2017 WL 3168458 (V.I.Super.)
Only the Westlaw citation is currently available.
Superior Court of the Virgin Islands,
Division of St. Croix.

Waleed HAMED, as Executor of the Estate of
Mohammed Hamed, Plaintiff/Counterclaim Defendant,
v.
Fathi YUSUF and United Corporation, Defendants/Counterclaimants,
Waleed Hamed, Waheed Hamed, Mufeed Hamed, Hisham
Hamed, and Plessen Enterprises, Inc., Counterclaim Defendants.
Waleed Hamed, as Executor of the Estate of Mohammed Hamed, Plaintiff
v.
United Corporation, Defendant.
Waleed Hamed, as Executor of the Estate of Mohammed Hamed, Plaintiff
v.
Fathi Yusuf, Defendant.

Civil No. SX–12–CV–370, Civil No. SX–14–CV–287, Civil No. SX–14–CV–278
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July 21, 2017

ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, and PARTNERSHIP DISSOLUTION, WIND UP, and ACCOUNTING
ACTION FOR DAMAGES and DECLARATORY JUDGMENT
ACTION FOR DEBT and CONVERSION

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO STRIKE JURY DEMAND

DOUGLAS A. BRADY, Judge of the Superior Court

***1** This matter came on for hearing on March 6 and 7, 2017 on various matters including Defendants' Motion to Strike Jury Demand, filed September 14, 2014; Plaintiff's Response Re: Jury Issues, filed September 27, 2016; Defendants' Motion and Memorandum in Support of Motion to Strike Plaintiff's Response and Reply Memorandum in Further Support of Motion to Strike Jury Demand, both filed October 14, 2016; and Plaintiff's Opposition to Motion to Strike Response, filed October 18, 2016. For the reasons that follow, the Court will

deny Defendants' Motion to Strike Response, and will grant Defendants' Motion to Strike Jury Demand.

Hamed's First Amended Complaint (Complaint) characterizes itself as an action for damages, injunctive and declaratory relief, and demands a jury trial. Count I requests declaratory and injunctive relief, together with compensatory and punitive damages, alleging a 50/50 partnership with Yusuf and that, pursuant to 26 V.I.C. § 75, Hamed "is entitled to legal and equitable relief as deemed appropriate to protect and preserve his partnership rights." Complaint ¶¶ 35–38. In Count II, Hamed requests "a judicial determination under 26 V.I.C. § 121(5) that it is not practicable to continue the Partnership with Yusuf so that Yusuf's partnership interests should be disassociated from the business." *Id.* ¶ 42. In Count III, Hamed alleges Yusuf's breach of duties due the partnership and his partner such that he is "entitled to declaratory relief finding that an amount equal to 50% of the Partnership profits and property held in United for distribution to or for the benefit of Yusuf are owed to Hamed under the Partnership Agreement or pursuant to a constructive trust for Hamed." *Id.* ¶¶ 44–46.

Pursuant to stipulation of Hamed and Yusuf, by Order entered September 18, 2014, the Court appointed Honorable Edgar D. Ross to serve as judicial Master in this action, to direct and oversee the winding up of the Hamed–Yusuf partnership. On January 7, 2015, following extensive input from the parties, the Court adopted the Final Wind Up Plan, by which the Master was to provide judicial supervision of the liquidation of partnership assets, and thereafter Hamed and Yusuf each would submit a proposed accounting and distribution plan for the Master's review and ultimate report and recommendation to the Court for final determination. Final Wind Up Plan, Section 9, Step 6.

Motion to Strike Response Re Jury Issues

Defendants argue that Hamed's Response must be stricken as filed grossly out of time, without seeking leave of Court for the untimely filing, signifying that Hamed's recent dissatisfaction with the Master has led him to seek to change the course of the litigation. Hamed asserts that his Response was not untimely because the Court's October 2014 stay of discovery included an express or *de facto* stay of motion practice as well.

The Supreme Court has repeatedly expressed that "there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules." *Joseph v. Bureau of Corrections,* 54 V.I. 644, 650 (V.I. 2011) (citations omitted). This preference applies in the context of this motion to decide the course of the pending litigation. In "doubtful cases," the opposing party should be provided the opportunity to be heard on the issues in dispute. Here, the Court perceives no prejudice to Yusuf in permitting consideration of Hamed's Response. Given the preference for deciding

cases on substance rather than procedural defects, and taking into account the complex history of this matter, the Court finds that it is appropriate to consider Hamed's Response.

Motion to Strike Jury Demand

***2** Defendants contend that the Seventh Amendment protects a litigant's right to a jury trial only in a cause of action that is legal in nature and involves a matter of private right. Motion, at 1 (citing *Granfmanciera, S.A. v. Norberg,* 492 U.S. 33, 42 n.4 (1989)); *see also, Penn v. Penn,* 14 V.I. 522, 525–26 (V.I. Super. Ct. 1978) (no right to jury trial in a divorce action); *Caron v. First Penn. Bank,* 16 V.I. 169, 178 (V.I. Super. Ct. 1979) (equitable relief sought in will contest affords no right to jury trial). Actions for accounting are equitable in nature to which the right to jury trial does not attach. *Efron v. Milton,* 892 So.2d 497, 499 (Fla. Ct. App. 2004). Defendants argue that because "each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership," that only a bench trial is appropriate. Motion, at 2–3.

Hamed asserts that the 1998 adoption in the Virgin Islands of the Revised Uniform Partnership Act (RUPA) opened the gate to permit the litigation of pre-dissolution legal and equitable claims between partners and requires that a jury determine his claims at law. Response, at 1–2 (citing 26 V.I.C. § 75(b)). Hamed asserted his right to trial by jury in his Complaint, ("A trial by jury is demanded as to all issues triable by a jury"), a right that he claims he has never waived. [1] He notes that his Complaint seeks not only injunctive and declaratory relief, but also compensatory and punitive damages, and that the filing of the lawsuit itself "was triggered by the conversion of $2.7 million dollars by Yusuf." Response, at 4.

1 Although the Court bases its ruling herein on a substantive analysis of Plaintiff's claims under Supreme Court Seventh Amendment jurisprudence, the Court alternatively finds that both Hamed and Yusuf have waived any right to trial by jury in this matter by virtue of their stipulation to the substance of the Final Wind Up Plan. Pursuant to the claims resolution procedure outlined in Step 6: Distribution Plan, each party, following liquidation of the partnership assets is to submit a proposed accounting and distribution to the Master who shall, in turn, "make a report and recommendation of distribution *to the Court for its final determination."* Thus, the Final Wind Up Plan, to which both partners have stipulated, clearly contemplates that the respective claims of the parties are to be tried by the Court rather than by jury. Hamed disputes that his stipulation to the Final Wind Up Plan constitutes a waiver of his right to trial by jury. Although the Court denies Yusuf's Motion to Stirke Hamed's Response Re: Jury Issues, Hamed's delay of more than two years in filing his Response also supports the Court's conclusion that Hamed has waived his right to trial by jury. Because the Court concludes that Hamed, despite the inclusion of a nominal, factually unsupported request for "compensatory damages," has presented only claims for equitable relief and is therefore not entitled to trial by jury, the decision to strike Hamed's jury demand is not based solely upon Hamed's waiver. Nonetheless, the Court finds that Hamed's stipulation to the Wind Up Plan does constitute a waiver of his right to trial by jury and, in turn, an independent ground for striking the jury demand from Hamed's Complaint.

As explained by the Supreme Court of the Virgin Islands:

> The right to a jury trial in a civil suit in the Virgin Islands is guaranteed by section 3 of the Revised Organic Act of 1954, which provides that "the first to ninth amendments" to the United States Constitution "are hereby extended to the Virgin Islands ... and shall have the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. Among these amendments extended to the Virgin Islands is the Seventh Amendment, providing that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII; *see also* 5 V.I.C. § 321 ("The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States shall apply in civil actions in the [Superior Court] of the Virgin Islands, except as otherwise provided by law.").

***3** *Samuel v. United Corporation,* 64 V.I. 512, 521–22 (V.I. 2016).

In *Ross v. Bernhard,* the Supreme Court of the United States recognized three factors to be considered by courts in examining whether a particular claim carries with it the right to a jury trial: 1) the customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970). "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.

In considering the *Ross* factors, the Court must, as a threshold matter, identify and characterize the various claims for relief presented by Plaintiff. Pursuant to the Court's Order entered April 15, 2016, civil cases SX–12–CV–370, SX–14–CV–287, and SX–14–CV–278 were consolidated and accordingly there are three operative Complaints in this matter. However, as Plaintiff did not demand trial by jury with respect to his Complaint in SX–14–CV–287, only those claims presented in the Complaints filed in SX–12–CV–370 and SX–14–CV–278 are at issue.

Plaintiff's Complaint in SX–12–CV–370, styled as an "action for damages, injunctive and declaratory relief," presents three untitled counts and fourteen individually numbered requests for relief. Counts II and III explicitly contemplate only declaratory and injunctive relief and therefore present purely equitable claims carrying no right to trial by jury. [2] Count I, in addition to incorporating, by reference, the antecedent factual allegations, consists of four separately numbered paragraphs.

2 Count II requests that "Yusuf's partnership interests... be dissociated from the business, allowing Hamed to continue the Partnership's business without him," on the grounds that "it is not practicable to continue the Partnership." Complaint ¶ 42. However, it makes little sense to speak of the "dissociation" of a partner in a partnership consisting of only two people, as any "dissociation" must necessarily result in the dissolution and wind up of the partnership. Thus, Count II of the Complaint is properly construed, not as a separate cause of action, but as a prayer for relief in the form of the dissolution and wind up of the partnership in the context of Hamed's cause of action under 26 V.I.C. § 75(b)(2)(iii). In any event, the Court has already effectively entered judgment on Count II of Plaintiff's Complaint, by dissolving the partnership and adopting the Final Wind Up Plan on January 7, 2015. Additionally, Count III of the Complaint presents no independent claim nor prayer for relief that is not already included in Count I. Thus, considered altogether, Plaintiff's Complaint presents only a single cause of action under 26 V.I.C. § 75(b)(2)(iii); the nature of which is discussed below.

***4** The first alleges the existence and relevant terms of the partnership between Hamed and Yusuf. The second paragraph states that "pursuant to 26 V.I.C., including § 75, Mohammad Hamed is entitled to legal and equitable relief as deemed appropriate to protect and preserve his partnership rights." The third paragraph alleges that Hamed "is entitled to declaratory and equitable relief as to his rights as well as injunctive relief to protect those rights, including the return of funds or creation of trust as to the Partnership funds improperly taken or spent by Yusuf and/or United to date in violation of the agreement between the parties."

Only the final paragraph of Count I makes any reference to damages, alleging that "Hamed is also entitled to compensatory damages for all financial losses inflicted by Yusuf on the Partnership and/or his partnership interest as well as punitive damages against Yusuf for his willful and wanton misconduct." However, Plaintiff has not alleged anywhere in his Complaint that Yusuf directly inflicted any financial loss upon the partnership or Hamed's partnership interest. [3] The Complaint itself attests to the informal nature of the partnership's financial practices by which Hamed and Yusuf, or their designated family members, each sporadically withdrew partnership profits for their own use on the understanding that ultimately each partner would be entitled to "an equal (50/50) amount of these withdrawals for each partner directly or to designated family members." Complaint ¶ 21. In this light, Plaintiff does not truly allege that Yusuf impermissibly or unlawfully withdrew partnership funds in such a manner as to give to rise to a claim for compensatory damages based upon any financial loss to Hamed. Rather, Plaintiff has alleged that Yusuf, as the partner in charge of managing partnership finances, [4] has withheld the various sums listed in the Complaint to which Hamed believes he is entitled according to his own personal accounting of his 50% partnership interest. [5] Thus, Plaintiff has not presented a legal claim for damages, but rather a claim for an equitable accounting of the partnership. "That such an accounting action results in an award of money to plaintiffs does not detract from the equitable nature of the remedy provided." *Siegel v. Warner Bros. Entm't, Inc.,* 581 F. Supp. 2d 1067, 1071–72 (C.D. Cal. 2008).

3 Here the Court uses the term *loss,* allegations of which may form the basis of a claim for compensatory damages, in contrast to allegations of improper gains or appropriation of money or property which, as discussed below, properly give rise to an equitable claim for restitution.

4 To the extent it is not already established by admissions of the parties and previous Orders of the Court, the Court now confirms its preliminary factual finding—as detailed at ¶ 19 of the Memorandum Opinion and Order entered April 25, 2013 (58 V.I. 117, 124)—that since the inception of the partnership, Yusuf acted as the managing partner, such that Hamed was completely removed from the financial aspects of the business. *See* Defendants' Brief in Opposition to Motion for Partial Summary Judgment Re Statute of Limitations Defense, filed June 6, 2014, at 11 ("Mr. Yusuf, as the partner admittedly in charge of all operations of the partnership...").

5 This distinction is subtle, but important. Compensatory damages indemnify an injured party for loss suffered as a result of a defendant's unlawful action. Here, Plaintiff has not alleged that Yusuf has taken anything from him or directly inflicted upon him a financial loss, but rather that Yusuf, as the *de facto* managing partner, has failed to fully and accurately account for Hamed's 50% partnership interest and thereby unjustly enriched himself at Hamed's expense. Accordingly, Plaintiff's prayers for relief variously request the "return of all funds," a declaration that funds and property are "subject to a constructive trust," and a declaration that Defendants would be "unjustly enriched" if not ordered to return such funds and property. Complaint, at 16 ¶¶ 3, 4, 9, 10. Thus, even to the extent that Plaintiff, at the conclusion of the accounting, may be entitled to an award of money, such an award would appear to be more in the nature of equitable restitution than compensatory damages. *See Great–West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 213–14 (2002) (noting that an action for restitution lies in equity where plaintiff seeks the return of particular funds or property in the defendant's possession). Either way however, an equitable action for accounting is not converted into a legal action for damages simply because the ultimate disposition of the action will potentially involve an award of money to Plaintiff. *See Phillips v. Kaplus,* 764 F.2d 807, 814 (11th Cir. 1985).

***5** The Supreme Court of the United States has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for 'the recovery of specific property or *monies,* ejectment from land, or injunction either directing or restraining the defendant officer's actions.' " *Bowen v. Massachusetts,* 487 U.S. 879, 893–94 (1988) (emphasis in original) (quoting *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 688 (1949)). In concluding that the "monetary relief" sought in a claim brought by a state government against the federal government for refusal to pay out Medicaid reimbursements constitutes a prayer for equitable relief rather than damages, the *Bowen* Court quoted, at length, Judge Bork's opinion in *Maryland Dept. of Human Resources v. Dept. of Health and Human Services,* 763 F. 2d 1441 (D.C. Cir. 1985), including the following passage:

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U. S. C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e.g., First National State Bank v. Commonwealth Federal Savings & Loan Association,* 610 F. 2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch v. Crouch,* 566 F. 2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to fixture

> installments); *Joyce v. Davis,* 539 F. 2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).
>
> In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought—specific relief, not relief in the form of damages. *Cf. Clark v. Library of Congress,* 750 F. 2d 89, 104 n. 33 (D.C. Cir. 1984) (dictum) (describing an action to compel an official to repay money improperly recouped as 'in essence, specific relief').

Maryland, 763 F. 2d, at 1446 (emphasis in original) (citation omitted).

Similarly, in this case, Hamed is seeking funds to which he is allegedly entitled pursuant to the terms of the partnership agreement between himself and Yusuf, "rather than money in compensation for the losses, whatever they may be, that [Hamed] will suffer or has suffered by virtue of the withholding of those funds." *See id.* Thus, as the term is understood and used in Supreme Court jurisprudence, Hamed has not presented any claim for "damages," but rather an equitable action for accounting pursuant to 26 V.I.C. § 75(b)(2)(iii). [6]

6 26 V.I.C. § 75(b)(2)(iii) codifies the right of one partner to maintain an action against the partnership or another partner to enforce the partner's "right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII of this chapter." In turn, subchapter VIII, § 177 explicitly provides that "[e]ach partner is entitled to a settlement of all partnership accounts upon winding up the partnership business."

***6** This construction of Plaintiff's Count I is supported by Plaintiff's accompanying prayers for relief, the very first of which requests a "full and complete accounting to be conducted by a court-appointed Master." Additionally, nine out of Plaintiff's fourteen individually numbered prayers for relief specifically request declaratory or injunctive relief including a declaration of the respective rights and obligations of the partners as well as the return of the various sums to which Plaintiff alleges he is entitled.

By contrast, only two of Plaintiff's fourteen requests for relief refer to damages; one compensatory, the other punitive. As to the first request, without describing or explaining to what other compensable losses he refers other than the withholding of those sums already forming the subject of Plaintiff's requests for equitable relief, Plaintiff seeks "an award of compensatory damages against the defendants, jointly and severally, as determined by the trier of fact." Similarly, absent any factual allegation which might justify such an award, Plaintiff additionally requests "an award of punitive damages against Yusuf as determined by the trier of fact." [7]

7 The remaining three requests for relief include requests for an award of prejudgment interest, an award of attorney's fees, and "any other relief the Court deems appropriate."

The Supreme Court of the United States has long held that the inclusion of a request for a nominally equitable remedy does not convert what is otherwise a legal claim into an equitable one. *See Phillips,* 764 F.2d at 814 (citing *Dairy Queen v. Wood,* 369 U.S. 469 (1962)). Conversely, the inclusion of a nominal, unsupported claim for damages does not transform an essentially equitable claim into a legal one. *See, e.g., Baker v. Detroit,* 458 F. Supp. 379, 384 (E.D. Mich. 1978) ("Great care must be taken in examining the complaint and the nature of the remedy sought so that a complaint which seeks essentially equitable relief is not subverted by the addition of damage claims to obtain a jury trial where none is justified under the law... the Court does not think that unsupported allegations should be allowed to obscure the fundamentally equitable nature of the claim which plaintiffs have brought"); *Lynch v. Pan American World Airways, Inc.,* 475 F.2d 764, 765 (5th Cir. 1973) ("imposition of monetary damages to make the employee whole for lost backpay does not change the character of the [equitable reinstatement] proceeding and thereby mandate a jury trial"); *Lafayette Club v. Dakota Rail, Inc.,* 1990 Bankr. LEXIS 1394, at *14 (U.S. Bankr. D. Minn. June 26, 1990) ("adding a meritless claim for damages to a case which is essentially equitable in nature does not furnish the right to a jury trial where one otherwise would not exist").

Thus, the Court finds that Count I of Plaintiff's Complaint in SX–12–CV–370, despite the inclusion of a nominal, unsupported request for compensatory damages, presents an equitable action for partnership accounting pursuant to 26 V.I.C. § 75(b)(2)(iii) as it seeks declaratory and injunctive relief protecting and preserving Hamed's 50% partnership interest upon dissolution and wind up of the partnership in accordance with the terms of the partnership agreement and the provisions of RUPA, codified at Title 26, Chapter 1 Virgin Islands Code. [8]

8 Plaintiff's Count I seeks a partnership accounting. As discussed in note 2 above, Plaintiff's Count II seeks the dissolution of the partnership, which consequently triggers a wind up of the partnership pursuant to 26 V.I.C. § 171. Count III presents no claim or prayer for relief not already included in Count I. Thus, considered together under the provisions of RUPA, Plaintiff's three counts do not present three separate causes of action, but rather a single, tripartite cause of action for the dissolution, wind up, and accounting of the partnership. *See* 26 V.I.C. § 75 (b)(2)(iii) (codifying the right of one partner to maintain an action against the partnership or another partner to enforce the partner's "right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII of this chapter;" which in turn explicitly provides in § 177 that "[e]ach partner is entitled to a settlement of all partnership accounts upon winding up the partnership business").

***7** Plaintiff's Complaint in SX–14–CV–278 nominally presents a claim for damages for debt, or alternatively conversion, in the amount of $802,955, which Plaintiff alleges he is owed in connection with the sale of certain real property originally purchased with partnership funds. However, in their Stipulation Re: Consolidation, filed March 21, 2016, the parties jointly stipulated to the substantive consolidation of SX–14–CV–278 with SX–12–CV–370 on the

basis of their agreement that "the claims in the more recently filed case SX–14–CV–278... may be treated as claims for resolution in the liquidation process of the older case SX–12–CV–370." [9] Thus, on the basis of Plaintiff's own representations, the Court finds that Plaintiff's Complaint in SX–14–CV–278, as a result of the consolidation of these matters, presents no additional claims or prayers for relief, and remains operative only in so far as it contains factual allegations supplementing those already contained in Plaintiff's Complaint in SX–12–CV–370. [10]

9 These "claims for resolution in the accounting process" refer to claimed charges and credits against the individual partner accounts described in 26 V.I.C. § 71(a).

10 As the parties acknowledged in their Stipulation Re: Consolidation, Plaintiff's Complaints in SX–14–CV–278 and SX–14–CV–287 both present claims based upon transactions already included in the relief sought by Plaintiff in SX–12–CV–370. Thus, there exists an open question as to whether Plaintiff's Complaints in SX–14–CV–278 and SX–14–CV–287 should be dismissed as duplicative pursuant to the Court's inherent authority to administer its docket. *See, e.g., Curtis v. Citibank, N.A.,* 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another") (citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)). Alternatively, given that the Stipulation confirms that the relief sought by Plaintiff in SX–14–CV–278 and SX–14–CV–287 is already included in the relief sought by Plaintiff in SX–12–CV–370, the Stipulation Re: Consolidation may in fact be more properly considered as presenting a stipulation for dismissal. However, the Court need not resolve these issues in ruling on the instant Motion.

Having determined that Plaintiff's Complaint presents an equitable action for the dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii), the Court turns to the factors for consideration outlined by the Supreme Court in *Ross v. Bernhard.* [11] Historically, accounting claims predicated upon a duty arising from the parties' relationship with one another, such as business partners, co-owners of property, or beneficiaries and trustees, were considered equitable. *See* 5 Moore's Federal Practice, ¶ 38.25 at 38–208 (2d ed. 1984); Joseph Story, *Commentaries on Equity Jurisprudence* § 622 at 37 (14th ed. 1918). Additionally, with regard to the remedy sought, as discussed in detail above, Plaintiff here seeks an accounting along with declaratory and injunctive relief with only a nominal and factually unsupported request for damages.

11 1) The customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970).

As to the last factor—the abilities and limitations of juries in deciding such cases—evidence presented by Hamed at the hearing on March 6–7, 2017 supports the Court's conclusion that "the 'accounts between the parties' are of a such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *See Dairy Queen,* 369 U.S. at 478 (Harlan, J. concurring) (quoting *Kirby v. Lake Shore & Michigan Southern R. Co.,* 120 U.S. 130, 134 (1886)). This is highlighted by the fact that Hamed challenges numerous transactions over a period of years between the parties and their families. At the hearing, witnesses including Hamed's sons testified as to the existence of a cash diversion scheme involving cashier's

checks, offered conflicting testimony regarding the ledger and receipt system for keeping track of cash withdrawals at each partnership store, and testified that records documenting the withdrawals had been destroyed. Evidence of the parties' history over many years depicts a litany of inextricably linked transactions presenting complexities which would adversely affect, if not make wholly impossible, the orderly determination of issues by a jury at trial. As demonstrated by Hamed's evidentiary presentation at the March 6, 2017 hearing, the resolution of Hamed's claims require "a complete and systematic financial review, in which all the activities related to the partnership are subjected to scrutiny," such that no single transaction may be considered in isolation. *See Thompson v. Coughlin,* 997 P.2d 191, 196 (Ore. 2000).

***8** Thus, considering the factors outlined by the Supreme Court in *Ross v. Bernhard,* the Court concludes that Plaintiff's cause of action and accompanying prayers for relief are properly considered equitable in nature and, in any event, necessarily entail a detailed, complicated accounting such that they may only be adequately and justly resolved by a court of equity. [12] Therefore, as this matter falls outside the scope of the Seventh Amendment and Plaintiff is not entitled to have his claims tried by jury, Defendants' Motion to Strike Jury Demand will be granted.

12 Some federal courts have found that complexity of facts alone constitutes a sufficient basis for invoking equitable jurisdiction and denying trial by jury. *See, e.g., In Re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069 (3d. Cir. 1980); *Donovan v. United States Postal Service,* 530 F. Supp. 894, 901 (D.D.C. 1981). This is most well established in the specific case of actions for accounting. *See, e.g., Kirby,* 120 U.S. at 134. However, as all three factors for consideration outlined by the Supreme Court in *Ross v. Bernhard* weigh in favor of asserting equitable jurisdiction and denying trial by jury, the Court need not determine whether the sheer complexity of the partnership accounting in this matter would, by itself, present sufficient justification to take this matter away from the jury and draw it instead into the Court's equitable jurisdiction.

Defendants' Jury Demand

Although no motion addressing the issue has been filed, the various arguments presented by both partners in the briefing concerning Defendants' Motion to Strike [Hamed's] Jury Demand are equally applicable to Defendants' own demand for trial by jury on their Counterclaim. [13] As such, the Court will consider, *sua sponte,* whether and to what extent Defendants are entitled to have their claims tried by jury, as requested in their Counterclaim.

13 Defendants' Counterclaims in SX–14–CV–278 and SX–14–CV–287 also included demands for trial by jury. However, in their two Stipulations Re: Consolidation, filed March 21, 2016, the parties jointly stipulated to the substantive consolidation of SX–14–CV–278 and SX–14–CV–287 with SX–12–CV–370 on the basis of their agreement that "the claims in the more recently filed case[s] [SX–14–CV–278 and SX–14–CV–287]... may be treated as claims for resolution in the liquidation process of the older case SX–12–CV–370." These "claims for resolution in the accounting process" refer to claimed charges and credits against the individual partner accounts described in 26 V.I.C. § 71(a). By stipulating to the resolution of these Counterclaims in the context of the Final Wind Up Plan, pursuant to which the respective claims of the parties are to be tried by the Court rather than by jury, the Defendants' have waived their right to trial by jury on their Counterclaims in SX–14–CV–278 and SX–14–CV–287. *See supra,* note 1.

Once again, the Court must first look beyond the titular form of the many counts presented in Defendants' Counterclaim to substantively identify and categorize the various claims presented.[14] The Counterclaim is, on its face, organized into fourteen counts.[15] Of these, Counts I and II seek declaratory relief regarding the existence and terms of the partnership. Both issues were resolved by the Court's November 7, 2014 Order granting Plaintiff's Renewed Motion for Partial Summary Judgment as to the existence of a partnership, which effectively entered Judgment against Defendant Yusuf on Count I of the Counterclaim and in favor of Defendant Yusuf on Count II. Defendants' Count VIII seeking dissolution of the then alleged partnership was similarly resolved by the mutual consent of the parties as memorialized in the Court's Order entered September 18, 2014 appointing the Master to oversee the dissolution and wind up of the partnership. Additionally, by Order entered April 27, 2015 granting United Corporation's Motion to Withdraw Rent, the Court effectively granted judgment in favor of Defendant United on Count XI for debt for rent owing on retail space leased to the partnership.[16]

14 Yusuf and United each also filed Counterclaims in SX–14–CV–278 and SX–14–CV–287. However, as with Hamed's claims, Defendants, by way of the Stipulation Re: Consolidation, filed March 21, 2016, stipulated to the substantive consolidation of SX–14–CV–278 and SX–14–CV–287 with SX–12–CV–370 on the basis of their agreement that "the claims in the more recently filed case[s]... may be treated as claims for resolution in the liquidation process of the older case SX–12–CV–370." Thus, on the basis of Defendants' own representations, the Court finds that Defendants' First Amended Counterclaim in SX–14–CV–278 and Counterclaim in SX–14–CV–287, as a result of the consolidation of these matters, present no additional claims or prayers for relief, and remain operative only in so far as they contain factual allegations supplementing those already contained in Defendants' Counterclaim in SX–12–CV–370

15 Counts XI and XII present claims exclusively on behalf of United, while all other Counts appear to present claims exclusively belonging to Yusuf.

16 United's Motion, and consequently the Court's ruling on the Motion, addressed only the debt allegedly owed to United for the rental of "Bay 1" as outlined in Count XI, and did not touch on United's second claim for rent presented in Count XII of Defendants' Counterclaim. By the Memorandum Opinion and Order Re Limitations on Accounting entered contemporaneously herewith, the Court denies Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, as to the remaining Counts IV and XII.

***9** Count IV (Accounting), Count V (Restitution),[17] Count VI (Unjust Enrichment/ Constructive Trust),[18] Count IX (Dissolution of Plessen),[19] Count X (Appointment of a Receiver), and Count XIV (Indemnity and Contribution)[20] unquestionably seek purely equitable relief and therefore carry no right to trial by jury.

17 While a claim for restitution may lie either in law or in equity depending on the nature of the relief sought, here Defendant Yusuf explicitly seeks "a constructive trust over any assets purchased with [partnership] funds; an equitable lien over such assets; and disgorgement of any profits made from the use of the Plaza Extra Stores' funds or assets purchased with the use of such funds." Thus, Yusuf clearly presents a claim for equitable rather than legal restitution. *See Great–West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. at 213–14 ("a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession... a court of equity could then order a defendant to

transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner").

18 Count VI differs from Count V only in title and is properly considered equitable for the same reasons discussed in the preceding footnote.

19 The Court is not aware of any cognizable action, whether grounded in common law or statute, by which an individual shareholder may unilaterally dissolve a corporation on the basis of "disagreement" with other shareholders. However, to the extent such an action is cognizable at all, it would necessarily be cognizable exclusively in equity as it prays only for declaratory relief unaccompanied by any request for damages.

20 While certain claims for indemnity and contribution, such as those based upon breach of a contractual indemnification clause, are considered actions at law, generally actions for indemnification and contribution are considered equitable in nature. *See, e.g., First Am. Bank of Va. v. Kindschi,* 1986 U.S. App. LEXIS 37722, at *32–33 (4th Cir. 1986) (noting that indemnification and contribution is an equitable remedy, "based upon principles of natural equity and justice"); *Union Pac. R.R v. Reilly Indus.,* 215 F.3d 830, 834 (8th Cir. 2000) (noting that district court submitted all claims to jury except claim for indemnification and contribution which was equitable in nature).

Count III (Conversion), Count VIII (Breach of Fiduciary Duty), and Count XIII (Civil Conspiracy) all nominally present legal claims for damages. However, close examination reveals that these Counts do not present separate, distinct claims for damages based on any particular transaction and fail to include in their respective prayers for damages any specified sum. Rather, these Counts, as well as Counts V, VI, and XIV merely represent alternate characterizations of Plaintiff's allegedly wrongful withdrawal and use of partnership funds over the life of the partnership, which in turn constitute alternative potential bases for granting the ultimate relief sought by Yusuf in his Counterclaim: the dissolution, winding up, and accounting of the partnership. Just as with Hamed's Complaint, Yusuf's Counterclaim has not alleged that Hamed directly inflicted upon Yusuf or the partnership any financial loss that would give rise to claim for damages. Rather, Yusuf alleges that Hamed has inaccurately calculated the amount of monies owed to him pursuant to his 50% partnership interest and has consequently withdrawn various sums from partnership accounts in excess of the 50% to which he is entitled. [21]

21 As previously discussed in the context of Hamed's Complaint, this characterization is particularly appropriate in light of the admittedly informal nature of the partnership's financial practices by which both partners and then-respective family members unilaterally withdrew fluids from partnership accounts as needed to cover various business and personal expenses. Given this customary practice, by which both partners were permitted to make large withdrawals on the understanding that each would ultimately, if not immediately, be entitled to a 50% share of partnership profits. Thus, Yusuf does not truly allege that the withdrawals themselves were wrongful or unauthorized. Rather, Yusuf alleges that by the time of the breakdown of the relationship between the partners, Hamed's withdrawals, while proper and authorized at the time they were made, ultimately exceeded the 50% of the partnership profits to which Hamed was entitled, thereby leaving Hamed unjustly enriched at Yusuf's expense. In essence, Yusuf's Counterclaim against Hamed directly mirrors Hamed's Complaint against Yusuf, and for the same reasons discussed in the context of Hamed's Complaint, the Court concludes that Yusuf has also presented an equitable claim for partnership accounting and not a legal claim for damages.

***10** Just like Hamed, Yusuf is seeking funds to which he is allegedly entitled pursuant to the terms of the partnership agreement between himself and Hamed, as opposed to "money in compensation for the losses, whatever they may be, that [Yusuf] will suffer or has suffered by virtue of the withholding of those funds." *See Maryland,* 763 F. 2d, at 1446. Accordingly,

despite the misleading form of the Counterclaim, the Court concludes that Yusuf has not presented multiple distinct claims for damages, but rather a single, tripartite action for the equitable dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). As noted above, the fact that such an accounting will result in the payment of monies to one or both parties does not convert an essentially equitable claim into a legal one. *See Siegel,* 581 F. Supp. 2d at 1071–72.

Count XII of the Counterclaim (Rent) presents a claim for rent allegedly owed to Defendant United for the use of certain storage bays by Plaza Extra–East from 1994 through 2001 and from 2008 through 2013. As this is a claim made solely by United against Hamed, it cannot be said to be included in or subsumed by the accounting claim between the partners as with Yusuf's nominal claims for damages presented in Defendants' Counterclaim. Additionally, as this claim specifically requests unpaid rent in the amount of $793,984.38 —"an amount certain, liquidated, and subject to immediate collection"—it presents a legal claim for damages.[22] Thus, of the fourteen Counts of Defendants' Counterclaim, only Count XII (Rent) presents a legal claim for damages ordinarily carrying with it the right to a trial by jury.

22 Whether construed as an action for debt, breach of implied contract, or otherwise, the claim presented in Count XII of Defendants' Counterclaim constitutes a legal claim as it requests relief in the form of damages for a sum certain.

Having identified the claims presented in the various Counts of Defendants' Counterclaim, the Court turns to the factors for consideration outlined by the Supreme Court in *Ross v. Bernhard* to determine whether Defendants are entitled to trial by jury under the Seventh Amendment.[23] As discussed above, with the exception of Count XII (Rent), Defendants have presented claims traditionally lying in equity and requesting exclusively equitable relief. Thus, considering only the first two *Ross* factors, it would appear that while Defendant Yusuf has presented no claims triable by jury, Defendant United is entitled to trial by jury on its claim for rent.

23 1) The customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970).

Turning to the final factor—the abilities and limitations of juries in deciding such cases—the evidence of record, discussed above in the context of Hamed's Complaint, supports the Court's conclusion that "the 'accounts between the parties' are of a such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *See Dairy Queen,* 369 U.S. at 478 (Harlan, J. concurring) (quoting *Kirby,* 120 U.S. at 134). Thus, even to the extent that certain Counts of Yusuf's Counterclaim—such as Count III (Conversion), Count VIII (Breach of Fiduciary Duty), and Count XIII (Civil Conspiracy)—could be construed as presenting legal claims for damages, these claims nonetheless remain unamenable to trial by jury as the propriety of each individual transaction or withdrawal, and in turn the individual

Partners' claims to the funds in question, may only be evaluated in conjunction with all other transactions and withdrawals made by the Partners during the life of the partnership. As discussed above, this task is further complicated by the highly informal nature of the financial and accounting practices of the partnership. Accordingly, just as with Hamed's claims, the resolution of Yusuf's claims also requires "a complete and systematic financial review, in which all the activities related to the partnership are subjected to scrutiny," such that any no single transaction may be considered in isolation. *See Thompson,* 997 P.2d at 196.

***11** Thus, after evaluating the factors for consideration outlined by the Supreme Court in *Ross v. Berhard,* the Court concludes that Defendant Yusuf is not entitled to trial by jury on any of the claims presented in his Counterclaim. Additionally, although Defendant United has presented a claim for damages for rent which does carry with it a right to a jury trial, both Defendants, by repeated representations to the Court, both express and implied, have unequivocally waived any right to trial by jury.

As discussed above in the context of Hamed's Complaint, both Hamed and Yusuf have waived any right to trial by jury in this matter by virtue of their stipulation to the substance of the Final Wind Up Plan adopted by the Court on January 7, 2015.[24] Pursuant to that Plan, each partner, following liquidation of the partnership assets is to submit a proposed accounting and distribution to the Master who shall, in turn, "make a report and recommendation of distribution *to the Court for its final determination*." Final Wind Up Plan, Section 9, Step 6.

24 *See supra,* note 1.

While the applicability of the Final Wind Up Plan and the waiver contained therein to United, a non-partner, may not be immediately obvious, a review of the record demonstrates that United was indeed party to the development and adoption of the Plan, and considers itself to be bound by the terms thereof. Both Defendant Yusuf and Defendant United jointly first moved the Court to appoint a Master to oversee the various claims involved in this litigation and attached to the Motion their first proposed version of the wind up plan.[25] Describing the process of developing and adopting the plan, Defendants, referring to themselves in the plural, note that "Plaintiff and *Defendants* proposed dueling plans," all of which contemplated resolution of all claims by recommendation of the Master for final determination by the Court.[26]

25 *See* Motion to Appoint Master, filed April 7, 2014 ("Defendants/counterclaimants Fathi Yusuf and United Corporation... respectfully move this Court to appoint a Master...").

26 Supplemental Brief Regarding Three Motions Addressed at March 6–7, 2017, at 8.

Additionally, United is properly considered a party to, and therefore bound by the terms of, the stipulated Final Wind Up Plan because: 1) the Plan itself provides a mechanism for the resolution of third-party claims against the partnership such as United's claim for rent by which such claims are to be settled by the liquidating partner subject to the approval of the Master and ultimately the Court, and 2) the Plan imposes a specific obligation upon United to divest itself of, and deliver to Hamed, 50% of its stock holdings in Associated Grocers. [27] Thus, based upon the representations of counsel for both Defendants, the role of United in developing and adopting the Plan, and the terms of Plan itself, the Court concludes that the language of the Final Wind Up Plan, to which all parties have stipulated, represents an agreement among all parties that the various claims presented in both the Complaint and Counterclaim are to be resolved by the Court and not by jury.

27 *See* Final Up Plan, Section 5: Duties of Liquidating Partner, "Any Liquidation Proceeds and Litigation Recovery shall be placed into the Claim Reserve Account from which all Partnership Debts shall first be paid. Following payment of all Partnership Debts, any remaining funds shall continue to be held in the Claims Reserve Account pending distribution pursuant to agreement of the Partners or order of the Court following a full accounting and reconciliation of the Partners' capital accounts and earlier distributions; Section 8–4: Stock of Associated Grocers, "The stock of Associated Grocers held in the name of United shall be split 50/50 between Hamed and Yusuf, with United retaining in its name Yusuf's 50% share, and 50% of such stock being reissued in Hamed's name or in the name of his designee."

***12** While equally applicable to Plaintiff, the proposition that the right to trial by jury was waived in this matter is particularly convincing with respect to Defendants. As Defendants argued in their Motion to Strike Jury Demand, "each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership...[and therefore] it is clear that these claims can only be adjudicated in a bench trial." Motion to Strike, at 3. [28] In their Reply in support of the same Motion, Defendants assert that "by participating in the process that resulted in the [Wind Up] Plan without objection or assertion of any jury trial right, Plaintiff has waived his right to invoke it now." Reply in Further Support of Motion to Strike, at 2. As noted in Defendants' Supplemental Brief Regarding Three Motions Addressed at March 6–7, 2017 Hearings, the record reveals that while Plaintiff and Defendants both proposed significantly different versions of what eventually became the Final Wind Up Plan, one feature constant across all versions was the Master's report and recommendation of distribution for final determination by the Court. Supplemental Brief, at 8–9. Never, at any time in the process of developing the Plan, did any party make any mention of or suggestion that any matter should ultimately be resolved by jury.

28 Although Defendants presented this argument as applied to Hamed's claims, it is equally applicable to the claims presented in Defendants' Counterclaim. While Defendants' Counterclaim originally included a Count seeking a declaration that no partnership existed, this claim was effectively dismissed following Yusuf's admission, and the Court's subsequent recognition, of the existence of the partnership, and, in any event, the remainder of Defendants' claims proceed under the assumption that a partnership did exist and are based upon Yusuf's entitlement to 50% of partnership profits and Hamed's responsibility for 50% of partnership liabilities and losses.

Thus, based upon Defendants' own representations, both Defendant Yusuf and Defendant United believed that by consenting to the Final Wind Up Plan—pursuant to which the claims between the parties would be decided by the Court based upon recommendation of the Master—they waived the right to trial by jury in this matter. Thus, based upon the clear intent and understanding of Defendants in connection with the adoption of the Final Wind Up Plan, the Court finds that Defendants have waived any right to trial by jury under the Seventh Amendment, and accordingly, Defendants' jury demand will be stricken.

In light of the foregoing, it is hereby

ORDERED that Defendants' Motion to Strike Plaintiff's Response is DENIED. It is further

ORDERED that Defendants' Motion to Strike Jury Demand is GRANTED. It is further

ORDERED that Plaintiff's demand for trial by jury in the above captioned consolidated cases is STRICKEN. It is further

ORDERED that Defendants' demand for trial by jury in the above captioned consolidated cases is STRICKEN as to both Defendants.

MEMORANDUM OPINION AND ORDER RE LIMITATIONS ON ACCOUNTING

This matter came on for hearing on March 6 and 7, 2017 on various pending motions, including Hamed's fully briefed Motion for Partial Summary Judgment re the Statute of Limitations Defense Barring Defendants' Counterclaim Damages Prior to September 16, 2006, filed May 13, 2014. [1] Because the Court concludes that Defendant Yusuf has not, in fact, presented any legal claims for damages, but has rather presented a single, equitable action for a partnership accounting, [2] and because the parties do not assert that the action for accounting is itself barred by the statute of limitations, Plaintiff's Motion will be denied as to Yusuf's claim for accounting. Additionally, as to Defendant United's claim for rent presented in Count XII of the Counterclaim, the Court finds that there exist genuinely disputed issues of material fact such that summary judgment is inappropriate.

1 Hamed's Motion was followed by: Defendants' Brief in Opposition, filed June 6, 2014; Hamed's Reply, filed June 20, 2014; Hamed's Notice of Supplemental Authority, filed November 15, 2016; Yusuf's Brief in Response, filed December 3, 2016; Yusuf's post-hearing Supplemental Brief, filed March 21, 2017; and Hamed's Response, filed March 27, 2017. Also pending is Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, which is addressed herein.

2 Count IX of the First Amended Counterclaim, seeking the dissolution of Plessen Enterprises, Inc., constitutes the sole claim presented by Yusuf that is unrelated to, and therefore not incorporated into, his equitable claim for accounting. However, Plaintiff's Motion, by its own terms, concerns only "monetary damage claims," and therefore Yusufs Count IX is excluded from consideration in this Opinion.

***13** Nonetheless, in light of the arguments presented by the parties, as well as the general complexities and difficulties inherent in addressing the peculiar questions of fact necessary for the resolution of this matter, the Court finds that the interests of the parties in the just and fair disposition of their claims, as well as the overarching interest of the judiciary in the efficient resolution of disputes before it, are best served by utilizing the broad powers conferred upon the Court sitting in equity to fashion remedies specifically tailored to the circumstances presented in order to establish an equitable limitation upon claimed credits and charges submitted to the Master in the context of the Wind Up process.

Background

Hamed's Complaint was filed September 17, 2012, followed by his First Amended Complaint (Complaint), filed in the District Court following removal and prior to remand, on October 19, 2012, seeking, among other relief, "A full and complete accounting... with Declaratory Relief against both defendants to establish Hamed's rights under his Yusuf/ Hamed Partnership with Yusuf..." Complaint, at 15, ¶ l. Defendants filed their First Amended Counterclaim (Counterclaim) on January 13, 2014, seeking relief as follows: Count: I—Declaratory Relief that No Partnership Exists; Count II—Declaratory Relief, in the event that a partnership is determined to exist to determine, among other relief, "their respective rights, interests, and obligations concerning the Plaza Extra Stores and the disposition of the assets and liabilities of these stores;" Count III—Conversion; Count IV—Accounting, alleging that "Yusuf is entitled to a full accounting...;" Count V—Restitution; Count VI—Unjust Enrichment and Imposition of a Constructive Trust; Count VII—Breach of Fiduciary Duty; Count VIII—Dissolution of Alleged Partnership, stating: "Although Defendants deny the existence of any partnership with Hamed, in the event the Alleged Partnership is determined to exist, then Yusuf is entitled to dissolution of the Alleged Partnership and to wind up its affairs, in that such partnership would be an oral at-will partnership and Yusuf provided notice of his intent to terminate any business relationship (including any partnership) with Hamed in March of 2012;" Count IX—Dissolution of Plessen; Count X—Appointment of Receiver; Count XI—Rent for Retail Space Bay I;[3] Count XII—Past Rent for Retail Spaces Bay 5 & 8; Count XIII—Civil Conspiracy; Count XIV—Indemnity and Contribution. Counterclaim ¶¶ 141–191.

3 This Count was the subject of Memorandum Opinion and Order entered April 27, 2015, denying, in part, Plaintiff's present Motion and granting United's Motion to Withdraw Rent. United's claim in Count XII and other monetary claims of United were unaffected by that Order.

Legal Standard

By his Motion, Plaintiff is entitled to entry of summary judgment barring certain relief sought by Defendants' Counterclaim pursuant to the applicable statute of limitations if he "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(a).

"A party is entitled to judgment as a matter of law when, in considering all of the evidence, accepting the nonmoving party's evidence as true, and drawing all reasonable inferences in favor of the nonmoving party, the court concludes that a reasonable jury could only enter judgment in favor of the moving party." *Antilles School, Inc. v. Lembach,* 2016 V.I. Supreme LEXIS 7, at *6–7 (V.I. 2016). The nonmoving party in responding to a motion for summary judgment has the burden to "set out specific facts showing a genuine issue for trial." *Williams v. United Corp.,* 50 V.I. 191, 194–95 (V.I. 2008). A dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S. V.I., LLC,* 61 V.I. 373, 391–92 (V.I. 2014).

Discussion

***14** There can be no more appropriate introduction to this matter than the lucid observations of Judge Herman E. Moore of the District Court of the Virgin Islands who remarked of another matter involving a dispute between business partners more than half a century ago:

> This case illustrates the pitfalls open to friends going into business. When two strangers go into business, you usually have each one requiring formal contracts, formal statements, formal deposits, and everything of the kind; but usually when two friends go into business, and where it becomes one happy family, so many of these things are omitted; and when they do fall out, as happened in this case, there arises bitterness and difficulties which make it the most difficult type of case to try.

Stoner v. Bellows, et al., 2 V.I. 172, 174–75 (D.V.I. 1951).

Hamed's Motion seeks to bar Defendants' unresolved monetary claims, as alleged in their Counterclaim, for "debt, breach of contract, conversion, breach of fiduciary duty, recoupment/ constructive trust and accounting" that accrued more than six years prior to the September 17, 2012 commencement of this action, citing *James v. Antilles Gas Corp.,* 43 V.I. 37 (V.I. Terr. Ct. 2000).[4] Defendants respond to Hamed's assertion that Defendants' monetary claims are governed by the six-year limitation period set out in 5 V.I.C. § 31(3) (Motion, at 3) by asserting that Yusuf's monetary claims constitute a cause of action for

an accounting which, consistent with longstanding common law precedent, accrues upon dissolution of the partnership, and examines the entire period of the partnership, or the period from the last accounting. Opposition, at 9; Supplemental Brief, at 1. Defendant United has not denied the applicability of a six-year limitation period to its third-party claims against Hamed and/or the partnership, but rather argues that the limitation period should be equitably tolled.

4 While acknowledging a split of authority, the Territorial Court in *James* found "compelling" the majority view, as described by Professors Wright and Miller: "although there is some conflict on the subject, the majority view appears to be that the institution of *plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim," James v. Antilles Gas Corp.,* 43 V.I. at 44, 46, citing 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1419, at 151 (2d ed. 1990) (emphasis in original).

"Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business." 26 V.I.C. § 177(b). "A partnership is dissolved, and its business must be wound up... upon... in a partnership at will, the partnership's having notice from a partner... of that partner's express will to withdraw as a partner." 26 V.I.C. § 171(1).

By their pleadings in this litigation, Hamed alleged and Yusuf denied the existence of a partnership at will. Although Yusuf had previously acknowledged the existence of a partnership during pre-litigation negotiations in February and March 2012, and his intention that the partnership be dissolved, by the time litigation ensued, Defendants sought "declaratory relief that no partnership exists." Counterclaim, Count I. By his Motion to Appoint Master, filed April 7, 2014, Yusuf "now concedes for the purposes of this case that he and Hamed entered into a partnership to carry on the business of the Plaza Extra Stores and to share equally the net profits from the operation of the Plaza Extra Stores." The Court granted in part Plaintiff's May 9, 2014 Renewed Motion for Partial Summary Judgment as to the Existence of a Partnership by Order entered November 7, 2014, finding and declaring the existence of a 50/50 partnership between Yusuf and Hamed based upon their 1986 oral agreement for the ownership and operation of the Plaza Extra Stores.

***15** Yusuf has argued that, to the extent a partnership existed, it was dissolved by Hamed's retirement in 1996 which constituted his withdrawal from the partnership. However, the Court has already found that Hamed's participation in the operation and management of the three Plaza Extra Stores continued after his withdrawal from day-to-day operations through his son Waleed Hamed, acting pursuant to powers of attorney. *Hamed v. Yusuf,* 58 V.I. 117, 126 (V.I. Super. Ct. 2013). As noted, Yusuf's pre-litigation negotiations seeking an agreement to dissolve his business relationship with Hamed never resulted in an agreement, such that the partnership was not dissolved by the time the litigation commenced. Within his April 7, 2014 Motion to Appoint Master, Yusuf states his " 'express will to withdraw as a partner,' thus dissolving the partnership," quoting 26 V.I.C. § 171(1). In his Response to that Motion, Hamed submitted his April 30, 2014 "Notice of Dissolution of Partnership."

Hamed and Yusuf concur that the partnership is dissolved, and both concur that the right of each partner to an accounting has accrued upon dissolution. Both also concur that the monetary claims set forth in Hamed's Complaint and the monetary claims of Yusuf set forth in Defendants' Counterclaim relate back to September 17, 2012, the date Hamed filed his original Complaint.

MOTION FOR PARTIAL SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS

As discussed in detail in the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith, despite the misleading form of both Hamed's Complaint and Yusuf's Counterclaim, each partner has presented in this matter only a single, tripartite cause of action for the dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). However, Count XII of Defendants' Counterclaim also presents a separate cause of action on behalf of United for debt in the form of rent. The Court first considers Hamed's Motion for Partial Summary Judgement Re: Statute of Limitations as it applies to United's action for rent, and then as it applies to the partners' competing claims for dissolution, wind up, and accounting.

United's Cause of Action for Debt (Rent)

By Memorandum Opinion and Order entered April 27, 2015, the Court denied Plaintiff's Motion for Partial Summary Judgment Re: Statute of Limitations as to United's Count XI for debt in the form of rent owed with respect to "Bay 1" and granted United's Motion to Withdraw Rent, filed September 9, 2013; authorizing the Liquidating Partner, under the supervision of the Master, to pay to United from partnership funds the total amount of $5,234,298.71 plus additional rents that have come due from October 1, 2013 at the rate of $58,791.38 per month. That Memorandum Opinion and Order also effectively, though not explicitly, granted in part Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, as to Count XI, and entered judgment thereon in favor of United.

In Count XII of Defendants' Counterclaim, United seeks an award of $793,984.38 for rent owed with respect to "Bay 5" and "Bay 8," which the partnership allegedly used for storage space in connection with the Plaza Extra–East store during various periods between 1994 and 2013. Counterclaim ¶¶ 179–84. United's arguments against the applying the statute of limitations to bar its claims for rent generally fail to distinguish between the rent owed for Bay 1 (Count XI) and the rent owed for Bays 5 and 8 (Count XII). Thus, the Court must infer that United opposes Hamed's statute of limitations argument as to Count XII on the same grounds as it opposed the argument with respect to Count XI. In denying Hamed's Motion for Partial Summary Judgment Re Statute of Limitations as to Count

XI, the Court found that the limitations period had been tolled on the basis of Hamed's undisputed acknowledgement and partial payment of the debt.

However, in his August 24, 2014 Declaration, attached as Exhibit 1 to Plaintiff's Response to Defendants' Rule 56.1 Statement of Facts and Counterstatement of Facts, Waleed Hamed expressly states that "there was no agreement to use [Bays 5 and 8] other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost." Declaration of Waleed Hamed ¶¶ 19–20. Mohammed Hamed's comments acknowledging the debt, which formed the basis of the Court's judgment as to Count XI, do not explicitly distinguish between the rent owed for Bay 1 and the rent owed for Bays 5 and 8. Yet, considered in light of the declaration of his son, the Court is compelled to conclude that a genuine dispute of material fact exists as to whether Hamed ever acknowledged any debt as to rent owed for Bays 5 and 8, and more basically, whether the partnership ever agreed to pay any rent for the use of Bays 5 and 8 in the first place. Accordingly, both Hamed's Motion for Partial Summary Judgment Re: Statute of Limitations and Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must be denied as to Count XII of Defendants' Counterclaim. [5]

5 Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must also be denied as to Count IV (Accounting). While Hamed and Yusuf are each entitled to an accounting of the partnership pursuant to 26 V.I.C. § 177, United's cause of action for rent is entirely unrelated to the partners' respective actions for accounting except insofar as each partner will ultimately be liable in the final accounting for 50% of whatever debt is found to be owing from the partnership to United.

Partners' Causes of Action for Partnership Dissolution, Wind Up, and Accounting

***16** 26 V.I.C. § 75(b) and (c) provide:

> (b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:
>
> (1) enforce the partner's rights under the partnership agreement;
>
> (2) enforce the partner's rights under this chapter... or
>
> (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.
>
> (c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

By Act No. 6205, the Revised Uniform Partnership Act (RUPA) was adopted in the Virgin Islands, effective May 1, 1998.[6] The amended statute changed the common law and predecessor statute by, among other things, linking the accrual and limitations of actions brought by a partner against another partner or the partnership to the periods provided "by other law," such that claims accruing during the life of the partnership are not revived upon dissolution.[7]

6 Yusuf argues that the RUPA savings clause (26 V.I.C. § 274) preserves his claims against Hamed that predate May 1, 1998, the effective date of RUPA in the Virgin Islands. That is, Yusuf contends that RUPA does not apply to claims that accrued before that date, which are instead governed by the limitations period then in effect. His argument fails in that claims in the nature of an accounting of one partner against another could only presented upon dissolution of the partnership. Here, since the partnership had not been dissolved by the date of the enactment of RUPA in the Virgin Islands, and since all his monetary claims against Hamed could only be brought on dissolution, no claims of Yusuf had accrued by May 1, 1998.

7 See National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act (1997); Section 405(c) [26 V.I.C. § 75(c)], comment 4: "The statute of limitations on such claims is also governed by other law, and claims barred by a statute of limitations are not revived by reason of the partner's right to an accounting upon dissolution, as they were under the UPA." http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.

"The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *Brady v. Gov't of the V.I.,* 57 V.I. 433, 441 (V.I. 2012) (citations omitted). By its plain language, Section 75 unambiguously provides that during the life of the partnership, a "partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to the partnership business;" and that "accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law." "The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them." National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act; Section 405(c) comment 4.

***17** Though the parties have submitted lengthy briefs presenting their respective positions on how the limited case law interpreting this section of RUPA affects the "claims" purportedly presented by Yusuf and United, there is significant confusion surrounding precisely what is meant by the term "claims."[8] As it is often used in legal parlance, the term "claim" is essentially synonymous with "cause of action." Used in this sense, Hamed and Yusuf have each, in their respective pleadings, presented only a single, tripartite cause of action, or claim, for an equitable partnership dissolution, wind up, and accounting under 26 V.I.C. § 75(b)(2)(iii).[9] However, as used by both the Court and the parties in the context of this litigation, the term "claims" has also taken on an entirely different, and more specific meaning, by which the term "claims" refers not to the parties' respective causes of action for accounting, but rather to the numerous alleged individual debits and withdrawals from

partnership funds made by the partners or their family members over the lifetime of the partnership that have been, and, following further discovery, will continue to be, presented to the Master for reconciliation in the accounting and distribution phase of the Final Wind Up Plan. [10]

8 Much of this confusion stems from the imprecision of the Complaint and Counterclaim. Both pleadings are presented in essentially the same fashion, consisting of a litany of alleged instances in which the opposing party partner, or his relatives, withdrew or otherwise utilized monies from partnership funds, followed by a "kitchen sink" style presentation of "counts" in which the parties purport to characterize these allegedly improper transactions variously as giving rise to causes of action for conversion, breach of fiduciary duty, unjust enrichment, constructive trust, etc., with no attempt to distinguish between them or to explain which transactions give rise to which cause of action. As a result, Plaintiff's Motion for Partial Summary Judgment is peculiar in that it does not, and indeed cannot, seek entry of judgment as to any one count presented in the Counterclaim, but rather seeks to bar from consideration as to all counts any alleged financial transaction occurring more than six years prior to the commencement of this litigation. In this respect, Plaintiff's Motion seems more akin to a motion *in limine* than a motion for summary judgment, as Plaintiff seeks only to limit the scope of the accounting process by excluding from consideration any transaction pre-dating September 2006.

9 For a detailed analysis of the nature of the claims presented by the parties in this action, see the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith; explaining that despite the misleading form of the Complaint and Counterclaim, Hamed presents only a single action for dissolution, wind up, and accounting, while Yusuf presents an action for accounting, and an action for corporate dissolution, and United presents an action for debt/breach of contract for failure to pay rent.

10 It is worth noting that this type of claims resolution process would appear to be unnecessary, or at least far less complicated, in the context of many, if not most, actions for partnership accounting, as the need for such a claims resolution process is generally obviated by the existence of the type of comprehensive ledger and periodic accounting statements typically maintained by modem businesses. Here however, as a result of the questionable and highly informal financial accounting practices of the partnership, by which both partners and their respective family members unilaterally withdrew funds from partnership accounts as needed to cover various business and personal expenses, there exists no authoritative ledger or series of financial statements recording the distribution of funds between partners upon which the Master or the Court could reasonably rely in conducting an accounting. Instead the Court finds itself in the predicament of having to account for multiple decades' worth of distributions of partnership funds among the partners and their family members based upon little more than a patchwork of cancelled checks, hand-written receipts for cash withdrawn from Plaza Extra safes, and the personal recollections of the partners and their agents.

***18** Pursuant to 26 V.I.C. § 71(a), "[e]ach partner is deemed to have an account that is: (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses." Thus, under the RUPA framework, the "claims" to which the parties refer are, in fact, nothing more than the parties' respective assertions of credits and charges to be applied in ascertaining the balance of each partner's individual partnership account. [11]

11 Alternatively, such "claims" may be referred to as § 71(a) claims, and the accounts to which they apply may be referred to as § 71(a) accounts.

As discussed above, pursuant to 26 V.I.C. § 75(c), "any time limitation on a right of action for a remedy under this section is governed by other law." In the Virgin Islands, limitations on the time for the commencement of various actions are codified at 5 V.I.C. § 31. In his Motion, Hamed argues that Yusuf's "claims" should be subject to the six year limitations period under § 31(3); presumably on the theory that they are essentially claims to enforce the Yusuf's rights under the partnership agreement as described in 26 V.I.C. § 75(b)(1), effectively rendering them claims upon a contract.

However, by its own terms, 5 V.I.C. § 31 applies to bar, in their entirety, *causes of action* that are commenced outside of the relevant limitations period: "Civil actions shall only be commenced within the period prescribed below after the cause of action shall have accrued." Here, Hamed does not contend that Yusuf's cause of action for accounting was commenced outside the relevant limitations period, [12] but only that Yusuf should be barred from asserting claims—meaning credits to and charges against the partners' accounts—based upon any transaction that took place more than six years prior to the filing of Hamed's initial Complaint. And while Yusuf's action for accounting, as a whole, is undoubtedly subject to a statutory limitations period, the statute of limitations, by its plain language, has no direct applicability to individual, claimed credits and charges presented within the accounting process. Accordingly, Plaintiff's Motion for Partial Summary Judgment will be denied.

12 The Court need not determine the relevant limitations period for the commencement of a cause of action for accounting, as Hamed has not challenged the timeliness of Yusuf's action for accounting as such, but only the timeliness of the individual § 71(a) claims presented within the accounting.

EQUITABLE LIMITATION OF SCOPE OF PARTNERSHIP ACCOUNTING

Despite concluding that Plaintiff is not entitled to partial summary judgment based upon the statute of limitations as such, the Court is nonetheless moved to consider whether the various issues raised and arguments presented in Plaintiff's Motion, among other concerns, justify the imposition of some equitable limitation on the presentation of claimed credits and charges in the accounting process.

The Supreme Court of the Virgin Islands has explained that "[d]espite the fact that the Superior Court of the Virgin Islands—like almost all modem American courts—exercises both equitable and legal authority, the division between law and equity remains meaningful to defining the remedies available in a particular action." *3RC & Co. v. Boynes Trucking Sys.,* 63 V.I. 544, 553 (V.I. 2015) (quoting *Cacciamani & Rover Corp. v. Banco Popular,* 61 V.I. 247, 252 n.3 (V.I. 2014)). Furthermore, "because '[a] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in [a] particular case,' a court has a great deal more flexibility in considering equitable remedies than it does in considering legal remedies." *Id.* (quoting *Kalloo v. Estate of Small,* 62 V.I. 571, 584 (V.I. 2015)).

***19** As explained in detail in the Memorandum Opinion and Order Striking Jury Demand entered contemporaneously herewith, both Hamed and Yusuf have presented in this matter competing equitable actions to compel the dissolution, winding up, and accounting of their partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). [13] As an accounting in this context is both an equitable cause of action and an equitable remedy in itself, the Court is granted considerable flexibility in fashioning the specific contours of the accounting process. *See, e.g., Isaac v. Crichlow,* 2015 V.I. LEXIS 15, at *39 (V.I. Super. 2015) ("An equitable accounting is a *remedy* of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiffs [sic] property or entitlements.") (quoting *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.,* 5 F. Supp. 2d, 324, 327 (D.V.I. 1998)) (emphasis added).

13 26 V.I.C. § 75(b)(2)(iii) codifies the right of one partner to maintain an action against the partnership or another partner to enforce the partner's "right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII of this chapter." In turn, subchapter VIII, § 177 explicitly provides that "[e]ach partner is entitled to a settlement of all partnership accounts upon winding up the partnership business."

Partnership Accounting Under RUPA

The general framework for conducting a partnership accounting in the Virgin Islands is outlined at 26 V.I.C. § 177(b):

> Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under section 46 of this chapter.

In turn, the "partners' accounts" referenced in § 177(b) are described at 26 V.I.C. § 71(a):

> Each partner is deemed to have an account that is: (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and (2) charged with an amount equal to the money plus the value of any other property, net of the

> amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

By the plain language of the statute,[14] these individual partner accounts, are deemed to exist, regardless of whether any such accounts are in fact maintained, and irrespective of the actual accounting practices of the partners. In this case, these § 71(a) accounts exist purely as a creation of equity, as Hamed and Yusuf, and their sons, withdrew partnership funds at will over the lifetime of the partnership with no formal system of accounting either for distributions made to partners from partnership funds, or contributions made by partners to partnership funds. Thus, because these implied partner accounts, particularly in this case, exist solely to facilitate the efficient settlement of accounts between partners under 26 V.I.C. § 177, which is itself an equitable remedy, the Court, operating within the parameters established by RUPA, possesses significant discretion and flexibility in determining the manner and scope of the partner account reconstruction process. *See 3RC & Co.,* 63 V.I. at 553.

14 Subject to certain specified exceptions, "relations among the partners and between the partners and the partnership are governed by the partnership agreement." 26 V.I.C § 4. However, "[t]o the extent the partnership agreement does not otherwise provide, [Title 26, Chapter 1] governs relations among the partners and between the partners and the partnership." Here, the terms of the oral partnership agreement are limited, and establish only that Hamed and Yusuf agreed to jointly operate the three Plaza Extra Stores, and to each share 50% in the profits and losses thereof. See Order entered November 7, 2014, granting Renewed Motion for Partial Summary Judgment as to the Existence of a Partnership.

***20** As the last and only true-up of the partnership business occurred in 1993,[15] the parties, by their respective actions for accounting, effectively impose upon the Court the onerous burden of reconstructing, out of whole cloth, twenty-five years' worth of these partner account transactions, based upon nothing more than scant documentary evidence and the ever-fading recollections of the partners and their representatives.[16] For the reasons discussed below, the Court concludes, upon considerations of laches and a weighing of the interests of both the parties and the Court in the just and efficient resolution of their disputes, that the equities of this particular case necessitate the imposition of a six-year equitable limitation period for § 71(a) claims submitted to the Master in the accounting and distribution phase of the Wind Up Plan.

15 *See* Counterclaim in SX–14–CV–287 (Counterclaim 287) ¶ 10.

16 *See supra,* note 10 and accompanying text.

Doctrines of Laches and Statute of Limitations by Analogy

In other similar situations, some courts have imposed equitable limitation periods by applying the "statute of limitations by analogy." In the days of the divided bench, when statutes of limitations were largely inapplicable to suits in equity, courts of equity regularly

invoked the statute of limitations by analogy to bar stale claims. Thus, Justice Strong remarked:

> The statute of limitations bars actions for fraud... after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him.

Burke v. Smith, 83 U.S. 390, 401 (1872).

Modem courts of equity, such as the Court of Chancery of Delaware, also apply the statute of limitations by analogy as a component of the equitable defense of laches. *See, e.g., Whittington v. Dragon Group, L.L.C.,* 991 A.2d 1, 9 (Del. 2009) ("Where the Plaintiff seeks equitable relief... failure to file within the analogous period of limitations will be given great weight in deciding in deciding whether the claims are barred by laches"); *see also Williams v. Williams,* 2010 Conn. Super. LEXIS 2344, at *15 (Conn. Super. Ct. Sep. 15, 2010) (noting that court may consider an analogous statute of limitation when considering laches defense). Under this approach, "[w]here the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity." *Whittington,* 991 A.2d at 9.[17] Different jurisdictions disagree, however, as to how much force an analogous statute of limitations should have. *See* Dobbs, *Law of Remedies* § 2.4(4), at 78 (2d ed. 1993) ("When courts look to an analogous statute of limitations for guidance, and that statute has run, they may (1) presume unreasonable delay and prejudice, but permit the plaintiff to rebut the presumption; (2) treat the statute as one element 'in the congeries of factors to be considered.' Some authority has gone beyond either of these rules by holding that equity will follow the law and (3) give the statute conclusive effect").[18]

17 The Delaware Supreme Court agreed with the Chancery Court's analysis that "[a]s a practical matter, there is not likely to be much difference between the prosecution of [the party's] claim here for an accounting and a claim for damages at law," and that, in turn, the "claims for declaratory relief and an accounting are analogous to a legal claim for the same relief" for the purposes of the laches analysis. *Whittington,* 991 A.2d at 9. The higher court disagreed with the lower court's conclusion that the three-year limitations period for contract actions applied, and instead found applicable the twenty-year limitations period for actions upon contracts under seal. *Id.* Nonetheless, the general approach of considering analogous statutes of limitations in the context of the laches analysis was upheld.

18 It appears that the Virgin Islands has effectively codified the doctrine of statute of limitations by analogy to conclusive effect in equitable actions. "An action of an equitable nature shall only be commenced within the time limited to commence an

action as provide by this chapter." 5 V.I.C. § 32(a). This suggests, in the event that a particular equitable cause of action is not explicitly included in any particular limitation period outlined in 5 V.I.C. § 31, that the Court must apply the most analogous statute of limitations, or fall back on the residual limitations period of ten years for "any cause not otherwise provided for," under § 31(2).

***21** The Supreme Court of the Virgin Islands has recognized the availability of the equitable defense of laches in territorial courts. In one of its earliest cases, *St. Thomas–St. John Board of Elections v. Daniel,* the Court explained:

> Laches is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure that bars a plaintiff's claim where there has been an inexcusable delay in prosecuting the claim in light of the equities of the case and prejudice to the defendant from the delay. *See Cook v. Wikler,* 320 F.3d 431, 438 (3d Cir. 2003); Churma, 514 F.2d at 593. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States,* 365 U.S. 265, 282, 81 S. Ct. 534, 543, 5 L. Ed. 2d 551 (1961).

49 V.I. 322, 330 (V.I. 2007). [19]

19 The Supreme Court has since adopted the Virgin Islands Rules of Civil Procedure to govern civil practice in the territory, however Virgin Islands Rule of Civil Procedure 8(c) is identical to the formerly applicable Federal Rule, and thus the Supreme Court's reasoning regarding the affirmative defense of laches, insofar as it relates to this rule, remains equally applicable under the new rules.

It must be noted that, just as with the statute of limitations defense, the equitable defense of laches is also typically invoked as a bar to causes of action, in their entirety. Thus, in a case such as this, the defense of laches, if proven, would typically be applied as a complete bar to the party's cause of action for accounting under 26 V.I.C. § 7 5 (b)(2)(iii), rather than as a limitation on the partners' § 71(a) claims presented within the § 177(b) accounting process. [20] However, the equitable defense of laches differs from any defense based upon the statute of limitations—a creature of law—in critical respects. Whereas direct application of a statute of limitations defense must fail because 5 V.I.C. § 31, by its own terms, applies only to causes of action, laches, as an equitable defense, is inherently flexible by nature, and may therefore be molded to suit the particular equities of a given case. [21]

20 In addition to pleading the affirmative defense of the statute of limitations, both Plaintiff and Defendants pled in their respective Answers the affirmative defense of laches.

21 The Supreme Court of the Virgin Islands has recognized at least one application of the defense of laches outside the confines of its traditional use as a bar to causes of action brought before the Court, further supporting the Court's conclusion herein that laches, as a creature of equity, is inherently broader and more flexible in its application than the statute of limitations. *See In the Matter of the Suspension of Joseph,* 60 V.I. 540, 558–59 (V.I. 2014) (noting that "laches, an equitable defense, is distinct from the statute of limitations, a creature of law," and finding that "the laches defense may apply to attorney discipline proceedings in certain very narrowly defined circumstances, such as when the delay in instituting the disciplinary proceedings results in prejudice to the respondent"). Particularly appropriate here, the Court also noted that "there may be factual situations in

which the expiration of time destroys the fundamental fairness of the entire proceeding." *Id.* (citing *Anne Arundel County Bar Ass'n, Inc. v. Collins,* 272 Md. 578 (1974)).

Doctrine of Laches as Limit on Scope of Accounting

***22** A most instructive case on this issue, bearing notable factual similarity to the case at bar, is the Connecticut Superior Court case of *Williams v. Williams,* 2010 Conn. Super. LEXIS 2344. [22] As described by the court, *Williams* involved a "battle between two brothers over how the assets of [their partnership] had been handled," in which each partner presented his own action for dissolution and accounting of the partnership. In response, each brother also presented affirmative defenses including, *inter alia,* statute of limitations and laches. *Id.* at *2–3. In explaining the law governing each partner's right to an accounting, the court noted that while a final accounting is generally "the one great occasion for a comprehensive and effective settlement of all partnership affairs" in which "all the claims and demands arising between the partners should be settled," the partners' "right to an accounting is not absolute." *Id.* at *7. Consistent with the principle that "actions for accounting generally invoke the equitable powers of the court," courts are granted wide latitude in setting the terms and principles upon which any accounting shall be based. [23] *Id.* "Consequently, a party's right to an accounting may be limited by other equitable considerations, for example a claim of laches." *Id.* at *8 (citations omitted).

22 Although the Connecticut Superior Court did not explicitly frame its opinion in the language of RUPA, Connecticut is a RUPA jurisdiction, and therefore the court's decision in *Williams* necessarily concerns principles applicable to actions for dissolution and accounting under RUPA. *See* Conn. Gen. Stat. § 34–300 et seq. (Revised Partnership Act). As the complaint in *Williams* was filed in 2006 there can be no doubt that the Williams partnership was governed by RUPA. *See* Conn. Gen. Stat. § 34–398(b) ("After January 1, 2002, sections 34–300 to 34–399, inclusive, govern all partnerships").

23 In articulating this rule, the Connecticut Superior Court referred to a Connecticut statute explicitly providing that "in any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be had." *Williams,* 2010 Conn. Super. LEXIS 2344, at *7 (citing Conn. Gen. Stat. § 52–401). Although the Virgin Islands lacks such a specific statute, the Court nonetheless concludes that the relevant provisions of RUPA such as 26 V.I.C. §§ 71, 75, and 177, coupled with the considerable discretion granted to the Court in tailoring equitable remedies to suit the needs of any given case, confer upon the Court wide latitude and discretion in establishing the terms and principles, including the scope, of this kind of judicially ordered and supervised accounting. *See supra,* discussion of Equitable Limitation of Scope of Partnership Accounting.

After noting that the statute of limitations had no direct applicability in the context of an accounting, the court explained that "to establish the defense [of laches], [a defendant] must prove both that there was an inexcusable delay by [the plaintiff] in seeking the accounting, and that [the defendant] has been prejudiced by the delay." *Id.* at *15. Under Connecticut law, the court was permitted to consider analogous statutes of limitation when evaluating the laches claim, but was not obligated to apply any such statute. [24] *Id.* Lastly, the court noted that the laches analysis "is an inherently fact specific question that can only be resolved by a close examination of the circumstances of the particular case." *Id.* at *16.

24 As discussed above, different jurisdictions afford different weight to the consideration of analogous statutes of limitations in the laches analysis. Connecticut appears to treat analogous statutes of limitations merely as one factor among many to be considered in evaluating a laches defense.

After examining nine separate claimed credits and charges to partner accounts presented by the defendant partner in his counterclaim, the court concluded that "the doctrine of laches precludes [defendant] from seeking an accounting on any of the issues he claims." *Id.* at *37. The court found that there had been "inexcusable delay" as plaintiff did not file his claims until 2007; even the most recent of which was related to events that transpired in 1999. *Id.* The court further noted that, while not dispositive of the issue, the most analogous statutory limitations period—three years for breach of fiduciary duty—had long expired. *Id.* This delay was inexcusable, as the defendant partner was, for most of the relevant period, "in charge of the day-to-day operations" of the partnership and therefore possessed either "actual or constructive knowledge of every transaction of which he now complains," and accordingly tolling was inappropriate. *Id.* at *38.

***23** Additionally, it was "clear to the court that [defendant's] delay in asserting his claims [had] prejudiced [plaintiff]." The court explained: "the passage of time puts [plaintiff] at an unfair disadvantage in responding to the merits of [defendant's] claims. Because many of [defendant's] claims involve how transactions were or were not recorded by [the partnership's] accountants an analysis of those claims would likely involve testimony from the accountants. Yet, how much [the accountant] might remember of a schedule he prepared for a client a decade before the claim relating to that schedule was made is questionable, at best." *Id.* at *39–40. Lastly, the court noted that while the parties had presented a "substantial amount" of accounting records, "they are by no means complete," and as such, "[plaintiff] would be at a distinct disadvantage if he were required to recreate or find decades of accounting records prepared by a variety of accountants." *Id.* at *40.

In summation, the court remarked: "While an accounting upon a dissolution of a partnership may be the final opportunity for the partners to square up, where one partner ignores issues year after year and allows the other partner to proceed along thinking everything is fine, the first partner cannot be heard to cry upon dissolution a decade or more later, 'I'd like a do over.' " *Id.* at *40–41. Accordingly, the court found that the plaintiff had met his burden in proving his laches defense to the defendant's counterclaim, entered judgment dissolving the partnership pursuant to stipulation of the parties, and ordered a final accounting to be conducted by an appointed third party, limited in scope to the reconciliation of the partners' respective interests in the partnership from January 1, 2009 to the September 15, 2010 dissolution of the partnership. *Id.* at *42.

Hamed/Yusuf Partnership Accounting

Turning to the case at bar, there are both striking similarities and critical differences between the factual scenario presented in this matter and that before the court in *Williams.* Just as in *Williams,* this matter is best described as a battle between two partners, here former friends and brothers-in-law, over how the assets of the partnership were handled. Additionally, despite having, at all times, either actual or constructive knowledge of the alleged ongoing, repeated withdrawals of partnership funds, both Hamed and Yusuf ignored these issues year after year and allowed one another to continue conducting partnership business, each implying to the other that all was well.

Procedurally, however, the *Williams* court considered the limitation of only one partner's accounting claims, as only that partner sought an accounting reaching back to the formation of the partnership while the other sought an accounting only as to how to divide the current assets of the partnership, as they stood at the time of dissolution. Additionally, whereas the defendant in *Williams* had identified in his counterclaim, by subject matter and date, nine specific challenged transactions, the description of the challenged transactions in the pleadings in this matter are largely devoid of specificity and generally fail to include the precise date, or even year of their occurrence. And while the parties in *Williams* had conducted significant discovery at the time of the court's ruling, here Hamed filed his present Motion with the clear aim of limiting not only the scope of Yusuf's § 71(a) claims, but also the cost and burden of the discovery process itself. *See* Plaintiff's Reply re Statute of Limitations, filed June 20, 2014, at 19. As a result of the partnership's notably informal and unreliable accounting, as well as each partner's general lack of concern or attention toward each other's financial practices over the lifetime of the partnership, neither partner truly knows what he might uncover upon investigation.

State of Partnership Accounting Records

Here, the pleadings alone demonstrate the imprecision and inadequacy of the partners' accounting practices. Hamed's Complaint explains the partners' practice of unilaterally withdrawing partnership funds as needed for various business and personal expenses on the understanding that "there would always be an equal (50/50) amount of these withdrawals for each partner directly or to designated family members." *See* Complaint ¶ 21. Though Hamed alleges that the partners "scrupulously maintained" records of these withdrawals, the other pleadings and evidence of record in this matter fatally belie this unsupported assertion. For example, Yusuf's First Amended Counterclaim in SX–14–CV–278 (FAC 278) speaks of the need for reconciliation of both "documented withdrawals" of cash from store safes, and "undocumented withdrawals from safes (i.e., all misappropriations)," in the § 177 accounting process. *See* FAC 278 ¶¶ 37–38.

***24** Yusuf has pled that, aside from the sole "full reconciliation of accounts" at the end of 1993, the partners only sporadically attempted to account for, and reconcile their respective

§ 71(a) charges and credits when Yusuf, for unspecified reasons, "decided their business accounts should be reconciled." *See* Counterclaim 287 ¶¶ 9–10. Alternatively, Yusuf has also alleged that such reconciliations sometimes occurred when Flamed specifically "sought to recover funds from his investment," at which point "funds would be given in cash and a notation would be made as to the amount given so as to insure an equal amount was paid to Yusuf from these net profits." *See* FAC 278 ¶ 55.

As part of the accounting and distribution phase of the Wind Up, Yusuf submitted to the Master the report of accountant Fernando Scherrer of the accounting firm BDO, Puerto Rico, P.S.C. (BDO Report). Yusuf contends that this report constitutes "a comprehensive accounting of the historical partner withdrawals and reconciliation for the time period 1994–2012." *See* Opposition to Motion to Strike BDO Report, filed October 20, 2016. However, the BDO report, by its own terms, appears to be anything but comprehensive. Most tellingly, the body of the BDO Report itself contains a section detailing its own substantial "limitations," resulting from the absence or inadequacy of records for each of the grocery stores covering various periods during the life of the partnership.[25] *See* Plaintiff's Motion to Strike BDO Report, Exhibit 1, at 22. Additionally, the analysis presented in the report rests on the unsupported assumption that any monies identified in excess of "known sources of income" constitute distributions from partnership funds to the partners' § 71(a) accounts. Thus, even Yusuf's own "expert report" acknowledges the insurmountable difficulties inherent in any attempt to accurately reconstruct the partnership accounts; a project which necessarily becomes proportionately more difficult and less reliable the farther back in time one goes.

25 These limitations include the following: 1) "Accounting records of Plaza Extra–East were destroyed by fire in 1992 and the information was incomplete and/or insufficient to permit us to reconstruct a comprehensive accounting of the partnership accounts before 1993;" 2) "Accounting records and/or documents (checks registers, bank reconciliations, deposits and disbursements of Supermarkets' accounts) provided in connection with Supermarkets were limited to covering the period from 2002 through 2004, East and West from 2006 through 2012, and Tutu Park from 2009 through 2012;" and 3) "Accounting records and/or documents provided to us for the periods prior to 2003 are incomplete and limited to bank statements, deposit slips, cancelled checks, check registers, investments and broker statements, cash withdrawal tickets/receipts and cash withdrawal receipt listings. For example, the retention policy for statements, checks, deposits, credits in Banco Popular de Puerto Rico is seven years; therefore, there is no Bank information available prior to 2007 and electronic transactions do not generate any physical evidence as to regular deposits and/or debits." Plaintiff's Motion to Strike BDO Report, Exhibit 1, at 22.

Furthermore, in his Revised Notice of Partnership Claims (RNPC), filed October 17, 2016, Hamed expressly states that he "believes that it is clear that because of the state of the partnership records due to Yusuf's acts and failures to act, no [accounting for the period from 1986–2012] is even arguably possible." RNPC, at 6–7. Plaintiff's belief appears to be based in large part on the Opinion Letter of Lawrence Shoenbach, presenting the "expert opinion of a criminal defense attorney with experience in federal criminal practice and so-called 'white collar' business crimes involving tax evasion, money laundering, and/or compliance." *See* RNPC, Exhibit C (Op. Letter), at 1.

***25** Plaintiff's expert [26] bases his opinion on the 2003 Third Superseding Indictment in the matter captioned *United States of America and Government of the Virgin Islands v. Fathi Yusuf Mohamad Yusuf et al.* and United's plea of guilty to Count 60 (tax evasion) thereof. [27] Under the terms of the plea agreement, United pled guilty to willfully preparing and presenting a materially false corporate income tax return for the year 2001 by reporting gross receipts as $69,579,412, knowing that the true amount was approximately $79,305,980. Plea Agreement at 3–4, *United States v. Yusuf*, No. 2005–15F/B (D.V.I. Feb. 26, 2010). According to the indictment, United evaded reporting gross receipts by employing a cash diversion/money laundering scheme by which United, through its officers and employees, [28] conspired "to withhold from deposit substantial amounts of cash received from sales, typically bills in denominations of $100, $50, and $20." *See* Plaintiff's Reply re Statute of Limitations, Exhibit D (Indictment) ¶ 12. Additionally, it was alleged that "instead of being deposited into the bank accounts with other sales receipts, this cash was delivered to one of the defendants or placed in a dedicated safe in a cash room." *Id.* As described by Plaintiff's expert, "those acting on behalf of the company took cash out of sales before the Company could properly account for them." Op. Letter, at 5.

26 The Court refers to Lawrence Shoenbach as "Plaintiff's expert" in this Opinion for simplicity. The Court expresses no opinion, however, as to the qualifications of this expert within the meaning of Virgin Islands Rule of Evidence 702.

27 "Although all of the individual defendants [Fathi Yusuf, Maher Yusuf, Isam Yusuf, Nejeh Yusuf, Waleed Hamed, and Waheed Hamed], were charged in the criminal indictment, only the corporate defendant [United] was convicted of a crime... Critical to my analysis is that United admitted at the time of entry of the corporate plea that it under-reported gross receipts by utilizing the money laundering scheme outlined in the 3rd superseding indictment." Op. Letter, at 3.

28 Including Fathi Yusuf, Maher Yusuf, Isam Yusuf, Nejeh Yusuf, Waleed Hamed, and Waheed Hamed. *See* Indictment, at 1.

The expert explains:

> The most fundamental feature of such a scheme is that the actual accounting records of the entity do not, and in fact *cannot,* accurately reflect the amount of cash taken in. No proper accounting can be determined from the Company's financial records because the gross receipts have been intentionally misapplied and documented. The very purpose of this sort of scheme is to render any accounting innacurate... It is critical that the parties have both admitted that many records of transaction that should have gone into any accurate accounting were not kept or mutually and intentionally destroyed... Because the very nature of the crime, particularly money laundering/tax evasion, is to hide such incoming and outgoing funds from legitimate accounting it is impossible to determine and account for any portion of that amount each partner has or owes to the other. Since many

> such transactions were not recorded or destroyed, any remaining "records" can never be legitimately credited or debited against the unknown amounts.

Op. Letter, at 6–7. [29]

29 The Court is not called upon to express any opinion, and therefore does not express any opinion, as to the criminal nature of the conduct of the individual defendants named in the criminal matter, except to the extent that such conduct demonstrates both the impossibility of reconstructing financial records or conducting, at present, an accurate accounting, and the partners' knowledge of this state of affairs. However, United's guilty plea as to Count 60 establishes that United, which as a corporation must necessarily act through its officers and employees, intentionally schemed to obfuscate gross receipts and cash disbursements thereby rendering impossible any accurate reconstruction of accounts.

In his April 3, 2014 deposition in this matter, Maher Yusuf recounted one instance, just prior to the FBI's raid of the Plaza Extra stores in 2001, in which Waheed Hamed advised Waleed Hamed of the impending raid, and Maher Yusuf and the Hameds mutually "decided to destroy some of the receipts, because they were all in cash." *See* Op. Letter, at 7 n.5. According to his deposition testimony, Maher Yusuf, together with Mufeed Hamed, "pulled out a good bit of receipts from the safe in Plaza East," and after roughly estimating the amount of withdrawals attributable to the Hameds and the Yusuf's, each family destroyed their own receipts. *Id.* At the hearing on March 6–7, 2017, witnesses including Hamed's sons corroborated this account as well as many of the allegations of the Third Superseding Indictment. Evidence presented at the hearing included testimony concerning a cash diversion scheme involving cashier's checks, conflicting testimony regarding the ledger and receipt system for keeping track of cash withdrawals at each partnership store, and testimony that records documenting the withdrawals had been destroyed.

***26** Altogether, the allegations presented in the pleadings paint a clear picture of the partners' loose, "honor system" style accounting practices by which each partner and his sons freely and unilaterally withdrew partnership funds, either by check drawn upon partnership bank accounts or, apparently more often, by directly removing cash from store safes; the only apparent control being a general understanding between the partners that such withdrawals would be documented by hand-written receipts to be placed in the safe so that the partners, at some undetermined date, could reconcile their accounts if, and when, they deemed it appropriate. Additionally, evidence of record reveals one clear instance in which the partners, through their sons, deliberately destroyed a substantial amount of records evidencing such withdrawals, and further suggests a general pattern of negligent, if not willful, failure to record such withdrawals throughout the history of the partnership. At a bare minimum, the pleadings and record evidence establish that the partners and their sons had both unfettered access to large amounts of cash, deliberately kept off company books, and ample opportunity to secretly remove that cash, secure in the knowledge that no partner, accountant, or investigator would be able, after the fact, to ascertain the amount taken, as the total amount of cash kept in store safes was intentionally omitted from any record keeping.

Knowledge, Delay, and Prejudice

Against this backdrop of decades of woefully inadequate and, in some instances, deliberately misleading accounting practices, the partners now present their competing claims for partnership accounting asking the Court to employ its already strained resources to untangle the web that they have spun and clean up the mess that they have made. Given the dismal state of the relevant records, this process necessarily entails an evaluation of each individual § 71(a) claim submitted to determine whether, in light of the frequently conflicting recollections of the partners, any given withdrawal or expenditure of partnership funds constituted a legitimate business expenditure on behalf of the partnership, or a unilateral withdrawal chargeable to the partner's § 71(a) account. However, just as in the *Williams* case, where each partner "ignores issues year after year and allows the other partner to proceed along thinking everything is fine, [neither partner will] be heard to cry upon dissolution a decade or more later, 'I'd like a do over.' " 2010 Conn. Super. LEXIS 2344, at *40–41.

Here, both partners and their respective sons were well aware from the beginning of their involvement with the business that any record keeping and accounting of distributions to the partners was highly informal and controlled only by the "honor system." As managing partner, Yusuf was not only intimately familiar with the methods of record keeping, or lack thereof, employed by the partnership, but was the one responsible for designing and implementing those procedures in the first place. It was Yusuf's responsibility to oversee, account for, and periodically reconcile the distributions of funds between the partners. And though Yusuf was content to dispense with the standard business accounting formalities for nearly the entire life of the partnership, upon Hamed's filing his Complaint in this matter, Yusuf changed course and now seeks to vindicate his right to a thorough and methodical partnership accounting. [30]

30 Yusuf argues that he only became aware of the extent of the Hameds' withdrawals of partnership funds upon the 2010 return of the voluminous documentation seized by the FBI in 2002. However, affidavit evidence shows that all documents seized by the FBI were not only available to the defendants in the criminal matter, including Yusuf, but were, in feet, thoroughly reviewed by them, through their lawyers, on multiple occasions. *See* Hamed's Reply re Statute of Limitiations, Exhibit 4–B (Declaration of Special Agent Thomas L. Petri) (noting that in 2003, subsequent to the return of the indictment, counsel were given complete access to seized evidence, and that a team of four to five individuals led by the attorney for defendants reviewed evidence at the FBI office on St. Thomas for several weeks).

Hamed is no less to blame for this state of affairs and no less at fault for failing to seek any formal accounting of his interest until this late hour. Although Hamed was not the managing partner, he was undoubtedly aware of the absence of any formal record keeping from at least the date of the first and only true-up of the partnership business in 1993, if not from the very inception of the partnership. [31] While Hamed may not have had the foresight to know that the 1993 true-up would be the last undertaken, the fact that the partners waited

approximately seven years—since the founding of the partnership in 1986—to conduct the first and only complete reconciliation of the accounts between them demonstrates that Hamed was equally content with this practice of informal and sporadic accounting.

31 Even the 1993 "true-up" itself was merely an informal reconciliation. As Hamed explains, "reliable books have only been attempted since an order from the District Court in the criminal case requiring such an accounting." *See* Plaintiff's Comments Re Proposed Winding–Up Order, filed October 21, 2014, at 11.

***27** Furthermore, both partners were clearly aware, during the entire life of the partnership, of their mutual practice of making, either personally or through their sons, unilateral withdrawals of partnership funds documented by hand-written receipts and controlled only by the honor system. Additionally, by at least 2001 and likely before, Hamed and Yusuf were similarly aware that substantial monies deposited in the store safes were being deliberately kept off the partnership books, and that all involved acted without hesitation in destroying voluminous records of cash withdrawals thereby rendering any independently verifiable accounting or audit impossible. Certainly, by the time of the 2003 filing of the Third Superseding Indictment in the criminal case recounting the cash diversion scheme implemented by the officers of United, even the most trusting individual would have sufficient reason to suspect malfeasance, thereby putting both partners on inquiry notice. [32]

32 This notion is perhaps best, and most memorably, expressed in Martin Scorsese's 1995 film, *Casino,* in which the gangster, Nicky Santoro, played by Joe Pesci, remarks of the men conducting the skim operation at the fictional Tangiers Casino: "You gotta know that the guy who helps you steal... even if you take care of him real well... he's gonna steal a little extra for himself. Makes sense, don't it?"

Thus, on the basis of the pleadings and evidence of record, it is clear that both Hamed and Yusuf, personally and through their sons as agents, had actual notice of the informal and imprecise nature of the accounting practices of the partnership since at least 1993, as well as actual notice of the deliberate destruction of substantial accounting records in 2001. In turn, even if the partners were ignorant of any one withdrawal of partnership funds considered in isolation, they both had actual notice of the significant potential for abuse inherent in their chosen method of record keeping, and therefore constructive, if not actual, notice of the need to protect their respective partnership interests by action pursuant to 26 V.I.C. § 75(b).

Additionally, by his acquiescence to such inadequate record keeping and his inexcusable delay in seeking to enforce his rights under 26 V.I.C. §§ 71(a) and 75(b), each partner has irrevocably prejudiced the ability of the other to respond to the various allegations against him. Here, as in *Williams* "the passage of time puts [each partner] at an unfair disadvantage in responding to the merits of [the other partner's] claims." 2010 Conn. Super. LEXIS 2344, at *39–40. Similarly, "because many of [the] claims involve how transactions were or were not recorded... an analysis of those claims would likely involve testimony" from the partners and then-sons, yet, how much they might remember concerning the details of a transaction completed a decade earlier "is questionable, at best." *Id.* Lastly, while the court in *Williams*

concluded that the defendant was prejudiced despite the production of "substantial records," here, in the absence of complete or comprehensive records, the partners are even more so "at a distinct disadvantage" in any attempt to "recreate or find decades of accounting records." *Id.* at *40. Thus, the Court concludes that consideration of the principles underlying the doctrine of laches strongly supports the imposition of an equitable limitation on the submission of § 71 (a) claims in the accounting and distribution phase of the Wind Up Plan. [33]

33 In addition to laches, consideration of the equitable doctrine of unclean hands also supports the impositions of an equitable limitation on the partners' § 71(a) claims. "It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing." *SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC,* 62 V.I. 168, 205–06, (V.I. Super. Ct. 2015) (quoting *Sunshine Shopping Ctr., Inc. v. KMart Corp.,* 85 F. Supp. 2d 537, 544 (D.V.I. 2000)). As explained above, both partners bear responsibility for the dismal state of partnership records, and for allowing the practice of unilateral withdrawal of partnership funds to continue unchecked, in the absence of accurate records. Additionally, as both partners, through their sons as agents, engaged in the deliberate destruction of accounting records, neither partner can be said to have come to Court in this matter with clean hands.

Policy Considerations

***28** Moreover, imposing such a limitation furthers the clear policy goals of the legislature as embodied by RUPA. In *Fike v. Ruger,* the Delaware Chancery Court examined statutory language identical to 26 V.I.C. § 75, and determined that "it is clear under RUPA that a right of action arising during the life of a partnership is not revived merely because dissolution occurs and a separate right to an accounting on dissolution arises." *Id.* at 263. While the common law and prior statutory scheme "placed partners in the predicament of either causing a dissolution to resolve disputes or continuing the partnership despite a cloud of conflict and uncertainty hanging over it, the drafters of [RUPA] included Section 22 [26 V.I.C. § 75], specifically authorizing actions prior to dissolution." *Id.* "The effect of those rules is to compel partners to litigate their claims during the life of the partnership or risk losing them." National Conference of Commissioners on Uniform State Laws; Uniform Partnership Act; Section 405(c) comment 4.

Both partners' claims, as presented in this matter, must be construed as actions for dissolution, wind up, and accounting under § 75(b)(2)(iii). Yet, each partner could have, and under the policy considerations undergirding RUPA, should have, brought his claims concerning individual withdrawals of partnership funds or other transactions, with or without an accompanying action for accounting, as each partner became aware or should have become aware of those transactions pursuant to § 75(b). Such a policy not only furthers the traditional goals of the statute of limitations by preventing prejudice to defendants resulting from the inevitable decay of memory and other evidence, but also prevents litigants from imposing upon the judiciary, and in turn the taxpayer, the burden of individually evaluating the validity of numerous disputed transactions decades after the fact. In this instance, the stated policy of RUPA clearly prevents both Hamed and Yusuf from imposing

upon the Court the great burden of sorting through the ramshackle patchwork of evidence supporting their § 71(a) claims, to reconstruct decades' worth of partnership accounts, when the partners, who deliberately determined not to keep accurate records in the first place, were themselves content to carry on conducting partnership business despite having full knowledge of the pattern of conduct of which they now, belatedly, complain.

Conclusion

"Equity aids the vigilant, not those who slumber upon their rights." *Kan. v. Colo.,* 514 U.S. 673, 687 (1995) (quoting Black's Law Dictionary 875 (6th ed. 1990)). And in keeping with this great maxim of jurisprudence, the Court concludes that considerations of laches, in addition to the express policy goals of the legislature as embodied by RUPA, justify the imposition of an equitable limitation on the submission of the partners' § 71(a) claims to the Master in the accounting and distribution phase of the Final Wind Up Plan. Because each of these § 71(a) claims could have, and should have, been pursued as they arose as causes of action under § 75(b)(1) to "enforce the partner's rights under the partnership agreement," the Court finds that such actions, had they been brought individually, would be subject, either directly or by analogy, to the six year limitations period outlined in 5 V.I.C. § 31(3)(A) as a species of an action upon contract. [34] Therefore, the Court exercises the significant discretion it possesses in fashioning equitable remedies to restrict the scope of the accounting in this matter to consider only those § 71(a) claims that are based upon transactions occurring no more than six years prior to the September 17, 2012 filing of Hamed's Complaint. [35]

34 Alternatively, these claims could have been pursued under 26 V.I.C. § 75(b)(2)(i) to "enforce the partner's rights under sections 71, 73, or 74 of this chapter," which, as "action upon a liability created by statute," are also subject, whether directly or by analogy, to a six year limitations period under 5 V.I.C. § 31(3)(B).

35 Yusuf has argued that certain § 71(a) claims are effectively undisputed, and that "if it is undisputed that payments were made to a partner, even without authorization, then to exclude them from an accounting for that reason would be entirely arbitrary." First, it appears doubtful, based upon the record and the representations of the parties in this matter, that any claim submitted by either party would truly be undisputed. But, even if some claims were, in fact, undisputed, because of the great dearth of accurate records there exists such an element of chance in any attempt to reconstruct the partnership accounts that an accounting reaching back to the date of the last partnership true-up in 1993 would ultimately be no more complete, accurate, or fair, than an accounting reaching back only to 2006.

***29** In light of the foregoing, it is hereby

ORDERED that Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent is DENIED, as to Counts IV and XII. It is further

ORDERED that Hamed's Motion for Partial Summary Judgment re the Statute of Limitations Defense Barring Defendants' Counterclaim Damages Prior to September 17, 2006 is DENIED. It is further

ORDERED that the accounting in this matter, to which each partner is entitled under 26 V.I.C § 177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C § 71(a), based upon transactions that occurred on or after September 17, 2006.

All Citations

2017 WL 3168458