

Plaintiff Reply to Opposition to Motion to Remand
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shareholder in United. Instead, he simply claims that the three Plaza Extra supermarket operations and assets are owned 50/50 by a partnership between himself and Yusuf.

Fourth, United's argument that this case is nothing more than an effort to keep United from filing its required tax returns is untrue as well. To the contrary, Mohammad Hamed has urged United to file proper tax returns. This is noted in plaintiff's counsel's recent letter attached to United's opposition memorandum as Exhibit 29.² (DE 19-29) In short, United is free to file its tax return at any time, and should do so, as this case does not interfere with those filings in any way.³

Fifth, the defendants' argument that the plaintiff's claim is somehow novel or inconsistent with what has transpired in the criminal case is both untrue and irrelevant. In fact, as noted by the defendants' opposition, the Government also raised the issue of whether United actually owns the Plaza Extra *supermarket operations and assets*. (DE 19-13) The government's filing that explored that issue quoted sections of the same deposition testimony by Yusuf already submitted to this Court by the plaintiff (DE 18-6). The sections quoted by the Government include a specific and unqualified admission by Fathi Yusuf that the plaintiff Mohammad Hamed (Yusuf's brother-in-law) is Yusuf's 50/50 partner in the Plaza Extra supermarket operations and assets, stating under oath as follows:

² As noted, United is required to file proper tax returns. If doing so requires it to properly account for the partnership profit split from the three supermarket operations in question, as the plaintiff believes, then United must do so. Indeed, the IRS and the IRB certainly want correct returns filed.

³ In fact, the request for a *status quo* TRO pending in this case does not seek to enjoin United from filing its tax returns. (DE 1-5)

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But I want you please to be aware that my partner's with me since 1984, and up to now his name is not in my corporation. And that -- excuse me and that prove my honesty. Because if I was not honest, my brother-in-law will not let me control his 50 percent. And I know very well, my wife knows, my children knows, that **whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.** (DE 19-14) (Emphasis added) (To assist the Court, this excerpt is also attached hereto as **Exhibit A.** See p. 23).

As the U.S. Attorney noted, even Yusuf's own attorney made sure this point was clear, eliciting the following testimony (DE 19-14)(excerpt attached as **Exhibit A,** at p. 69):

Q. Okay. Okay. You were asked by Attorney Adams, when it says United Corporation in this [other, unrelated] Joint Venture Agreement, **in talking about Plaza Extra, talking about the supermarket** on St. Thomas, who owned or who was partners in United Corporation **Plaza Extra** at the time before you entered into that Joint Venture Agreement?

A. **It's always, since 1984, Mohammed Hamed.**

Q: Okay. So when it says United Corporation –

A. **It's really meant me and Mr. Mohammed Hamed.** (Emphasis added)

This deposition testimony is from the same deposition quoted in the plaintiff's TRO reply memorandum.⁴ (DE 18) Thus, the allegations being raised by Mohammad Hamed in this case are neither novel nor inconsistent with matters already considered by the government in the criminal case.

Finally, and most important, **even if all of the arguments advanced by the defendants were true, they would not support a finding of federal jurisdiction in this case.** Despite the defendants' extensive efforts to create such jurisdiction, this is a purely local matter and should be remanded to the Superior Court forthwith.

⁴ To assist the Court, the relevant section quoting this full deposition excerpt from that motion is attached hereto as **Exhibit B.**

I. The Allegations In The Complaint

This is a complaint filed solely under the partnership law of this territory, in a dispute between citizens of the Virgin Islands, only seeking relief under V.I. partnership law. As there is no federal cause of action, this action is purely local in nature.⁵

The defendants ignore the clear language in the complaint and fail to respond to the point in Plaintiff's motion to remand relating to the plaintiff being the "master of his own complaint." Instead, the defendants try to create federal jurisdiction by arguing that the complaint "implicitly" contains certain allegations and seeks federally-related relief "by implication," none of which is found anywhere on the face of the complaint.⁶

United also argues the facts of the case -- alleging that two of the plaintiff's sons (not the plaintiff) made statements that contradict the plaintiff's allegations in the complaint. Even if such statements had been made (they were not), those facts would only be relevant to a potential defense to the plaintiff's complaint, as they do not change the allegations in the complaint, which determine if a federal question exists.⁷

⁵ While the merits of the claim are irrelevant to jurisdiction, there is a plethora of evidence based on the Defendants' own multiple admissions to support the allegations of a partnership. That evidence is discussed at length in the "success on the merits" sections of the TRO memorandum and reply. (DE 1-5 & 18) To make these sections more accessible for the Court, these portions of those two pleadings are attached as **Exhibits C and D**. Indeed, the excerpts in Exhibit D respond directly to the irrelevant factual matters raised in the defendants' opposition to the remand motion.

⁶ The defendants' approach ignores the well-established black letter law that a plaintiff is master of his own complaint. *Rivet v. Regions Bank of Louisiana*, 118 S.Ct. 921, 925 (1998); *Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171 (3d Cir. 1997).

⁷ As the plaintiff pointed out in his remand motion ". . . a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint . . ." *Rivet* 118 S.Ct. at 925 (quoting *Franchise Tax Board of*

Indeed, if the merits of the case were pertinent to the remand motion, the defendants' admissions that a partnership exists would be pertinent here, such as the portion of the Yusuf deposition previously described, as well as the admission made by United's president who stated the following in a declaration in this case (DE 11-2):

17. Most importantly, United has always charged rent for the use of part of its retail premises **by the Plaza Extra Supermarket operation** on Sion Farm, St. Croix. **Mohammed Hamed** has always understood that United would charge for the use of its retail space, **and would deduct the value of such rent in arriving at the net profits of the Plaza Extra Supermarkets.** (Emphasis added.)

However, all of these facts go to the merits of the claim, not the remand issue.

In short, as none of the collateral issues and potential defenses raised by the defendants are mentioned anywhere in the complaint, they are really irrelevant to the remand issue. With this understanding in mind, it is appropriate to address the arguments raised by the defendants in their opposition.

II. There is no federal or Virgin Islands tax claim raised in the complaint

The defendants first argue that this Court has exclusive jurisdiction over this case because it raises a tax issue, for which this Court has exclusive jurisdiction under 48 U.S.C. §1612(a). However, the complaint does not raise any tax claims, nor does it seek tax relief. **Indeed, it is a case between private parties**, and does not involve tax claims either between them or against (or by) the Virgin Islands Internal Revenue Bureau (IRB) or the United States Internal Revenue Service (IRS), which is the precise jurisdiction established by 48 U.S.C. § 1612(a). In brief, under the "well-pleaded

California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 14 (1984)). The Defendants did not even try to address this well-established rule.

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complaint” rule, the defendants’ efforts to insert this tax issue into the complaint must fail. *See Rivet* 118 S.Ct. at 925; *Joyce* 126 F.3d at 171.⁸

Likewise, the defendants’ sub-argument that the complaint is really an attempt to keep United or Yusuf from filing their tax returns has no factual basis, as noted above. United is free to file proper tax returns at any time. Indeed, the plaintiff has encouraged United to do so, as noted by Exhibit 29 attached to the defendants’ opposition. (DE19-29) Indeed, the plaintiff has not seek an injunction keeping it from doing so.

Recognizing the weakness of this argument, United also attempts to show that the plaintiff is trying to use this case to enforce the TRO entered in a criminal case. Again, no such claim has been raised, nor has any such relief been sought. To the contrary, the plaintiff has sought a separate **status quo** injunction in this case, based on the facts established **in this record**. (DE 1-5 & 18). Thus, this argument has no merit either.

In summary, the complaint filed in this case does not raise any tax claims or seek any tax relief that would warrant this Court exercising jurisdiction under 48 U.S.C. § 1612(a). Indeed, it is hard to understand how that statute would apply to any tax claim where the Government is not a party. In any event, it does not apply to the claims raised in the complaint filed in this case.

⁸ Under the well-pleaded complaint rule, the plaintiff is the master of his complaint and would be free to openly and intentionally *avoid* federal jurisdiction by “pleading only state claims *even where a federal claim is also available.*” *Marcus v. AT&T Corp.*, 138 F.3d 46, 52 (2d Cir.1998) (emphasis added.)

II. There is no federal question raised in the complaint

The defendants argue next that this case involves a federal question, warranting a finding of jurisdiction under 28 U.S.C. § 1331. However, a review of the complaint reveals that there is no federal question raised.

Defendants try again to insert a “federal” issue, where none exists by arguing that while this is a state law action, it will depend on *the interpretation of federal law*, citing *Grable & Sons Metal Products, Inc.*, 545 U.S. 308 (2005) for this proposition. In *Grable*, the plaintiff filed a suit in state court against the purchaser of his property at a tax sale conducted by the IRS for back taxes. The plaintiff was trying to set aside the IRS tax sale because he claimed the IRS had given him improper notice of the sale. The Supreme Court found that the case could be removed because at its core, it involved an interpretation of the federal statute pursuant to which the IRS gave notice of the sale.

Unlike the facts in *Grable*, the complaint in this case states a cause of action that will depend on the local partnership law of the Virgin Islands, not the interpretation of any federal statute. Thus, the holding in *Grable*, which the Supreme Court noted had a *very* limited application, is easily distinguishable.

Notwithstanding the fact that the interpretation of a federal statute is not implicated in this case, the defendant (again) argues that this case presents a federal question because the outcome will have an impact on the “tax issues and obligations set forth in the plea agreement.” In support of this argument, Defendants cite *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). That case is easily distinguishable as well. In *Smith*, a shareholder in a bank was seeking to have the Court declare that

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certain securities were issued under an act of Congress that the shareholder claimed was *unconstitutional*. Clearly a constitutional challenge to an act of Congress creates a federal question, but there is no such federal act being challenged as unconstitutional in this case.

Finally, tacitly acknowledging the failure of these first two arguments, as the facts and holdings in *Grable* and *Smith* do not support a finding that there is a federal issue in this case, the defendants still argue that this *is* a federal question -- contending the Plaintiff is allegedly seeking to have the defendants file tax returns *in violation of federal law*. However, the complaint does not seek any such relief. Indeed, if it did, it would not survive a Rule 12(b)(6) attack, as no court would permit a plaintiff to proceed with a claim seeking to force another party to file a tax return in violation of the law. In fact, the plaintiff has told the defendants in no uncertain terms that they should go ahead and file proper tax returns. (DE 19-29).

In summary, there is no federal question raised in the complaint filed in this case, nor is there any federal law or constitutional provision that might be affected by the outcome of the case.

III. Neither United (a criminal defendant) nor Fathi Yusuf is "acting under" a federal officer with regard to an act done "under color of federal law"

The defendants' final argument is that they are somehow "acting under" a federal officer in filing tax returns mandated by a plea agreement, making their actions in filing tax returns an act done under "color of federal law" -- warranting imposition of jurisdiction under 28 U.S.C. §1442(a)(1).

Let's see how this works. Everyone is required to file proper tax returns, so clearly everyone is not acting as (or under) a "federal officer" when they do so. So, when a corporation is indicted for filing false tax returns and then agrees to file proper tax returns as part of a plea agreement, it is now acting as (or under) a "federal officer?" Of course not -- the argument is ludicrous. Equally important, as noted at length above, the complaint *does not* allege any claims regarding the filing (or non-filing) of tax returns, nor does it seek any relief related to the filing of taxes. This argument is not only frivolous, it is irrelevant to the claims raised in the complaint.

Not to be deterred, the defendants also cite *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) and *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010) to support jurisdiction under §1442(a)(1), which allows such a finding when the defendant is (1) a person acting under a federal officer (2) who is being sued for his actions done as a federal officer and (3) he has a colorable federal defense. Not one of these three factors applies, much less all three, as noted throughout this reply.⁹

Criminal defendants entering into a plea agreement are not acting "for or relating to any act under color of such office" or "on account of any right, title or authority claimed under any Act of Congress" related to the punishment of criminals or the collection of the revenue. *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 152,

⁹ The "government contractor" line of "acting under federal law" cases to which defendants cite is an extremely well-litigated and highly specialized area of federal liability/contracting law -- dealing with the very close issue of when a federal contractor is so controlled and regulated in the carrying out of a federal function (such as building warships) that they are acting for and as the government in such a way that if they are sued, the judgment and effects will essentially be those of the federal government. There are a multitude of cases dealing with this contracting issue -- none even arguably analogous to conduct by federal criminal defendants.

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127 S.Ct. 2301, 2307 (2007) (" . . .the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law. . . . [mentioning both taxpayers and] well-behaved federal prisoners.") As noted in *Watson*:

The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries. *Id.* at 153.

See also 166 ALR, Fed. 297, *Who is "Person Acting Under" Officer of United States or Any Agency Thereof for Purposes of Availability of Right to Remove State Action to Federal Court Under 28 U.S.C.A. § 1442(A)(1)*.

In short, even though the defendants are required to file tax returns in order to comply with the federal plea agreement in question, it does not make this an act being done under an officer of the United States, nor are they then acting under color of federal law. Indeed, the defendants' opposition ignores the far more analogous situation in the case cited in plaintiff's motion for removal, *Morgan v. Ford Motor Co.*, 2007 WL 2137831, 1 (D.N.J. 2007), which held that the defendant's conduct was not "acting under" such authority where defendant ". . .was governed by a series of administrative consent orders and it was doing exactly what the Environmental Protection Agency told it to do. . ." Thus, this argument does not create federal jurisdiction in this Court.

IV. Conclusion

Plaintiff's counsel routinely files cases in both the federal and local courts in this jurisdiction. If there were even an arguable federal jurisdiction here, the plaintiff would have proceeded before this Court. However, no party can confer subject matter jurisdiction on this Court, so that a case cannot be heard here even if the parties stipulate to the case being heard by this Court. Plaintiff will not subject this case to the threat of eventual reversal by conceding jurisdiction where it does not exist.

In this case, the plaintiff pled a local cause of action involving a partnership dispute with the defendants. The pleadings are clear and the relief sought is equally clear -- despite the defendants' efforts to the contrary. Thus, as there is no basis for finding federal jurisdiction, this matter should be remanded back to the Superior Court of the Virgin Islands .

Dated: October __, 2012

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Dated: October __, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ of October, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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/s/ Joel H. Holt _____

EXHIBIT A

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

AHMAD IDHEILEH,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 156/1997
)	
UNITED CORPORATION and)	
FATHI YUSUF, Individually,)	
)	
Defendants.)	

THE ORAL DEPOSITION OF FATHI YUSUF
was taken on the 2nd day of February 2000, at the Offices of
Caribbean Scribes, 2132 Company St., Ste. 3, Christiansted,
St. Croix, U.S. Virgin Islands, between the hours of
1:05 p.m. and 4:05 p.m. pursuant to Notice and Federal Rules
of Civil Procedure.

Reported by:

Cheryl L. Haase
Registered Professional Reporter
Caribbean Scribes, Inc.
2132 Company Street, Suite 3
Christiansted, St. Croix U.S.V.I.
(340) 773-8161

EXHIBIT
A

Cheryl L. Haase
(340) 773-8161

COPY

FATHI YUSUF -- DIRECT

1 MR. ADAMS: Let the record indicate I'm
2 showing Mr. Yusuf a copy of the Joint Venture Agreement.

3 A. I sees Mr. Idheileh and myself and Notary Public,
4 and I believe it's a witness underneath. I don't know.

5 Q. (Mr. Adams) Now --

6 A. Notary Public someplace else, and the same
7 witness, and my signature repeated again on a different page.
8 My son. Yeah, my son is the president of United Corporation.

9 Q. Now, sir, the Joint Venture Agreement is between
10 whom?

11 A. Between -- if you have to look at it this way, --

12 Q. No, no, I'm looking --

13 A. -- between me, my partner and him.

14 Q. No, Mr. Yusuf. Let us look at the Joint Venture
15 Agreement that was signed.

16 A. Yeah, I seen it. United Corporation.

17 Q. Thank you.

18 A. But I want you please to be aware that my
19 partner's with me since 1984, and up to now his name is not
20 in my corporation. And that -- excuse me -- and that prove
21 my honesty. Because if I was not honest, my brother-in-law
22 will not let me control his 50 percent. And I know very
23 well, my wife knows, my children knows, that whatever
24 Plaza Extra owns in assets, in receivable or payable, we have
25 a 50 percent partner.

1 convince my partner's son, Look, we got \$6 million in this
2 store. This man, we come to an agreement --

3 Q. We're talking about Sea-Mart.

4 A. Okay.

5 Q. So in Sea-Mart, when you negotiated that
6 transaction that Mr. Idheileh would be able to be out of
7 Sea-Mart, --

8 A. Yes.

9 Q. -- was that based upon the books or just on a
10 hand shake?

11 A. There was no book whatsoever. Based on their
12 conversation.

13 Q. Okay. Okay. You were asked by Attorney Adams,
14 when it says United Corporation in this Joint Venture
15 Agreement, in talking about Plaza Extra, talking about the
16 supermarket on St. Thomas, who owned or who was partners in
17 United Corporation Plaza Extra at the time before you entered
18 into that Joint Venture Agreement?

19 A. It's always, since 1984, Mohammed Hamed.

20 Q. Okay. So when it says United Corporation --

21 A. It's really meant me and Mr. Mohammed Hamed.

22 Q. Okay.

23 A. Mr. Idheileh is well aware of that.

24 Q. Okay. Well, we're talking now Plaza Extra
25 St. Thomas. Who was responsible for hiring employees?

EXHIBIT B

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

AHMAD IDHEILEH,

Plaintiff,

vs.

UNITED CORPORATION and
FATHI YUSUF, Individually,

Defendants.

Case No. 156/1997

THE ORAL DEPOSITION OF FATHI YUSUF

was taken on the 2nd day of February 2000, at the Offices of Caribbean Scribes, 2132 Company St., Ste. 3, Christiansted, St. Croix, U.S. Virgin Islands, between the hours of 1:05 p.m. and 4:05 p.m. pursuant to Notice and Federal Rules of Civil Procedure.

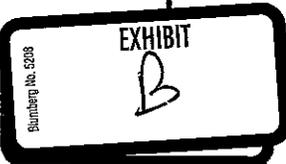
Reported by:

Cheryl L. Haase
Registered Professional Reporter
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(340) 773-8161

EXHIBIT

B

Cheryl L. Haase
(340) 773-8161



1 A. I personally own 50 percent of Plaza Extra in
2 1986. I own United Shopping Plaza. I'm a member of
3 United Corporation, who owns United Shopping Plaza. I build
4 that store, I was struggling for a loan. The whole island
5 know what I went through. I said I'm going to build this
6 building no matter what, and hold the supermarket for my
7 personal use.

8 It took me three years. I give an offer to
9 two nephew of mine and my brother-in-law, Mr. Hamed, if they
10 would like to join me in building up this store together, and
11 we should not have any problem, if I finish build up the
12 building, we should have no problem whatsoever to go to the
13 bank and the bank will grant us the loan to operate the
14 supermarket. Okay?

15 During construction -- I'm going to go a
16 little bit back to tell you what is my background. During
17 construction, I was struggling for loan. And at that time
18 Banco Popular, I remember, came into the Virgin Islands and
19 took over the majority of interest of First National
20 Citibank. They buy all their customers, and they was very
21 hungry to do business in the island because they have
22 expenses to face and they like to issue loan as fast as
23 possible to cover their expenses.

24 Excuse me. Can I have water please if you
25 don't mind?

FATHI YUSUF -- DIRECT

1 So I left Nova Scotia, struggling, left them
2 not to get a loan, but did not close my account. I struggle
3 all over looking to get a loan. I went to all local banks at
4 that time, and everybody says, I'm sorry, we can't help you.
5 So I find it is a golden opportunity for me to go to Banco
6 Popular.

7 So I went to the manager there, I explained to
8 him my story what Scotia did to me and so he say, I will come
9 to the site.

10 When he come to the site where I'm building,
11 he says, How you going to put this building together?
12 Where's your plan? I show it to him. It's almost zero, the
13 specification. Just numbers for me, columns, but the column
14 doesn't say what thick, what wide. It just give me the
15 height.

16 So the bank, he says, Mr. Yusuf, I'm sorry.
17 We don't do business that way. We have to have somebody
18 professional plan with full specification. I could see your
19 plan approved, I could see the steel here, but it's -- you
20 don't have the proper material or record to take to my board
21 of director to approve a loan in the millions.

22 So I understood. My answer to that gentleman
23 was, unfortunate because of my financial situation, I have to
24 choose this route. But I promise you, as a man, I will put
25 that building together. The man told me at that time, I

1 he gave me about 275,000, and to be 25 percent each,
2 25 percent for my sister son, 25 percent for my brother son,
3 25 percent for me.

4 But before I continue, I'm going to -- I would
5 like to go back a little bit more to clear something. When I
6 was in the financial difficulty, when I was in financial
7 difficulty, my brother-in-law, he knew. I shouldn't -- he
8 start to bring me money. Okay? He own a grocery, Mohammed
9 Hamed, while I was building, and he have some cash. He knew
10 I'm tight.

11 He start to bring me money. Bring me. I think
12 5,000, 10,000. I took it. After that I say, Look, we
13 family, we want to stay family. I can't take no money from
14 you because I don't see how I could pay you back. So he
15 insisted, Take the money. If you can afford to, maybe pay
16 me. And if you can't, forget about it. Okay. He kept
17 giving me. I tell him, Under this condition I will take it.
18 I will take it.

19 He kept giving me until \$200,000. Every
20 dollar he make profit, he give it to me. He win the lottery
21 twice, he gave it to me. All right? That time the man have
22 a little grocery, they call Estate Carlton Grocery. Very
23 small, less than 1,000 square foot, but he was a very hard
24 worker with his children. And it was, you know, just like a
25 convenience mom-and-pop stores. He was covering expenses and

1 saving money.

2 I say, Brother-in-law, you want to be a
3 partner too? He said, Why not? You know, as a family, we
4 sit down. Says, How much more can you raise? Say, I could
5 raise 200,000 more. I said, Okay. Sell your grocery. I'll
6 take the two hundred, four hundred. You will become
7 25 percent partner.

8 So we end up I'm 25 percent, my two nephew 25
9 each, and my brother-in-law, Mohammed Hamed, 25 percent. I
10 don't recall the year, could be '83 or '84, but at least
11 thanks God in the year that Sunshine Supermarket opened,
12 because his supermarket is the one who carries these two
13 young men and my brother to go into the supermarket with me.

14 So I have their money, I finish the building.

15 We call the refrigeration manufacturer, not to
16 waste time. We book an order for our refrigeration and we
17 committed to it. And from their money I have paid \$100,000
18 deposit on the equipment. I was so sure the gentleman at
19 Banco Popular, he promised me, you know. Everything were
20 look to go me encouraging. And especially at that time I'm
21 sure anybody in St. Croix in the past twenty, thirty years,
22 he knew that that building will never go up. Only maybe six
23 people in St. Croix at that time says I might be able to put
24 it up. But 99.9 of St. Croix resident, they were looking at
25 me as a fool.

1 man and he look at me, he underestimate. It came to an
2 extent, I tell him, Look, sir. I respect your profession.
3 You're the bank manager. I respect that. And I want you to
4 respect my profession. I'm a retailer. Everybody have a way
5 of making a living. Oh, I been denied.

6 Then, but when I been denied, I have to tell
7 my partner what's going on. I been entrusted to handle the
8 job perfect, and I am obligated to report to my partner to
9 anything that happened. I told my nephews and I told my
10 partner, Hey, I can't get a loan, but I'm not giving up.

11 So two, three days later my two nephews split,
12 say, We don't want to be with you no more, and we want our
13 money. I say I don't have no money to pay you. The money's
14 there, but if you want to leave because I default, you free
15 to leave.

16 How we going to get paid?

17 I says, Shopping center is 50 percent owned by
18 you uncle and 50 percent by me. I have to feed my children
19 first, and whatever left over, I'll be more than happy to
20 give it to you. Okay. What do you want us -- what do you
21 want to pay us for rent of our money?

22 We come to an agreement, I pay them 12 percent
23 on their money, and 150,000 default because I don't fulfill
24 my commitment. I accepted that. We wait until my partner,
25 which is my brother, came. He's an older man. And we came

1 up to Mr. Mohammed Hamed, I say, You want to follow them? He
2 say, Yeah, I will follow them, but do you have any money to
3 give? I say, Look, Mr. Hamed, you know I don't have no
4 money. It's in the building, and I put down payment in the
5 refrigeration. But if you want to follow them, if you don't
6 feel I'm doing the best I can, if you want to follow them,
7 you're free to follow them. I'll pay you the same penalty,
8 75,000. I will give you 12 percent on your 400,000.

9 He says, Hey. If you don't have no money,
10 it's no use for me to split. I'm going to stay with you.
11 All right. I say, Okay. You want to stay with me, fine. I
12 am with you, I am willing to mortgage whatever the
13 corporation own. Corporation owned by me and my wife at that
14 time.

15 Q. Uh-huh.

16 A. And my partner only put in \$400,000. That's all
17 he put in, and he will own the supermarket. I have no
18 problem. I told my partner, Look, I'll take you under one
19 condition. We will work on this, and I'm obligated to be
20 your partner as long as you want me to be your partner until
21 we lose \$800,000. If I lose 400,000 to match your 400,000, I
22 have all the right to tell you, Hey, we split, and I don't
23 owe you nothing.

24 They say, Mr. Yusuf, we knows each other. I
25 trust you. I keep going. Okay. Now, I told him about the

1 two partner left, Mr. Hamed. You know, these two guys, they
2 left, my two nephew, they was your partner and my partner. I
3 give you a choice. If you pay penalty with me and pay the
4 interest with me, whatever they left is for me and you. But
5 if I must pay them the one-fifty penalty and pay them
6 12 percent, then Plaza Extra Supermarket will stay
7 three-quarter for Yusuf and only one-quarter for you.

8 He says, Do whatever you think is right. I
9 tell him, You want my advice? I be honest with you. You
10 better off take 50 percent. So he took the 50 percent.

11 Q. Not to cut you short, Mr. Yusuf, but we have to
12 play with time, and I appreciate the history as far as
13 Plaza Extra St. Croix and United Corporation, but I want to
14 focus primarily right now on your relationship with
15 Mr. Idheileh.

16 There came a time that the two of you entered
17 into talks about Plaza Extra on St. Thomas?

18 A. May I interrupt you, sir? I cannot build a roof
19 before a foundation. The problem is you ask me who I am,
20 where I come from. I am explaining myself. I want to show
21 to you and the court that Mohammed Hamed is way before
22 Plaza Extra was opened with me, he was my partner. And
23 Mr. Idheileh, he himself knows, because the money he lend me
24 when I open up Plaza Extra, he was getting paid from Wally.

25 I'm a person, if I run a business, I want to

1 stay clean. You know what I mean, clean? I'm the final
2 decision man. I don't give that to anybody. Excuse me. But
3 when it come to money, I don't touch.

4 When I open up Plaza Extra Supermarket, who
5 was in charge of the money at that time is Wally Hamed. When
6 this gentleman, Mr. Idheileh, lend me his money as a friend,
7 I have never signed for him. Who paid him? I never pay him
8 back. My partner's son is the one who pay him back. And he
9 knew, because he come to my office once or twice a week. And
10 he's not the only one knew. Every single Arab in the Virgin
11 Islands knew that Mr. Mohammed Hamed is my partner, way
12 before Plaza Extra was opened.

13 Now, should I ask him or continue?

14 MS. VAZZANA: He's ready to give you a next
15 question.

16 Q. (Mr. Adams) My question to you, sir, is there
17 came a point in time that you and Idheileh started to, or
18 started to have some discussions about Plaza Extra on
19 St. Thomas, is that correct?

20 A. Repeat the question please.

21 Q. There came a point in time that you and
22 plaintiff, Mr. Idheileh, entered into negotiation about a
23 partnership, entering into a partnership with Plaza Extra on
24 St. Thomas, is that correct?

25 A. I can answer that if I could explain it.

EXHIBIT C

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

MOHAMMAD HAMED By His Authorized Agent WALEED HAMED)

Plaintiff,)

v.)

FATHI YUSUF AND UNITED CORPORATION)

Defendant:)

CIVIL NO. SX-12-CV- 370

ACTION FOR DAMAGES
INJUNCTIVE AND
DECLARATORY RELIEF
JURY TRIAL DEMANDED

MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

Comes now the plaintiff, Mohammed Hamed ("Hamed"), and respectfully requests that this Court enter a temporary restraining order pursuant to Rule 65(b), or a preliminary injunction, pursuant to Rule 65(a).¹ The plaintiff will first review the applicable facts and then will apply the applicable law to these facts so that this Court can understand why the plaintiff is entitled to Rule 65 relief at this time.

I. Factual Background

The facts giving rise to this motion are all verified in the attached affidavits of Mohammad Hamed (Exhibit 1) and Waleed Hamed (Exhibit 2). These affidavits explain the creation of the partnership in dispute in this case as well as the factual issues leading to the need for injunctive protection under Rule 65, as follows:

1. Mohammad Hamed, entered into a partnership with Fathi Yusuf in the 1980's to operate a supermarket known as Plaza Extra, located in the United Shopping Center located on the east end of St. Croix.

¹ The only difference between issuing a TRO and a preliminary injunction is that a TRO can be issued without notice to the opposing party. In this case, the defendants are being served with copies of the TRO/preliminary injunction pleadings immediately, so this matter should be able to just proceed as a preliminary injunction.



2. The partnership has since expanded to two other locations in the Virgin Islands, operating the Plaza Extra supermarket on the west end of St. Croix at Estate Plessen (Grove Place) and the Plaza Extra supermarket on St. Thomas located at the Tutu Park Mall.
3. The partnership between Hamed and Yusuf currently operates the same three Plaza supermarket locations, currently employing in excess of 600 employees in the three stores.
4. Since its formation, the three Plaza Extra supermarkets have been managed jointly by Mohammad Hamed and Fathi Yusuf, operating as a partnership with separate accounting records and separate bank accounts for each of the three stores. These separate bank accounts for each store are in the name of United Corporation (United).
5. The bank accounts for the three Plaza Extra supermarkets have always been accessible equally to Mohammad Hamed and Fathi Yusuf, with the parties ultimately agreeing in 2010 that one family member from each of the Hamed and Yusuf families will sign each check written on the bank accounts for these three Plaza Extra supermarkets.
6. United also owns a shopping center. The bank accounts for United's shopping center operations, which are unrelated to the three Plaza Extra supermarkets, are maintained separately by Fathi Yusuf and United. Mohammad Hamed does not have access to these separate bank accounts used by United for its shopping center (and other businesses) unrelated to the three Plaza Extra supermarkets.
7. At all times relative hereto, the Hamed and Yusuf partnership profits from the Plaza Extra stores have always been held in banking and brokerage accounts completely separate from the profits of United's other unrelated businesses, even though the banking and brokerage accounts holding the profits from the Hamed and Yusuf partnership are in United's name as well.
8. At all times relative hereto, Mohammad Hamed and Fathi Yusuf have equally shared the profits distributed from the three Plaza supermarkets.
9. Mohammad Hamed and Fathi Yusuf have also maintained records of any withdrawals from the partnership account to each of them (and their respective family members), to make sure there would always be an equal (50/50) amount of these withdrawals for each partner's family members.
10. Mohammad Hamed has authorized his son, Waleed Hamed a/k/a Wally Hamed to act on his behalf regarding the partnership with Fathi Yusuf.

11. Fathi Yusuf has repeatedly confirmed the existence of this partnership between himself and Mohammed Hamed. See deposition excerpts in Exhibit A attached to Wally Hamed's affidavit (Exhibit 2).

12. On February 10, 2012, Fathi Yusuf's attorney, Nizar DeWood ("DeWood"), informed Wally Hamed that Fathi Yusuf wanted to dissolve the partnership, which he followed up with in a subsequent letter, announcing that Mr. Yusuf was ready to proceed with dissolving the partnership, describing the partnership assets to be divided as follows See Group Exhibit B attached to Wally Hamed's affidavit (Exhibit 2):

As it stands, the partnership has three major assets: Plaza Extra - West (Grove Place, including the real property), Plaza Extra - East (Sion Farm) and Plaza Extra (Tutu Park, St. Thomas).

The letter went on to note that the dissolution would result in each of them retaining different stores in the partnership dissolution.

13. DeWood then sent a proposed partnership dissolution agreement on behalf of Fathi Yusuf on March 13, 2012, to Hamed, with a proposal to dissolve the partnership. That document then went on to state in part as follows See Exhibit C attached to Wally Hamed's affidavit (Exhibit 2):

WHEREAS, the Partners have operated the Partnership under an oral partnership Agreement since 1986.

WHEREAS, the Partnership was formed for the purposes of operating Super Markets in the District of St. Croix, and St. Thomas; and

WHEREAS, the Partners have shared profits, losses, deductions, credits, and cash of the Partnership;

WHEREAS, the Partners have certain rights and responsibilities under the Virgin Islands Revised Uniform Partnership Act ("Act") governing dissolution of partnerships, and hereby desire to vary or confirm by the terms of this Agreement;

That document then described the partnership assets as follows:

Section 1.1: Assets of the Partnership

1. PLAZA EXTRA EAST- Estate Sion Farm. St. Croix
2. PLAZA EXTRA WEST- Estate Grove, St. Croix (Super Market Business ONLY)
3. PLAZA EXTRA - Tutu Park. St. Thomas

14. To date no agreement has been reached regarding the division of these partnership assets.
15. As these discussions progressed, Fathi Yusuf has engaged in and continues to engage in numerous acts in breach of his fiduciary obligations as a partner in his partnership with Hamed, all of which are designed to undermine the partnership's operations, jeopardizing their continued success and existence. These acts include but are not limited to the following acts:
 - a) Threatening to terminate the Hamed family employees in the three Plaza Extra stores;
 - b) Attempting to discredit the operations of these three stores by making defamatory statements about Hamed and his family members to third parties, including suppliers for the three stores, which are completely untrue;
 - c) Attempting to unilaterally change how the stores have operated by threatening to impose new and unreasonable restrictions on the operations of these three stores, all of which are aimed at undermining Hamed's partnership interest in the three stores.
 - d) Threatening to close down the Plaza Extra Supermarkets;
 - e) Threatening the Hamed family members working in the Plaza Extra supermarkets with physical harm, trying to intimidate them into leaving the stores;
 - f) Unilaterally canceling orders placed with vendors and not ordering new inventory for the three Plaza Extra supermarkets;
 - g) Giving false information to third parties, including suppliers of the three Plaza Extra Supermarkets, regarding its future operations, jeopardizing the goodwill of the three Plaza Extra supermarkets; and
 - h) Spending funds from the bank accounts of the three Plaza Extra supermarkets to support his other personal business interests unrelated to the three Plaza Extra supermarkets.
16. Finally, on or about August 20, 2012, Fathi Yusuf indicated he wanted to withdraw \$2.7 million from the partnership, which Mohammad Hamed refused to agree to. See Exhibit D attached to Wally Hamed's affidavit (Exhibit 2).
17. Thereafter, Yusuf unilaterally and wrongfully converted \$2.7 million from the Plaza Extra supermarket accounts used to operate the partnership's three stores, placing the funds in a separate United bank account controlled only by him. See Exhibit D attached to Wally Hamed's affidavit (Exhibit 2).
18. Said conversion essentially looted the funds used to operate the three Plaza Extra supermarkets, which was a willful and wanton breach of the partnership agreement between Mr. Hamed and Mr. Yusuf.
19. Despite repeated demands, Fathi Yusuf has not returned these funds to the Plaza Extra bank accounts from which they were withdrawn.

20. If the partnership's operations are not secured immediately, the continued operation of the three Plaza Extra stores will be in jeopardy, as well as the continued employment of its 600 plus employees, resulting in irreparable harm to these partnership assets. Indeed, Plaza Extra is in serious jeopardy of losing customers to other stores, losing employees due to moral problems, losing suppliers, and otherwise losing its goodwill, which it has built up over past 25 years.
21. The Hamed family has operated this partnership for over 25 years and wants to continue these businesses into the future for its current family members.
22. Yusuf has extensive investments overseas, so that he could easily transfer these funds improperly removed by him to someplace outside the jurisdiction of this Court if the relief sought is not granted.

With these facts in mind, it is now appropriate to address the Rule 65 standard under which relief is being sought in this motion.

II. The Rule 65 Standard

As recently noted by the V.I. Supreme Court in *Petrus v. Queen Charlotte Corp.*,

S. Ct. Civ. 2011-0083 at *7 (Sup. Ct. 2012):

Before the Superior Court may grant a motion for a preliminary injunction, it must consider:

- (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

With this standard in mind, the plaintiff will now explain why entry of the Rule 65 relief is warranted as to the following two matters based on these four criteria:

- 1) Injunctive Relief enjoining the defendants from interfering with Hamed's partnership rights in his partnership with Yusuf in operating of the three Plaza Extra supermarkets located on St. Croix and St. Thomas;
- 2) Injunctive Relief enjoining Yusuf from withdrawing any funds from any partnership bank accounts or brokerage accounts without the consent of Hamed and directing both defendants to immediately return the \$2.7 million improperly withdrawn from the bank accounts of the three Plaza supermarket accounts by Yusuf.

III. The Plaintiff Is Entitled to Rule 65 Relief

For the sake of clarity, the plaintiff will address the facts in the four areas listed in *Petrus, supra*. Based on the foregoing analysis, it is respectfully submitted that the relief sought should be granted.

A. The plaintiff has a reasonable probability of success on the merits.

It is undisputed that there is a partnership between the plaintiff and Fathi Yusuf regarding the operation of the three Plaza Extra supermarkets in question. Indeed, Yusuf has repeatedly recognized the existence of this partnership, both in his statements under oath as well in the various statements made by his counsel in attempting to dissolve the partnership. Likewise, Hamed and Yusuf have shared the profits distributed from these three Plaza Extra supermarkets since the mid-1980's.

Regarding the formation of a partnership, 26 V.I.C. § 22 provides in part as follows:

§ 22. Formation of partnership

(a) Except as otherwise provided in subsection (b) of this section, the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership.

...
(c) In determining whether a partnership is formed, the following rules apply:

...
(3) A person who receives a share of the profits of a business is presumed to be a partner in the business ...

Based in the applicable law and the undisputed facts before this Court, it is respectfully submitted that Hamed has demonstrated that a partnership exists, so he will prevail on this issue.

Additionally, regarding the first request for injunctive relief in this motion -- enjoining the defendants from interfering with Hamed's partnership rights in operating of the three Plaza Extra supermarkets -- 26 V.I.C. § 71 provides in part as follows:

§ 71. Partner's rights and duties.

...
(f) Each partner has equal rights in the management and conduct of the partnership business. (Emphasis added).

Thus, based on this statutory section, Hamed will certainly prevail on this point as well, satisfying the requirement of showing he has a reasonable probability of success on the merits regarding his right to fully participate in the management and conduct of the three Plaza Extra supermarkets.

Regarding the second request for injunctive relief in this motion -- enjoining Yusuf from withdrawing any funds from any partnership bank/brokerage accounts and directing the immediate return the \$2.7 million improperly withdrawn from the Plaza Extra supermarket accounts by Yusuf-- 26 V.I.C. § 71 provides further in part as follows:

§ 71. Partner's rights and duties

...
(a) Each partner is entitled to an equal share of the partnership profits . . . (Emphasis added).

Thus, based on this statutory section, Hamed will prevail on this point as well at trial, requiring all partnership profits to be distributed on a 50/50 basis, satisfying the requirement of showing he has a reasonable probability of success on the merits regarding this claim.

As such, the plaintiff has satisfied this important prong in seeking Rule 65 relief, warranting the entry of an injunction (1) to protect his partnership rights in the participating in the daily operations of the three Plaza Extra supermarkets and (2) to

enjoin the defendants from improperly removing funds from the partnership bank/brokerage accounts.

B. The plaintiff will be irreparably injured by denial of the relief.

The record in this case also demonstrates that the plaintiff will be irreparably harmed if the requested Rule 65 relief is not granted.

First, the record demonstrates that Yusuf has already engaged in numerous acts to try to interfere with Hamed's statutory right to participate in the operation of the three Plaza Extra stores, jeopardizing the success of these three Plaza Extra stores and threatening their very existence. See Exhibit 2 at #18-#19.

Second, Yusuf has already unilaterally removed \$2.7 million from the three Plaza Extra supermarket accounts. See Exhibit 2 at #19-#20. As noted by Wally Hamed's affidavit (See Exhibit 2 at #21 and #22):

21. If the partnership's operations are not secured immediately, the continued operation of the three Plaza stores will be in jeopardy, as well as the continued employment of its 600 plus employees, resulting in irreparable harm to these partnership assets.

22. Indeed, Plaza is in serious jeopardy of losing customers to other stores, destroying its good will built up over the years. (Emphasis added).

As Hamed further noted (See Exhibit 2 at #23):

23. The Hamed family has operated this partnership for over 25 years and wants to continue these businesses into the future for its current family members.

Thus, the threat to the continued operation of the three Plaza Extra supermarkets warrants a finding of irreparable harm in support of the request for injunctive relief.

As noted in *Anderson v. Davila*, 125 F.3d 148 (3rd Cir. 1997):

To show irreparable harm, the party seeking injunctive relief must at least demonstrate "that there exists some cognizable danger of recurrent violation" of his legal rights. *Id.* at 164.

EXHIBIT D

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

MOHAMMAD HAMED <i>by his authorized</i>)	
<i>agent</i> WALEED HAMED,)	
)	
Plaintiff,)	CIVIL NO. SX-12-CV-99
v.)	
)	ACTION FOR DAMAGES
FATHI YUSUF and UNITED CORPORATION,)	INJUNCTIVE AND
)	DECLARATORY RELIEF
)	
Defendants.)	JURY TRIAL DEMANDED
)	

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER
AND/OR A PRELIMINARY INJUNCTION

The plaintiff, Mohammed Hamed ("Hamed"), hereby replies to the defendants' opposition memorandum to the plaintiff's motion for Rule 65 relief.¹ Several preliminary comments are in order.

First, while the defendants vehemently deny there is a partnership, they admit that the plaintiff has an interest in the profits -- in their motion to dismiss (DE 11 at p.16):

In the criminal case, the Criminal Defendants have always *truthfully* represented to the Government that United has always been owned completely by the Yusuf family, and has only granted Mohammed Hamed a limited interest in the profits of the operations of United. (Emphasis added).

The "Criminal Defendants" include both defendants in this case, Yusuf and United. Thus, despite the defendants' rhetoric, they concede profit sharing with Hamed exists.

Second, the defendants assert that the entry of an injunction as requested would bring the operations of the Plaza Extra supermarkets to a halt -- to the contrary, this is a

¹ While the defendant argues that this motion should be treated as a preliminary injunction since it has notice of this request, the plaintiff still seeks a TRO, as relief is needed now without any attendant delays that may be associated with a preliminary injunction hearing. However, the plaintiff is glad to proceed now on the request for a preliminary injunction as well if even a hearing can be promptly held.

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EXHIBIT
D

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advanced by the plaintiff, it is respectfully submitted that the record supports entry of the Rule 65 relief being sought.

I. Success on the merits

In addition to the evidence already submitted by the plaintiff, there is no doubt that the plaintiff is a partner in the Plaza Extra grocery business based on the defendants' own admissions in their pleadings. For the sake of clarity, each admission will be addressed separately, as each independently supports a finding that the plaintiff is likely to succeed on the merits of this issue. Moreover, as discussed herein, none of the defendants' arguments rebuts the evidence already offered by the plaintiff.

A. Admission 1: The sharing of profits

As noted above, defendants admitted in their Rule 12 motion (DE 11 at p. 16):

In the criminal case, the Criminal Defendants have always truthfully represented to the Government that United has always been owned completely by the Yusuf family, and has only granted Mohammed Hamed a limited interest in the profits of the operations of United. (Emphasis added).

The "Criminal Defendants" including Yusuf and United have thus admitted that Mohammed Hamed is entitled to a share of the profits of the operations.

A second, identical admission as to this profit sharing was also made in the defendants' filings. The defendants submitted (as an exhibit to their Rule 12 motion) a letter from their counsel, Nizar DeWood, trying to undo his damaging admissions that there is a partnership between Mohammad Hamed and Fathi Yusuf and detailing its assets. In this letter, even while trying to adhere to the defendants' "new" theory that "United owns it all," Attorney DeWood acknowledges a profit sharing arrangement with the plaintiff regarding the grocery stores, describing it as "a joint venture with respect to

Plaintiff's Reply to Opposition to Motion for TRO and/or Preliminary Injunction
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the net profits." (DE 11-4)² As is clear from *Boudreaux v. Sandstone Group*, 1997 WL 289867 6 (Terr.Ct. 1997), a joint venture is a form of partnership analyzed under the Uniform Partnership Act (UPA) which the USVI has adopted as the first part of Title 26.³

Thus, by conceding that there is a sharing of the profits with the plaintiff, the defendants have also conceded that there is *prima facie* evidence of the existence of the partnership under Virgin Islands law. In this regard, 26 V.I.C. § 22 provides:⁴

§ 22. Formation of partnership

(a) Except as otherwise provided in subsection (b) of this section, the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(c) In determining whether a partnership is formed, the following rules apply

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business

...

² This September 18th letter was actually sent on September 19th (see Exhibit 2). This admission, describing the relationship as a "joint venture" in the "net profits," was made after the Complaint and TRO motion had been sent to counsel, making this admission even more damaging. See Exhibit 3.

³ The USVI's rule follows the "fundamental rule of law" that a joint venture is a subspecies of partnership and is thus subject to the UPA. See *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md.App. 236, 247, 603 A.2d 1357, 1362 (Md.App. 1992) ("As a partnership, the Joint Venture's conduct is governed by the Maryland UPA. . . ."); *Austin v. Truly*, 721 S.W.2d 913, 920 (Tex.App.—Beaumont, 1986) ("It is a fundamental rule of law that a joint venture, such as this one is, is also a general partnership. Being a general partnership, this venture is subject to the Texas UPA [citation omitted]"); *Hallock v. Holliday Isle Resort & Marina, Inc.*, 885 So.2d 459, 462 (Fla.App.3 Dist. 2004) ("They are both governed by the Florida's Revised UPA. . . ."); *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or. 779, 785, 626 P.2d 1365 (Or. 1981) ("This court has consistently held that partnership law controls joint ventures.") and *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*, 27 So.3d 363, 372 (Miss. 2009) ("As a joint venture, SKG was governed by Mississippi's partnership law, the UPA of 1997. . . .")

⁴ The version of the UPA in effect when the Partnership was formed stated that the sharing of profits creates a "prima facie" showing of the existence of a partnership. See 22 V.I.C. §22 (1997 main volume, now superseded). In the USVI, the version of the UPA in effect at the formation of the partnership governs the issue of whether a partnership was formed. *Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 514 (D.V.I. 2001) ("The amendment was enacted on February 12, 1998, and by its express terms took effect May 1, 1998. . . .The Court must therefore look to the previous statute for guidance.")

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(4) The receipt by a person of a share of the profits of the business is prima facie evidence that he is a partner in the business. . . .(Emphasis added).

Thus, the fact that Mohammad Hamed received a share of the profits (a fact the defendants concede) is prima facie evidence that a partnership exists -- and thus, that all necessary elements are presumed proved to a preponderance by action of law, with the burden now on the defendants here to prove Yusuf is not a partner.

In summary, the defendants' admission regarding the sharing of profits is enough by itself, absent defendants rebutting this presumption, to find that the plaintiff is likely to succeed on the merits of his claim that he is a partner in the Plaza Extra grocery business and is entitled to protection of his rights as a partner.

B. Admission 2: The statements regarding rent

Defendants also concede in their Rule 12 motion that the Plaza Extra store at United's Sion Farm shopping center is operated by a separate entity. This admission constitutes a separate basis for finding that the plaintiff is likely to succeed on his claim that he is a partner in the Plaza Extra grocery business.

In this regard, as noted in the plaintiff's TRO memorandum, United Corporation has sent numerous eviction and rent notices, addressed to "Mohammed Hamed" as "Plaza Extra" at the Plaza Extra store address, regarding the Plaza Extra supermarket located in United's Sion Farm shopping center, attached hereto (again) as Exhibit 4. These notices are admissions as to the existence of a separate entity operating in the supermarket location. The language in these notices is quite telling, using terms that acknowledge that United Corporation does not presently possess (or operate) the supermarket premises at United's Sion Farm shopping center, including stating as follows (See Exhibit 4 (first page)):

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During the month of September 2009, I had a discussion with your son Wally, and within two days I repeat the same request while you were present that United Corporation would like to have its location back. Unfortunately, up to now, I have not seen that you give up the keys.

Therefore as of January 1, 2012 the rent will be \$200,000.00 per month, only for the coming three months. If you do not give up the keys before the three months, it will be \$250,000.00 per month until further notice.

In United's opposition to the TRO, it confirmed this landlord-tenant relationship in the affidavit of United's president, Maher Yusuf, stating under oath (DE 11-2 at ¶ 17):

17. Most importantly, United has always charged rent for the use of part of its retail premises by the **Plaza Extra Supermarket operation** on Sion Farm, St. Croix. **Mohammed Hamed** has always understood that United would charge for the use of its retail space, and would deduct the value of such rent in arriving at the net profits of the Plaza Extra Supermarkets. (Emphasis added.)

This admission is particularly significant, as it admits that (1) the partnership occupies the store's premises, (2) that United Corporation owns the building as landlord⁵ and therefore deducts rent from the calculation of the profits in determining the "net profits of the **Plaza Extra Supermarkets**" (plural) and (3) that despite the averments that plaintiff is just some retired employee, he is still in fact a partner in the grocery business, as the notice and requests to act are made directly to him; even this month.⁶

In short, the fact that United sends Hamed eviction notices and admits it charges the "Supermarket operation" rent for the space, which it deducts from that operation's profits in determining the Plaza Extra Supermarkets' "net profits," are clear admissions that a partnership does exist with regard to the "Plaza Extra Supermarkets." This is all

⁵ Defendants make this same distinction in their opposition at page 2, stating that "since 1979, United *alone* has owned and owns the **subject shopping center**, known as the 'United Shopping Plaza,' in fee simple absolute." (Emphasis in original.)

⁶ United sent another rent notice on October 1, 2012, to Mohammed Hamed at the "Plaza Extra Supermarket" (signed by Yusuf), which was after United was served with the pleadings in this case. Thus, this admission that Plaza Extra is a separate entity from United -- is particularly damaging since it was sent after defendants were on notice of the claims asserted here. See Exhibit 4 (last page).

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language now used by United, directly refuting the defense counsels' arguments in the Rule 12 memorandum (DE 11 at p. 8) that "the owner and operator Plaza Extra Supermarket is United." In short, United would not be sending eviction notices to itself if it was the owner and operator of these three supermarkets!

In summary, neither Yusuf nor United treat the "Plaza Extra supermarket operation" as being OWNED by United. This admission independently supports a finding that the plaintiff will succeed on the merits of his claim that a partnership exists in the Plaza Extra grocery business.

C. The defendants' other arguments

The remaining arguments raised by the defendants regarding the "success on the merits" issue are also easy to refute.⁷

The defendants first argue that the affidavits of Fathi Yusuf and his son disprove the plaintiff's position that a partnership exists. As already noted, however, both Yusufs acknowledge that there is an agreement to share the Plaza Extra supermarket profits with the plaintiff, which is *prima facie* evidence that a partnership exists, as previously noted. Moreover, a review of Fathi Yusuf's affidavit reveals that he never denies the existence of the partnership, as he just states that he never executed a "written or memorialized partnership agreement." (DE 11-1 at ¶ 20).

However, as Title 26 states and the defendants concede in their Rule 12 motion (DE 11 at p. 6):

⁷ In their opposition memorandum to the TRO, the defendants incorporated several arguments raised in their memorandum in support of their pending Rule 12 motion. While plaintiff has now filed an amended complaint (as per Rule 15), thus mooting that motion, the arguments raised in the Rule 12 memorandum still need to be addressed herein as they were incorporated by reference in the defendants' TRO opposition.

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There is no requirement that the partnership agreement be in writing, and may be made orally, or it may be found to exist from all of the attending circumstances.

Thus, as Yusuf failed to submit an affidavit denying the sworn assertions submitted by Mohammad Hamed that there was a partnership established between the parties, Yusuf's denial of a written agreement is meaningless. In short, Yusuf's limited submission that fails to deny the existence of any oral agreement partnership speaks volumes by this omission, and it fails to directly rebut the statutory presumption that a partnership exists when the profits are shared.⁸

Second, defendants argue that plaintiff cannot establish a partnership due to the failure to produce any partnership tax returns or related documentation of a partnership. This argument is also without merit, as there is no requirement in the V.I. Code or UPA requiring such proof before a court will find that a partnership exists. In fact, courts are not so blind, finding that where one partner controls the paperwork and filings (as was the case here), such a "paperwork trail" is not relevant -- or even works against the defendant. See e.g., *Al-Yassin v. Al-Yassin*, 2004 WL 625757 (Cal.App.1st Dist. 2004) (while the defendant (one brother) held all funds in accounts in his name, paid all taxes and held title to property in his name, the court found a partnership existed.)⁹

⁸ The defendants also argue that the plaintiff failed to provide a factual basis for his claim that the parties used the profits from the Plaza Extra supermarkets to buy other assets on a 50/50 basis. To address this point, the amended complaint lists some of these purchases, which are substantial. Attached hereto is a declaration from Wally Hamed that confirms the 50/50 investment of these partnership profits. See Exhibit 5

⁹ See also *Dundes v. Fuersich*, 2006 WL 2956005, *10-*12 (N.Y.Sup. 2006) (Rejecting defendants' argument that tax filings were conclusive evidence that no partnership existed, finding that this was just a factor to consider in reaching the ultimate determination of whether a partnership or joint venture existed). Likewise, in *Zito v. Fischbein Badillo Wagner Harding* (11 Misc.3d 713 [Sup Ct, N.Y. County 2006]) and *Prince v. O'Brien* (256 A.D.2d 208 [1st Dept 1998]), the courts recognized that tax documents and documentary evidence of compensation as an employee were merely

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Third, the defendants' argument that the statute of frauds bars this claim is without merit, as that defense does not apply to formation of a partnership under the UPA (as per 26 V.I.C. § 22). See Defendants Rule 12 motion at page 6 (DE 11) stating "[t]here is no requirement that the partnership agreement be in writing, and may be made orally, or it may be found to exist from all of the attending circumstances." Moreover, "[p]artnerships and joint ventures without fixed terms are deemed to be 'at will' subject to dissolution by either partner at any time. Therefore, such agreements are not within the Statute of Frauds." *Smith v. Robson*, 2001 WL 1464773 at *3 (Terr.Ct. 2001).¹⁰

Finally, the defendants' argument that the plaintiff, Mohammad Hamed, is equitably estopped from raising the partnership issue due to representations made in a criminal case or for unclean hands or defalcation is meritless for two reasons. First, Mohammad Hamed was not a party to any criminal case, so he cannot be bound by statements made in such a case. Second, as already discussed at length, United and Yusuf have asserted to this Court that the exact opposite factual assertion is true -- that Mohammed Hamed **does have**, at the very least, a joint venture agreement to share the profits from the Plaza Extra supermarkets. Thus, even according to their view of what

some proof, and not conclusive, on the issue of whether a person is an employee or a partner. Indeed, one bankruptcy court has even ruled that company and individual tax returns both listing the debtor as a partner of the company, although relevant, were administrative in nature and "not highly probative in regard to proving the intent of the parties" as to whether a partnership existed. See, *In re Ashline*, 37 BR 136, 140 (Bk. N.D. N.Y.1984) See also, *Mardanlou v. Ghaffarian*, 135 P.3d 904 (Utah App. 2006)(*questioned on other grounds*)(Even though all tax and other filings as well as title in one partners name, the court found "Ghaffarian had appropriated the partnership's real property by placing it solely in his name.")

¹⁰ Also, as noted in *Smith*, this defense is unavailable in the USVI where one party has fully performed under a contract. *Id. citing Birnbaum v. Zenda*, 15 V.I. 329 (Terr.Ct. 1978). Even partial performance takes a case out of the Statue of Frauds where it would be inequitable to allow a party to invest time and labor upon the faith of a contract that did not exist. *Smith, supra, citing Henderson v. Resevic*, 6 V.I. 196 (D.V.I.1967).

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was established in a criminal case, a partnership interest was established since a joint venture is just another form of a partnership. See *Boudreaux* and footnote 3 above.

D. The plaintiff's unrefuted evidence

Most important, in addition to the other points already made, much of the critical evidence previously submitted by the plaintiff in support of his partnership claim was not even discussed by the defendants, who dealt with it by ignoring these glaring facts. In this regard, the defendants did not even try to address: (1) the rent and eviction notices sent over the last year (DE 1-3, Ex. D, attached again to this reply as **Exhibit 4**), which amply demonstrate the existence of this partnership, and (2) the *explicit* admissions made in Yusuf's sworn testimony in 2000 that Mohammad Hamed is his 50/50 partner in the Plaza Extra grocery business. (DE 1-5, Ex. 2A) As for the eviction/rent notices, that point was discussed at length above and need not be repeated here, even though its importance cannot be overlooked. As for the deposition testimony of Yusuf, its significance does not disappear by trying to ignore it, as it (1) explains exactly how the partnership was formed and (2) admits that the plaintiff is Yusuf's 50/50 partner.

This deposition was given in 2000, just before any of the legal issues arose -- and was made as a representation to third parties.¹¹ It is, therefore, the last regular, unaffected, detailed statement by Yusuf on the matter. At the very outset, Yusuf admits that he owned only "50 percent of Plaza Extra in 1986," and made the distinction that he owned 100% of the "United Shopping Plaza" (**Exhibit 6** at p.8:1-14), which is consistent with Mohammed Hamed's statement that partnership in the Plaza Extra supermarket began in the mid-1980's. Yusuf then explains in detail how no bank would loan him funds

¹¹ While these deposition excerpts were attached to the initial TRO memorandum (DE 1-5), the key testimony in that deposition is attached hereto as **Exhibit 6** in order to assist the Court in reviewing this testimony.

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while he tried to build the shopping center because he did not have any formal specifications. (Exhibit 6 at p. 10:1-21) He then describes how, when he was broke, plaintiff saved this project, testifying (Exhibit 6 at pp. 14:5-15:14) (Emphasis added):

When I was in the financial difficulty, when I was in financial difficulty, my brother-in-law, he knew. I shouldn't – he started to bring me money. Okay? He own a grocery, Mohammed Hamed, while I was building, and he have some cash. He knew I'm tight. He started bring me money. Bring me I think 5,000, 10,000. I took it. After that I say, Look we Family, we want to stay family. I can't take no money from you because I don't see how I could pay you back. So he insisted, Take the money. If you can afford to, maybe pay me. And if you can't, forget about it. Okay. He kept giving me. I tell him, Under this condition I will take it. I will take it. He kept giving me until \$200,000. **Every dollar he make profit, he give it to me. He win the lottery twice, he gave it to me. All right? That time the man have a little grocery, they call Estate Carlton Grocery. Very small, less than 1,000 square foot, but he was a very hard worker with his children. And it was, you know, just like a convenience mom-and-pop stores. He was covering expenses and saving money.**

.....
I say, Brother-in-law, **you want to be a partner too? He said, Why not? You know, as a family, we sit down. Says, How much more can you raise. Say, I could raise 200,000 more. I said, Okay. Sell your grocery. I'll take the two hundred, four hundred. You will become 25 percent partner. So we end up I'm 25 percent, my two nephew 25 each, and my brother-in-law, Mohammad Hamed, 25 percent. I don't recall the year, could be '83 or '84, but at least thanks God in the year that Sunshine Supermarket opened, because his supermarket is the one who carries these two young men and my brother to go into supermarket with me. [In.14] So I have their money, I finish the building.**

Yusuf then continued by explaining how the other two partners decided to leave, resulting in plaintiff becoming his 50/50 partner in the supermarket, fully exposed to loss. (Exhibit 6 at pp. 17-19:6-10) (Emphasis added):

Then, but when I been denied [for loans], I have to tell my partner what's going on. I been entrusted to handle the job perfect, and I am obligated to report to my partner to anything that happened. I told my nephews and I told my partner, Hey, I can't get a loan, but I'm not giving up. So two, three days later my two nephews split, say, We don't want to be with you no more, and we want our money. I say I don't have no money to pay you. . . .

We come to an agreement, I pay them 12 percent on their money, and 150,000 default because I don't fulfill my commitment. I accepted that. We wait until my partner, which is my brother, came. He's an older man. And we came up to Mr. Mohammed Hamed, I say, You want to follow them? He say, Yeah, I will follow them, but do you have any money to give? I say, Look, Mr. Hamed, you know I don't

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have no money. It's in the building, and I put down payment in the refrigeration. But if you want to follow them, if you don't feel I'm doing the best I can, if you want to follow them, you're free to follow them. I'll pay you the same penalty, 75,000. I will give you 12 percent on your 400,000. (Emphasis added):

He says, Hey. If you don't have no money, it's no use for me to split. **I'm going to stay with you.**

All right. I say, Okay. You want to stay with me, fine. I am with you, I am willing to mortgage whatever the corporation own. Corporation owned by me and my wife at that time. **And my partner only put in \$400,000. That's all he put in, and he will own the supermarket.** I have no problem. I told my partner, Look, I'll take you under one condition. We will work on this, and I'm obligated to be your partner as long as you want me to be your partner until we lose \$800,000. If I lose 400,000 to match your 400,000, I have all the right to tell you, Hey, we split, and I don't owe you nothing.

They say, Mr. Yusuf, we knows each other. I trust you. I keep going. Okay. Now, I told him about the two partner left, **Mr. Hamed. You know, these two guys, they left, my two nephew, they was your partner and my partner. I give you a choice. If you pay penalty with me and pay the interest with me, whatever they left is for me and you.** But if I must pay them the one-fifty penalty and pay them 12 percent, then Plaza Extra Supermarket will stay three-quarter for Yusuf and only one-quarter for you.

He says, Do whatever you think is right. **I tell him, You want my advice? I be honest with you. You better off take 50 percent. So he took the 50 percent.**

Yusuf concluded this testimony stating (Exhibit 6 at p. 20)(Emphasis added):

Every single Arab in the Virgin Islands knew that Mr. Mohammed Hamed is my partner, way before Plaza Extra was opened.

Thus, this sworn testimony, ignored by the defendants, details how this 50/50 partnership was created between Yusuf and Mohammad Hamed. Thus, plaintiff respectfully submits that he will prevail in his claim that he is a 50/50 partner in the Plaza Extra supermarkets based on Yusuf's sworn, detailed and specific testimony.

E. The plaintiff's disputed evidence

Finally, the defendants vehemently argue that the admissions contained in Attorney DeWood's correspondence are inadmissible. That argument is without merit for several reasons. First, the February 10, 2012 email giving notice of the partnership

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dissolution was not a "settlement" proposal, but a dissolution notice (DE 1-5, Ex. 2B) The letter (DE 1-5, Ex. 2B) factually described the assets.

As it stands, the partnership has three major assets: Plaza Extra - West (Grove Place, including the real property), Plaza Extra - East (Sion Farm) and Plaza Extra (Tutu Park, St. Thomas).

Second, the relevant language to which plaintiff refers was a stated fact in a letter to Hamed (not any lawyer) that did not contain any language indicating that it was being sent for settlement purposes. The same is true of the statements in the dissolution agreement sent by Attorney DeWood, which identified these three stores as being partnership assets, and which also included these "Whereas" clauses (DE 1-5, Ex. 2C):

WHEREAS, the Partners have operated the Partnership under an oral partnership Agreement since 1986. (Emphasis in original)

WHEREAS, the Partnership was formed for the purposes of operating Super Markets in the District of St. Croix, and St. Thomas; and

WHEREAS, the Partners have shared profits, losses, deductions, credits, and cash of the Partnership;

Thus, these facts, as communicated by the defendants' counsel, cannot be hidden under the newly minted argument designed to create a dispute -- that they were made for settlement purpose. To hold otherwise would allow counsel to commit a fraud on this Court by trying to argue that there was in fact never a partnership when his client authorized him to **dissolve the partnership**.

Finally, defendants have put one of the letters in this chain of correspondence into evidence -- and cannot now be heard to protest about the other letters in the chain. Once the party that is attempting to exclude settlement evidence has put one letter in that chain before the Court, the others should be allowed. See e.g. *Evans v. Covington*, 795 S.W.2d 806, 808-809 (Tex.App. 1990) ("One may not complain of improper evidence

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produced by the other side when he has introduced the same evidence or evidence of a similar character”).

F. Conclusion as to success on the merits

Based on the applicable law and the undisputed facts before this Court, it is respectfully submitted that the plaintiff will succeed on the merits in establishing that he is a partner in the Plaza Extra grocery business. Plaintiff is certainly entitled to the injunctive relief he now seeks -- enjoining the defendants from interfering with the *status quo* and thus his partnership rights in operating the three supermarkets, as 26 V.I.C. § 71 regarding “Partner’s rights and duties” provides:

(f) Each partner has equal rights in the management and conduct of the partnership business.

Likewise, he is entitled to protection against Yusuf improperly removing any profits, as 26 V.I.C. § 71 also provides:

(a) Each partner is entitled to an equal share of the partnership profits. . . .

Plaintiff has satisfied this important prong in seeking Rule 65 relief, as the plaintiff has demonstrated that he is likely to prevail on his claim that he is a partner in the grocery business of the three Plaza Extra supermarkets.

II. Irreparable harm

Despite a rambling analysis, the defendants’ argument boils down to the contentions that the plaintiff cannot show irreparable harm because: (1) the acts the plaintiff complains about have already happened, (2) there is no reasonable basis for thinking the operations of the Plaza Extra supermarket operations will change immediately, (3) the TRO order in a pending criminal case provides any protection needed and (4) there is no threatened harm to the plaintiff that needs protection, as