SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff/Counterclaim Defendant*, vs. **FATHI YUSUF** and **UNITED CORPORATION** *Defendants and Counterclaimants*. vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.**, *Counterclaim Defendants*,	**Case No.: SX-2012-CV-370** **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** JURY TRIAL DEMANDED
WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,* vs. **UNITED CORPORATION,** *Defendant.*	Consolidated with **Case No.: SX-2014-CV-287**
WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff* vs. **FATHI YUSUF**, *Defendant.*	Consolidated with **Case No.: SX-2014-CV-278**
FATHI YUSUF, *Plaintiff*, vs. **MOHAMMAD A. HAMED TRUST***, et al,* *Defendants.*	Consolidated with **Case No.: ST-17-CV-384**
KAC357 Inc., *Plaintiff*, vs. **HAMED/YUSUF PARTNERSHIP,** *Defendant.*	Consolidated with **Case No.: ST-18-CV-219**

HAMED'S *EXPEDITED* MOTION TO COMPEL RE CLAIMS Y-2 & Y-4 -- RENT AND INTEREST ON BAYS 5 & 8 AT THE SION FARM LOCATION

I. INTRODUCTION

Fathi Yusuf's deposition is scheduled for January 21, 2019 as to this specific issue and the Special Master has ordered that dispositive motions be filed by February 20, 2019. It is impossible for Hamed to proceed without getting the responses described herein, at a minimum, from Fathi Yusuf. Thus, Hamed requests expedited processing of this motion by the Special Master on his receipt of the reply herein. The parties and the Special Master have agreed to the following schedule with regard to motions to compel:

Motions December 20, 2018

Oppositions 10 Days Later

Replies 5 Days Later

Court Disposition by Friday, January 18, 2019

This is either the fourth or fifth attempt by Yusuf to claim additional pre-2006 rents due – despite having been paid a $5 million rent settlement by Hamed and being awarded another $4.5 million for past rent by the Court (Brady, J.). This time, Yusuf alleges that there was an agreement for EXTRA payment for occasional use of Bays 5 and 8 at the Sion Farm location. This is despite the fact that a settlement check expressly for "Sion Farm" rent was cashed by Yusuf in settlement and the fact that the historical records show:

1. There is no such written agreement.
2. There were no such payments or invoices at the time.
3. There has been no acknowledgment as was the case with Bay 1.

Despite this, Yusuf has refused to answer 1 interrogatory and 2 RFPDs.

II. The Most Basic Possible Questions and Yusuf's Refusals to Answer

Hamed propounded the following interrogatory to Yusuf as #29 of the 50 allowed.

> Interrogatory 29 of 50, relates to Claim Y-2: "Rents for Bays 5 & 8."
>
> Please describe all facts related to this claim with reference to dates, documents, witnesses and **what facts, conversations, writings, communications or other information or documents that leads United to believe and assert that it had an agreement with Hamed to pay rent for Bays 5 and 8**. Include in your description the dates of the conversations, writings, communication or other documents, the place where these discussions or meetings took place and identify the participants to the discussions or meetings. Include in your response, but not limit to what facts, conversations, writings, communications or other information or documents that leads Yusuf to believe and assert that any consent for such an arrangement survived the bringing of a suit in September of 2012. (Emphasis added.)
>
> **Yusuf Response**:
>
> Defendants object to this Interrogatory because it is compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories under the JDSP and violates both the spirit and the terms of the JDSP limiting the number of interrogatory questions. Without waiving any objection to this Interrogatory, Defendants incorporate the Declaration of Fathi Yusuf dated August 12, 2014 attached as Exhibit 3 to the Defendants' Motion for Partial Summary Judgment on Counts IV, IX, and XII Regarding Rent, particularly paragraphs 21-25 thereof, as their response to this Interrogatory.

Similarly, Hamed propounded two RFPD's of 50 allowed – numbers 21 and 34. The first of these was a basic as imaginable:

> Request for the Production of Documents, 21 of 50, relates to Y-2: "Rent for Bays 5 & 8"
>
> With respect to Y-2, please provide all documents demonstrating a written agreement that Hamed or the Partnership agreed to pay rent for Bays 5 & 8, including any documents establishing the amount of rent, a signed lease agreement and any prior payments of rent on Bays 5 & 8, include but do not limit this to any writings after Hamed brought suit in September of 2012, that would show any such consent or agreement continued after that suit.

Yusuf's Response:

> Defendants submit that information responsive to this Request for Production is set forth in Fathi Yusuf's earlier declaration he explained that "[u]nder the business agreement between Hamed and me that I now describe as a partnership, profits would be divided 50-50 after deduction for rent owed to United, among other expenses" and that "[u]nder our agreement, I was the person responsible for making all decisions regarding when the reconciliation would take place" and that Yusuf had the discretion to determine when the reconciliation would take place. See August 12, 2014 Yusuf Declaration, p. 2.
>
> [Need to find out from Mr. Yusuf whether any prior payments were made as to Bays 5 and 8.]

The second RFPD on this subject was #34 – which is any evidence that suggests that such a rent was ever in existence, contemplated, discussed or otherwise mentioned:

> RFPDs 34 of 50:
> **SUBSTANTIALLY THE SAME AS YUSUF RFPD 9.** Please produce all documents relating to your claim that rent is due from the Partnership to occupying Bay 5 and Bay 8.
>
> **Yusuf's Response**:
>
> See Exhibit D - Declaration of Fathi Yusuf, attached to Yusuf's original Accounting Claims and Proposed Distribution previously served upon counsel for Hamed on September 30, 2016

Because none of these responses provided any information or documents, two Rule 37 letters were sent, **Exhibit 1 and Exhibit 2**. ***Yusuf agreed to supplement the responses***. After two requests for extensions of time in which to answer, on December 18, 2018 (two days before this motion to compel was due) Yusuf responded only with this:

> **1. Yusuf Claim Y-2 (for Rent for Bay 5&8), Hamed RTP 21, 34, Interrog. 29:** There are no additional documents responsive to this request beyond the Declaration of Fathi Yusuf dated August 12, 2014 attached as Exhibit 3 to the Defendant's Motion for Partial Summary Judgment on Counts IV, IX and XII Regarding Rent.

Finally, another Rule 37 conference was set for 11 a.m. on Thursday, December 20, 2018. Yusuf's counsel did not appear and did not provide any prior written or other notice of non-appearance (but did send an email more than an hour later requesting a change of date. However, the lack of time remaining until the deposition of Fathi Yusuf and the fact that Hamed had already given two extensions before receiving no additional responses, made this filing necessary.)

III. FACTS

This is a critical set of questions and involves MANY millions of dollars with interest as to which there has never been a single document or mention. The facts are critical.

A. On February 7, 2012, the Partnership paid the United Shopping Center $5,408,806.74. The memo on the check stated "Plaza Extra (Sion Farm) Rent." (**Exhibit 3**)

B. On May 17, 2013, Attorney Nizar DeWood, representing United Corporation, sent a letter to Attorney Holt stating that

> On behalf of United Corporation, the following is a notice of the value of rents due as follows:
>
> * * *
>
> Bay No. 5 May 1, 1994 through October 31, 2001
> 3,125 SQ. FT. at $12.00 6 years and 184 days Balance Due $243,904.00
>
> Bay No. 8 April 1, 2008 through May 30, 2013
> 6,250 SQ. FT. at $12.00 5 years and one month Balance Due $381,250.00
>
> These amounts are undisputed, and have been outstanding for a very long time - before 2012. This amount does not reflect the rent increase requested and noticed to Mohammed Hamed since January 1, 2012. We reserve our client's right for the additional rents

due and owing based on the rent increase after January 1, 2012. (**Exhibit 4**)

C. On May 22, 2012, Attorney Holt sent a letter to Attorney DeWood, responding on behalf of the Hameds that:

> 2. Bay No. 5 -The rent claimed for the time period between 1994 and 2001 is for vacant space was used without charge until a tenant could be located. Thus, there was never any agreement to pay rent for this space either. In fact, the rate your client is attempting to charge is grossly inflated as well. In any event, this claim is also barred by the statute of limitations.
>
> 3. Bay No. 8 -The rent claimed for this Bay was never agreed to, as the items stored there were removed from a space in a trailer where everything was just fine. Moreover, no one would agree to pay the amount you claim is due for warehouse storage, the fact that this amount is even being sought confirms that Fathi Yusuf should no longer be a partner in the Plaza Extra supermarkets, as it is a breach of the duty of good faith and fair dealing (that every partner owes the partnership) when you try to extort money from your own business. In any event, these items will be removed from Bay 8 to the second floor of the store since your client now wants to charge rent for this space. (**Exhibit 5**)

D. On December 23, 2013, defendants Fathi Yusuf and the United Corporation filed their answer and counterclaim in *Hamed v Yusuf*, SX-12-CV-370. Regarding the rents owed for Bays 5 and 8, the defendants alleged:

> **COUNT XII**
> **PAST RENT FOR RETAIL SPACES BAYS 5 & 8**
> * * *
> 180. United provided Plaza Extra - East with retail spaces Bay 5 & 8 for various time periods to increase the storage and capacity of Bay 1 (the main retail space where Plaza Extra-East is located).
> 181. Bay No. 5 (3,125 sq. ft. of retail space) was utilized for storage and quick access to various inventories used in the operations of Plaza Extra - East. Whether an internal expense or a debt of the Alleged Partnership, United is entitled to rent from May 1, 1994 through October 31, 2001 at rate of $12.00 per sq. ft.
> 182. Bay No. 8 (6,250 sq ft. of retail space) was utilized for the operations of Plaza Extra - East. Whether an internal expense or a

> debt of the Alleged Partnership, United is entitled to rent from April 1, 2008 through May 30, 2013 at a rate of $16.15 per sq. ft.
> 183. In the event that the Alleged Partnership is determined to exist, Hamed has refused to acknowledge his obligation to pay United the outstanding rent for Bays 5 and 8.
> 184. United, as the fee simple owner, is entitled to all unpaid rent for the use of Bays 5 and 8 in the amount of $793,984.38. (**Exhibit 6**)

E. On September 30, 2016, Yusuf filed his Accounting Claims and Proposed Distribution Plan in *Hamed v. Yusuf*, SX-12-CV-370. In it, he claimed that

> **2. Bays 5 and 8**
> Likewise, outstanding rent is due to United for Bays 5 and 8 of the United Shopping Plaza. These amounts were not adjudicated in the Rent Order and they remain an outstanding rent claim against the Partnership. The total amount due to United for unpaid rent for Bays 5 and 8 is $793,984.34. See the Yusuf Declaration at ¶¶ 21-25. (**Exhibit 7**)

F. The Yusuf declaration, ¶¶ 21-25, referenced in Yusuf's September 30, 2016 Accounting Claims and Proposed Distribution Plan, was signed on August 12, 2014. Paragraphs 21-25 of the declaration allege:

> 21. At periodic points in time, additional space was used by Plaza Extra-East for extra storage and staging of inventory. United has made demand for the rent covering the additional space actually occupied by Plaza Extra -East, but no payment has been received to date.
>
> 22. For the period from May 1, 1994 through July 31, 2001, Plaza Extra-East has occupied and owes rent for Bay 5 ("Bay 5 Rent"). The Bay 5 Rent is calculated by multiplying the square feet actually occupied (3,125) by $12.00 for 7.25 years. The total due for Bay 5 Rent is $271,875.00.
>
> 23. For the period from May 1, 1994 through September 30, 2002, Plaza Extra-East has occupied and owes rent for Bay 8 ("First Bay 8 Rent"). The First Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 for 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63.

> 24. For the period from May 1, 1994 through September 30, 2002, Plaza Extra-East has occupied and owes rent for Bay 8 ("Second Bay 8 Rent"). The Second Bay 8 rent is calculated by multiplying the square feet actually occupied (6,250) by $.15 for 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75.
>
> 25. The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38. (**Exhibit 8**)

G. On July 21, 2017, Judge Brady issued an order, Memorandum Opinion and Order Re Limitations on Accounting in in *Hamed v. Yusuf*, SX-12-CV-370. (**Exhibit 9**)

H. On October 30, 2017, Yusuf filed his Amended Accounting Claims Limited to Transactions Occurring on or After September 17, 2006 in *Hamed v. Yusuf*, SX-12-CV-370. In it, he did not revise his request for payment of rents for Bay 5 and Bay 8, even though both alleged rent obligations occurred prior to September 17, 2006.

> **2. Bays 5 and 8**
> Likewise, outstanding rent is due to United for Bays 5 and 8 of the United Shopping Plaza. These amounts were not adjudicated in the Rent Order and they remain an outstanding rent claim against the Partnership. The total amount due to United for unpaid rent for Bays 5 and 8 is $793,984.34. See the Yusuf Declaration at ¶¶ 21-25.
>
> **Disputed/Undisputed, Ripe for Determination or Discovery Needed:** Although this debt is disputed, it is fully briefed and it is ready for determination by the Master. (**Exhibit 10**)

I. On May 15, 2018, Fathi Yusuf admitted that there was no written agreement between Hamed and Yusuf after the date that Hamed sued Yusuf in 2012 that the Partnership would pay rent on Bays 5 & 8. (**Exhibit 11**). Nor has Yusuf alleged any affirmation by Hamed as existed with regard to Bay 1.

IV. Argument

This is a motion to compel based on a Hamed Revised Claim and this Motion to Compel is submitted pursuant to the *Joint Discovery and Scheduling Plan* of January 29, 2018.

Hamed cannot defend against this claim without information. THIS IS A YUSUF CLAIM. Yusuf will not answer interrogatories. Yusuf says there are no documents.

VI. Conclusion

Fathi Yusuf's deposition is scheduled for January 21, 2019 in this matter and the Special Master has ordered that dispositive motions be filed by February 20, 2019. It is impossible for Hamed to proceed without getting the above answers, at a minimum, from Fathi Yusuf.

Dated: December 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2018, I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:**Hon. Edgar Ross**
Special Master
% edgarrossjudge@hotmail.com

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CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)

This document complies with the page or word limitation set forth in Rule 6-1(e).

Exhibit 1

CARL J. HARTMANN III
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CHRISTIANSTED, VI 00820

TELEPHONE
(340) 719-8941

ADMITTED: USVI, NM & DC

KIMBERLY L. JAPINGA, (ADMITTED MI, DC)

EMAIL
CARL@CARLHARTMANN.COM

October 31, 2018

Charlotte Perrell, Esq. Via Email Only
DTF
Law House
St. Thomas, VI 00820

RE: Request for Rule 37 Conference re Claims Discovery Responses, Letter 2 of 2

Dear Attorney Perrell:

As discussed in the telephone conference three weeks ago, this is the second of two letters requesting a Rule 37 telephone conference regarding the Yusuf/United responses to the referenced discovery. The deficient discovery requests are separated into five categories. The first letter covered items 1-4, while this second letter deals with the remaining discovery responses that are just generally deficient.

1) KAC357, Inc. claims (Previously denied because of relevance – the case has since been filed separately and then consolidated),
2) Clams requiring John Gaffney's assistance (previously denied because Yusuf filed a motion seeking to have these transferred to Part-A, Gaffney Analysis, but that having since been denied),
3) Claims response pending determination of Yusuf's Motion to Strike (which has since been denied),
4) Claims responses where Yusuf indicated further information or supplementation would be forthcoming – but nothing has been received yet, and

5) Claim discovery responses that are generally deficient.

EXHIBIT
1

Civ. P. 26(b)(2)(C)(iii). The issues to be resolved in this case relate to the dissolution of the Partnership and the associated accounting as to historical withdrawals. Various family members of the Hamed and Yusuf families were defendants in certain criminal cases involving this case of which all parties are well aware. There are no issues currently pending to which this question would be even remotely relevant.

Deficiency for Interrogatory 28: Defendants failed to respond to the interrogatory at all. V.I. R. Civ. P. Rule 33(a)(2) states, in part: "[a]n interrogatory may relate to any matter that may be inquired into under Rule 26(b)." V.I. R. Civ. P. Rule 26(b) states, in part: "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." This interrogatory relates to Hamed's claim H-163.

Please explain in detail:

- Any criminal charges, convictions, plea agreements, or other criminal actions as to Fathi Yusuf for any entity which he controlled other than United Corporation.
- For each such event describe in detail, the dates involved, the police or other authority involved, the full description of the charges, the full description of the proceedings, the outcome, any restrictions imposed on Fathi Yusuf during or after - with a description of all relevant document and witnesses.

Interrogatory 29 of 50:

Interrogatory 29 of 50, relates to Claim Y-2: "Rents for Pays 5 & 8." Please describe all facts related to this claim with reference to dates, documents, witnesses and what facts, conversations, writings, communications or other information or documents that leads United to believe and assert that it had an agreement with Hamed to pay rent for Bays 5 and 8. Include in your description the dates of the conversations, writings, communication or other documents, the place where these discussions or meetings took place and identify the participants to the discussions or meetings. Include in your response, but not limit to what facts, conversations, writings, communications or other information or documents that leads Yusuf to believe and assert that any consent for such an arrangement survived the bringing of a suit in September of 2012.

Response:

Defendants object to this Interrogatory because it is compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories under the JDSP and violates both the spirit and the terms of the JDSP limiting the number of interrogatory questions.

Without waiving any objection to this Interrogatory, Defendants incorporate the Declaration of Fathi Yusuf dated August 12, 2014 attached as Exhibit 3 to the Defendants' Motion for Partial Summary Judgment on

Counts IV, IX, and XII Regarding Rent, particularly paragraphs 21-25 thereof, as their response to this Interrogatory.

Deficiency for Interrogatory 29: Defendants failed to respond to the interrogatory – the referenced Declaration of Fathi Yusuf dated August 12, 2014 does not include the following:

- Facts related to this claim that leads United to believe and assert that it had an agreement with Hamed to pay rent for Bays 5 and 8.
- Facts related to this claim that leads Yusuf to believe and assert that any consent for such an arrangement survived the bringing of a suit in September of 2012.
- For both items, include in your response what facts, writings, communications or other information or documents support your contention, including, with respect to any discussions or meetings, a description, the dates of any conversations, writings, communication or other documents, the place where these discussions or meetings took place and identify the participants to the discussions or meetings.

Interrogatory 30 of 50:
Interrogatory 30 of 50 relates to Y-12: "Foreign Accts and Jordanian Properties."

This interrogatory relates to Claim &-12: "Foreign Accts and Jordanian Properties." Please identify all foreign accounts and Jordanian properties that were funded or purchased with funds from the Plaza Extra supermarkets. For each such foreign account individually: include the name of the account, the account number, the name of the institution and its location, the date it was opened, how money generated by the Plaza Extra supermarkets got into the foreign account, the dates deposits and withdrawals were made from each account and the amounts, the date the last transaction on the account occurred, whether the account is active or closed. If open, provide the present balance and if closed, please identify the date the account closed and who closed it. For the Jordanian property, for each property individually please identify (in English) the date it was purchased, the name of the title holder, the property description, who presently owns the property, whether the purchase was in cash or was transferred from a bank, and how all funds generated or provided by Plaza Extra supermarkets were transferred for the purchase of the property (including amounts and dates of all such transactions).

Response:
Defendants object to this Interrogatory because it is compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories

All of the underlying documents supporting the allocations set forth in Exhibits 1-5 were produced via a flash-drive labeled as Exhibit J-1 and delivered to Counsel for Hamed on October 4, 2016, as part of the submission Yusuf s original Accounting Claims and Proposed Distribution.

Deficiency for RFPDs 33 of 50: We've examined Exhibit J-1 and there is no such allocation there. If this allocation is not supplied, Yusuf's claim must be dropped.

RFPDs 34 of 50:
SUBSTANTIALLY THE SAME AS YUSUF RFPD 9. Please produce all documents relating to your claim that rent is due from the Partnership to occupying Bay 5 and Bay 8.

Response:
See Exhibit D - Declaration of Fathi Yusuf, attached to Yusuf's original Accounting Claims and Proposed Distribution previously served upon counsel for Hamed on September 30, 2016.

Deficiency for RFPDs 34 of 50: Exhibit D is the calculation of interest on Bay 1 rent. If you are referring to Fathi Yusuf's August 12, 2014 declaration, primarily paragraphs 21-25, please so state and confirm that no other documents are applicable to claim Y-02.

RFPD 40 of 50:
Please produce any and all documents relating to gifts to Mafi Hamed and Shawn Hamed and/or their spouses at the time of their weddings to Yusuf daughters as to Fathi Yusuf or his spouse or his daughters seeking return, credit or offset in divorce proceedings.

Response:
Yusuf objects as to this Request on the grounds that "the proposed discovery is not relevant to any party's claim or defense." V.I. R. Civ. P. 26(b)(2)(C)(iii).

Deficiency for RFPDs 40 of 50: This is post 2006 claim that Hamed is making for funds Yusuf does not dispute were withdrawn by Yusuf from the Partnership. What the funds were used for does not negate the fact that this was a unilateral withdrawal from the Partnership which Hamed should be able to trace. Please produce the documents or state that there are no documents.

RFPD 41 of 50:
Please produce any and all documents identified in or relating to your responses to Hamed's Interrogatories 42-48 of 50.

Response:

Request to Admit 37 of 50:
Substantially the same as Yusuf RTA. Admit that the Partners agreed when the Partnership was formed that Fathi Yusuf would provide the services and use of United by the Partnership and the Partnership operated the three Plaza Extra Stores that way.

Response:
Defendants object to this request as vague and ambiguous as to the nature and scope of "the services and use of United by the Partnership."

Deficiency for RTA 37 of 50: This is an improper objection, as the request does not seek details of such use, only the fact that United was used in some manner by the Partnership. Thus, the proper response is admit.

Please let me know your availability to schedule the first Rule 37 as required by the Rule.

Sincerely,

cc: Joel H. Holt, Esq., Kimberly L. Japinga, Greg Hodges, Esq. & Stephan Herpel, Esq.

Exhibit 2

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Charlotte Perrell, Esq.
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Via Email Only

RE: Request for Rule 37 Conference re Claims Discovery Responses, Letter 1 of 2

Dear Attorney Perrell:

As discussed in the telephone conference last week, this is the first of two letters requesting a Rule 37 telephone conference regarding the Yusuf/United responses to the referenced discovery. The deficient discovery requests are separated into five categories. This letter covers items 1-4 and should require a relatively short conference. A second letter will be forthcoming outlining discovery responses that are just generally deficient.

1) KAC357, Inc. claims (Previously denied because of relevance – the case has since been filed separately and then consolidated),
2) Clams requiring John Gaffney's assistance (previously denied because Yusuf filed a motion seeking to have these transferred to Part-A, Gaffney Analysis, but that having since been denied),
3) Claims response pending determination of Yusuf's Motion to Strike (which has since been denied),
4) Claims responses where Yusuf indicated further information or supplementation would be forthcoming – but nothing has been received yet, and

5) Claim discovery responses that are generally deficient.

EXHIBIT
2

Deficiency for Interrogatory 21: Please supplement your response, including identifying how this half acre in Estate Tutu was purchased and what funds were used, the source of those funds and any discussions or agreements about the funds or the purchase, with reference to all applicable documents, communications and witnesses.

RFPDs 21 of 50:
Request for the Production of Documents, 21 of 50, relates to Y-2: "Rent for Bays 5 & 8"

With respect to Y-2, please provide all documents demonstrating a written agreement that Hamed or the Partnership agreed to pay rent for Bays 5 & 8, including any documents establishing the amount of rent, a signed lease agreement and any prior payments of rent on Bays 5 & 8, include but do not limit this to any writings after Hamed brought suit in September of 2012, that would show any such consent or agreement continued after that suit.
Defendants.

Response:
Defendants submit that information responsive to this Request for Production is set forth in Fathi Yusuf s earlier declaration he explained that "[u]nder the business agreement between Hamed and me that I now describe as a partnership, profits would be divided 50-50 after deduction for rent owed to United, among other expenses" and that "[u]nder our agreement, I was the person responsible for making all decisions regarding when the reconciliation would take place" and that Yusuf had the discretion to determine when the reconciliation would take place. See August 12, 2014 Yusuf Declaration, p. 2.

[Need to find out from Mr. Yusuf whether any prior payments were made as to Bays 5 and 8.] (May 15, 2018, *Response to Hamed's Fourth Request for Production of Documents Nos. 19-27 Of 50 Pursuant to the Claims Discovery Plan*, pp. 11-12)

Deficiency for RFPDs 21: Please supplement your response regarding "need to find out from Mr. Yusuf whether any prior payments were made as to Bays 5 and 8."

RFPDs 27 of 50: Request for the Production of Documents, 26 of 50, relates to Y-14, "Half of Value of Six Containers."

With respect to Y-14, please provide all documents substantiating your claim, including the itemized pricing and contents of the six containers.

Response:
To the extent that information has not already been provided to Hamed pursuant to briefing relating to this claim, Defendants will supplement their response to this Request. (May 15, 2018, *Response to Hamed's Fourth Request for Production of Documents Nos. 19-27 Of 50 Pursuant to the Claims Discovery Plan*, p. 7)

Deficiency for RFPDs 27: Please supplement your response and provide all documents substantiating your claim, including the itemized pricing and contents of the six containers.

Please let me know your availability to schedule the first Rule 37 conference by Friday, October 19, 2018.

Sincerely,

cc: Joel H. Holt, Esq., Kimberly L. Japinga, Greg Hodges, Esq. & Stephan Herpel, Esq.

Exhibit 3

UNITED SHOPPING PLAZA

Check Number: 64866
Check Date: Feb 7, 2012

Check Amount: $5,408,806.74

Item to be Paid - Description	Discount Taken	Amount Paid
Rent - Sion farm		5,408,806.74

UNITED CORPORATION D/B/A PLAZA EXTRA
4C & 4D ESTATE SION FARM
CHRISTIANSTED, VI 00821
(340) 778-6240 (340) 719-1870

BANCO POPULAR DE PUERTO RICO
101-667/216

64866

DATE
Feb 7, 2012

AMOUNT
$ ***$5,408,806.74

Five Million Four Hundred Eight Thousand Eight Hundred Six and 74/100 Dollars

PAY TO THE ORDER OF:
UNITED SHOPPING PLAZA
P.O. BOX 763 C'STED
ST.C ROIX, VI 00821

VOID AFTER 90 DAYS

Memo: PLAZA EXTRA (SION FARM) RENT

AUTHORIZED SIGNATURE

⑈064866⑈ ⑆021606674⑆ 191⑈148830⑈

UNITED CORPORATION D/B/A PLAZA EXTRA

64866

EXHIBIT 3

EXHIBIT 9

LMP98 M/P CHECK

51N325/39216 (2/11) 607699

Exhibit 4

DEWOOD LAW FIRM
2006 Eastern Suburb Suite 101
Christiansted, V.I. 00820
Admitted: NY, NJ, MD, & VI
T. 340.773.3444
F. 888.398.8428
info@dewood-law.com

BY: FIRST CLASS MAIL & EMAIL ONLY

May 17, 2013

Joel Holt, Esq.
2132 Company Street
Christiansted, VI 00820

Re: Rent Due – Plaza Extra – East Operations

Dear Attorney Holt,

On behalf of United Corporation, the following is a notice of the value of rents due as follows:

Rent due for Plaza Extra – East
Bay No. 1 January 1, 1994 through April 4, 2004
69,680 SQ. FT. at $5.55 10 years and 95 days Balance Due $3,967,894.19

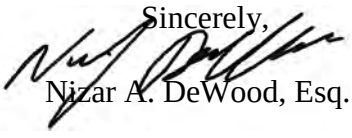
Bay No. 5 May 1, 1994 through October 31, 2001
3,125 SQ. FT. at $12.00 6 years and 184 days Balance Due $243,904.00

Bay No. 8 April 1, 2008 through May 30, 2013
6,250 SQ. FT. at $12.00 5 years and one month Balance Due $381,250.00

Total Amount Due **$4,593,048.19**

These amounts are undisputed, and have been outstanding for a very long time - before 2012. This amount does not reflect the rent increase requested and noticed to Mohammed Hamed since January 1, 2012. We reserve our client's right for the additional rents due and owing based on the rent increase after January 1, 2012. Kindly review the amount with your client, and advise when a check can be issued. Thank you.

Sincerely,



Nizar A. DeWood, Esq.

EXHIBIT 4

Exhibit 5

JOEL H. HOLT, ESQ. P.C.

2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820

Tele. *(340) 773-8709*
Fax *(340) 773-8677*
E-mail: *holtvi@aol.com*

May 22, 2013

Nizar A. DeWood
The Dewood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

By Email and Mail

Re: Plaza Extra

Dear Attorney DeWood:

In response to your letter dated May 17, 2013, regarding "Rent Due" for Bay Nos. 1, 5 and 8, my clients have authorized me to respond as follows:

1. **Bay No. 1**-The rent claimed is for the time period between 1994 and 2004. There was never any understanding that rent would be paid for this time period, much less at that rate. In any event, this inflated claim is clearly barred by the statute of limitations.

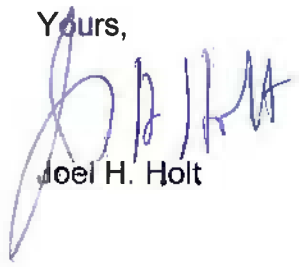
2. **Bay No. 5**-The rent claimed for the time period between 1994 and 2001 is for vacant space was used without charge until a tenant could be located. Thus, there was never any agreement to pay rent for this space either. In fact, the rate your client is attempting to charge is grossly inflated as well. In any event, this claim is also barred by the statute of limitations.

3. **Bay No. 8**-The rent claimed for this Bay was never agreed to, as the items stored there were removed from a space in a trailer where everything was just fine. Moreover, no one would agree to pay the amount you claim is due for warehouse storage, The fact that this amount is even being sought confirms that Fathi Yusuf should no longer be a partner in the Plaza Extra supermarkets, as it is a breach of the duty of good faith and fair dealing (that every partner owes the partnership) when you try to extort money from your own business. In any event, these items will be removed from Bay 8 to the second floor of the store since your client now wants to charge rent for this space.

EXHIBIT
5

Ever since your clients lost the preliminary injunction hearing, they have done everything they can to undermine the partnership. Your clients' belated claim for inflated amounts of back rent (that were never agreed to) is just another example of your clients' continued efforts to try to undermine the Court's Order.

Yours,



Joel H. Holt

Exhibit 6

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

ANSWER AND COUNTERCLAIM

Defendants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned counsel, answer the correspondingly numbered paragraphs of the First Amended Complaint ("Complaint") filed by Plaintiff Mohammad Hamed ("Hamed" or "Plaintiff") as follows:

1. Admitted.

2. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, except it is admitted that Waleed Hamed is an adult resident of St. Croix.

3-4. Admitted.

5-11. Denied.

12. Denied, except it is admitted that the supermarkets currently employ in excess of 600 employees in three stores.

13-15. Denied.

EXHIBIT 6

since Yusuf desires to immediately terminate any and all business relations Hamed may have with either of the Defendants.

COUNT XI
RENT FOR RETAIL SPACE BAY 1

172. Paragraphs 1 through 171 of this Counterclaim are realleged.

173. United has historically deducted rent for Plaza Extra – East as an internal expense and is entitled to deduct same so as to arrive at a proper calculation of the net profits from Plaza Extra – East.

174. In the alternative, in the event that the Alleged Partnership is determined to exist, then United is entitled to deduct all rent currently due and owing to arrive at the proper calculation of the net profits from Plaza Extra – East.

175. Whether an internal expense or a debt of the Alleged Partnership, for the period of January 1, 1994 through May 4, 2004, United is entitled to rent in the amount of $3,999,679.73 for Bay No. 1 (69,680 sq. ft. of retail space at $5.55 sq. ft.) for the operations of the Plaza Extra – East.

176. Whether an internal expense or a debt of the Alleged Partnership, for the period of January 1, 2012 to date, United is entitled to rent for Bay No. 1 (69,680 sq. ft. of retail space at the current monthly rate of $58,791.38).

177. In the event that the Alleged Partnership is determined to exist, then Hamed is in violation of the agreement to pay rent to United in an amount exceeding $5,293,090.09.

178. United, as the fee simple owner, is entitled to all unpaid rent for the use of Bay 1, and to recover possession of its premises currently occupied by Plaza Extra – East.

COUNT XII
PAST RENT FOR RETAIL SPACES BAYS 5 & 8

179. Paragraphs 1 through 178 of this Counterclaim are realleged.

180. United provided Plaza Extra – East with retail spaces Bay 5 & 8 for various time periods to increase the storage and capacity of Bay 1 (the main retail space where Plaza Extra – East is located).

181. Bay No. 5 (3,125 sq. ft. of retail space) was utilized for storage and quick access to various inventories used in the operations of Plaza Extra – East. Whether an internal expense or a debt of the Alleged Partnership, United is entitled to rent from May 1, 1994 through October 31, 2001 at rate of $12.00 per sq. ft.

182. Bay No. 8 (6,250 sq ft. of retail space) was utilized for the operations of Plaza Extra – East. Whether an internal expense or a debt of the Alleged Partnership, United is entitled to rent from April 1, 2008 through May 30, 2013 at a rate of $16.15 per sq. ft.

183. In the event that the Alleged Partnership is determined to exist, Hamed has refused to acknowledge his obligation to pay United the outstanding rent for Bays 5 and 8.

184. United, as the fee simple owner, is entitled to all unpaid rent for the use of Bays 5 and 8 in the amount of $793,984.38.

COUNT XIII
CIVIL CONSPIRACY

185. Paragraphs 1 through 184 of this Counterclaim are realleged.

186. Hamed and the Hamed Sons agreed to perform the wrongful acts and accomplish the wrongful ends alleged in this Counterclaim, and they aided and abetted each other and acted on that agreement.

187. As a result of such conspiracy, the Defendants have been damaged.

Accordingly, Defendants respectfully request entry of judgment in their favor providing the following relief:

i. a declaratory judgment declaring the parties' rights and obligations with respect to the Plaza Extra Stores;

ii. a full accounting of all funds taken by Hamed or his agents from the Plaza Extra Stores without Defendants' authorization;

iii. a judgment declaring that Hamed and the Hamed Sons hold any assets purchased with funds improperly taken from the Plaza Extra Stores as constructive trustees for Defendants and imposing a constructive trust or equitable lien in favor of Defendants over all funds taken without authorization by Hamed or his agents or assets purchased with such funds;

iv. awarding compensatory, consequential, and punitive damages in an amount according to proof at trial;

v. appointing a Receiver to dissolve and wind down the affairs of any joint venture/partnership determined to exist between Hamed and Yusuf and to dissolve and liquidate Plessen;

vi. a judgment for all rent found due and owing for the premises occupied by Plaza Extra-East and ordering immediate restitution of such premises to United;

vii. awarding Defendants their reasonable attorneys' fees and costs in defending against the Complaint and prosecuting this Counterclaim; and

viii. providing such other and further relief as the Court deems just and proper.

Pursuant to Fed. R. Civ. P. 38(b), Defendants demand a trial by jury of all issues triable by right to a jury.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: December 23, 2013 By: */s/Gregory H. Hodges*

Gregory H. Hodges (V.I. Bar No. 174)
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and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
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Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2013, I caused the foregoing **ANSWER AND COUNTERCLAIM** to be served upon the following via e-mail:

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

Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

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Exhibit 7

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF
MOHAMMAD HAMED, Plaintiff, v. **UNITED CORPORATION,** Defendant.	**Consolidated With** CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY RELIEF

YUSUF'S ACCOUNTING CLAIMS AND PROPOSED DISTRIBUTION PLAN

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

EXHIBIT 7

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AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

~~[1] Unless otherwise defined, all capitalized terms have the same meaning as provided in the Plan.~~

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

1. Bay 1 – Increased Rent Due Net of Rent Paid

United provided formal notice of increased rent of $200,000 per month to the Partnership, which was to begin on January 1, 2012 through March 31, 2012, if the premises were not vacated before then. Thereafter, beginning on April 1, 2012 through March 8, 2015, United provided formal notice of increased rent of $250,000 per month. *See* Exhibit D to Yusuf's Declaration dated August 12, 2014 (the "Yusuf Declaration") in support of Defendants' Motion for Partial Summary Judgment on Counts IV, XI and XII Regarding Rent. Although the Rent Order awarded certain amounts of rent to United during this period, the award did not address the increased rent claimed by United. The outstanding balance of the increased rent claimed as to Bay 1, net of the rent recovered pursuant to the Rent Order, is $6,974,063.10. *See* calculation of additional rents attached as **Exhibit C**.

2. Bays 5 and 8

Likewise, outstanding rent is due to United for Bays 5 and 8 of the United Shopping Plaza. These amounts were not adjudicated in the Rent Order and they remain an outstanding rent claim against the Partnership. The total amount due to United for unpaid rent for Bays 5 and 8 is $793,984.34. *See* the Yusuf Declaration at ¶¶ 21-25.

3. Interest on Rent Claims

The interest that accrued at 9% per annum on the rent actually awarded by the Rent Order ($6,248,924.14) is $881,955.08 as of May 11, 2015, when that rent was paid to United. *See* calculation of interest on Bay 1 rent attached as **Exhibit D**.[11]

The interest due for the unpaid rent on Bays 5 and 8 is also claimed by United. The total interest calculated at 9% per annum for the period from May 17, 2013 through September 30,

[11] This amount does not include any interest accruing at the 9% rate on each month's unpaid rent from June 1, 2013 through March 8, 2015.

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(340) 774-4422

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: September 30, 2016

By: _____

Gregory H. Hodges (V.I. Bar No. 174)
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St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail:ghodges@dtflaw.com

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2016, I caused the foregoing **Yusuf's Accounting Claims and Proposed Distribution Plan** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
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Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

Mark W. Eckard, Esq.
Eckard, P.C.
P.O. Box 24849
~~Christiansted, VI 00824~~
Email: mark@markeckard.com

Jeffrey B.C. Moorhead, Esq.
C.R.T. Building
1132 King Street
~~Christiansted, VI 00820~~
Email: jeffreymlaw@yahoo.com

The Honorable Edgar A. Ross
Email: edgarrossjudge@hotmail.com

Michele Barber

R:\DOCS\6254\1\DRFTPLDG\16U0900.DOCX

Exhibit 8

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED**, and **PLESSEN ENTERPRISES,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS IV, XI, AND XII REGARDING RENT

~~INTRODUCTION~~

Defendants/Counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants") bring this motion for partial summary judgment on the claims for undisputed past due rent of certain premises at its shopping center known as United Shopping Plaza. These claims include rent for the primary space occupied by the Plaza Extra supermarket (Plaza Extra-East) at the United Shopping Plaza in St. Croix, which is known as "Bay 1," and two other smaller spaces (Bays 5 and 8) at the shopping center being used to warehouse Plaza Extra-East inventory. Since its opening in April 1986, and in an effort to support the development of the business, Plaza Extra-East has paid rent to United in multi-year blocks in amounts totaling several million dollars per payment. Mohammad Hamed ("Hamed") agreed with Yusuf at the formation

EXHIBIT 8

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

Dated: August 12, 2014

By: _____

Gregory H. Hodges (V.I. Bar No. 174)
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St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
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and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
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Christiansted, VI 00830
Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2014, I caused the foregoing **United Corporation, Inc.'s Brief in Support of Motion For Summary Judgment On Its Claims For Rent** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
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Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
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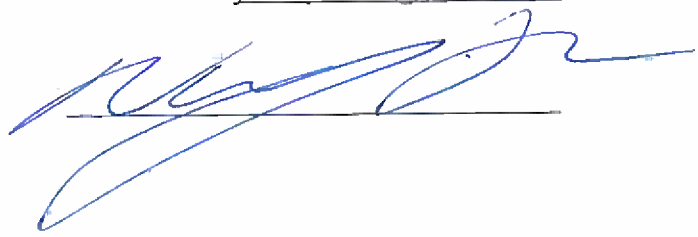

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

DECLARATION OF FATHI YUSUF

I, Fathi Yusuf, pursuant to 28 U.S.C. §1746 and Super. Ct. R. 18, declare under the penalty of perjury, that:

1. Mohammad Hamed ("Hamed") and I agreed to carry on a supermarket business (the "Plaza Extra Stores") that eventually grew into three locations, including the first of three stores, Plaza Extra-East, which opened in April 1986. Plaza Extra-East was and is located in United Plaza Shopping Center owned by United Corporation ("United"), of which I am the principal shareholder. Under the business agreement between Hamed and me that I now describe as a partnership, profits would be divided 50-50 after deduction for rent owed to United, among other expenses. Under our business agreement, we also agreed that rent would accrue until such time as I decided that our business accounts should be reconciled. The reconciliation of business accounts would not only involve payment of accrued rent, but also advances that each of us had taken by withdrawing money from the store safe(s). Under our agreement, I was the person

~~formula used at Plaza Extra – Tutu Park. See Exhibit F, which are the rent calculations that I~~ prepared. See Exhibit F.

18. For 2012, the undisputed rent due is $702,908. See Exhibit F, p.1.

19. For 2013, the undisputed rent due is $654,190.09. See Exhibit F, p. 2.

20. For the period from January 1, 2014 through August 30, 2014, the undisputed rent due is $452,366.03. This amount was calculated by adding the rent for 2012 and 2013 and dividing that sum by 24 months in order to determine an average monthly rent, which is then multiplied by 8, representing the eight months from January through August 30, 2014 ($702,908 + 654,190.09 = $1,357,098.09 ÷ 24 = $56,545.75 x 8 = $452,366.03). The total undisputed Current Rent is the ~~sum of $702,908, $654,190.09 and $452,366.03, which is $1,809,464.12.~~

21. At periodic points in time, additional space was used by Plaza Extra-East for extra storage and staging of inventory. United has made demand for the rent covering the additional space actually occupied by Plaza Extra-East, but no payment has been received to date.

22. For the period from May 1, 1994 through July 31, 2001, Plaza Extra-East has occupied and owes rent for Bay 5 ("Bay 5 Rent"). The Bay 5 Rent is calculated by multiplying the square feet actually occupied (3,125) by $12.00 for 7.25 years. The total due for Bay 5 Rent is $271,875.00.

23. For the period from May 1, 1994 through September 30, 2002, Plaza Extra-East has occupied and owes rent for Bay 8 ("First Bay 8 Rent"). The First Bay 8 Rent is calculated by multiplying the square feet actually occupied (6,250) by $6.15 for 8 years, 5 months. The total due for First Bay 8 Rent is $323,515.63.

24. For the period from April 1, 2008 through May 30, 2013, Plaza Extra-East has occupied and owes rent for Bay 8 ("Second Bay 8 Rent"). The Second Bay 8 Rent is calculated by

multiplying the square feet actually occupied (6,250) by $6.15 for 5 years, 2 months. The total due for Second Bay 8 Rent is $198,593.75.

25. The total amount due for Bay 5 Rent, First Bay 8 Rent, and Second Bay 8 Rent is $793,984.38.

26. The total outstanding, unpaid rent for all the space used by Plaza Extra-East from January 1, 1994 through August 30, 2014 is $6,603,122.23, excluding the "disputed" increased rent from January 1, 2012 through the present. **Exhibit G** is a Chronology of Rents, which accurately reflects the history of the rents that were paid and remain unpaid.

Dated: August 12, 2014

Fathi Yusuf

Exhibit 9

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

WALEED HAMED, as Executor of the Estate of MOHAMMED HAMED Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATION, Defendants/Counterclaimants, v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC., Counterclaim Defendants.	Civil No. SX-12-CV-370 ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, and PARTNERSHIP DISSOLUTION, WIND UP, and ACCOUNTING
WALEED HAMED, as Executor of the Estate of MOHAMMED HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	Civil No. SX-14-CV-287 ACTION FOR DAMAGES and DECLARATORY JUDGMENT
WALEED HAMED, as Executor of the Estate of MOHAMMED HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	Civil No. SX-14-CV-278 ACTION FOR DEBT and CONVERSION

MEMORANDUM OPINION AND ORDER RE LIMITATIONS ON ACCOUNTING

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

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

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

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

Background

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

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

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

Legal Standard

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

MOTION FOR PARTIAL SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS

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

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

United's Cause of Action for Debt (Rent)

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

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

with respect to Count XI. In denying Hamed's Motion for Partial Summary Judgment Re Statute of Limitations as to Count XI, the Court found that the limitations period had been tolled on the basis of Hamed's undisputed acknowledgement and partial payment of the debt.

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

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

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

26 V.I.C. § 75(b) and (c) provide:

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

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

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

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

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

that during the life of the partnership, a "partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to the partnership business;" and that "accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law." "The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them." National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act; Section 405(c) comment 4.

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

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

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

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

Pursuant to 26 V.I.C. § 71(a), "[e]ach partner is deemed to have an account that is: (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses." Thus, under the RUPA framework, the "claims" to which the parties refer are, in fact, nothing more than the parties' respective assertions of credits and charges to be applied in ascertaining the balance of each partner's individual partnership account.[11]

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

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

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

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

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

EQUITABLE LIMITATION OF SCOPE OF PARTNERSHIP ACCOUNTING

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

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

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

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

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

Partnership Accounting Under RUPA

The general framework for conducting a partnership accounting in the Virgin Islands is outlined at 26 V.I.C. § 177(b):

> Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under section 46 of this chapter.

In turn, the "partners' accounts" referenced in § 177(b) are described at 26 V.I.C. § 71(a):

> Each partner is deemed to have an account that is: (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

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

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

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

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

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

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

Doctrines of Laches and Statute of Limitations by Analogy

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

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

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

Modern courts of equity, such as the Court of Chancery of Delaware, also apply the statute of limitations by analogy as a component of the equitable defense of laches. *See, e.g., Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("Where the Plaintiff seeks equitable relief… failure to file within the analogous period of limitations will be given great weight in deciding in deciding whether the claims are barred by laches"); ***see also Williams v. Williams*, 2010 Conn. Super. LEXIS 2344, at *15 (Conn. Super. Ct. Sep. 15, 2010) (noting that court may consider an analogous statute of limitation when considering laches defense). Under this approach, "[w]here the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in**

a court of equity." *Whittington*, 991 A.2d at 9.[17] Different jurisdictions disagree, however, as to how much force an analogous statute of limitations should have. *See* Dobbs, *Law of Remedies* § 2.4(4), at 78 (2d ed. 1993) ("When courts look to an analogous statute of limitations for guidance, and that statute has run, they may (1) presume unreasonable delay and prejudice, but permit the plaintiff to rebut the presumption; (2) treat the statute as one element 'in the congeries of factors to be considered.' Some authority has gone beyond either of these rules by holding that equity will follow the law and (3) give the statute conclusive effect").[18]

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

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

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

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

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

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

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

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

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

Doctrine of Laches as Limit on Scope of Accounting

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

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

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

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

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

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

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

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

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

Hamed/Yusuf Partnership Accounting

Turning to the case at bar, there are both striking similarities and critical differences between the factual scenario presented in this matter and that before the court in ***Williams***. Just as in ***Williams***, this matter is best described as a battle between two partners, here former friends and brothers-in-law, over how the assets of the partnership were handled. Additionally, despite having,

at all times, either actual or constructive knowledge of the alleged ongoing, repeated withdrawals of partnership funds, both Hamed and Yusuf ignored these issues year after year and allowed one another to continne conducting partnership business, each implying to the other that all was well.

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

State of Partnership Accounting Records

Here, the pleadings alone demonstrate the imprecision and inadequacy of the partners' accounting practices. Hamed's Complaint explains the partners' practice of unilaterally withdrawing partnership funds as needed for various business and personal expenses on the understanding that "there would always be an equal (50/50) amount of these withdrawals for each partner directly or to designated family members." *See* Complaint ¶ 21. **Though Hamed alleges**

that the partners "scrupulously maintained" records of these withdrawals, the other pleadings and evidence of record in this matter fatally belie this unsupported assertion. For example, Yusuf's First Amended Counterclaim in SX-14-CV-278 (FAC 278) speaks of the need for reconciliation of both "documented withdrawals" of cash from store safes, and "undocumented withdrawals from safes (i.e., all misappropriations)," in the § 177 accounting process. *See* FAC 278 ¶¶ 37-38.

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

As part of the accounting and distribution phase of the Wind Up, Yusuf submitted to the Master the report of accountant Fernando Scherrer of the accounting firm BDO, Puerto Rico, P.S.C. (BDO Report). Yusuf contends that this report constitutes "a comprehensive accounting of the historical partner withdrawals and reconciliation for the time period 1994-2012." *See* Opposition to Motion to Strike BDO Report, filed October 20, 2016. However, the BDO report, by its own terms, appears to be anything but comprehensive. Most tellingly, the body of the BDO Report itself contains a section detailing its own substantial "limitations," resulting from the absence or inadequacy of records for each of the grocery stores covering various periods during

the life of the partnership.[25] *See* Plaintiff's Motion to Strike BDO Report, Exhibit 1, at 22. Additionally, the analysis presented in the report rests on the unsupported assumption that any monies identified in excess of "known sources of income" constitute distributions from partnership funds to the partners' § 71(a) accounts. Thus, even Yusuf's own "expert report" acknowledges the insurmountable difficulties inherent in any attempt to accurately reconstruct the partnership accounts; a project which necessarily becomes proportionately more difficult and less reliable the farther back in time one goes.

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

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

Plaintiff's expert[26] bases his opinion on the 2003 Third Superseding Indictment in the matter captioned *United States of America and Government of the Virgin Islands v. Fathi Yusuf Mohamad Yusuf, et al.* and United's plea of guilty to Count 60 (tax evasion) thereof.[27] Under the terms of the plea agreement, United pled guilty to willfully preparing and presenting a materially false corporate income tax return for the year 2001 by reporting gross receipts as $69,579,412, knowing that the true amount was approximately $79,305,980. Plea Agreement at 3-4, United States v. Yusuf, No. 2005-15F/B (D.V.I. Feb. 26, 2010). According to the indictment, United evaded reporting gross receipts by employing a cash diversion/money laundering scheme by which United, through its officers and employees,[28] conspired "to withhold from deposit substantial amounts of cash received from sales, typically bills in denominations of $100, $50, and $20." *See* Plaintiff's Reply re Statute of Limitations, Exhibit D (Indictment) ¶ 12. Additionally, it was alleged that "instead of being deposited into the bank accounts with other sales receipts, this cash was delivered to one of the defendants or placed in a dedicated safe in a cash room." *Id.* As described by Plaintiff's expert, "those acting on behalf of the company took cash out of sales before the Company could properly account for them." Op. Letter, at 5.

The expert explains:

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

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

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

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

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

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

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

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

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

Knowledge, Delay, and Prejudice

Against this backdrop of decades of woefully inadequate and, in some instances, deliberately misleading accounting practices, the partners now present their competing claims for partnership accounting asking the Court to employ its already strained resources to untangle the web that they have spun and clean up the mess that they have made. Given the dismal state of the relevant records, this process necessarily entails an evaluation of each individual § 71(a) claim submitted to determine whether, in light of the frequently conflicting recollections of the partners, any given withdrawal or expenditure of partnership funds constituted a legitimate business

expenditure on behalf of the partnership, or a unilateral withdrawal chargeable to the partner's § 71(a) account. However, just as in the *Williams* case, where each partner "ignores issues year after year and allows the other partner to proceed along thinking everything is fine, [neither partner will] be heard to cry upon dissolution a decade or more later, 'I'd like a do over.'" 2010 Conn. Super. LEXIS 2344, at *40-41.

Here, both partners and their respective sons were well aware from the beginning of their involvement with the business that any record keeping and accounting of distributions to the partners was highly informal and controlled only by the "honor system." As managing partner, Yusuf was not only intimately familiar with the methods of record keeping, or lack thereof, employed by the partnership, but was the one responsible for designing and implementing those procedures in the first place. It was Yusuf's responsibility to oversee, account for, and periodically reconcile the distributions of funds between the partners. And though Yusuf was content to dispense with the standard business accounting formalities for nearly the entire life of the partnership, upon Hamed's filing his Complaint in this matter, Yusuf changed course and now seeks to vindicate his right to a thorough and methodical partnership accounting.[30]

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

[30] Yusuf argues that he only became aware of the extent of the Hameds' withdrawals of partnership funds upon the 2010 return of the voluminous documentation seized by the FBI in 2002. However, affidavit evidence shows that all documents seized by the FBI were not only available to the defendants in the criminal matter, including Yusuf, but were, in fact, thoroughly reviewed by them, through their lawyers, on multiple occasions. *See* Hamed's Reply re Statute of Limitiations, Exhibit 4-B (Declaration of Special Agent Thomas L. Petri) (noting that in 2003, subsequent to the return of the indictment, counsel were given complete access to seized evidence, and that a team of four to five individuals led by the attorney for defendants reviewed evidence at the FBI office on St. Thomas for several weeks).

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

Furthermore, both partners were clearly aware, during the entire life of the partnership, of their mutual practice of making, either personally or through their sons, unilateral withdrawals of partnership funds documented by hand-written receipts and controlled only by the honor system. Additionally, by at least 2001 and likely before, Hamed and Yusuf were similarly aware that substantial monies deposited in the store safes were being deliberately kept off the partnership books, and that all involved acted without hesitation in destroying voluminous records of cash withdrawals thereby rendering any independently verifiable accounting or audit impossible. Certainly, by the time of the 2003 filing of the Third Superseding Indictment in the criminal case recounting the cash diversion scheme implemented by the officers of United, even the most trusting individual would have sufficient reason to suspect malfeasance, thereby putting both partners on inquiry notice.[32]

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

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

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

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

Additionally, by his acquiescence to such inadequate record keeping and his inexcusable delay in seeking to enforce his rights under 26 V.I.C. §§ 71(a) and 75(b), each partner has irrevocably prejudiced the ability of the other to respond to the various allegations against him. Here, as in *Williams* "the passage of time puts [each partner] at an unfair disadvantage in responding to the merits of [the other partner's] claims." 2010 Conn. Super. LEXIS 2344, at *39-40. Similarly, "because many of [the] claims involve how transactions were or were not recorded… an analysis of those claims would likely involve testimony" from the partners and their sons, yet, how much they might remember concerning the details of a transaction completed a decade earlier "is questionable, at best." *Id.* Lastly, while the court in *Williams* concluded that the defendant was prejudiced despite the production of "substantial records," here, in the absence of complete or comprehensive records, the partners are even more so "at a distinct disadvantage" in any attempt to "recreate or find decades of accounting records." *Id.* at *40. Thus, the Court concludes that consideration of the principles underlying the doctrine of laches strongly supports

the imposition of an equitable limitation on the submission of § 71(a) claims in the accounting and distribution phase of the Wind Up Plan.[33]

Policy Considerations

Moreover, imposing such a limitation furthers the clear policy goals of the legislature as embodied by RUPA. In *Fike v. Ruger*, the Delaware Chancery Court examined statutory language identical to 26 V.I.C. § 75, and determined that "it is clear under RUPA that a right of action arising during the life of a partnership is not revived merely because dissolution occurs and a separate right to an accounting on dissolution arises." *Id.* at 263. While the common law and prior statutory scheme "placed partners in the predicament of either causing a dissolution to resolve disputes or continuing the partnership despite a cloud of conflict and uncertainty hanging over it, the drafters of [RUPA] included Section 22 [26 V.I.C. § 75], specifically authorizing actions prior to dissolution." *Id.* "The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them." National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act; Section 405(c) comment 4.

Both partners' claims, as presented in this matter, must be construed as actions for dissolution, wind up, and accounting under § 75(b)(2)(iii). Yet, each partner could have, and under the policy considerations undergirding RUPA, should have, brought his claims concerning individual withdrawals of partnership funds or other transactions, with or without an

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

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

Conclusion

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

period outlined in 5 V.I.C. § 31(3)(A) as a species of an action upon contract.[34] Therefore, the Court exercises the significant discretion it possesses in fashioning equitable remedies to restrict the scope of the accounting in this matter to consider only those § 71(a) claims that are based upon transactions occurring no more than six years prior to the September 17, 2012 filing of Hamed's Complaint.[35]

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

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

In light of the foregoing, it is hereby

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

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

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

DATED: July 21, 2017.

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST: ESTRELLA GEORGE
Clerk of the Court

By: _____
Court Clerk Supervisor 7/24/17

CERTIFIED A TRUE COPY

DATE: July 24, 2017
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT

BY: _____
COURT CLERK

Exhibit 10

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

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
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(340) 774-4422

EXHIBIT
10

Motion for Partial Summary Judgment on Counts IV, XI and XII Regarding Rent. Although the Rent Order awarded certain amounts of rent to United during this period, the award did not address the increased rent claimed by United. The outstanding balance of the increased rent claimed as to Bay 1, net of the rent recovered pursuant to the Rent Order, is $6,974,063.10. *See* calculation of additional rents attached as Exhibit C to the Original Claims.

Disputed/Undisputed, Ripe for Determination or Discovery Needed: Although this debt is disputed, it is fully briefed and ready for determination by the Master.

2. Bays 5 and 8

Likewise, outstanding rent is due to United for Bays 5 and 8 of the United Shopping Plaza. These amounts were not adjudicated in the Rent Order and they remain an outstanding rent claim against the Partnership. The total amount due to United for unpaid rent for Bays 5 and 8 is $793,984.34. *See* the Yusuf Declaration at ¶¶ 21-25.

Disputed/Undisputed, Ripe for Determination or Discovery Needed: Although this debt is disputed, it is fully briefed and it is ready for determination by the Master.

3. Interest on Rent Claims

The interest that accrued at 9% per annum on the rent actually awarded by the Rent Order ($6,248,924.14) is $881,955.08 as of May 11, 2015, when that rent was paid to United. *See* calculation of interest on Bay 1 rent attached as Exhibit D to the Original Claims.[13]

Disputed/Undisputed, Ripe for Determination or Discovery Needed: Although this debt may be disputed, it is ripe for decision by the Master.

The interest due for the unpaid rent on Bays 5 and 8 is also claimed by United. The total interest calculated at 9% per annum for the period from May 17, 2013 through September 30,

[13] This amount does not include any interest accruing at the 9% rate on each month's unpaid rent from June 1, 2013 through March 8, 2015.

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~~and distributions between the Partners adjusted to reflect the period from September 17, 2006~~ forward, both disclosed and undisclosed, still reveals a large discrepancy in Yusuf's favor. Again, these calculations were prepared without the benefit of deposition testimony and additional written discovery following the stay. It is anticipated that additional discovery will yield information necessitating further revisions to these calculations. On balance, there exists a substantial amount due to Yusuf to reconcile the Partner's withdrawals and distributions. Solvency of Hamed (or his estate)[21] is in serious doubt given the significant discrepancy in the amounts due to Yusuf. For this reason, Hamed's (or his estate's or his trust's) interests in the jointly owned entities (Plessen Enterprises, Inc., Peter's Farm Investment Corporation, and Sixteen Plus Corporation) may need to be quantified as a means of payment to equalize the ~~Partnership withdrawals.~~

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: October 30, 2017

By: _____

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[21] A Petition for Probate of Will and for Letters Testamentary was filed on August 26, 2016 as Case No. SX-2016-PB-76. That petition reflects no available assets to satisfy Yusuf's claims since all of Hamed's interests in real and personal property had previously been conveyed to the Mohammad A. Hamed Living Trust dated September 12, 2012. Yusuf has filed a complaint challenging such conveyance as fraudulent. A copy of that complaint is attached as **Exhibit U** since Yusuf's Amended Supplementation left off with Exhibit T.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2017, I caused the foregoing **Yusuf's Amended Accounting Claims Limited to Those Claims Arising After September 17, 2012** to be served upon the following via e-mail:

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Exhibit 11

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
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	Consolidated With 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
FATHI YUSUF and UNITED CORPORATION, Plaintiffs, v. THE ESTATE OF MOHAMMAD HAMED, Waleed Hamed as Executor of the Estate of Mohammad Hamed, and THE MOHAMMAD A. HAMED LIVING TRUST, Defendants.	CIVIL NO. ST-17-CV-384 ACTION TO SET ASIDE FRAUDULENT TRANSFERS

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EXHIBIT 11

RESPONSE TO HAMED'S THIRD REQUEST TO ADMIT PURSUANT TO THE CLAIMS DISCOVERY PLAN OF 1/29/2018, NOS. 7-29 OF 50

Defendant/Counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United")(collectively, the "Defendants") through their attorneys, Dudley, Topper and Feuerzeig, LLP, hereby provide their Responses to Hamed's Third Request to Admit Pursuant to the Claims Discovery Plan of 1/29/2018, Nos. 7-29 of 50 as to:

GENERAL OBJECTIONS

Defendants make the following general objections to the Requests to Admit. These general objections apply to all or many of the Requests to Admit, thus, for convenience, they are set forth herein and are not necessarily repeated after each objectionable Request to Admit. The assertion of the same, similar, or additional objections in the individual responses to the Requests to Admit, or the failure to assert any additional objections to a discovery request does not waive any of Defendants' objections as set forth below:

(1) Defendants object to these Requests to Admit to the extent they may impose obligations different from or in addition to those required under the Virgin Islands Rules of Civil Procedure.

(2) Defendants object to these Requests to Admit to the extent that they use the words "any" and "all" as being overly broad, unduly burdensome, immaterial, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence.

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Request to Admit 8 of 50:

Request to admit number 8 of 50 relates to Claim Y-3 - as described in Hamed's November 16, 2017 Motion for a Hearing Before Special Master as "Interest on Bay 1 Rent Already Awarded by the Court on 4/27/2015."

Admit or Deny that there was no written agreement between Hamed and Yusuf effective after September 17, 2012, (the date that Hamed sued Yusuf) that the Partnership would pay interest on Bay 1.

Response:

Admitted.

Request to Admit 9 of 50:

Request to admit number 9 of 50 relates to Claim Y-4 – as described in Hamed's November 16, 2017 Motion for a Hearing Before Special Master as "Interest on Bays 5 & 8."

Admit or Deny that there was no written agreement between Hamed and Yusuf after the date that Hamed sued Yusuf in 2012 that the Partnership would pay rent on Bays 5 & 8.

Response:

Admitted.

Request to Admit 10 of 50:

Request to admit number 10 of 50 as described in Hamed's November 16, 2017 Motion for a Hearing Before Special Master relates to Claim Y-5 as "Reimburse United for Gross Receipt Taxes," Claim H-150 (old Claim No. 3002a) "United Shopping Center's gross receipt taxes," H-152 (old Claim No. 3008a) "United's corporate franchise tax and annual franchise fees," H-153 (old Claim No. 3009a) "Partnership funds used to pay United Shopping Center's

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~~Response:~~

Yusuf objects to this request as vague and ambiguous ~~since~~ it does not identify any unilateral spending decisions ~~made~~ by Yusuf between January and March, 2013 with which ~~Mohammad Hamed or his counsel disagreed in writing.~~

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: May 15th, 2018

By: _____
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