

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

**FATHI YUSUF'S MOTION FOR RECONSIDERATION OF  
MASTER'S NOVEMBER 14, 2018 ORDER**

The Master's Order of November 14, 2018 (the "Order") granted Hamed's Motion to Strike Yusuf Claim No. Y-13: loss of "going concern" value of Plaza Extra-West based upon his conclusion that Yusuf "has already conceded that Plaza Extra-West cannot be sold as a going concern." It goes without saying that the going concern value of Plaza Extra-West is a hotly contested issue. Hamed claims there is no going concern value because of the absence of a lease

with the Partnership, whereas Yusuf claims the going concern value is \$8,770,000 based on an expert report dated September 26, 2016 supporting his claim Y-13. The Order effectively bars Yusuf from pursuing this claim based on a purported concession contained in Section 8 of Yusuf's first proposed wind up plan, submitted in April 2014, that was never accepted by the Court and was later modified multiple times by Yusuf before the Court entered its Order Adopting Final Wind Up Plan dated January 7, 2015 (the "Wind Up Order") which approved the Final Wind Up Plan of the Plaza Extra Partnership (the "Plan") attached to the Wind Up Order. Yusuf respectfully submits that the Master should revisit his decision as it was improvidently granted, represents a "failure of the [Master] to address an issue specifically raised prior to the [Master's] ruling," and needs revision "to correct a clear error of law." V.I. R. CIV. P. 6-4.

Hamed argued that the Wind Up Order barred Yusuf's claim for loss of "going concern" value at the Plaza Extra-West store. The Master found these arguments "unpersuasive" holding that the Wind Up Order only went so far as to make provision for the transfer of "ownership" of the store and that such a transfer of ownership "free and clear of any claims or interests of Yusuf or United" did not preclude claims the partners had against the Partnership or each other relating to the stores. *See* Order p. 8-9. The Master explained: "It is disingenuous for Hamed to now argue that the language [free and clear of any claims or interests of Yusuf or United] precluded all claims of Yusuf and United generally" because such logic, therefore, would "preclude all claims of Hamed generally." *See* Order, p. 9. Hence, the Master determined that Yusuf's claim against Hamed for misappropriating the "going concern" value of Plaza Extra-West by

orchestrating the lease with KAC357, Inc. without any payment to the Partnership, is a viable claim that can be pursued and nothing in the Plan precludes such a claim.<sup>1</sup>

However, the Master also held that a single statement contained in Yusuf's very first proposed plan, which was never accepted or relied upon by the Court, and which was changed in subsequent iterations of Yusuf's proposed plans to ultimately propose a closed bid auction process in order to maximize values to the Partnership,<sup>2</sup> somehow operates to preclude or estop Yusuf from claiming the loss of the going concern value of Plaza Extra-West even though the Wind Up Order and Plan do not preclude the claim. The rationale seems incongruent—if the Plan *allows* Yusuf to make claims for loss of going concern value as to Plaza Extra-West and nothing in the Plan precludes the claim—how is it that an argument made by Yusuf before the adoption of the Plan (which argument was later abandoned) bars his claim? Because the Plan, which ultimately governs the liquidation process, does not preclude such a claim for loss of the going concern value at Plaza Extra-West—the mere arguments initially espoused by a party, which were raised early in the process and then abandoned before the Plan was adopted, cannot provide a valid basis to preclude the claim. The Order effectively holds that Yusuf is judicially estopped from claiming a loss of going concern value because he previously made an argument that all

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<sup>1</sup> The July 22, 2014 Order entered by Judge Brady denying Yusuf's motion seeking to nullify the lease with KA357 found that the lease was intrinsically fair to Plessen Enterprises, Inc. However, there was no finding that it was intrinsically fair to the Partnership or Yusuf.

<sup>2</sup> In both Yusuf's Comments, Objections and Recommendations Concerning The Court's Proposed Plan filed on October 21, 2014 (attached as **Exhibit 1** for the Master's convenience) and his Response To Hamed's Comments Concerning The Court's Proposed Wind Up Plan dated October 28, 2014, referenced at pages 2, 7 (n. 7), and 10 of the Order, Yusuf argued that the closed bid auction process was the best way to maximize value for the Partnership. The Master apparently found it significant that the later document "suggested a close bid sale for Plaza Extra-West without any discussion of his alleged change of position with regards to the 'going concern' value of Plaza Extra-West." Yusuf respectfully submits there is no requirement or need to "flag" the parties changing positions other than the comments contained in their filings and redlined plans. See particularly §8 of the redlined, proposed plan attached as Exhibit 3 to the October 28, 2014 filing.

three Plaza Extra Stores could not be sold as a going concern and later (according to the Master) did not sufficiently acknowledge that change in position. The Order, however, does not mention the judicial estoppel doctrine or apply its elements.

Judicial estoppel, in its most generic form, prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by that same party in an earlier proceeding. The precise elements necessary for the application of judicial estoppel vary, but in general, it will apply only when the two positions are clearly contradictory and when the first position has been accepted by a court, although success is not required. This doctrine is designed to protect the integrity of the courts, not the litigants. The V.I. Supreme Court held that:

the judicial estoppel doctrine will preclude a party from asserting a position on a question of fact or a mixed question of law and fact that is inconsistent with a position taken by that party in a previous judicial proceeding if the totality of the circumstances compels such a result. In conducting this inquiry, a court must focus on the impact that allowing the inconsistent claims would have on the judicial process, which may include considering the extent of the inconsistency (including any reasonable explanations that would harmonize both positions), whether the party has received an unfair advantage or benefit from asserting the inconsistent claims, and whether another court has already relied on the claim made in the first proceeding.

*Sarauw v. Fawkes*, 66 V.I. 253, 264–65, 2017 WL 77123, at \*6 (V.I. 2017).

Here, there are not separate judicial proceedings in which Yusuf has advocated one position (with success) and then advocated another contradictory position. This only involves a single case in which arguments (as opposed to purely factual positions) were made. Moreover, many courts have explicitly held that judicial estoppel should not be applied when a litigant has taken contradictory positions due to mistake or inadvertence. *See, e.g., Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002). Rather, judicial estoppel should be used only when a litigant is

“playing fast and loose with the courts,” and when intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. *Sarauw*, 66 V.I. 253, 264–65, 2017 WL 77123, at \*5. “Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.” *Id.* at \*7. The Virgin Islands Supreme Court “emphasize[d] that “[j]udicial estoppel is not a sword to be wielded by adversaries,” and “is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts.” *Id.* citing *Ryan Operations G.P. v. Santiam–Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996). In other words, judicial estoppel is not a “shortcut” to circumvent the ordinary fact-finding process, rather, the V. I. Supreme Court emphasized its “longstanding instruction ‘that the preference is to decide cases on their merits’ and ‘that any doubts should be resolved in favor of this preference.’” *Id.*

Here, the Master did not conduct a judicial estoppel analysis but nonetheless decided that Yusuf conceded or was estopped from asserting the claim as a result of earlier arguments, that the Master apparently found had not been fully abandoned. As Yusuf will show, he did abandon the position that the Plaza Extra Stores cannot be sold as a going concern.

Clearly, there is no adverse impact in allowing Yusuf to pursue the claim because the Plan contemplates that Yusuf (and Hamed) will be making claims against each other and the Partnership even after ownership of a particular store is transferred. In the Plan, the Court clearly rejected Yusuf’s proposal to subject Plaza Extra-West to a closed bid auction and instead allowed Hamed to give the going concern value to KAC357, Inc. upon payment of the inventory

and equipment as provided in the Plan. Yusuf's Claim Y-13 is completely consistent with the positions he was taking prior to and after the adoption of the Plan.

The Master seems to believe that Yusuf did not clearly abandon his earlier position that the "Plaza Extra Stores cannot be sold as a going concern" because he "never stated that he 'recognized that this position was incorrect' in the October 28, 2014 document [.]" Although Yusuf fails to understand the significance of this omission, he respectfully submits that the Master overlooked or misunderstood the arguments Yusuf had made that clearly demonstrate his position that Plaza Extra-West could be sold as a going concern. In his October 21, 2014 filing (Exhibit 1), Yusuf argued that the "Court's [October 7, 2014] proposed plan forecloses Hamed from acquiring the Tutu Park store and Yusuf from acquiring the West store, thus, unfairly excluding one partner from the opportunity of acquiring partnership assets while diminishing the prospect of maximizing the value of all partnership assets." *Id.* at p. 3. *See also* discussion at p. 8-12.

In Yusuf's Response to Hamed's Comments Concerning the Court's Proposed Wind-Up Plan dated October 28, 2014, he argued for a process which will capture this going concern value, to wit:

...if the Court is going to deviate from McCormick, it should adopt a plan that maximizes partnership value in a windup and sale. Bidding of the kind Hamed now proposes for Plaza Extra Tutu Park is the best way to accomplish that, but it should be applied to the West store as well, *albeit without the Hamed lease that tilts the tables, hands the Hameds the right to operate the store without paying up front for that right, and results in far less partnership value being realized upon windup.*

*See* October 28, 2014 Response at p. 6 and proposed plan attached thereto as Exhibit 3 at p. 6-7.

This is advocating for a process that will capture the going concern value of Plaza Extra-West.

Further, Yusuf previously argued that “Hamed’s suggestion that given the disputed lease, *only the inventory and equipment of Plaza Extra-West would be subject to bid plainly will not maximize partnership value.*” *Id.* at p. 2. Hence, Yusuf argued that ignoring the improper KAC357 lease fails to recognize the loss of the going concern value of Plaza Extra-West. Yusuf also argued:

Rather, both the Plaza Extra-West supermarket and the 16 acres on which it sits should be put up for bid by Yusuf and Hamed so, that *the value of this partnership asset is maximized and realized at the time of windup.*

*Id.* This is a description of the loss of the going concern value that is associated with the improper lease and Yusuf’s position that a wind up process which captures that value should be adopted.

Despite Yusuf’s arguments above to the contrary, the Plan entered by the Court<sup>3</sup> did *not* address the improper lease to KAC357 and simply provided for a means for Hamed to purchase the inventory and equipment at Plaza Extra-West and, upon payment, to assume full ownership and control of that store (but not, according to the Master, preclude claims for the going concern

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<sup>3</sup> The Master also incorrectly asserts that “Hamed and Yusuf *entered* into a Final Wind Up Plan...which was approved by the Court” and that the specific terms were mutually agreed upon. *See* Order at p. 2-3 and 11 (“When Hamed and Yusuf submitted the Final Wind Up Plan for the Court to approve”). This is not the case. Numerous submissions of various versions of proposed “wind up plans” were submitted by the parties and multiple responses and objections to specific terms were made. In its October 7, 2014 Order, the Court cobbled together a hybrid “wind up plan” picking and choosing different provisions and options and then ordered further comment and objections by the parties. A copy of that Order is attached as **Exhibit 2** for the Master’s convenience. Ultimately, after receiving comments from Hamed and Yusuf on October 21 and 28, 2014, the Plan was approved by the Court—some terms of which Yusuf supported and others which he advocated against. In fact, Yusuf sought to appeal from the Court’s July 22, 2014 Order concerning the lease to KAC357 and its Wind Up Order approving the Plan, but those appeals were later dismissed for lack of jurisdiction. *See Yusuf v. Hamed*, 2015 V.I. Supreme LEXIS 6 (Feb. 27, 2015).

value of Plaza Extra-West). Nothing in the Plan impacted the loss of going concern value and the claim was not precluded or conceded.<sup>4</sup>

Clearly, Yusuf was advocating for a means to maximize the value of the business operations of Plaza Extra-West.<sup>5</sup> Yusuf argued that KAC357's receipt of the 30-year lease operated to strip the on-going business operations away from the Partnership without just compensation—this is the very essence of going concern value. The Court ultimately adopted the Plan, which did not even mention the KAC357 lease, and allowed Hamed to purchase inventory and equipment, but leaving any other claims a partner possessed unaffected—including Yusuf's claims to the loss of the going concern value of Plaza Extra-West.

Hence, the Order fails to recognize the substance of Yusuf's earlier arguments in its holding that because "Yusuf suggested a close bid sale for Plaza Extra-West without any discussion of his alleged change of position with regards to the 'going concern' value of Plaza Extra-West," that Yusuf "has already conceded" that Plaza Extra-West "cannot be sold as a

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<sup>4</sup> It is noteworthy that the same sentence the Master relies upon for the proposition that "Yusuf has already conceded that Plaza Extra-West cannot be sold as a going concern" also applied to Plaza-Extra Tutu Park. Yet in his October 21 and 28, 2014 filings, Yusuf argued that notwithstanding the Court's proposed October 7, 2014 plan giving Yusuf the exclusive right to purchase the Partnership assets associated with that store, Tutu Park like Plaza Extra-West should be the subject of a closed bid auction between the partners. Obviously, in the Plan, the Court provided for such an auction of Tutu Park but not West. As the Master is well aware, at the April 30, 2015 auction of Tutu Park, Hamed "won" with a bid of \$4,050,000 plus the payment of \$220,000 in fees associated with the Tutu Park Ltd. litigation. Accordingly, this closed bid auction effectively valued a store (Plaza Extra Tutu-Park) with only 3 years left on its lease at \$8.1 million, which further supports Yusuf's Claim Y-13 for half of the \$8.7 million going concern value of Plaza Extra-West, a much larger and newer store.

<sup>5</sup> The closed bid auction process employed as to Plaza Extra-Tutu Park captured the going concern value of the store and Yusuf's request for such a process to be applied to the Plaza Extra-West was advocating for a process which would capture the going concern value. Hence, Yusuf did articulate a position which effectively and clearly differed from his earlier position on such valuations and thus, had not conceded that such a valuation could not be made.



going concern.” See Order, p. 10. This is clearly a mistake which overlooks the substance of the arguments raised by Yusuf and requires the Master to revisit the decision.

The very purpose of the procedural rules that afford a court the opportunity to revisit a ruling through reconsideration is to insure the consistency and integrity of the process as well as to preserve judicial resources and forestall unnecessary additional costs to the parties. *Castillo v. St. Croix Basic Services, Inc.*, 2010 WL 11504961, at \*4 (V.I. Super., 2010). “It is well-settled that a court has discretion to correct its own errors and spare appellate courts from the burden of unnecessary proceedings.” *Id.* citing *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986). Not reviewing the erroneous conclusions contained in the Order at this stage frustrates those goals for the orderly administration of claims.

### **CONCLUSION AND RELIEF REQUESTED**

For all of the foregoing reasons, Yusuf respectfully requests the Master to grant his motion for reconsideration and rule that Yusuf’s Claim – Y-13 for loss of the “going concern” value of Plaza Extra-West has not been conceded by Yusuf and should be allowed to proceed because the Wind Up Plan does not preclude the claim.

Respectfully submitted,

**DUDLEY, TOPPER AND FEUERZEIG, LLP**

**DATED:** December 6, 2018

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of December, 2018, I caused the foregoing **YUSUF'S MOTION FOR RECONSIDERATION OF NOVEMBER 14, 2018 ORDER**, which complies with the page and word limitations of Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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# EXHIBIT 1



Wind Up Partnership. The Yusuf Plan provided for a straight forward sale of all non-liquid partnership assets, consisting primarily of inventory and equipment, given the absence of commercial leases for Plaza Extra – East and Plaza Extra – West and the existence of a lease covering Plaza Extra – Tutu Park. On April 30, 2014, Hamed filed his plan for winding up the partnership (the “Hamed Plan”), which essentially provided for the conveyance of all non-liquid partnership assets to a start up company formed on April 22, 2014 by three of Hamed’s sons, KAC357, Inc. (the “New Hamed Company”). A critical “lynchpin”<sup>1</sup> of the Hamed Plan was the viability of a long term (30 year) lease between Plessen Enterprises, Inc. (“Plessen”) and the New Hamed Company, which was approved by Hamed and his son, as two of three acknowledged directors of Plessen, at a disputed meeting of directors on the morning of April 30, 2014. Finally, Yusuf and United Corporation (“United”) filed a plan for winding up the partnership (the “United/Yusuf Plan”), which provided for the sale of all non-liquid partnership assets to United after the unwinding and nullification of the purported lease from Plessen to the New Hamed Company. This plan was attached as Exhibit A to Yusuf’s and United’s Response to Surreply Regarding Dissolution Plans filed on June 16, 2014.

Instead of approving one of the competing plans or rejecting them all and sending Hamed and Yusuf back to the proverbial drawing board, the Court has taken the unusual measure of proposing its own plan, which attempts to make a Solomon like division of the non-liquid partnership assets amongst Hamed and Yusuf by tentatively approving the acquisition of the inventory, equipment and leasehold improvements of Plaza Extra – East and Plaza Extra – Tutu Park by Yusuf and Hamed’s acquisition of the inventory, equipment and leasehold

<sup>1</sup> See Hamed v. Yusuf, 2014 V.I. 1552, \*12 (Super. Ct. July 22, 2014) (this Court referred to the lease as the “lynchpin” of Plaintiff’s plan for winding up the Hamed-Yusuf partnership”).

improvements of Plaza Extra – West. While the Court might consider this proposed division of assets to be fair under the circumstances, as will be discussed in more detail below, the Court’s proposed plan is unfair to both partners because it arbitrarily decides which partner ends up with a particular store. What if, for example, the right to continue operations at Plaza Extra – Tutu Park was more valuable to Hamed given his sons’ recent opening of Moe’s Fresh Market in Red Hook and the potential for additional warehousing, inventory sharing, and economies of scale that having two stores on St. Thomas might provide? Similarly, what if the right to continue operations at Plaza Extra – West was more valuable to Yusuf given the synergies and symbiotic relationship already developed between Plaza Extra – East and Plaza Extra – West over the past fourteen years (e.g., sharing shipping expenses, warehouse space, inventory, advertising expenses, vendors and suppliers, customers, and other operating procedures). The Court’s proposed plan forecloses Hamed from acquiring the Tutu Park store and Yusuf from acquiring the West store, thus, unfairly excluding one partner from the opportunity of acquiring partnership assets while diminishing the prospect of maximizing the value of all partnership assets.

While Yusuf respectfully submits that it makes practical sense for Hamed to acquire Plaza Extra – Tutu Park and for Yusuf to acquire Plaza Extra – West, if neither Hamed nor the Court approve of this proposed course of action, Yusuf recommends that the only fair and simple solution is for each partner to be able to bid on the acquisition of these two stores in an open bidding process to be supervised by the Master, as explained in greater detail below.

With these comments in mind, Yusuf will now address the correspondingly numbered sections and steps set forth at pages 2-7 of the Order.

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### Section 3: Liquidating Partner

Yusuf agrees with the Court's proposal that he serve as Liquidating Partner under the supervision of the Master. Yusuf recommends, however, that Section 3 of the proposed plan should read as provided below. Suggested additions are shown in bold, suggested deletions are shown by interlineation.

Yusuf shall be the Liquidating Partner with the exclusive right and obligation to wind up the partnership, pursuant to this Plan **and the provisions of V.I. Code Ann. tit. 26, § 173(c)**, under the supervision of the Master. No person other than the Liquidating Partner may act on behalf of the Partnership, represent the Partnership in any official capacity or participate in management or control of the Partnership, for purposes of winding up its business or otherwise. The Liquidation Partner's rights and obligations relative to the winding up, subject to the review and supervision of the Master, shall be deemed to have commenced as of April 25, 2013, the date of the issuance of the Preliminary Injunction.

Yusuf proposes to add the citation to V.I. Code Ann. tit. 26, § 173(c) simply to provide greater clarity concerning his authority as the Liquidating Partner. Yusuf proposes to delete the last sentence because it is unclear how the rights and obligations of the Liquidating Partner could have commenced as of April 25, 2013 or at any time before his actual appointment.

Hamed will no doubt object to Yusuf's role as Liquidating Partner by dredging up his arguments that he should be the Liquidating Partner and that the provisions of V.I. Code Ann. tit. 26, § 74(b)(2) somehow preclude Yusuf from serving as Liquidating Partner. It is undisputed that when Hamed retired in 1996, he ceased all work at the Plaza Extra Stores. Even before he retired, it is undisputed that Hamed's role was limited to supervising the warehouse at one store – Plaza Extra - East – whereas Yusuf has been in charge of all three stores from the inception of the business relationship to date. Moreover, Hamed is 79 years old, suffers from poor health, and has claimed under oath that he cannot read English well and cannot understand questions put

to him in English without a translator. Clearly, Hamed is simply not qualified or capable of serving as Liquidating Partner. To the extent that Hamed seeks to be appointed the Liquidating Partner so he can delegate the rights and obligations of that position to his son, Waleed, Yusuf has already shown why that is not an option. See Defendants' Response To Surreply Re Dissolution Plans (the "Response") filed on June 16, 2014 at p. 7-9.

Yusuf has already demonstrated why he is not conflicted from serving as Liquidating Partner. See Defendants' Reply To Plaintiff's Response To Motion To Appoint Master For Judicial Supervision Of Partnership Winding Up Or, In The Alternative, To Appoint Receiver To Wind Up Partnership filed on May 19, 2014 at p. 5-7 and Response at p. 5-6. Hamed's argument that V.I. Code Ann. tit. 26, § 74(b)(2) somehow precludes Yusuf's designation as Liquidating Partner also ignores the provisions of subsection (e) of the same statute, which provide: "A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." Any concerns regarding Yusuf's purported conflicts<sup>2</sup> are adequately addressed by the appointment of the Master, who will supervise the Liquidating Partner's actions in winding up the partnership under an approved wind up plan. Finally, any argument by Hamed that the role of Liquidating Partner can be subsumed under the Master's judicial supervision duties would be wholly misplaced. This Court's September 18, 2014 order appointed the Honorable Edgar D. Ross as

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<sup>2</sup> On September 25, 2014, Hamed filed a two page Motion to Show Cause why Yusuf should not be held in contempt for purportedly violating the April 25, 2013 preliminary injunction by taking action to prevent supermarket operating funds from being used to pay Waleed Hamed without Yusuf's consent. This terse motion was not supported by any declaration. Yusuf filed his Opposition And Cross-Motion For Similar Relief on October 1, 2014, which was supported by Yusuf's detailed declaration. Hamed did not file a reply/response to this Opposition And Cross-Motion. On October 15, 2014, Hamed filed another Motion to Show Cause that contained four sentences and was again unsupported by any declaration or authenticated, admissible evidence. Although Yusuf will once again demonstrate the baselessness of this latest motion, he expects that these frivolous motions will be cited as further grounds for this Court not to appoint him as Liquidating Partner.



Master “to direct and oversee the winding up of the Hamed-Yusuf Partnership.” As noted by the Court in its order of August 28, 2014, both Hamed and Yusuf “have consented to have a master appointed to perform certain duties regarding the wind-up of the Hamed-Yusuf Partnership.” This Court has clearly chosen to provide “judicial supervision of the winding up,” as contemplated by V.I. Code Ann. tit. 26, § 173(a), via a Master who will supervise or oversee the Liquidating Partner. The very concept of supervision requires that there be a supervisor to oversee the person to be supervised. The Master cannot logically perform both roles at the same time. Only a receiver could effectively perform the functions of the Liquidating Partner and Hamed has consistently resisted the appointment of a receiver.

#### **Section 8: Plan of Liquidation and Winding Up**

##### **1) Plaza Extra – East**

Yusuf has no objections to this section, which should be promptly implemented. Unlike the partnership assets associated with Plaza Extra – Tutu Park and Plaza Extra – West, the inventory, equipment, and leasehold improvements at Plaza Extra – East cannot, as a practical matter, be acquired by Hamed since United owns the premises occupied by Plaza Extra – East and is unwilling to lease these premises to Hamed or a company owned or controlled by Hamed or his sons. Consequently, it makes obvious practical sense that Yusuf acquire Hamed’s 50% interest in these assets.

Yusuf notes that even though both partners simply referred to “inventory” and “equipment,” see, e.g., United/Yusuf Plan at § 8(B)(1) and Hamed Plan at § 8(B)(3) (Step 4), the Court has added the term “leasehold improvements.” Some clarification will be needed as to how, if at all, “leasehold improvements” may differ from “equipment,” as used by Hamed and Yusuf. Clarification will also be needed to determine what will happen if Yusuf or Hamed is

unwilling to pay the value of equipment and leasehold improvements as determined by the appraiser selected by the Master. If, for example, the partners cannot agree on the value of the equipment and leasehold improvements for Plaza Extra – East and the appraiser selected by the Master values this property at \$400,000, meaning Hamed's ½ interest is worth \$200,000, if Yusuf is unwilling to pay more than \$150,000, what will happen? Yusuf submits that unless Hamed is prepared to pay at least \$150,000 plus the cost of removing such property and immediately repairing any damages caused by such removal, Yusuf should be able to acquire these assets for \$150,000. Finally, it should be clarified that for each store, the purchasing partner is only required to pay one half of the landed cost of inventory and the depreciated value of the equipment and leasehold improvements.

Yusuf anticipates that Hamed will attempt to impede the Court's proposed disposition of the Plaza Extra – East by claiming that an acre purchased in part with insurance proceeds received after the store burned down in 1992 somehow belongs to the partnership. Yusuf addressed this claim in his Response at p. 11-12. This land has not only been titled in United's name for decades, it is undisputed that rent for this acre was included in the \$5,408,806.74 paid on February 7, 2012 covering rent for the period from May 5, 2004 to December 31, 2011. If the partnership was the legal or equitable owner of this acre, why was rent paid to United for its occupancy? In any event, this vague and disputed claim can be asserted by Hamed as a part of his accounting claims. It certainly should not impede the disposition of Plaza Extra – East in any way.

**Section 4 and Step 4**

**2) Plaza Extra – Tutu Park**

Yusuf submits that the Court apparently overlooked the need to address what happens to the “Tutu Park Litigation,” as defined at § 1.35 of the United/Yusuf Plan. Such litigation should be included in the assets associated with that store. Otherwise, there is no rationale for requiring Yusuf to “reimburse the Partnership for 50% of the reasonable costs and attorneys’ fees incurred to date in the Tutu Park Litigation,” as provided in the Court’s proposed plan. The partnership assets being sold in connection with Plaza Extra – Tutu Park should consist of the leasehold interest where the store is located, the inventory, equipment, leasehold improvements at such store, and the Tutu Park Litigation.

Yusuf submits that it is fundamentally unfair to arbitrarily assign Plaza Extra – Tutu Park and Plaza Extra – West to particular partners without careful consideration of the surrounding circumstances affecting each store’s operations. It should not be forgotten that Hamed has previously informed the Court that “the Hameds’ representatives discussed this scenario [whether the landlord will allow the Hameds to take over the Tutu Park lease] with the landlord’s representatives before filing their plan and have full confidence that this can happen.” See Plaintiff’s Surreply Re Dissolution Plans filed May 27, 2014 at p. 5.<sup>3</sup> Within the past year, Hamed’s sons have developed a new store in Red Hook called Moe’s Fresh Market. With the very recent opening of this new store, it makes practical sense for Hamed to acquire the Plaza Extra – Tutu Park assets in order to provide an opportunity for sharing shipping expenses, warehouse space, inventory, vendors and suppliers, and other operating procedures to create an

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<sup>3</sup> Under the terms of the Tutu Park lease, the landlord could not unreasonably withhold its consent to an assignment anyway.

economy of scale. Hamed's acquisition of the Tutu Park store, with Yusuf acquiring Plaza Extra – West, as provided below, would also help further separate – by island – the supermarket operations of Hamed and Yusuf, which will significantly reduce the prospect of future conflict between their families. In the event Hamed is the eventual purchaser of Plaza Extra – Tutu Park, Hamed and Yusuf must cooperate in facilitating any necessary assignments, cancellation of personal guarantees, and substitution of parties in the pending litigation.

### 3) Plaza Extra – West

Yusuf vigorously objects to this proposed plan provision. Although the Court does not expressly deal with the continued viability of the purported lease between Plessen and the New Hamed Company, this proposed plan provision is apparently premised on the unstated assumption that there is a valid lease covering the premises occupied by the Plaza Extra – West store. Yusuf has filed a Motion for Reconsideration of this Court's July 22, 2014 Order denying his motion to nullify the results of the April 30, 2014 special meeting of the Board of Directors of Plessen, which included the approval of the lease that serves as the acknowledged "lynchpin" of Hamed's Plan. That Motion for Reconsideration is fully briefed and awaiting disposition.<sup>4</sup> If the Court denies Yusuf's Motion for Reconsideration, he intends to appeal from that order and seek a stay of the implementation of any plan premised on such lease.

Yusuf respectfully submits that the only fair way to deal with the assets of Plaza Extra – West is to put the parties back into the same positions they were in before the disputed April 30, 2014 special meeting at which the disputed lease to the New Hamed Company was approved by Hamed and his son. Neither Hamed nor Yusuf should be able to burden the other or their

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<sup>4</sup> Yusuf's Reply Brief In Support of Motion For Reconsideration filed on August 29, 2014 provides a comprehensive summary of the arguments why the Court should reconsider and vacate its July 22, 2014 order.

mutually owned company, Plessen, with a long term lease that effectively condemns these warring families to continue dealing with each other for another 30 years. As contemplated in § 8(B)(1)(c) of the United/Yusuf Plan, the Court should provide for Yusuf or United to purchase an approximately 16 acre tract of land subdivided from a larger tract owned by Plessen on which Plaza Extra – West is located, along with the associated inventory, equipment, and leasehold improvements. The parties had previously contemplated this subdivision as shown on the July 13, 2012 preliminary surveys of this subdivided parcel (the “Plaza West Parcel”), attached as Exhibit A. The market value and purchase price of the Plaza West Parcel should be established by the average appraised value determined by appraisers selected by each partner, and a third appraiser selected by the appraisers selected by the partners. Hamed should receive the purchase price, except that Plessen should receive \$10.00 from the purchase price as consideration for such conveyance. Hamed and Yusuf should split the stamp taxes and other costs of transfer. In the event Yusuf becomes the purchaser of Plaza Extra – West, either through the process described in this paragraph or in the bidding process described below, Hamed should be required to take such action as necessary to cancel and discharge of record any leases or other agreements affecting the Plaza West Parcel.

If for any reason Hamed or this Court are unwilling to approve Yusuf’s suggested disposition of Plaza Extra – Tutu Park and Plaza Extra – West, the only fair and simple solution for each partner to have an equal opportunity to acquire these stores and simultaneously maximize the value of these important partnership assets is to implement an open bidding process to be supervised by the Master. In order to make this bidding process fair and truly competitive, the Court must squarely address the validity of the lease from Plessen to the New Hamed Company in light of Yusuf’s Motion for Reconsideration. Obviously, unless the Motion

for Reconsideration is granted and the parties are put back into the positions they were in before the lease was improvidently approved, Hamed will have an unfair competitive advantage in acquiring Plaza Extra – West because Yusuf would have little or no incentive to bid on property that is subject to a 30 year lease with the Hameds.

Yusuf submits that the Master should convene a meeting at which Hamed, Yusuf, and any representative they choose will appear and be prepared to bid for Plaza Extra – Tutu Park and Plaza Extra – West. At such meeting, the Master will direct one partner to open the bidding for Plaza Extra – Tutu Park and the other partner to open bidding for Plaza Extra – West including the Plaza West Parcel. Each partner shall respond to the opening bid of the other partner by either accepting such offer or by increasing the amount offered by a least \$500,000 per store. This process will continue at \$500,000 increments per store until the Master has determined that Hamed and Yusuf have agreed on the purchase or sale of Plaza Extra – Tutu Park and Plaza Extra – West.

The partnership assets being sold in connection with Plaza Extra – Tutu Park consists of the leasehold interest where such store is located, the inventory, equipment, and leasehold improvement at such store, and the Tutu Park Litigation. The bidding for Plaza Extra – Tutu Park should be for the combination of the leasehold interest, equipment, leasehold improvements, and Tutu Park Litigation plus 50% of the landed cost of the Plaza Extra – Tutu Park inventory.

The bidding for Plaza Extra – West should be for the Plaza West Parcel inclusive of all improvements and equipment located on such premises plus 50% of the landed cost of the Plaza Extra – West inventory. Whoever ends up purchasing the Plaza West Parcel should be entitled to a recordable easement for the existing sewage line servicing Plaza Extra – West provided the

owner of the servient parcel, Plessen, shall also have the right to tap into such sewer line.

The foregoing process avoids continued litigation regarding the hotly contested lease to the New Hamed Company, time consuming and expensive appeals, and maximizes the value of the Plaza Extra -- Tutu Park and Plaza Extra -- West stores to the partnership.

\* \* \*<sup>5</sup>

### 5) Plaza Extra Name

Yusuf objects to Hamed's ownership and operation of Plaza Extra -- West for all the reasons set forth above. In no event should Hamed be allowed to operate under the trade name "Plaza West." Given the close interrelationship between the two St. Croix stores for the last fourteen years in dealing with vendors, suppliers, and customers, allowing Hamed to use "Plaza West" as a trade name would create significant confusion. If Yusuf purchases Plaza Extra -- West, he should be allowed to continue using the "Plaza Extra" name in the operation of the two St. Croix stores. If Hamed purchases Plaza Extra -- Tutu Park, he should be allowed to continue using the Plaza Extra name in connection with that store provided the location of the store is always identified with the use of the trade name.

\* \* \*

### Step 3: Continued Employment of Employees

The Court's proposed plan provides:

Yusuf and Hamed, and their respective successors, shall attempt to keep all employees of the Plaza Extra Stores fully employed. Although approval of this plan should avoid any need to comply with provisions of the Virgin Islands Plant Closing Act, to the extent necessary, Yusuf and Hamed, and their respective successors, shall comply with the PCA for any affected employees of the Plaza Extra Stores as a result of the

<sup>5</sup> Omission of a section or step of the Court's proposed plan simply means Yusuf has no comments, objections or recommendations regarding same.

winding up and closure of the Partnership business.

These provisions suggest that Hamed has some continuing role to work with Yusuf as the Liquidating Partner. This would be inconsistent with Section 3 of the proposed plan, which makes Yusuf the Liquidating Partner with the “exclusive right and obligation to wind up the partnership pursuant to this Plan under the supervision of the Master.” Furthermore, this language suggests that Yusuf would be required to continue the employment of the Hamed sons in the Plaza Extra – East store, notwithstanding the provisions of § 8(1) of the Court’s proposed plan that upon payment for the inventory, equipment and leasehold improvements, Yusuf “will assume full ownership and control and may continue to operate the business Plaza Extra – East without any further involvement of Hamed or the Hamed sons . . . .”

**Step 4: Liquidation of Partnership Assets**

Although Yusuf has no objection to conferring with Hamed to inventory all “non-Plaza Extra Stores Partnership Assets,” whatever they may be,<sup>6</sup> this provision may be misconstrued to suggest that Yusuf, as the Liquidating Partner, must secure Hamed’s agreement before he can implement any plan to liquidate such assets. This provision should be clarified so that it is consistent with Section 3 of the Court’s proposed plan and cannot be misconstrued to allow Hamed’s interference with the Liquidating Partner’s exclusive right to wind up the partnership under the supervision of the Master.

\* \* \*

Yusuf recommends adding another Step to the Court’s proposed plan similar to § 8(B)(3) (Step 4) of the United/Yusuf Plan entitled “Use of Available Cash and Encumbered Cash To

<sup>6</sup> All of the competing plans used the same balance sheet reflecting complete agreement on what comprised the partnership assets. See Balance Sheets attached as Exhibit B to all three competing plans.



Purchase Partnership Assets.” Yusuf suggest the following language:

This Plan is conditioned upon the ability of Hamed and Yusuf to use their 50% interest in Available Cash and Encumbered Cash to purchase the non-liquid Partnership Assets. Any such use shall be subject to the approval of the Court and, to the extent necessary, the District Court.

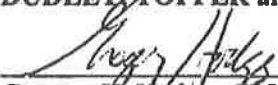
Yusuf respectfully requests this Court to take into consideration his foregoing comments, objections, and recommendations and to modify the Court’s proposed plan accordingly.

Respectfully submitted,

**DUDLEY TOPPER and FEUERZEIG, LLP**

Dated: October 21, 2014

By:

  
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Attorneys for Fathi Yusuf and United Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of October, 2014, I caused the foregoing **FATHI YUSUF'S COMMENTS, OBJECTIONS AND RECOMMENDATIONS CONCERNING THE COURT'S PROPOSED PLAN** to be served upon the following via e-mail:

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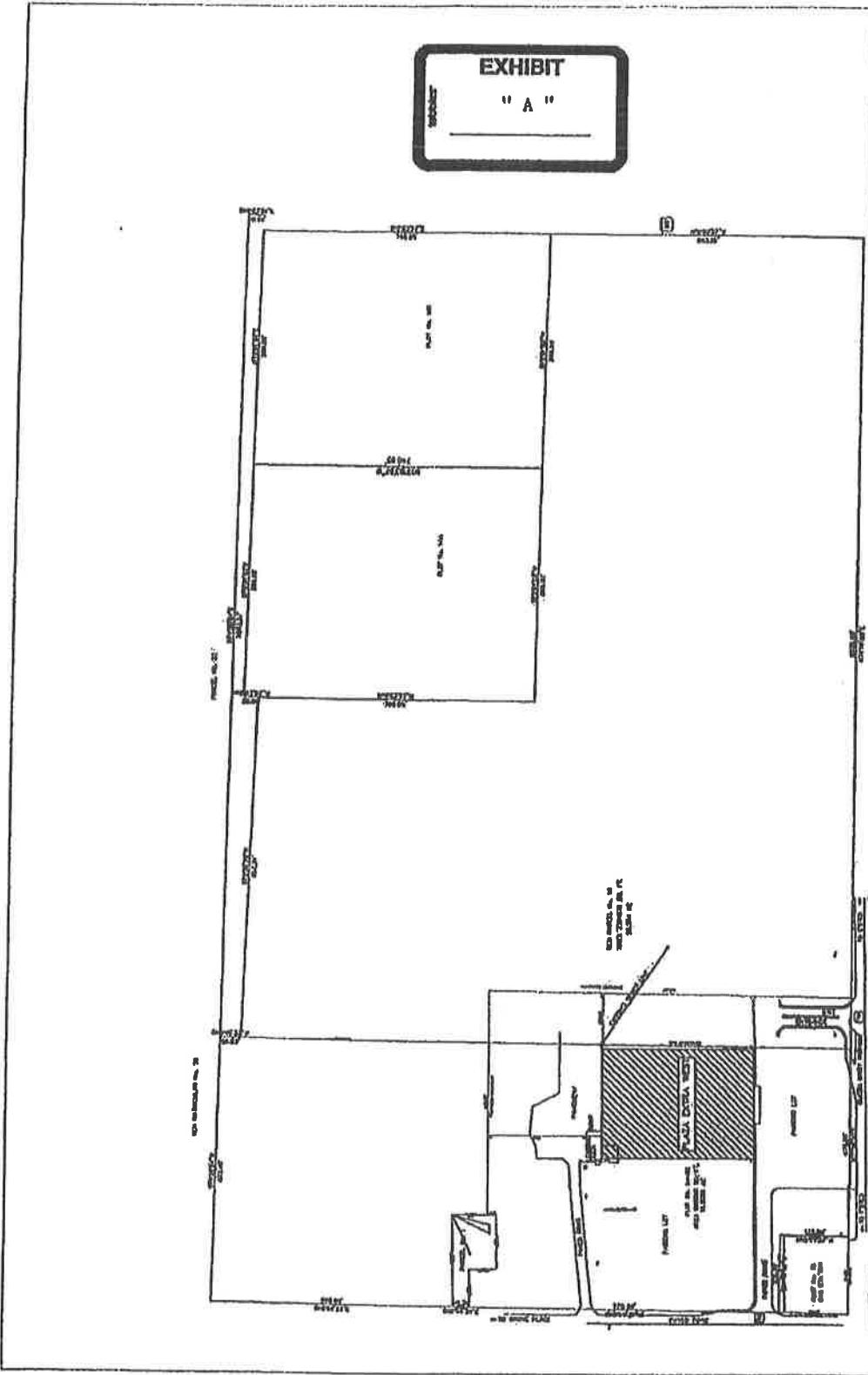
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Michelle Barker

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**EXHIBIT**  
" A "



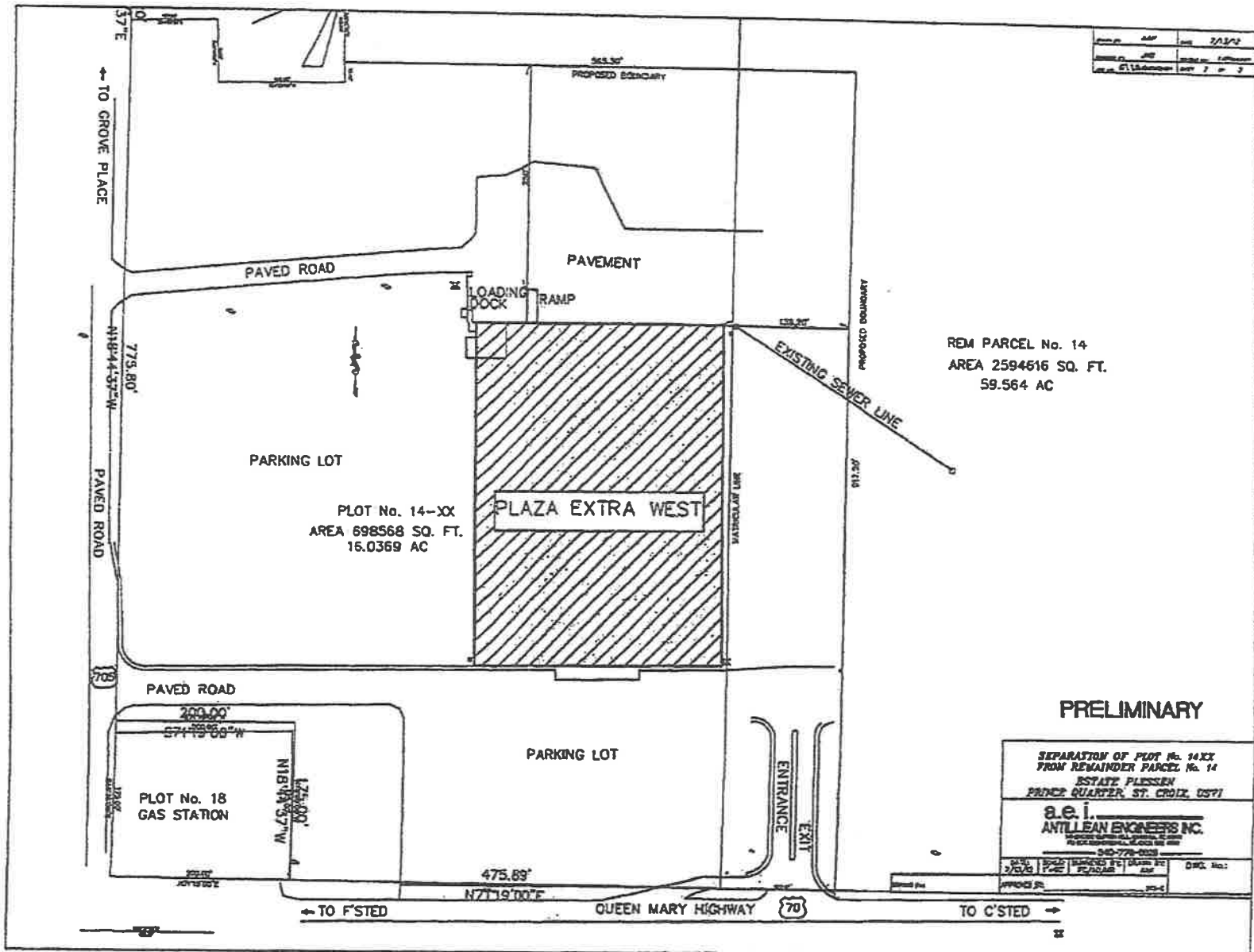
SEPARATION OF PLOT NO. 1421  
FROM REMAINDER PAREIL NO. 14  
ESTATE PLESSIN  
PRINCE RUAHETA, ST. CROIX, IS71

**B.C. ANTHEAN ENGINEERS INC.**  
REGISTERED PROFESSIONAL ENGINEERS  
NO. 1778-8289  
1001 P.O. BOX 1001  
PRINCE RUAHETA, ST. CROIX, IS71

**PRELIMINARY**

DATE	BY	REVISION

SCALE: 1" = 100'  
DATE: 10/15/2011  
DRAWN BY: J. ANTHEAN  
CHECKED BY: J. ANTHEAN  
PROJECT NO.: 11-001



14 OCT 21 14 52

STATION 1000

14 OCT 21

# EXHIBIT 2



## **Proposed Wind Up Plan**

### **Section 1: Definitions**

1.18 “Liquidating Partner” means Yusuf.

### **Section 3: Liquidating Partner**

Yusuf shall be the Liquidating Partner with the exclusive right and obligation to wind up the partnership pursuant to this Plan under the supervision of the Master. No person other than the Liquidating Partner may act on behalf of the Partnership, represent the Partnership in any official capacity or participate in management or control of the Partnership, for purposes of winding up its business or otherwise. The Liquidation Partner’s rights and obligations relative to the winding up, subject to the review and supervision of the Master, shall be deemed to have commenced as of April 25, 2013, the date of the issuance of the Preliminary Injunction.

### **Section 8: Plan of Liquidation and Winding Up**

#### **1) Plaza Extra-East**

Yusuf will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-East: the inventory at landed cost and the equipment and leasehold improvements at their depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. Upon payment for such inventory, equipment and leasehold improvements, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-East without any further involvement of Hamed or the Hamed sons, and free and clear of any claims or interest of Hamed.



2) Plaza Extra-Tutu Park

Yusuf will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-Tutu Park: the inventory at landed cost and the equipment and leasehold improvements at their depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. Yusuf will reimburse the Partnership for 50% of the reasonable costs and attorneys' fees incurred to date in the Tutu Park litigation. Upon payment for such inventory, equipment, leasehold improvements and attorneys' fees, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-Tutu Park without any further involvement of Hamed or the Hamed sons, and free and clear of any claims or interests of Hamed.

3) Plaza Extra-West

Hamed will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-West: inventory at landed cost and the equipment and leasehold improvements at their depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. Upon payment for such inventory, equipment and leasehold improvements, Hamed will assume full ownership and control and may continue to operate Plaza Extra-West without any further involvement of Yusuf, Yusuf's sons or United and free and clear of any claims or interests of Yusuf or United.

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 his designee's name.

5) Plaza Extra Name

Yusuf shall own and have the right to use the trade name "Plaza Extra" in the operation of Yusuf's Plaza Extra stores. Hamed will operate Plaza Extra-West under the trade name "Plaza West."

Steps to Be Taken for the Orderly Liquidation of the Partnership

Step 1: Budget for Wind Up Efforts

The Liquidating Partner proposes the Wind Up Budget (Exhibit A) for the Wind Up Expenses. Such expenses include but are not limited to, those incurred in the liquidation process, costs for the continued operations of Plaza Extra Stores during the wind up, costs for the professional services of the Master, costs relating to pending litigation in which Plaza Extra and/or United d/b/a/ Plaza Extra Stores is named as a party, and the rent to be paid to the landlords of Plaza Extra-East and Plaza Extra-Tutu Park.

Step 2: Setting Aside Reserves

The sum of Ten Million Five Hundred Thousand Dollars (\$10,500,000) shall be set aside in a Liquidating Expenses Account to cover the Wind Up Expenses as set out in the Wind Up

Budget with a small surplus to cover any miscellaneous or extraordinary Wind Up expenses that may occur at the conclusion of the liquidation process. Such Account shall be held in trust by the Liquidating Partner under the supervision of the Master. The Liquidating Partner shall submit to Hamed and the Master each month a reconciliation of actual expenditures against the projected expenses set forth in Exhibit A. Unless the Partners agree or the Master orders otherwise, the Liquidating Partner shall not exceed the funds deposited in the Liquidated Expenses Account.

#### Step 3: Continued Employment of Employees

Yusuf and Hamed, and their respective successors, shall attempt to keep all employees of the Plaza Extra Stores fully employed. Although approval of this plan should avoid any need to comply with the provisions of the Virgin Islands Plant Closing Act, to the extent necessary, Yusuf and Hamed, and their respective successors, shall comply with the PCA for any affected employees of the Plaza Extra Stores as a result of the winding up and closure of the Partnership business. Any severance payments due to the employees determined in accordance with the PCA shall be paid by the Master out of the Claims Reserve Account.

#### Step 4: Liquidation of Partnership Assets

The Liquidating Partner shall promptly confer with the Master and Hamed to inventory all non-Plaza Extra Stores Partnership assets, and to agree to and implement a plan to liquidate such assets, which shall result in the maximum recoverable payment for the Partnership.

#### Step 5: Other Pending Litigation

The pending litigation against United set forth in Exhibit C arises out of the operation of the Plaza Extra Stores. As part of the wind up of the Partnership, the Liquidating Partner shall

undertake to resolve those claims in Exhibit C, and to the extent any claims arise in the future relating to the operation of a Plaza Extra Store during the liquidation process, within the available insurance coverage for such claims. Any litigation expenses not covered by the insurance shall be charged against the Claims Reserve Account.

**Step 6: Distribution Plan**

Upon conclusion of the Liquidation Process, the funds remaining in the Liquidation Expenses Account, if any, shall be deposited into the Claims Reserve Account. Within 45 days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan for the funds remaining in the Claim Reserve Account. Thereafter, the Master shall make a report and recommendation of distribution for the Court for its final determination. Nothing herein shall prevent the Partners from agreeing to distribution of Partnership assets between themselves rather than liquidating assets by sale and distributing proceeds.

**Step 7: Additional Measures to Be Taken**

- a) Should the funds deposited into the Liquidating Expenses Account prove to be insufficient, the Master shall transfer from the Claims Reserve Account sufficient funds required to complete the wind up and liquidation of the Partnership, determined in the Master's discretion.
- b) All funds realized from the sale of the non-cash Partnership Assets shall be deposited into the Claims Reserve Account under the exclusive control of the Master.

- c) All bank accounts utilized in the operation of the Partnership business shall be consolidated into the Claims Reserve Account.
- d) All brokerage and investment accounts set forth in Exhibit D shall be turned over to the Master as part of the Claims Reserve Account.
- e) Any Partnership Assets remaining after the completion of the liquidation process shall be divided equally between Hamed and Yusuf under the supervision of the Master.

The Court submits the foregoing to the Parties and solicits comments, objections and recommendations revisions and additions regarding the proposed wind up plan.

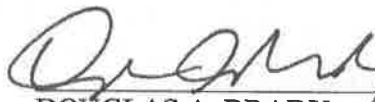
Therefore, it is

ORDERED that the Parties will meet and confer with the Master FORTHWITH relative to the foregoing proposed plan. It is further

ORDERED that each Party shall have fourteen (14) days from the entry of this Order within which to submit his comments, objections and recommendations. It is further

ORDERED that each Party may file a response to the filing of the other Party within seven (7) days from receipt of the other Party's filing.

Dated: October 7, 2014

  
DOUGLAS A. BRADY  
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE  
Acting Clerk of the Court

By:   
Court Clerk Supervisor