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

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

HAMED'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO CLAIM H-163: LOSS OF ASSETS DUE TO WRONGFUL DISSOCIATION

I. Introduction

A. Procedural Posture of this "B Claim" Dispositive Motion

Recently, the parties agreed on a "final" scheduling order that addresses all of the remaining "B" (non-Gaffney) claims. On October 4, 2019, the Master amended the original scheduling order[1] to accept these changes. Thus, the parties are required to submit their summary motions for the disposition of these remaining "B" claims. [2]

Therefore, Hamed has gathered information and reached understandings necessary to finalize a motion for *partial* summary judgment on an issue of law as to this claim based on discovery and investigation to date. He will not be submitting any further dispositive motions on this claim. This is the first of eight such dispositive "B" claims motions by Hamed.

This partial summary judgment as to Claim H-163 is simple, and may seem painfully obvious or even unnecessary—but, like the motion for partial summary judgment as to the existence of the Partnership after Yusuf's April 2014 concession of that point, it will narrow the matter to allow a focus on the damages in a hearing. It seeks ***only*** a determination of '*wrongful dissociation*'[3] of the Partnership by Yusuf. It does not seek a determination of the damages or the amounts of such damages at this time.

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[1] *Joint Discovery and Scheduling Plan,* January 29, 2017. Paragraph 8 of that Plan provides for one party to file a dispositive motion on a matter for which it believes no additional fact inquiry is required:

> B. Remaining Claims
> * * * *
> 8. A motion regarding any claim may be filed at any time, without regard for the discovery schedule, and need not be held until the end of this process. Timing of responses and replies shall be governed by the V.I. Rules of Civil Procedure.

[2] Dispositive motions as to five of Hamed's "B" claims,' and four of Yusuf's are due before April 1, 2020. These are referred to as the "B(1)" claims.

[3] The phrase "wrongful dissociation" is a term of art which is defined under USVI RUPA section 26 V.I.C. 122(c) and the associated Drafters' *Comments*. It is discussed in detail below.

A subsequent determination of the amounts of damages will require factual inquiry at a hearing. However, all of the material facts as to the sole *legal issue* are at hand and known to the parties—and have been subject to prior evidentiary hearings and review by the Court.[4]

For the purpose of supplying context to this motion, Hamed will use the Partnership's loss of its contributions to constructing and paying off the East store building as ***just one illustrative example*** of such damages.

B. Summary

In April of 2013, Judge Brady found that Yusuf and Hamed formed a Partnership in 1986. In April of 2014, Yusuf finally stipulated to the existence of the Partnership Agreement, and later that year Judge Brady entered summary judgment. The Partnership Agreement is an established fact, its existence is the law of the case.

Yusuf caused wrongful dissociation of the Partnership by two specific mechanisms proscribed under RUPA: (1) a *withdrawal by express will* by Yusuf in the form of repudiation of the Partnership—the denial of its existence coupled with acts in derogation of the agreement, and (2) *violation of an express term*—as to when the Partnership could be voluntarily ended.

1. *Yusuf repudiated the existence of the Partnership by both words and deeds—which was a "withdrawal by express will"*

As will be discussed below, pursuant to RUPA a wrongful dissociation occurs when "in the case of a partnership for a…particular undertaking, before the…the completion of the

[4] The findings of fact in the April 2013 *Preliminary Injunction* by the Court are based on annotated citations from the record for each fact. The testimony and documents referenced by Judge Brady are testimony of record and documents of record. Hamed incorporates each "fact" described by Judge Brady here as his own *statement of a fact*, and all testimony and documents Judge Brady referred to in support of those enumerated facts*. V.I. R. Civ. P.* 10(c). Because re-filing of existing exhibits of record is now disfavored and these items are of record and in the Clerk's Office, Hamed does not append them, but will supply the Master and parties those sections of the record in a separate binder on request—for the ease of reference.

undertaking…the partner withdraws ***by express will***." 'Repudiation' of a partnership agreement can have both a narrow and a broad definition depending on context. At its narrowest, it can require the more stringent proof that the partner overtly "denied the existence" of the partnership; and at its broadest, it can mean that a party "does or says anything indicating that he does not intend to perform the contract." That distinction is ***irrelevant*** here because, by either definition of the term, Yusuf repudiated and denied the existence of the Partnership by both words and a large number of deeds. *See, e.g., **OLP, Ltd. Liab. Co. v. Burningham***, 2008 UT App 173, ¶¶ 43-44, 185 P.3d 1138, 1149

> The district court instructed the jury that Wilson's claim required a repudiation of the LLC agreement by Burningham. The district court also defined repudiation: "A party repudiates a contract when that party does or says anything indicating that he does not intend to perform the contract. Repudiation is not the mere breach of the contract or some of its terms." This definition of repudiation appears to be consistent with our prior case law. *See, e.g.,* Scott v. Majors, 1999 UT App 139, P 15, 980 P.2d 214 (holding that a statement that a party will not perform unless the other party modifies a contract is a repudiation "'because the breach that he threatens . . . is a complete refusal of performance'" (omission in original) (citation omitted)).
>
> Nevertheless, Burningham argues that repudiation has a more specific meaning in this context. Relying on Mardanlou v. Ghaffarian, 2006 UT App 165, 135 P.3d 904, *cert. denied,* 150 P.3d 58 (Utah 2006), and Gherman v. Colburn, 72 Cal. App. 3d 544, 140 Cal. Rptr. 330 (Cal. Ct. App. 1977), Burningham asserts that repudiation "requires that the partner or member of a company such as the LLC actually deny the existence of the LLC." For the reasons expressed above, we do not read these cases as imposing the narrow definition of repudiation urged by Burningham. *See* supra PP 37-41. Accordingly, we see no error in the instruction as given.

In this section, RUPA simply codifies one of the most basic, ultimate principles of law—that "no one shall induce another to act … and then after … repudiate the contract." ***Browne v. Stanley***, No. 2015-0042, 2017 V.I. Supreme LEXIS 8, at *5 (Feb. 2, 2017)

2. Breach of an express provision

A partner's dissociation is also, independently, wrongful if "it is in breach of an express provision of the partnership agreement." Judge Brady held that Partnership agreement had a number of specifically stated terms. However, the ***sole*** term of the Partnership that is of import here is the specific, ***undisputed*** agreement that the Partnership would continue unless it lost money (or, implicitly, until the parties mutually agreed to lawful, voluntary dissociation pursuant to RUPA.[5]) Again, BOTH partners agreed to this term with regard to the specific undertaking of the Plaza Extra Supermarket. *Brady Finding of Fact* 13. Yusuf stated under oath:

> 13. . . . .*Pl.Ex. 1, 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*

Mohammad Hamed stated under oath:

> (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.") (Emphasis added.)

3. Causal connection

In return for inclusion in the Partnership, Hamed provided funds to the Partnership not only for the opening of the actual grocery store business, ***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 construction on the shopping center** and to facilitate opening the Plaza Extra supermarket in Estate Sion Farm, St. Croix. (Emphasis added.)

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[5] Yusuf was not "trapped" forever. Under RUPA (as opposed to the older UPA) a partner can ***always*** leave a partnership—the catch is that he must do so under specific RUPA provisions. 26 V.IC. 122.("(a) A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to section 121, subsection (1) of this chapter.") If Yusuf had wanted to leave the Partnership but could not reach agreement with Hamed on the terms of the dissolution, he had the various options under RUPA section 26 V.I.C. § 122—and Subsections VI and VII, at his disposal. He could have also sought judicial assistance rather than hatch a plan to steal the assets and then attempt to carry that plan out.

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.

Thus, in the hearing on damages, Hamed will show that not only did the Partnership provide construction funds contributed by Hamed, but when 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.[7]

Under RUPA, Hamed had the lawful expectation that such use by the Partnership would continue, and that in the negotiation for the termination of the Partnership under RUPA, those amounts would be credited back to the Partnership, with half going to his Partner account. In 2012 and 2013, wrongful termination interdicted the ongoing negotiations for such a lawful termination. 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.

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[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."

[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.

4. The effect of USVI RUPA

This was not a written partnership agreement. However, Judge Brady found that the Partners did expressly agree on some of the major terms, just not all of them. As the Court has also noted, RUPA supplies any missing terms. *See* 26 V.I.C. § 4.

> § 4 Effect of partnership agreement; nonwaivable provisions
>
> (a) Except as otherwise provided in subsection (b) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

Thus, RUPA supplies terms related to "how to properly dissolve a partnership" as well as terms for "wrongful dissociation" and the damages it occasions. While Yusuf breached the Partnership Agreement and, as part of that whole scheme, "took back" his supermarket from the Partnership's use and kept the Partnership's contributions, ***he still charged the Partnership back rent*** and "threw the Partnership out" of the premises in violation of the Partnership. In fact, he is presently using the premises that was significantly paid for by the Partnership with no return of the Partnership's funds. **More to the point, he also denied Hamed the MUTUAL, negotiated voluntary dissociation that would have seen Hamed receive funds in return for contributions to the building and payment of the mortgage—as required by RUPA.** As Judge Brady found, there ***were*** such negotiations underway, but when Yusuf didn't want to pay for such things by negotiation and proper dissociation, he simply stole them.

Yusuf simply does not get to keep both the rent AND the Partnership's contributions. One is a setoff to the other in the event of a wrongful dissolution.

5. The relief sought

Now Hamed seeks summary judgment as a matter of law, that there was a 'wrongful dissociation' pursuant to 26 V.I.C. 122(c):

> (c) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

See also, the drafter's comments to the original of this section, RUPA section 602.

> 3. Subsection (c) provides that a wrongfully dissociating partner is liable to the partnership and to the other partners for any damages caused by the wrongful nature of the dissociation. That liability is in addition to any other obligation of the partner to the partnership or to the other partners. For example, the partner would be liable **for any damage caused by breach of the partnership agreement or other misconduct**. The partnership might also incur substantial expenses resulting from a partner's premature withdrawal from a term partnership, such as replacing the partner's expertise or obtaining new financing. The wrongfully dissociating partner would be liable to the partnership for those and **all other expenses and damages that are causally related to the wrongful dissociation**. (Emphasis added.)

In this motion, Hamed seeks to have the upcoming damages hearing defined and limited—the very purpose of partial summary judgment on law.[8]

Some of these damages have already been partially recovered. For example, Yusuf has already "concede[d] $504,591.03 for the attorney fees personally taken to pay Yusuf's personal attorneys in the early 2013 litigation regarding the existence of the partnership. Similarly, the remaining attorneys' fees caused by the wrongful dissociation and included under this claim were settled on November 9, 2018.[9] That partial settlement removed only the attorneys' fees from the amounts claimed under H-163.

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[8] Hamed agrees to full, additional discovery on these issues by Yusuf if Yusuf wishes—in addition to the already scheduled depositions and expert reports. As Yusuf failed to respond to this discovery, there will no prejudice to discovery prior to any hearing.

[9] *So Ordered* on November 26, 2018.

II. Statement of Undisputed Material Facts

The following, verbatim, are the facts as found by the Court after an evidentiary hearing and the submission of exhibits by the parties. Judge Brady's order was upheld by the Supreme Court. Hamed adopts these facts, the references to testimony and the references to documents as his requisite "statement of undisputed facts."

> 1. Plaintiff and Defendant Yusuf have a longstanding friendship and familial history which preceded their business relationship. *January 25, 2013 Evidentiary Hearing Transcript, at 196–198,* hereinafter *Tr. 196–198, Jan. 25, 2013.*
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> 2. In 1979, Fathi Yusuf incorporated United Corporation ("United") in the U.S. Virgin Islands. *Defendants' Evidentiary Hearing Exhibit, no. 7,* hereinafter *Def. Ex. 7.*
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> 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.*[10]
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> 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.*
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> 5. **Hamed provided Yusuf with monies to facilitate completion of construction on the shopping center and to facilitate opening the Plaza Extra supermarket in Estate Sion Farm, St. Croix.** *Tr. 197:5–199:13, Jan. 25, 2013.*
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> * * * *
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> 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.*[11]

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[10] [*Footnote in Judge Brady's original Findings*.] The Court has taken judicial notice of the certified copy of the deposition transcript in the noted Territorial Court action, submitted as PI. Ex. 1. See discussion at *Tr. 6–9, Jan. 25, 2013.*

[11] [*Footnote in Judge Brady's original Findings.]* 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,

12. As a partner in the Plaza Extra Supermarket business, Hamed was entitled to fifty (50%) percent of the profit and liable for fifty (50%) of the "payable" as well as loss of his contribution to the initial start-up funds. *Tr. 44:12–21; 200:16–23; 206:23–25, Jan. 25, 2013; Pl. Ex. 1, p. 18:16–23; p.23:18–25.*

13. Yusuf and Hamed have both acknowledged their business relationship as a partnership of an indefinite term. ***Pl.Ex. 1, 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.")**

* * * *

30. Thereafter, discussions commenced initiated by Yusuf's counsel regarding the "Dissociation of Partnership." *Pl.Ex. 10, 11, 12.* On March 13, 2012, through counsel, **Yusuf sent a Proposed Partnership Dissociation Agreement to Hamed, which described the history and context of the parties' relationship, including the formation of an oral partnership agreement to operate the supermarkets, by which they shared profits and losses. *Pl.Ex. 12.*[12] Settlement discussions followed those communications but have not to date resulted in an agreement**. *Tr. 58:15–20, Jan. 25, 2013.*

* * * *

35. On or about August 15, 2012, Yusuf wrote a check signed by himself and his son Mahar Yusuf and made payment to United in the amount of $2,784,706.25 from a segregated Plaza Extra Supermarket operating account, despite written objection of Waleed Hamed on behalf of Plaintiff and the Hamed family, who claimed that, among other objections, the unilateral withdrawal violated the terms of the District Court's restraining order in the Criminal Action. *Tr. 246:1–250:14, Jan. 25, 2013; Pl. Group Ex. 13.*

36. On the first hearing day, Mahar Yusuf, President of United Corporation testified under oath that he used the $2,784,706.25 withdrawn from the Plaza Extra operating account to buy three properties on St. Croix in the name of United. On the second hearing day, Mahar Yusuf contradicted his prior testimony

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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 Plaintiff's 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.*

[12] [*Footnote In Judge Brady's Original Findings*.] These exhibits were admitted at hearing over Defendants' objection premised on Fed.R.Evid. 408. The evidence was not offered to prove the validity or amount of Plaintiffs claims, but rather to put into context the history of the parties' relationship which may be accepted as evidence for another purpose under R. 408(b). Further, the exhibits offer nothing beyond evidence presented wherein Yusuf has similarly characterized the history of his relationship with Plaintiff.

and admitted that those **withdrawn funds had actually been used to invest in businesses not owned by United, including a mattress business, but that none of the funds were used to purchase properties overseas.** *Tr. 250:2–251:15, Jan. 25, 2013; Tr. 118:12–120:2, Jan. 31, 2013.*

37. A restraining order was entered by the District Court in the Criminal Action which remains in place and restricts withdrawal of funds representing profits from the supermarkets that have been set aside in the Banco Popular Securities brokerage account pending the conclusion of the Criminal Action or further order of that Court. *Tr. 41:15–42:18; 119:4–12, Jan. 25, 2013.* The Criminal Action will remain pending until past tax returns are filed. *Tr. 134:15–136:22; 242:16–245:5, Jan. 25, 2013.* **As of January 18, 2013, the brokerage account had a balance of $43,914,260.04.** *Def. Ex. 9.* This Court cannot enforce the restraining order or otherwise control any aspect of the Criminal Action or its disposition.

38**. Funds from supermarket accounts have also been utilized unilaterally by Yusuf, without agreement of Hamed, to pay legal fees of defendants relative to this action and the Criminal Action, in excess of $145,000 to the dates of the evidentiary hearing.** *Tr. 76:5–82:9, Jan. 25, 2013; Pl. Ex. 15, 16.*[13]

39**. Since at least late 2012, Yusuf has threatened to fire Hamed family managers and to close the supermarkets.** *Tr. 149:20–150:22; 158:18–159:12; 253:25–254:19, Jan. 25, 2013.*

40. On January 8, 2013, Yusuf confronted and unilaterally terminated 15 year accounting employee Wadda Charriez for perceived irregularities relative to her timekeeping records of her hours of employment, threatening to report her stealing if she challenged the firing or sought unemployment benefits at Department of Labor, *Tr. 181:20–185:16, Jan. 25, 2013.* Charriez had a "very critical job" with Plaza Extra (*Tr 179:17–19, Jan. 25, 2013*), and the independent accountant retained by Yusuf agreed that she was "a very good worker" and that her work was "excellent." *Tr. 94:2–6, Jan. 31, 2013.* Because the Hamed co-managers had not been consulted concerning the termination or shown any proof of the employee's improper activity, Mafeed Hamed instructed Charriez to return to work the following day. *Tr. 179:4–24; 185:17–186:8, Jan. 25, 2013.* On Charriez' January 9, 2013 return to work, Yusuf started screaming at her, and told her to leave or he would call the police. *Tr. 186:9–187:1, Jan. 25, 2013.* **Yusuf did call police and demanded on their arrival that Charriez, and Mufeed Hamed and Waleed Hamed be removed from the store, and**

[13] [*Footnote In Judge Brady's Original Findings.]* Plaintiff has submitted Exhibit 30 with his February 19, 2013 Second Request to Take Judicial Notice and Request to Supplement the Hearing Record, granted by separate Order. Defendants' opposition to Plaintiffs' Motion did not address Exhibit 30, consisting of two checks in the total sum of more than $220,000 in payment to defense counsel in this action, dated January 21, 2013 and February 13, 2013, drawn on a supermarket account by Defendants without Plaintiffs' consent. Although the evidence is cumulative and not essential to the Court's decision herein, it reflects an ongoing practice of unilateral withdrawals and the possibility of continuing unilateral action in the future.

> **threatened to close the store.** ***Tr. 93:5–94:15; 164:19–165:18: 187:5–188:8, Jan. 25, 2013***. . . .(Emphasis added.)

These acts constituted an extensive, ongoing denial of the Partnership Agreement. It was a willful series of acts by which Yusuf both verbally repudiated the Partnership and then acted on that repudiation by hostile and incendiary acts against his Partner.

III. Applicable Law

In direct repudiation of the Partnership Agreement, Yusuf stated that Hamed was just an illiterate old man who was an inconsequential back room employee—that he had no ownership interest. Yusuf stated this to members of the public, suppliers, in court filings and in courtroom arguments. (In fact, in his oral argument, Yusuf's lawyer, Attorney DiRuzzo, told the USVI Supreme Court that his client took the position that because Hamed was "nothing" to the actual ownership of the business and actually had no rights at all, Yusuf could unilaterally terminate Hamed and decide how much of an "annuity" Hamed should get, and Hamed could get nothing more. The Supreme Court openly derided Yusuf's counsel for this at oral argument.[14] It engendered what is believed to be the all-time maximum of five "No" exclamations from Justice Swan.)

Failing to get a proper settlement that would have correctly ended the Partnership as required by RUPA, or to make the requisite judicial filing under the judicial dissolution provisions

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[14] *Transcript*, July 9, 2013, at pp. 14-15:

> JUSTICE CABRET: You realize that this is the first time I've heard the word "annuity" -
> MR. DIRUZZO: I -
> JUSTICE CABRET: -- and I've been – it appears nowhere in your brief.
> MR. DIRUZZO: I understand, but it is the best way I can characterize this -
> JUSTICE CABRET: **It's like your arguments are like a moving target.**
>
> * * * *
>
> JUSTICE SWAN: No, no, no, no, no. There's nothing about any kind of annuity here. That's a ***concoction*** that you must have come up with. (Emphasis added.)

of RUPA, Yusuf began a series of acts of breach and repudiation in September 2012. *He undertook by **force** what he could not do by negotiation and did not want to do by a RUPA dissolution filing because it would be too generous to his Partner*.[15] Yusuf took $2.7 million, excluded Hamed from funds and bank accounts, took money unilaterally, *paid his personal lawyers a half-million dollars to deny the existence of the Partnership from Partnership funds*, called the police to have Hamed and his sons removed from the premises, alleged criminal trespass, and, finally, threatened to close all of the stores if the police did not arrest and remove Hamed. THAT was some serious, major league repudiation based on a "concoction." He denied its existence in Superior Court filings, in Federal Court filings, and police reports.

Judge Brady noted that Yusuf first tried to negotiate an end to the Partnership but did not do so. Failing that, Yusuf decided to steal Hamed's half by *saying there was no Partnership*. The sole purpose of Yusuf's actions, and what he would have achieved if successful, was to steal Hamed's half of the Partnership, the future profits, Hamed's past contributions, the goodwill and $43 million dollars sitting in Partnership bank accounts. He would also have gotten the funds that the Partnership put into the construction of the East store. Hamed MIGHT have gotten an annuity—if Yusuf was feeling generous.

A year later, in April of 2014, after losing before both Judge Brady and the USVI Supreme Court, United/Yusuf *then* acknowledged the Partnership. Despite this, when Hamed moved for summary judgment on the existence of the Partnership Agreement, Yusuf tried to block it, saying it was obvious and unnecessary.

[15] Under RUPA section 141, had Yusuf wanted to lawfully dissociate, Hamed would have had an option to continue the business by buying Yusuf out. Yusuf didn't want that. He wanted to keep the business and buy Hamed out at a pittance. Hamed would not agree, and unfortunately for Yusuf, RUPA does not have such an option….so force was necessary.

Thus, he files this motion for partial summary judgment, as obvious as it may seem. Hamed moves pursuant to 26 V.I.C. § 122 of RUPA, which defines a wrongful dissociation:

> (b) A partner's dissociation is wrongful only if:
>
> **(1) it is in breach of an express provision of the partnership agreement;**
>
> **or**
>
> **(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:**
>
> **(i) the partner withdraws by express will,** unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under section 121, subsections (6) through (10) of this chapter or wrongful dissociation under this subsection; (Emphasis added.)

From 2012 through 2014 there was a wrongful dissociation pursuant to two, independently sufficient provisions of RUPA—either of which would have been sufficient:

1. Yusuf breached section 122(b)(2)(i) "by express will" when he stated there was no partnership and then followed that up with a series of acts in denial and derogation of the partnership such as locking Hamed out of bank accounts, calling the police to have him removed from the stores and using funds for personal uses.

2. Yusuf breached section 122(b)(1) by breaching an "express provision," the agreement that the Partnership would continue until a loss of $800,000. That is an express provision that Yusuf himself stated under oath, and which Judge Brady noted was a term of the agreement.

There is also no dispute that the *Revised Uniform Partnership Act* (RUPA) provides for damages to a partner in the event of wrongful dissociation. 26 V.I.C. 122(c).

> (c) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

If a partner acts in complete denial of the partnership, he becomes liable for all damages. How are those damages to be determined? The drafter's comments to RUPA section 602

makes it clear that those damages extend to **all other expenses and damages that are *causally related* to the wrongful dissociation."**

> 3. Subsection (c) provides that a wrongfully dissociating partner is liable to the partnership and to the other partners for any damages caused by the wrongful nature of the dissociation. That liability is in addition to any other obligation of the partner to the partnership or to the other partners. For example, the partner would be liable **for any damage caused by breach of the partnership agreement or other misconduct**. The partnership might also incur substantial expenses resulting from a partner's premature withdrawal from a term partnership, such as replacing the partner's expertise or obtaining new financing. The wrongfully dissociating partner would be liable to the partnership for those and ***all other*** **expenses and damages that are causally related to the wrongful dissociation**. (Emphasis added.)

IV. Argument

As the Master recently noted with regard to Yusuf Claim Y-2 (Order, at 5-6, November 14, 2019), summary judgment is a serious tool that is not to be used in inappropriate circumstances. However, it does serve a purpose in narrowing and delineating issues by removing any matters, particularly issues of law, that are no longer in material dispute.

> Rule 56 of Virgin Islands Rules of Civil Procedure (hereinafter "Rule 56") provides that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought" and "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. CIV. P. 56; see also Rymer v. Kmart Corp., 68 V.I. 571, 575 (V.I. 2018) ("A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record."). **"Once the moving party has identified the portions of the record that demonstrate no issue of material fact, "the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in his favor." Rymer, 68 V.I. at 576 (citing Chapman v. Cornwall, 58 V.I. 431, 436 (V.I. 2013) (internal citations and quotation marks omitted). The non-moving party "may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial."** Rymer, 68 V.I. at 576 (quoting Williams v. United Corp., 50 V.I. 191, 194 (V.I. 2008)). The reviewing court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. Williams, 50 V.I. at 194; Perez v. Ritz-Carlton (Virgin Islands), Inc., 59 V.I. 522, 527 (V.I. 2013). Because summary judgment is "[a] drastic remedy, a court should only

> grant summary judgment when the 'pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.'" Rymer, 68 V.I. at 575-76 (quoting Williams, 50 V.I. 191, 194).

That is why Hamed does not move for the actual award of damages in this motion—only partial summary judgment as to the matter of the law regarding the undisputed material facts. The "what happened" here with regard to ***just*** Yusuf's wrongful dissociation is not in dispute. There was a Partnership. Yusuf repeatedly and openly repudiated the Partnership and stopped performance. End of story. By statute, he is liable for "all other expenses and damages that are causally related to the wrongful dissociation."

In addition, independently, the partnership had a specific term as to when it would end—Yusuf stated it would end if it began to lose money in excess of $800,000. It did not lose money, but Yusuf ended the Partnership. End of the second story. That constitutes wrongful dissociation on two independent bases. That is the partial summary judgment Hamed seeks.

Once it is held by the Master that there WAS wrongful dissociation, there will have to be a hearing on the merits—the scope and amount of such damages. In this ***example***, Yusuf has clearly taken rent for the stores ***and cannot not argue that the Partnership agreement allowed him both full rent AND the right to keep amounts for construction and as mortgage payments that cannot be setoff***. It is statutory that a partner's right to setoff does NOT limit the amount of damages for the partner's wrongful dissociation. *RUPA* § 701, cmt. 4*. See, e.g., **Sebring Assocs. v. Coyle***, 375 N.J. Super. 315, 326 n.9 (Super. Ct. App. Div. 2005),

> we note that *RUPA* § 701, cmt. 4 states:
>
> > It is not intended that the partnership's right of setoff be construed to limit the amount of the damages for the partner's wrongful dissociation and any other amounts owing to the partnership to the value of the dissociated partner's interest. Those amounts may result in a net sum due to the partnership from the dissociated partner.
>
> *See also RUPA* § 602 (wrongful dissociation; damages), cmt. 4 (enumerating types of damages available).

V. Conclusion

As Hamed has stated above, this is only an example of the amounts that will be sought at a later date. Other items include:

(1) the Partnership's diminution of income, profits and time occasioned by the Yusuf taking and efforts to correct those. Under the revised scheduling order, the supporting documents will be expert reports not yet due.

(2) the costs of accountants and accounting experts to determine the amount that Yusuf took between 2006 and 2012. Under the revised scheduling order, the supporting documents will be expert reports not yet due.

(3) the costs of accountants and accounting experts to determine the amount that Yusuf took between 2012 and the end of the Partnership. Under the revised scheduling order, the supporting documents will be expert reports not yet due.

(4) the costs of 100% of Mr. Gaffney's fees to determine review the accounting as part of the Claims process. Under the revised scheduling order, the supporting documents will be expert reports not yet due.

(5) the damage to trade reputation and goodwill[16] occasioned by the Yusuf's acts and statements. Under the revised scheduling order, the supporting documents and the expert reports are not yet due.

[16] *Congel v. Malfitano*, 2018 NY Slip Op 02119, ¶ 8 n.2, 31 N.Y.3d 272, 302, 76 N.Y.S.3d 873, 891, 101 N.E.3d 341, 359(“RUPA § 701 is the "counterpart" to UPA § 38 (2) (*see* Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 Bus Law 45, 66 [1993]). The RUPA, like the UPA, requires this sum to be offset against any damages that a partner must pay for a wrongful dissociation (*see* RUPA § 701 [c]). Unlike the UPA, however, it contains no discount for goodwill (*see id.* § 701 [b], Comment).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2019, I served a copy of the foregoing by email, as agreed by the parties, on:

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