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

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

FATHI YUSUF'S MOTION FOR ADDITIONAL RULINGS FROM MASTER RE:
CLAIM H-163 PRIOR TO CONDUCTING EVIDENTIARY HEARING

Claim H-163, Hamed's wrongful dissolution claim, is set for hearing on April 15, 2020. Claim H-163 is in the "B" group of claims for which no discovery has been taken. Fathi Yusuf (sometimes "Yusuf" or "Mr. Yusuf") has regarded this claim, from the outset, as legally dubious for a myriad of reasons. The claims for accounting credits to Hamed's side of the ledger from this claim that were offered as potential damage claims in his November 18, 2019 Motion for Partial Summary Judgment were, on their face, barred by Judge Brady's laches-based limitations order, which precluded recovery on any partner's accounting claim if the damages being sought arose prior to September 17, 2006.[1] In addition, the claim seemed convoluted, to put it mildly, because Yusuf's request that his attorney send Hamed a notice of dissolution in February 2012 was itself based on Yusuf's discovery that Hamed had been embezzling partnership monies. As Mr. Yusuf has testified on many occasions in deposition, he did not and does not want to remain a partner with somebody, who is stealing from the partnership. This common sense proposition is embodied in the RUPA rules, and it necessarily means that any dissociation of the partnership by Yusuf was rightful.

Hamed's own briefing on this claim – and his attempts in the past few weeks to commit to a damage theory for the hearing – have been riddled with shifts in position, which weaken the claim even more and suggest that it is not ripe for an evidentiary hearing. Hamed's Motion for Partial Summary Judgment on claim H-163 argued for the first time in this litigation that the partnership was not "at will," but, instead, was for a definite undertaking. When Yusuf pointed out in his Opposition that the "at will" nature of the partnership agreement was central to Judge Brady's and the Virgin Islands Supreme Court's holding that the statute of frauds did not render

[1]Indeed, the Master's June 2, 2020 Order reaffirmed that any accounting claims to be submitted by Hamed would have to comply with Judge Brady's limitations order.

this oral partnership unenforceable, and that reopening the statute of frauds issue could wipe out all of the windup orders in this case, Hamed relented. Hamed conceded unequivocally in his reply that the partnership was "at will," and he disavowed any statements to the contrary in his motion.

In a March 11 conference between counsel for Yusuf and Hamed, counsel for Yusuf pointed out that H-163 was a "B claim" for which there had been no discovery at all, and that it would be difficult to prepare for an evidentiary hearing in the complete absence of any discovery regarding what kinds of dollar amounts Hamed would be seeking if he could prove a wrongful dissociation by Yusuf. Counsel for Hamed identified, in general terms, the damages his client would be seeking for Yusuf's alleged wrongful dissociation, and promised to provide supplemental discovery very soon after the conference. On that basis, counsel for Yusuf agreed to the request for an evidentiary hearing in April.

Attorney Hartmann provided the promised discovery in a very expeditious way on March 11. But that discovery confirmed that the amounts Hamed was seeking against the partnership – alleged contributions by the partnership to construction of the Plaza Extra supermarket in the 1980's and 1990's – were barred by Judge Brady's limitations order. *See* **Exhibit A,** Hamed's Supplemental Discovery. Then, several days ago, on March 29, Hamed's counsel, Attorney Holt, articulated a new damage theory for H-163 in an apparent attempt to surmount the limitations problems. Instead of claiming reimbursement for payments allegedly made in the 1980's and 1990's by the partnership for loans on the Plaza Extra building, Hamed was now seeking "the ledger value of Hamed's partnership interest in the Plaza Extra East premises at the time of Yusuf's wrongful disassociation." In other words, Hamed was now claiming that his damages for wrongful dissociation was a dollar amount corresponding to the value of an interest in the Plaza Extra premises that Hamed now argued, for the first time, that he had acquired.

This latest shift in position makes it clear that there are too many legal uncertainties regarding the H-163 claim for it to go to trial on April 15. Instead, United respectfully asks the Master to schedule an oral argument (without witnesses) for that day to determine whether this claim should be tried or dismissed.[2] In the section below, United will discuss the legal issues that remain open regarding the H-163 claim, and that it believes can and should be resolved by the Master before an evidentiary hearing is conducted on that claim.

ARGUMENT

I. Hamed's Arguments are Barred by the Law of the Case and Judicial Estoppel Doctrines.

Yusuf articulated some but not all of the reasons the H-163 claim is infirm in his April 9, 2020 Opposition to Hamed's Motion for Partial Summary Judgment as to Claim H-163. He also pointed out in that brief that the various damages that Hamed suggested were potentially recoverable if wrongful dissolution could be proven were barred by Judge Brady's limitations order.

Hamed sought only partial summary judgment on liability in his November 18, 2019 Motion regarding H-163. Yusuf's Opposition pointed out that the "at will" nature of this oral partnership agreement was the lynchpin of Hamed's argument in his 2013 preliminary injunction briefing before Judge Brady, and that Hamed was successful in convincing Judge Brady that the agreement was "at will." *See* Yusuf's April 9, 2020 Opposition, p. 9. Judge Brady found that the partnership was an "at will" partnership agreement, and as such had "no definite term or duration, and [is] subject to dissolution by either partner at any time." *Id.* at p. 9 (quoting from Judge Brady's 2013 preliminary injunction ruling[3]).

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[2] Yusuf still remains prepared to present evidence as to Y-8 which is also to proceed on April 15.
[3] Yusuf cited to *Hamed v. Yusuf*, 58 V.I. 117, 131 (Super. Ct. 2013).

In seeking affirmance of Judge Brady's ruling on appeal, Hamed acknowledged that "at will partnerships are subject to dissolution by either party at any time…." *Id*. at 9 (quoting from Hamed's Opposition Brief on Appeal). From that, it followed as a straightforward matter that the oral partnership agreement was capable of being performed in one year, and therefore, that the statute of frauds did not render it unenforceable.[4] *See id*. at p. 9. The Virgin Islands Supreme Court agreed with Hamed's argument for affirmance of Judge Brady's finding "that the partnership is an indefinite at will agreement," and the Court noted that it was "a finding that Yusuf and United do not challenge" on appeal. *See id*. at p. 9 (quoting from *Yusuf v. Hamed*, 59 V.I. 841, 853 (V.I. 2013). The High Court, therefore, affirmed Judge Brady's holding that the "at will" nature of the oral partnership agreement meant that it "did not violate the statute of frauds," and was therefore enforceable. *See id*. at 9 (citing to Yusuf, 59 V.I. at 852-853).

The Master has correctly ruled that Judge Brady's preliminary injunction findings are not binding on a court in subsequent proceedings, and therefore, may not be relied on as a basis for granting summary judgment. *See* Master's June 2, 2020 Order re: Claim H-163, pp. 18-19 (citing cases for the proposition that a trial court's rulings on a preliminary injunction motion are not binding on subsequent proceedings in the same case). In making that ruling, however, the Master did not consider how the rules applied to an appellate decision that affirms a lower court's preliminary injunction on a question of law. In that situation, "when the appellate panel considering the preliminary injunction has issued a fully considered appellate ruling on an issue of

[4]The rule that that statute of frauds does not apply to an "at will" contract because it can be canceled without breach by any party in less than a year is universally followed. *See, e.g.*, *Behrman v Red Flower*, 2018 WL 5831141 (N.Y. Sup. 2018) ("at-will arrangements are capable of performance within one year, because the parties can terminate them at any time without breach," making the statute of frauds inapplicable).

law, then that opinion becomes the law of the case." *See Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (citations and internal marks omitted); *see also Virgin Islands Taxi Association v. Virgin Islands Port Authority*, 67 V.I. 643, 670 (V.I. 2017) (holding that the law of the case "only applies to decisions on questions of law… and to all conclusions that flow necessarily from such decisions" and quoting the rule that "the decision of [an] appellate court in a case is the law of that case [for]… all the subsequent proceedings in the case") (citations and internal marks omitted). "The doctrine applies with greater force when an appellate court remands a case to an inferior tribunal, and prohibits the lower tribunal from taking action inconsistent with the appellate court's ruling." *Id*. at 671 (citations and internal marks omitted).

The Virgin Islands Supreme Court's holding that the oral partnership agreement between Hamed and Yusuf was "at will" and therefore not rendered unenforceable by the statute of frauds is the kind of ruling on a question of law that should be treated as the law of the case, even though made in the context of its review of a preliminary injunction ruling. This is a very important law of the case, because if the partnership agreement were not "at will," and instead, had a definite term (e.g., it would continue until annual losses hit $800,000), the statute of frauds would apply, rendering the partnership unenforceable, and all of the proceedings to wind up the partnership would have to be vacated, including all of the decisions of the Master that have been made as part of that wind up. As the law of the case, the Master is required to follow it, unless and until the Supreme Court revisits the issue and reverses its ruling that the partnership was "at will."

Also important here is the doctrine of judicial estoppel, which "preclude[s] a party from asserting a position on a question of fact or a mixed question of law and fact that is inconsistent with a position taken by that party in a previous judicial proceeding if the totality of circumstances compels such a result." *Virgin Islands Taxi Association, supra,* 67 V.I. at 685 (citation and internal

marks omitted). The "purpose [of this docrtrine] is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Sarauw v. Fawkes*, 66 V.I. 253, 262. (V.I. 2017). The factors to be considered in determining whether judicial estoppel applies include "the extent of the inconsistency (including any reasonable explanations that would harmonize both positions), whether the party has received an unfair advantage or benefit from asserting the inconsistent claims, and whether another court has already relied on the claim made in the first proceeding." *Id*. at 265.

Hamed was successful in getting Judge Brady to agree that the partnership agreement was "at will," and therefore not void under the statute of frauds. For Hamed to benefit in a major way from that argument, and then to take the opposite position to try to recover a substantial sum in the partnership accounting for breach of a definite term agreement is plainly unfair to Fathi Yusuf. The doctrine of judicial estoppel precludes any attempt by Hamed to argue now that the partnership agreement was not "at will," but instead was for a definite term.

In response to Yusuf's arguments in his Opposition regarding the risks of revisiting the "at will" nature of the partnership – and in apparent recognition of the legal obstacles to doing so posed by the law of the case and judicial estoppel doctrines – Hamed's reply unequivocally conceded that "the Partnership was an 'at will' partnership", and specifically withdrew "any inconsistent or contrary arguments in his initial motion." Hamed's May, 2020 Reply, p. 8, n. 1. The Master recognized that concession in his Order regarding denying Hamed partial summary judgment as to H-163. Master's June 2, 2020 Order at p. 20. Hamed then asserted in a footnote this "at will" partnership could be viewed as also simultaneously being one for a "a particular undertaking." *Id*. at 20. The Master ruled that this assertion contravenes the very definition of "partnership at will" in the Virgin Islands RUPA. *Id*. at 20. The statement that an "at will"

agreement can at the same time be an agreement for a particular undertaking is false, and should be disregarded, but it in no way undercuts Hamed's concession that the partnership agreement was "at will." The upshot is that both Hamed and Yusuf acknowledge in their H-163 briefs that the partnership agreement was "at will," and have no dispute on that point. As such, Yusuf believes it would be appropriate for the Master to reconsider his ruling that there is "a genuine dispute as to whether the Partnership was a partnership at will or a partnership until the completion of a particular undertaking…" Master's Order at p. 21. Based on Hamed's unequivocal concession in his Reply, there simply is no dispute between the parties on this point.

And if the agreement is "at will," the case law establishes that either partner had the right to dissociate for any reason and at any time, and that Yusuf's dissociation in February 2012 cannot be wrongful. Hamed insists that "every court considering the issue" has held that an "at will" partner who decides to exercise his right to end a partnership can be guilty of wrongful dissociation, but fails to cite to a single case that has so held. Indeed, Yusuf cited to *Robertson v. Mauro*, 2013 WL 3293069, *5 (D. Idaho 2013) which held that the elements of wrongful dissociation set forth in Idaho's counterpart to 26 V.I.C. § 122 do "not apply to an at will partnership." If Yusuf had a right to withdraw from the partnership for any reason and at any time, how can he possibly be guilty of a wrongful dissociation when he directed his attorney Nizar DeWood in February 2012 to announce the dissolution of the partnership?

As the Virgin Islands Supreme Court stated in *Serauw, supra* at 265, judicial estoppel does not apply if there are "any reasonable explanations that would harmonize both positions." Here, the Yusuf testimony that he would remain a partner "until we lose $800,000" is easily reconciled with the "at will" nature of the partnership agreement. The partners agreed that each could terminate the partnership at any time for any reason, but both also agreed that if the partnership

ceased to be profitable and yearly losses reached $800,000, they would both be required to terminate it.[5] Yusuf's testimony about the partners' obligations to terminate if losses reached that level was included in Judge Brady's preliminary injunction order as finding of fact number 13. *See Hamed v. Yusuf*, 58 V.I. 117, 123 (Super. Ct. 2013). Judge Brady must have concluded that that the $800,000 provision could be easily harmonized with his finding that the partnership agreement was "at will," and the Virgin Islands Supreme Court, in affirming the preliminary injunction, must have likewise concluded that the provision was not in any respect inconsistent with the "at will" nature of the agreement.

The Idaho Supreme Court's decision in *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 224 P.3d 1068 (2009), is illustrative in this context. In *Saint Alphonsus*, the Idaho High Court considered the meaning of counterpart to 26 V.I.C. § 122 in Idaho's RUPA, and specifically the provision that a dissociation is wrongful if it is "in breach of an *express* provision of the partnership agreement." *Id*. at 1077 (emphasis added). The partnership in that case acquired and operated MRI equipment and other diagnostic and therapeutic medical devices. The written partnership agreement allowed any partner to withdraw from the partnership in any of four defined circumstances. These four circumstances were the partner forming the reasonable judgment that continued participation in the partnership would: 1) jeopardize the tax-exempt status of a partner, 2) jeopardize Medicare and Medicaid reimbursements, 3) contravene the ethical principles of the Roman Catholic Church, or 4) violate state, federal or local law. *Id*. at 1075. Plaintiff withdrew

[5]This is a far more plausible exercise in semantics than treating the $800,000 loss provision as a "particular undertaking" of the Yusuf/Hamed partnership. A particular undertaking or purpose of a partnership might, for example, be to "develop a single residential development project on a particular piece of property." *See Meyer v. Christie*, 634 F3d 1152, 1161 (10th Cir. 2011) (applying Kansas RUPA). But it would be a peculiar usage to call a requirement that a partnership cease operating if losses reach a certain level as the purpose or undertaking of a partnership.

form the partnership for other reasons, and the partnership argued that its dissociation was wrongful because it breached this provision of the agreement.

The Idaho Supreme Court held that the use of the adjective "express" in the RUPA section providing that a dissociation is wrongful if in breach of an express provision of the partnership agreement was significant. As the Court said, that term means "[m]ade known distinctly and explicitly, and not left to inference," and "manifested by direct and appropriate language." *See id.* at 1077 (citation and internal marks omitted). The Court held that the provision was not "an express provision limiting the right of any partner to dissociate rightfully":

> Because the provision limiting the right to withdraw rightfully must be an express provision, any doubt as to the meaning of the provision at issue must be resolved in favor of not limiting the right to withdraw. The provision of the partnership agreement at issue does not contain any prohibitive language. For example, it does not state that a hospital partner *shall not* withdraw from the partnership *except* under the specified circumstances. Likewise, it does not state that a hospital partner may *only* withdraw from the partnership under the specified circumstances. We hold that the provision is not an express provision limiting the right to dissociate rightfully.

Id. at 1077-1078. It reversed the trial court's determination and instruction to the jury that the plaintiff had wrongfully dissociated from the partnership.

Likewise, the $800,000 provision in the partnership agreement, as summarized in Judge Brady's findings, does not provide that a partner shall not withdraw from the partnership except in the circumstance that yearly losses hit $800,000. Nor does it state that a partner may only withdraw under these circumstances. In short, there is nothing about the provision that undercuts in any way the right of a partner to withdraw for any reason whatsoever. Any strained construction of this provision that would limit Yusuf's or Hamed's at will termination rights would also run afoul of the law of the case and judicial estoppel doctrines. The only way this provision could have been breached would be if losses had reached $800,000 in a given year, and either Hamed or Yusuf refused to end the partnership.

Hamed's wrongful dissociation claim is convoluted for another reason, and that is that Yusuf requested his counsel to give notice of dissolution of the partnership in February 2012 precisely because he had discovered Hamed's misappropriation of partnership monies and no longer wanted to remain partners with somebody who had acted dishonestly. The Master has already found in his May 3, 2020 Order regarding Hamed's Motion for Summary Judgment regarding claim H-142 that at some time in 2010 or 2011, Mohammad Hamed, Fathi Yusuf and Waleed Hamed "met to discuss Yusuf's discovery of Hamed's misappropriation of [partnership] funds…," and that Hamed agreed to give him a parcel of property as recompense for that misappropriation. Master's May 3, 2020 Order, p. 23. The Master has also found that very shortly after that meeting, Fathi Yusuf "discovered additional misappropriation of funds by Hamed," and rescinded the agreement. *Id.* at p. 30. The Master found that Yusuf's rescission was justified because Hamed fraudulently induced Yusuf to enter the original agreement by the false representation that "there were no other misappropriation of funds by Hamed," when, in fact, he had engaged in "other misappropriation…" *Id.* at 33.

Once Yusuf learned that Hamed had embezzled partnership funds, he surely had a right to dissociate from the partnership. Nothing about the provision obligating the partners to terminate the partnership if losses reached a certain threshold could conceivably impair Yusuf's right to dissociate from a dishonest partner. Dissociating for this reason obviously cannot be regarded as a breach of the $800,000 provision.

One other point bears mention. In the case of a term or particular undertaking partnership, the drafters comments to RUPA section 602 (26 V.I.C. § 122) make it clear that a partner's dissociation form a partnership before the end of the term or undertaking will be considered rightful if the other partner precipitates that dissociation by his or her own prior wrongful conduct.

Specifically, if the Court finds, *inter alia*, under RUPA section 601(5) [26 V.I.C. § 121(5)], that the other "partner engaged in wrongful conduct that adversely and materially affected the partnership business," or that he or she "engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner," then the partner who withdrew before the end of the term will be treated as having rightfully dissociated, and the other will be deemed to have wrongfully dissociated. *See* Comment 2 to RUPA § 602, last paragraph, attached as Exhibit 1 to Yusuf's April 9, 2020 Opposition to Hamed's Motion for Partial Summary Judgment as to H-163. The instant partnership is "at will," but even if it were for a definite term or a particular undertaking, Hamed should be deemed to have wrongfully dissociated by the misconduct that the Master has already found him to have engaged in, and Yusuf's dissociation should be treated as a rightful response to that misconduct.[6]

II. Hamed's Recent Discovery Regarding the Dollar Amounts He is Claiming Only Heightens the Incoherence of Claim H-163.

The supplemental discovery provided by Hamed on March 11 makes clear that the sums being sought by Hamed for wrongful dissociation are barred by Judge Brady's limitations order. What Hamed says he is seeking in this supplemental discovery is partnership payments on several million dollar loans that he says were taken out to build the Plaza Extra-East store in the 1980's and 1990's. *See* Exhibit A, Hamed's Supplemental Discovery. The last such loan, Hamed says, was a Scotia Bank loan made in May 1994, which consolidated all of the prior loans into a single

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[6] While Yusuf would argue that Hamed should be deemed to have wrongfully dissociated, and that his own dissociation should be viewed as rightful, Yusuf is not seeking damages for Hamed's wrongful dissociation, but is simply using this doctrine defensively. It seems more appropriate to view this partnership windup much as one would view a no-fault divorce proceeding. The equities between the parties will be adjusted in the windup, and any taking of partnership property will be redressed in that windup (subject to Judge Brady's limitations order), but there should be no separate relief on the theory that one party was at fault (or more at fault) in causing the divorce.

$6.1 million loan. *See* Exhibit A, p. 12. As shown in Exhibit 12 to Yusuf's April 9, 2020 Opposition to Hamed's Motion for Partial Summary Judgment on claim H-163, that Scotia mortgage was paid off and released in February 2000. That means that all of the alleged repayment of loans for which Hamed is now seeking recovery long pre-date September 17, 2006, the deadline under Judge Brady's limitations order.

No doubt aware of his vulnerability to the Judge Brady limitations order, a few days ago (on March 29), Attorney Holt sent an email outlining a brand new theory of recovery for H-163. Based on that email Hamed will be seeking "the ledger value of Hamed's partnership interest in the Plaza Extra East premises at the time of Yusuf's wrongful disassociation." In other words, Hamed is now claiming that the partnership had a property interest in the Plaza East building and real estate as of the time of Attorney Dewood's February 2012 letter to Attorney Holt giving notice of dissolution of the partnership. This brand new theory cuts against the most elemental conclusions that undergird this litigation. From the time of Judge Brady's rent ruling, it has been absolutely clear that what the Master refers to as United's United (as distinct from Yusuf's and Hamed's) owned the real estate at the United Shopping Center lock, stock and barrel. Hamed has cited no authority that would permit the partnership to acquire a property interest in a building by virtue of past alleged contributions to mortgage loan repayments.[7]

The confused nature of the H-163 claim is compounded by the fact that, as the Master stated, Hamed's Reply "changed his argument and argued for the first time that Yusuf breached the following express provisions of the Partnership" by, *inter alia*, "thr[owing] the Hamed family

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[7] Loans undertaken to build out the grocery store bay and make it suitable for operating the Plaza Extra East supermarket are properly expenses of the partnership, the lessee for the premises. Hamed's argument and supplemental discovery appears to be based on the misconception that repayments for those kinds of loans should have been made by Yusuf's United rather than the partnership.

out of the Plaza stores," "unilaterally [taking] money and refus[ing] them access to account and banks," "fail[ing] to follow particular requirements when dissociating," "refus[ing] to deal with one's partner under the good faith RUPA provisions," and "den[ying] Hamed the opportunity to continue the business that was expressly created under the new RUPA." Master's June 2, 2020 Order at pp. 21-22. The Master declined to address these brand new arguments about "additional breaches by Yusuf" raised for the first time in a reply because that would reward "gamesmanship in motion practice." *Id*. at 22. But it remains the case that there has been no briefing regarding whether there are any "express provisions" in the partnership of the kind raised in this new argument, and if so, whether they were breached as alleged by Hamed, and whether any provable breaches were excused by Hamed's prior misappropriations that Yusuf discovered, as found by the Master in his ruling on Claim H-142. Whether these new breaches of express partnership provisions claims are even cognizable should be addressed and resolved before evidence is taken on them.[8]

CONCLUSION

In summary, there are too many open legal questions that need to be resolved before Claim H-163, if it even survives, can be tried. Yusuf respectfully requests that the Master use the portion of the April 15th date available for the H-163 claim to conduct an oral argument (without evidence-taking) to determine whether H-163 can go forward, and, if so, in what form.

[8]Nor has there been any discovery about the amount and kind of damages in the form of accounting credits that would flow from any of these alleged breaches, if they are cognizable and could be proved. For that additional reason, an evidentiary hearing on H-163 is premature.

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DATED: April 1, 2021

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CERTIFICATE OF SERVICE

It is hereby certified that on this 1st day of April, 2021, I caused the foregoing a true and exact copy of the foregoing **FATHI YUSUF'S MOTION FOR ADDITIONAL RULINGS FROM MASTER RE: CLAIM H-163 PRIOR TO CONDUCTING EVIDENTIARY HEARING** to be served upon the following via Case Anywhere docketing system:

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Exhibit A

Discovery Supplementation as to H-163

I. Hamed's Assertion as to United's Liability to the Partnership

1. Declaration as to Wrongful Dissociation as Against Yusuf

Under RUPA a Partner may dissociate. But the partner must do so in particular ways.[1] Instead, Yusuf denied the *existence* of a partnership—a prima facie basis for wrongful dissociation. Thus, Hamed wishes to set the date of obligations to that date of wrongful dissociation. (Yusuf also locked Hameds out of all control and financial functions. Yusuf called the police and sought to have the Hameds physically removed from the stores.) In other words, even if Yusuf wanted to terminate, he violated RUPA in trying to do so unilaterally and not pursuing the applicable statutory provisions in a failed attempt to convert all partnership assets to himself.) This declaration merely sets the date of termination in September 2012 to February 2013 as opposed to 2014.

2. Funds Supplied to United by the Partnership and Due at Ending

Thus, while the rightness or wrongness of the ending of the Partnership is irrelevant to the requirement of an accounting and the accrual of certain claims, the date must be determined before interest on these claims can be calculated.

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[1] Even if, as Atty. Herpel alleged for the first time yesterday, Hamed did acts inconsistent with the Partnership or it was purely "at will," under RUPA Yusuf would have has specific means to terminate. Instead he attempted a decidedly Anti-RUPA self-help act of conversion. In the end, however, the claim against United is simply another ledger claim just as past rent between United and the Partnership was, not "punishment" for the wrongful dissociation. Thus, a finding of "proper" dissociation does not alter this claim except as to the amount of interest. The wrongful dissociation only set the "when" of the occurrence for damage calculations—as Yusuf later terminated the Partnership by Declaration in 2014.

The Court (Brady) has ordered this proceeding, the accounting and determination of amounts as between Yusuf and Hamed, and also as between United and the Partnership. The rent recovered by United beyond the claim bar date was one such example.

This is the simply reciprocal claim by the Partnership against United that ripened on whatever date Judge Ross determines the Partnership ended. And it is a claim that could *only* be made when the Partnership ended--as it accrued only when the Partnership was denied further use of the East Store.

The specific accounting claim here is that the ending of the Partnership required United to repay the Partnership funds the Partnership paid on United's behalf (for construction of the East Store) during the course of the Partnership. It was not ripe during the Partnership's ongoing use of the premises which Hamed assumed would be perpetual. But, when United took back that use, like rent, it is simply a balance ledger item of funds from the Partnership to United. (The repayment of these loans could not have been provided in lieu of rent as rent was subsequently collected by United *in toto.*)

When the Partnership ended by either Yusuf's acts (wrongful dissociation) and his declaration of termination of the partnership: (1) United sought back rent—but has not paid the reciprocal obligation of repayment of these cash payments by the Partnership—which paid for the construction of the building of the East Store. Hamed will prove that when the store was built, although the land was owned by Yusuf, 100% of the construction (and later reconstruction) was financed by two mortgage loans in 1985 and 1994. These were paid solely by the Partnership.

100% of the cost of building the East physical building were paid by the Partnership in the repayment of these mortgage loans—United's separate Tenant Account paid 0%.[2] Thus, when the Partnership ended in either 2012 by Yusufs acts, or in 2014 by his concession and declaration of termination, those funds due to the Partnership came due and are merely part of the accounts owed as was the rent.

Again, the only difference is that while the rent could have been sought at any time, the Partnership could not pursue these funds until the Partnership ended or it was otherwise denie3d use of the premises, as that is when the obligation to repay accrued—the amount due to the end of use of the premises by the Partnership. The Court must decide whether the value of this contribution is the amount initially paid for the building by the Partnership by repayment of the loans which is a known amount, or the present value of the structure sans land which Hamed will assert is identical to the valuation places on the premises at West.

In conclusion, this is a simple accounting issue. The Partnership paid for the construction of the East Store Building. That amount was no in lieu of rent. When the use of the building ended, it was a ledger item to be repaid. United does not get both the rent and the construction cost and then get to keep the building.

II. Statement of Calculation Damages

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[2] As noted above, United has refused to provide any proof of payments from the tenant account. But the converse can be see in documengts provided by others. For example see the attached notation of payment of the Scotia loan from the non-tenant account on the general ledger, as supplied by the FBI.

258000-20 Note Payable - ScotiaBan	8/1/97		Beginning Balance		-2,560,000.00
	8/1/97 AJE #9	GENJ	Bank Reconciliation 9708	60,000.00	
			Current Period Change	60,000.00	60,000.00
	8/31/97		**Ending Balance**		**-2,500,000.00**

FBIX208699 017-0883

(1) The Partnership provided (1) construction funds contributed by Hamed during the original construction of the Supermarket ($800,000 from Hamed to the Partnership which was and then provided by the Partnership to United for construction in 1985) and (2) also $2.5 million in a mortgage loan in 1985 following construction)[3], and

(2) The post-fire rebuild that was done partially with insurance [proceeds and an additional 1994 United mortgage ($2.5 million.) The Partnership, solely, paid down the consolidated Scotia Bank mortgage loans solely from supermarket earnings—i.e., *with Partnership funds*. The Tenant Account and income from the tenants was not used for this.

(3) Partnership funds from the fire insurance claim and the 1994 mortgage loan were used by United to purchase and construct the H Parcel addition and purchase the land thereunder. Thus, any water claim accruing therefrom is the Partnership.[4] While the ownership of the parcel has been determined, the claim for the funding of it from Partnership proceeds has not.

This is what was said in the motion: (Hamed Motion for Partial SJ as to Claim H-163 Wrongful Dissociation Page 5)

> In return for inclusion in the Partnership, Hamed provided funds to the Partnership not only for the opening of the actual grocery store business,

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[3] Other funds were used to pay for the initial building efforts, but those earlier mortgage loans and all other funds used for construction were "cashed out" by the post-construction mortgage loan in 1985—immediately on completion of the physical building.

[4] *See* Ross Order dated July 12, 2018 at 10.
Thus, there is some evidence that the conveyance was to United operating as a separate distinct entity from the Partnership, and not United operating as the Partnership. Nevertheless, *at this time*, the Master lacks sufficient record before him to make a determination as to the true ownership of Plot 4-H.

> *but also* to be provided to United *for the **building** of "a supermarket within the shopping center*."

Brady Findings of Fact 3, 4, and 5. Hamed provided Yusuf with monies to facilitate completion of the construction of the shopping center and to allow (1) opening the Plaza Extra supermarket in Estate Sion Farm, St. Croix, and (2) the immediate obtaining of a mortgage loan for the remaining construction costs.[5] Hamed will so testify, and Yusuf has never disputed this and reference will be made to his prior responses.

It is also undisputed that neither Hamed nor the Partnership owned the East supermarket building, but they did provide funds to provide to United/Yusuf with a means of completing and then re-building the East store. They did this because the Partnership was to have use of the premises, at a fair rental value,[6] for Partnership operations—until they either lost a certain amount or mutually dissolved the Partnership by legitimate RUPA methods.

Not only did the (1) Partnership provide construction funds contributed by Hamed, but when (2) United had a mortgage, the Partnership also paid down the Scotia Bank mortgage loans for the supermarket partially *with Partnership funds*. This was money that the Partnership provided to the Yusuf-only United Corporation for the building and re-building of property that was solely United's.

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[5] In other words, Hamed paid for $800,000 of the construction costs and the Partnership subsequently paid the rest of the construction costs—United actually paid none, although it did own the land in advance. At the end, United kept both the land and the building. United charged rent, the Partnership seeks the building costs.

[6] Even before the Court ordered several million dollars more, Hamed had agreed to have the Partnership pay United more than $5 million in rent for East. Thus, these contributions to the building were NOT "in lieu of rent."

In other words, under RUPA, while Yusuf could end the Partnership, Hamed had the lawful expectation that when it ended--in the negotiation for the termination of the Partnership required under RUPA, those amounts would be credited back to the Partnership from United, with half going to Hamed's Partner account. In 2012 and 2013, wrongful termination interdicted the ongoing negotiations for such a lawful termination.[7] Thus, this claim arose only on the happening of that wrongful dissociation and accrued when that disassociation occurred. Finally, as United was able to secure interest on the rents, interest is due on these amounts as well.

The proof of the claim will be by testimony that the stores paid the loans from both Hamed and Yusuf, and by the following documents. In a series of three loans, from 1983 through 1985, United Corporation obtained funds for the building of the East Store – on land described as:

> Plot No. 4-C of Estate Sion Farm, Queen's Quarter, consisting of 2.5 U.S.
>
> acres, more or less, as shown on PWD Drawing No. 2348 dated April 19, 1968 as revised March 16, 1972 and:
>
> Plot No. 4-D of Estate Sion Farm, Queen's Quarter, consisting of 3.0 U.S. acres, more or less, as shown on PWD Drawing No. 2348 dated April 19, 1968 as revised July 28, 1972.

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[7] Yusuf and United have made United's rent dealings with the Partnership viable beyond this date by its positions before the Court, and these offsets would necessarily fall under the factors Judge Brady pointed to for those rents. These are counter-amounts for the Partnership being charged rent for a store "taken" from the Partnership. Put another way, Hamed would not have "lost" his value in the Supermarket if Yusuf had not wrongfully dissociated This is a claim amount that accrued after the bar date, on wrongful dissociation. It is directly caused by the wrongful dissociation subject to the same considerations.

The first of these was a First Priority Mortgage Bond and Indenture in favor of Banco Popular de Puerto Rico which was entered for record in the Office of the Recorder of Deeds at Christiansted, St. Croix, United States Virgin Islands on June 9, 1983 and recorded at P.C. 318M, Page 113, The second a Second Priority Mortgage Bond in favor of Banco Popular de Puerto Rico which was entered for recording on October 12, 1983 at P.C. 323-M, page 60, No. 3701/83. The third was a Third Mortgage in favor of Banco Popular de Puerto Rico, entered for recording on May 2, 1984 at P.C. 330M.

These initial three loans and mortgages (" the 3 Initial Construction Loans"), were used to the purchase of building materials such as steel and the labor to construct the shopping center at Sion Farm— as at that time there was no Plaza Extra East Store— and, as such, no stock or other such items were purchased with these funds.

All three of these initial mortgages were released by a December 12, 1985 release, when United Corporation obtained a consolidating loan of $2.5 million from First Pennsylvania Bank. But the banks would lend no additional funds for the construction and more particularly for the completion of the Plaza Extra East Supermarket--as stated by Fathii Yusuf in testimony, and found by Judge Brady in his Preliminary injunction decision of April 25, 2013, In fact, Yusuf sought additional bank financing to complete the construction of the building for the Plaza Extra business, which loan application was eventually denied, as a result of which Yusuf s two nephews requested to have their funds returned and to leave the partnership. Thus, only Mohammad Hamed contributed the funds to the Partnership to be used by United to complete the building of the Plaza East Store and allow it to get further "consolidation" mortgages that paid of the 3 Initial

Construction Loans and finished the structure. Judge Brady summarized this as follows in his Findings of Fact, paragraphs 3-11.

> 3. United subsequently began construction on a shopping center located at Estate Sion Farm, St. Croix. Thereafter, Defendant Yusuf desired and made plans to build a supermarket within the shopping center. *Plaintiff' s Evidentiary Hearing Exhibit, no. 1 (Transcript, February 2, 2000 Oral Deposition of Fathi Yusuf: Idheileh v. United Corp. and Yusuf*, *Case No. 156/1997, Territorial Court of the Virgin Islands, Div. St. Thomas and St. John), at 8, lines 1– 14;* hereinafter *Pl.Ex. 1, p. 8.1– 14.*[1] The Court has taken judicial notice of the certified copy of the deposition transcript in the noted Territorial Court action, submitted as Pl. Ex. 1. See discussion at *Tr. 6– 9, Jan. 25, 2013.*
>
> 4. **Subsequently, Yusuf encountered financial difficulty in completing construction of the shopping center and opening the supermarket, was unable to procure sufficient bank loans, and told Plaintiff Mohammad Hamed (" Hamed") that he was unable to finance the completion of the project.** At Yusuf s request, Hamed provided funding to Yusuf s project from proceeds of Hamed' s grocery business. *Pl.Ex. 1, p. 14:4– 15:14.*
>
> 5. **Hamed provided Yusuf with monies to facilitate completion of construction on the shopping cen**ter and to facilitate opening the Plaza Extra supermarket in Estate Sion Farm, St. Croix. *Tr. 197:5– 199:13, Jan. 25, 2013.*
>
> 6. Upon Yusuf s request, Hamed sold his two grocery stores to work exclusively as a part of Plaza Extra. *Tr. 200:4– 15. Jan. 25, 2013.*
>
> 7. **Hamed contributed to Yusuf s project funds as they were available to him, including the entire proceeds from the sale of his two grocery stores,[**[2] Hundreds of thousands of dollars.
>
> 2**]** with the agreement that he and Yusuf would each be a 50% partner in the Plaza Extra Supermarket, " in the winning or loss." *Tr.200:16– 23, Jan. 25, 2013.*
>
> 8. Hamed initially became a 25% partner of Yusuf, along with Yusuf s two nephews who each also had a 25% interest in the Plaza Extra Supermarket business. *Pl. Ex. 1, p. 15:2– 14.*
>
> 9**. Yusuf sought additional bank financing to complete the construction of the building for the Plaza Extra business, which loan application was eventually denied**, as a result of which Yusuf s two

nephews requested to have their funds returned and to leave the partnership. *Pl. Ex. 1, p. 17:6– 24.*

10. With the withdrawal of Yusuf s nephews, the two remaining partners of the Plaza Extra Supermarket business were Hamed and Yusuf. Notwithstanding the financing problems, Hamed determined to remain with the business, having contributed a total of $400,000 in exchange for a 50% ownership interest in the business. *Pl.Ex. 1, p. 17:24– 19:10.*

11. Yusuf and Hamed were the only partners in Plaza Extra by the time in 1986 when the supermarket opened for business and Hamed has remained a partner since that time. *Pl.Ex. 28.*[3] Subsequent to the evidentiary hearing but before the parties submitted their post-hearing briefs, Plaintiff on February 19, 2013 filed his Second Request to Take Judicial Notice and Request to Supplement the Hearing Record, presenting proposed Plaintiff' s Exhibits 28, 29 and 30. By separate Order of this date, Plaintiff' s Request was granted. Exhibit 28 is comprised of selected Defendants' Responses to Plaintiffs Second Set of Interrogatories to Defendants in that matter known as *Idheileh v. United Corp. and Yusuf, Case No. 156/1997, Territorial Court of the Virgin Islands, Div. St. Thomas and St. John.*

Thus, as a result of the completion of the structure, the first 3 Initial Construction Mortgages were released and that First Priority Mortgage in the amount of $2,500,000.00 was executed by United Corporation in favor of First Pennsylvania Bank on December 12, 1985.

Though that initial $2.5 million in debt was consolidated and refinanced several times in the following years (1993, 1994, 2000, etc.) and additional amounts added for other purposes, there is no dispute that the initial Construction Loans of $2.5 million were always part of those refinances, or that neither the original loans nor any of these subsequent " consolidation and additional funding" loans were ever paid with anything other than proceeds from the Partnership' s Plaza Extra Supermarket operations.

For example an additional loan and mortgage for operations, equipment and stock in the amount of $300,000.00 was given by United Corporation in favor of First Pennsylvania Bank, N.A. dated August 3, 1989, recorded August 9, 1989 at PC 328, page

406, Doc. No. 5508.. Similarly a consolidating mortgage in the amount of $4,500,000.00 given by United Corporation in favor of Corestates Bank, N. A. dated June 23, 1993, recorded June 25, 1993 at PC 470, page 217, Doc. No. 3551. (also RELEASED MAY 2, 1994)

And on May 2, 1994, all of the prior mortgages were released and all were consolidated into the longer term Loan and Mortgage for $6.1 million— which was also always paid by the Plaza Extra Supermarkets proceeds. See First Priority Mortgage in the amount of $6,100,000.00[8] given by United Corporation **d/b/a Plaza Extra** in favor of The Bank of Nova Scotia dated May 2, 1994, recorded May 4, 1994, at PC 506, page 303, Doc. No. 2550. RELEASED FEBRUARY 7, 2000, RECORDED FEBRUARY 11, 2000 AT PC 714, PAGE 1, DOC. NO. 537. (Additional funds were also obtained for equipment and ongoing operations—but this is not claimed, only the construction loans.

[8] A small part of this was in lines of credit and for operating expenses, The real estate portion was $5.15 million as can been seen in all of the subsequent tax returns. *See, e.g.*, 1996 Tax Return supplied by the FBI.

Form **1120** Department of the Treasury Internal Revenue Service

U.S. Corporation Income Tax Return

For calendar year 1996 or tax year beginning ____________, 19__, ending ____________, 19__

▶ Instructions are separate. See Instructions for Paperwork Reduction Act Notice.

OMB No. 1545-0123 **1996**

A Check if a:
1 Consolidated return (attach Form 851) ☐
2 Personal holding co. (attach Sch. PH) ☐
3 Personal service corp. (as defined in Temporary Regs. sec. 1.441-4T-see instructions) ☐

Use IRS label. Otherwise, print or type.

Name: UNITED CORPORATION

Number, street, and room or suite no. (If a P.O. box, see instructions.): P.O. BOX 763, C'STED

City or town, state, and ZIP code: ST. CROIX, VI 00821-0763

B Employer identification number: 66-0391237

C Date incorporated: 03/05/79

D Total assets (see instructions)

Preparer's Use Only — Firm's name (or yours if self-employed) and address ▶ BRAMMER CHASEN O'NEILL & DELUCA, P.O.BOX 3016,C'STED, ST.CROIX. VI — EIN ▶ 66-0536085 — ZIP code ▶ 00822-3016 — 139-0753

FBIX264765

	Liabilities and Stockholders' Equity				
16	Accounts payable		2,594,312.		2,609,155.
17	Mortgages, notes, bonds payable in less than 1 year		1,510,000.		720,000.
18	Other current liabilities (attach schedule) SEE	STMT 6	867,386.		926,415.
19	Loans from stockholders				
20	Mortgages, notes, bonds payable in 1 year or more		5,125,194.		5,190,398.

The testimony and accounting documents already of record show that payments on these mortgage loans were solely by income from the Plaza Extra Stores. In addition, although United and Yusuf were served with discovery as to the United Tenant account that would have elicited any such payments by the Tenant account, none were received, and in fact the Tenant account never paid these mortgage loans. (Obviously, if United or Yusuf allege the contrary and intend to introduce any Tenant account records now, Hamed will object—but in any case Hamed must be provided with the prior to the hearing.)