

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,

Defendants.

CIVIL NO. SX-12-CV- 370

ACTION FOR DAMAGES
INJUNCTIVE AND
DECLARATORY RELIEF

JURY TRIAL DEMANDED

PLAINTIFF MOHAMMAD HAMED'S REPLY TO DEFENDANTS' OPPOSITION
TO PLAINTIFF'S EMERGENCY MOTION AND RENEWED TRO REQUEST

Defendants' opposition memorandum to plaintiff's "Emergency TRO Motion" (now a preliminary injunction motion) is predicated on defendants' absolute refusal to address the overwhelming, **dispositive** admissions in (1) the sworn deposition of Fathi Yusuf and United Corporation (Exhibit 1),¹ (2) the subsequent judicial admissions made by the defendants (Exhibits 2, 3, 4), (3) the notice of dissolution of partnership (Exhibit 11), (4) the rent demands sent by the defendants to plaintiff, Hamed (Exhibit 7), and (5) the testimony of Maher Yusuf at the January 25, 2013 hearing where he stated his father and Hamed had a *presently effective* agreement to operate the three Plaza Extra Supermarkets.²

Thus, this case does *not* present a reasonable dispute over equally balanced facts. Indeed, in the deposition of Fathi Yusuf and United (Exhibit 1), the defendants **admitted every single necessary element of the partnership agreement at issue.**

¹ As the opposition memorandum was filed just before the January 25th hearing, this reply will include references to the evidence now before this Court as well. All references to exhibits are to the exhibits admitted into evidence at the January 25, 2013 hearing.

² This portion of the transcript has been requested and should be available forthwith.

here in *excruciating* detail. Their dissolution notice then affirms the present existence of the partnership and lists its assets. Finally, the rent notices confirm that joint control of the major decision-making in the "Plaza Extra Supermarkets" still lies with Mohammad Hamed – sent as recently as January of 2013.

Thus, every conceivable term of a partnership agreement is set forth in detail -- both to what the agreement says, and more importantly, how it worked for those many years: 50% share of net profits, initial capitalization (not a loan), shared risk of loss and equal exposure to payables on an ongoing basis, segregated accounts and accounting, joint RIGHT to control and actual joint decision making on major decisions, indefinite term – everything a partnership involves.

Because of these clear admissions, the defendants argue in their opposition memorandum that even if there is a partnership, there is no irreparable harm, as the business is "operating as usual." Really? If so, then why is \$3 million missing from segregated supermarket operating accounts, in just a few months? Why are the police being called to remove managers over business disagreements? Why are key employees hysterically threatened? Why are the police and other employees being told that if these key employees are not arrested and removed, the store will close immediately? Why are Hamed and his sons being told they are fired?

With the foregoing comments in mind, it is appropriate to review the applicable law and facts in this case in order to respond to the specific points raised in defendants' opposition memorandum.

I. REPLY ARGUMENT REGARDING SUCCESS ON THE MERITS

Defendants make multiple arguments in their opposition that have no relevance to the evidence in this case and do not refute the plaintiff's evidence that a partnership

exists. These arguments will be addressed in the order raised in the opposition:

1) Gross profits. Defendants' opposition argument begins (pp. 6-7) with the assertion that there is no likelihood of success on the merits because

the Virgin Islands Uniform Partnership Act "VIUPA") provides that "[t]he sharing of **gross revenues** does not by itself establish a partnership...." (Emphasis added).

As the Court knows by now, this is not a "gross revenues" case. No assertions are made about gross revenues. All documents and testimony refer to **net profits**. Thus, this argument is without merit.

2) Loans: Defendants next state (p. 7) that:

[R]eceipt of a share of profits does not create a presumption of a partnership if, as here, "the profits were received in **payment of a debt** by installments or otherwise." VI Code tit. 26, § 22(c) (3) (j). (Emphasis added.) (Emphasis added).

In addition to this detailed explanation of how \$400,000 was Hamed's initial contribution to the partnership capital, on November 5, 2012, defendants filed a renewed Rule 12 motion (Exhibit 2 at p. 3) stating as follows:

In 1986, due to financial constraints, Defendant Yusuf and Plaintiff Hamed entered into an oral joint venture agreement. The agreement called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the **operations of the Plaza Extra supermarkets** in exchange for a loan of \$225,000 **and \$175,000 cash payment**. The loan was repaid in full, **and Plaintiff Hamed received 50% of the net profits thereafter**. (Emphasis added)

Consistent with this admission, the defendants then further admitted in their Rule 12 reply memorandum on page 11 as follows (Exhibit 3):

There is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operation of Plaza Extra Store.

Thus, there is no evidence in this record that the funds paid to Hamed were only for the repayment of a loan. Indeed, there are \$43 million in profits sitting in a Plaza Extra

Supermarket investment account, 50% of which defendants conceded is due Hamed and which is **not the repayment of any loan**. Thus, defendants' argument regarding a "loan" is also without merit.

3) Obligation to share losses and authority over decisions and rent. Next defendants argue (p. 7) that:

Significantly, the instant record reflects a fundamental dispute as to whether: (a) Mohammad Hamed ever has had an **obligation to share losses** of the Plaza Extra Supermarkets; and (c) Mohammad Hamed ever has had the right to exercise any authority over any decisions of any of the Plaza Extra Supermarkets, let alone "major business decisions."

However, Fathi Yusuf testified under oath in his deposition that Hamed is equally responsible for all "payables," stating as follows (Exhibit 1 at p. 23):

"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.** (Emphasis added).

In fact, Mohammad Hamed testified that he had responsibility for 50% of the partnership losses at the January 25th hearing -- and was liable for half of the loan payments taken out even if Yusuf was a guarantor.

As for *control*, Fathi Yusuf continues to this date to send rent notices to Hamed at the "Plaza Extra Supermarkets" regarding rents payments and eviction. See Exhibit 7. Indeed, Yusuf testified at 20-21 in his deposition that he could only make decisions as to acquisitions with the approval of Hamed.³ Similarly, Maher Yusuf wrote to Hamed in

³4 He testified, regarding entry into the St. Thomas Joint Venture:

When I open up Plaza Extra Supermarket, **who was in charge of the money at that time is Wally Hamed**. When this gentleman, Mr. Idheileh,

mid-2012 seeking approval of the \$2.7 million withdrawal. See Exhibit 13. Likewise, a notice of dissolution of partnership was sent to Hamed. See Exhibit 12. Clearly control is shared.

Indeed, the defendants repeatedly and intentionally try to confuse an agreed "division of responsibilities" with the absence of a "right" to control. As noted in *Ziegler v. Dahl*, 691 N.W.2d 271, 277 (N.D. 2005):

[Under the UPA] [c]o-ownership includes the "sharing of profits and losses as well as the power of control in the management of the business." *Id.* Control is an indispensable component of the co-ownership analysis. *Gangl*, 281 N.W.2d at 580. If partners are co-owners of a business, they each have the power of ultimate control. *Id.* (citing *Uniform Partnership Act* § 6, cmt. 1 (1914)). **An important qualification to that rule, however, is that a person does not need to control the business but only needs to have the right to exercise control in the management of the business.** *Id.* (Emphasis added).

This holding echoes the facts before this Court. For example, as Yusuf admits that he cannot dissolve the partnership without notice to Hamed, it is clear Hamed exercises joint control. Likewise, as Yusuf admits he cannot alter and pay rent without notifying Hamed, Hamed exercises joint control. The other established hearing testimony included similar compelling evidence that the operations of all three Plaza Extra supermarkets are jointly managed by the Hamed and Yusuf interests.

4) Statute of Frauds. The defendants admit that an oral agreement exists -- and ratify it. Indeed, Maher Yusuf confirmed it in testimony -- stating it was still in effect now,

lend me his money as a friend, I have never signed for him. Who paid him? I never pay him back. My partner's son is the one who pay him back. And he knew, because he come to my office once or twice a week. And he's not the only one knew. Every single Arab in the Virgin Islands knew that Mr. Mohammed Hamed is my partner, way before Plaza Extra was opened.

24 . . . You know, I don't have the final word. I will check with my partner

being performed daily. It is black letter law that an oral agreement accompanied by performance negates any Statute of Frauds argument. Moreover, contrary to the defendants' assertions, *Smith v. Robson*, 44 V.I. 56, 2001 WL 1464773 (Terr. V.I. June 26, 2001) was not at odds with *Fountain Valley Corp.*, 98 F.R.D. 679 (D.V.I. 1983), as *Smith* cites and follows *Fountain Valley* in interpreting 28 V.I.C. § 244(1)⁴:

Partnerships 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.** *Id.* at *3. (Emphasis added).

Thus, the statute of frauds defense does not apply to formation of a partnership under the UPA -- either under the *explicit language* of the UPA or the USVI statute of frauds:

5) Tax Returns. Defendants first admit (p. 11) that:

the absence of partnership tax returns and related publicly filed documentation does not, standing alone, conclusively establish that a partnership or joint venture does not exist.

Or, in Fathi Yusuf's own testimony (Exhibit 1 at 23-24):

18 A. 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. But due to my honesty—my partner, he never have it in writing from me. (Emphasis added).

However, the defendants then go right back to the "tax return" argument -- to which plaintiff offers the same response -- there are many cases already discussed which

⁴ Plaintiff makes no claim to ownership of United's real property. Plaza Extra Supermarket East is United's TENANT. *Fountain Valley* dealt with the unique situation where the agreement affected title to real property -- with the Court instead interpreting 28 V.I.C. § 242 ("Contracts for lease or sale of lands.")

show that when a partner who controls the accounting makes it appear he owns everything, the resulting filings are disfavored by courts.⁵ Thus, the tax return issue is a "non-issue" here, as the defendants had responsibility for the "front office" tasks such as filing the tax returns for the partnership profits -- and overseeing preparation of the individual returns, which returns for the past 10 years (which have not been filed) now need to be filed correctly, showing the partnership income, as established by the hearing testimony.

6) **Terms.** While the defendants complain that the terms of the partnership are undefined, this is once again simply ignoring clear judicial admissions of record. Fathi Yusuf outlined the terms of this partnership in his 2000 deposition (Exhibit 1). The hearing testimony has supplemented this testimony as well. In his deposition, Yusuf testified under oath stating that Hamed has been his 50/50 partner in the Plaza Extra supermarkets since before the first store opened in 1986, stating in part as follows:

⁵ Defendants try to distinguish *Al-Yassin v. Al-Yassin*, No. A099324, 2004 WL 625757 (Cal.App. 1 Dist. Mar. 30, 2004). There, two brothers went into business together, with one brother filing all of the official government filings. While telling the other brother that they are partners and taking the second brother's money, the first brother files tax returns and other paperwork showing himself to be in control. When the second brother seeks his partnership share, the first brother argues that the second brother is not on any of the filed "official" forms (*id.* at *1) and that the initial contribution was a loan. The *Al-Yassin* court rejected this argument. *Id.* at *1 ("he used this account to purchase two parcels of real property in Davis and Turlock, taking title to both in his own name"). Indeed, the *Al-Yassin* court also noted that "[w]hile each partner must have a right to participate in the management, conduct and control of the partnership, it is equally well established that partners may apportion their duties with respect to the management and control of the partnership in such a way that one or more partners may be given a greater share in the management than others. Thus, the fact that one partner may be given a greater day-to-day role in the management and control of a business than another partner has does not defeat the existence of the partnership itself." *Id.* at *7.

Amount of Initial Contribution to Capital: "my partner [plaintiff] . . . put in . . . \$400,000." ⁶

Duration of Agreement and Splitting Future Risk of Loss: "I'm obligated to be your [plaintiff's] 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." ⁷

Share: "I tell him, You want my advice? I be honest with you. You better off take 50 percent. So he took the 50 percent." ⁸

Scope of partnership: "his name is not in my corporation [but]. . . whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner." ⁹

Risk of Loss: "his name is not in my corporation [but]. . . whatever Plaza Extra owns in assets, in receivable **or payable**, we have a 50 percent partner." ¹⁰

⁶ Hamed testified that in fact he closed the two grocery stores he had established on St. Croix before the formation of the partnership and put his entire life's investment from the sale of these stores into the formation of the first Plaza Extra store at Sion Farm, now known as Plaza East. The defendants also reaffirmed this fact in their Rule 12 motion (Exhibit 2 at 3), stating in part:

The agreement called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the **operations of the Plaza Extra supermarkets** in exchange for a loan of \$225,000 **and \$175,000 cash payment**. The loan was repaid in full, **and Plaintiff Hamed received 50% of the net profits thereafter**. (Emphasis added).

⁷ At the hearing, Hamed also testified this partnership had no termination date, which the courts find is indicative of a partnership arrangement. Defendants cite *Southex Exhibitions*. The court in that case declined to find a partnership partially because there was a fixed term rather than being an indefinite arrangement. *Southex Exhibitions, Inc. v. Rhode Island Builders Ass'n., Inc.*, 279 F.3d 94, 99, 2002 WL 181334 (1st Cir. 2002) ("rather than an agreement for an indefinite duration, it prescribed a fixed (albeit renewable) term.")

⁸ Hamed testified at the hearing that he was a 50/50 partner with Yusuf in this partnership. Likewise, Maher Yusuf, Fathi's son and the president of United Corporation, candidly acknowledged that his father had formed a partnership with Hamed in the supermarket business, which is why all rent notices are sent by United to Hamed at "Plaza Extra Supermarket." Finally, the defendants' judicial admissions in Exhibits 2 and 3 conceded this fact.

⁹ The trial testimony confirmed that all three Plaza Extra stores (St. Croix East and West as well as St. Thomas) were owned by the partnership as did the dissolution notices from Yusuf's lawyer, Nizar DeWood. See Exhibits 11 and 12.

¹⁰ Hamed likewise testified that he was responsible for 50% of all losses.

Form of Agreement (Oral): "my partner, he never have it in writing from me." . . . "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.* But due to my honesty . . . my partner, he never have it in Writing from me. (Emphasis added).¹¹

Name: As Yusuf testified "his name is not in my corporation [but]. . . . *whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.*" (Emphasis added).¹²

Despite the defendants' angst about this point, the partnership terms are clear:

7) Summary. The plaintiff's evidence of the formation, existence and terms of a partnership is overwhelming based upon the hearing testimony and exhibits. The defendants' effort to undermine this evidence is based on flawed factual and legal arguments, as noted herein. As such, nothing in the defendants' opposition memorandum is sufficient to negate the fact that the plaintiff has a strong likelihood of success on the merits in establishing the existence of a partnership.

II. REPLY ARGUMENT REGARDING IRREPARABLE HARM

The defendants' real argument here is that this dispute is "just about money damages" -- there is no irreparable harm. However, actions to protect a partner's right to participate in the partnership's business and to preserve its business assets so it can continue to operate are equitable actions, which this Court has the statutory power to

¹¹ Hamed testified that the agreement was oral, which one of the dissolution notices from Yusuf's lawyer, Nizar DeWood, confirmed. See Exhibit 12.

¹² The trial exhibits regarding the dissolution notices and rent notices confirm that the term "Plaza Extra" is the name given to the partnership operating the three supermarkets. See Exhibits 11, 12 and 7.

impose pursuant to 26 V.I.C. §75¹³. Thus, the full range of the court's equitable powers, including the power to grant a preliminary injunction to preserve the status quo, may be invoked. As noted in *Scarcelli v. Gleichman*, No. 2:12-cv-72-GZS, 2012 WL 1430555, *4 (D.Me. April 25, 2012):

“To establish irreparable harm, however, a plaintiff need not demonstrate that the denial of injunctive relief will be *fatal* to its business. It is usually enough if the plaintiff shows that its legal remedies are inadequate. If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.” *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18–19 (1st Cir.1996) (internal citations omitted).^[14]

Waldron v. George Weston Bakeries, Inc., 575 F.Supp.2d 271, 273 (D.Me.2008). A sliding scale is appropriate such that “when the likelihood of success on the merits is great, a movant can show

¹³ 26 V.I.C. § 75 Actions by partnership and partners

* * * *

- (b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:
- (1) enforce the partner's rights under the partnership agreement;
 - (2) **enforce the partner's rights under this chapter**, including:
 - (i) the partner's rights under sections 71, 73, or 74 of this chapter;
 - (ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to section 141 of this chapter or enforce any other right under Subchapter VI or VII; of this chapter or
 - (iii) the partner's right to compel a dissolution and winding up of the partnership business under section 171 of this chapter or enforce any other right under subchapter VIII, of this chapter or
 - (3) enforce the rights and otherwise protect the interests of the partner, including, rights and interests arising independently of the partnership relationship.
- (c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

¹⁴ *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996).

By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable. See, e.g., *K-Mart*, 875 F.2d at 915; *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 14–15 (1st Cir.1986).

somewhat less in the way of irreparable harm ..." *EEOC v. Astra USA*, 94 F.3d 738, 743–744 (1st Cir.1996). See also *Fairchild Semiconductor Corporation v. Third Dimension (3D) Semiconductor*, 564 F.Supp.2d 63, 67 (D.Me.2008). **A request that funds be held in escrow is in essence a request for a preliminary injunction.** See, e.g., *Securities & Exchange Commission v. Gemstar–TV Guide International, Inc.* 367 F.3d 1087, 1092 (9th Cir.2004); *Savoie v. Merchants Bank*, 284 F.3d 52, 54 (2d Cir.1996); *Wyser–Pratte v. Van Dorn Company*, 49 F.3d 213, 216–17 (6th Cir.1995).

In this request for injunctive relief, there are two statutory partnership rights at that are being threatened, as provided in 26 V.I.C. § 71 entitled "Partner's rights and duties":

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

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

These rights warrant protection by the issuance of an injunction for several reasons established by the evidence before this Court.

1) Loss of Joint Management Rights in a Closely Held 50/50 Partnership is Irreparable Harm. Two weeks before this hearing, Fathi Yusuf "fired" his partner and his partner's agents/sons. Likewise, he attempted to terminate a key accounting employee, Wadda Charriez, without consulting the partner or the partner's agents.¹⁵ Just before that, he also asserted unilateral control over partnership funds -- paying his lawyers \$143,000 from a segregated, partnership supermarket operations account that he had previously already removed \$2.7 million from. In short, he is attempting to take 100% control of the partnership despite his counsel's arguments to the contrary, as otherwise he would just stipulate to the relief sought herein:

¹⁵ The events surrounding her attempted firing, resulting in the police being called to the Plaza East store, warrants the injunctive relief sought just to prevent another similar event, as her compelling testimony demonstrated.

In a very recent case within the Third Circuit (that is almost directly on point both factually and legally) the District Court examined the issue of trying to take exactly this sort of control as "irreparable harm." In *Health & Body Store v. JustBrand Ltd.*, No. 11-CV-6638, 2012 WL 4006041 (E.D. Pa. Sept. 11, 2012), the court applied two Third Circuit decisions in a case in its "preliminary stages" where the parties with a long personal and family history also disputed whether what was formed was partnership or joint venture. There was also no written agreement governing the respective rights and responsibilities of the parties and the court noted that there is "significant animosity between the parties." The court found irreparable harm when one party tried to exclude the other partner from control of the business:

balancing the parties' interests and potential hardships requires that **neither party have the right to exclude the other from any part of the business**, including the Websites, bank accounts, vendor lists, and other proprietary information of the business. Under normal circumstances, the Court would leave it to the parties to effectuate and maintain the business in this fashion through the remainder of this litigation. However, given the current toxic relationship between the parties, directing them to interact for the betterment of HBS while this litigation continues raises serious concerns.

Although this case is only in its preliminary stages, it is clear that there is significant animosity between the parties. Personal and familial issues underlie the parties' business relationship dating back to Zelenko's childhood relationship with Bruce Singer, and his assumption of control....

The circumstances described raise a substantial concern that the parties will be unable to work cooperatively, and that the joint venture will suffer severely as a result. *Id.* at *5-6.

In examining the specifics of the exclusion from the business, the court noted:

Here, Defendants have excluded Plaintiffs from access to the Websites, which are the primary source of income for HBS. **Defendants are also diverting revenue to an account which they exclusively control.** Under these circumstances, although no terms regarding the partnership have ever been reached, Plaintiffs have made a strong showing that at trial they are likely to establish Defendants' breach of their fiduciary duty of loyalty. See *Clement v. Clement*, 436 Pa. 466, 260 A.2d 728, 729

(Pa.1970) (self-dealing and diversion of partnership funds constitutes a breach of fiduciary duty); cf. 15 Pa.C.S. § 8331(5) ("All partners have equal rights in the management and conduct of the partnership business."). *Id.* at * 4.

Finally, the Court went on to note that:

We also conclude that Plaintiffs have made a strong showing that Defendants' exclusion of Plaintiffs from the Websites has likely resulted in irreparable harm, which may continue unless injunctive relief is granted. "Grounds for irreparable injury include loss of control of reputation, loss of trade and loss of goodwill." *S & R Corp. v. Jiffy Lube Intern., Inc.*, 968 F.2d 371, 378 (3d Cir.1992) (citing *Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 195 (3d Cir.1990)). By converting the Websites to their own use, Defendants have created a situation where the partnership has no ability to maintain the reputation, trade and goodwill of the business. This injury is not fully compensable by money damages. See *Pierre & Carlo, Inc. v. Premier Salons, Inc.*, 713 F.Supp.2d 471, 481 (E.D.Pa.2010) (citing *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 726 (3d Cir.2004)). *Id.*

This case sets forth exactly the situation now before this Court.

Similarly, in *Sonwālkar v. St. Luke's Sugar Land Partnership, L.L.P.*, No. 01-11-00473-CV; 2012 WL 3525384 (Tex. App. Houston, 1:Dist. Aug. 16, 2012) the court noted that a loss of management rights, even including the right to participate by a partner who wielded 49% of the interest, could not be measured by any certain pecuniary standard and were unique and irreplaceable, and money damages would not have provided adequate compensation.¹⁶

¹⁶ See also *Wisdom Import Sales Co. v. Labatt Brewing Company Ltd.*, 339 F.3d 101 (2d Cir. 2003) where it was alleged, as it is here by Defendants, that what existed was only a joint venture to create minority rights. The court held, nonetheless that *even absent a full partnership*, denial of bargained-for minority rights, standing alone, may constitute irreparable harm for purposes of obtaining preliminary injunctive relief where such rights are central to preserving an agreed-upon balance of power. See also, *International Equity Investments, Inc. v. Opportunity Equity Partners Ltd.*, 441 F.Supp.2d 552 S.D.N.Y. 2006 ("there is no support in the case law for the proposition that only the loss of *exclusive* [partnership] control rights can constitute irreparable harm.")

Likewise, directly relevant to the attempted discharge of Wadda Charriez and the fear expressed by Kareema Dorset about losing her job, the court in *Sheridan, Broadcasting Networks, Inc. v. NBN Broadcasting, Inc.*, 693 A.2d 989 (Pa. Super, 1997), upheld an injunction prohibiting the termination of two employees, finding that the unilateral interference was irreparable harm:

We conclude that the lower court had a reasonable basis to conclude that NBN's interference with employee relationships would irreparably harm Sheridan. *Sovereign, supra; John G. Bryant Co., supra* (the unwarranted interference with employee relationships constitutes irreparable harm), *Sheridan*, 693 A.2d at 995.

Thus, the issuance of injunctive relief is appropriate for the protection of Hamed's statutory right to participate in the partnership's supermarket business.

2) Risk of the Disappearance of \$50 million to offshore accounts is irreparable harm. Defendants completely misread the proposition for which plaintiff cites *United States v. I.T. Grant Co.*, 345 U.S. 629, 633 (1953). *I.T. Grant* holds that just because a party claims it has stopped its past transgressions that does not mean an injunction cannot be entered -- as a cognizable danger of recurrent violations will still support the entry of injunctive relief. In the instant case, the defendants unilaterally removed \$2.7 million from the Plaza Extra bank accounts and are now using the partnership accounts to pay other non-supermarket operations debts, like \$143,000 in 29 days for their lawyers here. They have done so in spite of the fact that a criminal TRO is in effect which is supposed to prevent the withdrawal of funds from those accounts. (They note, correctly, that Mohammad Hamed is not a defendant there and cannot enforce that TRO¹⁷ -- which is why this one is so critical.)

¹⁷ Defendants state the following in their Memorandum of Law in Support of Motion to Dismiss, Definite Statement, and Strike, dated October 10, 2012 (formerly DE 11.)

Additionally, the internal "two party" procedure (that has been followed since the inception of the partnership) requiring both partners to agree to the withdrawal of funds (and since 2009 for both parties to actually sign) has been violated. Thus, what is really stopping the continued wholesale removal of funds by Yusuf to the detriment of the supermarkets? When this firewall failed, almost \$3 million was unilaterally removed from the partnership bank accounts. It also meant that the entire amount in these accounts can be looted and removed from the United States by United, a convicted felon – now convicted of removing and hiding funds. **Indeed, the partnership profits held in the brokerage accounts are in excess of \$43 million -- the only thing that will assure these funds are not removed as well is an order stopping the unilateral withdrawal of funds.**

Thus, there is nothing to suggest that defendants will stop unilaterally removing additional (or all) funds from the Plaza Extra bank accounts and move them out of the plaintiff's reach, including to off-shore accounts. Otherwise, the defendants would stipulate to not make such withdrawals.

3) On-Going Damage IS Prospective and is Irreparable Harm. While it is true that the court in *Envirogas Inc. v. Walker Energy Partners*, 641 F. Supp. 1339, 1346 (W.D.N.Y. 1986) determined that a large part of the damage to the plaintiff's reputation had already occurred and any further damage resulting from the denial of an injunction would appear to be minimal, the situation in *Envirogas* were much different than the

Paragraph 10 of the Complaint alleges that the brokerage accounts that are subject to court imposed restrictions in the criminal case belong to **United and not Yusuf. First, Plaintiff is not a party to the criminal case, as such he has no standing in respect to the TRO currently existing in the criminal case. (Emphasis in original)**

present case. In *Envirogas*, the court concluded that the main damage to the plaintiff had already been done *prior* to the TRO hearing — not that the plaintiff was in peril of future damages, as is the case here. In the current case, there is still the threat of (1) the Plaza Extra accounts being removed beyond the plaintiff's reach, (2) the Hamed managers being fired and/or forcibly removed from the stores, (3) the police being called to business disputes, and (4) the stores being unilaterally closed by the defendants. Thus, further damage would be substantial, not minimal, if injunctive relief is not granted.

As for defendants' contention that *First Health Group Corp. v. Nat'l. Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 235 (M.D. Pa. 2001) requires that any irreparable harm alleged by plaintiff must be prospective, plaintiff has satisfied this standard. Additionally, plaintiff has demonstrated that "[A] preliminary injunction should not be granted if the injury suffered can be recouped in monetary damages" *IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007) (citing *Frank's GMC Truck Center, Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988)), as clearly the threats that plaintiff outlined may not be cured monetarily.

Defendants correctly point out that the court in *Allstate Ins. Co. v. IMR Medicbill Inc.*, 2000 WL 34011895 *10 (E.D.N.Y. 2000), stated "the dissolution of . . . defendant corporations following the investigation . . . in conjunction with the closing of all of their corporate bank accounts . . . , raise[d] a strong inference of a concerted attempt to frustrate a potential judgment." Further, in the *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), defendants noted "similarly, the Republic of the Philippines, as the plaintiff therein who was seeking a preliminary injunction, ha[d] also presented evidence that the funds used to acquire the properties [subject to the

requested injunction] were illegally obtained.'" *Id.* at 354 -55. However, defendants then mistakenly conclude that the facts in these cases are not analogous to the present case. While it is true that the present case obviously does not involve gross denial of human rights, it does involve a pattern of behavior of taking money out of the Plaza Extra accounts and moving them beyond the reach of the plaintiff. Indeed, when questioned under oath, Maher Yusuf initially claimed the missing \$2.7 million was in United accounts -- but under further examination admitted it was not. Instead it was supposedly used to purchase three properties.

4) Summary: In summary, the arguments raised in the defendants' opposition memorandum regarding irreparable harm (and the cases they rely upon) do not undermine the fact that the plaintiff has made a showing that injunctive relief is needed to prevent irreparable harm to his partnership rights.

III. CONCLUSION

Plaintiff seeks the status quo. The Court has asked what that means. What that means in the real world is simple:

1. Plaintiff seeks injunctive relief preserving his right to jointly manage the three Plaza Extra supermarkets through his appointment of his sons to jointly manage these businesses, as has been done for years, until a final hearing on the merits or further order of this Court.
2. Plaintiff seeks injunctive relief protecting the joint control of the three supermarket bank/credit card accounts -- as well as an order directing that they cannot be removed unilaterally by the defendants -- so that the funds can only be used for the operation of the supermarket business until a final hearing on the merits or further order of this Court.
3. Plaintiff seeks injunctive relief preserving the investment accounts holding partnership profits, as the defendants have admitted that those funds are the profits of the supermarkets in which the plaintiff has a 50% interest until a final hearing on the merits or further order of this Court.

The fact that the defendants will not stipulate to these simple points speaks volumes. As

such, it is respectfully requested that the injunctive relief sought be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2013, I served a copy of the foregoing motion by hand on:

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