during the life of the partnership, a "partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to the partnership business;" and that "accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law." "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.

Though the parties have submitted lengthy briefs presenting their respective positions on how the limited case law interpreting this section of RUPA affects the "claims" purportedly presented by Yusuf and United, there is significant confusion surrounding precisely what is meant by the term "claims."[8] As it is often used in legal parlance, the term "claim" is essentially synonymous with "cause of action." Used in this sense, Hamed and Yusuf have each, in their respective pleadings, presented only a single, tripartite cause of action, or claim, for an equitable partnership dissolution, wind up, and accounting under 26 V.I.C. § 75(b)(2)(iii).[9] However, as

[8] Much of this confusion stems from the imprecision of the Complaint and Counterclaim. Both pleadings are presented in essentially the same fashion, consisting of a litany of alleged instances in which the opposing party partner, or his relatives, withdrew or otherwise utilized monies from partnership funds, followed by a "kitchen sink" style presentation of "counts" in which the parties purport to characterize these allegedly improper transactions variously as giving rise to causes of action for conversion, breach of fiduciary duty, unjust enrichment, constructive trust, etc., with no attempt to distinguish between them or to explain which transactions give rise to which cause of action. As a result, Plaintiff's Motion for Partial Summary Judgment is peculiar in that it does not, and indeed cannot, seek entry of judgment as to any one count presented in the Counterclaim, but rather seeks to bar from consideration as to all counts any alleged financial transaction occurring more than six years prior to the commencement of this litigation. In this respect, Plaintiff's Motion seems more akin to a motion *in limine* than a motion for summary judgment, as Plaintiff seeks only to limit the scope of the accounting process by excluding from consideration any transaction pre-dating September 2006.

[9] For a detailed analysis of the nature of the claims presented by the parties in this action, see the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith; explaining that despite the misleading form of the Complaint and Counterclaim, Hamed presents only a single action for dissolution, wind up, and accounting, while Yusuf presents an action for accounting, and an action for corporate dissolution, and United presents an action for debt/breach of contract for failure to pay rent.

used by both the Court and the parties in the context of this litigation, the term "claims" has also taken on an entirely different, and more specific meaning, by which the term "claims" refers not to the parties' respective causes of action for accounting, but rather to the numerous alleged individual debits and withdrawals from partnership funds made by the partners or their family members over the lifetime of the partnership that have been, and, following further discovery, will continue to be, presented to the Master for reconciliation in the accounting and distribution phase of the Final Wind Up Plan.[10]

Pursuant to 26 V.I.C. § 71(a), "[e]ach 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." Thus, under the RUPA framework, the "claims" to which the parties refer are, in fact, nothing more than the parties' respective assertions of credits and charges to be applied in ascertaining the balance of each partner's individual partnership account.[11]

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[10] It is worth noting that this type of claims resolution process would appear to be unnecessary, or at least far less complicated, in the context of many, if not most, actions for partnership accounting, as the need for such a claims resolution process is generally obviated by the existence of the type of comprehensive ledger and periodic accounting statements typically maintained by modern businesses. Here however, as a result of the questionable and highly informal financial accounting practices of the partnership, by which both partners and their respective family members unilaterally withdrew funds from partnership accounts as needed to cover various business and personal expenses, there exists no authoritative ledger or series of financial statements recording the distribution of funds between partners upon which the Master or the Court could reasonably rely in conducting an accounting. Instead the Court finds itself in the predicament of having to account for multiple decades' worth of distributions of partnership funds among the partners and their family members based upon little more than a patchwork of cancelled checks, hand-written receipts for cash withdrawn from Plaza Extra safes, and the personal recollections of the partners and their agents.

[11] Alternatively, such "claims" may be referred to as § 71(a) claims, and the accounts to which they apply may be referred to as § 71(a) accounts.

As discussed above, pursuant to 26 V.I.C. § 75(c), "any time limitation on a right of action for a remedy under this section is governed by other law." In the Virgin Islands, limitations on the time for the commencement of various actions are codified at 5 V.I.C. § 31. In his Motion, Hamed argues that Yusuf's "claims" should be subject to the six year limitations period under § 31(3); presumably on the theory that they are essentially claims to enforce the Yusuf's rights under the partnership agreement as described in 26 V.I.C. § 75(b)(1), effectively rendering them claims upon a contract.

However, by its own terms, 5 V.I.C. § 31 applies to bar, in their entirety, *causes of action* that are commenced outside of the relevant limitations period: "Civil actions shall only be commenced within the period prescribed below after the cause of action shall have accrued." Here, Hamed does not contend that Yusuf's cause of action for accounting was commenced outside the relevant limitations period,[12] but only that Yusuf should be barred from asserting claims—meaning credits to and charges against the partners' accounts—based upon any transaction that took place more than six years prior to the filing of Hamed's initial Complaint. And while Yusuf's action for accounting, as a whole, is undoubtedly subject to a statutory limitations period, the statute of limitations, by its plain language, has no direct applicability to individual, claimed credits and charges presented within the accounting process. Accordingly, Plaintiff's Motion for Partial Summary Judgment will be denied.

[12] The Court need not determine the relevant limitations period for the commencement of a cause of action for accounting, as Hamed has not challenged the timeliness of Yusuf's action for accounting as such, but only the timeliness of the individual § 71(a) claims presented within the accounting.

EQUITABLE LIMITATION OF SCOPE OF PARTNERSHIP ACCOUNTING

Despite concluding that Plaintiff is not entitled to partial summary judgment based upon the statute of limitations as such, the Court is nonetheless moved to consider whether the various issues raised and arguments presented in Plaintiff's Motion, among other concerns, justify the imposition of some equitable limitation on the presentation of claimed credits and charges in the accounting process.

The Supreme Court of the Virgin Islands has explained that "[d]espite the fact that the Superior Court of the Virgin Islands—like almost all modern American courts—exercises both equitable and legal authority, the division between law and equity remains meaningful to defining the remedies available in a particular action." *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 553 (V.I. 2015) (quoting *Cacciamani & Rover Corp. v. Banco Popular*, 61 V.I. 247, 252 n.3 (V.I. 2014)). Furthermore, "because '[a] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in [a] particular case,' a court has a great deal more flexibility in considering equitable remedies than it does in considering legal remedies." *Id.* (quoting *Kalloo v. Estate of Small*, 62 V.I. 571, 584 (V.I. 2015)).

As explained in detail in the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith, both Hamed and Yusuf have presented in this matter competing equitable actions to compel the dissolution, winding up, and accounting of their partnership pursuant to 26 V.I.C. § 75(b)(2)(iii).[13] As an accounting in this context is both an

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[13] 26 V.I.C. § 75(b)(2)(iii) codifies the right of one partner to maintain an action against the partnership or another partner to enforce the partner's "right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII of this chapter." In turn, subchapter VIII, §177 explicitly provides that "[e]ach partner is entitled to a settlement of all partnership accounts upon winding up the partnership business."

equitable cause of action and an equitable remedy in itself, the Court is granted considerable flexibility in fashioning the specific contours of the accounting process. *See, e.g., Isaac v. Crichlow*, 2015 V.I. LEXIS 15, at *39 (V.I. Super. 2015) ("An equitable accounting is a *remedy* of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiffs [sic] property or entitlements.") (quoting *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 5 F. Supp. 2d, 324, 327 (D.V.I. 1998)) (emphasis added).

Partnership Accounting Under RUPA

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.

By the plain language of the statute,[14] these individual partner accounts, are deemed to exist, regardless of whether any such accounts are in fact maintained, and irrespective of the actual accounting practices of the partners. In this case, these § 71(a) accounts exist purely as a creation of equity, as Hamed and Yusuf, and their sons, withdrew partnership funds at will over the lifetime of the partnership with no formal system of accounting either for distributions made to partners from partnership funds, or contributions made by partners to partnership funds. Thus, because these implied partner accounts, particularly in this case, exist solely to facilitate the efficient settlement of accounts between partners under 26 V.I.C. § 177, which is itself an equitable remedy, the Court, operating within the parameters established by RUPA, possesses significant discretion and flexibility in determining the manner and scope of the partner account reconstruction process. *See 3RC & Co.*, 63 V.I. at 553.

As the last and only true-up of the partnership business occurred in 1993,[15] the parties, by their respective actions for accounting, effectively impose upon the Court the onerous burden of reconstructing, out of whole cloth, twenty-five years' worth of these partner account transactions, based upon nothing more than scant documentary evidence and the ever-fading recollections of the partners and their representatives.[16] For the reasons discussed below, the Court concludes, upon considerations of laches and a weighing of the interests of both the parties and the Court in the just and efficient resolution of their disputes, that the equities of this particular case necessitate

[14] Subject to certain specified exceptions, "relations among the partners and between the partners and the partnership are governed by the partnership agreement." 26 V.I.C § 4. However, "[t]o the extent the partnership agreement does not otherwise provide, [Title 26, Chapter 1] governs relations among the partners and between the partners and the partnership." Here, the terms of the oral partnership agreement are limited, and establish only that Hamed and Yusuf agreed to jointly operate the three Plaza Extra Stores, and to each share 50% in the profits and losses thereof. See Order entered November 7, 2014, granting Renewed Motion for Partial Summary Judgment as to the Existence of a Partnership.

[15] *See* Counterclaim in SX-14-CV-287 (Counterclaim 287) ¶ 10.

[16] *See supra*, note 10 and accompanying text.

the imposition of a six-year equitable limitation period for §71(a) claims submitted to the Master in the accounting and distribution phase of the Wind Up Plan.

Doctrines of Laches and Statute of Limitations by Analogy

In other similar situations, some courts have imposed equitable limitation periods by applying the "statute of limitations by analogy." In the days of the divided bench, when statutes of limitations were largely inapplicable to suits in equity, courts of equity regularly invoked the statute of limitations by analogy to bar stale claims. Thus, Justice Strong remarked:

> The statute of limitations bars actions for fraud... after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him.

Burke v. Smith, 83 U.S. 390, 401 (1872).

Modern courts of equity, such as the Court of Chancery of Delaware, also apply the statute of limitations by analogy as a component of the equitable defense of laches. *See, e.g., Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("Where the Plaintiff seeks equitable relief... failure to file within the analogous period of limitations will be given great weight in deciding in deciding whether the claims are barred by laches"); *see also Williams v. Williams,* 2010 Conn. Super. LEXIS 2344, at *15 (Conn. Super. Ct. Sep. 15, 2010) (noting that court may consider an analogous statute of limitation when considering laches defense). Under this approach, "[w]here the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity." *Whittington*, 991 A.2d at 9.[17] Different jurisdictions disagree, however, as to how much force an analogous statute of limitations should have. *See* Dobbs, *Law of Remedies* § 2.4(4), at 78 (2d ed. 1993) ("When courts look to an analogous statute of limitations for guidance, and that statute has run, they may (1) presume unreasonable delay and prejudice, but permit the plaintiff to rebut the presumption; (2) treat the statute as one element 'in the congeries of factors to be considered.' Some authority has gone beyond either of these rules by holding that equity will follow the law and (3) give the statute conclusive effect").[18]

The Supreme Court of the Virgin Islands has recognized the availability of the equitable defense of laches in territorial courts. In one of its earliest cases, *St. Thomas-St. John Board of Elections v. Daniel,* the Court explained:

> Laches is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure that bars a plaintiff's claim where there has been an inexcusable delay in prosecuting the claim in light of the equities of the case and prejudice to the defendant from the delay. *See Cook v. Wikler*, 320 F.3d 431, 438 (3d Cir. 2003); Churma, 514 F.2d at 593. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534, 543, 5 L. Ed. 2d 551 (1961).

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[17] The Delaware Supreme Court agreed with the Chancery Court's analysis that "[a]s a practical matter, there is not likely to be much difference between the prosecution of [the party's] claim here for an accounting and a claim for damages at law," and that, in turn, the "claims for declaratory relief and an accounting are analogous to a legal claim for the same relief" for the purposes of the laches analysis. *Whittington*, 991 A.2d at 9. The higher court disagreed with the lower court's conclusion that the three-year limitations period for contract actions applied, and instead found applicable the twenty-year limitations period for actions upon contracts under seal. *Id.* Nonetheless, the general approach of considering analogous statutes of limitations in the context of the laches analysis was upheld.

[18] It appears that the Virgin Islands has effectively codified the doctrine of statute of limitations by analogy to conclusive effect in equitable actions. "An action of an equitable nature shall only be commenced within the time limited to commence an action as provide by this chapter." 5 V.I.C. § 32(a). This suggests, in the event that a particular equitable cause of action is not explicitly included in any particular limitation period outlined in 5 V.I.C. § 31, that the Court must apply the most analogous statute of limitations, or fall back on the residual limitations period of ten years for "any cause not otherwise provided for," under § 31(2).

49 V.I. 322, 330 (V.I. 2007).[19]

It must be noted that, just as with the statute of limitations defense, the equitable defense of laches is also typically invoked as a bar to causes of action, in their entirety. Thus, in a case such as this, the defense of laches, if proven, would typically be applied as a complete bar to the party's cause of action for accounting under 26 V.I.C. § 75(b)(2)(iii), rather than as a limitation on the partners' § 71(a) claims presented within the § 177(b) accounting process.[20] However, the equitable defense of laches differs from any defense based upon the statute of limitations—a creature of law—in critical respects. Whereas direct application of a statute of limitations defense must fail because 5 V.I.C. § 31, by its own terms, applies only to causes of action, laches, as an equitable defense, is inherently flexible by nature, and may therefore be molded to suit the particular equities of a given case.[21]

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[19] The Supreme Court has since adopted the Virgin Islands Rules of Civil Procedure to govern civil practice in the territory, however Virgin Islands Rule of Civil Procedure 8(c) is identical to the formerly applicable Federal Rule, and thus the Supreme Court's reasoning regarding the affirmative defense of laches, insofar as it relates to this rule, remains equally applicable under the new rules.

[20] In addition to pleading the affirmative defense of the statute of limitations, both Plaintiff and Defendants pled in their respective Answers the affirmative defense of laches.

[21] The Supreme Court of the Virgin Islands has recognized at least one application of the defense of laches outside the confines of its traditional use as a bar to causes of action brought before the Court, further supporting the Court's conclusion herein that laches, as a creature of equity, is inherently broader and more flexible in its application than the statute of limitations. *See In the Matter of the Suspension of Joseph*, 60 V.I. 540, 558-59 (V.I. 2014) (noting that "laches, an equitable defense, is distinct from the statute of limitations, a creature of law," and finding that "the laches defense may apply to attorney discipline proceedings in certain very narrowly defined circumstances, such as when the delay in instituting the disciplinary proceedings results in prejudice to the respondent"). Particularly appropriate here, the Court also noted that "there may be factual situations in which the expiration of time destroys the fundamental fairness of the entire proceeding." *Id.* (citing *Anne Arundel County Bar Ass'n, Inc. v. Collins*, 272 Md. 578 (1974)).

Doctrine of Laches as Limit on Scope of Accounting

A most instructive case on this issue, bearing notable factual similarity to the case at bar, is the Connecticut Superior Court case of *Williams v. Williams*, 2010 Conn. Super. LEXIS 2344.[22] As described by the court, *Williams* involved a "battle between two brothers over how the assets of [their partnership] had been handled," in which each partner presented his own action for dissolution and accounting of the partnership. In response, each brother also presented affirmative defenses including, *inter alia*, statute of limitations and laches. *Id.* at *2-3. In explaining the law governing each partner's right to an accounting, the court noted that while a final accounting is generally "the one great occasion for a comprehensive and effective settlement of all partnership affairs" in which "all the claims and demands arising between the partners should be settled," the partners' "right to an accounting is not absolute." *Id.* at *7. Consistent with the principle that "actions for accounting generally invoke the equitable powers of the court," courts are granted wide latitude in setting the terms and principles upon which any accounting shall be based.[23] *Id.* "Consequently, a party's right to an accounting may be limited by other equitable considerations, for example a claim of laches." *Id.* at *8 (citations omitted).

[22] Although the Connecticut Superior Court did not explicitly frame its opinion in the language of RUPA, Connecticut is a RUPA jurisdiction, and therefore the court's decision in *Williams* necessarily concerns principles applicable to actions for dissolution and accounting under RUPA. *See* Conn. Gen. Stat. § 34-300 et seq. (Revised Partnership Act). As the complaint in *Williams* was filed in 2006 there can be no doubt that the Williams partnership was governed by RUPA. *See* Conn. Gen. Stat. § 34-398(b) ("After January 1, 2002, sections 34-300 to 34-399, inclusive, govern all partnerships").

[23] In articulating this rule, the Connecticut Superior Court referred to a Connecticut statute explicitly providing that "in any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be had." *Williams*, 2010 Conn. Super. LEXIS 2344, at *7 (citing Conn. Gen. Stat. § 52-401). Although the Virgin Islands lacks such a specific statute,.the Court nonetheless concludes that the relevant provisions of RUPA such as 26 V.I.C. §§ 71, 75, and 177, coupled with the considerable discretion granted to the Court in tailoring equitable remedies to suit the needs of any given case, confer upon the Court wide latitude and discretion in establishing the terms and principles, including the scope, of this kind of judicially ordered and supervised accounting. *See supra*, discussion of Equitable Limitation of Scope of Partnership Accounting.

After noting that the statute of limitations had no direct applicability in the context of an accounting, the court explained that "to establish the defense [of laches], [a defendant] must prove both that there was an inexcusable delay by [the plaintiff] in seeking the accounting, and that [the defendant] has been prejudiced by the delay." *Id.* at *15. Under Connecticut law, the court was permitted to consider analogous statutes of limitation when evaluating the laches claim, but was not obligated to apply any such statute.[24] *Id.* Lastly, the court noted that the laches analysis "is an inherently fact specific question that can only be resolved by a close examination of the circumstances of the particular case." *Id.* at *16.

After examining nine separate claimed credits and charges to partner accounts presented by the defendant partner in his counterclaim, the court concluded that "the doctrine of laches precludes [defendant] from seeking an accounting on any of the issues he claims." *Id.* at *37. The court found that there had been "inexcusable delay" as plaintiff did not file his claims until 2007; even the most recent of which was related to events that transpired in 1999. *Id.* The court further noted that, while not dispositive of the issue, the most analogous statutory limitations period—three years for breach of fiduciary duty—had long expired. *Id.* This delay was inexcusable, as the defendant partner was, for most of the relevant period, "in charge of the day-to-day operations" of the partnership and therefore possessed either "actual or constructive knowledge of every transaction of which he now complains," and accordingly tolling was inappropriate. *Id.* at *38.

Additionally, it was "clear to the court that [defendant's] delay in asserting his claims [had] prejudiced [plaintiff]." The court explained: "the passage of time puts [plaintiff] at an unfair

[24] As discussed above, different jurisdictions afford different weight to the consideration of analogous statutes of limitations in the laches analysis. Connecticut appears to treat analogous statutes of limitations merely as one factor among many to be considered in evaluating a laches defense.

disadvantage in responding to the merits of [defendant's] claims. Because many of [defendant's] claims involve how transactions were or were not recorded by [the partnership's] accountants an analysis of those claims would likely involve testimony from the accountants. Yet, how much [the accountant] might remember of a schedule he prepared for a client a decade before the claim relating to that schedule was made is questionable, at best." *Id.* at *39-40. Lastly, the court noted that while the parties had presented a "substantial amount" of accounting records, "they are by no means complete," and as such, "[plaintiff] would be at a distinct disadvantage if he were required to recreate or find decades of accounting records prepared by a variety of accountants." *Id.* at *40.

In summation, the court remarked: "While an accounting upon a dissolution of a partnership may be the final opportunity for the partners to square up, where one partner ignores issues year after year and allows the other partner to proceed along thinking everything is fine, the first partner cannot be heard to cry upon dissolution a decade or more later, 'I'd like a do over.'" *Id.* at *40-41. Accordingly, the court found that the plaintiff had met his burden in proving his laches defense to the defendant's counterclaim, entered judgment dissolving the partnership pursuant to stipulation of the parties, and ordered a final accounting to be conducted by an appointed third party, limited in scope to the reconciliation of the partners' respective interests in the partnership from January 1, 2009 to the September 15, 2010 dissolution of the partnership. *Id.* at *42.

Hamed/Yusuf Partnership Accounting

Turning to the case at bar, there are both striking similarities and critical differences between the factual scenario presented in this matter and that before the court in *Williams*. Just as in *Williams*, this matter is best described as a battle between two partners, here former friends and brothers-in-law, over how the assets of the partnership were handled. Additionally, despite having, at all times, either actual or constructive knowledge of the alleged ongoing, repeated withdrawals of partnership funds, both Hamed and Yusuf ignored these issues year after year and allowed one another to continue conducting partnership business, each implying to the other that all was well.

Procedurally, however, the *Williams* court considered the limitation of only one partner's accounting claims, as only that partner sought an accounting reaching back to the formation of the partnership while the other sought an accounting only as to how to divide the current assets of the partnership, as they stood at the time of dissolution. Additionally, whereas the defendant in *Williams* had identified in his counterclaim, by subject matter and date, nine specific challenged transactions, the description of the challenged transactions in the pleadings in this matter are largely devoid of specificity and generally fail to include the precise date, or even year of their occurrence. And while the parties in *Williams* had conducted significant discovery at the time of the court's ruling, here Hamed filed his present Motion with the clear aim of limiting not only the scope of Yusuf's § 71(a) claims, but also the cost and burden of the discovery process itself. *See* Plaintiff's Reply re Statute of Limitations, filed June 20, 2014, at 19. As a result of the partnership's notably informal and unreliable accounting, as well as each partner's general lack of concern or attention toward each other's financial practices over the lifetime of the partnership, neither partner truly knows what he might uncover upon investigation.

State of Partnership Accounting Records

Here, the pleadings alone demonstrate the imprecision and inadequacy of the partners' accounting practices. Hamed's Complaint explains the partners' practice of unilaterally withdrawing partnership funds as needed for various business and personal expenses on the understanding that "there would always be an equal (50/50) amount of these withdrawals for each partner directly or to designated family members." *See* Complaint ¶ 21. Though Hamed alleges that the partners "scrupulously maintained" records of these withdrawals, the other pleadings and evidence of record in this matter fatally belie this unsupported assertion. For example, Yusuf's First Amended Counterclaim in SX-14-CV-278 (FAC 278) speaks of the need for reconciliation of both "documented withdrawals" of cash from store safes, and "undocumented withdrawals from safes (i.e., all misappropriations)," in the § 177 accounting process. *See* FAC 278 ¶¶ 37-38.

Yusuf has pled that, aside from the sole "full reconciliation of accounts" at the end of 1993, the partners only sporadically attempted to account for, and reconcile their respective §71(a) charges and credits when Yusuf, for unspecified reasons, "decided their business accounts should be reconciled." *See* Counterclaim 287 ¶¶ 9-10. Alternatively, Yusuf has also alleged that such reconciliations sometimes occurred when Hamed specifically "sought to recover funds from his investment," at which point "funds would be given in cash and a notation would be made as to the amount given so as to insure an equal amount was paid to Yusuf from these net profits." *See* FAC 278 ¶ 55.

As part of the accounting and distribution phase of the Wind Up, Yusuf submitted to the Master the report of accountant Fernando Scherrer of the accounting firm BDO, Puerto Rico, P.S.C. (BDO Report). Yusuf contends that this report constitutes "a comprehensive accounting of the historical partner withdrawals and reconciliation for the time period 1994-2012." *See* Opposition to Motion to Strike BDO Report, filed October 20, 2016. However, the BDO report, by its own terms, appears to be anything but comprehensive. Most tellingly, the body of the BDO Report itself contains a section detailing its own substantial "limitations," resulting from the absence or inadequacy of records for each of the grocery stores covering various periods during the life of the partnership.[25] *See* Plaintiff's Motion to Strike BDO Report, Exhibit 1, at 22. Additionally, the analysis presented in the report rests on the unsupported assumption that any monies identified in excess of "known sources of income" constitute distributions from partnership funds to the partners' § 71(a) accounts. Thus, even Yusuf's own "expert report" acknowledges the insurmountable difficulties inherent in any attempt to accurately reconstruct the partnership accounts; a project which necessarily becomes proportionately more difficult and less reliable the farther back in time one goes.

Furthermore, in his Revised Notice of Partnership Claims (RNPC), filed October 17, 2016, Hamed expressly states that he "believes that it is clear that because of the state of the partnership records due to Yusuf's acts and failures to act, no [accounting for the period from 1986-2012] is even arguably possible." RNPC, at 6-7. Plaintiff's belief appears to be based in large part on the Opinion Letter of Lawrence Shoenbach, presenting the "expert opinion of a criminal defense attorney with experience in federal criminal practice and so-called 'white collar' business crimes involving tax evasion, money laundering, and/or compliance." *See* RNPC, Exhibit C (Op. Letter), at 1.

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[25] These limitations include the following: 1) "Accounting records of Plaza Extra-East were destroyed by fire in 1992 and the information was incomplete and/or insufficient to permit us to reconstruct a comprehensive accounting of the partnership accounts before 1993;" 2) "Accounting records and/or documents (checks registers, bank reconciliations, deposits and disbursements of Supermarkets' accounts) provided in connection with Supermarkets were limited to covering the period from 2002 through 2004, East and West from 2006 through 2012, and Tutu Park from 2009 through 2012;" and 3) "Accounting records and/or documents provided to us for the periods prior to 2003 are incomplete and limited to bank statements, deposit slips, cancelled checks, check registers, investments and broker statements, cash withdrawal tickets/receipts and cash withdrawal receipt listings. For example, the retention policy for statements, checks, deposits, credits in Banco Popular de Puerto Rico is seven years; therefore, there is no Bank information available prior to 2007 and electronic transactions do not generate any physical evidence as to regular deposits and/or debits." Plaintiff's Motion to Strike BDO Report, Exhibit 1, at 22.

Plaintiff's expert[26] bases his opinion on the 2003 Third Superseding Indictment in the 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.[27] Under the terms of the plea agreement, United pled guilty to willfully preparing and presenting a materially false corporate income tax return for the year 2001 by reporting gross receipts as $69,579,412, knowing that the true amount was approximately $79,305,980. Plea Agreement at 3-4, United States v. Yusuf, No. 2005-15F/B (D.V.I. Feb. 26, 2010). According to the indictment, United evaded reporting gross receipts by employing a cash diversion/money laundering scheme by which United, through its officers and employees,[28] conspired "to withhold from deposit substantial amounts of cash received from sales, typically bills in denominations of $100, $50, and $20." *See* Plaintiff's Reply re Statute of Limitations, Exhibit D (Indictment) ¶ 12. Additionally, it was alleged that "instead of being deposited into the bank accounts with other sales receipts, this cash was delivered to one of the defendants or placed in a dedicated safe in a cash room." *Id.* As described by Plaintiff's expert, "those acting on behalf of the company took cash out of sales before the Company could properly account for them." Op. Letter, at 5.

The expert explains:

> The most fundamental feature of such a scheme is that the actual accounting records of the entity do not, and in fact *cannot*, accurately reflect the amount of cash taken in. No proper accounting can be determined from the Company's financial records because the gross receipts have been intentionally misapplied and documented. The

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[26] The Court refers to Lawrence Shoenbach as "Plaintiff's expert" in this Opinion for simplicity. The Court expresses no opinion, however, as to the qualifications of this expert within the meaning of Virgin Islands Rule of Evidence 702.

[27] "Although all of the individual defendants [Fathi Yusuf, Maher Yusuf, Isam Yusuf, Nejeh Yusuf, Waleed Hamed, and Waheed Hamed], were charged in the criminal indictment, only the corporate defendant [United] was convicted of a crime… Critical to my analysis is that United admitted at the time of entry of the corporate plea that it under-reported gross receipts by utilizing the money laundering scheme outlined in the 3rd superseding indictment." Op. Letter, at 3.

[28] Including Fathi Yusuf, Maher Yusuf, Isam Yusuf, Nejeh Yusuf, Waleed Hamed, and Waheed Hamed. *See* Indictment, at 1.

> very purpose of this sort of scheme is to render any accounting innacurate… It is critical that the parties have both admitted that many records of transaction that should have gone into any accurate accounting were not kept or mutually and intentionally destroyed…Because the very nature of the crime, particularly money laundering/tax evasion, is to hide such incoming and outgoing funds from legitimate accounting it is impossible to determine and account for any portion of that amount each partner has or owes to the other. Since many such transactions were not recorded or destroyed, any remaining "records" can never be legitimately credited or debited against the unknown amounts.

Op. Letter, at 6-7.[29]

In his April 3, 2014 deposition in this matter, Maher Yusuf recounted one instance, just prior to the FBI's raid of the Plaza Extra stores in 2001, in which Waheed Hamed advised Waleed Hamed of the impending raid, and Maher Yusuf and the Hameds mutually "decided to destroy some of the receipts, because they were all in cash." *See* Op. Letter, at 7 n.5. 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 amount of withdrawals attributable to the Hameds and the Yusufs, each family destroyed their own receipts. *Id.* At the hearing on March 6-7, 2017, witnesses including Hamed's sons corroborated this account as well as many of the allegations of the Third Superseding Indictment. Evidence presented at the hearing included testimony concerning a cash diversion scheme involving cashier's checks, conflicting testimony regarding the ledger and receipt system for keeping track of cash withdrawals at each partnership store, and testimony that records documenting the withdrawals had been destroyed.

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[29] The Court is not called upon to express any opinion, and therefore does not express any opinion, as to the criminal nature of the conduct of the individual defendants named in the criminal matter, except to the extent that such conduct demonstrates both the impossibility of reconstructing financial records or conducting, at present, an accurate accounting, and the partners' knowledge of this state of affairs. However, United's guilty plea as to Count 60 establishes that United, which as a corporation must necessarily act through its officers and employees, intentionally schemed to obfuscate gross receipts and cash disbursements thereby rendering impossible any accurate reconstruction of accounts.

Altogether, the allegations presented in the pleadings paint a clear picture of the partners' loose, "honor system" style accounting practices by which each partner and his sons freely and unilaterally withdrew partnership funds, either by check drawn upon partnership bank accounts or, apparently more often, by directly removing cash from store safes; the only apparent control being a general understanding between the partners that such withdrawals would be documented by hand-written receipts to be placed in the safe so that the partners, at some undetermined date, could reconcile their accounts if, and when, they deemed it appropriate. Additionally, evidence of record reveals one clear instance in which the partners, through their sons, deliberately destroyed a substantial amount of records evidencing such withdrawals, and further suggests a general pattern of negligent, if not willful, failure to record such withdrawals throughout the history of the partnership. At a bare minimum, the pleadings and record evidence establish that the partners and their sons had both unfettered access to large amounts of cash, deliberately kept off company books, and ample opportunity to secretly remove that cash, secure in the knowledge that no partner, accountant, or investigator would be able, after the fact, to ascertain the amount taken, as the total amount of cash kept in store safes was intentionally omitted from any record keeping.

Knowledge, Delay, and Prejudice

Against this backdrop of decades of woefully inadequate and, in some instances, deliberately misleading accounting practices, the partners now present their competing claims for partnership accounting asking the Court to employ its already strained resources to untangle the web that they have spun and clean up the mess that they have made. Given the dismal state of the relevant records, this process necessarily entails an evaluation of each individual § 71(a) claim submitted to determine whether, in light of the frequently conflicting recollections of the partners, any given withdrawal or expenditure of partnership funds constituted a legitimate business expenditure on behalf of the partnership, or a unilateral withdrawal chargeable to the partner's § 71(a) account. However, just as in the *Williams* case, where each partner "ignores issues year after year and allows the other partner to proceed along thinking everything is fine, [neither partner will] be heard to cry upon dissolution a decade or more later, 'I'd like a do over.'" 2010 Conn. Super. LEXIS 2344, at *40-41.

Here, both partners and their respective sons were well aware from the beginning of their involvement with the business that any record keeping and accounting of distributions to the partners was highly informal and controlled only by the "honor system." As managing partner, Yusuf was not only intimately familiar with the methods of record keeping, or lack thereof, employed by the partnership, but was the one responsible for designing and implementing those procedures in the first place. It was Yusuf's responsibility to oversee, account for, and periodically reconcile the distributions of funds between the partners. 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.[30]

Hamed is no less to blame for this state of affairs and no less at fault for failing to seek any formal accounting of his interest until this late hour. Although Hamed was not the managing partner, he was undoubtedly aware of the absence of any formal record keeping from at least the date of the first and only true-up of the partnership business in 1993, if not from the very inception

[30] Yusuf argues that he only became aware of the extent of the Hameds' withdrawals of partnership funds upon the 2010 return of the voluminous documentation seized by the FBI in 2002. However, 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. *See* Hamed's Reply re Statute of Limitiations, Exhibit 4-B (Declaration of Special Agent Thomas L. Petri) (noting that in 2003, subsequent to the return of the indictment, counsel were given complete access to seized evidence, and that a team of four to five individuals led by the attorney for defendants reviewed evidence at the FBI office on St. Thomas for several weeks).

of the partnership.[31] While Hamed may not have had the foresight to know that the 1993 true-up would be the last undertaken, the fact that the partners waited approximately seven years—since the founding of the partnership in 1986—to conduct the first and only complete reconciliation of the accounts between them demonstrates that Hamed was equally content with this practice of informal and sporadic accounting.

Furthermore, both partners were clearly aware, during the entire life of the partnership, of their mutual practice of making, either personally or through their sons, unilateral withdrawals of partnership funds documented by hand-written receipts and controlled only by the honor system. Additionally, by at least 2001 and likely before, Hamed and Yusuf were similarly aware that substantial monies deposited in the store safes were being deliberately kept off the partnership books, and that all involved acted without hesitation in destroying voluminous records of cash withdrawals thereby rendering any independently verifiable accounting or audit impossible. Certainly, by the time of the 2003 filing of the Third Superseding 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.[32]

Thus, on the basis of the pleadings and evidence of record, it is clear that both Hamed and Yusuf, personally and through their sons as agents, had actual notice of the informal and imprecise

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[31] Even the 1993 "true-up" itself was merely an informal reconciliation. As Hamed explains, "reliable books have only been attempted since an order from the District Court in the criminal case requiring such an accounting." *See* Plaintiff's Comments Re Proposed Winding-Up Order, filed October 21, 2014, at 11.

[32] This notion is perhaps best, and most memorably, expressed in Martin Scorsese's 1995 film, *Casino*, in which the gangster, Nicky Santoro, played by Joe Pesci, remarks of the men conducting the skim operation at the fictional Tangiers Casino: "You gotta know that the guy who helps you steal… even if you take care of him real well… he's gonna steal a little extra for himself. Makes sense, don't it?"

nature of the accounting practices of the partnership since at least 1993, as well as actual notice of the deliberate destruction of substantial accounting records in 2001. In turn, even if the partners were ignorant of any one withdrawal of partnership funds considered in isolation, they both had actual notice of the significant potential for abuse inherent in their chosen method of record keeping, and therefore constructive, if not actual, notice of the need to protect their respective partnership interests by action pursuant to 26 V.I.C. § 75(b).

Additionally, by his acquiescence to such inadequate record keeping and his inexcusable delay in seeking to enforce his rights under 26 V.I.C. §§ 71(a) and 75(b), each partner has irrevocably prejudiced the ability of the other to respond to the various allegations against him. Here, as in *Williams* "the passage of time puts [each partner] at an unfair disadvantage in responding to the merits of [the other partner's] claims." 2010 Conn. Super. LEXIS 2344, at *39-40. Similarly, "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." *Id.* Lastly, while the court in *Williams* concluded that the defendant was prejudiced despite the production of "substantial records," here, in the absence of complete or comprehensive records, the partners are even more so "at a distinct disadvantage" in any attempt to "recreate or find decades of accounting records." *Id.* at *40. Thus, the Court concludes that consideration of the principles underlying the doctrine of laches strongly supports the imposition of an equitable limitation on the submission of § 71(a) claims in the accounting and distribution phase of the Wind Up Plan.[33]

Policy Considerations

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.

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

[33] In addition to laches, consideration of the equitable doctrine of unclean hands also supports the impositions of an equitable limitation on the partners' § 71(a) claims. "It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing." *SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC*, 62 V.I. 168, 205-06, (V.I. Super. Ct. 2015) (quoting *Sunshine Shopping Ctr., Inc. v. KMart Corp.*, 85 F. Supp. 2d 537, 544 (D.V.I. 2000)). As explained above, both partners bear responsibility for the dismal state of partnership records, and for allowing the practice of unilateral withdrawal of partnership funds to continue unchecked, in the absence of accurate records. Additionally, as both partners, through their sons as agents, engaged in the deliberate destruction of accounting records, neither partner can be said to have come to Court in this matter with clean hands.

accompanying action for accounting, as each partner became aware or should have become aware of those transactions pursuant to § 75(b). Such a policy not only furthers the traditional goals of the statute of limitations by preventing prejudice to defendants resulting from the inevitable decay of memory and other evidence, but also prevents litigants from imposing upon the judiciary, and in turn the taxpayer, the burden of individually evaluating the validity of numerous disputed transactions decades after the fact. In this instance, the stated policy of RUPA clearly prevents both Hamed and Yusuf from imposing upon the Court the great burden of sorting through the ramshackle patchwork of evidence supporting their § 71(a) claims, to reconstruct decades' worth of partnership accounts, when the partners, who deliberately determined not to keep accurate records in the first place, were themselves content to carry on conducting partnership business despite having full knowledge of the pattern of conduct of which they now, belatedly, complain.

Conclusion

"Equity aids the vigilant, not those who slumber upon their rights." *Kan. v. Colo.*, 514 U.S. 673, 687 (1995) (quoting Black's Law Dictionary 875 (6th ed. 1990)). And in keeping with this great maxim of jurisprudence, the Court concludes that considerations of laches, in addition to the express policy goals of the legislature as embodied by RUPA, justify the imposition of an equitable limitation on the submission of the partners' § 71(a) claims to the Master in the accounting and distribution phase of the Final Wind Up Plan. Because each of these § 71(a) claims could have, and should have, been pursued as they arose as causes of action under § 75(b)(1) to "enforce the partner's rights under the partnership agreement," the Court finds that such actions, had they been brought individually, would be subject, either directly or by analogy, to the six year limitations period outlined in 5 V.I.C. § 31(3)(A) as a species of an action upon contract.[34] 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.[35]

[34] Alternatively, these claims could have been pursued under 26 V.I.C. § 75(b)(2)(i) to "enforce the partner's rights under sections 71, 73, or 74 of this chapter," which, as "action upon a liability created by statute," are also subject, whether directly or by analogy, to a six year limitations period under 5 V.I.C. § 31(3)(B).

[35] Yusuf has argued that certain § 71(a) claims are effectively undisputed, and that "if it is undisputed that payments were made to a partner, even without authorization, then to exclude them from an accounting for that reason would be entirely arbitrary." First, it appears doubtful, based upon the record and the representations of the parties in this matter, that any claim submitted by either party would truly be undisputed. But, even if some claims were, in fact, undisputed, because of the great dearth of accurate records there exists such an element of chance in any attempt to reconstruct the partnership accounts that an accounting reaching back to the date of the last partnership true-up in 1993 would ultimately be no more complete, accurate, or fair, than an accounting reaching back only to 2006.

In light of the foregoing, it is hereby

ORDERED that Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent is DENIED, as to Counts IV and XII. It is further

ORDERED that Hamed's Motion for Partial Summary Judgment re the Statute of Limitations Defense Barring Defendants' Counterclaim Damages Prior to September 17, 2006 is DENIED. It is further

ORDERED that the accounting in this matter, to which each partner is entitled under 26 V.I.C § 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.

DATED: July 21, 2017.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST: ESTRELLA GEORGE
Clerk of the Court

By: Court Clerk Supervisor 7/24/17

EXHIBIT D

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED By His Authorized Agent WALEED HAMED, Plaintiff, vs. FATHI YUSUF and UNITED CORPORATION, Defendants.	CIVIL No. SX-12-CV-370 ACTION FOR DAMAGES INJUNCTIVE AND DECLARATORY RELIEF JURY TRIAL DEMANDED

CERTIFIED TRANSCRIPT

The Hearing in the above-entitled action was heard before the HONORABLE DOUGLAS A. BRADY, JUDGE, in Courtroom No. 211, Kingshill, St. Croix, on Friday, January, 25th, 2013, at approximately 10:30 a.m.

SUZANNE A. OTWAY-MILLER
REGISTERED PROFESSIONAL REPORTER
SUPERIOR COURT OF THE VIRGIN ISLANDS
KINGSHILL, ST. CROIX, U.S.V.I.
(340) 778-9750

Thanksgiving?

A No, that was a mistake entering the time.

Q I understand, ma'am. Now let me be clear, you agree with me you --

A It's 8 hours.

Q -- don't get paid unless you go in and actually work, correct?

A But the holiday, Thanksgiving, we get paid eight hours.

Q But overtime?

A No overtime that day.

Q Thanksgiving of 2012 your time sheet reflected that you worked for twelve hours, correct?

A Yes, that was a mistake.

Q That was a mistake.

A That was a mistake entering the time. It was entered and stuff in the office.

Q Okay. Now, you said you've work there for 15 years?

A Yes.

Q And so you're -- you know Fathi Yusuf well? You've seen him around?

A Yes.

Q And you know -- since Fathi Yusuf is the owner he makes a lot of important decisions, right?