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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

YUSUF'S OPPOSITION TO MOTION TO PRECLUDE YUSUF'S CLAIMS PRIOR TO SEPTEMBER 17, 2006

INTRODUCTION

Hamed challenges a $1,778,103.00 entry shown on the revised BDO Report as owing to Yusuf on the basis that the claimed debts that comprise it all arose prior to September 17, 2006, and therefore are barred by Judge Brady's July 21, 2017 Order limiting Yusuf's accounting claims to debts arising after September 17, 2006 under the doctrine of laches.[1] The $1,778,103.00 entry on the page from BDO's revised report has three components:

1) the amount taken by Waleed Hamed from a partnership account at a St. Martin Bank when he closed it in 2011 or 2012 (i.e., $88,711.00);

2) the amount taken by Waleed Hamed from a partnership account at a Jordanian Bank when he closed it in 2011 or 2012 (i.e., $89,392.00); and

3) a debt of $1.6 million owed to Yusuf by Hamed that was tabulated in October 2001[2] but acknowledged by Waleed Hamed to be owed in 2012.

The portion of the $1,778,103.00 represented by the two bank account withdrawals by Hamed – namely, $178,103.00 – is plainly a debt that arose after September 17, 2006, and therefore one that falls within the scope of Judge Brady's limitation on the accounting claim. As for the $1,600,000 portion that was acknowledged to be owed by Hamed[3] as late as 2012, the

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[1]Yusuf has already addressed this issue in part in his January 17, 2018 Response to Hamed's Motion as to Hamed Claim No. H-2: $2,784,706.25 Taken in 2012 by Yusuf (at page 5).

[2]The $1.6 million was tabulated jointly by Waleed Hamed and Maher Yusuf in October 2001 using receipts of withdrawals made from the Plaza Extra-East safe.

[3]Waleed Hamed acknowledged this debt repeatedly in 2012, before various individuals, including Bakir Hussein, who affirmed in a sworn affidavit that:

> In several open meetings, Mr. Yusuf said that the Hameds took $1.6 million more than the Yusufs. Waleed Hamed admitted that

legal analysis in Judge Brady's order limiting the parties' accounting claims, together with a prior ruling by him recognizing oral acknowledgement of a debt as basis for equitable tolling, bring that debt within the scope of the limitation on the accounting claim too. Hamed's Motion should therefore be denied.

ARGUMENT

The operative time period for Judge Brady's laches-based time bar on the parties' accounting claims is the six-year time period for the analogous statute of limitations that would have applied if separate legal actions had been brought on each of the various debts or charges that comprise the parties' respective accounting claims. By using the prescriptive period from the contract statute of limitations to create a laches-based limitation, Judge Brady embraced the Delaware Supreme Court's decision in *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009). There, the Delaware High Court held that "[w]here the Plaintiff seeks equitable relief...failure to file within the analogous statute of limitations will be given great weight in deciding whether the claims are barred by laches." *See* **Exhibit B**, Court's July 21, 2017 Opinion and Order, p. 16. Judge Brady ruled that if separate legal actions had been brought to recover on the numerous debts that make up the parties' respective accounting claims, those actions would have been "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." *Id.* at pp. 32-33. Judge

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> he took the excess $1.6 million dollars, which is the difference between the $2.9 million taken by the Hameds and the $1.3 million taken by the Yusufs. In addition to the $1.6 million dollars which I heard Waleed Hamed admit to, both Waleed Hamed and Fathi Yusuf both agreed to additional withdrawals by the Yusufs provided that the Yusuf's produced receipts to show proof of the additional withdrawals.[3]

See **Exhibit A**, Affidavit of Bakir Hussein, ¶9.

Brady then adopted that identical six-year period of limitation from the analogous statute as a laches-based limitation, and restricted the accounting claims to debts that post-date September 17, 2006. *See id.* at p. 33.

Consistent with Judge Brady's analysis, the cases in Delaware and other jurisdictions recognize that in using the analogous statute of limitations to inform a laches analysis, a court must determine whether the analogous statute of limitations has run using the claims accrual rules for the analogous statute. If the limitations period for the claim has not expired under the analogous statute, then the doctrine of laches presumptively will not apply to the claim. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 62 A.3d 62, 78 (Del. Chan. Ct. 2013) ("Using June 26, 2007 as the accrual date, Meso asserted its claims within the three-year limitations period," and because "Delaware courts presume, in the absence of exceptional circumstances, that an action filed within the analogous limitations period" is not barred by laches, summary judgment on the laches defense would be denied); *Association of Unit Owners of the Inn at Otter Crest v. Far West Federal Bank*, 852 P.2d 218, 223 (Ore. Ct. App. 1993) ("[s]tatutes of limitation for analogous actions at law are relevant to define a presumptively reasonable period within one is not guilty of laches") (citation and internal marks omitted); *Fernandez v. Virgillo*, 2013 WL 593941, *4 (D. Az. 2013) ("[i]f the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable").

Significantly, Judge Brady has already found in a prior ruling that an oral acknowledgement of a debt tolls the 6-year statute of limitation for contract claims, so that the debt is deemed to have accrued on the date it was acknowledged – rather than the date the debt originally arose. *See* **Exhibit C**, Judge Brady's April 27, 2015 Order and Opinion relating to payment of rent ("Rent Order"), p. 7-8. In his Opinion ordering the payment of rent, Judge

Brady found that both Waleed Hamed (as late as 2012) and Mohammad Hamed (as late as a 2014 deposition) had orally acknowledged the validity of the rent debt to United for the years 1994 to 2004. *See id.* at pp. 9-10. For that reason, Judge Brady found that the rent claim, which totaled $3,999,679.73, was not time-barred under the statute of limitations for contract claims, and ordered the back rent to be paid to United Corporation by the partnership. *See* Exhibit C, pp. 10.

Hamed's oral acknowledgment of the $1,600,000 debt to Yusuf in 2012 likewise means that his counterclaim to recover that debt would not have been time-barred under the analogous 6-year statute of limitations for breach of contract claims. And that in turn creates a presumption that laches does not bar recovery for this debt as part of Yusuf's equitable accounting claim. The affidavit attached hereto as Exhibit A creates, at the very least, genuine issues of material fact precluding any summary holding that the doctrine of laches bars this claim under Judge Brady's July 21 Order.

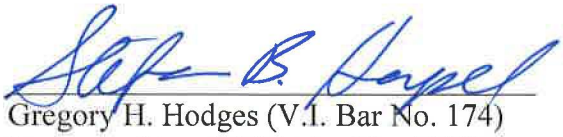
CONCLUSION

For all of the foregoing reasons, Hamed's motion to disallow the $1,788,103.00 entry in the BDO Report should be denied. The Master should recognize the $178,103.00 portion of this sum as valid, and should order discovery with respect to the evidence of Hamed's 2012 acknowledgement of the $1,600,000 portion.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: January 19, 2018

By: 

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Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

It is hereby certified that on this 19th day of January, 2018, I served a true and correct copy of the foregoing **YUSUF'S MOTION TO PRECLUDE YUSUF'S CLAIMS PRIOR TO SEPTEMBER 17, 2006,** which complies with the page and word limitations set forth in Rule 6-1(e), via the Case Anywhere docketing system:

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EXHIBIT A

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

TERRITORY OF THE VIRGIN ISLANDS)
) SS.
DIVISION OF ST. CROIX)

AFFIDAVIT OF BAKIR HUSSEIN

I, BAKIR HUSSEIN, being first duly sworn, declare under penalty of perjury that the foregoing is true and correct.

1. I am an adult of sound mind, and a resident of St. Croix, Virgin Islands; I personally know Fathi Yusuf, Waleed Hamed, and Mohammed Hamed. I make this affidavit of my own personal knowledge and information.

2. I attended several meetings and had numerous discussions with Fathi Yusuf, Waleed Hamed and Mohammed Hamed, together and separately, and as such, I am aware of the facts in this Affidavit.

3. Sometime in mid-2012, I heard rumors of a potential split between the Hamed and Yusuf families. I visited Mr. Yusuf to ask about the split, and at the time Mr. Yusuf said there was nothing wrong between the families, except that Mr. Yusuf wanted to separate from the Hameds.

4. A few weeks later, I asked him again about the rumored split, Mr. Yusuf then expressed his concerns regarding the unauthorized withdrawals of funds by Waleed Hamed. At that point, I realized along with other friends of both families that there was a problem between the Yusuf and Hamed families.

5. Over a six to eight month period, I was involved in a total of three meetings between the Hamed and Yusuf families. Other mutual friends were also present at those meeting. One of the meetings was held at Best Furniture, while the other meetings were held at various locations.

6. There were two major disputes between the Yusufs and Hameds. The first dispute was Waleed Hamed's unauthorized taking of monies belonging to the Plaza Extra supermarket stores

without Mr. Yusuf's knowledge. The second dispute concerned the issue of excess funds that were withdrawn by the Hameds for which the Yusufs did not take in matching withdrawals.

7. As to the first dispute, Mr. Yusuf, Waleed Hamed, and Mohammed Hamed agreed that Mr. Yusuf would receive title to two properties in satisfaction of Waleed Hamed's unauthorized withdrawals. The first property is an 8 acre property located in Jordan, and the second property was a 9-10 acre property in Tutu Park.

8. To my knowledge the first property was transferred to Mr. Yusuf, however to date the second property was not transferred.

9. In several open meetings, Mr. Yusuf said that the Hameds took $1.6 million more than the Yusufs. Waleed Hamed admitted that he took the excess $1.6 million dollars, which is the difference between the $2.9 Million taken by the Hameds and the $1.3 Million taken by the Yusufs. In addition to the $1.6 million dollars which I heard Waleed Hamed admit to, both Waleed Hamed and Fathi Yusuf both agreed to additional withdrawals by the Yusufs provided that the Yusufs produced receipts to show proof of the additional withdrawals.

10. I personally heard Waleed Hamed admitting to owing $1.6 million dollars to the Yusufs as a result of excess withdrawals by the Hameds, and that the receipts for that amount were not available because they were destroyed prior to the raid by the U.S. Government.

11. In addition, Mr. Yusuf and Waleed Hamed discussed the unpaid rent on the Plaza Extra – East store that has been pending for many years. Specifically, Waleed Hamed agreed to pay the rent for the rental period prior to 2004.

12. At one point, there was an agreement in place between the Hameds and Fathi Yusuf that the Hameds would transfer two (2) properties to Mr. Yusuf for what he had discovered so far.

12. Despite meeting with both sides, individually and together on a number of occasions, two issues began to stand out as the sticking points.

13. First, Fathi Yusuf stated that the Hameds were not being straight with him when the Hameds refused to transfer the second property, as agreed for the transactions he had discovered so far. On the other hand, Waleed Hamed said that he did not believe that Fathi would not stop with his final request for the third property for everything. At the end, the parties could not agree to the transfer of the third piece of land to satisfy Mr. Yusuf's claims regarding the unauthorized monies taken by the Hameds. The parties also could not agree on how to divide up the business and go their separate ways.

I attest that the above facts are true.

Date: 08-10-2014

Bakir Hussein

SUBSCRIBED AND SWORN TO before me
On this 10th day of July, 2014.

NOTARY PUBLIC

NIZAR A. DEWOOD
My Commission #: LNP-09-11
Expires. July 14, 2015
St. Croix, U.S.V.I.

FY 015026

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EXHIBIT B

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
GRANTING MOTION TO STRIKE JURY DEMAND

This matter came on for hearing on March 6 and 7, 2017 on various matters including Defendants' Motion to Strike Jury Demand, filed September 14, 2014; Plaintiff's Response Re: Jury Issues, filed September 27, 2016; Defendants' Motion and Memorandum in Support of Motion to Strike Plaintiff's Response and Reply Memorandum in Further Support of Motion to Strike Jury Demand, both filed October 14, 2016; and Plaintiff's Opposition to Motion to Strike

Response, filed October 18, 2016. For the reasons that follow, the Court will deny Defendants' Motion to Strike Response, and will grant Defendants' Motion to Strike Jury Demand.

Hamed's First Amended Complaint (Complaint) characterizes itself as an action for damages, injunctive and declaratory relief, and demands a jury trial. Count I requests declaratory and injunctive relief, together with compensatory and punitive damages, alleging a 50/50 partnership with Yusuf and that, pursuant to 26 V.I.C. § 75, Hamed "is entitled to legal and equitable relief as deemed appropriate to protect and preserve his partnership rights." Complaint ¶¶ 35-38. In Count II, Hamed requests "a judicial determination under 26 V.I.C. § 121(5) that it is not practicable to continue the Partnership with Yusuf so that Yusuf's partnership interests should be disassociated from the business." *Id.* ¶ 42. In Count III, Hamed alleges Yusuf's breach of duties due the partnership and his partner such that he is "entitled to declaratory relief finding that an amount equal to 50% of the Partnership profits and property held in United for distribution to or for the benefit of Yusuf are owed to Hamed under the Partnership Agreement or pursuant to a constructive trust for Hamed." *Id.* ¶¶ 44-46.

Pursuant to stipulation of Hamed and Yusuf, by Order entered September 18, 2014, the Court appointed Honorable Edgar D. Ross to serve as judicial Master in this action, to direct and oversee the winding up of the Hamed-Yusuf partnership. On January 7, 2015, following extensive input from the parties, the Court adopted the Final Wind Up Plan, by which the Master was to provide judicial supervision of the liquidation of partnership assets, and thereafter Hamed and Yusuf each would submit a proposed accounting and distribution plan for the Master's review and ultimate report and recommendation to the Court for final determination. Final Wind Up Plan, Section 9, Step 6.

Motion to Strike Response Re Jury Issues

Defendants argue that Hamed's Response must be stricken as filed grossly out of time, without seeking leave of Court for the untimely filing, signifying that Hamed's recent dissatisfaction with the Master has led him to seek to change the course of the litigation. Hamed asserts that his Response was not untimely because the Court's October 2014 stay of discovery included an express or *de facto* stay of motion practice as well.

The Supreme Court has repeatedly expressed that "there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules." *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011) (citations omitted). This preference applies in the context of this motion to decide the course of the pending litigation. In "doubtful cases," the opposing party should be provided the opportunity to be heard on the issues in dispute. Here, the Court perceives no prejudice to Yusuf in permitting consideration of Hamed's Response. Given the preference for deciding cases on substance rather than procedural defects, and taking into account the complex history of this matter, the Court finds that it is appropriate to consider Hamed's Response.

Motion to Strike Jury Demand

Defendants contend that the Seventh Amendment protects a litigant's right to a jury trial only in a cause of action that is legal in nature and involves a matter of private right. Motion, at 1 (citing *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 42 n.4 (1989)); *see also, Penn v. Penn*, 14 V.I. 522, 525-26 (V.I. Super. Ct. 1978) (no right to jury trial in a divorce action); *Caron v. First Penn. Bank*, 16 V.I. 169, 178 (V.I. Super. Ct. 1979) (equitable relief sought in will contest affords no right to jury trial). Actions for accounting are equitable in nature to which the right to jury trial does not attach. *Efron v. Milton,* 892 So.2d 497, 499 (Fla. Ct. App. 2004). Defendants argue that

because "each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership," that only a bench trial is appropriate. Motion, at 2-3.

Hamed asserts that the 1998 adoption in the Virgin Islands of the Revised Uniform Partnership Act (RUPA) opened the gate to permit the litigation of pre-dissolution legal and equitable claims between partners and requires that a jury determine his claims at law. Response, at 1-2 (citing 26 V.I.C. § 75(b)). Hamed asserted his right to trial by jury in his Complaint, ("A trial by jury is demanded as to all issues triable by a jury"), a right that he claims he has never waived.[1] He notes that his Complaint seeks not only injunctive and declaratory relief, but also compensatory and punitive damages, and that the filing of the lawsuit itself "was triggered by the conversion of $2.7 million dollars by Yusuf." Response, at 4.

As explained by the Supreme Court of the Virgin Islands:

> The right to a jury trial in a civil suit in the Virgin Islands is guaranteed by section 3 of the Revised Organic Act of 1954, which provides that "the first to ninth amendments" to the United States Constitution "are hereby extended to the Virgin Islands ... and shall have the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. Among these amendments extended to the Virgin Islands is the Seventh Amendment, providing that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the

[1] Although the Court bases its ruling herein on a substantive analysis of Plaintiff's claims under Supreme Court Seventh Amendment jurisprudence, the Court alternatively finds that both Hamed and Yusuf have waived any right to trial by jury in this matter by virtue of their stipulation to the substance of the Final Wind Up Plan. Pursuant to the claims resolution procedure outlined in Step 6: Distribution Plan, each party, following liquidation of the partnership assets is to submit a proposed accounting and distribution to the Master who shall, in turn, "make a report and recommendation of distribution *to the Court for its final determination*." Thus, the Final Wind Up Plan, to which both partners have stipulated, clearly contemplates that the respective claims of the parties are to be tried by the Court rather than by jury. Hamed disputes that his stipulation to the Final Wind Up Plan constitutes a waiver of his right to trial by jury. Although the Court denies Yusuf's Motion to Stirke Hamed's Response Re: Jury Issues, Hamed's delay of more than two years in filing his Response also supports the Court's conclusion that Hamed has waived his right to trial by jury. Because the Court concludes that Hamed, despite the inclusion of a nominal, factually unsupported request for "compensatory damages," has presented only claims for equitable relief and is therefore not entitled to trial by jury, the decision to strike Hamed's jury demand is not based solely upon Hamed's waiver. Nonetheless, the Court finds that Hamed's stipulation to the Wind Up Plan does constitute a waiver of his right to trial by jury and, in turn, an independent ground for striking the jury demand from Hamed's Complaint.

> common law." U.S. Const. amend. VII; *see also* 5 V.I.C. § 321 ("The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States shall apply in civil actions in the [Superior Court] of the Virgin Islands, except as otherwise provided by law.").

Samuel v. United Corporation, 64 V.I. 512, 521-22 (V.I. 2016).

In *Ross v. Bernhard*, the Supreme Court of the United States recognized three factors to be considered by courts in examining whether a particular claim carries with it the right to a jury trial: 1) the customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970). "Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." *Id.* at 537-38.

In considering the *Ross* factors, the Court must, as a threshold matter, identify and characterize the various claims for relief presented by Plaintiff. Pursuant to the Court's Order entered April 15, 2016, civil cases SX-12-CV-370, SX-14-CV-287, and SX-14-CV-278 were consolidated and accordingly there are three operative Complaints in this matter. However, as Plaintiff did not demand trial by jury with respect to his Complaint in SX-14-CV-287, only those claims presented in the Complaints filed in SX-12-CV-370 and SX-14-CV-278 are at issue.

Plaintiff's Complaint in SX-12-CV-370, styled as an "action for damages, injunctive and declaratory relief," presents three untitled counts and fourteen individually numbered requests for relief. Counts II and III explicitly contemplate only declaratory and injunctive relief and therefore

present purely equitable claims carrying no right to trial by jury.[2] Count I, in addition to incorporating, by reference, the antecedent factual allegations, consists of four separately numbered paragraphs.

The first alleges the existence and relevant terms of the partnership between Hamed and Yusuf. The second paragraph states that "pursuant to 26 V.I.C., including § 75, Mohammad Hamed is entitled to legal and equitable relief as deemed appropriate to protect and preserve his partnership rights." The third paragraph alleges that Hamed "is entitled to declaratory and equitable relief as to his rights as well as injunctive relief to protect those rights, including the return of funds or creation of trust as to the Partnership funds improperly taken or spent by Yusuf and/or United to date in violation of the agreement between the parties."

Only the final paragraph of Count I makes any reference to damages, alleging that "Hamed is also entitled to compensatory damages for all financial losses inflicted by Yusuf on the Partnership and/or his partnership interest as well as punitive damages against Yusuf for his willful and wanton misconduct." However, Plaintiff has not alleged anywhere in his Complaint that Yusuf directly inflicted any financial loss upon the partnership or Hamed's partnership interest.[3] The Complaint itself attests to the informal nature of the partnership's financial practices by which

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[2] Count II requests that "Yusuf's partnership interests... be dissociated from the business, allowing Hamed to continue the Partnership's business without him," on the grounds that "it is not practicable to continue the Partnership." Complaint ¶ 42. However, it makes little sense to speak of the "dissociation" of a partner in a partnership consisting of only two people, as any "dissociation" must necessarily result in the dissolution and wind up of the partnership. Thus, Count II of the Complaint is properly construed, not as a separate cause of action, but as a prayer for relief in the form of the dissolution and wind up of the partnership in the context of Hamed's cause of action under 26 V.I.C. § 75(b)(2)(iii). In any event, the Court has already effectively entered judgment on Count II of Plaintiff's Complaint, by dissolving the partnership and adopting the Final Wind Up Plan on January 7, 2015. Additionally, Count III of the Complaint presents no independent claim nor prayer for relief that is not already included in Count I. Thus, considered altogether, Plaintiff's Complaint presents only a single cause of action under 26 V.I.C. § 75(b)(2)(iii); the nature of which is discussed below.

[3] Here the Court uses the term *loss,* allegations of which may form the basis of a claim for compensatory damages, in contrast to allegations of improper gains or appropriation of money or property which, as discussed below, properly give rise to an equitable claim for restitution.

Hamed and Yusuf, or their designated family members, each sporadically withdrew partnership profits for their own use on the understanding that ultimately each partner would be entitled to "an equal (50/50) amount of these withdrawals for each partner directly or to designated family members." Complaint ¶ 21. In this light, Plaintiff does not truly allege that Yusuf impermissibly or unlawfully withdrew partnership funds in such a manner as to give to rise to a claim for compensatory damages based upon any financial loss to Hamed. Rather, Plaintiff has alleged that Yusuf, as the partner in charge of managing partnership finances,[4] has withheld the various sums listed in the Complaint to which Hamed believes he is entitled according to his own personal accounting of his 50% partnership interest.[5] Thus, Plaintiff has not presented a legal claim for damages, but rather a claim for an equitable accounting of the partnership. "That such an accounting action results in an award of money to plaintiffs does not detract from the equitable nature of the remedy provided." *Siegel v. Warner Bros. Entm't, Inc.*, 581 F. Supp. 2d 1067, 1071-72 (C.D. Cal. 2008).

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[4] To the extent it is not already established by admissions of the parties and previous Orders of the Court, the Court now confirms its preliminary factual finding—as detailed at ¶ 19 of the Memorandum Opinion and Order entered April 25, 2013 (58 V.I. 117, 124)—that since the inception of the partnership, Yusuf acted as the managing partner, such that Hamed was completely removed from the financial aspects of the business. *See* Defendants' Brief in Opposition to Motion for Partial Summary Judgment Re Statute of Limitations Defense, filed June 6, 2014, at 11 ("Mr. Yusuf, as the partner admittedly in charge of all operations of the partnership…").

[5] This distinction is subtle, but important. Compensatory damages indemnify an injured party for loss suffered as a result of a defendant's unlawful action. Here, Plaintiff has not alleged that Yusuf has taken anything from him or directly inflicted upon him a financial loss, but rather that Yusuf, as the *de facto* managing partner, has failed to fully and accurately account for Hamed's 50% partnership interest and thereby unjustly enriched himself at Hamed's expense. Accordingly, Plaintiff's prayers for relief variously request the "return of all funds," a declaration that funds and property are "subject to a constructive trust," and a declaration that Defendants would be "unjustly enriched" if not ordered to return such funds and property. Complaint, at 16 ¶¶ 3, 4, 9, 10. Thus, even to the extent that Plaintiff, at the conclusion of the accounting, may be entitled to an award of money, such an award would appear to be more in the nature of equitable restitution than compensatory damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14 (2002) (noting that an action for restitution lies in equity where plaintiff seeks the return of particular funds or property in the defendant's possession). Either way however, an equitable action for accounting is not converted into a legal action for damages simply because the ultimate disposition of the action will potentially involve an award of money to Plaintiff. *See Phillips v. Kaplus*, 764 F.2d 807, 814 (11th Cir. 1985).

The Supreme Court of the United States has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for 'the recovery of specific property or *monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988) (emphasis in original) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). In concluding that the "monetary relief" sought in a claim brought by a state government against the federal government for refusal to pay out Medicaid reimbursements constitutes a prayer for equitable relief rather than damages, the *Bowen* Court quoted, at length, Judge Bork's opinion in *Maryland Dept. of Human Resources v. Dept. of Health and Human Services*, 763 F. 2d 1441 (D.C. Cir. 1985), including the following passage:

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U. S. C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e. g., First National State Bank v. Commonwealth Federal Savings & Loan Association*, 610 F. 2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch v. Crouch*, 566 F. 2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to future installments); *Joyce v. Davis*, 539 F. 2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).
>
> In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident.

> The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought -- specific relief, not relief in the form of damages. *Cf. Clark v. Library of Congress*, 750 F. 2d 89, 104 n. 33 (D.C. Cir. 1984) (dictum) (describing an action to compel an official to repay money improperly recouped as 'in essence, specific relief').

Maryland, 763 F. 2d, at 1446 (emphasis in original) (citation omitted).

Similarly, in this case, Hamed is seeking funds to which he is allegedly entitled pursuant to the terms of the partnership agreement between himself and Yusuf, "rather than money in compensation for the losses, whatever they may be, that [Hamed] will suffer or has suffered by virtue of the withholding of those funds." *See id.* Thus, as the term is understood and used in Supreme Court jurisprudence, Hamed has not presented any claim for "damages," but rather an equitable action for accounting pursuant to 26 V.I.C. § 75(b)(2)(iii).[6]

This construction of Plaintiff's Count I is supported by Plaintiff's accompanying prayers for relief, the very first of which requests a "full and complete accounting to be conducted by a court-appointed Master." Additionally, nine out of Plaintiff's fourteen individually numbered prayers for relief specifically request declaratory or injunctive relief including a declaration of the respective rights and obligations of the partners as well as the return of the various sums to which Plaintiff alleges he is entitled.

By contrast, only two of Plaintiff's fourteen requests for relief refer to damages; one compensatory, the other punitive. As to the first request, without describing or explaining to what other compensable losses he refers other than the withholding of those sums already forming the

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[6] 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."

subject of Plaintiff's requests for equitable relief, Plaintiff seeks "an award of compensatory damages against the defendants, jointly and severally, as determined by the trier of fact." Similarly, absent any factual allegation which might justify such an award, Plaintiff additionally requests "an award of punitive damages against Yusuf as determined by the trier of fact."[7]

The Supreme Court of the United States has long held that the inclusion of a request for a nominally equitable remedy does not convert what is otherwise a legal claim into an equitable one. *See Phillips,* 764 F.2d at 814 (citing *Dairy Queen v. Wood,* 369 U.S. 469 (1962)). Conversely, the inclusion of a nominal, unsupported claim for damages does not transform an essentially equitable claim into a legal one. *See, e.g., Baker v. Detroit,* 458 F. Supp. 379, 384 (E.D. Mich. 1978) ("Great care must be taken in examining the complaint and the nature of the remedy sought so that a complaint which seeks essentially equitable relief is not subverted by the addition of damage claims to obtain a jury trial where none is justified under the law... the Court does not think that unsupported allegations should be allowed to obscure the fundamentally equitable nature of the claim which plaintiffs have brought"); *Lynch v. Pan American World Airways, Inc.*, 475 F.2d 764, 765 (5th Cir. 1973) ("imposition of monetary damages to make the employee whole for lost backpay does not change the character of the [equitable reinstatement] proceeding and thereby mandate a jury trial"); *Lafayette Club v. Dakota Rail, Inc.,* 1990 Bankr. LEXIS 1394, at *14 (U.S. Bankr. D. Minn. June 26, 1990) ("adding a meritless claim for damages to a case which is essentially equitable in nature does not furnish the right to a jury trial where one otherwise would not exist").

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[7] The remaining three requests for relief include requests for an award of prejudgment interest, an award of attorney's fees, and "any other relief the Court deems appropriate."

Thus, the Court finds that Count I of Plaintiff's Complaint in SX-12-CV-370, despite the inclusion of a nominal, unsupported request for compensatory damages, presents an equitable action for partnership accounting pursuant to 26 V.I.C. § 75(b)(2)(iii) as it seeks declaratory and injunctive relief protecting and preserving Hamed's 50% partnership interest upon dissolution and wind up of the partnership in accordance with the terms of the partnership agreement and the provisions of RUPA, codified at Title 26, Chapter 1 Virgin Islands Code.[8]

Plaintiff's Complaint in SX-14-CV-278 nominally presents a claim for damages for debt, or alternatively conversion, in the amount of $802,955, which Plaintiff alleges he is owed in connection with the sale of certain real property originally purchased with partnership funds. However, in their Stipulation Re: Consolidation, filed March 21, 2016, the parties jointly stipulated to the substantive consolidation of SX-14-CV-278 with SX-12-CV-370 on the basis of their agreement that "the claims in the more recently filed case SX-14-CV-278… may be treated as claims for resolution in the liquidation process of the older case SX-12-CV-370."[9] Thus, on the basis of Plaintiff's own representations, the Court finds that Plaintiff's Complaint in SX-14-CV-278, as a result of the consolidation of these matters, presents no additional claims or prayers for

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[8] Plaintiff's Count I seeks a partnership accounting. As discussed in note 2 above, Plaintiff's Count II seeks the dissolution of the partnership, which consequently triggers a wind up of the partnership pursuant to 26 V.I.C. § 171. Count III presents no claim or prayer for relief not already included in Count I. Thus, considered together under the provisions of RUPA, Plaintiff's three counts do not present three separate causes of action, but rather a single, tripartite cause of action for the dissolution, wind up, and accounting of the partnership. *See* 26 V.I.C. § 75(b)(2)(iii) (codifying 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;" which in turn explicitly provides in §177 that "[e]ach partner is entitled to a settlement of all partnership accounts upon winding up the partnership business").

[9] These "claims for resolution in the accounting process" refer to claimed charges and credits against the individual partner accounts described in 26 V.I.C. § 71(a).

relief, and remains operative only in so far as it contains factual allegations supplementing those already contained in Plaintiff's Complaint in SX-12-CV-370.[10]

Having determined that Plaintiff's Complaint presents an equitable action for the dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii), the Court turns to the factors for consideration outlined by the Supreme Court in *Ross v. Bernhard.*[11] Historically, accounting claims predicated upon a duty arising from the parties' relationship with one another, such as business partners, co-owners of property, or beneficiaries and trustees, were considered equitable. *See* 5 Moore's Federal Practice, ¶ 38.25 at 38-208 (2d ed. 1984); Joseph Story, *Commentaries on Equity Jurisprudence* § 622 at 37 (14th ed. 1918). Additionally, with regard to the remedy sought, as discussed in detail above, Plaintiff here seeks an accounting along with declaratory and injunctive relief with only a nominal and factually unsupported request for damages.

As to the last factor—the abilities and limitations of juries in deciding such cases—evidence presented by Hamed at the hearing on March 6-7, 2017 supports the Court's conclusion that "the 'accounts between the parties' are of a such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *See Dairy Queen,* 369 U.S. at 478 (Harlan, J. concurring)

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[10] As the parties acknowledged in their Stipulation Re: Consolidation, Plaintiff's Complaints in SX-14-CV-278 and SX-14-CV-287 both present claims based upon transactions already included in the relief sought by Plaintiff in SX-12-CV-370. Thus, there exists an open question as to whether Plaintiff's Complaints in SX-14-CV-278 and SX-14-CV-287 should be dismissed as duplicative pursuant to the Court's inherent authority to administer its docket. *See, e.g., Curtis v. Citibank, N.A.,* 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another") (citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)). Alternatively, given that the Stipulation confirms that the relief sought by Plaintiff in SX-14-CV-278 and SX-14-CV-287 is already included in the relief sought by Plaintiff in SX-12-CV-370, the Stipulation Re: Consolidation may in fact be more properly considered as presenting a stipulation for dismissal. However, the Court need not resolve these issues in ruling on the instant Motion.

[11] 1) The customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970).

(quoting *Kirby v. Lake Shore & Michigan Southern R. Co.*, 120 U.S. 130, 134 (1886)). This is highlighted by the fact that Hamed challenges numerous transactions over a period of years between the parties and their families. At the hearing, witnesses including Hamed's sons testified as to the existence of a cash diversion scheme involving cashier's checks, offered conflicting testimony regarding the ledger and receipt system for keeping track of cash withdrawals at each partnership store, and testified that records documenting the withdrawals had been destroyed. Evidence of the parties' history over many years depicts a litany of inextricably linked transactions presenting complexities which would adversely affect, if not make wholly impossible, the orderly determination of issues by a jury at trial. As demonstrated by Hamed's evidentiary presentation at the March 6, 2017 hearing, the resolution of Hamed's claims require "a complete and systematic financial review, in which all the activities related to the partnership are subjected to scrutiny," such that no single transaction may be considered in isolation. *See Thompson v. Coughlin*, 997 P.2d 191, 196 (Ore. 2000).

Thus, considering the factors outlined by the Supreme Court in *Ross v. Bernhard*, the Court concludes that Plaintiff's cause of action and accompanying prayers for relief are properly considered equitable in nature and, in any event, necessarily entail a detailed, complicated accounting such that they may only be adequately and justly resolved by a court of equity.[12]

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[12] Some federal courts have found that complexity of facts alone constitutes a sufficient basis for invoking equitable jurisdiction and denying trial by jury. *See, e.g., In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d. Cir. 1980); *Donovan v. United States Postal Service*, 530 F. Supp. 894, 901 (D.D.C. 1981). This is most well established in the specific case of actions for accounting. *See, e.g., Kirby*, 120 U.S. at 134. However, as all three factors for consideration outlined by the Supreme Court in *Ross v. Bernhard* weigh in favor of asserting equitable jurisdiction and denying trial by jury, the Court need not determine whether the sheer complexity of the partnership accounting in this matter would, by itself, present sufficient justification to take this matter away from the jury and draw it instead into the Court's equitable jurisdiction.

Therefore, as this matter falls outside the scope of the Seventh Amendment and Plaintiff is not entitled to have his claims tried by jury, Defendants' Motion to Strike Jury Demand will be granted.

Defendants' Jury Demand

Although no motion addressing the issue has been filed, the various arguments presented by both partners in the briefing concerning Defendants' Motion to Strike [Hamed's] Jury Demand are equally applicable to Defendants' own demand for trial by jury on their Counterclaim.[13] As such, the Court will consider, *sua sponte*, whether and to what extent Defendants are entitled to have their claims tried by jury, as requested in their Counterclaim.

Once again, the Court must first look beyond the titular form of the many counts presented in Defendants' Counterclaim to substantively identify and categorize the various claims presented.[14] The Counterclaim is, on its face, organized into fourteen counts.[15] Of these, Counts I and II seek declaratory relief regarding the existence and terms of the partnership. Both issues were resolved by the Court's November 7, 2014 Order granting Plaintiff's Renewed Motion for

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[13] Defendants' Counterclaims in SX-14-CV-278 and SX-14-CV-287 also included demands for trial by jury. However, in their two Stipulations Re: Consolidation, filed March 21, 2016, the parties jointly stipulated to the substantive consolidation of SX-14-CV-278 and SX-14-CV-287 with SX-12-CV-370 on the basis of their agreement that "the claims in the more recently filed case[s] [SX-14-CV-278 and SX-14-CV-287]... may be treated as claims for resolution in the liquidation process of the older case SX-12-CV-370." These "claims for resolution in the accounting process" refer to claimed charges and credits against the individual partner accounts described in 26 V.I.C. § 71(a). By stipulating to the resolution of these Counterclaims in the context of the Final Wind Up Plan, pursuant to which the respective claims of the parties are to be tried by the Court rather than by jury, the Defendants' have waived their right to trial by jury on their Counterclaims in SX-14-CV-278 and SX-14-CV-287. *See supra*, note 1.

[14] Yusuf and United each also filed Counterclaims in SX-14-CV-278 and SX-14-CV-287. However, as with Hamed's claims, Defendants, by way of the Stipulation Re: Consolidation, filed March 21, 2016, stipulated to the substantive consolidation of SX-14-CV-278 and SX-14-CV-287 with SX-12-CV-370 on the basis of their agreement that "the claims in the more recently filed case[s]... may be treated as claims for resolution in the liquidation process of the older case SX-12-CV-370." Thus, on the basis of Defendants' own representations, the Court finds that Defendants' First Amended Counterclaim in SX-14-CV-278 and Counterclaim in SX-14-CV-287, as a result of the consolidation of these matters, present no additional claims or prayers for relief, and remain operative only in so far as they contain factual allegations supplementing those already contained in Defendants' Counterclaim in SX-12-CV-370

[15] Counts XI and XII present claims exclusively on behalf of United, while all other Counts appear to present claims exclusively belonging to Yusuf.

Partial Summary Judgment as to the existence of a partnership, which effectively entered Judgment against Defendant Yusuf on Count I of the Counterclaim and in favor of Defendant Yusuf on Count II. Defendants' Count VIII seeking dissolution of the then alleged partnership was similarly resolved by the mutual consent of the parties as memorialized in the Court's Order entered September 18, 2014 appointing the Master to oversee the dissolution and wind up of the partnership. Additionally, by Order entered April 27, 2015 granting United Corporation's Motion to Withdraw Rent, the Court effectively granted judgment in favor of Defendant United on Count XI for debt for rent owing on retail space leased to the partnership.[16]

Count IV (Accounting), Count V (Restitution),[17] Count VI (Unjust Enrichment/Constructive Trust),[18] Count IX (Dissolution of Plessen),[19] Count X (Appointment of

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[16] United's Motion, and consequently the Court's ruling on the Motion, addressed only the debt allegedly owed to United for the rental of "Bay 1" as outlined in Count XI, and did not touch on United's second claim for rent presented in Count XII of Defendants' Counterclaim. By the Memorandum Opinion and Order Re Limitations on Accounting entered contemporaneously herewith, the Court denies Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, as to the remaining Counts IV and XII.

[17] While a claim for restitution may lie either in law or in equity depending on the nature of the relief sought, here Defendant Yusuf explicitly seeks "a constructive trust over any assets purchased with [partnership] funds; an equitable lien over such assets; and disgorgement of any profits made from the use of the Plaza Extra Stores' funds or assets purchased with the use of such funds." Thus, Yusuf clearly presents a claim for equitable rather than legal restitution. *See Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. at 213-14 ("a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession... a court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner").

[18] Count VI differs from Count V only in title and is properly considered equitable for the same reasons discussed in the preceding footnote.

[19] The Court is not aware of any cognizable action, whether grounded in common law or statute, by which an individual shareholder may unilaterally dissolve a corporation on the basis of "disagreement" with other shareholders. However, to the extent such an action is cognizable at all, it would necessarily be cognizable exclusively in equity as it prays only for declaratory relief unaccompanied by any request for damages.

a Receiver), and Count XIV (Indemnity and Contribution)[20] unquestionably seek purely equitable relief and therefore carry no right to trial by jury.

Count III (Conversion), Count VIII (Breach of Fiduciary Duty), and Count XIII (Civil Conspiracy) all nominally present legal claims for damages. However, close examination reveals that these Counts do not present separate, distinct claims for damages based on any particular transaction and fail to include in their respective prayers for damages any specified sum. Rather, these Counts, as well as Counts V, VI, and XIV merely represent alternate characterizations of Plaintiff's allegedly wrongful withdrawal and use of partnership funds over the life of the partnership, which in turn constitute alternative potential bases for granting the ultimate relief sought by Yusuf in his Counterclaim: the dissolution, winding up, and accounting of the partnership. Just as with Hamed's Complaint, Yusuf's Counterclaim has not alleged that Hamed directly inflicted upon Yusuf or the partnership any financial loss that would give rise to claim for damages. Rather, Yusuf alleges that Hamed has inaccurately calculated the amount of monies

[20] While certain claims for indemnity and contribution, such as those based upon breach of a contractual indemnification clause, are considered actions at law, generally actions for indemnification and contribution are considered equitable in nature. *See, e.g., First Am. Bank of Va. v. Kindschi,* 1986 U.S. App. LEXIS 37722, at *32-33 (4th Cir. 1986) (noting that indemnification and contribution is an equitable remedy, "based upon principles of natural equity and justice"); *Union Pac. R.R. v. Reilly Indus.,* 215 F.3d 830, 834 (8th Cir. 2000) (noting that district court submitted all claims to jury except claim for indemnification and contribution which was equitable in nature).

owed to him pursuant to his 50% partnership interest and has consequently withdrawn various sums from partnership accounts in excess of the 50% to which he is entitled.[21]

Just like Hamed, Yusuf is seeking funds to which he is allegedly entitled pursuant to the terms of the partnership agreement between himself and Hamed, as opposed to "money in compensation for the losses, whatever they may be, that [Yusuf] will suffer or has suffered by virtue of the withholding of those funds." *See Maryland,* 763 F. 2d, at 1446. Accordingly, despite the misleading form of the Counterclaim, the Court concludes that Yusuf has not presented multiple distinct claims for damages, but rather a single, tripartite action for the equitable dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). As noted above, the fact that such an accounting will result in the payment of monies to one or both parties does not convert an essentially equitable claim into a legal one. *See Siegel,* 581 F. Supp. 2d at 1071-72.

Count XII of the Counterclaim (Rent) presents a claim for rent allegedly owed to Defendant United for the use of certain storage bays by Plaza Extra-East from 1994 through 2001 and from 2008 through 2013. As this is a claim made solely by United against Hamed, it cannot be said to be included in or subsumed by the accounting claim between the partners as with Yusuf's nominal claims for damages presented in Defendants' Counterclaim. Additionally, as this claim specifically

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[21] As previously discussed in the context of Hamed's Complaint, this characterization is particularly appropriate in light of the admittedly informal nature of the partnership's financial practices by which both partners and their respective family members unilaterally withdrew funds from partnership accounts as needed to cover various business and personal expenses. Given this customary practice, by which both partners were permitted to make large withdrawals on the understanding that each would ultimately, if not immediately, be entitled to a 50% share of partnership profits. Thus, Yusuf does not truly allege that the withdrawals themselves were wrongful or unauthorized. Rather, Yusuf alleges that by the time of the breakdown of the relationship between the partners, Hamed's withdrawals, while proper and authorized at the time they were made, ultimately exceeded the 50% of the partnership profits to which Hamed was entitled, thereby leaving Hamed unjustly enriched at Yusuf's expense. In essence, Yusuf's Counterclaim against Hamed directly mirrors Hamed's Complaint against Yusuf, and for the same reasons discussed in the context of Hamed's Complaint, the Court concludes that Yusuf has also presented an equitable claim for partnership accounting and not a legal claim for damages.

requests unpaid rent in the amount of $793,984.38—"an amount certain, liquidated, and subject to immediate collection"—it presents a legal claim for damages.[22] Thus, of the fourteen Counts of Defendants' Counterclaim, only Count XII (Rent) presents a legal claim for damages ordinarily carrying with it the right to a trial by jury.

Having identified the claims presented in the various Counts of Defendants' Counterclaim, the Court turns to the factors for consideration outlined by the Supreme Court in *Ross v. Bernhard* to determine whether Defendants are entitled to trial by jury under the Seventh Amendment.[23] As discussed above, with the exception of Count XII (Rent), Defendants have presented claims traditionally lying in equity and requesting exclusively equitable relief. Thus, considering only the first two *Ross* factors, it would appear that while Defendant Yusuf has presented no claims triable by jury, Defendant United is entitled to trial by jury on its claim for rent.

Turning to the final factor— the abilities and limitations of juries in deciding such cases— the evidence of record, discussed above in the context of Hamed's Complaint, supports the Court's conclusion that "the 'accounts between the parties' are of a such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *See Dairy Queen,* 369 U.S. at 478 (Harlan, J. concurring) (quoting *Kirby,* 120 U.S. at 134). Thus, even to the extent that certain Counts of Yusuf's Counterclaim—such as Count III (Conversion), Count VIII (Breach of Fiduciary Duty), and Count XIII (Civil Conspiracy)—could be construed as presenting legal claims for damages, these claims nonetheless remain unamenable to trial by jury as the propriety of each individual

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[22] Whether construed as an action for debt, breach of implied contract, or otherwise, the claim presented in Count XII of Defendants' Counterclaim constitutes a legal claim as it requests relief in the form of damages for a sum certain.

[23] 1) The customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970).

transaction or withdrawal, and in turn the individual Partners' claims to the funds in question, may only be evaluated in conjunction with all other transactions and withdrawals made by the Partners during the life of the partnership. As discussed above, this task is further complicated by the highly informal nature of the financial and accounting practices of the partnership. Accordingly, just as with Hamed's claims, the resolution of Yusuf's claims also requires "a complete and systematic financial review, in which all the activities related to the partnership are subjected to scrutiny," such that any no single transaction may be considered in isolation. *See Thompson*, 997 P.2d at 196.

Thus, after evaluating the factors for consideration outlined by the Supreme Court in *Ross v. Berhard*, the Court concludes that Defendant Yusuf is not entitled to trial by jury on any of the claims presented in his Counterclaim. Additionally, although Defendant United has presented a claim for damages for rent which does carry with it a right to a jury trial, both Defendants, by repeated representations to the Court, both express and implied, have unequivocally waived any right to trial by jury.

As discussed above in the context of Hamed's Complaint, both Hamed and Yusuf have waived any right to trial by jury in this matter by virtue of their stipulation to the substance of the Final Wind Up Plan adopted by the Court on January 7, 2015.[24] Pursuant to that Plan, each partner, following liquidation of the partnership assets is to submit a proposed accounting and distribution to the Master who shall, in turn, "make a report and recommendation of distribution *to the Court for its final determination*." Final Wind Up Plan, Section 9, Step 6.

While the applicability of the Final Wind Up Plan and the waiver contained therein to United, a non-partner, may not be immediately obvious, a review of the record demonstrates that

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[24] *See supra,* note 1.

United was indeed party to the development and adoption of the Plan, and considers itself to be bound by the terms thereof. Both Defendant Yusuf and Defendant United jointly first moved the Court to appoint a Master to oversee the various claims involved in this litigation and attached to the Motion their first proposed version of the wind up plan.[25] Describing the process of developing and adopting the plan, Defendants, referring to themselves in the plural, note that "Plaintiff and *Defendants* proposed dueling plans," all of which contemplated resolution of all claims by recommendation of the Master for final determination by the Court.[26]

Additionally, United is properly considered a party to, and therefore bound by the terms of, the stipulated Final Wind Up Plan because: 1) the Plan itself provides a mechanism for the resolution of third-party claims against the partnership such as United's claim for rent by which such claims are to be settled by the liquidating partner subject to the approval of the Master and ultimately the Court, and 2) the Plan imposes a specific obligation upon United to divest itself of, and deliver to Hamed, 50% of its stock holdings in Associated Grocers.[27] Thus, based upon the representations of counsel for both Defendants, the role of United in developing and adopting the Plan, and the terms of Plan itself, the Court concludes that the language of the Final Wind Up Plan, to which all parties have stipulated, represents an agreement among all parties that the various

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[25] *See* Motion to Appoint Master, filed April 7, 2014 ("Defendants/counterclaimants Fathi Yusuf and United Corporation… respectfully move this Court to appoint a Master…").

[26] Supplemental Brief Regarding Three Motions Addressed at March 6-7, 2017, at 8.

[27] *See* Final Up Plan, Section 5: Duties of Liquidating Partner, "Any Liquidation Proceeds and Litigation Recovery shall be placed into the Claim Reserve Account from which all Partnership Debts shall first be paid. Following payment of all Partnership Debts, any remaining funds shall continue to be held in the Claims Reserve Account pending distribution pursuant to agreement of the Partners or order of the Court following a full accounting and reconciliation of the Partners' capital accounts and earlier distributions; Section 8-4: Stock of Associated Grocers, "The stock of Associated Grocers held in the name of United shall be split 50/50 between Hamed and Yusuf, with United retaining in its name Yusuf's 50% share, and 50% of such stock being reissued in Hamed's name or in the name of his designee."

claims presented in both the Complaint and Counterclaim are to be resolved by the Court and not by jury.

While equally applicable to Plaintiff, the proposition that the right to trial by jury was waived in this matter is particularly convincing with respect to Defendants. As Defendants argued in their Motion to Strike Jury Demand, "each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership…[and therefore] it is clear that these claims can only be adjudicated in a bench trial." Motion to Strike, at 3.[28] In their Reply in support of the same Motion, Defendants assert that "by participating in the process that resulted in the [Wind Up] Plan without objection or assertion of any jury trial right, Plaintiff has waived his right to invoke it now." Reply in Further Support of Motion to Strike, at 2. As noted in Defendants' Supplemental Brief Regarding Three Motions Addressed at March 6-7, 2017 Hearings, the record reveals that while Plaintiff and Defendants both proposed significantly different versions of what eventually became the Final Wind Up Plan, one feature constant across all versions was the Master's report and recommendation of distribution for final determination by the Court. Supplemental Brief, at 8-9. Never, at any time in the process of developing the Plan, did any party make any mention of or suggestion that any matter should ultimately be resolved by jury.

Thus, based upon Defendants' own representations, both Defendant Yusuf and Defendant United believed that by consenting to the Final Wind Up Plan—pursuant to which the claims between the parties would be decided by the Court based upon recommendation of the Master—

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[28] Although Defendants presented this argument as applied to Hamed's claims, it is equally applicable to the claims presented in Defendants' Counterclaim. While Defendants' Counterclaim originally included a Count seeking a declaration that no partnership existed, this claim was effectively dismissed following Yusuf's admission, and the Court's subsequent recognition, of the existence of the partnership, and, in any event, the remainder of Defendants' claims proceed under the assumption that a partnership did exist and are based upon Yusuf's entitlement to 50% of partnership profits and Hamed's responsibility for 50% of partnership liabilities and losses.

they waived the right to trial by jury in this matter. Thus, based upon the clear intent and understanding of Defendants in connection with the adoption of the Final Wind Up Plan, the Court finds that Defendants have waived any right to trial by jury under the Seventh Amendment, and accordingly, Defendants' jury demand will be stricken.

In light of the foregoing, it is hereby

ORDERED that Defendants' Motion to Strike Plaintiff's Response is DENIED. It is further

ORDERED that Defendants' Motion to Strike Jury Demand is GRANTED. It is further

ORDERED that Plaintiff's demand for trial by jury in the above captioned consolidated cases is STRICKEN. It is further

ORDERED that Defendants' demand for trial by jury in the above captioned consolidated cases is STRICKEN as to both Defendants.

DATED: July 21, 2017.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: _____ Court Clerk Supervisor 7/21/17

E-Served: Jan 19 2018 11:35PM AST Via Case Anywhere

EXHIBIT C

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

MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATON, 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 DAMAGES, etc.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant United Corporation's Motion to Withdraw Rent and Memorandum of Law in Support of United's Motion ("Motion"), filed September 9, 2013; Plaintiff's Response, filed September 16, 2013; United's Reply, filed September 27, 2013; Plaintiff's Motion for Partial Summary Judgment re the Statute of Limitations Defense Barring Defendants' Counterclaim Damages Prior to September 16, 2006 (Plaintiff's "Summary Judgment Motion"), filed May 13, 2014; and Defendant's Brief in Opposition ("Opposition"), filed June 6, 2014. For the reasons that follow, United's Motion will be granted and Plaintiff's Summary Judgment Motion will be denied, in part.

FACTUAL BACKGROUND

In its instant Motion, United seeks allegedly past due rents for Bay No. 1 of United Shopping Plaza, defined therein as "69,680 Sq. Ft. Retail Space...," "utilized for the day to day operations of Plaza Extra East Store located at 4C and 4D Estate Sion Farm, St. Croix, Virgin Islands." Motion, 1-2.[1] Since 1986 this retail space has been leased by United to the Hamed-Yusuf Partnership ("Partnership"). According to United, and supported by the Affidavit of Defendant Yusuf, the Partnership has paid rent to United for leasing that space while operating Plaza Extra - East. Between 1986 and 1993, the parties settled rents following a request made by United. Motion, 3. Additionally, between 2004 and 2011, after United requested a rent payment for those years, the Partnership authorized payment to United for $5,408,806. Motion, 7 (Yusuf Affidavit, ¶7 and Exhibit B).

However, according to United, the Partnership owes United substantial unpaid rents from 1994-2004 and from January 1, 2012 - September 30, 2013. As a result of the injunction, entered in April 2013, Yusuf, a United shareholder, is unable to unilaterally withdraw money from the Partnership accounts for the purpose of paying rent or for any other reason. United requests the Court to allow United to withdraw rent in the amount of $3,999,679.73 (for 1994-2004) and $1,234,618.98 (for 2012-2013) for a total of $5,234,298.71 from the Partnership's account. Motion 1-2.

United argues that it was a common practice for the Partnership to make lump sum rent payments as opposed to monthly or even yearly payments. Motion, 3. United argues that it did not

[1] Defendant United's Counterclaim seeks back rent from Bays 1, 5 and 8 located in the same premises. However, for purposes of winding up the Partnership and because United's Motion only seeks back rent for Bay No. 1, this Order addresses only Bay No. 1.

seek rental payments for 1994-2004 because certain relevant financial records, informally referred to as the "black book," were seized by the FBI during the course of a criminal investigation. Motion, 7; Yusuf Affidavit, ¶8. As a result, United was unable to properly determine the amounts of past due Partnership rent and for that reason did not demand payments.

United explains in detail that the rent for Plaza Extra - East "is calculated based upon the 2012 sales of Plaza Extra -Tutu Park, St. Thomas store..." (Motion, 4). "The sales are divided by the square footage to arrive at a percentage amount. That percentage amount is multiplied by the sales of the Plaza Extra - East store located at 4C & 4D Estate Sion Farm, St. Croix." Motion, 5. According to United, this formula has been agreed upon by United and the Partnership and "...was used to calculate the rent for the period of May 5th, 2004 through December 31st, 2011... the monthly rate of $58,791.38 is what the current monthly rent is." Yusuf Affidavit, ¶8; Exhibit C (Rent Calculations Sheet).

Plaintiff, in his Response, argues that Yusuf cites no procedural basis that would allow United, in its capacity as landlord, to withdraw rents from the Partnership's accounts. Response, 1. Plaintiff further argues that United has issued rent notices for $250,000.00 per month as opposed to the $58,791.38 per month stated in Yusuf's affidavit for rent allegedly due from January, 2012. Response, 4. Without disputing that some rent is due, Plaintiff disputes United's calculations, pointing to discrepancies in the store's square footage[2] and implying that the rent for Plaza Extra - Tutu and Plaza Extra - East should be identical. Response, 4-5.

[2] Plaintiff argues that the square footage of Bay No. 1 is 67,498 sq. ft. as opposed to United's claim of 69,280 sq. ft. Response, 4-5. United has consistently averred that Bay No. 1 is 69,680 sq. ft. The Court will accept the previously undisputed square footage of Bay No. 1 as 69,680 sq. ft. and will allow monetary adjustments based on deviations from this area measurement if more accurate assessments in the future reveal that this area measurement is inaccurate. This can be accomplished as part of the Liquidating Partner's and Master's responsibilities during the wind up process.

Plaintiff, in both his Response and Summary Judgment Motion, asserts a statute of limitations defense for the past rents (1994-2004). Plaintiff cites V.I. Code Ann Tit. 5, §31(3) which sets a six year statute of limitations for "...actions upon contract or liability, express or implied, excepting those mentioned in paragraph (1)(C) of this article." Response, 5-6; Plaintiff's Summary Judgment Motion, 2-3.

United responds to Plaintiff's statute of limitations argument by claiming that Yusuf and Plaintiff's authorized agent, Waleed Hamed, reached an oral agreement in early 2012 to have the Partnership pay the past due rent back to United. Opposition, 10-11. This oral agreement was allegedly breached by Plaintiff when his attorney sent United a letter dated May 22, 2013 claiming that no agreement on rent had ever been reached. Opposition, 11; Exhibit D. Yusuf, by his affidavit, asserts that an agreement was reached for past rent to be paid when the Partnership's "black book" was returned by the FBI and a proper calculation could be achieved. Yusuf Affidavit, ¶¶4-6. Only when Yusuf's son discovered that the FBI had returned the black book in early 2013, did United calculate the past rent and seek repayment from the Partnership.

Hamed has admitted that the Partnership owes United rent: "We pay rent...we owe Mr. Yusuf... I don't pay for half. Still we owe him some more." Exhibit E, Hamed Deposition, p. 86; 10-14. Through an interpreter, Hamed admitted that rent is controlled by Yusuf, that he does not object to paying rent and that Yusuf (on behalf of United) could charge rent and collect it. Exhibit E, Hamed deposition p. 119; 7-11. In fact, when Hamed was asked "...if rent was not paid from January 1, 1994 through May 4, 2004, would you agree that rent should be paid," Hamed responded, "It should be paid." Exhibit E, Hamed Deposition, p. 117; 21-25.

Yusuf claims that he alone had been in charge of calculating rent and had bound the Partnership to paying United rent. Opposition, 11; Exhibit B, Yusuf Deposition p. 86; 8-12. Yusuf specified that United would charge the Partnership rent at $5.55 per square foot, "the same as the old one." *Id.* Yusuf states that the rental terms, as discussed with Hamed, revived the previous arrangement which had begun in 1986 and extended the landlord-tenant relationship from January, 1994 through 2004, briefly discussing how rent is calculated for Plaza Extra - East based on the percentage of sales from the Plaza Extra - St. Thomas store. Yusuf Deposition p. 88; 4-9; p. 89; 19-22.

DISCUSSION

The Court will examine whether the Partnership owes United rents from 1994 to 2004 (past due rent) and from 2012 to 2013. This inquiry is limited to the issue of rents and does not extend to other relief sought by Defendants' Counterclaim or to other aspects of Plaintiff's Motion for Partial Summary Judgment beyond the issue of past due rents.

1. The Court has the authority to order the Partnership to repay past due rent.

Plaintiff argues that United has failed to cite a procedural justification for the Court to order the Partnership to pay past due rent to United. Response, 1.

Without a written partnership agreement, as is the case between Hamed and Yusuf, courts will look to the Uniform Partnership Act to determine a partnership's property and its obligations to creditors (codified at 26 V.I.C. § 24; § 177, respectively). "The reason is that dissolution does not terminate or discharge pre-existing contracts between the partnership and its clients, and ex-partners who perform under such contracts do so as fiduciaries for the benefit of the dissolved partnership." *Labrum & Doak v. Ashdale*, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998).

In connection with winding up the Partnership, the Court has made several discretionary decisions regarding asset allocation in accordance with the Uniform Partnership Act and for the benefit of the partners. *See* Final Wind Up Plan, entered January 9, 2015. As the parties move forward with the wind up process, it is necessary to determine what constitutes Partnership property. Most of this determination can and should be done without judicial intervention but, in the case of past rents, Hamed cannot agree with Partnership creditor United, or with Yusuf, a United shareholder and Hamed's equal partner in the Partnership, as to the amount of rent that the Partnership owes United.

The Virgin Islands Supreme Court, in denying Defendants' appeal of this Court's Wind Up Plan, stated that "...matters that fall within the administration of winding up the partnership, over which the Superior Court possesses considerable discretion... are not immediately appealable." *Yusuf v. Hamed*, 2015 V.I. Supreme LEXIS 6, at *5-6 (V.I. February 27, 2015)(*citing Belleair Hotel Co. v. Mabry*, 109 F.2d 390, 391 (5th Cir. 1940); *see also United States v. Antiques Ltd. P'Ship*, 760 F.3d 668, 671-72 (7th Cir. 2014)).

Appellate courts, when treating a lower court's supervision over a wind up process as similar to a receivership, "...have recognized 'the scores of discretionary administrative orders a [trial] court must make in supervising its receiver.'" Hamed, 2015 V.I. Supreme LEXIS 6, at *6 (*quoting S.E.C. v. Olins*, 541 Fed. Appx. 48, 51 (2d Cir. 2013) (*quoting IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1020 (2d Cir. 1975)).

With the aim of winding up the Partnership in a fair and efficient manner, the Court in this Order exercises its "considerable discretion" to determine how much rent the Partnership owes to United as a debt due and owing under the Uniform Partnership Act.

2. The statute of limitations does not bar Defendant United's claim for rent and United is entitled to past due rent in the amount of $3,999,679.73 for 1994-2004.

Plaintiff argues that the Partnership is not responsible for rent from 1994-2004 because the six year statute of limitations for actions in debt expired in 2010, two years before the filing of his original Complaint in this action. Defendant United argues that the parties entered into an oral contract in 2012 that bound the Partnership to pay the past due rents as soon as a proper accounting could be done (i.e. the black book was recovered). When the black book was located in early 2013 and United made a subsequent demand for past rent, Plaintiff claimed that "there was never an understanding that rent would be paid for this time period…" and even if there had been, the statute of limitations had expired (preventing all claims for rents that came due prior to September, 2006). Motion, Exhibit D. According to Defendant United, the Partnership reneging on the agreement to pay back rents constituted a breach of contract which carries a six year statute of limitations that has yet to expire.

The Court views this matter somewhat differently. While 5 V.I.C. § 31(3) sets a six year statute of limitations for contractual liabilities such as payment of rents, there are certain equitable principles which operate to toll a statute of limitations. The "acknowledgment of the debt" doctrine (also known as the "revival of the promise to pay" doctrine) is recognized as follows:

> A debt which is time-barred may be "revived" by an acknowledgment by the debtor. 'It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run. . . . Such conduct revives the cause of action so that the statute starts to run again for the full statutory period.'

Gee v. CBS, Inc., 471 F. Supp. 600, 663 (E.D. Pa. 1979)(*quoting Developments in the Law Statutes of Limitations*, 63 Harvard L.Rev. 1177, 1254 (1950)).

Most courts only apply the acknowledgment of the debt doctrine when there exists "a clear, distinct, or unequivocal acknowledgment of the debt... [which] is sufficient to take the case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies." *CBS, Inc.* 471 Supp. at 664 (*citing In re Nicolazzo's Estate*, 414 Pa. 186, 190, 199 A.2d 455, 458 (1964), *quoting Palmer v. Gillespie*, 95 Pa. 340 (1880)).

Courts have employed a second equitable principle when tolling a statute of limitations, referred to as the "payment on account doctrine." Similar to the acknowledgment of the debt doctrine, the payment on account doctrine "... is regarded as an acknowledgment of liability." *Basciano v. L&R Auto Parks, Inc.,* 2012 U.S. Dist. LEXIS 17750, *36-39 (E.D. Pa. February 10, 2012)(*citing Quaker City Chocolate & Confectionery Co. v. Delhi-Warnock Bldg. Ass'n,* 53 A.2d 597, 600 (Pa. 1947)("There can be no more clear and unequivocal acknowledgment of debt than actual payment.")). To toll the statute of limitations, a partial payment "must constitute a constructive acknowledgment of the debt from which a promise to pay the balance may be inferred." *GE Med. Sys. v. Silverman*, 1998 U.S. Dist. LEXIS 886, * 20-21 (E.D. Pa. Feb. 2, 1998)(*quoting City of Philadelphia v. Holmes Electric Protective Co.*, 335 Pa. 273, 6 A.2d 884, 888 (Pa. 1939)). *See also Quaker City Chocolate & Confectionery Co.,* 53 A.2d at 600 ("Ordinarily, a payment on account of a debt is regarded as an acknowledgment of liability

and of willingness to pay the balance due thereon and therefore is held to interrupt the operation of the statute").[3]

In this case, both the acknowledgment of the debt doctrine and the payment on account doctrine apply to toll the statute of limitations on United's rent claims.

Regarding the acknowledgment of the debt, United has proven with sufficient certainty that the Partnership owes United rent from 1994 to 2004. Notwithstanding Plaintiff's denial that the parties had an agreement regarding past rents, Yusuf, by his affidavit, swears that Waleed Hamed entered into an agreement to pay United past due rent once the black book was recovered in early 2013. Opposition, 10-11; Exhibit D, Yusuf Affidavit, ¶¶4-6. Yusuf specifically addresses how rent is calculated ($5.55 per square foot), stating that the past due rent is "the same as the old one," referring to the 1986-1994 rental amounts. Yusuf Deposition p. 86; 8-12. Yusuf presents more than sufficient evidence that the Partnership's arrangement with United from 1986 to 1994 was identical, in terms of past due rent, as the arrangement between 1994 through 2004.

Nothing presented by Hamed calls into questions the validity of this debt or the application of the acknowledgment of the debt doctrine. Hamed has admitted on several occasions that Yusuf is in charge of rent, that the Partnership owes United rent for January 1, 1994 through May 4, 2004, and that the rent for this period should be paid to United. Opposition, Exhibit E, Hamed Deposition, p. 117-119. It is clear that the Partnership, through the statements of both Hamed and Yusuf, has

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[3] Courts will only allow "...a payment on a debt to qualify as an acknowledgment..." if there is an "unequivocal acknowledgment" of the debt, but have considered a debtor's payment on part of a debt to evidence an acknowledgment of the debt and therefore have tolled the statute of limitations. *See Basciano,* 2012 U.S. Dist. LEXIS 17750, at *36. From the acknowledgment of the debt the law will infer a promise to pay the underlying debt. *Receiver of Anthracite Trust Co. v. Loughran,* 19 A.2d 61, 62 (Pa. 1941) (*citing Dick v. Daylight Garage,* 335 Pa. 224, 6 A.2d 823, 826 (Pa. 1939)).

acknowledged a debt for rents owed to United, which is determined to be in the amount of $3,999,679.73 (based upon 69,680 sq. ft. @ $5.55/sq. ft.) for the period January 1, 1994 to May 4, 2004.

Similarly, the payment on account doctrine acts as a bar to Plaintiff's statute of limitations defense. The Partnership's partial payments "...constitute a constructive acknowledgment of the debt from which a promise to pay the balance may be inferred." *GE Med. Sys.,* 1998 U.S. Dist. LEXIS 886, at *20-21. For the period of the operation of Plaza Extra – East from 1986 through 2011, the Partnership made two lump sum rent payments to United (covering the periods from 1986-1994 and from 2004-2011). Motion, Yusuf Affidavit, ¶7; Exhibit B (previous rental check for $5.4 million). United and Yusuf have explained in detail how rent is calculated and why United did not collect rent for the period in question due to the unavailability of their financial records. Motion, 4, 7; Yusuf Affidavit, ¶8.

Therefore, both the acknowledgment of the debt doctrine and the payment on account doctrine apply to the facts of the rent dispute between United and the Partnership. The six year statute of limitations for United's past rent claims was tolled as a result and began to run on May 22, 2013 when Hamed first disputed the validity of the 1994-2004 rent debt. Motion, Exhibit D. United is within the timeframe with which to bring this claim and has presented sufficient information, through affidavits, depositions, and other evidence in the record, for the Court to grant United's Motion as to that period and to direct the Partnership to pay United the sum of $3,999,679.73.

3. Defendant United is also entitled to rent from 2012 to 2013 in the amount of $58,791.38 per month.

Plaintiff does not argue that the Partnership is exempt from paying rent to United. "[I]t is undisputed that United is the landlord and Plaza Extra is the tenant at the Sion Farm location, for which rent is due since January of 2012." Response, 1. Rather, Plaintiff claims that United itself has created a dispute regarding rents from January 2012 by issuing rent notices seeking increased rent in the amount of $250,000.00 per month, rather than the $58,791.38 per month set out in Yusuf's affidavit. Response, 4. The proof before the Court is clear as to United's claim that rent is due for Bay No. 1 at the rate of $58,791.38 per month from January 1, 2012 to September 30, 2013, when United's Motion was filed.[4]

As the fee simple owner and landlord of Bay No. 1 United Shopping Plaza, United is entitled to rents from the Partnership for its continued use of Bay No. 1 for the operations of Plaza Extra - East. Therefore, the Court will order the Partnership to pay United the sum of $1,234,618.98 for rent from January 1, 2012 through September 30, 2013, Plus rent due from October 1, 2013 at the same rate of $58,791.38 per month until the date that Yusuf assumed sole possession and control of Plaza extra – East.

On the basis of the foregoing, it is hereby

ORDERED that Defendant United Corporation's Motion to Withdraw Rent is GRANTED, and the Liquidating Partner, under the supervision of the Master, is authorized and directed to pay

[4] It is acknowledged that United delivered notices to the Partnership following the April 2013 Preliminary Injunction, seeking to collect an increased rent sum of $250,000.00. United presents in its Motion and proofs no numerical or factual justification for such claims, which are not considered in this Order.

from the Partnership joint account for past rents due to United 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, until the date that Yusuf assumed full possession and control of Plaza Extra – East. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED, in part, as to Plaintiff's claims that the statute of limitations precludes Defendant United's claims for past due rent.

Dated: April 27, 2015

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: _____
Court Clerk Supervisor
4/27/15

CERTIFIED TO BE A TRUE COPY
This 27th day of April 20 15
CLERK OF THE COURT
By _____ Court Clerk