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 PROPOSED FINDINGS OF FACT
AND CONCLUSION OF LAW RE: CLAIM H-163

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I. The H-163 Claims are Barred by Judge Brady's Limitations Order.

1. The Master's June 2, 2020 Order denying Hamed's motion for partial summary judgment re: claim H-163 reaffirmed that any H-163 accounting claims to be submitted by Hamed would have to comply with Judge Brady's limitations order.

2. While no discovery has been undertaken on claim H-163, Hamed's counsel agreed on or about March 10, 2021 to provide discovery which explained and quantified Hamed's accounting claim as to H-163. *See* Yusuf's April 1, 2021 Motion for Additional Rulings from Master re: Claim H-163 Prior to Conducting Evidentiary Hearing ("Yusuf's April 1, 2021 Motion"). That discovery was provided on March 11, 2021, supplemented with additional narrative on March 16, 2021 and then supplemented again on March 29, 2021. The March 16 Discovery is attached as Exhibit A. The March 29, 2021 is attached as Exhibit A-1.

3. The discovery provided by Hamed stated that "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," which were "paid solely by the partnership." *See* Exhibit A, p. 2. Hamed later modified that statement in the same discovery response by alleging that three mortgage loans taken by United in the 1983 to 1985 time period, which he refers to as 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 were repaid by the Partnership. *See* Exhibit A, p. 8, 9.

4. As discussed below, the testimony of both Mr. Yusuf and Waleed Hamed disproves Hamed's claim that any portion of the bank loans was used for the construction of the United Shopping Center. But putting that aside for the moment, it is clear that even if any of the bank

loans had been used to construct any part of the shopping center, recovery of any of those amounts would be barred by Judge Brady's limitations order, which bars any accounting claim that arose before September 17, 2006. The last loan referenced in Hamed's discovery supplementation is a May 1994 loan to Scotia Bank in the amount of $6,100,000 which Hamed acknowledges was release on February 7, 2000, which means that it was fully repaid as of that date. *See* Exhibit A, p. 12. Even assuming *arguendo* that that the 1994 Scotia loan was made to refinance the prior bank loans, and that these were construction loans for the shopping center (none of which is true), the partnership's repayment of the loan by February 2000 makes it clear that recovery of these repayment is precluded by the limitations order.

5. On March 29, 2021, Attorney Holt, wrote an email to counsel for Yusuf advising that 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 he argued that he had acquired.

6. This attempt to circumvent Judge Brady's limitations order is unsupportable and inconsistent with concessions already made by Hamed in this litigation. As the Master noted in his September 4, 2020 Order re: Claim Y-8, "[I]t is undisputed that (i) United owns the land and the improvements that make up the United Shopping Center." Master's September 4, 2020 Order at p. 25. Hamed is judicially estopped[1] from now claiming that he, Hamed, owns the Bay 1 portion of the United Shopping Center. Moreover, even assuming *arguendo* that Hamed could prove a

[1]The doctrine of judicial estoppel is discussed *infra* at page 5.

wrongful dissociation on the part of Yusuf, and could also prove that the bank loans repaid by the partnership were for the construction of the shopping center, he has cited no authority – and the Master is aware of none – that would entitle him to the value of the Plaza Extra portion of the United Shopping Center.

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

7. A "partnership at will" exists where the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking. 26 V.I. Code § 2(8).

8. One of the key issues in the early part of this case was whether an agreement as important as this partnership had to be in writing in order to be enforced – in other words, whether it was void under the statute of frauds.

9. The lynchpin of Hamed's argument at the preliminary injunction stage was that because the partnership agreement had no "fixed term," it must be "deemed to be 'at will' subject to dissolution by either partner at any time," and hence, outside the statute of frauds. *See* Exhibit B, Hamed's October 22, 2012 Reply to Opposition to Motion for Preliminary Injunction, p. 9. Judge Brady agreed with Hamed, ruling that RUPA "does not require that [partnership] agreements be memorialized by a writing," and that the Act recognizes "'at will' agreements that have no definite term or duration, and are subject to dissolution by either partner at any time." *Hamed v. Yusuf*, 58 V.I. 117, 131 (Super. Ct. 2013). [2]

[2]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).

10. In seeking affirmance of Judge Brady's ruling on appeal, Hamed argued that the statute of frauds did not render this oral partnership agreement unenforceable, because "at will partnerships are subject to dissolution by either partner at any time--they can be terminated within one year by either party…" *See* Exhibit C, Hamed's Opposition Brief on Appeal, p. 25.

11. 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 is therefore outside the statute of frauds. The High Court's ruling on this issue could not have been plainer:

> The Superior Court found that as an at-will agreement of indefinite duration, the partnership agreement did not violate the statute of frauds under 28 V.I.C. § 244(1). As a matter of statutory interpretation, we review this holding *de novo*. *Brady v. Gov't of the V.I.,* 57 V.I. 433, 438 (V.I.2012). "[M]ost courts have held that the Statute of Frauds does not have any application to a contract of partnership that fixes no definite time for the duration or continuance of the partnership." 72 AM. JUR. 2D *Statute of Frauds* § 31. And this Court has held that the statute of frauds has no application to oral contracts that, while intended to last for more than a year, have no stated durational terms and *could* conclude within a year. *Peppertree Terrace v. Williams,* 52 V.I. 225, 232 n.5 (V.I.2009) ("It is well settled that the oral contracts invalidated by the statute of frauds because they are not to be performed within a year include only those which *cannot* be performed within that period") (citation and internal marks omitted); s*ee also Smith v. Robson,* 44 V.I. 56, 62 (V.I.Terr.Ct.2001) ("It is immaterial that that the performance of the contract *actually* exceeds one year.... [A] contract for lifetime employment need not be in writing because the employee's death could occur at any time." (citing *Cooper v. Vitraco, Inc.,* 320 F.Supp. 239 (D.V.I.1970)). Accordingly, because the Superior Court found that the partnership is an indefinite at-will agreement—a finding that Yusuf and United do not challenge—the statute of frauds is not implicated.

Yusuf v. Hamed, 59 V.I. at 852-853.

12. The Master rejects Hamed's contention in his April 5, 2021 Response to Yusuf's Motion for Additional Rulings from Master that the Supreme Court's ruling did not affirm Judge Brady's finding that the partnership was at will, and instead merely "discussed several different reasons" why this partnership was not unenforceable by reason of the statute of frauds. Hamed's April 5, 2021 Response, p. 5.

A. Hamed is Judicially Estopped from Now Claiming that the Partnership was for a Definite Undertaking.

13. The doctrine of judicial estoppel "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 judicial estoppel] 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).

14. 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.

15. 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, and in getting the Virgin Islands Supreme Court to affirm that ruling. 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.

16. The Court concludes that 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 or particular undertaking.

17. 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 2, 2020 Reply, p. 8, n. 1.

18. Hamed then asserted in a footnote, that while it was "unnecessary" to his argument, this "at will" partnership could be viewed as also simultaneously being one for a "a particular undertaking" – namely an undertaking to continue until losses reached the $800,000 mark. *Id*. at p. 9. The Master ruled that this assertion contravenes the very definition of "partnership at will" in the Virgin Islands RUPA. Master's June 2, 2020 Order at p. 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."

19. The upshot is that both Hamed and Yusuf have acknowledged 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.

B. The Law of the Case Doctrine Also Bars Any Attempt by Hamed to Argue that the Partnership was not At Will, but was Instead for a Definite Term or Particular Undertaking.

20. The Master has previously 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).

21. 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 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).

22. 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. 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."

23. 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.

III. The At Will Nature of the Partnership Agreement is in No Way Undermined by Mr. Yusuf's Testimony about the Partnership Terms.

24. 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). That finding provides as follows:

> 13. Yusuf and Hamed have both acknowledged their business relationship as a partnership of an indefinite term. *Pl.Ex. 1,*[3] *p. 18:18–23* ("I'm obligated to be your partner as long as you want me to be your partner until we lose $800,000."); *Tr. 210:4–8, Jan. 25, 2013* (Q: "How long is your partnership with Mr. Yusuf supposed to last? When does it end?" A: "Forever. We start with Mr. Yusuf with the supermarket and we make money. He make money and I make money, we stay together forever.")

25. Yusuf's testimony that the partnership would continue as long as Hamed wanted it to continue, but would end if losses reached $800,000, is consistent with the at will nature of the partnership agreement. Either partner can terminate for any reason at any time, but if annual losses hit the $800,000 level the partnership would definitely be terminated. *See* Exhibit E, Transcript of April 15, 2021 Hearing, p. 16, lines 2-22. Fathi Yusuf reiterated at the April 15 hearing that under the partnership agreement either partner could leave at any time. *See* Exhibit E, p. 15, lines 23-25 and p. 16, line 1. As Mr. Yusuf testified, "But if I wanted to go close my business and go and do something else, he can't stop me, and if he wanted to do the same thing, I cannot stop him. That's free country." *Id.* at p. 97, lines 11-14.

26. Mohammad Hamed's characterization in his testimony of the partnership lasting "forever" is not a plausible statement of the term of the partnership agreement. *See Local Div. 589, Amalg. Transit Union v. Commonwealth of Massachusetts*, 666 F.2d 618, 637-638 (1st Cir.

[3]Plaintiff's Exhibit 1 in the preliminary injunction hearing is attached hereto as Exhibit D.

1981) (stating that "if taken literally, the language of the Agreement would make it perpetual," but then concluding that "(i)t is difficult to believe that the parties to the agreement thought they could bind their successors forever").[4] If by forever, Mohammad Hamed meant as long as both partners are alive, then the partnership would have ended upon Mohammad Hamed's death in June 2016.

27. Judge Brady must have concluded that neither Yusuf's testimony nor Mohammad Hamed's about the terms of the partnership undercut his finding that the partnership agreement was "at will." And the Virgin Islands Supreme Court, in affirming that conclusion, must have likewise determined that their testimony from the preliminary injunction hearing was not in any respect inconsistent with the "at will" nature of the agreement.

28. Even if the at will nature of the partnership is not the law of the case that the Master is obliged to follow, and even if Hamed is not judicially estopped from claiming that this partnership was for a particular undertaking, the Master concludes on the basis of the parties' testimony that that partnership was at will, meaning that either partner could terminate it at any time, for any reason. The $800,000 condition simply meant that if losses reached that level, then Yusuf would definitely exercise his right of termination.[5]

29. Because the agreement is "at will," then either partner had the right to dissociate for any reason and at any time, and Yusuf's dissociation in February 2012 cannot be wrongful. In

[4]"Forever" is often used figuratively, rather than literally, in ordinary discourse. As Mr. Yusuf testified, when marriages take place the husband and wife often describe their marriage as one that will last "forever," even while recognizing full well that either will have the right to terminate the marriage. *See* Exhibit E, p. 18, lines 2-9.

[5]Hamed's attempt to characterize the $800,000 loss provision as a "particular undertaking" of the Yusuf/Hamed partnership makes no sense in any event. 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.

particular 26 V.I.C. § 122(b)(2), which deals with wrongful dissociation in the case of a partnership for a definite term or particular undertaking, by definition does not apply. *See Robertson v. Mauro*, 2013 WL 3293069, *5 (D. Idaho 2013)(the elements of wrongful dissociation set forth in Idaho's RUPA counterpart to 26 V.I.C. § 122(b)(2) do "not apply to an at will partnership").

IV. Hamed has Failed to Identify Any Express Provision of the Partnership Agreement that Yusuf Allegedly Breached.

30. While Hamed argues that even an at will partner can be guilty of a wrongful dissociation under 26 V.I.C. 122(b)(1) if he or she breaches an "express provision of the partnership agreement," he has failed to identify any "express provision" that Yusuf allegedly breached.

31. The Idaho Supreme Court in *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 224 P.3d 1068 (2009), considered the meaning of counterpart to 26 V.I.C. § 122(b)(1) 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 from the partnership for other reasons, and the partnership argued that its dissociation was wrongful because it breached this provision of the agreement.

32. The Idaho Supreme Court in *MRI Associates* 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).

33. The Court in *MRI Associates* 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.

34. The Master, likewise, finds that the $800,000 condition in the partnership agreement, as summarized in Judge Brady's findings, is not an express provision limiting the right of either Hamed or Yusuf to end the partnership for any reason whatsoever and at any time. Mr. Yusuf did not testify that this is the only circumstance under which a partner could end the partnership, and indeed reaffirmed in his April 15 testimony the at will nature of the partnership. 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.

35. Hamed also argues that because "Yusuf denied the existence of a partnership" in the preliminary injunction proceedings, he engaged in a wrongful dissociation. *See* Exhibit A,

Hamed's March 16, 2021 Supplemental H-163 Discovery, p. 1. Hamed cites no case authority whatever to support the proposition that making a non-frivolous argument in a legal proceeding can amount to a wrongful dissociation. Does he also contend that arguing that the partnership is unenforceable by reason of the statute of frauds constituted a prima facie violation of RUPA? Mr. Yusuf's position has been that his agreement with Mohammad Hamed was a profit-sharing agreement, not a partnership.

36. Two businesspersons can enter a profit-sharing agreement without forming a partnership. As the First Circuit Court of Appeals held in *Southex Exhibitions, Inc. v. Rhode Island Builders Ass'n., Inc*., 279 F.3d 94, 101 (1st Cir. 2002),

> Similarly, even though the UPA explicitly identifies profit sharing as a particularly probative indicium of partnership formation, and some courts have even held that the absence of profit sharing compels a finding that no partnership existed…, it does not necessarily follow that evidence of profit sharing compels a finding of partnership formation.

See also Boeckmann v. Mitchell, 909 S.W.2d 308, 312 (Ark. 1995) ("sharing of profits alone does not make one a partner."); *Holmes v. Lerner,* 74 Cal.App.4th 442, 454 & n. 14 (Cal. App. 1999) ("profit sharing [is] evidence of a partnership, rather than a required element of the definition of a partnership," and the UPA simply establishes an "evidentiary presumption."); *Wilder v. Hobson,* 398 S.E.2d at 627 ("sharing profits does not of itself establish a partnership.").[6]

37. Yusuf's position that he had a profit-sharing agreement with Hamed, but not a partnership was a legitimate argument, especially since: 1) the supermarket business was operated under the aegis of United Corporation, a corporation that was exclusively owned by the Yusufs,

[6]RUPA continues the rule in UPA that the existence of a profit-sharing agreement gives rise to a rebuttable presumption that a partnership has been formed. *See* 26 V.I.C. § 22(b)(3). The Drafters Comment to this provision in RUPA (section 202) makes it clear that the "sharing of profits" creates only a "rebuttable presumption of a partnership…"

and in effect the corporate veil had to be pierced to find that the supermarket business was owned by a partnership; 2) the criminal case for tax evasion predicated on the supermarket being operated by United and United having filed false tax returns, and 3) Mohammad Hamed did not file any partnership tax returns until after 2013.

38. The Master finds that there is no legal or factual support for Hamed's contention that Yusuf's arguments about the existence or enforceability of the partnership agreement amounted to a wrongful dissociation.

39. Hamed also contends that "Yusuf also locked Hameds out of all control and financial functions," and that "Yusuf called the police and sought to have the Hameds physically removed from the stores." Exhibit A, p. 1. The Master finds that the Hameds worked continuously in the Plaza Extra stores up to the transfer of the West and Tutu Park stores. The Master has previously found that Yusuf was the partner with exclusive control over the finances of the partnership from its inception, and therefore rejects the allegation that the Hameds were divested of all control of financial functions in the 2012 time frame (or any other time frame). *See* Master's May 5, 2021 Memorandum Opinion, p. 21 (stating that Yusuf had "absolute control over the Partnership finances," and quoting Judge Brady's finding that "Hamed was completely removed from the financial aspects of the business"). The claim that Yusuf sought to have "the Hameds physically removed from the stores" is based on just one incident involving Wadda Charriez and Mr. Yusuf's discovery of her theft of partnership monies and the Hameds' insistence that, despite her firing by Yusuf, she be permitted to return to work. Yusuf admits that he asked Wadda to leave the store, but denies that he sought to remove the Hameds from the store on that occasion or any other. *See* Exhibit E, p. 94, line 25 to p. 95, lines 1-8.

V. Yusuf's Dissociation Cannot be Wrongful in Any Event Because it Was Precipitated by the Prior Misconduct that the Master Found Hamed to Have Engaged In.

40. Even if Hamed had shown that the $800,000 condition made the partnership one for a definite undertaking, or even if Hamed had proven the existence of any express provision of the partnership agreement that Yusuf violated when he asked to terminate the partnership (and Hamed has shown neither), RUPA makes it clear that a partner's dissociation from the partnership cannot be unlawful if made in response to misconduct of the other partner. 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. *See* Exhibit E, p. 95, lines 16-25, and p. 96, lines 1-4.

41. 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 from 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* Exhibit F, Comment 2 to RUPA § 602, last paragraph.

42. 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.

43. 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 reason of 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.[7]

VI. Even if Hamed Has Somehow Proved that Yusuf Dissociated Wrongfully, the Bank Loans Repaid by the Partnership were for Leasehold Improvements and Other Plaza Extra Expenses, and are Not Recoverable.

A. The Accounting Credit Hamed Seeks Was Waived by His Failure to Assert it as a Separate Claim by the Claims Deadline.

44. Hamed's argues that the remedy for Yusuf's alleged wrongful dissociation is an accounting credit equal to the value of the Plaza Extra portion (Bay 1) of the United Shopping

[7] 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 partnership split.

Center building. Hamed cites no cases to support this contention that a wrongfully dissociating partner is entitled to damages of this kind, and there is no connection between this kind of relief and the alleged acts of Yusuf that he says constitute a wrongful dissociation.

45. The lack of any coherent connection between the alleged acts giving rise to the wrongful dissociation and recovery of amounts spent on constructing part of the shopping center (or the value of the Plaza Extra portion of the shopping center) is underscored by statements made in Hamed's supplemental discovery on H-163. There, Hamed states that even if the Master were to find that Yusuf's dissociation was not wrongful, Hamed would still be entitled to that recovery, albeit without any prejudgment interest. As he puts it, "[A] finding of "proper" dissociation does not alter this claim except as to the amount of interest." *See* Exhibit A, p. 1, note 1. He adds that "the rightness or wrongness of the ending of the Partnership is irrelevant to the requirement of an accounting" that he seeks regarding the partnership's repayment of bank loans, except as to recovery of prejudgment interest. *Id*. at p. 1.

46. If, as Hamed asserts in his supplemental discovery, the accounting credit he seeks does not depend on whether he can prove a wrongful dissociation (his H-163 claim), then the claim for recovery of amounts paid by the partnership on bank loans – or recovery of the value of part of the United Shopping Center – has been waived because he never asserted it as an independent claim by the September 30, 2016 claims deadline. Trying to smuggle that accounting claim into an H-163 wrongful dissociation claim for which it has no logical connection is not a proper substitute for timely filing the claim.

B. Even if Not Waived, the Evidence Completely Disproves Hamed's Claim that Bank Loans Repaid by the Partnership Were Used to Build the United Shopping Center, thereby Disproving Entitlement to the Relief He Seeks for H-163.

47. Hamed's argument is based on the false assumption that that three mortgage loans taken by United in the 1983 to 1985 time period, which he refers to as 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 were repaid by the Partnership. *See* Exhibit A, p. 8, 9.

48. Mr. Yusuf testified that "in 1982, the United Shopping Center was one hundred percent complete and maybe 80 or 90 percent occupied…" Exhibit E, p. 82, lines 23 to 25.[8] Wally Hamed's testimony was consistent with Mr. Yusuf's on this point. *See* Exhibit E, p. 49, lines 16-25; and p. 50, lines 1-22. Waleed Hamed acknowledged that all of the loan money went into Plaza Extra accounts, not the United tenant accounts. *See* Exhibit E, p. 55, lines 2-12.

49. Mr. Yusuf testified that no bank loans were ever used to construct any part of the shopping center. *See* Exhibit E, p. 85, lines 15-19; p. 82, lines 18-19 ("But I want to make it clear that none of the loan money we ever took is to be used for United Corporation property. Always has been used to service Plaza Extra…"). The bank loans were primarily used for leasehold improvements to Bay 1 to make it suitable for the lessee, Plaza Extra, to conduct a supermarket business there. *See* Exhibit E, p. 94, lines 5-13.[9]

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[8]Mr. Yusuf had previously testified that he was unable to get any bank loans whatsoever to construct the United Shopping Center, and that he had to rely on his brother Sam to lend him money to build it. *See* Exhibit D, transcript pages 8-12.

[9]In addition to repeatedly making the false assertions in the supplemental discovery that the bank loans were construction loans for the shopping center, Hamed "edited" paragraph 61 of Yusuf's counterclaim by inserting the word "construction" in brackets to describe the Banco Popular loan

50. At common law, "in the absence of an agreement, any buildings or improvements erected by the tenant will become the property of the landlord at the termination of the lease." *Shields v. Dep't of Revenue*, 513 P.2d 784, 789 (1973); *Cutter Aviation, Inc. v. Ariz. Dep't of Revenue,* 958 P.2d 1, 8 (Ariz. App.1997) (reciting the general rule that "a permanent structure placed upon and attached to the realty by a tenant is real property belonging to the lessor"); *Schmeckpeper v. Koertje*, 222 Neb. 800, 388 N.W.2d 51, 54 (1986) ("[i]t is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to him" and "may not be removed"); *Lewis & Harris v. Cty. of Hennepin*, 516 N.W.2d 177, 180 (Minn. 1994) (recording studios built on leased premises by tenant are "leasehold improvements which will stay with the building and become the property of the lessor on expiration of the lease term"). This rule appears to be universally followed, and the Virgin Islands courts would therefore regard it as the soundest rule for the Virgin Islands.

51. There is no need for the Master to conduct a *Banks* analysis regarding the rule adopted by other jurisdictions relating to leasehold improvements and their reversion to the landlord upon expiration of the lease, because Waleed Hamed admitted that he is aware of this rule, and agrees that Plaza Extra would be responsible for paying back any bank loans used to finance leasehold improvements. *See* Exhibit E, p. 53, lines 13-25; p. 54, lines 1-24; and p. 55, line 1.

52. Mr. Yusuf testified that it is normal in the industry for a landlord to create a shell of a building and for the tenant to build it out to suit his or her needs, and that this is what has

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Yusuf was referring to in that allegation. *See* Exhibit A, p. 6. Hamed's attempt to alter Yusuf's words in the counterclaim is unwarranted and unsupported by any evidence.

regularly taken place at the United Shopping Center. *See* Exhibit E, p. 87, lines 19-25 and p. 88, line 1. At the expiration of the lease, all leasehold improvements belong to the landlord. *Id*. at p. 88, lines 2-6. The tenants are not permitted to take their leasehold improvements with them. *Id*. at p. 91, lines 11-15 ("Nobody in the world can take it back.").

53. During the course of the hearing, it became apparent that Hamed was abandoning the argument that bank loans were used to construct any part of the United Shopping Center. Indeed, there was no questioning at all of any witnesses about the various bank loans referenced in the Title Search as to the United Shopping Center property conducted by Island Title for Counsel for Hamed. *See* Exhibit A-1. Instead, Hamed's argument became that, while leasehold improvements normally become the property of the landlord upon expiration of the lease, in this case Plaza Extra should be reimbursed the value of those improvements because this "was supposed to be a partnership that lasted forever." *See* Exhibit E, p. 77, lines 6-11 (testimony of Mufeed Hamed); *see also id*. at p. 29, lines 5-22 (testimony of Waleed Hamed). Hamed cites no authority to support an argument that he is entitled to the value of those improvements, and the Master is aware of none. In addition, the Master has already determined the claim that the parties and their successors were obligated to continue this partnership for an eternity to be meritless, and any argument flowing from that assumption will likewise be rejected. The Master, therefore, rejects in total the argument that Hamed is entitled to reimbursement for any leasehold improvements that were funded by bank loans that went into Plaza accounts, and were repaid by the partnership.

DUDLEY NEWMAN FEUERZEIG, LLP

DATED: May 19, 2021 By: /s/Charlotte K. Perrell
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CERTIFICATE OF SERVICE

It is hereby certified that on this 19th day of May, 2021, I caused a true and exact copy of the foregoing **FATHI YUSUF'S MOTION PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW RE: CLAIM H-163** to be served upon the following via Case Anywhere docketing system:

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