

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

WALEED HAMED, as Executor of the
Estate of MOHAMMED HAMED
Plaintiff/Counterclaim Defendant,
v.
FATHI YUSUF and UNITED CORPORATION,
Defendants/Counterclaimants,
v.
WALEED HAMED, WAHEED HAMED,
MUFEED HAMED, HISHAM HAMED, and
PLESSEN ENTERPRISES, INC.,
Counterclaim Defendants.

Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE RELIEF,
DECLARATORY JUDGMENT, and
PARTNERSHIP DISSOLUTION,
WIND UP, and ACCOUNTING**

WALEED HAMED, as Executor of the
Estate of MOHAMMED HAMED,
Plaintiff,
v.
UNITED CORPORATION,
Defendant.

Civil No. SX-14-CV-287

ACTION FOR DAMAGES and DECLARATORY JUDGMENT

WALEED HAMED, as Executor of the
Estate of MOHAMMED HAMED,
Plaintiff,
v.
FATHI YUSUF,
Defendant.

Civil No. SX-14-CV-278

ACTION FOR DEBT and CONVERSION

**MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO STRIKE JURY DEMAND**

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

Response, filed October 18, 2016. For the reasons that follow, the Court will deny Defendants' Motion to Strike Response, and will grant Defendants' Motion to Strike Jury Demand.

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

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

Motion to Strike Response Re Jury Issues

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

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

Motion to Strike Jury Demand

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

because “each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership,” that only a bench trial is appropriate. Motion, at 2-3.

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

As explained by the Supreme Court of the Virgin Islands:

The right to a jury trial in a civil suit in the Virgin Islands is guaranteed by section 3 of the Revised Organic Act of 1954, which provides that “the first to ninth amendments” to the United States Constitution “are hereby extended to the Virgin Islands ... and shall have the same force and effect there as in the United States or in any State of the United States.” 48 U.S.C. § 1561. Among these amendments extended to the Virgin Islands is the Seventh Amendment, providing that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the

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

common law.” U.S. Const. amend. VII; *see also* 5 V.I.C. § 321 (“The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States shall apply in civil actions in the [Superior Court] of the Virgin Islands, except as otherwise provided by law.”).

Samuel v. United Corporation, 64 V.I. 512, 521-22 (V.I. 2016).

In *Ross v. Bernhard*, the Supreme Court of the United States recognized three factors to be considered by courts in examining whether a particular claim carries with it the right to a jury trial: 1) the customary manner in which such cases were tried prior to the merger of law and equity in 1938; 2) the type of remedy sought by the plaintiff; and 3) the abilities and limitations of juries in deciding such cases. 396 U.S. 531, 538 n. 10 (1970). “Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.” *Id.* at 537-38.

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

Plaintiff’s Complaint in SX-12-CV-370, styled as an “action for damages, injunctive and declaratory relief,” presents three untitled counts and fourteen individually numbered requests for relief. Counts II and III explicitly contemplate only declaratory and injunctive relief and therefore

present purely equitable claims carrying no right to trial by jury.² Count I, in addition to incorporating, by reference, the antecedent factual allegations, consists of four separately numbered paragraphs.

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

Only the final paragraph of Count I makes any reference to damages, alleging that “Hamed is also entitled to compensatory damages for all financial losses inflicted by Yusuf on the Partnership and/or his partnership interest as well as punitive damages against Yusuf for his willful and wanton misconduct.” However, Plaintiff has not alleged anywhere in his Complaint that Yusuf directly inflicted any financial loss upon the partnership or Hamed’s partnership interest.³ The Complaint itself attests to the informal nature of the partnership’s financial practices by which

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

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

Hamed and Yusuf, or their designated family members, each sporadically withdrew partnership profits for their own use on the understanding that ultimately each partner would be entitled to “an equal (50/50) amount of these withdrawals for each partner directly or to designated family members.” Complaint ¶ 21. In this light, Plaintiff does not truly allege that Yusuf impermissibly or unlawfully withdrew partnership funds in such a manner as to give rise to a claim for compensatory damages based upon any financial loss to Hamed. Rather, Plaintiff has alleged that Yusuf, as the partner in charge of managing partnership finances,⁴ has withheld the various sums listed in the Complaint to which Hamed believes he is entitled according to his own personal accounting of his 50% partnership interest.⁵ Thus, Plaintiff has not presented a legal claim for damages, but rather a claim for an equitable accounting of the partnership. “That such an accounting action results in an award of money to plaintiffs does not detract from the equitable nature of the remedy provided.” *Siegel v. Warner Bros. Entm’t, Inc.*, 581 F. Supp. 2d 1067, 1071-72 (C.D. Cal. 2008).

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

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

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

We begin with the ordinary meaning of the words Congress employed. The term ‘money damages,’ 5 U. S. C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies ‘are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.’ D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, ‘[o]ccasionally a money award is also a specie remedy.’ *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e. g., First National State Bank v. Commonwealth Federal Savings & Loan Association*, 610 F. 2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch v. Crouch*, 566 F. 2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to future installments); *Joyce v. Davis*, 539 F. 2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).

In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident.

The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought -- specific relief, not relief in the form of damages. *Cf. Clark v. Library of Congress*, 750 F. 2d 89, 104 n. 33 (D.C. Cir. 1984) (dictum) (describing an action to compel an official to repay money improperly recouped as ‘in essence, specific relief’).

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

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

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

By contrast, only two of Plaintiff’s fourteen requests for relief refer to damages; one compensatory, the other punitive. As to the first request, without describing or explaining to what other compensable losses he refers other than the withholding of those sums already forming the

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

subject of Plaintiff's requests for equitable relief, Plaintiff seeks "an award of compensatory damages against the defendants, jointly and severally, as determined by the trier of fact." Similarly, absent any factual allegation which might justify such an award, Plaintiff additionally requests "an award of punitive damages against Yusuf as determined by the trier of fact."⁷

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

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

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

Plaintiff's Complaint in SX-14-CV-278 nominally presents a claim for damages for debt, or alternatively conversion, in the amount of \$802,955, which Plaintiff alleges he is owed in connection with the sale of certain real property originally purchased with partnership funds. However, in their Stipulation Re: Consolidation, filed March 21, 2016, the parties jointly stipulated to the substantive consolidation of SX-14-CV-278 with SX-12-CV-370 on the basis of their agreement that "the claims in the more recently filed case SX-14-CV-278... may be treated as claims for resolution in the liquidation process of the older case SX-12-CV-370."⁹ Thus, on the basis of Plaintiff's own representations, the Court finds that Plaintiff's Complaint in SX-14-CV-278, as a result of the consolidation of these matters, presents no additional claims or prayers for

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

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

relief, and remains operative only in so far as it contains factual allegations supplementing those already contained in Plaintiff's Complaint in SX-12-CV-370.¹⁰

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

As to the last factor—the abilities and limitations of juries in deciding such cases—evidence presented by Hamed at the hearing on March 6-7, 2017 supports the Court's conclusion that “the ‘accounts between the parties’ are of a such a ‘complicated nature’ that only a court of equity can satisfactorily unravel them.” *See Dairy Queen*, 369 U.S. at 478 (Harlan, J. concurring)

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

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

(quoting *Kirby v. Lake Shore & Michigan Southern R. Co.*, 120 U.S. 130, 134 (1886)). This is highlighted by the fact that Hamed challenges numerous transactions over a period of years between the parties and their families. At the hearing, witnesses including Hamed's sons testified as to the existence of a cash diversion scheme involving cashier's checks, offered conflicting testimony regarding the ledger and receipt system for keeping track of cash withdrawals at each partnership store, and testified that records documenting the withdrawals had been destroyed. Evidence of the parties' history over many years depicts a litany of inextricably linked transactions presenting complexities which would adversely affect, if not make wholly impossible, the orderly determination of issues by a jury at trial. As demonstrated by Hamed's evidentiary presentation at the March 6, 2017 hearing, the resolution of Hamed's claims require "a complete and systematic financial review, in which all the activities related to the partnership are subjected to scrutiny," such that no single transaction may be considered in isolation. *See Thompson v. Coughlin*, 997 P.2d 191, 196 (Ore. 2000).

Thus, considering the factors outlined by the Supreme Court in *Ross v. Bernhard*, the Court concludes that Plaintiff's cause of action and accompanying prayers for relief are properly considered equitable in nature and, in any event, necessarily entail a detailed, complicated accounting such that they may only be adequately and justly resolved by a court of equity.¹²

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

Therefore, as this matter falls outside the scope of the Seventh Amendment and Plaintiff is not entitled to have his claims tried by jury, Defendants' Motion to Strike Jury Demand will be granted.

Defendants' Jury Demand

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

Once again, the Court must first look beyond the titular form of the many counts presented in Defendants' Counterclaim to substantively identify and categorize the various claims presented.¹⁴ The Counterclaim is, on its face, organized into fourteen counts.¹⁵ Of these, Counts I and II seek declaratory relief regarding the existence and terms of the partnership. Both issues were resolved by the Court's November 7, 2014 Order granting Plaintiff's Renewed Motion for

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

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

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

Partial Summary Judgment as to the existence of a partnership, which effectively entered Judgment against Defendant Yusuf on Count I of the Counterclaim and in favor of Defendant Yusuf on Count II. Defendants' Count VIII seeking dissolution of the then alleged partnership was similarly resolved by the mutual consent of the parties as memorialized in the Court's Order entered September 18, 2014 appointing the Master to oversee the dissolution and wind up of the partnership. Additionally, by Order entered April 27, 2015 granting United Corporation's Motion to Withdraw Rent, the Court effectively granted judgment in favor of Defendant United on Count XI for debt for rent owing on retail space leased to the partnership.¹⁶

Count IV (Accounting), Count V (Restitution),¹⁷ Count VI (Unjust Enrichment/Constructive Trust),¹⁸ Count IX (Dissolution of Plessen),¹⁹ Count X (Appointment of

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

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

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

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

a Receiver), and Count XIV (Indemnity and Contribution)²⁰ unquestionably seek purely equitable relief and therefore carry no right to trial by jury.

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

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

owed to him pursuant to his 50% partnership interest and has consequently withdrawn various sums from partnership accounts in excess of the 50% to which he is entitled.²¹

Just like Hamed, Yusuf is seeking funds to which he is allegedly entitled pursuant to the terms of the partnership agreement between himself and Hamed, as opposed to “money in compensation for the losses, whatever they may be, that [Yusuf] will suffer or has suffered by virtue of the withholding of those funds.” *See Maryland*, 763 F. 2d, at 1446. Accordingly, despite the misleading form of the Counterclaim, the Court concludes that Yusuf has not presented multiple distinct claims for damages, but rather a single, tripartite action for the equitable dissolution, wind up, and accounting of the partnership pursuant to 26 V.I.C. § 75(b)(2)(iii). As noted above, the fact that such an accounting will result in the payment of monies to one or both parties does not convert an essentially equitable claim into a legal one. *See Siegel*, 581 F. Supp. 2d at 1071-72.

Count XII of the Counterclaim (Rent) presents a claim for rent allegedly owed to Defendant United for the use of certain storage bays by Plaza Extra-East from 1994 through 2001 and from 2008 through 2013. As this is a claim made solely by United against Hamed, it cannot be said to be included in or subsumed by the accounting claim between the partners as with Yusuf’s nominal claims for damages presented in Defendants’ Counterclaim. Additionally, as this claim specifically

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

requests unpaid rent in the amount of \$793,984.38—“an amount certain, liquidated, and subject to immediate collection”—it presents a legal claim for damages.²² Thus, of the fourteen Counts of Defendants’ Counterclaim, only Count XII (Rent) presents a legal claim for damages ordinarily carrying with it the right to a trial by jury.

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

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

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

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

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

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

As discussed above in the context of Hamed's Complaint, both Hamed and Yusuf have waived any right to trial by jury in this matter by virtue of their stipulation to the substance of the Final Wind Up Plan adopted by the Court on January 7, 2015.²⁴ Pursuant to that Plan, each partner, following liquidation of the partnership assets is to submit a proposed accounting and distribution to the Master who shall, in turn, "make a report and recommendation of distribution *to the Court for its final determination.*" Final Wind Up Plan, Section 9, Step 6.

While the applicability of the Final Wind Up Plan and the waiver contained therein to United, a non-partner, may not be immediately obvious, a review of the record demonstrates that

²⁴ *See supra*, note 1.

United was indeed party to the development and adoption of the Plan, and considers itself to be bound by the terms thereof. Both Defendant Yusuf and Defendant United jointly first moved the Court to appoint a Master to oversee the various claims involved in this litigation and attached to the Motion their first proposed version of the wind up plan.²⁵ Describing the process of developing and adopting the plan, Defendants, referring to themselves in the plural, note that “Plaintiff and *Defendants* proposed dueling plans,” all of which contemplated resolution of all claims by recommendation of the Master for final determination by the Court.²⁶

Additionally, United is properly considered a party to, and therefore bound by the terms of, the stipulated Final Wind Up Plan because: 1) the Plan itself provides a mechanism for the resolution of third-party claims against the partnership such as United’s claim for rent by which such claims are to be settled by the liquidating partner subject to the approval of the Master and ultimately the Court, and 2) the Plan imposes a specific obligation upon United to divest itself of, and deliver to Hamed, 50% of its stock holdings in Associated Grocers.²⁷ Thus, based upon the representations of counsel for both Defendants, the role of United in developing and adopting the Plan, and the terms of Plan itself, the Court concludes that the language of the Final Wind Up Plan, to which all parties have stipulated, represents an agreement among all parties that the various

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

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

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

claims presented in both the Complaint and Counterclaim are to be resolved by the Court and not by jury.

While equally applicable to Plaintiff, the proposition that the right to trial by jury was waived in this matter is particularly convincing with respect to Defendants. As Defendants argued in their Motion to Strike Jury Demand, “each claim seeks relief based on the existence of a partnership and/or the accounting of funds held by a partnership...[and therefore] it is clear that these claims can only be adjudicated in a bench trial.” Motion to Strike, at 3.²⁸ In their Reply in support of the same Motion, Defendants assert that “by participating in the process that resulted in the [Wind Up] Plan without objection or assertion of any jury trial right, Plaintiff has waived his right to invoke it now.” Reply in Further Support of Motion to Strike, at 2. As noted in Defendants’ Supplemental Brief Regarding Three Motions Addressed at March 6-7, 2017 Hearings, the record reveals that while Plaintiff and Defendants both proposed significantly different versions of what eventually became the Final Wind Up Plan, one feature constant across all versions was the Master’s report and recommendation of distribution for final determination by the Court. Supplemental Brief, at 8-9. Never, at any time in the process of developing the Plan, did any party make any mention of or suggestion that any matter should ultimately be resolved by jury.

Thus, based upon Defendants’ own representations, both Defendant Yusuf and Defendant United believed that by consenting to the Final Wind Up Plan—pursuant to which the claims between the parties would be decided by the Court based upon recommendation of the Master—

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

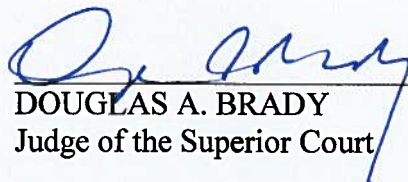
they waived the right to trial by jury in this matter. Thus, based upon the clear intent and understanding of Defendants in connection with the adoption of the Final Wind Up Plan, the Court finds that Defendants have waived any right to trial by jury under the Seventh Amendment, and accordingly, Defendants' jury demand will be stricken.

In light of the foregoing, it is hereby

ORDERED that Defendants' Motion to Strike Plaintiff's Response is DENIED. It is further ORDERED that Defendants' Motion to Strike Jury Demand is GRANTED. It is further ORDERED that Plaintiff's demand for trial by jury in the above captioned consolidated cases is STRICKEN. It is further

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

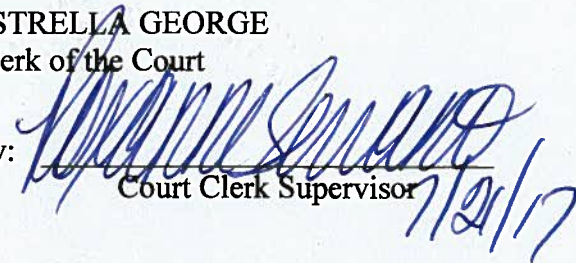
DATED: July 21, 2017.


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By:


Court Clerk Supervisor 7/21/17

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

**TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw**

ORDER

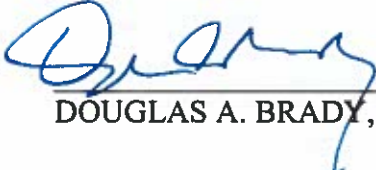
THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned matters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

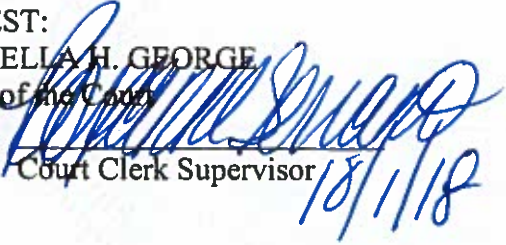

DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

By:


Court Clerk Supervisor 10/1/18