

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED

Plaintiff,

v.

UNITED CORPORATION  
FATHI YUSUF

Defendants.

)  
) CIVIL NO. SX-12-CV-370  
)  
)  
) ACTION FOR DAMAGES, et al.  
)  
) DEFENDANTS' REPLY  
) TO PLAINTIFF'S OPPOSITION  
) TO DEFENDANTS' RULE 12  
) MOTION  
)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' RULE 12 MOTION

COME NOW Defendants United Corporation and Fathi Yusuf, through their undersigned counsel and respectfully file this Reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss. For the reasons stated below, and reincorporating fully the arguments set out in Defendants' Rule 12 Motion to Dismiss Plaintiff's Amended Complaint, it is respectfully requested that the court grant Defendants' Motion to Dismiss.

I. INTRODUCTION

Plaintiff's Opposition to Defendants' Rule 12 Motion to Dismiss can be reduced to the following three arguments:

1. Because the parties agreed to split the profits "50/50" the court must find a partnership between the parties; that there is no such thing as a contractual "joint venture" and use

of such term is a matter of semantics. Accordingly, Plaintiff argues that the Virgin Islands Uniform Partnership Act ("VIUPA") governs every scenario where the parties agree to divide profits equally, entitling Plaintiff to the various reliefs available to a partner, as opposed to relief under contract law.

2. The Plaintiff need not plead any facts concerning the parties' intent, prior dealings, Plaintiff's representations to the Virgin Islands and United States government agencies, through his agent, that no partnership ever existed; or the fact that Plaintiff has failed to ever file a single partnership return, or a single document demonstrating the existence of a partnership. Rather, Plaintiff contends, the court only need to look at a portion of a transcript from a prior deposition to summarily conclude that Defendant Yusuf meant the word "partner" to be a partner of a general partnership under the VIUPA, and not an association or relationship between two persons to carry-on an objective, such as a contractual joint venture.
3. Plaintiff then argues that the court should disregard at this point any judicial and equitable bars against the Plaintiff because they are merely defenses and cannot be asserted in a Rule 12(b)(6) Motion. This despite the fact that these equitable bars are essential in determining whether or not a "partnership" could be found to exist at this stage.

**I. Equal Distribution of Profits, solely, does not make a Partnership.**

Plaintiff argues first that because Defendants admit to an agreement with the Plaintiff to equally share the profits from the operations of the Plaza Extra Stores, the court must automatically conclude that a partnership exists between Plaintiff and Defendants. Plaintiff cites 26 VIC §22(4), which provides:

In determining whether a partnership exists, these rules shall apply -

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

The term "*prima facie*" means "at first view; on the first appearance." Merriam Webster's Dictionary 11<sup>th</sup> Edition. Clearly, nothing in 26 VIC §22(4) states that equal division of profits amounts automatically to a partnership; section 22(4) cites one factor for the court to consider in determining the existence of a partnership. Therefore, Plaintiff's contention that any agreement to equally split profits amounts to a "partnership" under the VIUPA is a misreading of 26 VIC §22(4). Having conveniently misconstrued 26 VIC §22(4), Plaintiff then proceeds to argue that "the only dispute now appears to be whether the admitted relationship should be called a "partnership" or a "joint venture." Plaintiff Hamed refers to this distinction as a "semantic" dispute and therefore is irrelevant because under V.I. law a joint venture is a subspecies of partnership and is thus subject to the UPA. See *Plaintiff's Response in Opposition to Defendant's Rule 12 Motion to Dismiss*, p. 4.

Again, 26 VIC §22(4) states that equal profit sharing is only *prima facie* evidence of a partnership; nothing under Title 26 states that a partnership arises automatically by operation of law simply because of equal division of profits. Plaintiff therefore argues that no matter the intent and agreement between the parties, the law in the Virgin Islands does not recognize a contractual joint venture agreement, and anything else is essentially a partnership. This position would lead in turn to this absurd conclusion: No matter what the parties intended, no matter what the Plaintiff represented to other third

parties for the last 26 years, as long as there is a division of profits equally, there must be a partnership - even if the parties never intended for a partnership to exist, and even if the Plaintiff has always denied the existence of a partnership.

As such, Plaintiff wants the court to ignore the parties' understanding, prior dealings, equitable principles, and the parties' contractual intent because a "joint venture" is and will always be a partnership. Because nothing in the opposition supports this sweeping conclusion, the court should grant Defendant's Motion to Dismiss.

**II. The Amended Complaint still fails to plead a proper "partnership" and the scope of the alleged partnership.**

Plaintiff argues that the Amended Complaint sufficiently pleads the existence of a partnership. Plaintiff's Opposition re-incorporates ¶¶ 5 through 22 of the Amended Complaint to demonstrate a properly pled Amended Complaint. Therefore, each of the foregoing paragraphs of the Amended Complaint are addressed separately below.

**¶5. In the 1970's, Mohammad Hamed opened and operated a successful grocery business on St. Croix.**

This allegation is irrelevant. Whether Mohammed Hamed operated a successful grocery business on St. Croix or not is irrelevant to whether a partnership exists between the parties.

**¶6. In the early 1980's, Yusuf began to build a shopping center at Sion Farm, St. Croix, which he hoped would include a supermarket, even though he had never operated a grocery business before.**

This allegation supports the fact that Defendant Yusuf and his family, through Defendant United Corporation, have always maintained separate ownership of the shopping center at Sion Farm. It is irrelevant as to the issue of what partnership, if ever, existed between the parties, and the nature and scope of the alleged partnership, which Plaintiff concedes is only to operate a grocery business called Plaza Extra Supermarket.

**¶7. During the construction of that shopping center, Yusuf continually ran out of money and was unable to get any loans from any banks. As such, he sought help from Mohammed Hamed, which Mohammed Hamed agreed to provide.**

This allegation again is irrelevant as to what partnership existed between the parties, and the nature of the partnership.

**¶8. Mohammad Hamed provided funds to complete the construction of the shopping center. In addition, when more funds were needed to create and open the supermarket, Mohammad Hamed sold his grocery store and contributed all of his life savings to the supermarket project in addition to the funds previously provided for the shopping center construction, devoting his full time and energy to getting the supermarket open as well.**

This general assertion is belied directly by the fact that United Corporation has always owned the United Shopping Plaza ("Plaza") where the parties agreed to operate the Plaza Extra Supermarkets. All rental proceeds from the Plaza have always gone to Defendant United, which is owned completely by the Yusuf family. Not one penny from the rental proceeds has ever gone to Plaintiff Hamed. Therefore, on the one hand, Plaintiff pleads that he contributed to the construction of United Shopping Plaza, and on the other hand, Plaintiff concedes that he has never had any interest in the ownership of the United

Shopping Plaza as shown by Plaintiff's admission that there has always been a separation of accounts concerning the non-business operations of Defendant United.

Therefore, the Amended Complaint fails to make clear the nature and scope of this alleged partnership: Is it a partnership that concerns only the operations of the Plaza Extra supermarkets or is it a partnership that encompasses other assets? Therefore, even if the court concludes a *prima facie* showing of a partnership at this point, Plaintiff still fails to advise the Defendants as to the nature assets and liabilities of this partnership. This in turn deprives Defendants from understanding the alleged scope of this partnership, the alleged assets this partnership has, and what tax implications this sudden assertion of partnership creates for the Defendants.

**¶9. During this time period, Mohammad Hamed and Yusuf agreed to enter into a 50/50 partnership (hereinafter referred to as the "Partnership") to create, fund and operate this new grocery supermarket business, which they named Plaza Extra Supermarket. It was located in the shopping center.**

Here, Plaintiff readily admits that the "50/50 partnership" was only for the purpose of operating a new grocery supermarket business called "Plaza Extra Supermarket." However, in ¶8, Plaintiff makes the contrary assertion that he has impliedly some interest in the real property known as United Shopping Plaza. Again, Plaintiff fails to plead with specificity the assets of this partnership. Again, this in turn makes it next to impossible for the Defendants to understand what "partnership" Plaintiff alleges to have with Defendant Yusuf. If the only assets of the partnership are

the operations of the Plaza Extra stores, the Amended Complaint has failed to clearly state so. The Defendants cannot be expected to defend against an ill-defined alleged partnership. Defendant Yusuf has always been truthful and honest about his status as a percentage shareholder of Defendant United Corporation. The remaining shares of Defendant United are owned by Defendant Yusuf's children. This is demonstrated by the parties history of tax returns, government filings, and representations to the District Court of the Virgin Islands, and the U.S. Attorneys' Office. Plaintiff Hamed has never objected to Defendants' representation as to their status, and complete ownership of Defendant United.

**¶ 10. As both Mohammed Hamed and Yusuf agreed to contribute their time and their personal funds to create this Partnership, both risked the loss of their significant initial investments. Moreover, they both agreed that going forward each partner was responsible for 50% of all losses, and was entitled to 50% of all profits from the supermarket business' operations. Indeed, defendants have admitted that the profits of the grocery business were shared with plaintiff – in pleadings filed in this case.**

Plaintiff fails to allege a single fact showing any risk of loss by Plaintiff Hamed. Plaintiff fails to attach a single exhibit showing any risk of loss assumed by the Plaintiff. Despite the clear Affidavit of Fathi Yusuf concerning Plaintiff Hamed's failure to carry any risk of loss during the 26 year relationship both parties had, Plaintiff cannot allege a single contract, obligation, or loan that Plaintiff Hamed ever risked other than the initial investment Plaintiff invested in the joint venture.

For example, Defendant Yusuf personally and solely guaranteed the lease of the

Plaza Extra Store in St. Thomas, V.I., and personally guaranteed the substantial loans taken from various banks for the benefit of Defendant United. Both the risk of loss and sharing of profits are critical components of any partnership. It is precisely why 26 VIC §22(4) states that splitting of profit is only prima facie evidence and not conclusive proof of a partnership.

**¶11. When the supermarket at Sion Farm opened in 1986, Mohammad Hamed used his experience and contacts in the grocery business to get the store stocked and open successfully.**

This factual allegation is irrelevant to the formation of a partnership. The fact is that Plaintiff Hamed was employed as a warehouse clerk for Defendant United until 1998, and was compensated accordingly. Nothing in this allegation states how, where, and why Plaintiff's experience in the grocery business has ever benefitted Defendants in any way. As demonstrated in the Defendants' Motion to Dismiss, it is telling that Plaintiff Hamed has always been employed as a warehouse clerk, and never had any supervisory managerial responsibilities.

**¶12. The Partnership between Hamed and Yusuf subsequently expanded to two other supermarket locations, one in the west end of St. Croix (both built and initially stocked from the profits of the Partnership) and one in St. Thomas (also both built and initially stocked from the profits of the Partnership). Both of these supermarkets were also operated under the name Plaza Extra. The Partners generally refer to these three stores as Plaza Extra East (Sion Farm, St. Croix), Plaza Extra West (Plesson/Grove, St. Croix) and Plaza Extra St. Thomas (Tutu Park, St. Thomas). These supermarkets have grown in size, currently employing in excess of 600 employees in the three stores.**

The growth of a business neither supports the existence of a partnership, nor the intent of the parties as to the operations of the three stores.

**¶13. At all times relative hereto, the three Plaza Extra supermarkets have been managed jointly by the Partnership, with each Partner having an active role in the operations of the three stores either through their direct actions or through the actions of their authorized agents. In this regard, each Partner always has had a designated family member in a top managerial position in each store, acting as each Partner's representative and agent. The designated managers from each Partner's family jointly manage the respective stores together.**

None of the allegations here demonstrate the nature, scope, and risk and profit sharing between Mr. Yusuf and Mohammed Hamed. Thus, the Amended Complaint, like the original one, still cannot allege a single managerial decision made by Plaintiff Hamed in the 26 year history of this alleged partnership.

**¶14. The Partnership has always had separate, segregated books and accounts for each of the three Plaza Extra Supermarkets, and kept a detailed accounting open to both partners for the expenses and profits of the Partnership wholly separate from the unrelated business operations of United in its operation of the United shopping center located at Sion Farm St. Croix.**

Plaintiff admits here that Defendant United has always kept separate accounts for its "unrelated" business operations of the United Shopping center. Clearly, Plaintiff admits that he has no interest in the United Shopping Center, and that Defendant United is the owner of United Shopping Center. Therefore, this points to an agreement to operate the Plaza Extra Supermarkets, rather than a partnership.

**¶ 15. As part of his Partnership activities Yusuf made the decision that the reporting of all accounting and other filings for these Partnership operations to the Government would be done by United, such as all tax filings and similar matters -- he provided the services of United as part of his partnership contribution, to which Mohammad Hamed did not object.**

This assertion fails to allege why a partnership would utilize a corporation simply for filing taxes. As pointed out in the Motion to Dismiss, Defendant United has existed for seven (7) years prior to Plaintiff's joint venture agreement with Defendant United regarding the operations of the Plaza Extra Supermarkets. Defendant United has always owned in fee simple various real properties before it ever entered into a joint venture agreement with Plaintiff to only operate the Plaza Extra Supermarkets.

This is amply demonstrated by the fact that Plaintiff never filed a single partnership tax return throughout the existence of this alleged partnership. Instead, Plaintiff now seeks to link his failure to ever declare partnership taxes, and his 26 years of misrepresentation to the Government of the Virgin Islands, the U.S. Attorney's Office, and the District Court of the Virgin Islands to the fact that he simply agreed to allow Defendant Yusuf to utilize Defendant United as a tax reporting entity.

It is precisely why the Amended Complaint, like the original one, remains deficient, and must be dismissed for failure to establish the scope and nature of Plaintiff's alleged partnership.

**¶16. The bank accounts for the three Plaza Extra supermarkets were created for the benefit of, and have always been accessible to (and transacted on) equally by the partners, Mohammad Hamed and Yusuf, with the Partners agreeing that — to maintain management control — Yusuf and Hamed (or one family member from each of the Hamed and Yusuf families as their agents) would sign each check written on these supermarket bank accounts. . . .**

Plaintiff fails to allege any facts showing that a "partnership" owns these bank accounts. To date, these accounts remain the property of Defendant United. There is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store. This is what Plaintiff Hamed, through his agent, has represented to everyone for the last 26 years, including representations in prior proceedings before the District Court of the Virgin Islands and the U.S. Attorney's Office. The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is. The issue is whether Plaintiff Hamed can come to the court after 26 years and declare a partnership the parties never intended. As such, the Amended Complaint should be dismissed for failure to properly plead the existence of well-defined partnership with accurate allegations of assets and liabilities.

**¶17. United has always had completely separate accounting records and separate bank accounts for its operations of the "non-supermarket" shopping center and business operations that were unrelated to the three Plaza Extra supermarket stores. Neither Mohammad Hamed nor his agents have access to these separate "non- supermarket" United bank accounts used by United for its shopping center and other businesses unrelated to the three Plaza Extra supermarkets.**

Plaintiff concedes there is a separation between the accounts for the operation of the Plaza Extra supermarkets and the "non-supermarket" shopping center. This clearly again points to the fact that Defendant United has an agreement with Plaintiff and not a partnership: Why else would there be specially segregated United Corporation bank accounts that Plaintiff Hamed has no control or interest in if this is a partnership? The Amended Complaint does not properly allege the reason for these separate accounts, which is mainly because the parties have a joint

agreement to operate only the Plaza Extra Supermarkets, and not a general partnership under the VIUPA.

**¶18. At all times relative hereto, the Partnership profits from the Plaza Extra stores have always been held in the identified "supermarket" 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 Partnership are in accounts solely used by the Partnership and kept for the Partnership by United in segregated United accounts.**

The allegations of ¶18 reconfirms the fact that United Corporation has accounts wholly separate from the operating accounts for the Plaza Extra Supermarkets. Nothing in the Amended Complaint specifies what ownership interest and access rights Plaintiff Hamed has in which account. Instead, the Amended Complaint makes sweeping vague allegations of joint-ownership, and then contradicts itself by confirming that there are separate accounts Defendant United controls for purposes of the non-grocery business operations. These accounts belong solely to Defendant United and its shareholders because Defendant United has operations other than the Plaza Extra supermarket businesses.

**¶19. At all times relative hereto, for more than 25 years, Mohammad Hamed and Yusuf have equally shared all the profits distributed by United to the Partnership – from the operation of the three Plaza supermarkets – and been responsible for all losses. Except for the recent unauthorized removal of funds described herein, for 25 years, all such distributions from the supermarket accounts have been split 50/50 between the Partners.**

The Amended Complaint fails to allege when and Plaintiff Hamed was ever responsible for any losses, loans, and any other obligations for United Corporation. Again, not a single factual allegation is alleged in this supposed 26 year old

partnership where Plaintiff Hamed has ever taken out a loan, signed a contract, or risked any loss on behalf of Defendant United. The risk of loss is an essential component of a partnership. The Amended Complaint could not cite a single fact because the record is clear that Plaintiff Hamed never risked any loss, other than his initial investment. For that investment, Plaintiff Hamed received handsome returns of 50% of the profits of the operations of the Plaza Extra supermarket. Plaintiff still cannot allege a single fact showing Plaintiff Hamed risking any personal loss in this alleged partnership.

**¶20. The partners also agreed that all stores would employ and would rely on joint decisions of themselves (or their respective family members from each family assigned to each store), so that management would be by a working consensus of the two Partners directly or through their designated agents, all of whom are family members.**

The employment of various members of the Yusuf and Hamed families is not indicative of a partnership. Nothing in ¶20 alleges what and when any management decisions were ever made by Plaintiff Hamed or any of his children.

**¶21. From time to time, Mohammad Hamed and Yusuf have used these profits, distributed solely from these "supermarket accounts" to buy other businesses and real property -- always then owning these jointly held assets, regardless of the form of ownership, on a 50/50 basis. ...[identifying several such assets]**

The allegations of ¶21 fail to state whether the alleged "assets and businesses" are properties of the alleged partnership, or that such assets are jointly held separately by the parties in separate legal entities. To date, Defendants remain uncertain what "other businesses" Plaintiff's purported partnership owns other than the Plaza Extra supermarket

operations. This type of uncertainty in pleading is unacceptable, and warrants an Order dismissing the Amended Complaint, or in the alternative for a more definite statement.

## V. CONCLUSION

There is no dispute that Plaintiff is entitled to 50% of the profits from the operations of the Plaza Extra supermarkets pursuant to a joint venture agreement. This is a position that Plaintiff, his agent Waleed Hamed, and the Defendants have always maintained before the public, the Virgin Islands Government, the United States Attorney's Office, and the District Court of the Virgin Islands. What Plaintiff seeks now is to declare a partnership that is vaguely defined, whose assets and liabilities cannot be pled with specificity. Defendants cannot be tasked with answering and defending an action to declare a partnership that Plaintiff seems unable to properly define in his original and amended complaints.

As such, Defendants' Motion to Dismiss is appropriate, and should be granted. In the alternative, Plaintiff should be ordered to provide a more definite statement as to the scope of this partnership, including what assets and liabilities are due this partnership.

**WHEREFORE**, it is respectfully requested that Defendant's Motion to Dismiss be granted, or in the alternative, for a more definite statement.

Date: December 13, 2012

Respectfully Submitted,

DeWood Law Firm  
Counsel for Defendants

By:

  
Nizar A. DeWood, Esq.  
2006 Eastern Suburb, Suite 102  
Christiansted, V.I. 00820  
t. 340.773.3444  
f. 888.398.8428

**CERTIFICATE OF SERVICE**

**IT IS HEREBY CERTIFIED** that a true copy of Defendant's Reply to Plaintiff's Opposition to Defendants' Rule 12 Motion to Dismiss was served on the Plaintiff via his counsel at the below address and date on this 13<sup>th</sup> day of December, 2012.

Joe Holt, Esq. 2132 Company St. Suite 2 Christiansted VI 00820	CARL J. HARTMANN III Attorney-at-Law 5000 Estate Coakley Bay, L-6 Christiansted, VI 00820
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Nizar A. DeWood, Esq.