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

MOHAMMAD HAMED, by his authorized agent WALEED 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
MOHAMMAD HAMED, *Plaintiff*, vs. **FATHI YUSUF,** *Defendant.*	Case No.: SX-2014-CV-278 **ACTION FOR DEBT AND CONVERSION** JURY TRIAL DEMANDED

HAMED'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE HAMED'S "RESPONSE RE JURY ISSUES"

Because Defendants recently began suggesting in emails sent to the Special Master that none of the remaining issues were triable by a jury, [1] Hamed filed a formal *Response* to those assertions on September 27, 2016. That "Response Re Jury Issues"

[1] That email chain was attached as Exhibit 1 to Plaintiff's September 27th filing.

explained why there are issues still triable by a jury remaining in this case and why the Court is required to submit them to a jury.

Defendants have now moved to strike that filing, again asserting that the Plaintiff has no right to a jury on any of the remaining issues, **despite the fact that the Defendants do not deny that a timely request for a jury on issues at law was made at the outset of this case, and the V.I. Supreme Court has recently made it clear that other issues raised here *must* go to the jury.**

Therefore, for the reasons set forth herein, it is respectfully submitted that this motion should be denied and all factual issues in dispute should proceed to a jury trial.

I. The Facts – The Plaintiff was not out of time in filing his Response.

On September 29, 2014, Yusuf filed his motion to strike Hamed's original *Jury Demand* in this case. However, just a week later, **before Hamed's opposition was due**, the Court verbally ordered, in a conference call, that the "pending motions" then before the Court were being "held in abeyance" until the dissolution process had proceeded. This order as to the stay of the pending motions practice was accurately described by Defendant's counsel, Gregory Hodges, in a recent filing with the Court:[2]

> 1. Discovery in this case has been stayed since October 7, 2014. On that date, during a telephonic hearing, this Court explained that discovery was stayed to allow the liquidation process of the partnership. . .to proceed.
>
> 2. The Court advised that the stay of discovery would allow the parties to "focus on working on the details of the plan" for winding up the Partnership See Exhibit A - October 7, 2014 Hearing Transcript; 6:16-17, The Court acknowledged that discovery may be needed at some later point, after the initial liquidation process was put in place. The Court explained its hope that "perhaps some of the issues that are deemed important now, and

[2] *See* pages 1-2 of Yusuf's *Emergency Motions to Quash Subpoenas, Stay Enforcement of or Limit the Scope of Subpoenas,* dated June 29, 2016. Attached as **Exhibit 1**.

> some of the discovery that's deemed necessary now, may turn out not to be necessary." *See* Exhibit A, 11:10-12.

This same paragraph, authored by defense counsel, then continued, *expressly* acknowledging as follows regarding all motions. (*See* **Exhibit 1**):

> Likewise, **the Court acknowledged that there were a number of pending motions that the Court was holding in abeyance pending the parties' efforts to proceed with the liquidation process** that will be addressed at a later point assuming they, too, are not otherwise rendered moot. (Emphasis added.)

Plaintiff's counsel understood the procedural situation to be *exactly* what Hodges described. If it was not the Court's intent that the then pending motions practice be placed in abeyance, "pending the parties' efforts to proceed with the liquidation process" and that they would be "addressed at a later point" -- that was not either side's understanding.[3] There can be no doubt this Court held all motions in abeyance, including Defendants' September 29, 2014, *Motion To Strike Jury Demand*, so that no response was allowed.

However, after the Special Master signaled the impending end of this phase of the dissolution process by email on August 31, 2016, defense counsel began forcefully raising *this jury issue* again. It was clear the dissolution process had not rendered this issue moot. As such, Hamed filed a "Response Re Jury Issues" to set forth the correct

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[3] Similarly, Yusuf's counsel statement that he understood that all such motions would resume and "be addressed at a later point, assuming they too were not otherwise rendered moot," was also the same understanding counsel for the Plaintiff had. Moreover, if this was not the Court's intent, this was clearly a mutual and understandable error. As no order has issued and all discovery and other non-dissolution practice has been in abeyance during the dissolution efforts, there certainly has been no prejudice.

law on this issue. No motion to allow a late filing was required pursuant to this Court's prior order holding all motions in abeyance.

Thus, the Plaintiff's "Response Re Jury Issues" that the Defendants seeks to strike is neither out-of-time nor without merit.

II. The Right to a Jury Trial cannot be summarily waived.

Even if the Plaintiff's filing were somehow deemed untimely, Defendants' argument that a properly demanded jury trial is waived if a response to a motion to strike the initial demand is late is also without merit. [4] The granting of the motion to strike would effectively result in a waiver of the Plaintiff's right to a jury trial, which was properly demanded in both the initial Complaint and Amended Complaint.

Such a waiver cannot be allowed for several reasons. Indeed, as will be noted, the **Defendants have not cited one case which reached such a Draconian result!**

1. *Procedural Waivers of Jury Demands to be "*scrutinized with the utmost care": *Yusuf is in Error Regarding the Authority Cited as to Waiver of Right to Jury*

In a contemporaneous filing,[5] Defendants cite several cases for the proposition that a jury right can be waived by mere late filing of the opposition to a motion.

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[4] To the contrary, even when an opposition memorandum is not filed, the Court CANNOT deem the motion conceded, as it still must address the merits of the motion despite the lack of any opposition. *See, e.g., Hodge v. Virgin Islands Water and Power Authority*, 55 V.I. 460, 463–64, 2011 WL 6936480, at *2 (V.I.Super., 2011)(Court must address motion on merits even if no opposition or a belated opposition is filed); *People of the Virgin Islands v. Rivera*, 54 V.I. 116, 125, 2010 WL 4723455, at *4 (V.I.Super., 2010)(Motion to deem unopposed motion conceded must be denied, as motions must be addressed on their merits even when no opposition is filed).

[5] Indeed, Defendants have already fully responded to Hamed's Response. They filed a *Reply* to this "*Response Re Jury Issues*" in a separate pleading at the same time it moved to strike that "Response."

However, **none of the cases cited do deal with that topic** – they all deal with waiver by failure to make an initial demand for a jury until very late in the trial.[6] It is VERY useful to review exactly what Yusuf attempts to 'suggest' to the court in that contemporaneous filing at p. 2 – as it highlights why they are also wrong here:

> As indicated above and argued elsewhere, the Court should reject Plaintiffs response out of hand.[2] Like other constitutional rights, a party may waive his or her right to a jury trial, in a number of different ways. See Fed. R. Civ. P. 38(d) ("A party waives a jury trial unless its demand is **properly served and filed**."); Burgess v. Hendley, 26 V.I. 173, 175 (Terr. Ct. 1991)(waiver not rescinded by **belated claim** of inadvertence or change of "trial strategy"). (Emphasis added.)

Both authorities cited relate *solely* to the failure to demand a jury in the initial complaint. On its face, Rule 38 deals with failure to *initially* file the demand and serve it – **but that clearly did not happen here.**

Burgess v. Hendley, referenced in the above quote, is the exactly the same thing. The action was filed in 1990 without a jury demand. The case was then reassigned, a first amended complaint filed, answers were filed, a pre-trial conference was held and discovery set. Then the case was again re-assigned, that judge recused himself, a further pre-trial was held – and then after a year had passed, in 1991, a jury demand was *first* made. *Id.* at 26 V.I. 173, 173–74, 1991 WL 11818252, at *1 (Terr. V.I. Aug. 16, 1991).[7] No cases cited provide any support for denial of a jury trial because of a filing

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[6] As noted, there is no dispute that the Plaintiff included a proper demand for a jury trial in the initial and amended complaints, which distinguishes all of the cases cited by the Defendants, as will be discussed herein.

[7] It should be noted that *even when* a jury trial is not demanded initially, it is routinely allowed at the discretion of the court – because of the critical, constitutional importance of the right to trial by jury. *See, e.g., JnLouis v. Pueblo Int'l, Inc.*, No. 1642/1981, 1983 WL 952738, at *1 (Terr. V.I. June 7, 1983).

limit on a motion to strike. Likewise, aside from substantive jury waivers that are contained in contractual agreements,[8] Hamed cannot locate a single case where the Court granted a procedural waiver of the right to jury simply because of a late response if there was a proper request at the outset of the case.

Here you have the clear factual understanding of the parties as to the Court's abeyance of motions. In addition, *after the filing of Defendants' motion to strike the jury demand*, the V.I. Supreme Court changed the legal understanding of the requirements for a jury trial when factual matters were raised in regard to statutes of limitations. *United Corporation v. Waheed Hamed*, 2016 WL 154893, at *7 (Jan. 12, 2016). That

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> The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied.
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> 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil, Section 2334 at 116 (1971). **Furthermore, the following statement should be kept in mind: "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any, seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'"** *Collins v. Government of the Virgin Islands*, 5 V.I. 622, 632, 366 F.2d 279, 284 (3d Cir. 1966) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)). (Emphasis added.)

[8] See, *e.g.*, *Donnelly v. Branch Banking & Trust Co.*, 91 F. Supp. 3d 683, 701, 2015 WL 926022 (D. Md. 2015) (Waiver of "plaintiffs' jury demand, relying on jury trial waivers contained in the original Guaranty Agreement") and see, *e.g. Regions Bank v. Kaplan*, No. 8:12-CV-1837-T-17MAP, 2014 WL 4854304, at *2 (M.D. Fla. Sept. 29, 2014) ("Plaintiff Kaplan is a sophisticated businessman. The terms of the Deposit Agreement are not negotiable, but the Kaplan Parties were not obliged to open accounts at Regions Bank. There is no allegation that the Kaplan Parties were denied an opportunity to consult counsel, if they wished to do so.").

Court made it clear, in a related case, that there is a significantly heightened right to jury review of the factual basis of such defenses.

In short, there is the terse admonition in our case law that: "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any, seeming curtailment of the right to a jury trial should be scrutinized with the utmost care" as discussed in *JnLouis v. Pueblo Int'l, Inc.* As such, even if the Plaintiff's reply to the motion to strike had been untimely, the Court would still have to deny the motion to strike – especially where the law has changed, no order has issued and the substantive portion of the case has been on hold pending the dissolution proceedings.

III. The Plaintiff is entitled to a jury trial on all legal issues and, thus, should be given one on all equitable issues.

In his *Response Re Jury Issues*, Hamed raised one of the central issues here, recognized by the V.I. Supreme Court recently in a related case, that a jury ***must*** hear factually based statutory limitations defenses such as the ones presented here:

> . . . the nonmoving party cannot be required to definitively prove its case at summary judgment, or to even provide the most convincing evidence supporting its case. **Its only burden is to submit sufficient evidence to create a genuine issue of material fact for a jury to resolve.** (Emphasis added.)

United Corporation v. Waheed Hamed, 2016 WL 154893, at *7 (Jan. 12, 2016). This was obviously not included in Defendants' original motion and thus was not before the Court, as that decision was rendered after the September 29, 2014, motion to strike.

That case held, as a pure matter of law, that such factual issues must be decided by a jury where, as here, there are clearly contested facts surrounding the issues in

question. Following that V.I Supreme Court decision, such factual questions *cannot* either be (1) decided summarily, or (2) left to the Master rather than the Court without an agreement of the parties. Indeed, Plaintiff has filed several outstanding motions and other papers raising this point.[9] Thus, a jury must be empaneled.

Recognizing this fact, Defendants disingenuously try to assert that the Plaintiff *only* sought equitable relief in the Complaint and Amended Complaint. That argument is stunningly incorrect. The *Amended Complaint* specifically demanded a trial by jury "as to all issues triable by a jury." It then listed a number of specific damages at law – the removal and tortious conversion of the $2.7 million in partnership funds by a third party (United) (¶29), as well as the value of land taken by United (¶28(c)).[10] These are purely damage claims, which are triable by a jury as noted in the cases cited in the "Response Re Jury Issues," which are incorporated herein by reference. In fact, the theft of the $2.7 million by a third party was the precipitating injury and was the primary initial claim. While the Plaintiff also sought equitable relief regarding the structure of the partnership, there can be no doubt that claims at law were clearly asserted, as set forth in ¶38 of the Amended Complaint:

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[9] Indeed, in light of this new, related decision obtained by one of the Defendants in this case (United) against one of the other parties here (Willie Hamed), arising from the identical set of facts, this Court's ruling regarding the back payment of rent to United on April 27, 2015, predicated on findings of fact, is now erroneous and should, *sua sponte,* be vacated by this Court.

[10] After discovery began in this case, additional claims arose, like the conversion of legal fees previously mentioned in this Court's TRO opinion. See *Hamed v Yusuf*, 56 V.I. 117, 137, 2013 WL 1846506 at *6 (2013). These fees reached a total of $504,591 of United's attorneys fees being paid before the TRO finally stopped the conversion of more funds.

> 38. Mohammed Hamed is also entitled to compensatory damages for all financial losses inflicted by Yusuf on the Partnership and /or his partnership interest. . . .

Moreover, in citing the wrong line of cases – Defendants missed the clear, controlling law as it is firmly established that when a party seeks equitable relief with claims at law, the right to a jury trial on the claims at law are not waived despite the nature of the equitable claims. *See Dairy Queen v. Wood,* 369 U.S. 469, 478, 82 S.Ct. 894, 900, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506–07, 79 S.Ct. 948, 954–55, 3 L.Ed.2d 988 (1959).

As the U.S. Supreme Court further held in in *Ross v. Bernhard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), the holdings of *Beacon Theatres* and *Dairy Queen* provide that:

> where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. *Id.* at 537–38, 90 S.Ct. at 738.

These cases share the common theme in the references to procedural rules. In *Beacon Theatres,* Rule 13 authorized assertion of the legal counterclaim. In *Dairy Queen,* Rule 18 permitted joinder of all claims in one complaint. Thus, if the issues related to both the legal and equitable claims can be resolved in one lawsuit, then the right to a jury trial attendant to the legal claims will prevail.

Finally, while the Defendants try to ignore this fact, there is no dispute that United Corporation, a named Defendant, is not a partner, so that those damage claims cannot be part of the RUPA accounting and must be tried against United at law.

IV. Conclusion

Plaintiff's *Response Re Demand for Jury* was not untimely filed, nor can a properly demanded jury demand be waived by some subsequent procedural claim of waiver. Indeed, the V.I. Supreme Court, thanks to United Corporation, made it clear that factual issues are to be resolved by a jury.

Thus, the motion to strike should be denied, with all factual issues proceeding to trial before a jury.

Dated: October 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2016, I served a copy of the foregoing by email, as agreed by the parties, on:

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,** Additional Counterclaim Defendants	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

EMERGENCY MOTION TO QUASH SUBPOENAS, STAY ENFORCEMENT OF OR LIMIT THE SCOPE OF SUBPOENAS

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), through their undersigned counsel, pursuant to Super. Ct. R. 11(c), respectfully move this Court on an emergency basis to enter an order quashing two (2) subpoenas improperly issued to two banking institutions on May 31, 2016 or, in the alternative, to limit the scope of the subpoenas.

FACTUAL BACKGROUND

1. Discovery in this case has been stayed since October 7, 2014. On that date, during a telephonic hearing, this Court explained that discovery was stayed to allow the liquidation process of the partnership between Yusuf and Mohammad Hamed ("Hamed")[1] (the "Partnership") to proceed.

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EXHIBIT
1
Blumberg No. 5208

[1] Yusuf filed a Statement Noting the Death of Mohammed Hamed on June 22, 2016, which provided notice of Hamed's death on June 16, 2016. As a result of such death, any power of attorney given by Hamed to Waleed Hamed terminated. *See* V.I. Code Ann. tit. 15, §1265(a). To date, no motion for substitution of a representative of the estate of Hamed has been made.

2. The Court advised that the stay of discovery would allow the parties to "focus on working on the details of the plan" for winding up the Partnership. *See* **Exhibit A** – October 7, 2014 Hearing Transcript; 6:16-17. The Court acknowledged that discovery may be needed at some later point, after the initial liquidation process was put in place. The Court explained its hope that "perhaps some of the issues that are deemed important now, and some of the discovery that's deemed necessary now, may turn out not to be necessary." *See* Exhibit A, 11:10-12. Likewise, the Court acknowledged that there were a number of pending motions that the Court was holding in abeyance pending the parties' efforts to proceed with the liquidation process that will be addressed at a later point assuming they, too, are not otherwise rendered moot.

3. The Court also held that if the parties deemed discovery to be necessary in the interim, then, in that event, the process would be to file a motion explaining why a stay was counterproductive and to explain the "need to reopen discovery for any particular purpose" upon which the Court could then rule, following a recommendation by the Master. *See* Exhibit A, 6:18-19 and 11:13-19.

4. At no point has Hamed ever filed such a motion explaining the need for any specific discovery or requesting the Court to re-open discovery for any "particular purpose."

5. Instead, Hamed has circumvented the stay imposed by the Court by serving the subpoenas, attached as **Exhibit B**, upon the Bank of Nova Scotia and Banco Popular de Puerto Rico (collectively, the "Subpoenas"). The Subpoenas seek, among an extraordinarily broad range of information, documents relating to United's tenant accounts as well as information relating to Plessen Enterprises, Inc. ("Plessen"), neither of which are related to the Partnership or

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CONCLUSION

For all the foregoing reasons, Defendants respectfully request this Court to enter an order quashing the Subpoenas entirely. In the alternative, the Defendants request that the Subpoenas be modified to limit the information sought to only that information directly relating to Partnership liquidation and wind-up, which does not include information relating to Plessen or United's tenant account.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: June 29, 2016 By: Gregory H. Hodges by Charlotte K. Perrell with permission (V.I. Bar 1281)

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