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

MOHAMMAD HAMED, BY HIS AUTHORIZED AGENT WALEED 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, 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**
MOHAMMAD HAMED, PLAINTIFF, **V.** **FATHI YUSUF,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-378** **ACTION FOR DEBT and CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter "Master") on United's motion for summary judgment for Yusuf Claim No. Y-7: United's claim for advances United made on behalf of the Partnership in 1994, 1995, and 1998, in the total amount of $199,760.00 and Yusuf Claim No. Y-9: United's claim for advances United made directly to the Partnership in 1996, in the total amount of $188,132.00.[1] In response, Hamed filed two separate oppositions for Yusuf Claim No. Y-7 and Yusuf Claim No. Y-9, and United filed its reply thereafter.

BACKGROUND

In 2016, per the Master's order, Parties filed their respective accounting claims. Yusuf's accounting claims, filed on September 30, 2016 (hereinafter "Yusuf's Accounting Claims"), included United's claim for unreimbursed payments United made on behalf of the Partnership in 1994, 1995, and 1998, in the total amount of $199,760.00 and United's claim for unreimbursed money transfers from United to the Partnership in the total amount of $188,132.00:

> E. Additional Ledger Balances Due to United
> In addition to the Black Book balance owed to United, at various points in time, United made other payments on behalf of the Plaza Extra Stores. In 1994, 1995 and in 1998, United paid $199,760.00 for various expenses of the Partnership. See Exhibit H, Ledger Sheets Reflecting United's Payments for Plaza Extra.[2] In the same ledger book, records of

[1] The Master was appointed by the Court to "direct and oversee the winding up of the Hamed-Yusuf Partnership" (Sept. 18, 2015 order: Order Appointing Master) and "make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination." (Jan. 7, 2015 order: Final Wind Up Plan) The Master finds that that United's motion for partial summary judgment falls within the scope of the Master's report and recommendation given that Yusuf Claim Nos. Y-7 and Y-9 are alleged debts of the Partnership.

[2] Yusuf's Accounting Claims, Exhibit H-Handwritten ledger reflecting the following advances United made on behalf of the Partnership in 1994, 1995, and 1998 (as deduced from United and Hamed's briefs), totaling $199,760.00:

Date	Description	Amount
5/23/94	Steve Nesky	$400.00
5/24/94	Partnership's Prudential Bache Investment Account	$30,000.00
9/23/94	Core States Property St. Thomas	$45,010.00
9/23/94	Refrigerator x 2	$1,000.00
9/23/94	Bed and Bench	$350.00
2/17/95	1993 Property Tax for United	$20,000.00
5/5/95	Peters Farm Investment Corporation	$60,000.00
8/31/95	1994 Property Tax for United	$40,000.00
5/1/98	Bedroom set for Allah	$3,000.00

> withdrawals by Yusuf are also noted for certain personal expenses in 1995 and 1996. The amounts relating to Yusuf's personal expenses are included in the BDO Report discussed below in § IV, accounting for the withdrawals as between the Partners and their families. However, the total amount of $199,760.00 paid by United has not otherwise been captured in other reconciliations and remains due and owing to United.
>
> G. Unreimbursed Transfers to Plaza Extra from United's Tenant Account
> At various points throughout the Partnership, United would transfer funds from its tenant account, which the parties have already conceded was separate and independent from the Partnership, to the Plaza Extra Stores to cover expenses and to maintain cash-flow. The Partnership has not reimbursed United for certain transfers. The Partnership owes United $188,132 for its unreimbursed transfers. See Exhibit I, Summary and Supporting Documentation of Unreimbursed Transfers from United.[3] (Yusuf's Accounting Claims, pp. 9)

Subsequently, on July 25, 2017, the Court entered a memorandum opinion and order limiting accounting (hereinafter "Limitations Order"). In the Limitations Order, the Court "exercise[d] the significant discretion it possesses in fashioning equitable remedies to restrict the scope of the accounting in this matter and ordered, *inter alia*, 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." (Limitations Order, pp. 32, 34)

In light of the Limitations Order, the Master ordered Parties to file their amended accounting claims. United's claim for advances United made on behalf of the Partnership in 1994, 1995, and 1998, in the total amount of $199,760.00 and United's claim for advances United made directly to the Partnership in the total amount of $188,132.00 were again included in Yusuf's amended accounting claims, filed on filed on October 30, 2017 (hereinafter "Yusuf's Amended Accounting Claims"). (Yusuf's Amended Accounting Claims, pp. 11-12) On April 15, 2020, United filed this instant motion.

[3] Yusuf's Accounting Claims, Exhibit I-Documents reflecting the advances United made directly to the Partnership in 1996, in the total amount of $188,132.00.

STANDARD OF REVIEW

Rule 56 of Virgin Islands Rules of Civil Procedure (hereinafter "Rule 56") provides that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought" and "[t]he court shall grant summary judgment if the movant 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; *see also Rymer v. Kmart Corp.,* 68 V.I. 571, 575 (V.I. 2018) ("A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record."). "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]' " and a fact is material only where it "might affect the outcome of the suit under the governing law[.]" *Todman*, 70 V.I. at 436 (citations omitted) "Once the moving party has identified the portions of the record that demonstrate no issue of material fact, "the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in his favor." *Rymer*, 68 V.I. at 576 (citing *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (internal citations and quotation marks omitted). The non-moving party "may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial." *Rymer,* 68 V.I. at 576 (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)).

Rule 56 provides that "[e]ach summary judgment motion shall include a statement of undisputed facts in a separate section within the motion" and that "[e]ach paragraph stating an undisputed fact shall be serially numbered and each shall be supported by affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact." V.I. R. CIV. P. 56(c)(1). Additionally, "[a] party opposing entry of summary judgment must address in a separate section of the opposition memorandum each of the facts upon which the movant has relied pursuant to subpart (c)(1) of this Rule, using the corresponding serial

numbering, either (i) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (ii) stating that the fact is disputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number." V.I. R. CIV. P. 56(c)(2)(B). Furthermore, "a party opposing summary judgment may, if it elects to do so, state additional facts that the party contends are disputed and material to the motion for summary judgment, presenting one or more genuine issues to be tried" and "supply affidavit(s) or citations specifically identifying the location(s) of the material(s) in the record relied upon as evidence relating to each such material disputed fact, by number." V.I. R. CIV. P. 56(c)(2)(C). Rule 56(e) also states that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or (4) issue any other appropriate order." V.I. R. CIV. P. 56(e)(1)-(4). The reviewing court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Williams,* 50 V.I. at 194; *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013). Moreover, the court "should not weigh the evidence, make credibility determinations, or draw 'legitimate inferences' from the facts when ruling upon summary judgment motions because these are the functions of the jury." *Todman*, 70 V.I. at 437 (quoting *Williams v. United Corp.*, 50 V.I. 191, 197 (V.I. 2008). In deciding a motion for summary judgment, the court's role "is not to determine the truth, but rather to determine whether a factual dispute exists that warrants trial on the merits." *Todman*, 70 V.I. at 437 (quoting *Hawkins v. Greiner*, 66 V.I. 112, 117 (V.I. Super. Ct. 2017). Because summary judgment is "[a] drastic remedy, a court should only grant summary judgment when the 'pleadings, the discovery and disclosure materials on file, and any

affidavits, show there is no genuine issue as to any material fact.'" *Rymer,* 68 V.I. at 575-76 (quoting *Williams,* 50 V.I. 191, 194). Finally, Rule 56 requires the court to "state on the record the reasons for granting or denying the motion." V.I. R. CIV. P. 56(a).

DISCUSSION[4]

[4] The Master must note at the outset that the parties have failed to comply with Rule 56(c).

Rule 56(c)(1) provides that "[e]ach summary judgment motion shall include **a statement of undisputed facts** in a separate section within the motion" and that "**[e]ach paragraph stating an undisputed fact** shall be serially numbered and each shall be supported by affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact." V.I. R. CIV. P. 56(c)(1) (Emphasis added). United, in its statement of undisputed material facts (hereinafter "SOF"), often included multiple undisputed facts in one paragraph. For example, United's SOF ¶ 1 provided multiple facts:

> The United Shopping Center, which is owned by United Corporation ("United") and located in St. Croix, has 36 bays or retail spaces. See Exhibit 14 (Floorplan of United Shopping Center). Bay 1, the largest bay, was occupied by Plaza Extra-East under a rental agreement with United. Bays 5 and 8 were sometimes rented to third parties, but more often used to store Plaza Extra inventory. The remaining Bays were rented to third parties. See Exhibit 14.

Rule 56(c)(2)(B) provides that "[a] party opposing entry of summary judgment must address in a separate section of the opposition memorandum each of the facts upon which the movant has relied pursuant to subpart (c)(1) of this Rule, using the corresponding serial numbering, either (i) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (ii) stating that the fact is disputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number." V.I. R. CIV. P. 56(c)(2)(B). Hamed, in its response to United's statement of undisputed material facts often failed to include the response required by Rule 56(c)(2)(B). For example, Hamed's response to United's SOF ¶ 1 did not either "(i) agree[] that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (ii) stat[e] that the fact is disputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number." Instead, Hamed's response to United SOF ¶ 1 provided:

> Bays 5 and 8 were used from time to time by the Plaza Extra East store. However, the Bays were not use for a fixed period of time nor was there a rental agreement in place between United and the Partnership. Indeed, the Plaza Extra inventory had to be moved out of the bays each time United secured a paying tenant. (Y-7 Opp., p. 26; Y-9 Opp., p. 18)

See also, infra note 43.

Rule 56(c)(2)(C) provides that "a party opposing summary judgment may, if it elects to do so, state additional facts that the party contends are disputed and material to the motion for summary judgment, presenting one or more genuine issues to be tried" and "supply affidavit(s) or citations specifically identifying the location(s) of the material(s) in the record relied upon as evidence relating to each such material disputed fact, by number." V.I. R. CIV. P. 56(c)(2)(C). Hamed, instead of filing a statement of disputed material fact, did the opposite by filing a counter statement of undisputed material fact, which arguably could be construed to amount to a statement of disputed material fact. Hamed filed two separate counter statement of undisputed material fact, one for each of his oppositions (hereinafter "Y-7 CSOF" and "Y-9 CSOF"). There are several instances where Hamed included legal conclusions rather than facts as part of part of his statement—for example, Hamed's Y-7 CSOF ¶ 3 - "Therefore, this is an illegitimate claim against the Partnership." (Y-7 Opp., p. 3); Hamed's Y-7 CSOF ¶ 5 - "As demonstrated in CSOF ¶¶ 17-19, Ben Irvin's financial accounting was a fiction and is inherently unreliable and untrustworthy." (Id.); Hamed Y-7 CSOF ¶ 18 and Y-9 CSOF ¶ 15 - "Thus, any financial records from this time were total fiction." (Id., at p. 10; Y-9, p. 10).

The parties are reminded to comply with Rule 56 in their future filings.

In its motion, United explained that United advanced money to the Partnership by either making payments on behalf of the Partnership to third parties—to wit, United made the following payments: $400.00 on May 23, 1994, $30,000.00 on May 24, 1994, $46,360.00 on September 23, 1994, $20,000.00 on February 17, 1995, $60,000.00 on May 5, 1995, $40,000.00 on August 31, 1995, and $3,000.00 on May 1, 1998, for a total amount of $199,760.00[5] (Yusuf Claim No. Y-7)—or making monthly cash advances to the Partnership—to wit, United transferred $11,500.00 in 1995,[6] $188,132.00 in 1996,[7] and $54,400.00 in 1997-1998,[8] for a total amount of $254,032.00[9] (Yusuf Claim No. Y-9). (Motion, pp. 2-6) United argued that these advances claimed in Yusuf Claim Nos. Y-7 and Y-9 are not in dispute and that the statute of limitations has not expired. United made the following assertions in support of his argument: (i) "The partnership placed some of its income in a Prudential securities account, and United advanced $30,000 for that account, perhaps to cover a margin call."[10] (Id., at p. 5); (ii) "The partnership was responsible for paying property taxes to United for the United Shopping Center where it operated Plaza Extra East" and

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[5] United referenced: **Exhibit 1-**Transcript of Fathi Yusuf, Waleed "Wally" Hamed, Maher "Mike" Yusuf, Mafeed "Mafi" Yusuf, and Yusuf Yusuf's January 22, 2020 deposition at 269 (Fathi Yusuf); **Exhibit 2**-Articles of Incorporation for Peter's Farm Investment Corporation; **Exhibit 3**-Minutes of the organization meeting of Peter's Farm Investment Corporation, dated March 4, 1995; **Exhibit 4**-Peter's Farm Investment Corporation stock certificate transfers to Yusuf and Hamed; **Exhibit 4A**-Shareholder Agreement for Peter's Farm Investment Corporation, dated March 4, 1995; and **Exhibit 11**-Handwritten ledger reflecting the 1994, 1995, and 1998 advances listed in Yusuf Claim No. Y-7 (same as Yusuf's Accounting Claims-Exhibit H).

[6] United referenced: **Exhibit 13-**Documents reflecting the 1995 advances listed in Yusuf Claim No. Y-9.

[7] United referenced: **Exhibit 9**-Documents reflecting the 1996 advances listed in Yusuf Claim No. Y-9 (same as Yusuf's Accounting Claims-Exhibit I); **Exhibit 9A**-Community Bank statements and copies of various cashed checks for one of United's account for the period January 1996 through December 1996.

[8] United referenced: **Exhibit 10**-Documents reflecting the 1997-1998 advances listed in Yusuf Claim No. Y-9 (including Community Bank statements and copies of various cashed checks for one of United's account for the period January 1997 through April 1998).

[9] In its motion, United asked the Master to "supplements its claim Y-9 to include the amount of the 1997 and 1998 transfers, $54,400.00, and to include the amount of the 1995 transfers that are not already captured by claim Y-7, $11,500 that were not included in Claim Y-9 as originally filed." (Motion, p. 4) United reasoned that "[s]ince the documents that back up these amounts were previously produced to Hamed, and since United reserved its right to supplement its claims when it submitted its Claims and Amended Claims, permitting supplementation would not unfairly prejudice Hamed." (Id.)

Hamed referenced: **Exhibit 5-**Defendant's Initial Disclosures dated August 1, 2013 and Notice of Service of Supplemental Disclosures dated August 26, 2013; **Exhibit 9A**.

[10] United referenced: **Exhibit 1** at 251 (Mike Yusuf).

"United advanced funds for the partnership in 1995 to cover payment of 1993 and 1994 property taxes because the supermarkets were 'dry with cash' at that time."[11] (Id.); (iii) "Corestates Bank was a bank with branches in the Virgin Islands and the mainland whose assets were acquired by Banco Popular in August 1993" and "[t]he $40,010 apparently was a payment toward a loan originally made by Corestates on property in St. Thomas owned by the partnership."[12] (Id.); (iv) "While Peter's Farm was originally owned in equal thirds by Fathi Yusuf, Mohammad Hamed and an individual named Yusuf Jaber, Jaber assigned his shares to Yusuf and Hamed on October 30, 2002, with the result that Yusuf and Hamed became 50% owners of the stock of the corporation" and "[p]ursuant to March 4, 1995 stockholder's agreement, Yusuf and Hamed agreed to loan Peter's Farm substantial sums to enable it to purchase and develop properties."[13] (Id., at pp. 5-6); (v) "The $60,000 payment from the United tenant account at Community Bank to Peter's Farm on May 5, 1995 was undoubtedly an advance on the loan that Hamed and Yusuf had jointly committed to make to Peter's Farm.' (Id., at p. 6); (vi) "The circumstantial evidence is more than adequate to establish the trustworthiness of Exhibit 9" and "[f]or these same reasons, the trustworthiness of Exhibits 10 and 13 can also be readily shown." (Id., at p. 9); (vii) "The ledgers that comprise Exhibits 9 and 11 constitute what is known as an "open account" between United and the partnership"[14] and "[t]he statute of limitations on an open account depends on the nature of the arrangement between the parties"—to wit, "If it is contractual, the limitations period is 6

[11] United referenced: **Exhibit 1** at 269 (Fathi Yusuf).

[12] United referenced: "Fed Approves Bid by Banco Popular de Puerto Rico," New York Times, August 14, 1993, sec. 1, p. 35, reproduced on the web at https://www.nytimes.com/1993/08/14/business/companynews-fed-approves-bid-by-banco-popular-de-puerto-rico.html.

[13] United referenced: **Exhibit 3**; **Exhibit 4**; **Exhibit 4A**.

[14] United referenced: *Matter of Estate of Vanderpool*, 2010 WL 1141826, *1 (V.I. Super. 2010) (An open account is an arrangement between two parties in which they "intend that the individual transactions [between them] in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits.") (citation and internal marks omitted).

years. But if the arrangement is not based on either an implied or express contract, it will be governed by the residuary limitations period, which is 10 years."[15] (Id., at pp. 9-10); (viii) "Under the statute of limitations analysis set forth in this brief, Hamed's limitations defense fails as a matter of law whichever limitations period applies. But to the extent that it matters, United believes the appropriate statute of limitations is 10 years on the open account between it and the partnership, because there was neither an express nor implied contract between United and the partnership with respect to the advances United made for or on the partnership's behalf." (Id., at p. 10); (ix) "Pursuant to 5 V.I.C. § 33, the statute of limitations on an open account begins to run not from the date of each item on the account, but instead from the date of the last item on the account," and "[h]ere, the date of the last entry on the open account between United and the partnership is April, 1998."[16] (Id.); (x) "The six or ten-year limitations period commenced on that date [April 1998], which in the absence of an applicable tolling doctrine would mean that United should have sued the partnership by April, 2004 or April 2008," and while "[b]oth dates precede September 17, 2012, the date when United is deemed to have brought its claims against the partnership…the doctrine of equitable tolling stops or 'arrests the running of the statute of limitations after a claim has accrued.'"[17] (Id., at pp. 10-11); and (xi) "[T]here are at least four extraordinary circumstances or impediments beyond United's control that prevented it from bringing claims against the partnership in 2004 or 2008 on the Y-7 and Y-9 claims, and tolled the statute of limitations on those claims"—to wit: (a) "[t]he pendency of the criminal case,"[18] (b)

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[15] United referenced: *Vanderpool*, 2010 WL 1141826 at *2; Title 5 V.I.C. § 31(2)(a).

[16] United referenced: **Exhibit 10**; **Exhibit 15-**Chart labeled "Claim Y-7 and Y-9 Summaries of Funds Transferred from United Tenant Accounts to Plaza Extra that Comprise Open Account."

[17] United referenced: *MRC Development, LLC v. Whitecap Investment Corp.*, 2014 WL 646153, *7 (D.V.I. 2014) (The statute of limitations will be equitably tolled where, inter alia, "extraordinary circumstances" create an "impediment outside of the plaintiff's control" that prevents it from filing suit.); *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 588–89 (V.I. 2014) (The Virgin Islands Supreme Court has held that a plaintiff who wishes to avail itself of the doctrine of equitable tolling must show that it acted with diligence in pursuing his rights and that "some extraordinary circumstance" prevented it from bringing suit earlier.)

[18] United claimed: (i) "The criminal case brought by the United States against United Corporation for underreporting and failing to pay gross receipts taxes and income taxes owed on revenues from the supermarket business was filed

"[m]ost of the documents evidencing the open account were seized by the FBI and not returned until late 2011,"[19] (c) "[t]here was no recognized partnership entity to sue in 2004 or 2008, and Yusuf had no reason to effectively sue himself in any event,"[20] and (d) "Yusuf was the partner who managed the finances of the partnership, and his decision to defer payment of the amount owed by the partnership on its open account with United benefitted the partnership."[21] (Id., at pp. 11-15) As such, United requested the Master grant its motion.

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in the District Court on September 18, 2003." (Motion, p. 11); (ii) "The theory of that prosecution was that United, a corporation owned by Fathi Yusuf and his family members–and not a Hamed/Yusuf partnership–owned and operated the Plaza Extra supermarkets and was responsible for paying taxes on store revenues." (Id., at pp. 11-12); (iii) "The criminal defense lawyers instructed Yusuf and the other defendants not to take any action that would support the existence of a partnership, and thereby draw Mohammad Hamed (who was not named in the indictment) into the criminal case." (Id., at p. 12); and (iv) "Moreover, all of the Plaza Extra accounts were frozen by an injunction entered contemporaneously with the filing of the criminal case in September 2003, and that injunction was not lifted until February 9, 2015" and noted that "[w]hile the injunction had been relaxed sufficiently to make a lawsuit viable in 2012 for United to have filed a lawsuit before that would have been fruitless, at the very least, because the injunction would have barred the payment from supermarket accounts of any settlement or judgment." (Id.)

United referenced: **Exhibit 6**-Declaration of Fathi Yusuf, dated April 15, 2020, ¶ 4.

[19] United claimed: (i) "When the FBI conducted its raid on the stores in September 2001, it seized Exhibits 9, 9A, 10 and 13 as is evidenced by the fact that each of them bear the trademark FBI bates stamp numbers (the sequence of numbers beginning, for example, with "071" or "072")" and "[t]hese records were not returned, at the earliest, until some time in 2011, as part of a voluminous and very disorganized FBI hard drive." (Motion, p. 13); and (ii) "Even if the pendency of the criminal case did not preclude United from filing suit, the lack of records made it impossible for United to have drafted a proper complaint against the partnership in 2004 or 2008." (Id.)

United referenced: **Exhibit 12-**Declaration of Fathi Yusuf, dated June 6, 2014, ¶8.

[20] United claimed: (i) "Hamed's claim that half of the United accounts belonged to his father, despite owning no shares in United, had no judicial support of any kind, had never been asserted in the criminal case and was inconsistent with the U.S. Attorney's theory of prosecution in that case" so "United had absolutely no reason to bring suit in 2004 or 2008 to make sure that funds in one of its accounts (the tenant account) were paid back to another of its accounts (Plaza operating accounts)." (Motion, p. 13); (ii) "And even it if had been able to foresee then that a court would make a preliminary finding that, despite being held by United, the supermarket accounts should be treated as if they were held by a partnership in which Mr. Yusuf and Mohammad Hamed were equal partners, there was still no reason for United to bring suit then" because "[a]s managing partner, Yusuf surely would have had the authority to determine when the partnership should reconcile its open account with United" and "[i]t would hardly have been necessary for him to have a corporation he controlled bring suit against a partnership in which he was a 50% partner in order to get advances repaid." (Id., at pp. 13-14); and (iii) "Rather than effectively suing himself, if United had had any reason to believe in 2004 or 2008 that Hamed would later take the position that the partnership's liability to United was not enforceable, he would have simply directed the partnership to repay those sums." (Id.)

United referenced: *Hamed v. Yusuf*, 69 V.I. 168, 175, n.4 (V.I. Super. 2017) (finding that "Yusuf acted as the managing partner" and that Hamed was "completely removed from the financial aspects of the business"); *Hamed v. Yusuf*, 69 V.I. 189, 215 (V.I. Super. 2017) ("As managing partner,…[i]t was Yusuf's responsibility to oversee, account for, and periodically reconcile the distributions of funds between the partners").

[21] United claimed: (i) "Delaying repayment of the balance due on the open account with the partnership served the same purposes [as allowing the rent to accrue for substantial periods of time]"—to wit, provide working capital for the partnership." (Motion, p. 14); (ii) "Yusuf, in his capacity as president of United, could have sought repayment at any time, and his capacity as managing partner could have made repayment at any time" and "[t]he fact that he postponed that repayment to promote the economic interests of the partnership is another reason why equitable tolling applies here and stops the running of the statute of limitations." (Id.); (iii) "United had no reason to know in 2004 or

In his oppositions, Hamed argued that United's motion should be denied for the following reasons: "First, there are many disputes of material facts. Second, United did not file its claims within the timeframe ordered by the Special Master. Third, United's claims are outside of Judge Brady's July 25, 2017 Limitations on Accounting Order. Fourth, United's claims exceed the normal statute of limitations. Finally, there are no legitimate reasons for tolling the statute of limitations." (Y-7 Opp., p. 32; Y-9 Opp., p. 28) Hamed made the following assertions in support of his argument: (i) While Yusuf timely submitted his claims when he filed Yusuf's Accounting Claims on September 30, 2016, those are not United's claims, which are distinct third-party claims unrelated to Yusuf's claims. (Y-7 Opp., p. 19; Y-9 Opp., pp. 15-16); (ii) Under the Limitations Order, United's claim is barred because "all of the transactions in claim Y-7-Unreimbursed ledgers occurred in 1994-95 and 1998"[22] and "all of the transactions in claim Y-9-Unreimbursed Transfers occurred in 1998 or earlier."[23] (Y-7 Opp., p. 19-20; Y-9 Opp., pp. 16); (iii) Even if the Limitations Order is not applicable to United, "the statute of limitations for actions for debt, breach of contract and conversion of property is 6 years" and "the SOL on all of these claims expired years ago, between the years 2000 and 2004, depending on the specific claim."[24] (Y-7 Opp., p.

2008 that Hamed would later attempt to avoid liability for a debt to the partnership on the basis that United should have sued to recover it long 2012." (Id., at pp. 14-15); (iv) "Mr. Yusuf did not need to bring suit to collect on the debt; he could have directed that it be paid by Plaza Extra." (Id., at p. 15); (iv) "His failure to cause the repayment to be made in May 2004 or May 2008 is not the result of any lack of diligence on his part, but instead, is the result of his desire to help the Plaza Extra business, and his justified belief that Hamed would honor the debt." (Id., at p. 15); (v) "When Mr. Yusuf learned (after return of the FBI hard drive) that Mohammed Hamed and his sons were not persons of character and concluded that they had been stealing from the supermarket business, he took prompt action to dissolve the partnership by having his then attorney, Nizar DeWood, send a letter to Mohammad Hamed giving notice of dissolution of the partnership and a proposed dissolution agreement." (Id.); and (vi) "When negotiations for a wind up broke down, Hamed filed the instant lawsuit, and United's counterclaim represents the filing of its lawsuit on the Y-7 and Y-9 claims."

United referenced: **Exhibit 1** at 197, 269 (Fathi Yusuf and Mike Yusuf); **Exhibit 6** at ¶4; **Exhibit 8**-Email from Attorney Nizar DeWood to Wally Hamed, dated February 10, 2012, regarding the partnership dissolution, and a corresponding letter regarding the same.

[22] Hamed referenced: **United's Exhibit 11**.

[23] Hamed referenced: **United's Exhibits 9, 9A, 11, 13, and 15**.

[24] As to Yusuf Claim No. Y-7, Hamed claimed that "[i]n addition, the 1994 and 1995 claims SOL expired prior to the 2003 indictment in the criminal case." (Y-7 Opp., p. 20)

20; Y-9 Opp., pp. 16); (iv) "United has not produced any evidence, other than Fathi Yusuf's self-serving affidavit" that Yusuf and/or the Partnership allowed United to disregard the statute of limitations on United's repayment demands. (Y-7 Opp., p. 20; Y-9 Opp., p. 17); (v) "United tries to springboard the Partnership's payment of rent as evidence that United was not bound by statute of limitations and could demand payment for alleged debts from the Partnership at any time" but "[t]his is simply untrue" because (a) "Judge Brady found the rent payments proper because, according to the Court, Hamed stated that the Partnership agreed to pay rent on the Plaza Extra East store" and "[n]o such agreement is present here"[25] and (b) "United also has failed to demonstrate any history or course of dealing to show that United could demand payment at any time" and "[t]he only reconciliation that United can point to is the reconciliation done in 1993, hardly evidence of a history of reconciliations or course of dealings." (Y-7 Opp., pp. 20-21; Y-9 Opp., pp. 17-18); (vi) There was no open account between the Partnership and the United because (a) *In re Vanderpool* is distinguishable—to wit, *Vanderpool* involved a care facility that routinely charged for its services with "not more than one year elapsed between any of the services provided or demands for payment" and here, "there was no routine back and forth of payments between the two parties, making the present situation distinguishable from Vanderpool" and (b) "[i]In any event, no matter what SOL date is used, United is out of time to bring its claim." (Y-7 Opp., p. 21, footnote 1; Y-9 Opp., p. 17, footnote 2); (vii) These alleged advances are in dispute because (a) Lawrence Schoenbach, Esq., a white-collar criminal defense attorney, noted that "it would be impossible to accurately reconstruct the financial records of United and the Plaza Extra stores from 1996 to September 2002 due to the vast money laundering scheme," (b) "[g]iven the

As to Yusuf Claim No. Y-9, Hamed claimed that "[s]ome even expired prior to the October 2001 FBI raid." (Y-9 Opp., p. 16)

[25] Hamed referenced: The Court's April 27, 2015 memorandum opinion and order addressing United's motion to withdraw rent and Hamed's motion for partial summary judgment re the statute of limitations defense barring the defendants' counterclaim damages prior to September 16, 2006.

unreliable nature of the Partnership's accounting, United cannot meet its burden of proof to show that the 'transfers' of funds are actually owed United,"[26] (c) the Partnership financials prepared by Ben Irvin "are untrustworthy" in light of the fact that "Mr. Irvin stated in an interview with the FBI that he took direction from Fathi Yusuf when preparing the financials." (Y-7 Opp., p. 22; Y-9 Opp., pp. 18-19), and (d) additionally, for Yusuf Claim No. Y-7, the records from 1994-1995 and 1998 are unsubstantiated.[27] (Y-7 Opp., p. 2-6); and (viii) The doctrine of equitable tolling

[26] As to Yusuf Claim No. Y-7, Hamed claimed that: "1) United can't prove that the funds in its tenant account were generated from the Shopping Center's rents versus the Partnership depositing the funds in the tenant account at some prior date. 2) Assuming for a moment the transfers were legitimate, United can't demonstrate that the Partnership hadn't repaid the amounts sometime in the past. 3) United also can't prove that it was reimbursing Plaza Extra for expenses the Partnership made on United Shopping Center's behalf. It is conceivable that United was reimbursing the Partnership for expenses the Partnership paid on its behalf. In the past, the Partnership used its cash to pay for United expenses. Finally, even the President of United, Mike Yusuf, couldn't testify as to the reasons for the transfer of funds to Plaza." (Y-7 Opp., p. 22)

Hamed referenced: **Group Exhibit 19**-Copies of various Plaza Extra invoices/receipts; Hamed's Y-7 CSOF ¶ 20.

As to Yusuf Claim No. Y-9, Hamed claimed that: "1) United can't prove that the funds in its tenant account were generated from the Shopping Center's rents versus the Partnership depositing the funds in the tenant account at some prior date. 2) United can't prove that it wasn't reimbursing Plaza Extra for expenses the Partnership made on United Shopping Center's behalf. Finally, even the President of United, Mike Yusuf, couldn't testify as to the reasons for the transfer of funds to Plaza." (Y-9 Opp, pp. 18-19)

Hamed referenced: Hamed's Y-9 CSOF ¶¶ 17-18.

[27] Hamed claimed that the following facts are not in dispute in his Y-7 CSOF:

1. United has not provided any documentation to independently substantiate two of the larger claims from 1994: 5/24/94 Partnership's Prudential Bache Investment Account, $30,000 and 9/23/94 Core States Property St. Thomas $40,010. No investment or bank statements were provided to show that the money was actually moved from United's bank account ("tenant account"). No bank records were provided to show that the money was deposited into the Partnership's Prudential and Core States accounts. It is impossible to discern what the records from 1994 really mean. For example, there are records in 1994 of two Core States cashier's checks made out to Fathi Yusuf for a total of $145,000. (Exhibit 1) It is most probable that those cashier checks were funded with Partnership money. If so, any alleged debt owed by the Partnership would have been wiped out by that Yusuf draw. Completely unclear recordkeeping is one of the reasons why Judge Brady limited claims to those occurring on September 17, 2006 or later. (See also HCSOF ¶ 9)
2. United has not provided any records to independently substantiate the smaller claims for 1994 and 1998 either. Thus, there is no proof or record.
3. Similarly, a May 5, 1995 Peter's Farm Investment Corporation alleged expense of $60,000 claimed here does not belong in this Partnership claims process. As United described in its summary judgment motion, Peter's Farm is a totally separate and independent corporation. (United Exhibits 2-4) Any funds that United allegedly pledged to Peter's Farm must be addressed to Peter's Farm, not the Partnership. Therefore, this is an illegitimate claim against the Partnership.
4. Similarly, United alleges that the Partnership was required to pay the property tax of the Yusuf-family owned Shopping Center as Sion Farm (2/17/95 1993 Property Tax for United $20,000 and 8/31/95 1994 Property Tax for United $40,000). Again, United has not provided any documentation of an agreement between Fathi Yusuf and Mr. Mohammad Hamed to pay United's property tax. Also, Mike Yusuf, as President of United, and Fathi Yusuf do not agree on what these entries mean either: Mike Yusuf testified that the eighth ledger entry for $40,000 was for the United property tax, but then stated "It's not clear." Fathi Yusuf said it could

have been a tax on the improvements to the supermarket, not the whole United Shopping Center. (Exhibit 2)

5. United states that three of the 1995 entries on the ledger sheet were backed up by accounting records prepared by John Benson "Ben" Irvin. As demonstrated in HCSOF ¶¶ 17-19, Ben Irvin's financial accounting was a fiction and is inherently unreliable and untrustworthy. As set forth there, he has specifically testified that he wrote down whatever made up story Fathi told him to write and there is no truth in these records at all.

6. United has not provided the complete "black book" or ledger book. It is impossible to know whether these alleged debts are still outstanding or were offset by other entries. It is half an accounting. As Mike Yusuf, author of the ledger page or black book admitted, it is possible that other pages in the ledger book could show amounts that United owed to the Partnership.

> Q. [Ms. Perrell]. . . .So what I've handed you has been marked as Exhibit 11. Can you identify it?
>
> A. [MIKE YUSUF] Yes.
>
> Q. What is it?
>
> A. It's a -- what I paid from United. What tenant account for Plaza. I used to write it down on this ledger.
>
> * * * *
>
> Q. [Mr. Hartmann] So -- so there could have been like the next page of this thing. I don't have it, but obviously somebody did, because they put all these tabs on it. So let's say I flipped up this tab and read the heading at the next page, could the next page say -- this one says -- what does it say at the top? Can you just read that out for me where it says A? (1/21/2020 Mike Yusuf depo, 264:19-25)
>
> A. [MIKE YUSUF] I think that says United paid out for Plaza.
>
> Q. For Plaza. Okay. So if I flipped it over, could the next page have said, Plaza paid out for United? A. Possibly. (Exhibit 3)

7. Not only did Mike Yusuf destroy Partnership financial records (see HCSOF ¶ 14), he also stated that he kept the ledger or black book in the safe, but does not know what ultimately happened to it. He also did not know what happened to it after the one page of the Partnership's alleged debts was photocopied. Thus, it is impossible to know if these alleged debts are outstanding.

> Q. [Ms. Perrell]. . . .So what I've handed you has been marked as Exhibit 11. Can you identify it?
>
> A. [MIKE YUSUF] Yes.
>
> Q. What is it? A. It's a -- what I paid from United. What tenant account for Plaza. I used to write it down on this ledger.
>
> * * * *
>
> A. [MIKE YUSUF] And I used to keep -- it was in a black book that I used to keep in the safe.
>
> * * * *
>
> A. [MIKE YUSUF] Because I had a black book, and it's the same page just like this. And I know there's more, but it's just to put my hands on it.
>
> Q. [Ms. Perrell] This is the only one that you have?
>
> A. It's the only one I have, yes.
>
> * * * *
>
> Q. [Mr. Hartmann]. . . . And -- and you see over on the right side here, there are a bunch of -- of tab stickers? They look like things that were copied when this page was copied?
>
> A. [MIKE YUSUF] Right.
>
> Q. Do you -- do you know what was underneath this page? A. No. That's what I'm telling you. That's the black book. I don't know where it is.
>
> Q. Do you know when this copy was made?
>
> A. When it was made?
>
> * * * *

does not apply to Yusuf Claim Nos. Y-7 and Y-9 because (a) "Mike Yusuf, President of United, stated that it is possible that the FBI did not seize the ledger or black book because the black book was in the large safe at Plaza Extra East and the FBI did not take all documents that were in that safe,"[28] (Y-7 Opp., p. 23) (b) although a lot of documents were seized by the FBI, United had "unfettered access" according to Special Agent Thomas L. Petri's declaration,[29] (Y-7 Opp., pp. 23-24; Y-9 Opp., pp. 19-20); (c) there was a recognized entity to sue in the relevant time periods,[30]

A. [MIKE YUSUF] Not sure, no. (Exhibit 4)

8. In a supplemental response to Hamed's document request for the entire ledger or black book, United responded: "United shows that it has undertaken a diligent search of all records to determine if the book from which the copy was derived is available and has been unable to locate same." (Exhibit 5) (Emphasis added.)

9. Judge Brady, in his Order re Limitations on Accounting, Hamed v Yusuf, SX-12-CV-370 (July 25, 2017) at 11 observed in footnote 10:

> 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.

Judge Brady also stated,

> As the last and only true-up of the partnership business occurred in 1993, 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. 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 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. Id. at 15-16 (footnotes omitted). (Y-7 CSOF ¶¶ 1-9).

[28] Hamed referenced: Y-7 CSOF ¶ 21.

[29] Hamed claimed that: "In 2003, according to a declaration (dated July 8, 2009) in the criminal case, *United States of America v. Fathi Yusuf Mohammed Yusuf et. al*., Criminal No. 2005-015, Special Agent Thomas L. Petri stated that subsequent to the return of the indictment, counsel for defendants (including United) was afforded complete access to seized evidence." (Y-7 Opp., p. 23; Y-9 Opp., pp. 19-20)

[30] Hamed claimed that: (i) "Contrary to Yusuf's assertions, there was an entity in [2000, 2001,] 2004 and 2008 – the Partnership" since Yusuf stated under oath, in 1999 and again in 2000 that "he and Mr. Mohammad Hamed had been partners since 1984." (Y-7 Opp., p. 24; Y-9 Opp., p. 20); (ii) "The federal monitors approved expenditures throughout the criminal case" and thus, "during the pendency of the criminal case, United could have asked the federal monitors to have the Partnership pay back the transfers to the tenant account, assuming they were legitimate expenses." (Id.); and (iii) "There is no record of Fathi Yusuf requesting re-payment for the alleged transfers to the Partnership." (Y-7 Opp., p. 24; Y-9 Opp., p. 21)

(Y-7 Opp., pp. 24-25; Y-9 Opp., pp. 20-21), (d) "[t]he criminal case was no bar to United complying with the SOL,"[31] (Y-7 Opp., p. 25; Y-9 Opp., p. 21); and (e) "[t]here was no benefit to the Partnership in delaying repayment of alleged monies owed."[32] (Y-7 Opp., p. 25; Y-9 Opp., p. 21) As such, Hamed requested the Master to deny United's motion.

In its reply, United argued that Yusuf Claim Nos. Y-7 and Y-9 were timely asserted, that there are no disputes as to the debts claimed in Yusuf Claim Nos. Y-7 and Y-9, and that the statute of limitations does not bar Yusuf Claim Nos. Y-7 and Y-9. United made the following assertions in support of his argument: (i) United timely asserted its claims since Yusuf's Accounting Claims "stated that 'all debts of the Partnership must be paid prior to any distributions to the Partners,' and noted that 'the remaining debts include the unpaid rent obligations, with interest, due to United . . .as well as other obligations to United discussed in more detail below.'"[33] (Reply, p. 3); (ii) These advances are not in dispute since (a) "The FBI interview notes are plainly inadmissible hearsay, and thus Hamed may not use them to support any factual assertions made in opposition

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[31] As to Yusuf Claim No. Y-7, Hamed claimed that: (i) The criminal case was not in operation during the statute of limitations periods for the 1994 and 1995 alleged debts" and "[s]o, United has no argument to permit the tolling of the SOL for those debts." (Y-7 Opp., p. 25); (ii) There is "no legal support…and no factual basis" for Yusuf's contention that "the criminal case was somehow a bar to United complying with the SOL." (Id.); and (iii) "On a practical level, assuming the 1989 debt was legitimate, it was possible for United to seek reimbursement from the Partnership within the applicable statute of limitations period by requesting funds to be moved from the Plaza Extra bank accounts to the United tenant bank account." (Id.)

As to Yusuf Claim No. Y-9, Hamed claimed that: "Yusuf seems to contend that the criminal case was somehow a bar to United complying with the SOL" but "[t]here is no legal support for this contention and no factual basis" and "there is no such doctrine." (Y-9 Opp., p. 21)

[32] As to Yusuf Claim No. Y-7, Hamed claimed that: "Fathi Yusuf incorrectly states that he delayed payment of the alleged debts in order to provide working capital for the Partnership" which is "simply untrue" because "[c]ontrary to Fathi Yusuf's assertions, the Partnership in 1996-1998 had plenty of money to operate and pay its debts."(Y-7 Opp., p. 25)

As to Yusuf Claim No. Y-9, Hamed claimed that: (i) "Fathi Yusuf incorrectly states that 1) there was an agreement between him and Mr. Mohammad Hamed that allowed Fathi Yusuf to request re-payment of debts at any time and 2) the delay in requesting payment of the alleged debt was a benefit to the Partnership." (Y-9 Opp., p. 21); (ii) "Fathi Yusuf has not provided any proof of an agreement where Mr. Mohammad Hamed affirmatively agreed to allow Yusuf to request of re-payment of alleged debts for his corporation at any time." (Id.); (iii) "Mohammad Hamed did not testify in his deposition that such an agreement existed and Fathi Yusuf has not provided any written agreement to that effect either." (Id.); and (iv) "Yusuf's claim that the stores were cash strapped and needed funds was false" because "[c]ontrary to Fathi Yusuf's assertions, the Partnership in 1996-1998 had plenty of money to operate and pay its debts." (Id.)

[33] United referenced: **Reply Exhibit 1**-Yusuf's Accounting Claims.

to United's motion,"[34] (b) nothing suggests that the Partnership financials prepared by Ben Irvin are untrustworthy or inaccurate, (c) "Hamed relies on other inadmissible hearsay when he contends that the United States estimated that United had $60,000,000 in unreported income for the 1996 to 2001 tax years, (d) "Mr. Schoenbach was not asked to, and did not offer any opinions whatsoever regarding United's intra-company transactions in the 1995 to 1998 time period, or the accuracy of Ben Irvin's accounting entries showing payments from United's tenant accounts to its supermarket accounts that are the subject of United's motion," (e) "The evidence adduced by United, including Mr. Yusuf's declaration, establishes all of the facts United must establish in order for it to be granted summary judgment on claims Y-7 and Y-9" and Hamed's speculations "about what might have happened is insufficient to overcome Mr. Yusuf's testimony that there was no repayment," and (f) Hamed's specific challenges to items in Yusuf Claim Nos. Y-7 and Y-9 are meritless and "United has satisfied its burden for obtaining summary judgment for these entries[35] (Id., at pp. 4-11); (iii) The Limitations Order does not apply to United. (Id., at pp. 11-12);

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[34] United referenced: *United States v. Sampson*, 898 F.3d 287, 308-309 (2d Cir. 2018) (FBI agent's notes of interview with defendant were hearsay not subject to any exception, and lower court properly excluded them from evidence).

[35] United claimed that: (i) "Hamed asserts that United must also produce investment and bank records to show that the money was actually moved from the tenant account [for the two of the larger claims from 1994]…[b]ut he does not explain why this additional corroboration is needed to establish that these transfers were made, and United is aware of no reason it would be." (Reply, p. 9); (ii) "Hamed also points out that two Core States cashier's checks made out to Fathi Yusuf in 1994 in the total amount of $145,000, and if the source of those funds was partnership money, then the debt to United for the $30,000 transfer 'would have been wiped out by that Yusuf draw'" but "[a] debt owed by Yusuf to the partnership cannot be used to offset a debt owed by the partnership to United, a corporation." (Id.); (iii) "Hamed does not deny that the payment was made but instead argues that because a jointly held corporation like Peter's Farm is a distinct entity from the partnership, United's claim must be addressed to Peter's Farm" but "Hamed's argument misses the point" because "[t]he payment was to have been from the Partnership, so the Partnership should reimburse United (as paid from the Tenant Account) for the payment made on its behalf." (Id., at p. 10); (iv) "Hamed complains that United has not provided any bank records 'to independently substantiate the smaller claims for 1994 and 1998 either'" but "Mike Yusuf's testimony that he prepared the ledger and recorded payments that he knew about in that ledger is sufficient for summary judgment" and "[t]he other small items were not paid by check." (Id.); (v) "As for the payments United made for its property taxes, pursuant to an agreement made by Hamed and Yusuf as part of their original agreements regarding the partnership and rent, Hamed maintains that United cannot produce a writing regarding this agreement" but "Mr. Yusuf testified in his 2014 deposition that as part of his agreement with Hamed reached in 1986, the partnership would be responsible for paying various expenses of the United Shopping Center such as the insurance and taxes for the store" (**Reply Exhibit 4**-Transcript of Fathi Yusuf's April 2, 2014 deposition at 52-54; **Hamed's Exhibit 3**-Transcript of Fathi Yusuf, Waleed "Wally" Hamed, Maher "Mike" Yusuf, Mafeed "Mafi" Yusuf, and Yusuf Yusuf's January 22, 2020 deposition at 269 (Fathi Yusuf)) (Id., at p. 11); and (vi) "The agreement is unwritten, but so is the partnership agreement itself and United's rent agreement with the partnership, and that fact has obviously not been a bar to their enforcement in these proceedings." (Id.)

(iv) United reiterated its argument regarding the accrual date of its claims and statute of limitations and highlighted that "the Court in Vanderpool did not say that there had to be regular repayments or account reconciliations in order for an economic arrangement between two parties to constitute an open account." (Id., at pp. 12-13); and (v) The doctrine of equitable tolling applies to Yusuf Claim Nos. Y-7 and Y-9 because (a) "There are two problems with Hamed's 'unfettered access' argument"—to wit, FBI Agent Petri's affidavit is inadmissible because it "is hearsay that does not fall under any exception," but even if FBI Agent Petri's affidavit is admissible, Waleed Hamed had previously argued that "the deprivation of access was severe enough to warrant dismissal of the case" and that "[t]he doctrine of judicial estoppel prevents Hamed from arguing in these proceedings that the U.S. Government gave defendants unfettered access to documents that were seized in the raid, when he took precisely the opposite position in the criminal case." (Id., at pp. 13-18), (b) "Hamed also has no good answer to the other respects in which the pendency of the criminal case was an extraordinary circumstance or an impediment to bringing suit before late 2011 at the earliest" and "Hamed has therefore raised no issue of material fact concerning United's assertion that the criminal case created a serious impediment to suing the partnership because doing so would compromise the defense of the criminal case and expose his partner, Mohammad Hamed to a prosecution that, if successful, would lead to the equivalent of a sentence of imprisonment for life."[36] (Id., at pp. 20-21), (c) Hamed "has produced no evidence to dispute Mr. Yusuf's testimony that he had discretion to determine when a reconciliation was made, and his attempt to evade Judge Brady's finding on this point is unpersuasive." (Id., at p. 22), and (d) "Hamed offers no cogent response to United's contention that there was no recognized partnership

[36] United pointed out "Hamed does not and cannot dispute that '[t]he theory of the prosecution was that United Corporation, a corporation owned by Fathi Yusuf and his family members – and not an undocumented, oral Hamed/Yusuf partnership – owned and operated the Plaza Extra supermarkets and was responsible for paying income and gross receipts taxes on store revenues'" and that "Hamed's response to United's [SOF ¶ 9] is silent regarding Mr. Yusuf's account of the defense lawyers' instructions to the defendants." (Reply, pp. 20-21)

entity to sue before Judge Brady's issued his April 2013 preliminary ruling that there was an enforceable partnership agreement." (Id.)

The Master will first address the following threshold issues before addressing the merits of Yusuf Claim Nos. Y-7 and Y-9: (i) whether United timely asserted these claims prior to the cut-off date for filing claims, (ii) whether Yusuf Claim Nos. Y-7 and Y-9 are barred by the Limitations Order, and (iii) whether Yusuf Claim Nos. Y-7 and Y-9 are barred by the statute of limitations.

A. Whether United timely asserted these claims prior to the cut-off date for filing claims

Hamed argued that United did not bring these claims "under the timeframe set forth by the Special Master" because Yusuf's Accounting Claims "was not United's filing." (Y-7 Opp., p. 19; Y-9 Opp., p. 16) The Master finds Hamed's argument unpersuasive. This issue was previously addressed by the Master in its order addressing United motion for partial summary judgment and Hamed's cross-motion for summary judgment for Yusuf Claim No. Y-8, entered on September 4, 2020, and the Master adopts its previous analysis therein as though the same were set forth herein. Thus, the Master finds that United asserted this claim prior to the cut-off date for filing claims.

B. Whether Yusuf Claim Nos. Y-7 and Y-9 are barred by the Limitations Order

United's claims do not fall within the scope of the Limitations Order. The Limitations Order provided 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." (Limitations Order, p. 34) (Emphasis added). Thus, United's claims are not barred by the Limitations Order.

C. Whether Yusuf Claim Nos. Y-7 and Y-9 are barred by the statute of limitations

The statute of limitations applies to Yusuf Claim Nos. Y-7 and Y-9 regardless of whether they fall within the scope of the Limitations Order. Title 5 V.I.C. § 31 applies to bar causes of action that are commenced outside of the relevant limitations period. United argued that the applicable statute of limitations for Yusuf Claim Nos. Y-7 and Y-9 is ten years pursuant to Title 5 V.I.C. § 31(2)(A)[37] and accrues "from the date of the last item on the account" pursuant to Title 5 V.I.C. § 33,[38] which was on May 1, 1998.[39] (Motion, p. 10) (Emphasis omitted) Hamed argued that Yusuf Claim Nos. Y-7 and Y-9 are barred by the statute of limitations because "[p]ursuant to 5 V.I.C. § 31(3), the statute of limitations for actions for debt, breach of contract and conversion of property is 6 years"[40] and that "the [statute of limitations] on all of these claims expired years ago, between the years 2000 and 2004, depending on the specific claim."[41] (Y-7 Opp., p. 20; Y-9 Opp., p. 16)

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[37] Title 5 V.I.C. § 31(2)(A) provides:

> Civil actions shall only be commenced within the period prescribed below after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute:
>
> …
>
> (*2*) *Ten years*—
>
> (A) An action for any cause not otherwise provided for in this section.

[38] Title 5 V.I.C. § 33 provides:

> In an action to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side; but whenever a period of more than one year shall elapse between any of a series of items or demands, they are not to be deemed such an account.

[39] United noted in its reply that it "mistakenly suggested that the last item" was on April 16, 1998 but corrected it in its reply that the last item was on May 1, 1998.

[40] Title 5 V.I.C. § 31(3)(A) provides:

> Civil actions shall only be commenced within the period prescribed below after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute:
>
> …
>
> (3) *Six years*—
>
> (A) An action upon a contract or liability, express or implied, excepting those mentioned in paragraph (1)(C) of this section.

[41] In his oppositions, Hamed also noted that: (i) "the 1994 and 1995 claims [statute of limitations] expired prior to the 2003 indictment in the criminal case" (Y-7 Opp., p. 20) and (ii) "[s]ome [claims] even expired prior to the October 2001 FBI raid." (Y-9 Opp., p. 16).

1. The Applicable Statute of Limitations

Here, United argued that "the appropriate statute of limitations is 10 years on the open account between it and the partnership, because there was neither an express nor implied contract between United and the partnership with respect to the advances United made for or on the partnership's behalf" and cited to *Vanderpool* in support of its argument. (Motion, p. 10) The Master finds United's argument unpersuasive. In *Vanderpool*, the claimants argued that "there was never an express or implied contract between Claimants and Vanderpool and that the claim is therefore not subject to the six-year statute of limitations in 5 V.I.C. § 31(3)(A) for contract actions but is instead subject to the residuary ten-year statute of limitations for claims not otherwise specifically addressed," but the court found that the claimant's argument failed because the arrangement between claimants and Vanderpool was a contract—to wit, claimants provided services and Vanderpool agreed to pay for such services. *Vanderpool*, 2010 V.I. LEXIS 113 at *5. Similarly, the Master finds that the arrangement between United and the Partnership was a contract—to wit, United claimed that it made advances on behalf of the Partnership to third-parties (Yusuf Claim No. Y-7) and directly to the Partnership (Yusuf Claim No. Y-9) and that the Partnership agreed to repay United for these advances. Thus, the applicable statute of limitations is six years. Title 5 V.I.C. § 31(3)(A).

2. The Limitation Period

Here, United argued that Yusuf Claim Nos. Y-7 and Y-9 are not barred by the statute of limitations because (i) under *Vanderpool*, the agreement between the parties should be considered an open account, and thus, pursuant to Title 5 V.I.C. § 33, these claims should accrue from "the date of the last item on the account"—May 1, 1998 (Motion, pp. 9-10) and (ii) "there are at least four extraordinary circumstances or impediments beyond United's control that prevented it from bringing claims against the partnership in 2004 or 2008 on the Y-7 and Y-9 claims, and tolled the statute of limitations on those claims." (Id., pp. 11-15) Hamed disagreed and pointed out that, inter

alia, (i) "United has not produced any evidence, other than Fathi Yusuf's self-serving affidavit" that Yusuf and/or the Partnership allowed United to disregard the statute of limitations on United's repayment demands (Y-7 Opp., p. 20; Y-9 Opp., p. 17) and (ii) the doctrine of equitable tolling does not apply to Yusuf Claim Nos. Y-7 and Y-9. The Master finds both United and Hamed's arguments unpersuasive.

Although Yusuf Claim Nos. Y-7 and Y-9 are not the claims of the individual partners but the claims of United, a third party, these claims are being raised in the context of the Partnership accounting. As explained in the Limitations Order, an accounting of the Partnership is both an equitable cause of action and an equitable remedy in itself, and thus, "the Court is granted considerable flexibility in fashioning the specific contours of the accounting process." (Limitations Order, pp. 13-14) (citing *Isaac v. Crichlow*, 63 V.I. 38, 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, 38 V.I. 431 (D.V.I. 1998)) (emphasis added). Additionally, "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." (Limitations Order, p. 13) (quoting *Kalloo v. Estate of Small*, 62 V.I. 571, 584 (V.I. 2015)). As an extension of the Court in this matter, the Master is granted the same flexibility "in fashioning the specific contours of the accounting process" and "in considering equitable remedies." (Limitations Order, pp. 13-14)

a. Doctrine of Equitable Estoppel

In *Browne v. Stanley*, the Virgin Islands Supreme Court established that "[i]n the Virgin Islands, equitable estoppel requires an asserting party to demonstrate that (1) the party to be estopped made a material misrepresentation (2) that induced reasonable reliance by the asserting

party and (3) resulted in the asserting party's detriment" and explained that this is the soundest rule "because it promotes equity and justice by preventing one party from taking unfair advantage of another." 66 V.I. 328 at 334 (V.I. 2017). A misrepresentation is "an assertion that is not in accordance with the facts" and a misrepresentation is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *Wilkinson v. Wilkinson*, 70 V.I. 901, 914 (V.I. 2019).[42] Furthermore, in certain circumstances, misrepresentations may also include concealment or even nondisclosure. *See Id.*, 70 V.I. at 914, n.7 ("Actionable misrepresentations may also include, in certain circumstances, concealment or even non-disclosure.") With the elements of equitable estoppel in mind, the Master will begin his evaluation. *See Browne*, 66 V.I. at 336 ("The existence of reasonable reliance and detriment 'depends upon the facts of each particular case.'")

The first element of equitable estoppel concerns the conduct or language amounting to a material misrepresentation. Here, both partners and their respective sons were well aware from the inception of their involvement with the business that Yusuf acted as the managing partner of the Partnership and had absolute control over the Partnership finances. In *Hamed v. Yusuf*, the Court held that:

> To the extent it is not already established by admissions of the parties and previous Orders of the Court, the Court now confirms its preliminary factual finding — as detailed at ¶ 19 of the Memorandum Opinion and Order entered April 25, 2013 (58 V.I. 117, 124) — that since the inception of the partnership, Yusuf acted as the managing partner, such that Hamed was completely removed from the financial aspects of the business. *See* Defendants' Brief in Opposition to Motion for Partial Summary Judgment Re Statute of Limitations Defense, filed June 6, 2014, at 11 ("Mr. Yusuf, as the partner admittedly in charge of all operations of the partnership …"). 69 V.I. 168, 175, n. 4 (Super. Ct. 2017).

[42] Although the *Wilkinson* court discussed misrepresentation and material misrepresentation in the context of a claim to rescind a contract, the Master nonetheless finds the *Wilkinson* court's definition of misrepresentation and material misrepresentation applicable in this instance.

In the Limitations Order, the Court similarly held that "[a]s 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" and that "[i]t was Yusuf's responsibility to oversee, account for, and periodically reconcile the distributions of funds between the partners." (Limitations Order, p. 28) In other words, since the inception of the business, Yusuf, as the managing partner of the Partnership, made all the financial decisions for the Partnership with Hamed's full knowledge and agreement. Moreover, both partners and their respective sons were also well aware from the inception of their involvement with the business that Yusuf, while he functioned as the managing partner of the Partnership, he also simultaneously functioned as the president of United, and that the dealings between the Partnership and United were treated as one unit. In other words, since the inception of the business, by practice and usage, all authorities resided in Yusuf as he simultaneously functioned as the president of United and the managing partner of the Partnership, and thereby, since the inception of the business, the dealings between the Partnership and United were treated as one unit with Hamed's full knowledge and agreement. For example, in the early phases of the Partnership, United and the Partnership filed taxes as one unit and United maintained the bank accounts for both the Partnership (collectively "United's Partnership Account") and United's own separate bank accounts, such as United's tenant account (collectively "United's Account"), all with Hamed's full knowledge and agreement. In fact, Hamed's action during the pendency of the criminal case brought by the United States against United further exemplified that Hamed was fully aware and content that all authorities resided in Yusuf and that the dealings between the Partnership and United were treated as one unit. From the commencement of the prosecution and through the pendency of the criminal case, including the negotiation of the plea agreement and its ultimate execution, Hamed, along with Yusuf and their respective sons, purposefully kept the façade that United and the Partnership were one unit by actively concealing the fact that United

and the Partnership were actually separate entities to the prosecutors.[43] Nevertheless, Hamed now changed his tune and claimed that he did not have knowledge and did not agree to Yusuf, the

[43] In his motion, United stated:

> The criminal case brought by the United States against United Corporation for underreporting and failing to pay gross receipts taxes and income taxes owed on revenues from the supermarket business was filed in the District Court on September 18, 2003. The theory of that prosecution was that United, a corporation owned by Fathi Yusuf and his family members–and not a Hamed/Yusuf partnership–owned and operated the Plaza Extra supermarkets and was responsible for paying taxes on store revenues. The criminal defense lawyers instructed Yusuf and the other defendants not to take any action that would support the existence of a partnership, and thereby draw Mohammad Hamed (who was not named in the indictment) into the criminal case. (Motion, pp. 11-12; United's statement of facts ("SOF") ¶ 9)

United referenced: **Exhibit 6**-Declaration of Fathi Yusuf, dated April 15, 2020, ¶ 4 ("…In addition, the defense lawyers for me and the other defendants in the criminal advised us not to do or say nothing that would suggest the existence of a partnership between me and Mohammad Hamed, because that would hurt our defense and cause Mohammad Hamed to be added to the case.").

In his oppositions, Hamed neither agreed "that the fact is undisputed for the purpose of ruling on the motion for summary judgment only" nor "stated that the fact is disputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number" as required by Rule 56. *See* V.I. R. CIV. P. 56(c)(2)(B). Instead, Hamed's responses to United's SOF ¶ 9 stated:

> Y-7 Opposition
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> That was one of many alternate theories of the defense. This claims process is a matter of allocation of "real" amounts NOW in a "real amounts" claims process. Yusuf is arguing that because this was once one of MANY positions taken, Hamed is forever estopped from pointing out the actual facts or what really happened—and what is really owed. Fine. If this is to be the rule in this case, Yusuf repeatedly said he was not a partner in this Partnership, and is, therefore, forever barred from ANYTHING from the Partnership. But, seriously, it is a little late for these sorts of debating club semantics. On the other hand, Hamed would agree to this logic, thus case should end and all of the Partnerships remaining assets should go to Hamed. Otherwise, historical estoppel is not a real "thing" in a RUPA partnership division.
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> On a more practical level, the statute of limitations for the 1994 and 1995 claims expired in 2000 and 2001, before the 2003 criminal indictment, so United's purported reason for tolling the SOL with respect to these claims does not apply. (HCSOF ¶ 27)
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> Further, the federal monitors, brought in to provide oversight on United's financials during the pendency of the criminal case allowed expenditures to be made out of the Yusuf family-owned tenant account and the Partnership bank accounts, despite those accounts being under a court imposed injunction. For example, United was allowed to use the tenant bank account to fund the building of a home on St. Thomas for Fathi Yusuf's son, Nejeh Yusuf, to fund and open a laundromat in United's name. Plaza Extra also was allowed to make capital expenditures at the Plaza Extra East store for new shelves. (HCSOF ¶ 28) If the alleged 1998 debt was legitimate, there was no reason why United couldn't have requested authorization for repayment from the monitors prior to the expiration of the statute of limitations on that claim. (Y-7 Opp., p. 29-30)
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> Y-9 Opposition
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> That was one of many alternate theories of the defense. This claims process is a matter of allocation of "real" amounts NOW in a "real amounts" claims process. Yusuf is arguing that because this was once one of MANY positions taken, Hamed is forever estopped from pointing out the actual facts or what really happened—and what is really owed. Fine. If this is to be the rule in this case, Yusuf repeatedly said he was not a partner in this Partnership, and is, therefore, forever barred from ANYTHING from the Partnership. But, seriously, it is a little late for these sorts of debating club semantics. On the other hand, Hamed would agree to this logic, thus case should end and all of the Partnerships remaining assets should go to Hamed. Otherwise, historical estoppel is not a real "thing" in a real RUPA partnership division.

managing partner of the Partnership, having absolute control over the Partnership finances, to Yusuf, the president of United and the managing partner of the Partnership, having total authorities over the Partnership and United, and to the treatment of the dealings between the Partnership and United as one unit. In his Y-9 opposition, Hamed argued:

> United has not produced any evidence, other than Fathi Yusuf's self-serving affidavit, that there was an agreement between the Partners that allowed United avoid the statute of limitations on demands for repayment made to the Partnership. Mr. Mohammad Hamed never testified to any such agreement. United has not produced any written document articulating this alleged agreement either. United also has failed to demonstrate any history or course of dealing to show that United could demand payment at any time. The only reconciliation that United can point to is the reconciliation done in 1993, hardly evidence of a history of reconciliations or course of dealings. (Y-9 Opp., p. 17) (Footnote omitted)

Hamed made similar arguments in his Y-7 opposition.[44] However, Hamed himself, either by deposition or otherwise, never denied that Yusuf had such absolute control over the Partnership

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> On a practical level, assuming the expenditures were legitimate, it was possible for United to seek reimbursement from the Partnership within the applicable statute of limitations period by requesting funds to be moved from the Plaza Extra bank accounts to the United tenant bank account. There is ample evidence that the federal monitors allowed funds to be expended from both the tenant account and Plaza Extra accounts for things such as purchasing new store shelving, starting a new laundromat business and completing construction of Nejeh Yusuf's home. (HCSOF ¶ 19) (Y-9 Opp., p. 25)

In its reply, United pointed out "Hamed does not and cannot dispute that '[t]he theory of the prosecution was that United Corporation, a corporation owned by Fathi Yusuf and his family members – and not an undocumented, oral Hamed/Yusuf partnership – owned and operated the Plaza Extra supermarkets and was responsible for paying income and gross receipts taxes on store revenues'" and that "Hamed's response to United's [SOF ¶ 9] is silent regarding Mr. Yusuf's account of the defense lawyers' instructions to the defendants." (Reply, pp. 20-21)

The Master agrees with United's assessment of Hamed's oppositions. In Hamed's responses to United's SOF ¶ 9, Hamed never disputed that Yusuf and the other defendants were instructed to not to take any action that would support the existence of a partnership nor that they complied with such instructions. Additionally, the oppositions failed to provide any affirmative assertion by Hamed objecting to Yusuf and the other defendants not taking any action that would support the existence of a partnership. Thus, Hamed, through his silent acceptance and affirmation of the others not taking any action that would support the existence of a partnership, actively concealed the fact that United and the Partnership were actually separate entities to the prosecutors. Furthermore, when the parties in the criminal case finally executed the plea agreement—to wit, United pled guilty to "Count Sixty of the Third Superseding Indictment, which charges willfully making and subscribing a 2001 U.S. Corporation Income Tax Return (Form 1120S), in violation of Title 33, Virgin Islands Code, Section 1525(2)" and all other counts of the indictment against the remaining defendants and all remaining counts of the indictment against United were dismissed with prejudice (The Plea Agreement in the Criminal Case, dated February 26, 2010)—neither Hamed nor Yusuf advised the prosecutors that United and the Partnership were actually separate entities, which would have resulted in more taxes due. Instead, Hamed and Yusuf continued to actively conceal, either by silence or action, the fact that United and the Partnership were actually separate entities. Hamed and Yusuf had a duty to tell the truth and avoid deception before the Court, yet, they failed to do so, and thus, their suppression of the truth was an affirmation of the fact that the Partnership and United were treated as one unit.

[44] In his Y-7 opposition, Hamed argued:

> United has not produced any evidence, other than Fathi Yusuf's self-serving affidavit specific to rent payments for Plaza Extra East, that Yusuf was empowered to let United disregard the statute of limitations

finances or that Yusuf had total authorities over the Partnership and United or that the dealings between the Partnership and United were treated as one unit, nor presented any evidence showing that he never agreed nor consented to such an arrangement.[45] Thus, the Master finds Hamed's conduct of ongoing and repeated silence and acceptance of Yusuf, the managing partner of the Partnership, having absolute control over the Partnership finances, of Yusuf, the president of United and the managing partner of the Partnership, having total authorities over the Partnership and United, and of the treatment of the dealings between the Partnership and United as one unit, went beyond a miscommunication or single act and amounted to an ongoing and repeated material misrepresentation of the fact that Hamed agreed and consented to Yusuf having absolute control over the Partnership finances, to Yusuf having total authorities over the Partnership and United, and to the treatment of the dealings between the Partnership and United as one unit.

The second element, reasonable reliance. The facts are clear that Yusuf relied on Hamed's ongoing and repeated material misrepresentation—to wit, in its motion and reply, United pointed out that Yusuf, as the president of United, made advances on behalf of the Partnership to third-parties and directly to the Partnership by transferring funds from United's Account to United's Partnership Account and had the discretion to seek repayment from the Partnership at any time, and that Yusuf, as the managing partner of the Partnership, had the discretion to accept the advances from United and to determine when the Partnership should repay United for the

> on demands for repayment of alleged Partnership debts (United Exhibit 12, ¶ 1). Mr. Mohammad Hamed never testified to any such agreement. United has not produced any written document articulating this alleged agreement either. United also has failed to demonstrate any history or course of dealing to show that United could demand payment at any time. The only reconciliation that United can point to is the reconciliation done in 1993, hardly evidence of a history of reconciliations or course of dealings. (Y-7 Opp., pp. 20-21) (Footnote omitted)

[45] This lawsuit was filed prior to Hamed's passing and thus, Hamed knew that Yusuf asserted that Yusuf had absolute control over the Partnership finances and that Yusuf had all authorities over the Partnership and United. Hamed had the opportunity to contradict Yusuf's assertion, yet no one had asked Hamed any questions related to such an arrangement. In his oppositions, Hamed only argued the absence of any evidence showing agreement or consent by Hamed to Yusuf's absolute control over the Partnership finances and Yusuf's total authorities over the Partnership and United. However, the oppositions failed to provide any affirmative assertion by Hamed denying such an arrangement.

advances. (Motion, pp. 14-15; Reply, p. 22) The question remains whether Yusuf's reliance can be considered reasonable under the circumstances. The Master finds that Yusuf's reliance was reasonable because (i) at the time, Yusuf, as the managing partner of the Partnership and as the president of United, made all the decisions in connection with the Partnership finances, including but not limited to instructing United to make advances on behalf of the Partnership to third-parties and directly to the Partnership by transferring funds from United's Account to United's Partnership Account, Hamed never objected nor prevented Yusuf from taking such actions[46] and (ii) at the time when the dealings between the Partnership and United were treated as one unit, Hamed also never objected nor prevented Yusuf from taking any actions as a result thereof.[47]

The final element, detriment. Here, Yusuf's reasonable reliance on Hamed's ongoing and repeated material misrepresentations resulted in Yusuf Claim Nos. Y-7 and Y-9 being barred by statute of limitations because United failed to timely demand the repayment from the Partnership. Under these circumstances, the Master is inclined to invoke equitable estoppel to ensure fairness in the relationship between the parties and find that Hamed, and in turn the Partnership, are estopped from taking a position inconsistent with their prior conduct and language. *See Browne*, 66 V.I. 328 at 334 ("because [equitable estoppel] promotes equity and justice by preventing one party from taking unfair advantage of another"). More specifically, Hamed and the Partnership are estopped from raising the statute of limitations defense against Yusuf Claim Nos. Y-7 and Y-9 based on the argument that Hamed did not agree and consent to Yusuf, the managing partner of the Partnership, having absolute control over the Partnership finances, to Yusuf, the president of United and the managing partner of the Partnership, having total authorities over the Partnership and United, and to the treatment of the dealings between the Partnership and United as one unit.

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[46] *Hamed*, 69 V.I. at 175, n. 4 (holding that "Yusuf acted as the managing partner, such that Hamed was completely removed from the financial aspects of the business").

[47] *See supra* note 43.

With that said, this does not mean that the limitation period for Yusuf Claim Nos. Y-7 and Y-9 never accrues and lasts forever. As soon as Yusuf or Hamed advised the other partner of his intent to dissolve the Partnership, the relationship became adversarial, which in effect terminated Yusuf's absolute control over the Partnership finances, terminated Yusuf's total authorities over the Partnership and United, and terminated the treatment of the dealings between the Partnership and United as one unit. Once the relationship between the partners became adversarial, Hamed and the Partnership are no longer estopped from raising the aforementioned statute of limitations defense for actions taken by Yusuf thereafter, and the limitation period for Yusuf Claim Nos. Y-7 and Y-9—which are claims based on Yusuf's absolute control over the Partnership finances, Yusuf's total authorities over the Partnership and United, and the treatment of the dealings between the Partnership and United as one unit—began to accrue. In United's motion, United claimed that Yusuf "took prompt action to dissolve the partnership by having his then attorney, Nizar DeWood, send a letter to Mohammad Hamed giving notice of dissolution of the partnership and a proposed dissolution agreement." The email from Attorney Nizar DeWood regarding the partnership dissolution, with a corresponding letter regarding the same, was dated February 10, 2012. *See* United's Exhibit 8. Thus, the Master concludes that Hamed and the Partnership were no longer estopped from raising the aforementioned statute of limitations defenses for actions taken by Yusuf after February 10, 2012 and the limitation period for Yusuf Claim Nos. Y-7 and Y-9 began to accrue on February 10, 2012.

b. Yusuf Claim Nos. Y-7 and Y-9

United timely filed Yusuf Claim Nos. Y-7 and Y-9 on September 30, 2016, when they were included in Yusuf's Accounting Claims.[48] Therefore, Yusuf Claim Nos. Y-7 and Y-9 are not barred by the six-year statute of limitations.

[48] In its motion, United indicated that September 17, 2012, the date the complaint was filed, is "the date when United is deemed to have brought its claims against the partnership." (Motion, p. 10) The Master disagrees. In the Limitations

c. Supplemental Yusuf Claim No. Y-9

Yusuf Claim No. Y-9, as originally claimed in Yusuf's Accounting Claims, only included the advances made in 1996 and did not include the advances made in 1995, 1997, and 1998. United made the request to supplement Yusuf Claim No. Y-9 to include the advances made in 1995, 1997, and 1998 (hereinafter "Supplemental Yusuf Claim No. Y-9") in its instant motion, filed on April 15, 2020. Without deciding whether granting United's request would prejudice Hamed, the Master finds that the six-year statute of limitations expired for Supplemental Yusuf Claim No. Y-9 prior to April 15, 2020 since the limitation period for Supplemental Yusuf Claim No. Y-9 also began to accrue on February 10, 2012. "Once a cause of action has accrued and the statutory period for bringing the action has expired, an injured party is barred from bringing suit unless the statute of limitations has been tolled." *Santiago v. V.I. Hous. Auth*., 57 V.I. 256, 273 (V.I. 2012) (citing *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991)) (internal quotation marks omitted).

In *Bonelli v. Gov't of the Virgin Islands*, the Virgin Islands Supreme Court made it clear that "the party seeking the benefit of equitable tolling bears the burden of establishing their entitlement to it." 67 V.I. 714, 722 (V.I. 2017) (citing *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 588-89 (V.I. 2014)). In its motion, United argued that "there are at least four extraordinary circumstances or impediments beyond United's control that prevented it from bringing claims against the partnership in 2004 or 2008 on the Y-7 and Y-9 claims, and tolled the statute of limitations on those claims": (a) "[t]he pendency of the criminal case," (b) "[m]ost of the documents evidencing the open account were seized by the FBI and not returned until late 2011," (c) "[t]here was no recognized partnership entity to sue in 2004 or 2008, and Yusuf had no

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Order, the Court noted that the Court provided a "detailed analysis of the nature of the claims presented by the parties in this action" in its memorandum opinion and order striking the jury demand, entered on July 25, 2017, and explained 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." (Limitations Order, p. 10, footnote 9) Thus, aside from United's rent claims, United remaining claims were not filed until September 30, 2016, when they were included in Yusuf's Accounting Claims.

reason to effectively sue himself in any event," and (d) "Yusuf was the partner who managed the finances of the partnership, and his decision to defer payment of the amount owed by the partnership on its open account with United benefitted the partnership." (Id., at pp. 11-15) The Master finds United's argument unpersuasive. Regardless of when the criminal case concluded or when the documents were returned or when the Partnership was legally recognized, it is clear that United could have raised its Supplemental Yusuf Claim No. Y-9 prior to the expiration of the limitation period—to wit, United could have included Supplemental Yusuf Claim No. Y-9 in Yusuf's Accounting Claims, like it included Yusuf Claim Nos. Y-7 and Y-9. As to the last circumstance claimed by United, the Master already addressed Yusuf's absolute control over the Partnership finances, Yusuf's total authorities over the Partnership and United, and the treatment of the dealings between the Partnership and United as one unit in terms of equitable estoppel. As such, the Master finds that United failed to carry the burden of establishing its entitlement to equitable tolling.[49] *See Bonelli*, 67 V.U. at 722. Since the doctrine of equitable tolling is not applicable to United's Supplemental Yusuf Claim No. Y-9, it is barred by the statute of limitations.

D. Merits of Yusuf Claim Nos. Y-7 and Y-9

Now that the Master has addressed the threshold issues, the Master will turn to the merits of Yusuf Claim Nos. Y-7 and Y-9. In his oppositions, Hamed disputed that the alleged debts are still outstanding due to the unreliability and untrustworthiness of the Partnership accounting

[49] The elements of the doctrine of equitable tolling for breach of contract has yet to be addressed by the Virgin Islands Supreme Court. The Virgin Islands Supreme Court cited to the elements in passing in *Bonelli* and in *Thomas* in support of its ruling that "the party seeking the benefit of equitable tolling bears the burden of establishing their entitlement to it." *See Bonelli*, 67 V.I. at 722; *Thomas*, 60 V.I. at 588-89. However, a *Banks* analysis was never conducted to establish the elements of equitable tolling for breach of contract. *Compare Bonelli and Thomas* (the elements of equitable tolling for breach of contract was mentioned in passing and a *Banks* analysis was not conducted to determine the elements of equitable tolling for breach of contract, an issue of first impression in this jurisdiction) *with Browne* (a *Banks* analysis was conducted to determine the elements of equitable estoppel, an issue of first impression in this jurisdiction). Nevertheless, in light of the Master's finding, the Master need not conduct a *Banks* analysis to determine the elements of equitable tolling for breach of contract.

during the relevant period.[50] The Master is again inclined to exercise the significant discretion he possesses in fashioning equitable remedies.

1. The Doctrine of Equitable Estoppel

The first element of equitable estoppel concerns the conduct or language amounting to a material misrepresentation. Here, as the Court pointed out in the Limitations Order, both partners and their respective sons had, at all times, either actual or constructive knowledge, of the Partnership's notably informal and unreliable accounting and the deliberate destruction of a substantial amount of records evidencing such withdrawals prior to the FBI raid in 2001.[51] The

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[50] *See supra* notes 26, 27.

[51] In the Limitations Order, the Court stated:

> …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. (Limitations Order, p. 11, footnote 10)
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> …
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> Turning to the case at bar, there are both striking similarities and critical differences between the factual scenario presented in this matter and that before the court in Williams. Just as in Williams, this matter is best described as a battle between two partners, here former friends and brothers-in-law, over how the assets of the partnership were handled. Additionally, despite having, at all times, either actual or constructive knowledge of the alleged ongoing, repeated withdrawals of partnership funds, both Hamed and Yusuf ignored these issues year after year and allowed one another to continue conducting partnership business, each implying to the other that all was well.
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> …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.
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> …
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> 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 [*30] 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.
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> …
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> 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).

Court also pointed out that 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.'"[52] (Limitations Order, p. 28) (Citation omitted) Thus,

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> 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. 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.
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> …
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> 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.
>
> 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. (Id., at pp. 21-27) (Footnotes omitted)

[52] In the Limitations Order, the Court stated:

> 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.

the Master finds Hamed's conduct of ongoing and repeated silence and acceptance of the inadequacy of the Partnership accounting over the years and the lack of record keeping either through failure to document or active destruction of documents went beyond a miscommunication or single act and amounted to an ongoing and repeated material misrepresentation of the fact that Hamed agreed and consented to the inadequacy of the Partnership accounting over the years and the lack of record keeping either through failure to document or active destruction of documents.

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 of the partnership. 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.

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 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. (Id., at pp. 28-31) (Footnotes omitted)

The second element, reasonable reliance. The facts are clear that Yusuf reasonably relied on Hamed's ongoing and repeated misrepresentation—to wit, the inadequacy of the Partnership accounting and the lack of record keeping continued for years without any objections from Hamed or any actions by Hamed to rectify the situation.[53] In fact, as the Court noted in its Limitations Order, "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." (Limitations Order, p. 28)

The final element, detriment. Here, Yusuf's reasonable reliance on Hamed's ongoing and repeated material misrepresentations resulted in Yusuf Claim Nos. Y-7 and Y-9 being disputed due to the unreliability and untrustworthiness of the Partnership accounting during the relevant period. Under these circumstances, the Master is again inclined to invoke equitable estoppel to ensure fairness in the relationship between the parties for Yusuf Claim Nos. Y-7 and Y-9 and find that Hamed, and in turn the Partnership, are estopped from taking a position inconsistent with their prior conduct and language. *See Browne*, 66 V.I. 328 at 334 ("because [equitable estoppel] promotes equity and justice by preventing one party from taking unfair advantage of another"). More specifically, Hamed and the Partnership are estopped from raising any defenses against Yusuf Claim Nos. Y-7 and Y-9 based on the argument that the Partnership accounting were inadequate and that there are inadequate records to support various accounting claims. With that said, this ruling is not a blanket estoppel for all the accounting claims and is not limited to Hamed and the Partnership. The Master will exercise his significant discretion he possesses in fashioning equitable remedies as the need arises and make the determination on a case by case basis.

[53] *See supra*, notes 51, 52.

In light of the Master's ruling, the Master concludes that there is no genuine dispute as to any material fact regarding United's motion for summary judgment for Yusuf Claim Nos. Y-7 and Y-9.

CONCLUSION

Based on the foregoing, the Master will grant United's motion for summary judgment for Yusuf Claim Nos. Y-7 and Y-9 and deny United's request to include Supplemental Yusuf Claim No. Y-9 for being time-barred. Accordingly, it is hereby:

ORDERED that United's motion for summary judgment for Yusuf Claim No. Y-7: United's claim for advances United made on behalf of the Partnership in 1994, 1995, and 1998, in the total amount of $199,760.00 and Yusuf Claim No. Y-9: United's claim for advances United made directly to the Partnership in 1996, in the total amount of $188,132.00 is **GRANTED**. And it is further:

ORDERED that United's request to include Supplemental Yusuf Claim No. Y-9 is **DENIED** for being time-barred.

DONE and so ORDERED this 20th **day of October, 2020.**

EDGAR D. ROSS
Special Master