IN THE SUPREME COURT
OF THE VIRGIN ISLANDS
FILED
07/05/2013
VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

S. Ct. Civ. No. 2013-0040

In the Supreme Court of the Virgin Islands

FATHI YUSUF and UNITED CORPORATION,
Appellants/Defendants,

v.

MOHAMMAD HAMED, by his authorized agent, WALEED HAMED,
Appellee/Plaintiff.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX
Super. Ct. No. 370/2012 (STX)
HON. DOUGLAS BRADY, PRESIDING

SUPPLEMENATL APPENDIX VOLUME I

Joseph A. DiRuzzo, III
FUERST ITTLEMAN DAVID & JOSEPH, PL
1001 Brickell Bay Drive, 32nd Floor
Miami, FL 33131
305.350.5690 (o)
305.371.8989 (f)
jdiruzzo@fuerstlaw.com

Counsel for the Appellants

SUPPLEMENTAL APPENDIX VOLUME I
TABLE OF CONTENTS

PAGE

Defendants Fathi Yusuf and United Corporation's Joint Memorandum of Law in Support of Their Proposed Findings of Fact and Conclusions of Law Regarding TRO/Preliminary Injunction Application, dated March 4, 2013..................SA-001

N.2

ST. CROIX, V.I.
IN THE VIRGIN ISLANDS
'13 [illegible]

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

MOHAMMAD HAMED, by his authorized agent, WALEED HAMED, Plaintiffs, v. FATHI YUSUF and UNITED CORPORATION, Defendants.	)	**CIVIL NO. SX-12-CV-370**

DEFENDANTS FATHI YUSUF'S AND UNITED CORPORATION'S JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRO/PRELIMINARY INJUNCTION APPLICATION

Submitted by:

THE DEWOOD LAW FIRM
2006 Eastern Suburb, Suite 102
Christiansted, V.I. 00820

FUERST ITTLEMAN DAVID & JOSEPH, PL
1001 Brickell Bay Drive, 32nd Floor
Miami, Florida 33131

Counsel for Defendants Fathi Yusuf and United Corporation

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

DISCUSSION

A. Plaintiff Has Not Met His *Heavy* Burden 1

B. Plaintiff Has Not Shown *Irreparable Harm* 3

C. Plaintiff Has Not Come to this Court with Clean Hands 4

D. Plaintiff Retired "Long Ago" and, at Best, is Simply an "Ordinary Creditor" 5

E. The Statute of Frauds Bars the Alleged Agreement 6

F. The Record Evidence Reflects, at Best, Competing Inferences 10

1. Gross Profits 12

2. Repayment of a Debt/Loan 13

3. Obligation to Share Losses 13

4. Right of Control 14

5. Rent Notices 14

6. Attorney DeWood Communications 15

7. Parties' Own Designations and Casual Use of the Word "Partner" 15

8. Removal of Assets 17

9. Testimony of Maher Yusuf 19

G. Plaintiff's Own Cases Support Denial of the Requested Injunction 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Abed v. Azar, No. 08-Civ-4404, 2010 U.S. Dist. LEXIS 1649 (S.D.N.Y. Jan. 5, 2010) 8, 9

Artco, Inc. v. Kiddie, Inc., No. 88-Civ-5734, 1994 U.S. Dist. LEXIS 15156 (S.D.N.Y. Oct. 13, 1994) 8

Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship, 938 F. Supp. 304 (D.V.I. 1994) 3, 4, 20

Byker v. Mannes, 641 N.W.2d 210 (Mich. 2002) 16

Cont'l Res., Inc. v. PXP Gulf Coast, Inc., No. CIV-04-1681-F, 2006 U.S. Dist. LEXIS 72870 (W.D. Okla. Oct. 5, 2006) 17

Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812 (2d Cir. 1984) 7, 8

Estate of Matteson v. Matteson, 749 N.W.2d 557 (Wis. 2008) 5, 6

Fountain Valley Corp. v. Wells, 98 F.R.D. 679 (D.V.I. 1983) 7, 9

Frank's GMC Truck Center, Inc. v. Gen. Motors Corp., 847 F.2d 100 (3d Cir. 1988) 4

Health and Body Store, LLC v. Just-Brand Limited, No. 11-cv-6638, 2012 U.S. Dist. LEXIS 129917 (E.D. Pa. Sept. 11, 2012) 20

IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc., 250 Fed. Appx. 476 (3d Cir. 2007) 3, 4, 19

In re Lona, 393 B.R. 1 (Bankr. N.D. Cal. 2008) 16

In re PCH Assocs., 949 F.2d 585 (2d Cir. 1991) 2

Int'l Equity Invs., Inc. v. Citigroup Venture Int'l Brazil, LLC, 441 F. Supp. 2d 552 (S.D.N.Y. 2006) 20

Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933) 4

Macedon v. Macedon, 19 V.I. 434 (Terr. Ct. 1983) 8

Mazurek v. Armstrong, 520 U.S. 968 (1997) 17

McBean v. Guardian Ins. Agency, 52 F. Supp. 2d 518 (D.V.I. 1999) 3, 4

Monsanto Co. v. Rohm & Haas Co., 456 F.2d 592 (3d Cir. 1972) 4, 5

Peer v. Hajoca Corp., No. 94-1542, 1995 U.S. App. LEXIS 12111 (4th Cir. Dec. 30, 1994) 8

Rivkin v. Coleman, 914 F. Supp. 76 (S.D.N.Y. 1996) 7, 10, 12

Rizoti v. Plemmons, 91 Fed. Appx. 793 (4th Cir. 2003) 8

Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12 (3d Cir. 1996) 19, 20

Salomon Smith Barney Inc. v. Vockel, 137 F. Supp. 2d 599 (E.D. Pa. 2000) 4, 5, 9

Scarcelli v. Gleichman, No. 2:12-cv-72, 2012 U.S. Dist. LEXIS 57776 (D. Me. Apr. 25, 2012) 19

Sheridan Broadcasting Networks, Inc. v. NBN Broadcasting, Inc., 693 A.2d 989 (Pa. Super. Ct. 1996) 20

Smith v. Robson, 44 V.I. 56 (Terr. Ct. 2001) 3, 8, 10, 12

Sonwalkar v. St. Luke's Sugar Land P'ship, No. 01-11-00473, 2012 Tex. App. LEXIS 6794 (Tex. App. Aug. 16, 2012) 20

Todi v. Stursberg, No. 01-2539, 2001 U.S. Dist. LEXIS 11270 (E.D. Pa. Aug. 1, 2001) 18, 19

United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995) 11, 12

Wisdom Import Sales Co. v. Labatt Brewing Co., 339 F.3d 101 (2d Cir. 2003) 20

Wyatt v. Terhune, 315 F. 3d 1108 (9th Cir. 2003) 17

Federal Statutes

26 U.S.C. § 7201 (Attempt to evade or defeat tax) 2

26 U.S.C. § 7203 (Willful failure to file return, supply information, or pay tax) 2

Other Authorities

21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) 17

Virgin Islands Statutes

33 V.I.C. § 1521 (Attempt to evade or defeat tax) 2

33 V.I.C. § 1524 (Willful failure to file return, supply information, or pay tax) 2

Defendants, pursuant to the Court's February 28, 2013 Order, respectfully jointly submit this Memorandum of Law in support of their Proposed Findings of Fact and Conclusions of Law in opposition to the application for a temporary restraining order ("TRO") and/or a preliminary injunction made by Plaintiff Mohammad Hamed, by his self-appointed "authorized agent," Waleed Hamed. As set forth herein, the preliminary injunction must be denied.[1]

DISCUSSION

A. Plaintiff Has Not Met His *Heavy* Burden

Plaintiff in his complaint and moving papers promised a "partnership" case that never materialized. In requesting the *extraordinary* and *drastic* remedy of preliminary injunctive relief on a feigned "emergency" basis, Plaintiff also sensationally asserted months ago that a "Rubicon" had been crossed, *e.g.*, that United Corporation d/b/a Plaza Extra was in "serious jeopardy" of closing its Plaza Extra stores if its operations were "not secured immediately." However, the hearing evidence, including testimony from the stores' employees and recent photographs depicting normal operations, confirmed that this sensationalism was simply hyperbole.

Plaintiff Mohammad Hamed – a purported "partner" in an alleged partnership with Fathi Yusuf dating back to the 1980s – testified that, since the very beginning, Fathi Yusuf alone has been and "is in charge of everybody" and in charge of "all the three store[s]" (Defs. FoF ¶ 115); that Plaintiff's sons, including Waleed Hamed, are mere "employees" of United Corporation d/b/a Plaza Extra and thus are not in any alleged partnership with Fathi Yusuf (Defs. FoF ¶ 116); that Plaintiff has signed "nothing" to guaranty the supermarkets' losses or to otherwise document any alleged

[1] Defendants' have concurrently filed their Proposed Findings of Fact and Conclusions of Law Relating to TRO/Preliminary Injunction Application (abbreviated herein as "Def. FoF"), which findings and conclusions Defendants hereby adopt and incorporate in this supporting memorandum of law. Defendants also incorporate and adopt herein the arguments raised in their October 10, 2012 Response to the Initial TRO, January 24, 2013 Response to the Renewed TRO, and November 5, 2012 Renewed Motion to Dismiss (D.V.I. Doc. # 29), which later motion is briefed and pending.

interest in the supermarket operations (Defs. FoF ¶ 114); and that Plaintiff disassociated himself from those operations a "[l]ong time" ago when he "retired" in 1996 (Defs. FoF ¶ 119).

If his partnership claims are to be believed, it is also clear that Plaintiff is either, at worst, a criminal tax evader[2], or, at best, a criminal tax non-filer[3], as he has *never* filed a single partnership tax return, statement of partnership or other regulated tax declaration reflecting his alleged "partnership" status; and has *never* paid a single cent in tax to any governmental taxing authority on the taxable income allegedly attributable to him as an alleged partner. Indeed, to the outside world, Plaintiff – generally, and to the tax authorities, specifically – has been a *total stranger* to the very partnership that he now claims has existed for the past 26 years.[4]

Nor has Plaintiff established, let alone even asserted, any interest in or partnership with United Corporation d/b/a Plaza Extra – the operator of the grocery stores. As such, as a matter of law and fact, United Corporation should be dismissed from this action because it cannot be the subject of any possible injunction or partnership claims against it. (Defs. FoF ¶ P).

Ignoring the great weight of the evidence and testimony *in this action*, Plaintiff relies heavily on cherry-picked excerpts of a decades-old deposition transcript from an unrelated action and other such supposed "admissions" to boldly argue that the heart of this commercial dispute – *i.e.*, whether or not a partnership exists – is undisputed or somehow "dispositive." The argument is absurd; and, regardless, a court may not take judicial notice of the record of a different prior action, including testimony, as substantive proof of the matters asserted in the latter action.

---

[2] *See* I.R.C. § 7201; 33 V.I.C. § 1521.

[3] *See* I.R.C. § 7203; 33 V.I.C. § 1524.

[4] *See, e.g., In re PCH Assocs.*, 949 F.2d 585, 602-03 (2d Cir. 1991) ("mo[st] important[]" "evidentiary fact[]" relating to partnership issues is "conduct of the parties . . . *with respect to third parties*") (finding no joint venture relationship where, among other reasons, "nothing in th[e] record indicat[ed] that any third parties that dealt with the [business or defendant] believed [the movant] to be a participant in the business or looked to [the movant]'s creditworthiness as a basis for doing business").

Rather, Plaintiff – as the movant – bears the *heavy* burden of convincing the Court, based on the testimony *in this action*, that each of the four injunction factors favors the entry of an extraordinary injunction order at this preliminary stage of the proceedings. Plaintiff has utterly failed to meet that burden. Moreover, as the courts in this context uniformly provide, including Plaintiff's own cases, "[d]eciding whether there was [an alleged joint venture or partnership] contract between [Plaintiff and Fathi Yusuf] requires a determination of the intent of the parties – whether they manifested a mutual intent to be bound – **and this question is one for the fact finder,**" *i.e.*, the very jury Plaintiff has demanded. *Smith v. Robson*, 44 V.I. 56, 61 (Terr. Ct. 2001).

B. Plaintiff Has Not Shown *Irreparable Harm*

"A movant's burden with regard to establishing irreparable harm is quite heavy" and the legal standard is "exacting." *Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship*, 938 F. Supp. 304, 310 (D.V.I. 1994). "'The requisite injury must be more than merely serious or substantial, and it must be of a peculiar natures, so that money cannot atone for it.'" *McBean v. Guardian Ins. Agency*, 52 F. Supp. 2d 518, 521 (D.V.I. 1999) (internal citation omitted).

Any meaningful review of the record evidence shows that this commercial dispute concerns only money. Plaintiff's self-appointed "agent," Waleed Hamed, conceded as much, acknowledging that the lawsuit was filed to seek the return of monies. (Defs. FoF ¶ 151). Although Plaintiff complains about the alleged "diversion" of $2.7 million dollars from United Corporation d/b/a Plaza Extra's accounts and alleged improper "removal" of other such funds for legal fees, etc., which are all disputed factual issues, the foregoing such complaints make it clear that "a preliminary injunction should not be granted if the injury suffered can be recouped in monetary damages." *IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007) (citing *Frank's GMC Truck Center, Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) ("[A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement . . . .")).

Similarly, the feigned fears regarding goodwill, customers and reputation are unavailing, as the supermarket stores clearly are operating normally and Plaintiff otherwise has failed to credibly support those fears, as required, *McBean*, 52 F. Supp. 2d at 521; and which, at best, are simply "remote future injur[ies]" that do not constitute potential irreparable harm for preliminary injunction purposes, *Barclays*, 938 F. Supp. at 310. In addition, the Third Circuit has made clear that injuries such loss of goodwill, consumers and reputation are "limited to 'the special problem of [consumer] confusion that exists in cases involving trademark infringement and unfair competition.'" *IDT*, 250 Fed. Appx. at 479 (citing *Acierno*, 40 F.3d at 653-54). "As the harm claimed by [Plaintiff here] is not analogous to the harm caused by consumer confusion, the line of cases recognizing loss of goodwill or reputation as irreparable harm is not applicable." *Id.*

C. <u>Plaintiff Has Not Come to this Court with Clean Hands</u>

A court "sit[s] in equity" in considering a preliminary injunction request. *Salomon Smith Barney Inc. v. Vockel*, 137 F. Supp. 2d 599, 604 (E.D. Pa. 2000). The court in *Vockel* discussed the "fundamental" principle of clean hands as follows:

> The [U.S.] Supreme Court has declared, 'It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands.' *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244 [] (1933).

Vockel, 137 F. Supp. 2d at 602-03 (involving, as here, a request for a preliminary injunction and an evidentiary hearing thereupon). *See also Monsanto Co. v. Rohm & Haas Co.*, 456 F.2d 592, 599 n.11 (3d Cir. 1972) ("Misconduct which will bar relief . . . need not necessarily be of such a nature as to be punishable as a crime or to constitute the basis of a legal action. [Instead], any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean.").

The maxim of clean hands "'is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" *Vockel*, 137 F. Supp. 2d at 603 (quoting *Monsanto*, 456 F.2d at 598). "[I]n determining the issue of clean hands, [this Court must] look solely at the conduct of the plaintiff – the one who seeks the aid of the [court] – and not the [alleged] conduct of the defendant." *Vockel*, 137 F. Supp. 2d at 603.

Here, Plaintiff has not come into this Court with clean hands. Rather, having now admitted to being, at worst, a criminal tax evader or, at best, a criminal tax-non-filer for the past 26 years; having allowed a federal judge in a pending criminal action to accept a plea agreement premised upon factual representations that are directly at odds with the ones asserted in this action; and having introduced and relied upon a false affidavit, Plaintiff's hands, and the hands of his primary witnesses, including Waleed Hamed and Waheed Hamed, as co-defendants in the subject criminal action, are plainly *unclean*. Accordingly, this Court should reject Plaintiff's extraordinary request for equitable relief and should slam "the doors of the court . . . against him in limine." *Vockel*, 137 F. Supp. 2d at 603 (denying motion for preliminary injunction where, irrespective of the motion on its merits, the plaintiff in that case "d[id] not come into the court with clean hands") (citation omitted).

D. <u>Plaintiff Retired "Long Ago" and, at Best, is Simply an "Ordinary Creditor"</u>

Even if this Court were to ignore the "fundamental" maxim of clean hands and ignore Defendants' other Rule 12 arguments, and even assuming, *arguendo*, a partnership existed some time ago, Plaintiff cannot establish a likelihood success on the merits of his claims in this action, because "[w]hen a partner retires . . ., the partnership is dissolved." *Estate of Matteson v. Matteson*, 749 N.W.2d 557, 568 (Wis. 2008) (applying Wisconsin Uniform Partnership Act provisions) (citation omitted). "An existing partner has two primary options upon initiating a partnership dissolution[:] . . . (1) (continuation) to permit the business to continue and claim his or her interest in the dissolution

value as a *creditor*, or (2) (wind-up) to force the dissolved business to wind up and take his or her part of the proceeds." *Id.* (citation omitted) (emphasis added). Upon election of a continuation, when the remaining partner ultimately ends and dissolves the business, the retiring/exiting partner receives his elected sum of the partnership's dissolution value "'as an *ordinary creditor*,' with creditors of the dissolved partnership having priority over an exiting partner's claims." *Id.* at 572-73 (citing Wis. Stat. § 178.37) (emphasis added).

Here, Plaintiff testified that he "retired" a "[l]ong time" ago from any alleged partnership. (Defs. FoF ¶ 110). Plaintiff likewise clarified that his sons are mere "employees" at the subject grocery stores; and are not in any self-labeled "partner" relationship with Fathi Yusuf. (Defs. FoF ¶ 116). Accordingly, at best, as simply an "ordinary creditor" of the alleged partnership, Plaintiff cannot establish any success on the partnership claims that he has alleged in this action, let alone a likelihood of such success in proving such claims or in proving that a money judgment could not satisfy this ordinary creditor. *Matteson*, 749 N.W.2d at 568.[5]

E. The Statute of Frauds Bars the Alleged Agreement

Plaintiff testified that he was to be Fathi Yusuf's "partner" for the stated term of "forever." (Defs. FoF ¶ 111). In this context, where an unwritten agreement purports to provide a stated term of greater than one year, the Second Circuit Court of Appeals has clarified that:

> Despite some sweeping pronouncements to the effect that the New York statute of frauds [] does not apply to joint ventures, these must mean only that a writing is not required simply because the transaction is a joint venture, and the statute must apply to joint ventures having a stated term of more than one year, as the plain language of [the statute] dictates. We perceive no difference relevant for the purpose of the statute of frauds between joint ventures for a stated term and partnerships for a stated term. The statements that the New York statute of frauds does not apply to joint ventures doubtless arise from the fact that joint ventures are usually not for a

[5] Plaintiff's admitted "retire[ment]" in 1996 also raises serious issues regarding the statute of limitations, such that, again, Plaintiff cannot establish a likelihood of success on the merits. (*See also* Defendants' Nov. 5, 2012 Renewed Motion to Dismiss (D.V.I. Doc. # 29)).

> stated term but for a stated purpose, and the implicit assumption that, however unlikely, this purpose could be achieved within one year.

Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 827 (2d Cir. 1984) (internal citation omitted).

The dispute in *Ebker*, like the present dispute, involved an alleged 50-50 joint venture without any writing memorializing the parties' agreement, notwithstanding repeated references by the parties to the terms "partner" and "partnership." *See, e.g., Ebker*, 739 F.2d at 817 (noting, as one such example, the comment, "We are going to be partners. We must trust each other."). The disputed relationship in *Ebker* was submitted to the *jury* on the basis that the duration of the alleged partnership was, as here, greater than one year. *Id.* at 827 n.19 (five-year term). On appeal, the Second Circuit found that "the statute of frauds renders unenforceable the oral joint venture agreement containing a stated term of [greater than one year] as found by the jury." *Id.* at 828 (rejecting the argument that the "Statute of Frauds did not apply to joint ventures at all" and alternative argument that, even "if the statute applied, the five-year joint venture agreement would be treated as a partnership at will").

Plaintiff's cases to the contrary are distinguishable on the basis that, as noted in *Ebkar*, "[oral] joint ventures are *usually* not for a stated term but for a stated purpose, and the implicit assumption that, however unlikely, this purpose could be achieved within one year." 739 F.2d at 827 (emphasis added). However, the present action does not involve the "usual" oral joint venture, as, again, Plaintiff testified to a stated term of "forever," which the statute of frauds renders unenforceable, and which disposes of this action as a matter of law. *Ebkar*, 739 F.2d at 828. *See also Fountain Valley Corp. v. Wells*, 98 F.R.D. 679, 683-65 (D.V.I. 1983) (holding that, under Virgin Islands law, "statute of frauds . . . bar[s] this Court from enforcing any alleged joint venture agreement" that "was to exist for more than one year"); *Rivkin v. Coleman*, 914 F. Supp. 76, 79 (S.D.N.Y. 1996) (holding that New York statute of frauds barred enforcement of alleged oral joint venture agreement

where, as here, plaintiff testified that agreement was to continue **"forever"**); *Rizoti v. Plemmons*, 91 Fed. Appx. 793, 797 (4th Cir. 2003) (holding that alleged oral joint venture "agreement [] to form a business that would have continued for an indefinite duration" is unenforceable under the Florida statute of frauds) (citation omitted); *Abed v. Azar*, No. 08-Civ-4404, 2010 U.S. Dist. LEXIS 1649, at *10 (S.D.N.Y. Jan. 5, 2010) ("An oral joint venture is clearly within the scope of the New York Statute of Frauds if its stated terms cannot be performed within one year of its making."); *Artco, Inc. v. Kiddie, Inc.*, No. 88-Civ-5734, 1994 U.S. Dist. LEXIS 15156, at *11-22 (S.D.N.Y. Oct. 13, 1994) (holding that New York statute of frauds barred enforcement of alleged oral joint venture agreement where there was no agreement on duration or shared losses) (noting also that "calling an organization a partnership does not make it one") (citation omitted).[6]

The partial performance exception to the applicability of the statute of frauds is likewise unavailing. First, "[p]art performance is an equitable doctrine available only where the principal relief sought is specific performance of the oral agreement, and has no application in an action at law for money damages." *Peer v. Hajoca Corp.*, No. 94-1542, 1995 U.S. App. LEXIS 12111, at *7 (4th Cir. Dec. 30, 1994) (applying Maryland law). Because the "principle relief" sought in this action is money damages, as addressed above, the equitable doctrine of part performance "has no application." *Id.* Moreover, because Plaintiff has come to this court with unclean hands, also

[6] Plaintiff's reliance on *Smith v. Robson* is not in conflict and does not sanction Plaintiff's claims, as the Territorial Court therein correctly noted that, in the usual case, "[p]artnerships and joint ventures without fixed terms are deemed to be 'at will' subject to dissolution by either partner at any time." 44 V.I. at 61 (noting that the alleged "agreement [in *Smith*] did not set forth any specific term"). However, as noted above, the present case does not involve the "usual" case, because Plaintiff has expressly identified a specific term of duration, *i.e.*, "forever." At best, even if the Court were to ignore *Ebkar* and Defendants' other cases, Plaintiff's own case reflects that any determination at this preliminary stage still would be unwarranted, as "[d]eciding whether there was a contract between [the Hameds] and the [Yusufs] requires a determination of the intent of the parties – whether they manifested a mutual intent to be bound – and this question is one for the fact finder." *Smith*, 44 V.I. at 60-61 (citing *Macedon v. Macedon*, 19 V.I. 434 (Terr. Ct. 1983)).

addressed above, he is not entitled to any equitable relief, including the equitable doctrine of part performance. *Vockel*, 137 F. Supp. 2d at 603.

Second, the exception "only applies where 'part performance [] is clear, certain and definite in object and design as to be unequivocally referable to the agreement, [] which will precipitate a fraud if the agreement is not enforced." *Abed*, 2010 U.S. Dist. LEXIS 1649, at *11-12 (citation omitted). Plaintiff has not established, let alone even asserted, any such "clear, certain and definite" fraud in this action.

In addition, if "an act is equally consistent with an explanation having a basis in other than the alleged oral [partnership] agreement, the part performance relied upon will not remove the agreement from the bar of the Statute of Frauds." *Id.* at *12 (citation omitted). Here, Plaintiff's employment in the warehouse of one the Plaza Extra supermarkets is "equally consistent" with the logical explanation that Fathi Yusuf – for his own purely business reasons and as a personal favor to a relative (a brother-in-law) from the same "village" in the West Bank and as gratitude for the loans that this relative provided at a time when he desperately needed money to re-pay other loans and to "build[] the business" – agreed to provide Plaintiff, and Plaintiff's sons, a livelihood in that business with a share of its profits as employees only, without the legal liabilities and responsibilities of a *de jure* partner. Indeed, Plaintiff was not indicted by the Government for paying taxes on what he now calls "partnership" income; did not go to jail along with his "partner" (Fathi Yusuf); did not sign any loan documents; did not pay partnership taxes or ever file partnership returns; and did not make any "ultimate calls" and major decisions of the business, all of which were made by Fathi Yusuf alone. Accordingly, when, as here, "there is a logical explanation for the actions of the parties [] that does not require the existence of the alleged joint venture agreement . . ., there is no partial performance of the agreement and the alleged relationship may not be used as the basis for seeking an accounting under partnership law." *Id.* at *14. *See also Fountain Valley*, 98 F.R.D. at 684 (rejecting partial

performance exception upon appellate court's "conclusion that any performance on the part of [the defendant] was motivated by purely business reasons . . . and not the alleged joint venture agreement").[7]

At best, any dispute regarding the applicability of the statute of frauds – as with a myriad of other disputed factual issues in this action – *must* be submitted to the jury for a trial on the merits at the appropriate time, and should not be decided by a non-fact finder at this preliminary stage of the proceedings on an incomplete record. *See, e.g., Smith*, 44 V.I. at 60; *Rivkin*, 914 F. Supp. at 79 ("resolution" of "all" issues in an alleged partnership case "involv[ing] questions of fact . . . must await a trial on the merits").

F. The Record Evidence Reflects, at Best, Competing Inferences

It is now clear why the record leading up to the January 25 and 31, 2013 TRO hearings relied almost exclusively on the claims of Waleed Hamed, who is an outsider to the alleged "partnership" but who nonetheless purports to be Plaintiff's "represent[ative]" and "agent." (Defs. FoF ¶ 116). Plaintiff simply worked as a warehouse employee in one of United Corporation d/b/a Plaza Extra's supermarket stores (Plaza Extra East), from which position Plaintiff "retired" a "[l]ong time" ago. (Defs. FoF ¶ 110). Plaintiff therefore has no meaningful knowledge about the extraordinary injunction that is being requested in his name, or about the supermarkets' current operations. Moreover, although Plaintiff signed an affidavit in this action, he has conceded that he does not know the contents of either his own affidavit or his son's affidavits, which he purported to bolster, because Plaintiff does not read or understand written English. (Defs. FoF ¶ 120). Rather, Plaintiff "sign [sic] the paper" because his son (Waleed Hamed) "want[ed]" it signed "[a]nd he tell me sign the paper." (*Id.*). This false affidavit, coupled with Plaintiff's serious tax evasion and other such

[7] The narrative in Defendants' Rule 12 motion and other papers is entirely consistent with the foregoing "logical explanation" – and is not, as Plaintiff harps, a "judicial admission" of anything that would support Plaintiff's claims.

concealment for the past 26 years, strongly militate against the giving of any weight to the testimony of Plaintiff and his sons, much less sufficient weight to grant the equitable relief requested.

Regardless, "[w]here, as here, the facts permit competing inferences concerning the existence of an agreement to form a joint venture, the issue must be submitted to the fact finder." *United States v. USX Corp.*, 68 F.3d 811, 827 (3d Cir. 1995). Specifically, the hearing testimony regarding United Corporation d/b/a Plaza Extra's present supermarket operations – including the testimony offered by Plaintiff and his sons – confirmed that the sensational claims in the initial and renewed "emergency" TRO applications were factually baseless:

TRO Hyperbole	Present Day Reality
Sept. 18, 2012 Initial TRO "If the [supermarket] operations are not secured immediately, the continued operation of the three Plaza Extra stores will be in jeopardy, as well as the continued employment of its 600 plus employees, resulting in irreparable harm" (Initial TRO at 8). "Indeed, Plaza is in serious jeopardy of losing customers to other stores, destroying its good will built up over the years" (*id.*). Jan. 9, 2012 Renewed "Emergency" TRO A "new wave of activity . . . has suddenly picked up to such a fervent rate that the present supermarket operations may be so compromised that they will no longer be viable if the Court does not intervene" (Renewed	Plaza Extra Stores Generally Maher Yusuf, on behalf of United Corporation d/b/a Plaza Extra, testified that: • the stores are still open; • vendors are getting paid; • employees have not been intimidated; • rather, employees are all getting paid; • customers have not been lost; and • the operations are otherwise normal. (Defs. FoF ¶¶ 220-22). Yusuf Yusuf, a United employee and co-manager of Plaza Extra East, similarly testified that none of the Hameds' TRO hyperbole has come to pass. (Defs. FoF ¶ 257). Yusuf Yusuf also attested to the good cause related to Wadda Charriez's termination. (Def. FoF ¶¶ 233-256). Ayman Al-Khaled, who currently serves as a controller at United Corporation d/b/a Plaza Extra, and is familiar with its finances and operations, also testified that there have been no unusual disruptions at the Plaza Extra Stores. (Defs. FoF ¶ 271). Plaza Extra East St. Croix Waleed Hamed, an employee at Plaza Extra East, acknowledges that, as reflected by recent actual photographs of the store, including of its warehouse and inventory areas, the "grocery store [is] full of inventory [and] is not about to close any time soon." (Defs. FoF ¶ 157). Mufeed Hamed, an employee at Plaza Extra East, likewise acknowledges that the store is open and fully stocked, its warehouse is

TRO at 1). "[S]tore employees are being intimidated—threatening a major business and 600 jobs" (*id.*). "[Fathi] Yusuf has engaged in numerous acts that now have arisen to the level of requiring emergency relief," including "Threats to close the store as a means of intimidating employees," and "Refusal to pay valid supplier amounts & interference with ordering" (*id.* at 3). "[T]he defendants have crossed the Rubicon – they are out of control" (*id.* at 4). Without an injunction, "there will be nothing left to save" (*id.* at 4).	fully stocked, the vendors are all getting paid, and the store's employees are all getting paid. (Defs. FoF ¶ 199). Yusuf Yusuf, a co-manager of Plaza Extra East as noted above, also confirms that the store is operating normally. (Defs. FoF ¶ 257). <u>Plaza Extra West St. Croix</u> Hisham Hamed, an employee at Plaza Extra West St. Croix, testified that, since the Hameds started this lawsuit, the only operational "problem[]" that allegedly has resulted at Plaza Extra West is that he and Maher Yusuf, a co-manager, "[are] not getting along." (Defs. FoF ¶ 187). <u>Plaza Extra St. Thomas</u> Waheed Hamed, an employee at Plaza Extra St. Thomas, acknowledges that the St. Thomas store is currently operating in the normal course. (Def. FoF ¶ 176). Karema Dorsette, an employee at Plaza Extra St. Thomas, also confirmed that she is employed and the store is still open. (Defs. FoF ¶ 191).

In addition, at best, the testimony and evidence reflect the following *competing inferences* concerning the alleged partnership that, again, "must be submitted to the fact finder." *USX*, 68 F.3d at 827; *Smith v. Robson*, 44 V.I. at 60-61; *Rivkin*, 914 F. Supp. at 79.

1. <u>Gross Profits:</u> The plaintiff claims that he "and [Fathi] Yusuf have shared the profits distributed from these three Plaza Extra supermarkets since the mid-1980's" (Initial TRO at 1).

Regardless of any possible entitlement to a profit distribution, Mohammad Hamed has not introduced into evidence a single document establishing (a) that he ever received a share of the supermarket profits at any time over the past 26 years, as opposed to a salary as a regular employee; or (b) that United Corporation d/b/a Plaza Extra ever shared with or distributed to Plaintiff any of its profits. (Defs. FoF ¶ 118). Further, during the criminal proceedings, Waleed Hamed and Waheed Hamed, as co-defendants in the Criminal Action and co-signatories of the Plea Agreement, never expressed the claim that Plaintiff held any interest in the Plaza Extra supermarket operations

as an alleged "partner" with Fathi Yusuf or otherwise; or the claim that any Hamed family member had received any share of the profits distributed from the supermarket operations. (Defs. FoF ¶¶ 160, 162). To the contrary, the Hameds actively represented to the Government and others that United Corporation d/b/a Plaza Extra was a *de jure* Virgin Islands corporation and that no Hamed possessed any interest in Plaza Extra as a partnership or otherwise. (Defs. FoF ¶¶ 55, 56, 60, 63).

2. <u>Repayment of a Debt/Loan:</u> *The plaintiff claims "there is no evidence in this record that the funds paid to [Mohammad] Hamed were only for the repayment of a loan" (Jan. 30, 2013 Reply at 3).*

First, the claim assumes a disputed fact, *i.e.*, that "funds [have been] paid to Hamed." As noted above, Plaintiff has not introduced into evidence a single document or financial record establishing that he in fact ever received any "funds" or supermarket profits at any time over the past 26 years, or that "funds" were ever distributed to him. (Defs. FoF ¶ 118). Second, regarding the loan issue, Mohammad Hamed testified that Fathi Yusuf "need[ed] money" to re-pay loans to "people," and Mr. Yusuf thus asked Plaintiff for a loan to help re-pay the other loans. (Defs. FoF ¶ 104). Plaintiff concedes that he loaned Fathi Yusuf various monies totaling approximately $250,000. (Defs. FoF ¶ 105). Plaintiff also testified that, because those monies were loans, Fathi Yusuf offered to pay "interest" in repayment of such debt. (Defs. FoF ¶ 106). Thus, the evidence in this record plainly reflects a competing inference concerning whether any profit distributions – of which, again, there is no documentation whatsoever – were received in payment of Fathi Yusuf's such debt.[8]

3. <u>Obligation to Share Losses:</u> *The plaintiff claims in his papers to "own 50 in the . . . loss" of the "supermarket" (Jan. 25, 2013 Hr'g Tr. at 200:16-23).*

This naked claim is not supported by the record evidence. Plaintiff also testified that Fathi Yusuf – in Mr. Yusuf's name alone – obtained separate bank loans, and signed the loan documents

[8] *See* V.I. Code Ann. tit. 26, § 22(c)(3)(i) (receipt of profit shares does *not* create a presumption of a partnership if "the profits were received in payment of a debt by installments or otherwise").

and personal guaranties for such financing himself. (Defs. FoF ¶ 109). In contrast, Plaintiff has not provided a single document reflecting his own personal liability for any partnership obligation of any kind. (Defs. FoF ¶ 113). Plaintiff likewise concedes that he has never signed any loan document, written guaranty or other such paper for any documented financial loss or liability for any of the supermarket operations. (Defs. FoF ¶ 114). Indeed, when the Government indicted United Corporation and Fathi Yusuf, and threatened the loss of liberty as a potential liability, Plaintiff was neither indicted nor did he appear to stand alongside his alleged "partner."

4. <u>Right of Control:</u> The plaintiff asserts that, based on certain alleged "admi[ssions]" made by Fathi Yusuf during a deposition taken over 12 years ago, and on the issuance of certain notices, "it is clear [Mohammad] Hamed exercises joint control"(Jan. 30, 2013 Reply at 5). Plaintiff asserts also, absent any citation, that "other established [sic] hearing testimony included similar compelling evidence that the operations of all three Plaza Extra supermarkets are jointly managed by the Hamed and Yusuf interests" (id.).

The record evidence directly conflicts with those naked assertions. Specifically, Plaintiff admitted to being a mere warehouse employee in one of the stores, Plaza Extra East, from which position he "retired" a "[l]ong time ago." (Defs. FoF ¶ 110). Plaintiff also confirmed that all of his sons are mere "employees" themselves. (Defs. FoF ¶ 116). Nor was there any alleged "internal 'two party' procedure . . . requiring both partners to agree" to management decisions (Jan. 30, 2013 Reply at 15), as Plaintiff expressly testified that he did not have any right of joint control or management because "*Mr. [Fathi] Yusuf, he is in charge of everybody*" and in charge of "*all the three store[s].*" (Defs. FoF ¶ 115). Plaintiff's son, Waleed Hamed, agreed and acknowledged that Fathi Yusuf has the ultimate responsibility for the entire operations of United Corporation d/b/a Plaza Extra and the "ultimate call" over those operations. (Defs. FoF ¶ 126).

5. <u>Rent Notices:</u> The plaintiff asserts that "control" is somehow demonstrated because "Fathi Yusuf continues to this date to send rent notices to [Mohammad] Hamed at the 'Plaza Extra Supermarkets' regarding rents [sic] payments and eviction" from the Plaza East Store (Jan. 30, 2013 Reply at 4).

However, it is undisputed that United Corporation does business as "Plaza Extra." (Defs. FoF ¶ 295). Thus, as John Gaffney (one of United Corporation d/b/a Plaza Extra's controllers)

explained, the rent notices that United Corporation d/b/a Plaza Extra provided to the Plaza Extra East store were simply "intracompany" internal accounting transactions, *i.e.*, "an intra-company payable due to/from," which income is "offset by an expense" and thus is "washed" in the final analysis on United's tax returns. (Defs. FoF ¶ 296). At best, the parties' dispute regarding this rent issue, as with all of their factual disputes concerning the alleged partnership, should be decided by the fact-finder, *i.e.*, a jury, at a trial on the merits after a full record can be developed.

6. <u>Attorney DeWood Communications:</u> The plaintiff also relies on the communications, starting on February 10, 2012, of "Fathi Yusuf's attorney, Nizar DeWood" (Initial TRO at 3).

Waleed Hamed testified that the "problems" between the Yusufs and Hameds that gave rise to this action developed no later than *February 7, 2012*. (Defs. FoF ¶ 149). The parties thereafter commenced settlement "discussions" with attorneys. (Defs. FoF ¶ 150). Accordingly, the subject communications from Attorney DeWood, who was attempting to resolve those "problems" as legal counsel for Fathi Yusuf, were transmitted *after* the "problems" developed and *after* the parties' settlement "discussions" commenced. Pursuant to Federal Rule of Evidence 408, the communications are thus inadmissible to prove the existence of any alleged partnership.

7. <u>Parties' Own Designations and Casual Use of the Word "Partner":</u> The plaintiff harps upon the alleged "dispositive admissions" of Fathi Yusuf, including his testimony in an unrelated action provided over 12 years ago when the word "partner" was used (Jan. 30, 2013 Reply).

The record evidence reflects that both sides have historically characterized their relationship through the casual or slang use of the term "partner," including in contexts in which the law clearly would not ascribe any legal meaning to such casual reference. For example, in describing his management duties, Plaintiff's son, Waheed Hamed, testified that the Plaza Extra St. Thomas store is co-managed "by [him] and [his] *partner* which is one Yusuf one Hamed in each store." (Defs. FoF ¶ 170). When Waheed Hamed then was asked to disclose the terms of his self-labeled partnership with Nejeh Yusuf, Waheed Hamed retreated from the statement and his misuse of the term

"partner" – in any legal, substantive sense – was exposed. (Defs. FoF ¶ 173). Similarly, when the Government in the Criminal Action questioned whether the Plaza Extra supermarkets were being operated as a partnership, which is the same claim that Plaintiff has alleged in this action and was based upon the very same deposition testimony, the defendants in the Criminal Action, including Waleed Hamed and Waheed Hamed, never expressed the view that their father (the plaintiff here) held any interest in the supermarket operations as a "partner" or otherwise. (Defs. FoF ¶ 162). To the contrary, Plaintiff's supposed agent here, Waleed Hamed, actively represented to the Government and the District Court that the operations of the supermarkets by United Corporation was at all times as a *de jure* corporation, in which Mohammad Hamed held no interest or ownership whatsoever. (Defs. FoF ¶¶ 63, 64, 66, 69, 70).

More importantly, Plaintiff's heavy reliance on the parties' own designations is misplaced, as "the existence of a partnership is not determined by the parties' designation of their arrangement. Instead, it depends primarily upon the intention of the parties ascertained from the terms of any agreement, from the parties' acts and from the surrounding circumstances as a whole." *In re Lona*, 393 B.R. 1, *16 (Bankr. N.D. Cal. 2008) (citation omitted). *See also Byker v. Mannes*, 641 N.W.2d 210, 211, 216 (Mich. 2002) ("In determining whether a partnership exists, . . . it is unimportant whether the parties would have labeled themselves 'partners.'") ("The law must declare what is the legal import of [parties'] agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable."); *Cont'l Res., Inc. v. PXP Gulf Coast, Inc.*, No. CIV-04-1681-F, 2006 U.S. Dist. LEXIS 72870, at *54 (W.D. Okla. Oct. 5, 2006) ("the manner in which the written [or oral] agreements characterize or label the parties' relationship is not conclusive in determining whether a partnership [or a joint venture] has been created") (addressing Texas UPA).

Plaintiff's heavy reliance on Fathi Yusuf's testimony in an unrelated action and on other such alleged "admissions" as substantive facts in this action is likewise misplaced. Fathi Yusuf strongly

disputes that his testimony, provided over 12 years ago in an underdeveloped record in a different action, should be deemed an "admission" or fact relating to the present claims by Mohammad Hamed, a non-party to the prior unrelated action, regarding any alleged *de jure* partnership between himself and Fathi Yusuf. This is especially apparent where Fathi Yusuf – as well as Waleed Hamed, Waheed Hamed, and the other defendants in the Criminal Action – affirmatively represented to the Government that Mohammad Hamed held no interest in the supermarket operations whatsoever, as confirmed by United Corporation d/b/a Plaza Extra's stock ownership and governmental tax filings since its inception.[9]

At bottom, Plaintiff failed to issue a subpoena for Fathi Yusuf's appearance at the TRO hearings and otherwise opposed Defendants' desire to conduct limited discovery prior to the hearings. (Defs. FoF ¶ 38). Plaintiff, who carries the *heavy* burden of proof in seeking the *extraordinary* and *drastic* remedy of preliminary injunctive relief, thus should not now be heard to complain about his own doing or be allowed to bootstrap matter from a different decades-old case into this action. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.") (citation omitted). Plaintiff's disingenuous attempt to improperly shift the burden of proof should be summarily rejected and simply highlights the weakness of Plaintiff's case.

8. <u>Removal of Assets:</u> The plaintiff spends a lot of energy discussing "the $2.7 million withdrawal" and asserting his belief that the possible removal of assets from this Court's jurisdiction constitutes irreparable harm (Jan. 30, 2013 Reply at 5).

---

[9] Regardless, courts may not take judicial notice of either factual findings or the record of a different case, including testimony, as substantive proof of the matters asserted. *See, e.g.*, 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (a court "cannot take judicial notice of truth of facts found in another case"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases).

Maher Yusuf testified that the referenced withdrawal was not concealed from the Hameds in any way, but, instead, was properly documented by United Corporation d/b/a Plaza Extra, to which documentation the Hameds had equal access at all times, and even received on numerous occasions. (Defs. FoF ¶ 229). It is also undisputed that the Hameds have viewing access to all of the subject supermarket accounts. (Defs. FoF ¶ 227). Indeed, as addressed in greater detail in Defendants' October 10, 2012 Response at pages 14-18, Plaintiff has introduced no evidence whatsoever demonstrating that a money judgment would be "unsatisfiable" in light of Defendants' respective resources ***in St. Croix independent of the supermarket profits at issue***; or otherwise demonstrating that a foreign jurisdiction would fail to allow the plaintiff his day in court or ability to recoup any final award entered after a trial on the merits. ***Plaintiff has not even addressed these requisite showings.*** *See, e.g., Todi v. Stursberg*, No. 01-2539, 2001 U.S. Dist. LEXIS 11270, at *18-20 (E.D. Pa. Aug. 1, 2001) (no irreparable harm where, as here, "plaintiff has not presented any evidence to demonstrate that the money judgment he seeks would be unsatisfiable" "nor did plaintiff demonstrate that defendants have attempted to disguise assets in an effort to conceal them from plaintiff and thus prevent a monetary recovery in this case").

Tellingly, Plaintiff's repeated focus on the withdrawal highlights his true intent in bringing this action, as Waleed Hamed acknowledged: to recoup money damages. However, as noted, "a preliminary injunction should not be granted if the injury suffered can be recouped in monetary damages." *IDT*, 250 Fed. Appx. at 479 (citation omitted); *Todi*, 2001 U.S. Dist. LEXIS 11270, at *18 ("extraordinary injunctive relief is not warranted . . . where plaintiff has an adequate remedy at law in the form of a money judgment").[10]

---

[10] Plaintiff's suggestion in this context that Defendants should just "stipulate" to Plaintiff's demands (Jan. 30, 2013 Reply at 15) "is sheer persiflage," *i.e.*, sheer banter. "The law – much less a court of equity – should not compel a litigant to sign away the farm in order to save the crops." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (3d Cir. 1996) (cited by Plaintiff).

9. Testimony of Maher Yusuf: The plaintiff asserts that Maher Yusuf allegedly has "ratif[ied]" the "agreement" (Jan. 30, 2013 Reply at 5).

Maher Yusuf merely testified about an ambiguous "agreement" between Fathi Yusuf and Mohammad Hamed as to "[o]nly profits," and about which ambiguous "agreement" Maher Yusuf did not otherwise know any "details." (Jan. 31, 2013 Hr'g Tr. at 34:20-24, 35:1). However, the "agreement" that Maher referenced is clearly *different than* the partnership agreement that Plaintiff has alleged in this action. Specifically, Plaintiff's alleged partnership agreement allegedly includes "50/50 sharing of losses, joint management . . ., joint control . . ., authority of . . . agents, [and] joint ownership." (First Amended Complaint at ¶ 35). Maher Yusuf testified to no such terms. Thus, at best, Maher Yusuf and Plaintiff are each referring to two entirely different alleged agreements.[11]

G. Plaintiff's Own Cases Support Denial of the Requested Injunction

Defendants invite this Court to read the cases on which they have relied, as well as Plaintiff's own cases. Significantly, none of the cases relied upon by Plaintiff, when analyzed in a full context, supports Plaintiff's instant invitation to commit reversible error.[12]

---

[11] As shown in greater detail in Defendants proposed findings of fact, Mohammad Hamed's testimony during the TRO hearings of his alleged agreement with Fathi Yusuf materially conflicts with the partnership agreement that is alleged in the complaint. (Defs. FoF ¶ 112). For example, Plaintiff now has testified that he never had any right to joint control or management of the supermarket operations ever. (Defs. FoF ¶ 115).

[12] For example, the cases cited in Plaintiff's January 30, 2013 Reply are easily distinguished. *See Scarcelli v. Gleichman*, No. 2:12-cv-72, 2012 U.S. Dist. LEXIS 57776, at *1 & *6 (D. Me. Apr. 25, 2012) (unopposed motion; court deemed true all allegations in the complaint based on default; "substantial evidence" that defendant "[wa]s experiencing substantial financial distress and [wa]s unable to meet her financial obligations when due," none of which factors are present here); *Ross-Simons*, 102 F.3d at 12, 20 (unfair trade/competition case; goodwill pegged "to the uniqueness of Baccarat crystal," in the absence of which customers might forego business with the movant and "enlist[] instead with a competitor who offers the full spectrum of desired products," which the movant had already "advertised" in its sales catalogs); *Health and Body Store, LLC v. Just-Brand Limited*, No. 11-cv-6638, 2012 U.S. Dist. LEXIS 129917, at *2-3 (E.D. Pa. Sept. 11, 2012) (initial preliminary injunction motion *denied*) (trade case; goodwill pegged to exclusive control of unique commodity (websites); corporate filings and "certain tax documents reflected" existence of joint venture, whereas this is not an unfair trade case and there is absolutely no corporate or tax documentation

CONCLUSION

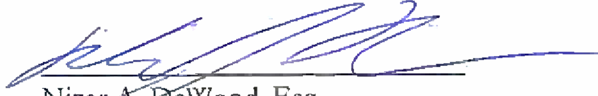
An injunction "'should be granted only in limited circumstances.'" *Barclays*, 938 F. Supp. at 307 (citation omitted). "'This proposition is particularly apt in motions for preliminary injunctions, when the motion comes before the facts are developed to a full extent through the normal course of discovery,'" as applies here. *Barclays*, 938 F. Supp. at 307 (citation omitted).

Plaintiff in this action has failed to meet the *heavy* and *exacting* burdens of a preliminary injunction. At best, there are simply too many issues of material disputed fact to support the equitable relief that Plaintiff – with unclean hands – has requested, especially as to a defendant, United Corporation, who is indisputably not a party to the alleged partnership at issue. The case law, including the cases relied upon by Plaintiff, also uniformly establish that this partnership dispute, if it survives dismissal as a matter of law, *must be* submitted to the fact-finder, *i.e.*, the very jury that Plaintiff has demanded, for a trial on the merits – and not on this incomplete preliminary record. For the reasons set forth above, Defendants respectfully request that this Court deny the injunction request in its entirety.

---

reflecting Plaintiff's claims here); *Sonwalkar v. St. Luke's Sugar Land P'ship*, No. 01-11-00473, 2012 Tex. App. LEXIS 6794, at *32-36 (Tex. App. Aug. 16, 2012) (written partnership agreement; termination of partnership interests, absent right to manage or control operations, "does not demonstrate" irreparable harm; movants there had "non-pecuniary management rights," whereas Plaintiff here admits to having no such rights); *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113-15(2d Cir. 2003) (mere breach of "bargained-for minority [management] rights" that were memorialized in a written joint venture agreement "itself constitutes irreparable harm," whereas there is no such written agreement and no such management rights here); *Int'l Equity Invs., Inc. v. Citigroup Venture Int'l Brazil, LLC*, 441 F. Supp. 2d 552, 564 (S.D.N.Y. 2006) (written agreement memorialized management rights at issue (to participate in control of investment fund); court also "lack[ed] confidence that defendants w[ould] behave in an honorable fashion absent legal compulsion," whereas no such finding is warranted here); *Sheridan Broadcasting Networks, Inc. v. NBN Broadcasting, Inc.*, 693 A.2d 989, 995 (Pa. Super. Ct. 1996) (written partnership agreement memorialized management rights at issue; irreparable harm where defendant had "failed to return confidential attorney-client documents" and where "none of [movant]'s employees were being compensated for services rendered" and "[it] was unlikely that [movant] would be able to continue its business operations" absent injunction, whereas the stores here are open and fully stocked and employees are all getting paid in the normal course, and there is no concern regarding "access to [Plaintiff's] documents prepared for litigation").

Dated: March 4, 2013 Respectfully submitted,



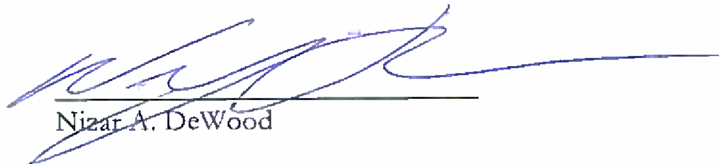
Nizar A. DeWood, Esq.
USVI Bar No. 1177
THE DEWOOD LAW FIRM
2006 Eastern Suburb, Suite 102
Christiansted, V.I. 00820
T. 340.773.3444
F. 888.398.8428
info@dewood-law.com
Counsel for Defendants Fathi Yusuf and United Corporation

-and-

Joseph A. DiRuzzo, III
USVI Bar # 1114
Christopher M. David
S. Ct. BA. No. 2013-0010 (pro hac vice)
FUERST ITTLEMAN DAVID & JOSEPH, PL
1001 Brickell Bay Drive, 32nd Floor
Miami, Florida 33131
305.350.5690 (T)
305.371.8989 (F)
jdiruzzo@fuerstlaw.com
cdavid@fuerstlaw.com
Co-counsel for Defendants Fathi Yusuf and United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, a true and accurate copy of the foregoing was forwarded via email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com; and *K. Glenda Cameron, Esq.*, Law Offices of K.G. Cameron, 2006 Eastern Suburb, Suite 101, St. Croix, VI 00820, kglenda@cameronlawvi.com.



Nizar A. DeWood