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

**RE CLAIM H-142: HALF-ACRE ACCESS PARCEL AT TUTU**

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1. Introduction

It is now clear that Yusuf has no colorable claim regarding this motion. Moreover, Hamed doesn’t believe a hearing or live testimony is necessary because (1) this claim should be decided solely on issues of law, and (2) even if the matter isn’t disposed of “at law,” full testimony has been extensively taken in two depositions subject to cross-examination.[[1]](#footnote-1)

1. The Paramount Issue Presented

Hamed Claim H-142 concerns a 0.536 acre parcel near the Tutu Park Mall.[[2]](#footnote-2) In granting partial summary judgment on January 14, 2020, the Master noted three central points, at 2-3:

1. Hamed filed a written claim in 2016—that the parcel “belongs” to the Partnership:

Hamed, in his accounting claims filed on October 17, 2016 (hereinafter “Hamed’s Accounting Claims”), included Hamed’s claim that the Half Acre in Estate Tutu *belongs**to the Partnership*[[[3]](#footnote-3)] and was incorrectly titled….

1. But Yusuf made a contrary claim in his 2016 claims filing—that he got ownership in 2011:

Yusuf had agreed to resolve **this misappropriation** but not any others that Yusuf might later discover**, by the [2011] conveyance** of Hamed's interest in two parcels, one in Jordan . . .and one half acre parcel in St, Thomas, previously titled in the name of Plessen Enterprises, Inc.

**Exhibit 3**. Also set forth in that same Yusuf claim, was the additional statement that:

Yusuf insisted that if Hamed wanted a resolution addressing **all Hamed misappropriations, whether known or unknown**, Hamed would have to arrange for the conveyance to Yusuf or United of **another** approximately 9.3 acre parcel located on St. Thomas also titled in the name of Plessen Enterprises, Inc. **Hamed, through his son, Waleed, refused to convey this third parcel.** (Emphasis added.)

3..The Master held that the parcel *did* become a partnership asset in 2008—and the

Partnership, not Yusuf’s-United, *was* in title *in 2008,* pursuant to the ‘deed in lieu.’

Thus, in what remains of H-142 the Master is called on to decide between these two specific, competing claims as to this half-acre parcel—pursuant to Judge Brady’s order that he “direct and oversee the winding up of the Hamed-Yusuf Partnership.” As the Court also noted, these are RUPA, 26 V.I.C §77, claims within a RUPA winding-up. Hamed has never been in title. This is solely a claim by Yusuf against what was indisputably partnership property in 2008.

Yusuf further explained his claim above in his December 20th (“Prior”) Opposition at 3:

As partial performance of this agreement, Hamed relinquished his interests to the property in Jordan on July 18, 2011. As to the Tutu Half-Acre, because the record title to it was already in the name of United, an entity solely owed by Yusuf and his family, no further documentation was needed to **“transfer” or document Hamed’s relinquishment** of his partnership interests in the Tutu Half-Acre per the partners’ agreement. Hence, during the 2011 to the time of Dissolution Period and, in particular, at the time of the dissolution, the Tutu Half-Acre **was not a partnership asset**. . . .

Yusuf’s 2016 claim that the Master cannot hear this issue is based on his “view” that the parcel was “convey[ed]” to him during 2011 relies on his assertion that it was “transferred” and/or “relinquished” to him in 2011 pursuant to an *oral “contract” for “two parcels”* arising out of a face-to-face verbal settlement negotiation with Mohammad. Thus, he argues, this was no longer partnership property at dissolution. But, if there was no actual transfer in 2011, title still lies with the Partnership and this is just Yusuf claiming he had a 2011 oral contract that was never performed—as to which he seeks specific performance NOW. He is just a claimant in a RUPA claims process trying to get partnership land from the partnership based on that alleged, as-yet-unperformed oral contract for Hamed to assist in a Partnership transfer of the property.

1. Two Threshold Problems— Before Even Reaching the Alleged Oral Contract
2. i..Yusuf Admits There was no Actual “Transfer” by the Partnership in 2011

Thus, before getting to the whole issue of whether Mohammad Hamed orally agreed to a ‘two parcel’ contract in 2011, there is a major threshold problem—Yusuf’s entire position that the parcel was “not a partnership asset after 2011” relies on the predicate ‘fact’ that **a 2011 transfer actually occurred**. He states this repeatedly. But, oddly, he can’t say how, when or where this purported *transfer* actually took place. That is because **he** admits it did not happen.

First, in Yusuf’s own, repeated (sworn) testimony he admits that contemporaneously, in 2011, Hamed repeatedly, emphatically refused to go through with the actual, physical transfer of the parcel from the Partnership to Yusuf. Second, the only written document was drafted by Yusuf’s own lawyers, and is for the one Jordanian parcel only—no reference to Tutu. Third, the facts as to how the parties *acted*, how they ‘*treated’* the parcel, in and after 2011, are stark--the partners treated the parcel as though there was no such intent to transfer, or actual transfer.

The first of these facts is dispositive as **there is absolutely no question that Yusuf has sworn that in 2011, after the transfer of the Jordanian parcel, Hamed contemporaneously and unequivocally refused to cause the Partnership to transfer the parcel**.[[4]](#footnote-4) In 2014, before his deposition in this case, Yusuf attested under oath:

When Responding Party [Yusuf] asked Waleed Hamed to proceed with the transfer of the Tutu Park property,it is at this point, several months later [in 2011] that Plaintiff Waleed "Wally" Hamed and **Plaintiff Mohammed Hamed refused** **to transfer not only the second property** [Tutu], but also the third property requested as a set-off for the unauthorized transactions.

**Exhibit** 2, *Fathi Yusuf's Answers to Interrogatories*, *Hamed v. Yusuf*, SX-12-CIV-377 at 9. It is hard to walk away from that. Moreover, Hamed testified to this as did Wally Hamed.

The writing is equally clear: It states “one parcel in Jordan.” No mention of Tutu at all.

Equally damning under RUPA, which is based on what the partners *intended*, is that the *very best* evidence of what a partner “really” intended with regard to a partnership asset is: (1) what he said at the time, and (2) what he did at the time. There is no dispute; Fathi states Hamed expressly and repeatedly said “no” to the actual transfer. Thus, what is really happening here is that Yusuf has only a contractual claim for **specific performance of an oral contract** with his partner to transfer the property—under RUPA. That is what he is trying to enforce now.

ii. Yusuf Relies on Inadmissible Evidence of Settlement Negotiations and Mediations

To get around Yusuf’s patent admission of Hamed’s blatant refusal to transfer, the writing and the post-2011 treatment of the parcel by the partners, Yusuf tries to improperly use statements from other mediations and settlement negotiations to conflate a fictional “two parcel” oral contract which **wasn’t** reduced to a writing, with a real “one parcel” agreement—that doesn’t rely on statements from those other mediations and settlement negotiations, as it **was** reduced to writing. To be clear, these are statements long after the Fathi-Mohammad ‘one parcel’ deal that both parties describe in detail, in their prior deposition testimony.[[5]](#footnote-5)

However, no matter how complicated Yusuf attempts to make this or how many *intermediate* statements from settlement negotiations he tries to patch together (and then get past Rule 408) this is not some bizarre quandary or an unfamiliar situation in a RUPA dissolution. The sad truth is that partnerships break up badly, and just before the end there can be a lot of this sort of maneuvering. There are many RUPA cases like this—in which one partner alleges the other partner “orally” agreed to cause the partnership to transfer a partnership asset in a pre-dissolution settlement discussion—at a “settling of their rights” just prior to what turns out to be a breakup the partner is secretly planning*.* When this sort of claim involves partnership property which was purchased with partnership assets, RUPA §204(c) applies. *See, Reed v. Thurman*, No. E2014-00769, 2015 Tenn.App.LEXIS 111, at \*29 (Ct.App. Mar. 10, 2015):

Moreover, although Randell argues that the January 2010 settlement agreement settled all property rights between him and Leisa, we find no error in the trial court's conclusion that it did not. Leisa testified that **the parties had discussed settling their rights with respect to the farm equipment**, and despite representations from Randell that he would pay her for her share, she testified that he never did. A review of the settlement agreement confirms that it does not address the parties' rights concerning farm equipment, and we accordingly find that the trial court did not err in awarding Leisa compensation for identified partnership assets.

Specifically, we affirm the trial court's determination that Leisa had an interest in the "Hay Rings," "Gates," "Post Hole Digger/Auger," "Sprayer," "Cattle Chute," "2-Three Ton Feeders," "6-Ton Feeder," and "4-Three Ton Feeders." The trial court **awarded Leisa an interest in these assets upon determining that they were purchased out of the L&R Farm bank account during the period of the implied partnership.** We agree with this conclusion of the trial court. As already noted, **property is presumed to be partnership property if purchased with partnership assets**. Tenn. Code Ann. § 61-1-**204(c)** (2013). (Emphasis added.)

What happened in *Reed* is very similar to what happened here. The partnership was held to exist—implied under RUPA from a long, complex relationship. The property was purchased with partnership funds well before the breakup. As the end neared, one partner initiated oral discussions to “settl[e] their rights with respect to” that property. Although there was a writing as to some property, it did not mention the specific property at issue. That partner said a transfer had been agreed to orally and completed, the other disputed the agreement and transfer. This was classic “he said, she said.” Because the property was purchased with partnership assets, UPA §204(c) was applied. Based on that presumption, the “court awarded [the Partnership and the contesting partner] an interest in these assets upon determining that they were purchased out of the L&R Farm bank account during the period of the implied partnership.” That takes care of such oral discussions between partners. But here there is a further complication when Yusuf tries to go beyond the actual discussion between the partners, beyond the “he said, he said’” and into separate statements from totally distinct, subsequent settlement mediations and negotiations with third parties acting as the mediators.

As the Master has seen in two orders compelling responses as to this claim Yusuf refused for years to produce any documents about this parcel other than the original transfer documents. In 2017 Yusuf filed *one of three* affidavits about completely distinct settlement mediations *about this parcel*—but did not disclose two others.

First, Hamed takes the position that these mediations are confidential and privileged—completely inadmissible and all settlement negotiations are inadmissible under Rule 408.[[6]](#footnote-6)

Second, Yusuf must be precluded from using anything that he failed to disclose and produce until the very last second, and then only because of an order compelling that disclosure. Third, Yusuf’s actions in disclosing one affidavit but holding the ones that are contrary to his interests violates Rule 26 generally, and more specifically highlights the repeated refusals to respond and to supply a privilege log (which Hamed repeatedly sought.) It also violated Rule 34. But what is far more unfortunate is what was just revealed by the Master’s new order.

Fourth and finally, on December 30, 2019, when Yusuf did produce the other two affidavits pursuant to the order compelling production. One expressly contradicts the existence of an oral two-parcel contract and *any* final oral agreement. In that affidavit, Mr. Mohammad Hannun states of direct, personal knowledge as one of the mediators, that the partners ***had*** agreed to execute a two parcel deal, but after they agreed, after they shook, after it was ***over***:

before 24 hours past, Mr. Yusuf called and asked, if I find anything else, can he ask for it, and **I said no the agreement covers everything, even what he doesn't know about right now**, and Mr. Yusuf said no, that the agreement was for what he knew now, not for anything else he finds. **Then there was no more agreement**.

**Exhibit 4,** *Hannun Aff.*, April 21, 2014, at ¶19-21**.** (Emphasis added.) Sound familiar? It is *exactly* what Yusuf did to Hamed—it is an obvious technique. Moreover, this was finally produced in the eighth year of the case…five years after mandatory Rule 26 disclosure…two years after initial discovery requests for any writings. Worse, it was withheld after it was obtained but before the motion to strike—which is outrageous, as none of this would have ever come out if that motion had been granted. And this is from a person aligned with Yusuf, whose affidavit Yusuf secretly obtained without the Hameds finding out *for years*, and who describes himself as “family to both the Yusuf and Hamed Families because I am the brother of the wives of Fathi Yusuf and Mohammad Hamed.”[[7]](#footnote-7) “Then there was *no more agreement*.”

So, why would Hamed seek to exclude testimony that is so damning to Yusuf? The attempt to use this testimony is very, *very* important here. Yusuf seeks a hearing, but because these secondary witnesses cannot be allowed to testify on the facts surrounding negotiations, the testimony has been taken in *two* widely-spaced sets of depositions. It was videotaped for this exact reason, and is submitted to the Master here and can be further appended to Yusuf’s opposition. Thus, while Hamed believes that this matter should be decided on the solely legal issues set forth below, even if that is not the case, a hearing is unnecessary.

The Master is presented with three alternatives:

1. *As a matter of law*, in the absence of a writing, the Master should not reach evidence purporting to show such a second, oral “two parcel” contract (a) discussed only in attempted settlement **re**negotiations, (b) with another person, and (c) that contradicts the sole contemporaneous writing—for 7 reasons “at law” (1) timeliness, (2) Rule 408, (3) the parol evidence rule, (4) Judicial estoppel/admission, (5) lack of meeting of the minds, (6) anticipatory breach/repudiation, and (7) RUPA.
2. *Presumption under RUPA §204(c)*. But if the Master *does* get beyond those seven legal issues, and reaches a consideration of the evidence on the merits, he will crash into the impenetrable ambiguities presented by “he said-he said” and “multiple, draining, conflicting Fathi *explanations*.” When that occurs, Hamed enjoys a strong statutory presumption of the Partnership’s ownership,[[8]](#footnote-8) and Yusuf loses on the issue of ‘burden’ under RUPA § 204(c).[[9]](#footnote-9) There is simply too much evidence against him for Yusuf to even begin overcome the presumption created by the Partnership having fully funded the purchase.
3. *RUPA Partners’ intent as evaluated by “treatment*.” And, finally, if there ***is*** sufficient evidence to decide one way or the other, and all of the other facts are not dispositive, Hamed must prevail because all of the evidence regarding the Partners’ 2011 and *post-2011* “treatment” of the parcel supports Hamed’s position that they did not treat the parcels as if they intended transfer it in and after 2011.[[10]](#footnote-10) Yusuf has conceded the Partnership’s continuing receipt of all post-2011 rents, its continuing payment of all post-2011 taxes and its being carried on the financials long after 2011—until Yusuf changed this in 2015. Thus, this “finding” is favored under RUPA §204(c) and the VI cases on oral attacks on title.[[11]](#footnote-11)
4. *Summary of Yusuf’s Challenge*

Yusuf is just one more partner seeking to claim transfer to him of *partnership assets* just before a breakup—via an oral, undocumented contract. **This is exactly why RUPA §204(c) exists**—rather than put all partnership property into a “he said, she said” lottery of this sort of last minute, pre-breakup claims, it creates a presumption of *equality*: “Property is presumed to be partnership property [and thus 50/50] if purchased with partnership assets” and then the burden shifts to the partner claiming **100%** to rebut the presumption of equal ownership.

In this regard, there is *no factual dispute* that in their *only* face-to-face settlement negotiation, Hamed and Yusuf agreed to a contract for “one parcel” in Jordan. *Yusuf gave a detailed description of both the negotiation and agreement in his 2014 deposition*. He testified that although he *originally* demanded two parcels in exchange for a release of his claims and Hamed was willing, they kept discussing matters and when it *ended* they had entered into an agreement to create a document to transfer “one parcel” in Jordan. Hamed described this *identically* in his 2014 deposition—one parcel, in Jordan. But no statements or conduct from that negotiation need be admitted, because Yusuf had *his* lawyers draft a writing that *he says* effectuated the outcome. It precisely reflects both men’s 2014 testimony above. Again, it conveys Hamed’s interest in just the one parcel (in Jordan) and contains no reference either (1) to a broader contract implicating a second parcel, or (2) to any land in Tutu.

Yusuf’s lawyers tendered that writing to Hamed. He executed it with no changes and returned it to them on the spot. They later faxed it to Yusuf with an invoice. Yusuf has said that the transfer was recorded. (While this fact cannot be reliably verified, as it involves property in Jordan not before this Court, it will be assumed to be true for the limited purpose of this motion.)

In the Prior Opposition Yusuf tries to make it sound like Hamed **did** transfer the property but that “there was no need for an additional writing because the deed was already in United’s name.” But this is a recent fabrication. **There has never been a prior assertion that the transfer took place**. Before he knew what the “new story” was, Yusuf repeatedly testified that back in 2011, contemporaneously with all of this happening, the Hameds refused to sign over the Tutu Parcel or any more parcels beyond the one in Jordan per the writing. Yusuf has repeatedly testified there was no transfer in 2011. Period. End of discussion. NO TRANSFER.

Plaintiff Mohammed Hamed refused to transfer not only the second property [Tutu], but also the third property requested as a set-off. . . .

Exhibit 2, *supra.* at 9. Reading only Yusuf’s testimony, it is clear that this new version of events, that such a transfer took place in 2011 is *absolutely not true*.[[12]](#footnote-12) The facts surrounding how the parcel was ‘treated’ by the partners confirms this. There are absolutely no indications in Yusuf’s own post-2011 *actions* that even *suggest* he believed the partners had made such a transfer. Nothing in the TREATMENT of the parcel BY THE PARTNERS suggests that Yusuf or Yusuf’s United owned it after 2011 rather than the Partnership. To the contrary, the Partnership continued to pay everything. There were no post-2011 changes to 50/50 tax payments by the partners, no changes to the Partnership’s post-2011 financials or tax filings, and **no** post-2011 changes to rents being deposited into the Partnership—much less one written reference to such a change of ownership. None of this occurred until the litigation began, and later in 2015.

Thus, Yusuf is attempting to overcome all those *real* facts by suggesting that the written Agreement and the transfer of the one parcel in Jordan pursuant to that Agreement are **“partial performance” of some larger deal**. This is patently absurd. Again, until litigation there was no deed, recording, email, letter, discussion with counsel, accountant consultation, financial statement, tax document or anything else that even *mentions* such a “two parcel” contract, much less memorializes it. This “two parcel” contract appears in writing, testimony and declarations *only after litigation started*. Therefore, as to the one parcel contract, everything necessary was done correctly and reduced to a writing—bur as to the illusory two parcel contract, there is, indisputably…zero, nothing, nada.

1. **Hamed’s Statement of Material Facts Not in Dispute**
2. The USVI GIS photosurvey below is an accurately annotated enlargement from the official online database which shows the location of this 0.536 acre parcel Yusuf calls the “entrance” parcel, in relation to the 9.438 acre parcel that Fathi Yusuf calls the “major” parcel. Proximity to Route 38 and the Tutu Park Mall can also be seen. *See* **Exhibit 5,** full survey image.



1. Yusuf admitted in his Prior Opposition that that the Hamed/Yusuf-owned (*Plaza Extra) Partnership* directly paid the seller the full $330,000 price for the parcel ”by using income *from the Plaza Extra stores,*“ and that the funds were paid to the seller with two checks from the Partnership’s “d/b/a Plaza Extra” accounts. *Prior Opposition* at 16, ¶¶1-3.
2. In the Prior Opposition and in his 2014 deposition Yusuf admitted that the Partners’ intended the parcel to be jointly owned by them 50/50. *Prior Opposition* at 16, ¶6.

Q. Okay. So, and what I'm trying to get at is I know there's a half-acre piece in United, that's in the name of United?

A. Yes.

\* \* \* \*

Q. Okay. And both of those, the smaller piece and the bigger piece, were purchased with money from the supermarket, so they're 50/50.

A. That's correct.

1. In his Prior Opposition, Yusuf admitted when the land was purchased, its intended use was as a Supermarket development for the Partnership. Also that in 2006 the Partners made an initial application to build the new Tutu Plaza Extra Supermarket on this land, but lacked the required secondary access to the major (9.3 acre) parcel from the Route 38 thoroughfare. He also admitted that the access was blocked by the half-acre parcel.[[13]](#footnote-13) Therefore, as Fathi Yusuf also conceded in his Prior Opposition, at the time of the second application in 2007, the intended use of the parcel was still “as an entrance”. *Prior Opposition* at ¶¶7-8.
2. He also admitted that in 2007 this ‘Site Plan’ was submitted to the Senate, to add a mandatory “entrance”—for the second hearing regarding a Tutu Plaza Extra Supermarket, as the project would not be approved without access.[[14]](#footnote-14) *Prior Opposition* at ¶¶7-8.



1. Judgment has been entered that in 2008 the Partnership recovered record title to the parcel in 2008 pursuant to a deed in lieu of foreclosure. Order of January 14, 2020.
2. A year and six months later, on February 26, 2010, the Hameds and Yusufs entered into a criminal plea agreement. Because of that, $42 million in cash was about to become available for the first time in 8 years, along with mutually owned lands. *See* DE 1248, *USA et. al. v. Fathi Yusuf et. al*., D.V.I, Div. of St. Croix, Crim. No. 2005-015.
3. Thereafter, in 2010, Yusuf began to claim Hamed owed him millions, and demanded Hamed’s half interest in parcels of land. *See* citations to the record in ¶¶ 10-16 below.
4. Fathi Yusuf and Mohammad Hamed gave very similar deposition testimonies about what happened regarding the 2010 in-person negotiation and 2011 writing that underlie Yusuf’s position here. *Compare* Yusuf testimony *with* Hamed testimony. ¶¶ 10-16 below.
5. Fathi Yusuf’s deposition of April 2, 2014, provides the following at 77-79. **Exhibit 8**.

Q. [By Joel Holt] You know, I asked a question, but I asked it wrong, but didn't there come a time when you and Mohammad Hamed sat down within the last year and a half and tried to resolve things by—he talked about it a little bit in his deposition about the giving of properties and things of that nature. Do you recall that?

A. [By Fathi Yusuf] Much more than a year and a half.

Q. Can you tell me about that?

A. Can you come up with question, or you want to come up with a story?

Q. I can—I actually like the way you tell the story, but I'll tell you what I've—what I've heard, and then you can correct what I've heard. **That the two of you met to try to resolve all the differences** between you and yourself, the Hamed family, and Wally in particular.

**A. Yes.**

Q. And that he offered two or three properties, and **you agreed to take one** or something like that. And, you know, I never really quite -

A. I can comment on that.

Q. Okay. Please.

**A. I—we met, and after I tell him my story of what I know at that time, he say, What do you want? I say, I'll take *two* property for what I discover so far. He say, Which? I give him the description of the property, one in Jordan and one at Tutu Park.** The one in Jordan, I pay one million two, approximate. The one at Tutu Park, I paid 1 million for it. 1,000,350, I believe. It's two pieces at Tutu Park, but we call it one piece. One-half an acre as an entrance, and 9.31 as the major piece of property. **He say, You can have it.** And after they say it, the man come up front after I tell him my story, and he was very generous to say, You can have it. And we kept talking, as a family. After all, we are family, as you mentioned over and over in your correspondence. We are family at that time, and we have a very high respect for each other, even though, up to now we still have high respect to each other, **and I told him, *No, one is enough*.**

1. Thus, Fathi admitted that by the end of the only in-person negotiation with Mohammad, he agreed to a “one parcel” settlement contract—with just the Jordanian parcel, stating ”one is enough.” He then went on to describe what happened after the meeting, with Wally. *Id*.

[*Id*. begin page 79] So I went to the store, I take a look, and I analyze the bank statement of what he was saying. I say, Man, after that, this man would not even tell me the truth, unfortunate? **So immediately I told Wally, Do me a favor, Wally. You was present. Go back to your father and tell him, No, I wanted the two piece of property.** That's the same day. Not even, as soon as we get to the store, it take me about half an hour to take a look of what he was talking about. Unfortunate, I have found it's impossible what he was talking about, it could be true. And I say, Come on, man. You know? **And—and he went home that night. He told his father. The next day he come to work, I say, *Did you tell your father*?** **He said, Yes. I said, Fine. That's it.**

Q. Okay. You done?

A. Done.

1. Thus, in 2014, *Yusuf testified* in deposition that there *was* an initial “one parcel” agreement for the Jordanian parcel in the face-to-face meeting and *the meeting then ended*. He testified he subsequently asked Wally to ‘tell’ his father about an additional demand. Yusuf demanded a different, “two parcel” agreement. Wally verified that he did ‘tell his father.” *Id*.
2. But Yusuf made a HUGE error between that first negotiation and his subsequent demands over the next few days and then months. *He has testified* that he started trying to justify *more parcels by stating to Wally that he knew there were additional acts of theft and malfeasance he would find*, and that based on his post-meeting “review of [his] papers” he was demanding the additional land for “known and unknown claims.” This really, really, really, really upset Mohammad Hamed. In his own filing, Yusuf admitted:

**Yusuf had agreed to resolve this misappropriation**, **but not any others that Yusuf might later discover**, by the conveyance of Hamed's interest in two parcels, one in Jordan that is the subject of Exhibit N, and one half acre parcelin St. Thomas, previously titled in the name of Plessen Enterprises, Inc., which is addressed in a number of the Liquidating Partner's Bi-Monthly Reports. See Ninth [BMR] at p. 5-6. **Yusuf insisted that if Hamed wanted a resolution addressing all Hamed misappropriations,** **whether known or unknown**, Hamed would have to arrange for the conveyance to Yusuf or United of another approximately 9.3 acre parcel located on St. Thomas also titled in the name of Plessen Enterprises, Inc. **Hamed, through his son, Waleed, refused to convey this third parcel.** (Emphasis added.)

Or, as Mohammad Hamed stated at 148-149 of his deposition:

Mr. Fathi had asked for two pieces of property. He [Hamed] had agreed to that. Mr. Fathi had then said one is enough, and then again changed his mind and said, No, he wants the two. And I understood that then he also asked for a third piece of property. That **there was a back and forth trying to find a way to -- to reach settlement, and that he [Hamed] says he's been accused by Mr. Fathi of stealing, he and his son. He says, I have not stolen. My son has not stolen. We are honorable people.**

1. That’s why Yusuf did NOT and could not testify that the renegotiation for the second parcel, after that in-person negotiation ended, was accepted. Only that he told Fathi to tell Mohammad. To the contrary, the Hameds forcefully rebelled. Thus, all that we have on what happened when Yusuf overreached first for a ”two parcel” contract and then for a “three parcel” contract is the writing which *Yusuf calls* the “Agreement”—which involves just the one parcel in Jordan. *Id*. See also the Agreement. **Exhibit** **9** and in English, **Exhibit 10.**
2. Mohammad Hamed’s deposition testimony about the identical “one parcel” settlement discussion in the in-person negotiation, contract and eventual writing, two days *before* Yusuf’s testimony, is substantially in agreement with Yusuf’s rendition. **Exhibit 11.**

Q. (Mr. Hodges) Mr. Hamed, given the 25-plus years that your—you and Mr. Yusuf have—have worked together in the store, why haven't you taken the time to make sure you understand what the facts are with respect to this

$2.7 million dispute?

MR. HARTMANN: Object as to form. Object, argumentative.

A. (Speaking in Arabic.) Work, work, work, work, day and night.

THE INTERPRETER: Okay. I can only translate or interpret what he said. He's saying—he said that they come from the same area, they are farmers, and that, you know, he was responsible for bringing them here. When they arrived here, they came to his home. He welcomed them, and—and helped them out, and—and over the years, he established a [begin page 138] business, a grocery business, and when he made some money, here came a time when—when Mr. Fathi Yusuf was going to build a shopping center. It's a long story, and that, you now, most of their time has been working, working, and here's really—there hasn't been a time that they could sit and talk.

Q. (Mr. Hodges) In the past two years, isn't that right?

A. (Speaking in Arabic.) Okay. Go ahead.

THE INTERPRETER: He said, I begged him to sit and—and—and—so we can finish this, and in Jordan, we—we—we, in my house, we met, and I was giving him—(speaking in Arabic). **He asked for two pieces** of --

A. Just one I want.

THE INTERPRETER: —he [Yusuf] had asked for two pieces of property *in Jordan*. He {Hamed] told him [Yusuf], I'd sign for—for them, no problem. ***Later*,** he came—meaning Mr. Fathi Yusuf—and told him [Hamed], You've kicked me in my stomach. It's a term of, in other words, **he was willing to accept, as I understand, one piece of property instead of two.** (Speaking in Arabic.)

1. Also identical is Hamed’s next, immediately following line of testimony, that AFTER the in-person settlement negotiation was over, beginning the next day Yusuf spoke to Wally about “*asking”* to renegotiate to add the second parcel—the half acre in Tutu. *Id*.

**Next day**, he came back and ***asked for*** the other piece of property.

1. In two different sworn submissions, Yusuf has admitted that ***after*** the verbal agreement for one parcel, he instituted several additional renegotiation attempts for “two parcels” which would have been the Tutu half acre, and then a third parcels. He alleged additional “known and unknown wrongs. In all both places, Yusuf represented that that the attempts *failed*.
2. Yusuf Claims filing at 13, Exhibit 2, *supra.*

[In 2011] Yusuf insisted that if Hamed wanted a resolution addressing all Hamed misappropriations, whether known or unknown, Hamed would have to arrange for the conveyance to Yusuf or United of another approximately 9.3 acre parcel located on St. Thomas also titled in the name of Plessen Enterprises, Inc. Hamed, through his son, Waleed, refused to convey this third parcel.

1. Yusuf Interrogatory Response 377. Exhibit 1, *supra*.:

When Responding Party [Yusuf] asked Waleed Hamed to proceed with the transfer of the Tutu Park property, it is at this point, several months later, that *Plaintiff Waleed "Wally" Hamed and Plaintiff Mohammed Hamed refused to transfer not only the second property [Tutu], but also the third property* ***requested*** as a set-off for the unauthorized transactions. (Emphasis added.)

1. The admission in the 377 interrogatory was made BEFORE the 2014 depositions, and the claims filing admission is from 2016—yet in the Prior Opposition, Yusuf attempts to make all of these additional renegotiation “go away” in the same way he changed the “inadvertently misstated” rents and carrying the property in years of the “inadvertently misstated” Partnership financials go away—by making up an even newer, new story—tucked away in a footnote. *See* page 6, footnote 3. Seemingly forgetting the other places where he told the identical story, long BEFORE the “erroneous” 2016 claim:

The description in Yusuf’s Initial Accounting Claims inadvertently misstates the 9.3 acre to be considered a third property.

1. Yusuf’s testimony makes it clear that multiple attempts to increase this to two (and perhaps three) parcels failed because he told the Hameds starting the NEXT DAY, that he was trying to get this “extra” land in compensation for “other claims” he “might discover” in the future—which he described as ‘known or unknown’—for which he sought this additional land. Yusuf stated that Hamed rejected those proposal. *Id*. Again, Yusuf admitted the following:

Yusuf insisted that if Hamed wanted a resolution addressing all Hamed misappropriations, ***whether known or unknown***, Hamed would have to arrange for the conveyance to Yusuf or United of ***another*** approximately 9.3 acre parcel located on St. Thomas also titled in the name of Plessen Enterprises, Inc.

1. *Affidavit of Mohammad Hannun*, April 21, 2014, (Ex. 4) states, at ¶19, Exhibit 4**:**

before 24 hours past, Mr. Yusuf called and asked, if I find anything else, can he ask for it, and I said no the agreement covers everything, even what he doesn't know about right now, and Mr. Yusuf said no, that the agreement was for what he knew now, not for anything else he finds. **Then there was no more agreement**.

And at ¶21:

Finally, at one the last meetings, Mr. Yusuf said that if the Hameds transferred a third piece of property that would settle everything about the unauthorized monies, whatever he knows and he would not do any more searching for monies he did not know about.

1. In fact, the negotiations never really stopped, and Fathi Yusuf testified that by the end of 2011, at yet another renegotiation meeting was held—and again there was no written agreement for additional parcels. *See Answers to Plaintiff Waleed "Wally" Hamed's First Set of Interrogatories in Mohammad Hamed, et. al. v Fathi Yusuf*, SX-2012-CV-377, *supra.*

18. Do you dispute that a meeting was held in or around December 2011 in order to try and resolve the disputes between the parties, if not, who was present, the date of the meeting, the substance of what was discussed, whether an investigation was undertaken, by whom the scope of the investigation and the results and whether an agreement was put in writing to be finalized by Attorneys and the terms and conditions of that agreement.

RESPONSE No. 18: [Yusuf] objects to the form of the question. . . Notwithstanding the above objection, [Yusuf] believes that this Interrogatory is referring to a *meeting that was held on the day before Christmas*. For Attendees see Defendant's Response to No. 16. *No agreement was reached. No agreement was drafted as a result of this meeting* to [Yusuf’s] knowledge.

1. It is undisputed on the documents of record in this motion that in late 2010 and early 2011, the *sole* written Agreement that came out of the negotiation was drafted by counsel retained, paid for, and directed completely by Fathi Yusuf. *See* invoices and facsimile. **Exhibit 12.**
2. That Agreement was signed on July 8, 2011. *See Agreement, supra*., Exhibit 10.
3. The Agreement recites both Hamed’s consideration (shares in the parcel) and Yusuf’s (“*I received the price* of my share in the mentioned land *from Mr. Fathi Yusuf Mohamad Yusuf*”—both men testified that the “price” Hamed received was the release of the alleged claims.) *Id*.[[15]](#footnote-15)
4. It is also undisputed that Yusuf’s legal counsel faxed that signed Agreement along with a bill in November 2011. *Supra,* Exhibit 12.
5. It is also a matter of the undisputed factual record that there are no subsequent writings or financial records which ever even *mention* any second agreement as to the Tutu parcel. It is not mentioned in any deed, document, communication, writing or other item of evidence. *See* **Exhibit 13,** Declaration.
6. No document or other evidence reflects that any deed or other writing contrary to the 2008 Deed has ever been executed or recorded. Declaration. *Id.*
7. No document or other evidence reflects that any counsel was ever retained by Yusuf or Hamed as to the half-acre parcel. See Declaration. *Id*.
8. To the contrary, in the Prior Opposition, Yusuf does not dispute that the books and financials of the Partnership, submitted both to this Court and to the IRB by Yusuf, continued to reflect the original status of the half-acre parcel as being Partnership property (owned 50/50) until mid-2015, when Yusuf unilaterally changed the Partnership books on the half-acre parcel in response to this claim. Prior Opposition at ¶¶11-12.
9. Yusuf also does not dispute that those 2013 financials, identifying the parcel as Partnership property were submitted by Yusuf as the correct Partnership accounting—to this Court, the BIR and the federal court. Prior Opposition at ¶¶11-12.
10. From that point on Yusuf repeatedly denied publicly and in court filings, verbally and under oath (1) that there ever had been a partnership, (2) that neither he nor Hamed ever referred to themselves as partners, (3) that Hamed was an illiterate backroom employee, *and (4) that Hamed wasn’t due anything more than an annuity (which Yusuf could determine at his discretion) as Hamed was just a long-departed nobody*.
11. **Argument: Applicable Law and Application of that Law to the Facts**

Yusuf’s story presents eight threshold issues ‘at law’ and requires no additional facts:

1. The Master ordered that all RUPA claims be filed by September 30, 2016. However, (1) while Hamed filed a claim that the Partnership was in record title, and (2) United sort-of-claimed that IT was in record title (and in any case, because it actually had ‘apparent title’ on the face of the deed, Hamed had to litigate record title), (3) there was no claim filed in September of 2016 that Yusuf was the owner pursuant to oral settlement negotiations.
2. Yusuf’s argument involves enforcing what both men agree occurred entirely during a settlement negotiation, and is therefore inadmissible under Rule 408—because, as a matter of VI law, evidence “either to prove or disprove the validity or amount of a disputed claim . . . .is not admissible either [for] (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim” or as to “(2) conduct or a statement made during compromise negotiations about the claim.”
3. Independently, the parol evidence rule applies where there is a contemporaneous written outcome of such discussions. Here, it was a writing drafted by counsel retained by Yusuf following the negotiation. Yusuf calls this the Agreement.
4. Four years after this supposed settlement, in 2015, Fathi Yusuf was still carrying the parcel on the Partnership books, United was NOT carrying it on United’s books—and Fathi represented these financials as being accurate to both the IRB under penalty of perjury and this Court under oath. As a matter of law, he is either (1) judicially estopped from now arguing “alternative facts,” or (2) it is a “judicial admission” in this case, which he cannot contradict.
5. Even if Yusuf thought he had an oral deal for two parcels in good faith, there was no “meeting of the minds” as to which parcels were involved. This can be seen from their similar testimony, Yusuf’s admission in an interrogatory response that Hamed rejected the multi-parcel renegotiation attempts—refusing transfer, and the undisputed documents of record. As a matter of law there is no contract.
6. Even if Yusuf thought he initially had an oral deal for two parcels, Yusuf repudiated and then breached that deal by subsequently demanding that the deal would only go through with 2 then 3 parcels.
7. There is a failure of consideration. Even if Yusuf thought he had an oral deal for two parcels, he cannot show facts that suggest he “paid” the full “purchase price” where he finally stated that he would not provide a release absent a third parcel.
8. The RUPA Effects of Burden and “Treatment”

Hamed will address each issue individually.

1. Legal Issue 1: Timeliness

This is a RUPA action—the Master ordered that all RUPA claims had to be filed by September 30, 2016. However, (1) while Hamed filed a claim that the Partnership was in record title, and (2) United sort-of-claimed that IT was in record title (and in any case, because it actually had ‘apparent title’ on the face of the deed, Hamed had to litigate record title), **(3)** **there was no claim filed in September of 2016 that Yusuf was the owner pursuant to oral settlement negotiations**. Thus, this challenge to the title should be summarily denied. It exists now only because ‘*Plan A’* (2008 title in Yusuf’s-United) failed, and this plan (Plan B) *would have directly contradicted Plan A*—so ‘*Plan B*’ couldn’t be filed originally. (**Why would Yusuf be negotiating for Hamed’s share in 2010 if Yusuf’s-United had been in title since 2008, as he originally, repeatedly averred? It would have made no sense.**)

1. Legal Issue 2: This new Yusuf argument involves what both parties state was a settlement negotiation, and intermediate oral ‘agreements’ during such discussions are inadmissible and non-binding.

Both men describe an in-person settlement negotiation prior to July 2011—to deal with a disputed claim by Yusuf—one which eventually led to this litigation. The following are statements from the documents already cited and quoted above. First, from Yusuf’s deposition:

[Holt] …the two of **you met to try to resolve all the differences** between you and yourself, the Hamed family, and Wally in particular.

1. [Yusuf] Yes.

Also, from Hamed’s deposition:

THE INTERPRETER: He said, **I begged him to sit and—and—and—so we can finish this**, and in Jordan, we—we—we, in my house, we met. . . .

The most basic USVI law on oral discussions in settlement negotiations is Rule 408:

Rule 408. Compromise Offers and Negotiations (a) Prohibited uses.

1. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove *the validity* or amount *of a disputed claim* or to impeach by a prior inconsistent statement or by contradiction:

(1) furnishing, promising, or offering—*or accepting, promising to accept, or offering to accept*—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, or negating a contention of undue delay.

Yusuf admits that the parties met to negotiate a compromise to a disputed claim. Despite this, he wants to create a contract out of what was discussed and re-discussed in those negotiations.

Worse yet, what he really wants to admit into evidence is an alleged oral RENEGOTIATION of that oral settlement discussed with another person AFTER the initial negotiation ended. Further, he wants to admit an oral agreement that is different from what the sole writing that emerged states—to show another, different, intermediary offer and acceptance in discussions, directly contrary to the writing. Finally, he *also* wants to ignore his own admission that he attempted a second and third renegotiation where he said he would not issue a release unless additional parcels were agreed to—an explicit repudiation of any earlier agreement. This is *exactly* why Rule 408 exists. This court stated the following as to “**statements**” in settlement negotiations between private parties not reduced to writings:

Rule 408 was amended and further clarified, effective December 1, 2006. . . .**statements** made during compromise negotiations *of* private matters are not admissible, if offered to prove liability, invalidity or amount of the claims in dispute. Third, the rule prohibits both the party attempting to compromise either by an offer to settle or through an admission of fault, and the party to whom the offer to compromise was made, from disclosing **the contents** of those discussions.

*People v. Brewley*, No. ST-06-CR-402, 2007 V.I. LEXIS 24, at \*16-17 (Super. Ct. Nov. 16, 2007)(emphasis added.) As the court noted: “These prophylactic measures are intended to ensure that Rule 408 retains the underlying policy of encouraging settlements and admitting fault when necessary.” In his Prior Opposition, Yusuf attempted to equate Hamed’s reliance on the written agreement from the first day of negotiations with his oral “statements” and the “contents” of such negotiations not reduced to a writing. This is turning the rule on its head.

1. Legal Issue 3: The parol evidence rule

Here there is not just an alleged oral agreement between partners, there *is* a writing that Yusuf has told the Master is the “Agreement” that arose out of the settlement negotiations. Parol oral evidence cannot be admitted contradicting the writing that Yusuf calls the Agreement.

In other words, “a writing intended as the entire understanding of the parties is then subject to the parol evidence rule which precludes consideration of extrinsic evidence of a prior or contemporaneous agreement extending or altering the authority granted in writing.” *Phillips v. Andrews*, 332 F. Supp. 2d 797, 803, 46 V.I. 233 (DVI App. Div. 2004). However, extrinsic evidence may be admitted interpreting a vague term in an agreement or it may be used to establish “illegality, fraud, duress, mistake, lack of consideration, or any other invalidating cause.” Restatement (Second) of Contracts § 214 [\*\*22] (1981).

*Jefferson v. Bay Isles Assocs., L.L.L.P.*, No. ST-09-CV-186, 2011 V.I. LEXIS 7, at \*21-22 (Super. Ct. Feb. 1, 2011). There was no vague term in the Agreement on the land—specific land is stated, and the Tutu parcel is not mentioned. If the writing is ambiguous in any way, that should be construed against the drafter. *See Mastrobuono, supra.*Yusuf admits in his own filing that this is the ‘Agreement’ that came out of that negotiation. It recites the consideration to Yusuf. Further, in his claims filing, Yusuf states:!

Hamed's interest in another parcel that was purchased in Jordan using funds from the Plaza Extra Stores has already been conveyed to Yusuf **as part of Hamed's efforts to appease Yusuf following his discovery of the misappropriation** of $2,000,000. . .A copy of **the agreement** in Arabic conveying Hamed's interest in such parcel is attached as Exhibit 0.

*See* Exhibits 9 and 10, *supra.* So what Yusuf is trying to get away with is the argument that while the two men retained counsel, had a writing drafted and entered into it with regard to the Jordanian parcel; but, oddly, the parallel contract for the half-acre at Tutu was not in writing.

1. Legal Issue 4: Yusuf is judicially estopped from arguing “alternative facts.”

Hamed incorporates the factual recitation in his main motion, that Fathi Yusuf submitted statements and financials, under oath to the IRB and to this Court; that until 2015, the half-acre parcel was always on the books and financials of the Partnership as a Partnership asset.

The doctrines of judicial estoppel and judicial admission preclude a party from contradicting its previous position where there has been no change in the law*, simply because his interests have changed*. *New Hampshire v. Maine*, 532 U.S. 742 (2001). This is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749.

The U.S. Supreme Court has noted that this doctrine is not restricted to statements in prior cases but applies within a single case. (This is sometimes referred to as a judicial admission.) For an excellent discussion of this, see *Intellivision v. Microsoft Corp*., 784 F. Supp. 2d 356, 364 (S.D.N.Y. 2011), where the 2d Circuit, in affirming a district court, rejected the argument that judicial estoppel requires a party’s position to have been adopted by a different court or in a “prior separate proceeding.”[[16]](#footnote-16) Citing *Pegram v. Herdrich,* the court noted that judicial estoppel is a flexible equitable doctrine without fixed requirements and that judicial estoppel “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”

Thus, "[j]udicial estoppel prevents a party from ‘playing fast and loose with the courts’," *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (internal citation omitted.)

1. Legal Issue 5: No “meeting of the minds” as to which parcels were involved.

Even if RUPA 204(c) wasn’t creating a presumption in favor of this being Partnership property, a party asserting a contract has the burden to show there was a meeting of the minds. Thus, accepting every fact he has suggested as true and ignoring the inadmissibility of a settlement discussion and the existence of a writing, Yusuf cannot show there was actually a meeting of the minds in those settlement discussions. His own story varies from his deposition to this claims statement to his interrogatory response. But even accepting his “best” version, when did Hamed agree to the second parcel?

The basic law of contract and the basic burden Yusuf bears are clear. *Cornelius v. Bank of Nova Scotia*, No. 2015-0058, 2017 V.I. Supreme LEXIS 50, at \*21 (Aug. 8, 2017)(“a contract is only formed or modified to the extent there is mutual assent and mutual consideration*,”) see also* *Williams v. UVI*, 2019 V.I. LEXIS 2, at \*5-6 (Super. Ct. Jan. 18, 2019)(emphasis added)

Here, this court finds that Defendant is correct that there was no express contract created between the parties. The language of the 1997 memo does not expressly offer a promise of merit pay to Plaintiffs, **there was no clear acceptance by Plaintiffs** as Plaintiffs were conditioned on their employment agreement to continue working for Defendant, thus the continued benefit given to Defendant by Plaintiffs does not signal separate adequate consideration to this court. **Also, without an offer presented by Defendant and an acceptance by Plaintiffs, this court cannot deduce that there was a manifestation of mutual assent between both sides or a “meeting of the minds.”** Therefore, absent clear evidence of all requirements of an enforceable contract, this court holds that no enforceable express contract existed between Plaintiffs and Defendant.

Here, there was “no clear acceptance of any offer.” In short, there is no offer and acceptance after the initial oral agreement as to the one parcel in Jordan—which Hamed did transfer to Yusuf—exactly as described in the writing. There is only Yusuf repeatedly TELLING the Hameds that they must renegotiate, and Mohammad Hamed’s repeated silence or refusals to either agree or to do so. As best, absent Mohammad’s express assent, the 2-parcel renegotiation with Wally was a unilateral contract offer requiring Hamed’s performance for acceptance—which Yusuf admits Hamed declined.

1. Legal Issue 6: Even if Yusuf thought he initially had an oral deal for two parcels, Yusuf repudiated and then breached that deal by subsequently demanding that the deal would only go through with 2 then 3 parcels.

Yusuf describes the “ongoing” nature of the “negotiations” (i.e., his continually increasing demands) he makes it absolutely clear that *Hamed signed and delivered the Agreement but that was not the end.*

As a result of these new discoveries of even more unauthorized transfer of funds by Plaintiff/Waleed Hamed, the Defendant informed Wally Hamed that it has to be three (3) properties to cover everything had found.

Thus, Yusuf was *still negotiating* what was necessary for a release. Even if there were had been an original, oral two-parcel deal, this was an express repudiation by Yusuf—**he says that *he stated*** there would now be no release without a THIRD parcel. And there is absolutely no factual disagreement that this **re-re-renegotiation** was refused.

1. Legal Issue 7: There is a failure of consideration. Even if Yusuf thought he had an oral deal for two parcels, he cannot show facts that suggest he “paid” the full “purchase price” where he finally stated that he would not provide a release absent a third parcel.

This relies on the same facts as subparagraph “f” above. Yusuf’s saying “we have a deal” is no deal at all if he conditioned the release on additional parcels. Consideration was never given if it was conditioned on “more performance” to get it.

1. Legal Issue 8: *The RUPA issues: Burden and “Treatment”*
2. *Burden: The Presumption that the Parcel is Partnership Property*

First, as set forth above, RUPA §204(c) creates a mandatory *presumption* that because the Partnership supplied the funds from its “d/b/a Plaza Extra account” it is the owner. Thus, Yusuf must overcome the rebuttable presumption that property *is* partnership property the *burden* shifts to him to rebut that ownership by proving that the intent of the Partners was to transfer title to him in 2011.*See In re Estate of Bolinger*, 1998 MT 303, ¶ 80, 292 Mont. 97, 116, (1998)(“The presumption is rebuttable and may be overcome.”)

Once this presumption is triggered and the burden shifts, RUPA jurisdictions considering the resulting burden have looked to several factors—but in all cases, the single question that all of these factors are reviewed to answer is: **“**What did the Partners intend?”For example, in *Mogensen v. Mogensen*, 273 Neb. 208, 215-19, 729 N.W.2d 44, 52-54 (2007). the Nebraska Supreme Court, interpreting its identical enactment of RUPA, *reversed the trial Court’s refusal* to properly *apply* this presumption against a third party that had title of record.

In determining whether a party has rebutted the presumption, no single factor or combination of factors is dispositive. Ultimately, the partners' intentions control…

\* \* \* \*

The use of partnership funds in the purchase and the other evidence suggest that Opal owns [it] in name only….Once we acquire equity jurisdiction, we can adjudicate all matters properly presented and grant complete relief….

Obviously, the first and very best evidence of the Partner’s intent is their own testimony on what they intended in 2011—Yusuf conceded that in the Prior Opposition. Hamed never intended to transfer the half-acre parcel. There are four differing Yusuf versions of the facts, plus the Hamed version and the Agreement. **If, because of this ”he said-he said,” the Master cannot make this determination based on the facts and testimony of record, he must further analyze this intent through the other RUPS 204(c) factor, how the parties *acted***.[[17]](#footnote-17)

1. *Intent Gauged by Acts in RUPA: How the Parties “Treated” it after 2012*

Thus, the Master must move to the next step, to consider what happened, what the Partners intended, from how the Partners “*treated*” the property in and after 2011. *White, supra*.

The 1992 deed lists the grantees as Charles W. White and Charles T. White, as tenants in common [not the partnership]. At trial, the testimony revealed that all of these properties were ***treated*** as partnership property, that they were purchased with partnership funds, that the property taxes were paid with partnership funds,and that the rent from the properties was collected by and paid to the partnership.

Again, there is no dispute. Not only did the rents from this parcel *still* go into Partnership’s account after 2011,[[18]](#footnote-18) but the parcel was *still* carried on the Partnership’s books as Partnership property from after the *2008 Deed*[[19]](#footnote-19) *until 2015*—when Yusuf had it this changed after Hamed raised the issue.[[20]](#footnote-20) Same with joint payment of taxes. They changed nothing at all.

For example, the **2013** *Balance Sheet was provided to the BIR for tax purposes*. In his opposition to Yusuf’s motion to strike this claim, Hamed submitted this to show the parcel was carried on the Partnership’s books, not Yusuf’s-United’s books. There, Hamed noted that they are the official Partnership financials used to make sworn submissions to the Bureau of Internal Revenue regarding the years before the litigation began and they show this parcel being carried on the *Partnership’s* books for $330,000. However, in his July 12, 2018 Order on this issue, the Master stated (. 4,at 4) that the balance sheet exhibit in the motion did not *specifically* refer to *this* parcel, but rather: “The balance sheets simply listed “Land, $330,000.00” under “ASSETS.”

Fortunately, exactly what “land” is being referred to as being a $330,000 Partnership asset can be seen in **Exhibit 15,** from the 2010 Plaza Extra Trial Balance Report (run Sept. 8, 2011). It *lists the land as this parcel*, “2 4 Rem, Est Ch”—for the same $330,000.[[21]](#footnote-21) Similarly, in the Fourth Bi-monthly Report, while Yusuf admitted that the parcel *had* always ”been listed on the balance sheet of the Partnership” as partnership property, for the first time he also claimed that always carrying it as a Partnership asset until 2015 was just an “error”. That same report belatedly informed the Master that the books were being changed—Yusuf, had the Partnership’s books and reports changed to favor Yusuf’s-United;—same as the rent deposits.

**. . .Yusuf submits that** **the Land has erroneously** **been carried on the balance sheet of the Partnership**, (Emphasis added.)

Thus, after 2008 the parcel was *moved from Plessen’s books* to the Plaza Extra *Partnership’s books and stayed there long after 2011*. Yusuf now says that while it is true that *both the rent deposits and accounting entries* all *originally* reflected that this parcel was “treated” as Partnership property well after 2011—this was all just a huge accounting mistake…it was “erroneous.” But his sudden, late changes not only highlight how the parties *really* ‘treated’ the parcel for years, up to 2015, but also expose Fathi Yusuf’s guilty knowledge and actions in trying to change the record because of what these financials reveal.

1. **Conclusion**

There are no disputes as to any of the *material* facts here. There is no dispositive fact which requires testimony. As a matter of law, there is no contract and no transfer of the parcel.

**Dated:** February 3, 2020 A

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of February, 2020, I served a copy of the foregoing by email, as agreed by the parties, on:

**Hon. Edgar Ross** *(w/ 2 paper copies to his Clerk)*

Special Master

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**CERTIFICATE OF WORD/PAGE COUNT**

This document complies with the limitations set forth in Rule 6-1 (e). Counsel notes that this excludes the cover page, caption, table of contents, table of authorities, appendices, exhibits, certificates of service and “*Statement of Undisputed Facts*” per the revised requirements. As the Rule, as amended, is unclear, if the *Statement of Facts* is counted in the total, Hamed will remove it from the body and append it as a separate exhibit.

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**LIST OF EXHIBITS**

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| **Exhibit** | **Description** | **Text** |
|  |  |  |
| **Exhibit 1** | *Official* *Comment 4* to RUPA Section 204(c) | The inference concerning the partners’ intent from the use of partnership funds outweighs any inference from the State of the title, subject to the overriding reliance interest in the case *of a purchaser without notice of the partnership’s interest*. |
| **Exhibit 2** | *Defendant Fathi Yusuf's Answers to Plaintiff Waleed "Wally' Hamed's First Set of Interrogatories*, *Hamed et al. v. Yusuf*, SX-12-CIV-377 at page 9 of 50 | When Responding Party [Yusuf] asked Waleed Hamed to proceed with the transfer of the Tutu Park property, it is at this point, several months later [in 2011] that Plaintiff Waleed "Wally" Hamed and Plaintiff Mohammed Hamed refused to transfer not only the second property [Tutu], but also the third property requested as a set-off for the unauthorized transactions. |
| **Exhibit 3** | Yusuf Claims Filing, September 30, 2016, at 13 | [In 2011] Yusuf insisted that if Hamed wanted a resolution addressing all Hamed misappropriations, whether known or unknown, Hamed would have to arrange for the conveyance to Yusuf or United of another approximately 9.3 acre parcel located on St. Thomas also titled in the name of Plessen Enterprises, Inc. Hamed, through his son, Waleed, refused to convey this third parcel. |
| **Exhibit 4** | *Mohammad Hannun Aff.*, April 21, 2014, at ¶19 and ¶21 | Paragraphs 19 and 21. |
| **Exhibit 5** | USVI GIS photosurvey | Location of this 0.536 acre parcel Yusuf calls the “entrance” parcel, in relation to the 9.438 acre parcel that Fathi Yusuf calls the “major” parcel. |
| **Exhibit 6** | Act 6194 [Bill 27-0036], 27th Legis., Reg. Sess., March 21,, 2007 | Rezoning “from R-2 (Residential-Low Density). . .to C (Commercial.) |
| **Exhibit 7** | *Declaration* as to the Site Plan | Extensive |
| **Exhibit 8** | Fathi Yusuf’s deposition of April 2, 2014, at 77-7 | Extensive |
| **Exhibit 9** | 2011 “Agreement” in Arabic | Extensive |
| **Exhibit 10** | 2011 “Agreement” in Arabic (English Translation] | Extensive |
| **Exhibit 11** | Mohammad Hamed’s deposition of March 31, 2014. | Extensive |
| **Exhibit 12** | Fathi Yusuf’s lawyers’ fax and invoice for drafting 2011 Agreement | Extensive |
| **Exhibit 13** | Declaration | It is also a matter of the undisputed factual record that there are no subsequent writings or financial records which ever even *mention* any second agreement as to the Tutu parcel. It is not mentioned in any deed, document, communication, writing or other item of evidence. |
| **Exhibit 14** | March 15, 2012 Plessen Enterprises Scotiabank account, no. 45012, check 348, in the amount of $570.00 | Reimbursement of Yusuf’s-United for Tax on half-acre parcel in 2012 |
| **Exhibit 15** | 2010 Plaza Extra Trial Balance Report (run Sept. 8, 2011) | Lists the land as parcel, “2 4 Rem, Est Ch” —for $330,000. |
| **Exhibit 16** | 2012 balance sheet for the Partnership | Extensive |
| **Exhibit 17** | 2012 balance sheet for the Yusuf’s-United version of United, which operated through the “Tenant” account | Extensive |

1. The Court has repeatedly stated that this is a RUPA accounting process by a special master. There is no right to a trial or jury as it is *solely* a claims processing exercise in equity: “As an accounting in this context is both an 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 *Order re Limitations on* *Accounting*, dated July, 25, 2017, at 32-33. *See also Jury Order* dated July, 25, 2017 at 22.

   Thus, based upon Defendants' own representations, both Defendant Yusuf and Defendant United believed that by consenting to the Final Wind Up Plan-pursuant to which the claims between the parties would be decided by the Court based upon *recommendation of the Master* they waived the right to trial by jury. . . . [↑](#footnote-ref-1)
2. Parcel 2-4 Rem., Estate Charlotte Amalie, No. 3 New Quarter, St. Thomas, USVI. [↑](#footnote-ref-2)
3. As set forth in his claim, Hamed seeks judgment that the parcel “belongs to the Partnership,” he does not seek a credit of $500,000 to his Partnership Account. That was solely the appraised value of the raw land. **If Hamed prevails, ownership will be in the Partnership, 50/50—if Yusuf prevails *he will own 100%****.* As Hamed has consistently warned, this is a *critical* “access” parcel. If he wrests it from the Partnership, a large, jointly-funded grocery store site and extensively-planned development will effectively be controlled by him—because the Senate rejected the project and only reversed itself when this parcel was added for the requisite secondary access. If ownership is 50/50, the project will have to be dealt with jointly, with neither Partner having the completely unintended, overwhelming advantage when the parcels are inevitably auctioned. Despite its size, 100% ownership of this parcel holds hostage access to the 9.3 acres, and thus, the project of a separate, 50/50-owned corporation, Plessen. [↑](#footnote-ref-3)
4. Thus, what Yusuf alleges here is not that a transfer ever actually *took place*, but rather that it SHOULD HAVE taken place. The land is still in title to the Partnership, subject only to a contract claim here by Yusuf for specific performance of an alleged oral contract. Also, Yusuf wasn’t a purchaser without notice, and the full RUPA presumption applies. *See* **Exhibit 1**. [↑](#footnote-ref-4)
5. All agree that the two men orally agreed at Hamed’s house prior to the July 2011 trip to Jordan, and that these subsequent mediations with elders and religious leaders occurred after the return—between August and December 2011. [↑](#footnote-ref-5)
6. This was a series of much later settlement negotiations using family members, business associates or community leaders to mediate—NOT the single in-person negotiation cited by Hamed and Yusuf in their depositions. Mediation proceedings are privileged and confidential. *Webster v. FirstBank P.R*., 66 V.I. 514, 520 (VI Supreme, 2017). **Hamed has never referred to these other mediations/settlement negotiations anywhere, and thus these have been neither sword nor shield for Hamed.** They are simply confidential and inadmissible. Even if that were not the case as “mediations,” it is black letter law in the USVI that any negotiations for settlement are completely inadmissible to show a either what was said or any putative settlement—even if they are pre-litigation, involve third parties or are informal. *See, e.g., Equinor USA Onshore Props. v. Pine Res., LLC*, 917 F.3d 807, 817 n.3 (4th Cir. 2019)(“those exhibits that contain references to settlement or **informal** resolution of the alleged breach are inadmissible under Rule 408." *See also Statoil USA Onshore Props. v. Pine Resoures, LLC*, No. 2:14-cv-21169, 2018 U.S. Dist. LEXIS 23936, at \*13 n.5 (S.D. W. Va. Feb. 14, 2018)(“the emails simply confirm Mr. Heffelfinger's account of continuous efforts to communicate with Statoil. However, as the Court stated during trial, those exhibits that contain references to settlement or **informal** resolution of the alleged breach are inadmissible under Rule 408.” This is not a privilege that can be waived, it is an evidentiary exclusion rule.

   [↑](#footnote-ref-6)
7. After the motion is decided, when the Master hears the issues as to discovery on H-142, *as he has ordered*—Hamed asks that the affidavit filed in 2017 and Mr. Hannun’s affidavit be reviewed together. The attempt to use them was wrong, but intentionally withholding the critical one without Rule 26 supplemental or later discovery disclosure was worse. [↑](#footnote-ref-7)
8. *Revised Uniform Partnership Act* (“RUPA”) §204(c)(“When Property Is Partnership Property”)

   (c) Property is *presumed* to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners…. [↑](#footnote-ref-8)
9. Hamed incorporates his analysis of §204(c) of the 1997 RUPA in his PSJ motion. RUPA was adopted, *verbatim*, by the USVI, in 1998—as *26 V.I.C. § 2*4 (“When property is partnership property”) *accord*., *Yusuf v. Hamed*, 59 V.I. 841 (2013)(“the [VI] Code incorporates the [UPA] of 1997…See 26 V.I.C. §§ 1-274.”) Thus, the actual operative section here is 26 V.I.C. § 24(c). [↑](#footnote-ref-9)
10. Even under Yusuf’s “best” telling of events, he clearly *took* with absolute notice of the Partnership’s interest in this parcel. Thus, he should have created a writing to overcome the strong presumption. *See, Official* *Comment 4* to RUPA Section 204(c). Exhibit 1.

    The inference concerning the partners’ intent from the use of partnership funds outweighs any inference from the State of the title, subject to the overriding reliance interest in the case *of a purchaser without notice of the partnership’s interest*. [↑](#footnote-ref-10)
11. *See, e.g., White v. White,* 234 So. 3d 1210, 1214 (Miss. 2017) (emphasis added.)

    The 1992 deed lists the grantees as Charles W. White and Charles T. White, as tenants in common [not the partnership]. At trial, the testimony revealed that all of these properties were ***treated*** as partnership property, that they were *purchased* with partnership funds, that the property *taxes were paid* with partnership funds,and that the *rent* from the properties was collected by and paid to the partnership. [All true here.] [↑](#footnote-ref-11)
12. Under the 1997 version of RUPA, partnerships are distinct entities. This was the major change when the old UPA was revised—it effected a complete re-visualization of the ownership of property by partnerships. Under RUPA, Hamed had no personal right to the half-acre and no personal right to alienate it—it is property of the entity, and his only interest in it is its intrinsic value to the entirety of his half ownership. *Etheridge v. Opitz*, 580 S.W.3d 167, 179 (Tex. App. 2019)(“Partnership property is not property of the partners. Tex. Bus. Orgs. Code Ann. § 152.101. Neither a partner nor a partner's spouse [nor his Estate] has any interest in partnership property.”); *Trowbridge Sidoti LLP v. Taylor*, No. No. 8:16-cv-00771-ODW-SK, 2017 U.S. Dist. LEXIS 138249, at \*8 (C.D. Cal. Aug. 28, 2017)(“such property is property of the partnership and not of the partners individually.”) It is partnership property until it is alienated from *the Partnership*, which was never done here. Yusuf may contend that he intended that, or that they *should have* done that, but it wasn’t ever done. Thus, a threshold issue is whether the Partnership ever actually transferred the property after it came into title in 2008. This is a matter of record title, either it did or it did not. **It did not**. **Yusuf himself has repeatedly testified that Hamed refused to make the transfer.** What Yusuf is actually trying to sue for here is an order compelling the deceased Hamed or his Estate to retroactively “vote his 50% partnership share” *nunc pro tunc because of an oral agreement Yusuf admits Hamed explicitly refused back in 2011*—to create a fiction that *the Partnership* SHOULD HAVE transferred title back in 2011.

    [↑](#footnote-ref-12)
13. **Exhibit 6**, Act 6194. In his Prior Opposition, Yusuf conceded that Act 6194, 27th Legis., Reg. Sess., March 21,, 2007, addresses the rezoning “from R-2 (Residential-Low Density)...to C (Commercial.) Also, that the proposed Plaza Extra Supermarket project had to be approved by the Legislature. The project did not originally have secondary access to Route 38—but was approved with the parcel added, as shown on the *Site Plan* submitted with that application. [↑](#footnote-ref-13)
14. *See* **Exhibit 7**, *Declaration* as to the Site Plan. [↑](#footnote-ref-14)
15. The U.S. Supreme Court held in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-63, 115 S. Ct. 1212, 1219 (1995):

    Moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. [Citations omitted.] Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. (Emphasis added.) [↑](#footnote-ref-15)
16. The *Intellivision* court noted, at 364:

    See *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000) ("Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." (emphasis added)); see also Stichting, 407 F.3d at 45 (considering whether a party should be judicially estopped for taking "a position in their first motion to dismiss that was actually inconsistent with that taken on the current motion"). [↑](#footnote-ref-16)
17. *See e.g., Finch v. Raymer*, 2013 Tenn. App. LEXIS 319, at \*35 (Ct. App. May 6, 2013). [↑](#footnote-ref-17)
18. As Nejeh Yusuf testified recently, it is undisputed that *all* of the rents for the businesses on that parcel were deposited into Partnership funds–directly into the d/b/a Plaza Extra store account. *See* January 22, 2019, deposition testimony of Nejeh Yusuf, at 38. **Exhibit 18.** **This continued well after 2011**, at least until the litigation began, when Fathi ordered several financial records and practices changed to make things look better.

    Q. Okay. And did you ever—any of the—the money that came in for rent, did it ever go through your hands or did it always go through the desk?

    A. They always called me. I handled it with the folks. I wrote them a ***receipt from the store****. And I had it deposited in the accounts up until my dad told me stop depositing those funds in the—****in the store's account****.*

    Q. *And when did he tell you that?*

    A. *Towards the end of the partnership.*

    Q. Okay. And from that point on, where did the rents go?

    A. I just held onto it. It went—either I held onto it or it went into the—**I think I held onto it, mainly**. He said not to deposit into the account....(Emphasis added.)

    Similarly, Yusuf has conceded that the intended use of the parcel was for a Partnership supermarket and thus the property taxes were paid on credit cards or from other accounts *that were reimbursed with joint (50/50) funds*. Again, *this continued after 2011*. This was still the “treatment” of the parcel in 2015 when Fathi Yusuf changed the books as described directly below. For example, **Exhibit 14** is a March 15, **2012** document provided by Yusuf’s counsel, it shows Plessen Enterprises (not Yusuf personally) still reimbursing Yusuf’s-United for the property taxes for Parcel No. 2-4 Rem. Estate Charlotte Amalie. (Regardless of who “paid” the taxes, they were reimbursed by the Partnership.) This is from the Plessen Enterprises Scotiabank account, no. 45012, check 348, for $570.00. **Thus, for years after the alleged 2011 oral contract**, the Partners were still jointly reimbursing *all* of the taxes and other costs. [↑](#footnote-ref-18)
19. *See, e.g.,* Yusuf’s financial statements of the Liquidating Partner were referred to in his July 31, 2015 *Third Bi-Monthly* Report was as follows: “The 2014 tax return for the Partnership was filed [with the BIR] on July 14, 2015. A copy has been provided to the Master and Hamed.” That 2014 tax return shows the parcel as Partnership property. [↑](#footnote-ref-19)
20. Hamed’s Objection to that 3rd Bi-Monthly, dated August 18, 2015, at 3-4. Similarly, the 2nd Bi-Monthly states that “An updated balance sheet was provided to counsel and the Master on February 6, 2015, as required by $ 9, Step 4 of the Plan.” That balance sheet shows the same. [↑](#footnote-ref-20)
21. *Compare* **Exhibit 16**, the 2012 balance sheet for the Partnership *with* **Exhibit 17**, the completely separate balance sheet for the Yusuf’s-United version of United, which operated through the “Tenant” account -- which is titled “*United Corporation - Balance Sheet -* ***STX Shopping Center*** *- December 31,* ***2012****.*” That was after the alleged transfer and was compiled and filed far later than that. The Yusuf’s-United balance sheet shows the real estate at Sion in the shopping center, but not the half-acre in Tutu. The Tutu parcel was carried in the St. Thomas section of the *Partnership books* as “Land - Est Char Ama - 330,000.00.” Again, all of this was the treatment of the land long after 2011. *Nobody* thought of this as Yusuf’s. [↑](#footnote-ref-21)