

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED , by his)	CIVIL NO. SX-12-CV-370
authorized agent WALEED HAMED ,)	
)	
Plaintiff/Counterclaim Defendant,)	ACTION FOR DAMAGES,
)	INJUNCTIVE RELIEF
vs.)	AND DECLARATORY RELIEF
)	
FATHI YUSUF and UNITED CORPORATION ,)	
)	
Defendants/Counterclaimants,)	
)	
vs.)	
)	
WALEED HAMED, WAHEED HAMED,)	
MUFEEED HAMED, HISHAM HAMED, and)	
PLESSEN ENTERPRISES, INC.,)	
)	
Additional Counterclaim Defendants.)	
_____)	Consolidated With
)	
MOHAMMAD HAMED ,)	
)	CIVIL NO. SX-14-CV-287
Plaintiff,)	
v.)	ACTION FOR DAMAGES
)	AND DECLARATORY RELIEF
UNITED CORPORATION ,)	
)	
Defendant.)	
_____)	

**OPPOSITION TO
PLAINTIFF’S MOTION TO STRIKE THE REPORT OF
DEFENDANTS’ ACCOUNTING EXPERT,
FERNANDO SCHERRER OF BDO, PUERTO RICO, P.S.C.**

Defendants/counterclaimants Fathi Yusuf (“Yusuf”) and United Corporation (“United”)(collectively, the “Defendants”) submit this Opposition to the Motion to Strike the Report of Defendants’ Accounting Expert, Fernando Scherrer of BDO, Puerto Rico, P.S.C. filed by plaintiff/counterclaim defendant Mohammed Hamed (“Hamed”).

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I. FACTS

Pursuant to the “Final Wind Up Plan Of The Plaza Extra Partnership,” entered on January 9, 2015 (the “Plan”), §9, Steps 4 and 6, and the August 31, 2016 and September 22, 2016 directives of the Master, the parties were supposed to submit their accounting claims and proposed distribution plans by September 30, 2016. These submissions were to be made only to the Master and opposing counsel and not filed with the Court. The rationale for not filing these competing accounting claims with the Court was to maintain the confidentiality of the extensive financial information that would be included in these documents and submission to the Master was in accordance with the procedures of the Plan and a Stipulated Order entered on November 16, 2016, in which it was agreed that the “Partners will submit their proposed accounting and distribution plans required by Section 9, Step 6, of the Plan to each other and the Master...” Review by the Master of these competing claims would result in his report and recommendation to the Court. Such a private exchange did not prohibit the Master or the Court from later directing the parties to file their submissions with the Court should it be deemed necessary.

Despite these instructions, on September 30, 2016, Hamed filed his “Notice of Partnership Claims and Objections to Yusuf’s Post-January 2012 Accounting” (“Hamed’s Claims”) with the Court, along with various supporting documents, which he further made public by placing them on a website for download.¹

¹ As a result of this flagrant violation of the Master’s directive and the rules of this Court to eliminate personal data identifiers, Yusuf filed a Motion to Strike Hamed’s Claims on October 14, 2016. It appears that the reason Hamed’s Claims were filed and published on the internet was to put into the public realm only Hamed’s claims against Defendants and to usurp the procedures established by the Plan for the winding up of the Partnership.

The same day, Yusuf submitted his Accounting Claims and Proposed Distribution Plan (“Yusuf’s Claims”) directly to the Master and counsel for Hamed in accordance with the Master’s instructions. Because Yusuf did not file his Claims or any of the exhibits thereto with the Court, they were not a part of the record in this case.² One exhibit Yusuf submitted was the Expert Report of accountant, Fernando Scherrer from the accounting firm, BDO Puerto Rico, P.S.C. (the “BDO Report”). The BDO Report set forth a comprehensive accounting of the historical partner withdrawals and reconciliation for the time period 1994 through 2012, as well as acknowledgment of income from 1992 – 1993 for Waleed Hamed as reflected in his tax returns for those years which were previously undisclosed. The BDO Report was comprised of two parts: a) the written report (Exhibit J to Yusuf’s Claims) and, b) the tables, schedules and supporting documentation (Exhibit J-1 to Yusuf’s Claims). Given the voluminous size of the tables, schedules and supporting documentation of Exhibit J-1 to Yusuf’s Claims, they were provided separately on a flash drive and delivered to counsel for Hamed and the Master on October 4, 2016.

However, on October 3, 2016, before ever receiving the flash drive and even though the BDO Report was not of record in this case, Hamed filed his Motion to Strike the BDO Report raising challenges to the sufficiency of the information which forms the basis for the conclusions and opinions. In similar fashion, on the following day, October 4, 2016, Hamed filed a Motion to Strike Defendants’ Business Evaluation Expert Integra Realty Resources-Caribbean (“Second Motion to Strike”), which, likewise, was not a matter of record. Yusuf will address the Second

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² Yusuf did file a Notice of Service of Accounting Claims and Proposed Distribution Plan with the Court on October 3, 2016.

Motion to Strike and has already addressed the improper filing of Hamed's Claims with the Court in separate filings.

II. ARGUMENT

A. **The BDO Report was not of record and, therefore, cannot be stricken by the Court and Hamed's attempts to solicit a ruling on the BDO Report violates the procedures established in the Plan.**

A fundamental flaw with Hamed's ill-conceived Motion to Strike is the fact that the BDO Report it seeks to "strike" was never filed with the Court by Yusuf - nor was it supposed to be.³ Rather, in accordance with the Master's specific instructions, the BDO Report, which comprised a portion of Yusuf's Claims (Exhibits J and J-1) was not filed with the Court so as to keep the financial information contained therein confidential and in keeping with the procedures established in the Plan. As a result, Hamed's Motion to Strike is misplaced as there was nothing in the record to strike.

Yet, Hamed improperly attempted to make the BDO Report part of the record by attaching the written portion⁴ to his motion. By doing so, he committed yet another violation of the Master's directive and did so without any consideration whatsoever of the significant

³ Moreover, as this Court noted in its recent opinion in *Schrader v. Juan F. Luis Hospital*, SX-12-CV-066, generally, if an expert is to testify at trial, the admission of his report is considered redundant. In rendering a *Daubert* opinion in advance of trial, the admissibility of the expert's opinions contained in the report is considered and typically the question of admissibility of the physical report at trial is deferred. Hamed's Motion to Strike the BDO Report, therefore, is premature. Nonetheless, Yusuf responds to Hamed's motion as if it relates to both the physical BDO Report as well as the opinions of Yusuf's expert Fernando Scherrer embodied within the BDO Report.

⁴ Hamed only attached the written portion of the BDO Report to his Motion without the accompanying schedules, tables and supporting documentation. As described above, Hamed filed his Motion to Strike before having received the schedules, tables and all supporting documentation, contesting, without any knowledge, the extent of the information reviewed and considered by BDO.

personal data identifiers it contained. Moreover, counsel for Hamed provide no authority whatsoever for their conclusion that this Court, rather than the Master, must address this Motion to Strike (and the Second Motion to Strike) in the first instance. Since these exhibits were submitted in support of Yusuf's Claims, pursuant to §9, Step 6, of the Plan, the Master is given the authority, in the first instance, to issue his report and recommendation regarding the competing claims. As counsel for Hamed would have it, this Court must address, in piecemeal fashion, any motion that concerns the parties' competing claims. It is respectfully submitted that this process would unduly extend the winding up of the Partnership and the Master must be allowed to make whatever rulings and decisions are necessary for him to complete his report and recommendation to the Court.

Nevertheless, since Yusuf did not file the BDO Report with the Court, there was nothing to be stricken from the record and for this reason alone, the Motion to Strike should be denied as moot. Further, Yusuf requests that the portion of the BDO Report, which was attached to the Motion to Strike, likewise, be removed from the record and any other public forum.

B. All of the information, which Hamed contends was "missing" or not considered, was, in fact, present and accounted for in the BDO Report, along with additional information not referenced by Hamed.

Notwithstanding the foregoing procedural grounds for denying the motion, Yusuf submits that it must be denied on substantive grounds as well. Hamed filed his motion before he was ever in possession of the detailed schedules, tables and supporting documentation, despite knowing that this detailed information was forthcoming. Yet, Hamed attacked the BDO Report on the grounds that it was lacking in support as it failed to address two types of evidence: 1) the

draft Summary of Schedules prepared by the FBI (“Draft Summary Schedules”), and 2) a series of checks written to Yusuf between 2002 and 2012. Hamed is wrong on both fronts.

1. Draft Summary Schedules

The Draft Summary Schedules are preliminary findings of the FBI created during their investigation as to under-reporting of income from the grocery store operations of the Plaza Extra Stores. Contrary to Hamed’s unfounded assertion, these Draft Summary Schedules were reviewed by BDO in their analysis but were determined to be unreliable as a reflection of partner distributions. Hence, BDO did receive and review this information.

For a number of reasons, the Draft Summary Schedules are inaccurate as a basis to demonstrate partner withdrawals. The most glaring problem with the Draft Summary Schedules is the fact that \$13,571,441.36 of the income from the grocery store operations shown as income of United was improperly attributed solely to Yusuf in the years 1999, 2000 and 2001. *See Exhibit A*, excerpts from the Draft Summary Sheets attributed to Yusuf. Those funds constitute overall business income from the grocery store operations and are not a reflection of the particular partner distributions that Yusuf received. Similarly, another \$3,223,344.11 was improperly attributed to Yusuf in the years 1996 and 1998, which constituted funds owned by Hamdan Diamond Corporation, not Yusuf. *See Exhibit A*, Chart and excerpts from the Draft Summary Sheets reflecting Hamdan Diamond funds attributed to Yusuf. When these two amounts are subtracted from the calculations in the Draft Summary Schedules and then compared to what is reflected therein for Waleed Hamed, Waleed took some \$12,061,025.00 more than Yusuf. Hence, the Draft Summary Schedules provide little, if any, probative value as to the issue of partnership distributions. Therefore, simply because the BDO Report did not

adopt the preliminary calculations in the Draft Summary Schedules as they do not reflect partner distributions and were created for a different purpose; i.e. to determine underpayment of taxes by the grocery store operations, this does not impugn the validity or integrity of the BDO Report.

Additionally, the Draft Summary Schedules cannot be considered as an adequate reflection of partnership withdrawals as they do not even consider funds received by Hamed, the 50/50 partner, as he was not included in the FBI investigation or the criminal proceedings. The Draft Summary Schedules are incomplete and clearly marked "DRAFT." From an evidentiary standpoint, the individual who appears to have prepared them has not been designated as an expert witness in accordance with the requirements of the rules and they fall woefully short of the requirements for an expert report or even the information that may be relied upon by an expert. Nevertheless, Hamed's challenge to the BDO Report was that the Draft Summary Schedules were not considered. This is incorrect. They were considered by BDO and then disregarded as unreliable.

2. Yusuf Checks

Every single check listed and identified in Exhibit 3 to Hamed's Motion to Strike was accounted for in the BDO Report. A quick review of the schedules, tables and corresponding support documentation provided on the Exhibit J-1 flash drive reveals that each check, (along with other checks that Hamed failed to list) was accounted for in the BDO Report. Attached is a listing of the location of each check in Exhibit 3 and its corresponding location in the BDO Report. *See Exhibit B* – Location of Checks in BDO Report, Table 35B, p. 3 and 5; Table 42B.

What is clear is that Hamed's Motion to Strike was a "knee jerk" response to only a portion the BDO Report which did not include the schedules, tables and supporting

documentation. All of the information that Hamed claims was not considered, was, in fact, considered. Furthermore, BDO identified additional checks and other evidence of withdrawals (for Yusuf) which were included in the BDO Report beyond those listed by Hamed. There is no merit to the contention that these two items were not considered by BDO or that the information BDO received was selective and non-comprehensive. To the contrary, BDO analyzed voluminous records and a simple review of the documentation BDO considered and analyzed reflects the extensive and comprehensive nature of the information BDO was provided. Hence, there is no merit to the contention that the review of information was selective or anything less than comprehensive.

C. Extensive records were reviewed and there exists more than a sufficient basis to render the opinions as to the historical distributions between the partners for the period analyzed.

In an attempt to discredit the BDO Report, Hamed points to the qualifying language in the BDO Report for the proposition that the evidentiary support upon which the report is based is flawed and incomplete and, therefore, he extrapolates it is unreliable. This is incorrect. If anything, this attack goes to the issue of *weight* to be placed upon the expert testimony as opposed to the *admissibility* of the BDO Report. However, *Daubert* motions question the *admissibility* of expert testimony, the trier of fact will determine the *weight* it is to be given.

When considering admissibility of expert testimony, the Supreme Court of the Virgin Islands has adopted the more liberal interpretation of Rule 702 of the Federal Rules of Evidence governing expert witnesses as enunciated in *Daubert* and its progeny, holding “we join the vast majority of jurisdictions in holding that the more liberal *Daubert* standard should govern the

admission of expert testimony in the Virgin Islands.” *Antilles Sch., Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, at *20 (V.I. 2016).

“Under the Federal Rules of Evidence, a trial judge acts as a ‘gatekeeper’ to ensure that ‘any and all expert testimony or evidence is not only relevant, but also reliable.’” *United States v. Wrensford*, 2014 U.S. Dist. LEXIS 39127, 12-13 (D.V.I. Mar. 25, 2014), citing *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) (quoting *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997) (citing *Daubert*, 509 U.S. at 589). The Rules of Evidence “embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact.” *Id.*, citing *Kannankeril*, 128 F.3d at 806. In that regard, Rule 702, “which governs the admissibility of expert testimony, has a liberal policy of admissibility.” *Id.*

The three major requirements for admissibility of expert testimony are that: “(1) the proffered witness must be an expert, i.e., must be qualified; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact.” *Id.* citing *Pineda*, 520 F.3d at 244 (citing *Kannankeril*, 128 F.3d 806). The shorthand for this three-part test that must be satisfied before an expert may testify is: qualification, reliability, and fit. *Id.* The “rejection of expert testimony is the exception and not the rule.” Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments.

1. “Qualification” and “Fit” are not contested.

Hamed does not contest that Fernando Scherrer, CPA, CIRA, CA, MBA, who is the Managing Partner of BDO Puerto Rico, is not qualified to render the opinions contained in the BDO Report. This is because Mr. Scherrer’s qualifications as a forensic accountant make him amply qualified to analyze the financial information described and to assess and review this

information and compile a comprehensive assessment of the partnership withdrawals as between Hamed and Yusuf taking into account the specific members of each partner's family. His experience in such matters is clearly set forth in his C.V. attached to the BDO Report. Hence, there is no challenge as to the qualifications of the expert to render opinions as to his calculations of the historical partnership withdrawals during the period covered in his analysis. A "broad range of knowledge, skills, and training qualify an expert." *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 741 (3d Cir. 1994). Further, practical experience can be the basis of "specialized knowledge" for purposes of qualifying an individual as an expert. *See Betterbox Commc'ns, Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 327-28 (3d Cir. 2002). Fernando Scherrer possesses the specialized knowledge and training as well as experience to present the opinions in the BDO Report.

Likewise, Hamed does not contest the "fit" component, which contemplates whether the testimony will assist the trier of fact. Here, the issue addressed by the BDO Report is the historical withdrawals between the two partners, Yusuf and Hamed, and their family members between 1994 and 2012, as well as certain previously undisclosed income by Waleed Hamed as reflected in his 1992 and 1993 income tax returns. The issue of historical withdrawals and distributions between the partners who each are to share in the net profits on a 50/50 basis is obviously relevant to the dissolution of the Partnership and the claims between the partners for off-sets and distribution of the remaining partnership assets. Hence, the testimony to be offered by Fernando Scherrer as set forth in the BDO Report provides a comprehensive, systematic reconciliation of all available financial information reviewed and analyzed to reflect the

distributions between the partners and their agents during this period. Therefore, the “fit” prong is satisfied.

2. Reliability

The reliability requirement has been interpreted “to mean that ‘an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable.’ ” *Pineda* 520 F.3d at 244 (quoting *Kannankeril*, 128 F.3d at 806). “The evidentiary requirement of reliability is lower than the merits standard of correctness.” *Pineda*, 520 F.3d at 247 (quoting *In re Paoli*, 35 F.3d at 744). The trial Court has “broad discretion in determining the admissibility of evidence, and ‘considerable leeway’ in determining the reliability of particular expert testimony under *Daubert*.” *Simmons v. Ford Motor Co.*, 132 F. App'x 950, 952 (3d Cir. 2005) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53 (1999)).

As reflective of the relatively low threshold required to demonstrate reliability, the proponent of the evidence does not have to demonstrate that the assessments of the expert are correct (although Yusuf contends the opinions in the BDO Report are correct) — they only have to demonstrate by a preponderance of the evidence that their opinions are reliable. *In re Paoli*, 35 F.3d at 744. “ ‘The analysis of the conclusions themselves is for the trier of fact when the expert is subjected to cross-examination.’ ” *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000) (quoting *Kannankeril*, 128 F.3d at 806).

Daubert sets forth a non-exhaustive list of factors to assess whether a particular methodology employed by an expert in arriving at their opinion is reliable. However, not every factor would need to be applied to every case underscoring the flexibility of the *Daubert* analysis. In this regard, the Supreme Court addressed “how *Daubert* applies to the testimony of

engineers and and other experts who are not scientists,” but who nevertheless possess “technical” and “other specialized” knowledge under Fed. R. Evid. 702. *Kumbo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The Court ruled that *Daubert’s* list of factors does not necessarily or exclusively apply to all experts or in every case and that the trial court has “broad latitude” in determining how to assess reliability. *Id.* at 142.

Contrary to Hamed’s assertions as to the applicable standards, in the case of testimony of an accounting expert, the nature of the engagement defines the standards and procedures to be employed by the accountant. In this case, the work required to review the financial information and prepare the BDO Report is considered to be a litigation support engagement. As such, it is within the definition of a “consulting engagement” and, therefore, is subject to the standards set forth in the Statement of Standards for Consulting Services promulgated by the American Institute of Certified Public Accountants (“AICPA”). *See Exhibit C - Statement on Standards for Consulting Services of the AICPA.* As set forth by AICPA:

Statements on Standards for Consulting Services are issued by the AICPA Management Consulting Services Executive Committee, the senior technical committee of the Institute designated to issue pronouncements in connection with consulting services. Counsel has designated the AICPA Management Consulting Services Executive Committee as a body to establish professional standards under the “Compliance with Standards Rule” of the Institute’s Code of Professional Conduct. Members should be prepared to justify departures from this statement.

See Exhibit C - Statement on Standards for Consulting Services of the AICPA, Section 100. A fundamental difference between attesting to the representations of others such as in an audit, compilation or review, is that “[I]n a consulting service, the practitioner develops the findings, conclusions, and recommendations presented.” *See Exhibit C, Section 100.02.* Furthermore,

“[T]he nature and the scope of the work is determined solely by the agreement between the practitioner and the client.” *See* Exhibit C, Section 100.02. In addition, under these standards, the accountant is to formulate his opinions upon “[O]btaining sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.” *See* Exhibit C, Section 100.06.

Here, the volume and amount of information reviewed by BDO was extensive. Massive amounts of documents were reviewed, compiled and analyzed. The documents included, *inter alia*, in excess of 160 boxes from the FBI, the voluminous information exchanged between the parties during discovery and subpoenaed records contained on discs which were all reviewed. As reflected in Exhibit J-1 to Yusuf’s Claims, the information contained therein was voluminous and this constitutes only a relatively limited portion of the total and overall volume of documents and information reviewed. The vast amounts of information reviewed was first sorted which was an extensive and laborious process. It was then categorized as to the particular individuals. It was then further categorized by the nature of the evidence, i.e., checks, receipts, bank statements, payments to third parties, loans from third parties, etc. The information was then divided into time periods. From there, all information was logged and entered and cross referenced. Certain parameters were established to govern BDO’s assessment and analysis of each document. For example, if a check was written to a particular individual and within three (3) business days, the same amount was deposited into another account bearing that individual’s name, then the amount was adjusted to insure that double counting did not occur. The adjustments and the basis for them were reflected on the schedules and then cross referenced with the evidentiary support for the adjustment. Additional other parameters were established

consistent with engagements of this nature and reflective of how personal expenses incurred with business funds are accounted for and then reflected as a partnership distribution. As described in the BDO Report, the distributions were reflected in different ways. The obvious means was through a Plaza Extra check written directly to a partner or member of the partner's family other than a paycheck. Another means of distribution was in the form of a receipt signed by an individual reflecting cash removed from a safe. However, payments made from the Plaza Extra accounts to third parties, such as a contractor and laborers for the building of a partner's or his family member's home was also considered a distribution. Such assessments are consistent with established treatment of such expenditures for non-business purposes on behalf of a partner or their agents as a partnership distribution.

In order to determine reliability of an opinion, there has to be sufficient relevant information to support the analysis and conclusion. Here, there was extensive information dating back to 1994. In addition, there were tax returns for Waleed Hamed from 1992 -1993 reflecting substantial income for Waleed Hamed, which were also considered. The fact BDO qualified that the opinions in the BDO Report are dependent upon the information reviewed, simply acknowledges that given the span of time involved, the numerous transactions involved, and the number of individuals involved that certain records may not be available. This does not equate to an admission that the cumulative information reviewed is insufficient to render an opinion. Rather, it is a qualification of all of the extensive information provided over this span of time. There is no analytical gap between the data and the opinion proffered. To the contrary, each amount attributed to one partner or the other is supported by a specific document and noted on a

schedule. Special care was taken to insure that no double accounting occurred when reviewing data from differing sources, i.e. a check, a bank statement, a deposit slip or a credit card charge.

Further, to the extent that Hamed contests the sufficiency of the underlying data, that is a point which goes to the weight of the conclusions, rather than to the admissibility of the BDO Report. Likewise, the opinions should not be excluded under Fed. R. Evid. 401 and 403 as they are not akin to speculation. Quite the opposite – each amount attributed to a partner or his family member is supported by a particular piece of documentary evidence. Further underscoring the independence of the opinions are the various objections raised by Yusuf as to certain classifications by BDO in its report. By way of example, Yusuf contests that funds expended during a trip to Turkey for the purchase of goods for the Plaza Extra Stores should not be included as a partnership distribution to him. BDO, however, attributed such expenditures to Yusuf as a distribution since the information reviewed did not appear to reflect the business nature of the expenditure. If further information comes to light to demonstrate that the expenses were for a business purpose, then an adjustment could later be made. The import of this is to demonstrate the integrity of the process and to demonstrate that the positions in the report are consistent with the parameters established and demonstrated by the documentary evidence, even though Yusuf make take the position that further evidence as to a particular transaction will demonstrate that it should not be categorized as a distribution. Hence, the information reviewed was reliable and extensive and comports with the nature of the engagement to provide an accounting of all available financial information to determine the historical partnership distributions. Nothing in the qualifications or acknowledged limitations operates to render the conclusions and opinions unreliable. Hence, the information and the methodology utilized by

BDO in arriving at the conclusions in the BDO Report were reliable and are not a basis upon which to deny the admission of the BDO Report.

3. Distinction as to Authority Cited

Hamed cites to a District Court for the Northern District of Georgia opinion in, *Atlantic Rim Equities, LLC v. Slutzky, Wolfe & Bailey, LLP*, No. 1:04-cv-2647-WSD, 2006 WL 5159598, at *6 (N.D. Ga. Nov. 21, 2006), for the proposition that in its role as a gatekeeper the Court must insure that there is not too great of a gap between the data and the opinion offered by the expert accountant. In the *Atlantic Rim* case, however, the CPA expert, Howard Zandman, was allowed to testify and allowed to supplement his report. Coincidentally, the undersigned was lead counsel for the Plaintiff in *Atlantic Rim* during her time practicing in Georgia and is intimately familiar with its facts. A review of the Order cited clearly reflects the trial court's decision that "Zandman [defendant's CPA expert] may therefore testify as to his estimation of damages provided that he completes an estimation of damages that includes damages for the Liberty deal that he discounted summarily in his report." See **Exhibit D**. Hence, the expert was provided an opportunity to supplement his report to include information previously disregarded. Zandman did, in fact, testify at trial as an expert witness. The citation provides no additional support for Hamed's Motion to Strike and, if anything, undercuts it, as the Court in *Atlantic Rim* exercised its discretion and liberally applied the *Daubert* factors to allow the expert not only the opportunity to testify but to revise his report to consider a matter previously disregarded.

4. Attorney's fees properly attributed to each individual

Hamed also takes exception to the allocation of attorney's fees in the BDO Report. Again, while particular conclusions are better left to issues of weight as opposed to admissibility,

Yusuf shows that the allocation of attorney's fees was made as per the party to whom the invoices were made. This is consistent with the methodology for other payments to third parties on behalf of a partner or their family member not directly related to business expenses. Payment of attorney's fees in defense of criminal charges would be an individual's personal expense. Hence, the allocation was not improper and does not reflect a lack of reliability or failure to adhere to an established methodology consistently applied to the information reviewed.

III. CONCLUSION

The Motion to Strike must be denied on procedural grounds as the BDO Report Hamed seeks to prohibit and to strike was never made a part of the record. The attempt to engage this Court for a ruling at this stage usurps the procedures established and ordered by this Court in the Plan and disrupts the orderly progression of the Partnership wind up. On substantive grounds, the Motion to Strike likewise fails. Contrary to Hamed's assertions, the BDO Report did consider and analyze information set forth in the Draft Summary Schedules but rejected the calculations as incomplete and not a reliable representation of partnership withdrawals as the purpose of the Draft Summary Schedules was to determine overall under-reporting of the business, not to assess particular distributions taken by the partners. The BDO Report also accounted for each and every check Hamed contended was absent as well as other checks (to Yusuf) which Hamed failed to list. Moreover, the vast amounts of information reviewed, analyzed and cross-referenced was more than sufficient to satisfy the applicable standards for the reconciliation of historical partner withdrawals and distributions for the time period assessed. Any challenges to information or the availability of information would only go to the weight of the opinions and does not impact whether the opinions in the BDO Report should be admitted or

considered. For these reasons, Hamed's premature and ill-conceived Motion to Strike must be denied.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP



Dated: October 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2016, I served the foregoing **OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE REPORT OF DEFENDANTS' ACCOUNTING EXPERT, FERNANDO SCHERRER OF BDO, PUERTO RICO, P.S.C.** via e-mail addressed to:

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Exhibit Index

- Exhibit A** – Chart and Excerpts from the Draft Summary Schedules reflecting amounts improperly attributed to Yusuf
- Exhibit B** – Location of Checks in BDO Report, Table 35B and 42B.
- Exhibit C** – American Institute of Certified Public Accountants Statement of Standards for Consulting Services
- Exhibit D** – Order in *Atlantic Rim Equities, LLC v. Slutzky, Wolf and Bailey*, No. 1:04-cv-2647-WSD, 2006 WL 5159598 (N.D. Ga. Nov. 21, 2006)

EXHIBIT A

\$2,400,000.00 of the total is from deposits to Hamdan Diamond Account in 1996 improperly attributed to Yusuf
(FY010156, and FY010150)

Pulled from "Computation of Additional Taxable Income, Adjusted Gross Income" for 1996
(FY010149)

\$823,344.11 of the total is from deposits to Hamdan Diamond Account in 1998 improperly attributed to Yusuf
(FY010156, and FY010150)

Pulled from "Computation of Additional Taxable Income, Adjusted Gross Income" for 1998
(FY010149)

US Government Calculation of Additional Income to Fathi Yusuf, Wally Hamed and Willie Hamed from January 4, 2005 Draft Bates Number FY 009991 - (Overage to Fathi Yusuf was \$4.646 Million)

	1996	1997	1998	1999	2000	2001	Total
1996-2001 Additional Income for Fathi Yusuf	\$ 2,939,822.40	\$ 301,230.42	\$ 2,231,582.09	\$ 5,413,214.70	\$ 7,286,897.12	\$ 7,756,376.54	\$ 25,929,123.27
1996-2001 Additional Income for Wally Hamed	\$ 4,868,283.17	\$ 1,696,282.02	\$ 3,619,176.42	\$ 1,981,853.48	\$ 8,647,150.59	\$ 381,618.63	\$ 21,955,364.31
1996-2001 Additional Income for Willie Hamed	\$	\$ 14,700.00	\$ 16,300.00	\$ 75,189.00	\$ 31,193.00	\$	\$ 87,482.00
Overage Obtained by Fathi Yusuf over Hameds	\$ (1,928,460.77)	\$ (1,409,751.60)	\$ (1,403,894.33)	\$ 7,406,172.22	\$ (1,391,546.47)	\$ 7,373,717.91	\$ 4,646,276.96

Pulled from "Computation of Corrected Taxable Income" for Fathi Yusuf 1999-2001," line 2 reflecting "Unreported Income from S Corporation" of:

- **\$3,485,352.70** from S. Corp. in 1999
- **\$5,688,584.12** from S. Corp. in 2000
- **\$4,397,504.54** from S. Corp. in 2001

Total: **\$13,571,441.36** improperly attributed to Yusuf
(FY010148)

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

JAN 04 2005

UNITED STATES OF AMERICA, and
GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
dba Plaza Extra,
Defendants.

CRIMINAL NO. 2003-147

DRAFT SUMMARY SCHEDULES

FY 009991

CORRECTED TAXABLE INCOME AND TAX
FATHI YUSUF
1996 - 2001

Item	1996	1997	1998	1999	2000	2001
Corrected Taxable Income	\$ 2,939,822.40	\$ 301,230.42	\$ 2,231,582.09	\$ 5,413,214.70	\$ 7,286,897.12	\$ 7,756,376.54
Corrected Tax	1,139,169.67	93,597.95	857,310.31	2,116,794.32	2,858,279.16	3,004,786.13
Less:						
Tax Per Income Tax Return	1,729.00	4,556.00	969.00	725,185.00	605,600.00	1,285,362.00
Tax Per Self Employment Return	3,087.00	5,067.00	1,723.00			600.00
Tax Credit						
Additional Tax Due & Owing	\$ 1,134,353.67	\$ 93,974.95	\$ 854,619.31	\$ 1,391,609.12	\$ 2,252,679.16	\$ 1,718,824.13

15/11/01

COMPUTATION OF CORRECTED TAXABLE INCOME
 FOR FATHI YUSUF
 1999 - 2001

Item	1999	2000	2001
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Total Income per Return	\$ 4,935,460.00	1,607,800.00	3,402,579.00
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Add: Unreported Income From S. Corporation	3,485,352.70	5,608,584.12	4,397,504.54
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Less: Itemized/Standard Deduction	8,598.00	\$,487.00	43,797.00
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Corrected Taxable Income	\$ 5,413,214.70	\$ 7,286,897.12	7,756,376.54
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DRAFT

COMPUTATION OF ADDITIONAL TAXABLE INCOME
 FATHI YUSUF
 1996-1998

Particulars	Year 1996	Year 1997	Year 1998	Description of Evidence
Gross Bank Deposits	\$2,837,000.00	\$6,000.00	\$3,740,407.26	Summary of Gross Bank Deposits
Add:				
Cash Expenditures	\$225,000.00	\$309,225.00	\$70,750.00	Summary of Cash Expenditures
Increase to Cash on Hand	\$0.00	\$0.00	\$0.00	
Subtract:				
Checks Written to Cash	\$110,477.60	\$7,094.59	\$156,630.00	Summary of Checks Written to Cash
Non-Taxable Deposits	\$0.00	\$0.00	\$750,000.00	Summary of Non-Taxable Deposits
Transfers Between Accounts	\$0.00	\$0.00	\$665,925.17	Summary of Transfers Between Accounts
Accounting Errors in Favor of T/P	\$0.00	\$0.00	\$0.00	
Decreases to Cash on Hand	\$5,000.00	\$0.00	\$0.00	BNS Bank Records
Gross Income	\$2,946,522.40	\$308,130.42	\$2,238,692.09	
Adjusted Gross Income	\$2,946,522.40	\$308,130.42	\$2,238,692.09	
Less:				
Personal Deductions	\$6,700.00	\$5,900.00	\$7,100.00	1996-1998 Tax Returns
Corrected Taxable Income	\$2,939,822.40	\$301,230.42	\$2,231,592.09	
Less:				
Reported Taxable Income	\$11,503.00	\$30,376.00	\$6,480.00	1996-1998 Tax Returns
Additional Taxable Income	\$2,928,319.40	\$270,854.42	\$2,225,102.09	
Total Additional Taxable Income 96-98			\$5,424,275.91	

DRAFT

FATHI YUSUF - Summary of Gross Bank Deposits				
Particulars	Year 1996	Year 1997	Year 1998	Description of Evidence
Banque Francaise Commerciale Acct. 7790	\$425,000.00	\$0.00	\$1,560,760.27	Deposit Analysis of Banque Francaise Commerciale Account 40-60-63887-90
Banque Francaise Commerciale Acct. 8790	\$2,400,000.00	\$0.00	\$823,344.11	Deposit Analysis of Banque Francaise Commerciale Account 40-60-63887-90
Cairo Amman Bank Acct. 2349	\$0.00	\$0.00	\$665,925.17	Deposit Analysis of Cairo Amman Bank Account 02-503-172349
Cairo Amman Bank Acct. 2349	\$0.00	\$0.00	667,457.71	Deposit Analysis of Cairo Amman Bank Account 02-528-172349
Bank of Nova Scotia Acct. 5610	\$12,000.00	\$6,000.00	\$23,000.00	Deposit Analysis of Bank of Nova Scotia Account 058-00365610
Total Deposits To Accounts	\$2,837,000.00	\$6,000.00	\$3,740,487.25	

DR. AT

DEPOSIT ANALYSIS

HAMDAN DIAMOND CORPORATION
Banque Francaise Commerciale
Acct # 8790

DEPOSIT DATE	GROSS DEPOSIT	CASH WITH	NET DEPOSIT	ITEM SOURCE	AMOUNT	CURRENCY	CHECKS	TRANSFER	INTEREST	UNIDENTIFIED
6/26/96	10,000.00		10,000.00	Currency	10,000.00	10,000.00				
7/22/96	50,000.00		50,000.00	Currency	50,000.00	50,000.00				
7/23/96	50,000.00		50,000.00	Currency	50,000.00	50,000.00				
7/24/96	50,000.00		50,000.00	Currency	50,000.00	50,000.00				
7/28/96	50,000.00		50,000.00	Currency	50,000.00	50,000.00				
7/30/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
7/31/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/1/96	250,000.00		250,000.00	Currency	250,000.00	250,000.00				
8/2/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/5/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/6/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/7/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/8/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/9/96	200,000.00		200,000.00	Currency	200,000.00	200,000.00				
8/14/96	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
8/19/96	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
8/21/96	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
10/11/96	40,000.00		40,000.00	Currency	40,000.00	40,000.00				
			2,400,000.00		2,400,000.00	2,400,000.00	0.00	0.00	0.00	0.00
3/20/98	60,000.00		60,000.00	Currency	60,000.00	60,000.00				
4/23/98	21,000.00		21,000.00	Currency	21,000.00	21,000.00				
4/27/98	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
4/29/98	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
5/4/98	80,000.00		80,000.00	Currency	80,000.00	80,000.00				
5/6/98	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
5/7/98	100,000.00		100,000.00	Currency	100,000.00	100,000.00				
5/11/98	60,000.00		60,000.00	Currency	60,000.00	60,000.00				
11/18/98	200,000.00		200,000.00	Banque Francaise Commerciale	200,000.00	200,000.00			2,344.11	
11/18/98	2,344.11		2,344.11	Banque Francaise Commerciale	2,344.11	2,344.11				
			823,344.11		823,344.11	823,344.11	0.00	0.00	2,344.11	0.00
1/11/00	50,000.00		50,000.00	Currency	50,000.00	50,000.00				
1/11/00	70,000.00		70,000.00	Currency	70,000.00	70,000.00				
1/13/00	80,000.00		80,000.00	Currency	80,000.00	80,000.00				
1/14/00	75,000.00		75,000.00	Currency	75,000.00	75,000.00				
1/17/00	90,000.00		90,000.00	Currency	90,000.00	90,000.00				
1/18/00	65,000.00		65,000.00	Currency	65,000.00	65,000.00				
1/20/00	45,000.00		45,000.00	Currency	45,000.00	45,000.00				
4/11/00	723,000.00		723,000.00	Banque Francaise Commerciale	723,000.00	723,000.00				
4/11/00	9,745.00		9,745.00	Banque Francaise Commerciale	9,745.00	9,745.00				
7/11/00	732,745.00		732,745.00	Banque Francaise Commerciale	732,745.00	732,745.00				
									9,745.00	
									723,000.00	
									732,745.00	

EXHIBIT B



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CY-99

Table 35B

(October 2001 to 2012)

Funds withdrawn from partnership through checks.

Family Member: Fathi Yusuf

Type of Account	Account Number	Account Owner	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
Telechecks	[REDACTED]	United Corporation DBA Plaza Extra	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 750,000.00	\$ 2,784,706.25	\$ 3,534,706.25
Checking Account	[REDACTED]	United Corporation DBA Plaza Extra	70,000.00	516,320.00	113,147.00	224,908.40	-	-	-	-	-	-	-	-	924,375.40
Checking Account	[REDACTED]	United Corporation DBA Plaza Extra	-	150,080.00	-	-	-	-	-	-	-	-	-	-	150,080.00
Unknown	[REDACTED]	United Corporation / Plaza Extra	-	-	-	-	-	-	-	-	-	-	750,000.00	-	750,000.00
Total Checks accounted for			\$ 70,000.00	\$ 666,400.00	\$ 113,147.00	\$ 224,908.40	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 1,500,000.00	\$ 2,784,706.25	\$ 5,359,161.65



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CV-99

(October 2001 to 2012)

Account Owner: United Corporation DBA Plaza Extra
 Supermarket Location: Sion Farm, St. Croix
 Financial Institution: Scotiabank
 Type of Account: Telechecks
 Account Number: [REDACTED]

Year	Statement Date	Transaction Date	Check #	Amount	Adjustment	Adjusted Amount	Pay to the order of	Tickmarks/ Note
2011	N/A	7/7/2011	1149	\$ 750,000.00	\$ (375,000.00)	\$ 375,000.00	Fathi Yusuf	1
2011	N/A	7/7/2011		750,000.00	(375,000.00)	375,000.00	Fathi Yusuf	2
Total Year 2011				1,500,000.00	(750,000.00)	750,000.00		
2012	N/A	8/15/2012	1154	2,784,706.25		2,784,706.25	United Corporation	3
Total Year 2012				2,784,706.25	-	2,784,706.25		
Total				\$ 4,284,706.25	\$ (750,000.00)	\$ 3,534,706.25		

Notes:

- 1 We observed an affidavit signed by Mr. Fathi Yusuf referencing a gift to Mr. Mufeed Hamed for \$750,000. Ms. Fawzia Yusuf signed a similar affidavit for the same amount. A total of \$1,500,000 where withdrawn from Plaza Extra accounts through checks #1149 and #1104 (\$750,000 each) using the Plaza Extra St. Croix accounts [REDACTED] and [REDACTED]. Since Mr. Mufeed's wife was Ms. Amal Yusuf, this amount is considered a Partnership distribution from both families.
- 2 We observed an affidavit signed by Mr. Fathi Yusuf referencing a gift to Mr. Hisham Hamed for \$750,000. Ms. Fawzia Yusuf signed a similar affidavit for the same amount. A total of \$1,500,000 was deposited in Mr. Hisham Hamed personal account # [REDACTED] on 8/24/2011, amount was observed in bank statement. Since Hisham's wife was Ms. Hoda Yusuf we considered this amount as a Partnership distribution from both families.
- 3 Check #1154 was paid to the order of United Corporation from Plaza Extra account # [REDACTED] for \$2,784,706.25 dated 8/15/2012 and signed by Fathi Yusuf and Maher Yusuf.



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CV-99

(October 2001 to 2012)

Account Owner: United Corporation DBA Plaza Extra
 Supermarket Location: Tutu Park, St. Thomas
 Financial Institution: Scotiabank
 Type of Account: Checking Account
 Account Number: [REDACTED]

Year	Statement Date	Transaction Date	Check #	Amount	Adjustment	Adjustments suggested by Fathi Yusuf	Adjusted Amount	Pay to the order of	Tickmarks/ Note
2001	10/31/2001	10/2/2001	10934	\$ 50,000.00			\$ 50,000.00	Fathi Yusuf	A, 1
2001	11/30/2001	11/9/2001	11114	20,000.00			20,000.00	Fathi Yusuf	C, 2
Total Year 2001				70,000.00	-	-	70,000.00		
2002	N/A	4/15/2002	11866	1,306,265.00		(1,306,265.00)	-	V. I. Bureau of Internal Revenue	3
2002	N/A	4/29/2002	11939	50,000.00			50,000.00	Fathi Yusuf	4
2002	N/A	6/8/2002	12187	50,000.00			50,000.00	Fathi Yusuf	4, 5
2002	N/A	7/23/2002	12419	115,150.00		-	115,150.00	Fathi Yusuf	4, 5, 6
2002	N/A	9/15/2002	12692	20,050.00		-	20,050.00	Scotiabank	C, 4, 6
2002	N/A	10/4/2002	12813	50,000.00			50,000.00	Fathi Yusuf	C, 4
2002	N/A	10/21/2002	12944	100,055.00		-	100,055.00	Scotiabank	4, 5, 6
2002	N/A	10/24/2002	12977	100,055.00		-	100,055.00	The Bank of Nova Scotia	4, 5, 6
2002	N/A	11/20/2002	13145	6,010.00		-	6,010.00		4, 5, 6
2002	N/A	12/23/2002	13356	25,000.00			25,000.00	Scotiabank	C
Total Year 2002				1,822,585.00	-	(1,306,265.00)	516,320.00		
2003	N/A	2/20/2003	13763	50,000.00			50,000.00	Yusuf	4
2003	N/A	3/28/2003	13994	15,000.00			15,000.00	Fathi Yusuf	4
2003	N/A	7/10/2003	14537	150,000.00		(150,000.00)	-	Fathi Yusuf	5, 7
2003	N/A	7/14/2003	14560	23,114.00			23,114.00	Fathi Yusuf	C, 6
2003	N/A	9/15/2003	14922	25,000.00			25,000.00	The Bank of Nova Scotia	C
2003	N/A	12/19/2003	20041	33.00			33.00	Fathi Yusuf	4
Total Year 2003				263,147.00	-	(150,000.00)	113,147.00		
2004	N/A	5/21/2004	15765	25,000.00			25,000.00	Fathi Yusuf	4, 5
2004	N/A	6/18/2004	15819	25,000.00			25,000.00	Fathi Yusuf	4, 5
2004	N/A	7/5/2004	15857	25,000.00			25,000.00	Fathi Yusuf	C
2004	N/A	7/8/2004	15868	908.40			908.40	Fathi Yusuf	C
2004	N/A	7/19/2004	15891	14,000.00			14,000.00	Fathi Yusuf	5
2004	N/A	7/29/2004	15921	25,000.00			25,000.00	Fathi Yusuf	5
2004	N/A	8/10/2004	15943	25,000.00			25,000.00	Fathi Yusuf	5
2004	N/A	8/30/2004	15975	25,000.00			25,000.00	Fathi Yusuf	5
2004	N/A	9/20/2004	16009	25,000.00			25,000.00	Fathi Yusuf	5
2004	N/A	9/24/2004	16026	25,000.00			25,000.00	Fathi Yusuf	5
2004	N/A	10/6/2004	16039	10,000.00			10,000.00	Fathi Yusuf	5
Total Year 2004				224,908.40	-	-	224,908.40		
Total				\$ 2,380,640.40	\$ -	\$ (1,456,265.00)	\$ 924,375.40		

Tickmarks:

- A Amount was observed in bank statement.
- C Amount was observed in cancelled check.

Notes:

- 1 Check was also corroborated with General Ledger # [REDACTED] of Plaza Extra ST. Thomas Tutu Park account [REDACTED]
- 2 Check was endorsed and deposited to personal account # [REDACTED]
- 3 As per Mr. Fathi Yusuf, all tax expenses were covered by partnership's funds. He confirmed that these checks were made to V. I. Bureau of Internal Revenue; amount was adjusted in order to eliminate them from his analysis. Also attached, Form 4868 Application for Automatic Extension of Time To File U.S. Individual Income Tax Return 2001.
- 4 Check was also corroborated with General Ledger # [REDACTED] of Plaza Extra ST. Thomas Tutu Park account [REDACTED]
- 5 Amount was observed in a copy of check.
- 6 Mr. Yusuf disputes all checks with the memo note "Turkey." He argues that all these payments represent advancements or reimbursements for purchases he made in Turkey to acquire inventory for Plaza Extra.
- 7 As per Mr. Fathi Yusuf both family members were responsible for depositing Plaza Extra funds into the [REDACTED] United Merrill Lynch account, amount was adjusted.



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CV-99

(October 2001 to 2012)

Account Owner: United Corporation D/B/A Plaza Extra
 Supermarket Location: Plaza Extra East, St Croix
 Financial Institution: Scotiabank
 Type of Account: Checking
 Account Number: [REDACTED]

Year	Statement Date	Transaction Date	Check #	Amount	Adjustment	Adjustments suggested by Fathi Yusuf	Adjusted Amount	Pay to the order of	Tickmarks/Notes
2002	9/30/2002	9/23/2002	19115 ✓	\$ 150,080.00	-	\$ -	150,080.00	Fathi Yusuf	C, 1
Total				\$ 150,080.00	\$ -	\$ -	150,080.00		

Tickmarks:

C Amount was observed in cancelled check.

Notes:

1 Mr. Yusuf disputes all checks with the memo note "Turkey." He argues that all these payments represent advancements or reimbursements for purchases he made in Turkey to acquire inventory for Plaza Extra.



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CV-99

(October 2001 to 2012)

Account Owner: United Corporation / Plaza Extra
 Supermarket Location: Christiansted
 Financial Institution: Scotiabank
 Type of Account: Unknown
 Account Number: [REDACTED]

Year	Statement Date	Transaction Date	Check #	Amount	Adjustment	Adjusted Amount	Pay to the order of	Tickmarks/ Notes
2011	N/A	7/7/2011	1104	\$ 750,000.00	\$ (375,000.00)	\$ 375,000.00	Fawzia Yusuf	1
2011	N/A	7/7/2011		750,000.00	(375,000.00)	375,000.00	Fawzia Yusuf	2
Total Year 2011				1,500,000.00	(750,000.00)	750,000.00		
Total				\$ 1,500,000.00	\$ (750,000.00)	\$ 750,000.00		

Notes:

- 1 We observed an affidavit signed by Mr. Fathi Yusuf referencing a gift to Mr. Mufeed Hamed for \$750,000. Ms. Fawzia Yusuf signed a similar affidavit for the same amount. A total of \$1,500,000 where withdrawn from Plaza Extra accounts through checks #1149 and #1104 (\$750,000 each) using the Plaza Extra St. Croix accounts # [REDACTED] and [REDACTED]. Since Mr. Mufeed's wife was Ms. Amal Yusuf, this amount is considered a Partnership distribution from both families.
- 2 We observed an affidavit signed by Mr. Fathi Yusuf referencing a gift to Mr. Hisham Hamed for \$750,000. Ms. Fawzia Yusuf signed a similar affidavit for the same amount. A total of \$1,500,000 was deposited in Mr. Hisham Hamed personal account # [REDACTED] on 8/24/2011, amount was observed in bank statement. Since Hisham's wife was Ms. Hoda Yusuf we considered this amount as a Partnership distribution from both families.



Dudley, Topper and Feuerzeig, LLP
 Mohammad Hamed v. Fathi Yusuf and United Corporation
 Civil No. SX-12-CV-99 (October 2001 to December 2012)

Table 42-B

Account Owner: United Corporation DBA Plaza Extra
 Supermarket Location: Tutu Park, St. Thomas
 Financial Institution: Scotiabank
 Type of Account: Checking Account
 Account Number: [REDACTED]

Year	Statement Date	Transaction Date	Check #	Amount	Adjustment	Adjusted Amount	Pay to the order of	Tickmarks/ Notes
2001	11/30/2001	11/18/2001	11110	\$ 3,482.98	-	\$ 3,482.98	Nejeh Yusuf	1
Total Year 2001				\$ 3,482.98		\$ 3,482.98		
2003	4/1/2003	4/30/2003	14186	25,000.00		25,000.00	Najeh Fathi Yusuf	1
2003	5/1/2003	5/12/2003	14244	25,000.00		25,000.00	Najeh Fathi Yusuf	1
2003	6/1/2003	6/4/2003	14362	2,978.74		2,978.74	Najeh Fathi Yusuf	1
2003	6/1/2003	6/17/2003	14405	25,000.00		25,000.00	Najeh Fathi Yusuf	1
2003	7/31/2003	7/9/2003	14509 ✓	25,000.00		25,000.00	Nejeh Yusuf	C, 2
2003	7/31/2003	7/14/2003	14564 ✓	25,000.00		25,000.00	Nejeh Yusuf	C, 2
2003	7/31/2003	8/1/2003	14643 ✓	25,000.00		25,000.00	Nejeh Yusuf	C, 2
2003	8/31/2003	8/20/2003	14787 ✓	25,000.00		25,000.00	Nejeh Yusuf	C, 2
2003	9/30/2003	9/10/2003	14889 ✓	25,000.00		25,000.00	Nejeh Yusuf	C, 2
2003	9/1/2003	9/30/2003	15036	5,983.99		5,983.99	Najeh Fathi Yusuf	1
2003	11/1/2003	11/18/2003	15307	2,064.45		2,064.45	Najeh Fathi Yusuf	1
2003	12/1/2003	12/19/2003	15475	6,811.16		6,811.16	Najeh Fathi Yusuf	1
Total Year 2003				\$ 217,838.34		\$ 217,838.34		
2004	1/30/2004	1/1/2004	15542	4,677.47		4,677.47	Najeh Fathi Yusuf	1
2004	1/30/2004	1/28/2004	15597	4,550.98		4,550.98	Najeh Fathi Yusuf	1
2004	2/29/2004	2/19/2004	15626 ✓	12,213.45		12,213.45	Nejeh Yusuf	1, 3
2004	10/31/2004	10/21/2004	16062 ✓	25,000.00		25,000.00	Nejeh Yusuf	3
2004	11/30/2004	11/3/2004	16084 ✓	25,000.00		25,000.00	Nejeh Yusuf	3
2004	3/1/2004	3/10/2004	15659	15,407.56		15,407.56	Najeh Fathi Yusuf	1
2004	3/1/2004	3/30/2004	15688	1,095.35		1,095.35	Najeh Fathi Yusuf	1
2004	4/1/2004	4/21/2004	15722	3,248.24		3,248.24	Najeh Fathi Yusuf	1
2004	6/1/2004	6/10/2004	15810	23,305.54		23,305.54	Najeh Fathi Yusuf	1
2004	6/1/2004	6/10/2004	15812	8,594.25		8,594.25	Najeh Fathi Yusuf	1
Total Year 2004				\$ 123,092.84		\$ 123,092.84		
Total				\$ 344,414.16		\$ 344,414.16		

Tickmarks:

C Amount was observed in cancelled check.

Notes:

- 1 Amount was observed in General Ledger [REDACTED] for account # [REDACTED]
- 2 Check was deposited on account # [REDACTED]
- 3 Amount was observed in a copy of a check.

EXHIBIT C

Consulting Services

CS Section

STATEMENT ON STANDARDS FOR CONSULTING SERVICES

Statements on Standards for Consulting Services are issued by the AICPA Management Consulting Services Executive Committee, the senior technical committee of the Institute designated to issue pronouncements in connection with consulting services. Council has designated the AICPA Management Consulting Services Executive Committee as a body to establish professional standards under the "Compliance with Standards Rule" (ET sec. 1.310.001) of the Institute's Code of Professional Conduct (code). Members should be prepared to justify departures from this statement.

CS Section 100

Consulting Services: Definitions and Standards

Source: Statement on Standards for Consulting Services No. 1

Effective for engagements accepted on or after January 1, 1992, unless otherwise indicated.

Introduction

.01

Consulting services that CPAs provided to their clients have evolved from advice on accounting-related matters to a wide range of services involving diverse technical disciplines, industry knowledge, and consulting skills. Most practitioners, including those who provide audit and tax services, also provide business and management consulting services to their clients.

.02

Consulting services differ fundamentally from the CPA's function of attesting to the assertions of other parties. In an attest service, the practitioner expresses a conclusion about the reliability of a written assertion that is the responsibility of another party, the asserter. In a consulting service, the practitioner develops the findings, conclusions, and recommendations presented. The nature and scope of work is determined solely by the agreement between the practitioner and the client. Generally, the work is performed only for the use and benefit of the client.

.03

Historically, CPA consulting services have been commonly referred to as management consulting services, management advisory services, business advisory services, or management services. A series of Statements on Standards for Management Advisory Services (SSMASs) previously issued by the AICPA contained guidance on certain types of consulting services provided by members. This Statement on Standards for Consulting Services (SSCS) supersedes the SSMASs and provides standards of practice for a broader range of professional services, as described in paragraph .05.

.04

This SSCS and any subsequent SSCSs apply to any AICPA member holding out as a CPA while providing consulting services as defined herein.

Definitions

.05

Terms established for the purpose of SSCSs are as follows:

Consulting services practitioner. Any AICPA member holding out as a CPA while engaged in the performance of a Consulting Service for a client, or any other individual who is carrying out a Consulting Service for a client on behalf of any Institute member or member's firm holding out as a CPA.

Consulting process. The analytical approach and process applied in a Consulting Service. It typically involves some combination of activities relating to determination of client objective, fact-finding, definition of the problems or opportunities, evaluation of alternatives, formulation of proposed action, communication of results, implementation, and follow-up.

Consulting services. Professional services that employ the practitioner's technical skills, education, observations, experiences, and knowledge of the consulting process. ^{fn.1}
Consulting services may include one or more of the following:

- a. *Consultations*, in which the practitioner's function is to provide counsel in a short time frame, based mostly, if not entirely, on existing personal knowledge about the client, the circumstances, the technical matters involved, client representations, and the mutual intent of the parties. Examples of consultations are reviewing and commenting on a client-prepared business plan and suggesting computer software for further client investigation.
- b. *Advisory services*, in which the practitioner's function is to develop findings, conclusions, and recommendations for client consideration and decision making. Examples of advisory services are an operational review and improvement study, analysis of an accounting system, assistance with strategic planning, and definition of requirements for an information system.
- c. *Implementation services*, in which the practitioner's function is to put an action plan into effect. Client personnel and resources may be pooled with the practitioner's to

accomplish the implementation objectives. The practitioner is responsible to the client for the conduct and management of engagement activities. Examples of implementation services are providing computer system installation and support, executing steps to improve productivity, and assisting with the merger of organizations.

- d. *Transaction services*, in which the practitioner's function is to provide services related to a specific client transaction, generally with a third party. Examples of transaction services are insolvency services, valuation services, preparation of information for obtaining financing, analysis of a potential merger or acquisition, and litigation services.
- e. *Staff and other support services*, in which the practitioner's function is to provide appropriate staff and possibly other support to perform tasks specified by the client. The staff provided will be directed by the client as circumstances require. Examples of staff and other support services are data processing facilities management, computer programming, bankruptcy trusteeship, and controllership activities.
- f. *Product services*, in which the practitioner's function is to provide the client with a product and associated professional services in support of the installation, use, or maintenance of the product. Examples of product services are the sale and delivery of packaged training programs, the sale and implementation of computer software, and the sale and installation of systems development methodologies.

Standards for Consulting Services

.06

The general standards of the profession are contained in the "General Standards Rule" of the code (ET sec. 1.300.001 and 2.300.001) and apply to all services performed by members. They are as follows:

- *Professional competence*. Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.
- *Due professional care*. Exercise due professional care in the performance of professional services.
- *Planning and supervision*. Adequately plan and supervise the performance of professional services.
- *Sufficient relevant data*. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

.07

The following additional general standards for all consulting services are promulgated to address the distinctive nature of consulting services in which the understanding with the client may establish

valid limitations on the practitioner's performance of services. These standards are established under the "Compliance with Standards Rule" of the code (ET sec. 1.310.001 and 2.310.001):

- *Client interest.* Serve the client interest by seeking to accomplish the objectives established by the understanding with the client while maintaining integrity and objectivity. ^{fn 2}
- *Understanding with client.* Establish with the client a written or oral understanding about the responsibilities of the parties and the nature, scope, and limitations of services to be performed, and modify the understanding if circumstances require a significant change during the engagement.
- *Communication with client.* Inform the client of (a) conflicts of interest that may occur pursuant to the "Integrity and Objectivity Rule" of the code (ET sec. 1.100.001 and 2.100.001), ^{fn 3} (b) significant reservations concerning the scope or benefits of the engagement, and (c) significant engagement findings or events.

.08

Professional judgment must be used in applying Statements on Standards for Consulting Services in a specific instance because the oral or written understanding with the client may establish constraints within which services are to be provided. For example, the understanding with the client may limit the practitioner's effort with regard to gathering relevant data. The practitioner is not required to decline or withdraw from a consulting engagement when the agreed-upon scope of services includes such limitations.

Consulting Services for Attest Clients

.09

The performance of consulting services for an attest client does not impair independence. ^{fn 4} However, members and their firms performing attest services for a client should comply with applicable independence standards, rules and regulations issued by AICPA, the state boards of accountancy, state CPA societies, and other regulatory agencies.

Effective Date

.10

This section is effective for engagements accepted on or after January 1, 1992. Early application of the provisions of this section is permissible.

[Revised, January 2015, to reflect the revised Code of Professional Conduct.]

Footnotes (CS Section 100 — Consulting Services: Definitions and Standards):

^{fn 1} The definition of consulting services excludes the following:

- a. Services subject to other AICPA professional standards such as Statements on Auditing Standards (SASs), Statements on Standards for Attestation Engagements (SSAEs), or Statements on Standards for Accounting and Review Services (SSARs). (These excluded services may be performed in conjunction with consulting services, but only the consulting services are subject to the Statement on Standards for Consulting Services [SSCS].)
- b. Engagements specifically to perform tax return preparation, tax planning or advice, tax representation, personal financial planning or bookkeeping services, or situations involving the preparation of written reports or the provision of oral advice on the application of accounting principles to specified transactions or events, either completed or proposed, and the reporting thereof.
- c. Recommendations and comments prepared during the same engagement as a direct result of observations made while performing the excluded services.

^{fn 2} In "Integrity" (ET sec. 0.300.040), *integrity* is described as follows: "Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle."

In "Objectivity and Independence" (ET sec. 0.300.050), *objectivity* and *independence* are differentiated as follows: "Objectivity is a state of mind, a quality that lends value to a *member's* services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. *Independence* precludes relationships that may appear to *impair a member's* objectivity in rendering attestation services."

^{fn 3} The "Conflict of Interest Rule" (ET sec. 1.110.010) states, in part, the following:

A conflict of interest may occur if a *member* or the *member's firm* has a relationship with another person, entity, product, or service that, in the member's professional judgment, the client or other appropriate parties may view as impairing the *member's* objectivity...

A *member* may perform the *professional service* if he or she determines that the service can be performed with objectivity because the *threats* are not significant or can be reduced to an *acceptable level* through the application of *safeguards*...

^{fn 4} AICPA independence standards relate only to the performance of attestation services; objectivity standards apply to all services. See footnote 2.

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EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ATLANTIC RIM EQUITIES, LLC

Plaintiffs,

v.

1:04-cv-2647-WSD

**SLUTZKY, WOLFE and BAILEY,
LLP, BERNARD WOLFE, ESQ.,
and WILLIAM J. LIEBERBAUM,
ESQ.**

Defendants.

ORDER

This matter is before the Court on Plaintiff Atlantic Rim Equities, LLC's ("Plaintiff") Renewed Motion to Exclude Defendants' Expert Witnesses Under Daubert [64] and Defendants' Response to Plaintiff's Renewed Motion to Exclude Expert Witnesses Under Daubert [65].

I. BACKGROUND

Defendants seek to introduce the testimony, expert report, and trial exhibits of John Millkey, Esq. ("Millkey") and Mr. Howard Zandman, CPA, ("Zandman") in support of their defenses to Plaintiff's claims of legal malpractice, breach of contract, and breach of fiduciary duty. Millkey is Defendants' putative expert on

the standard of care. (Proposed Consolidated Pretrial Order of January 23, 2006 at 45, Attachment F-2.) In his September 9, 2005, report (the “Millkey Report”), Millkey states his opinions regarding (i) the general professionalism of Defendants, (ii) his impression of the exclusivity of the Atlantic Rim Operating Agreement (“Operating Agreement”), and (iii) the typical behavior of members of commercial real estate limited liability corporations (“LLCs”). Millkey concludes that Defendants operate with a high degree of professionalism in general, that the Operating Agreement did not give notice of an exclusive relationship that would prevent Sal Biondo (“Biondo”) from engaging in commercial real-estate transactions other than for Plaintiff’s benefit, and that it is not unusual for an individual to be involved in multiple commercial real estate LLCs.

Plaintiff moves to prohibit Millkey from offering expert opinion testimony because Millkey “has formulated no opinion as to the standard of care to be exercised by attorneys nor whether the Defendants’ actions were below the standard of care.” (Pl. Br. in Support of Pl. Mot. to Exclude Testimony of Def. Witnesses Under Daubert at 2.) (“Pl. Mot. to Exclude”). Plaintiff also moves to disqualify Milkey because he “was wholly and completely unaware of the facts of this case.” (Id. at 6.) Plaintiff argues that Millkey’s Report has “no bearing on the

facts of the case because he did not and does not know the facts of the case.” (Id. at 8.) Plaintiff also objects to Millkey’s testimony because he “is a client of the Defendants and employs their firm on certain matters” (Id. at 2-3.)

Zandman is Defendants’ putative damages expert. In his September 20, 2006, report (the “Zandman Report”), Zandman opines regarding: (i) an estimate of potential damages from Plaintiff’s legal malpractice claims; (ii) alleged deficiencies or errors in the opinions of Plaintiff’s damages experts; and (iii) the financial behavior of Plaintiff as a developer.

Zandman essentially concludes that if Defendants committed legal malpractice, Plaintiff’s damages would be in the range of \$23,333 to \$90,000. Zandman also concludes that Plaintiff’s damages experts Odom and Viloski (“Plaintiff’s experts”) did not calculate properly Plaintiff’s damages, that Plaintiff had problems funding deals such that Biondo had to seek third-party help, and that the Operating Agreement did not preclude Biondo from engaging in outside business opportunities. Zandman bases these latter “opinions” entirely on Biondo’s deposition transcript.

Plaintiff's remaining¹ objections to Zandman's testimony are that "he has no particular real estate background or training." (Id. at 18); (Renewed Pl. Mot. to Exclude at 3.) In other words, Plaintiff objects that Zandman is not a properly qualified expert in a relevant field. (Renewed Pl. Mot. to Exclude at 3.) Plaintiff also objects that Zandman "sets forth opinions which are not the product of any analysis or review, are not the result of any accounting experience or knowledge and no accounting methodology was used to arrive at his opinions." (Id. at 4.) Although the briefing is unclear, this argument seems to refer to Zandman's opinions regarding Plaintiff's capabilities as a financier.

Based on its review of the parties' submissions, and the evidence of record, including Millkey and Zandman's reports and deposition testimony, the Court concludes that Millkey's testimony is not relevant and does not meet the

¹ A large portion of Plaintiff's objections in its first motion to exclude Zandman, incorporated by reference here, centered on the fact that he had filed no expert report and had no opinion as to damages or Plaintiff's experts methods. The lack of an expert report was, in part, caused by the parties decision to proceed with expert discovery in violation of the Court's previous scheduling orders. The Court's August 29, 2006 Order, granting a discovery extension for expert reports and depositions, was intended to rectify this. Zandman filed a report within the deadline set by the August 29 Order, which set forth his opinions as to damages and Plaintiff's experts, and Plaintiff deposed him. The Court therefore does not need to address Plaintiff's "no opinion, no report" contentions.

requirements set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Zandman's testimony is relevant, but must be limited to comply with the requirements of Daubert, as described below.

II. DISCUSSION

A. Relevance under Rule 402

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Expert witness testimony, like all evidence, is subject to Rule 402's relevance requirement. See Allison v. McGhan Medical Corp., 184 F.3d 1300, 1309 (11th Cir. 1999) ("The Daubert analysis does not operate in a vacuum. Any proffer of scientific evidence is also subject to other rules of evidence."). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Determinations as to the relevancy of evidence are well within the broad discretion of the district courts" United States v. Russo, 717 F.2d 545, 551 (11th Cir. 1983) (*per curiam*).

Plaintiff argues that Millkey's testimony is not relevant to any issue in this action. The Court must determine whether Millkey's testimony will tend to make

the existence of any fact that is of consequence to the action more or less probable. Defendants admitted at the Pretrial Conference that Millkey is “not someone who has an opinion on the standard of care.” (Transcript of the August 29, 2006, Pretrial Conference at 20.)

Defendants instead intend to offer Millkey for the “narrow range” of testimony that “it is not at all unusual to have one member of a limited liability company involved in several different ventures.” (Def. Response to Pl. Mot. to Exclude at 10.) Defendants admit that Millkey “has not analyzed the facts of this case to determine whether defendants were ever specifically informed that [Biondo] had an exclusive relationship with Plaintiff.” (Id.) Defendants acknowledge that Millkey’s contribution as an expert witness “would simply be that as a practitioner in the field, [Biondo’s general conduct] is not unusual.” Id. Defendants also intend to offer Millkey to testify that “the actual operating agreement as presented, would not have put him on notice, standing alone, that there was an exclusive relationship between the members.” (Id.)

This proffered testimony, as characterized by Defendant, is not relevant to any claim or defense in this case. Millkey’s opinion that “it would not be unusual to do deals with . . . entities other than plaintiff” in the abstract does not make more

or less probable any fact tending to show whether Defendants committed legal malpractice, breached their fiduciary duty, or breached their contract with Plaintiff. The issues in this case do not turn upon how real estate investors typically act in the abstract—the apparent subject of Millkey’s testimony—but rather upon Defendants’ execution of their ethical, fiduciary, and contractual duties to their client in this particular professional relationship. Millkey’s proffered opinion testimony is not probative of any fact that would tend to show that Defendants executed their duties properly, nor does it purport to offer a standard of care by which Defendants conduct can be evaluated.

Even if Millkey’s testimony were relevant, it would be so only minimally, and would be outweighed by its potential to confuse or mislead the jury. The testimony proffered consists of Millkey’s general observations regarding professional propriety. This testimony risks confusing or misleading the jury to believe that Defendants’ behavior was in this instance consistent with Millkey’s general observations. Thus the testimony, even if relevant, is excluded under Rule 403 of the Federal Rules of Evidence.

B. Admissibility under Rule 702 and Daubert

Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The Supreme Court further refined what Rule 702 requires in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and its progeny:

Expert testimony may be admitted into evidence if: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcross Chems., Inc., 158 F.3d 548, 562-63 (11th Cir. 1998) (citing Fed. R. Evid. 702 and Daubert, 509 U.S. at 589). These requirements apply

to all experts. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999). The party seeking to admit a purported expert must demonstrate each of these elements by a preponderance of the evidence. Daubert, 509 U.S. at 593.

1. *Are Defendants Experts Qualified to Testify Competently Regarding the Matters They Intend to Address?*

Rule 702 provides that a witness may be “qualified as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Determining whether a witness is qualified to testify as an expert “requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony.” Jack v. Glaxo Wellcome, Inc., 239 F. Supp. 2d 1308, 1314-16 (N.D.Ga. 2002) (stating that the court’s finding that the proposed expert was “well-trained, highly educated, and experienced,” and possessed an “extremely impressive professional track record” with respect to his specialty “does not obviate the need for a more thorough analysis of whether [the expert] is qualified and competent to testify as an expert as to the subject matter of his proposed testimony”). This determination is left primarily to the discretion of the district court. Id. at 1314 (citing Berdeaux v. Gamble Alden Life Ins. Co., 528 F.2d 987, 990 (5th Cir. 1976)).

Defendants offer Millkey to testify on the subjects of how an experienced commercial real estate attorney would understand the Operating Agreement at issue in this case, and on the generic, rather than specific, practices of members of LLCs who are involved in other ventures. Millkey's qualifications are roughly twenty years' experience as a commercial real estate practitioner, and Plaintiff does not object to Millkey's qualifications. Because Millkey has some relevant professional experience, the Court assumes, without deciding, that Millkey is qualified to testify with respect to the subjects proposed. Defendants offer Zandman to testify on three separate subjects, for which his qualifications must be independently considered: (i) his assessment of Plaintiff's damages should malpractice be proven; (ii) his criticisms of Plaintiff's expert damages reports; and (iii) his opinion that Plaintiff required third-party involvement to finance its deals.

Zandman is a licensed certified public accountant ("CPA") with experience in forensic and insurance-loss accounting. Zandman also has significant experience as a litigation damages expert. Zandman has published a number of works, including on the subjects of litigation damages and forensic accounting.

Plaintiff argues that "Mr. Zandman is not qualified to review and understand Plaintiff's expert reports. Mr. Zandman has never prepared an appraisal of a

business opportunity as was done by Plaintiff's experts and has admitted that he is not qualified to prepare such a report" (Pl. Mot. to Exclude at 24.) Plaintiff also argues that "Mr. Zandman has no real estate background and has no special training or expertise in real estate development." (Id. at 24-25.)

The Court finds that Zandman is qualified to engage in the assessment of damages he undertakes. Zandman's assessment of damages involves straight-forward accounting methods: he uses development costs and sales to estimate lost profits arithmetically. Zandman's CPA license and significant experience as a damages expert are adequate qualifications to perform this task. Plaintiff elicited an admission from Zandman that he is not qualified to perform a business development estimate of the type prepared by Plaintiff's experts. Zandman is not required to be qualified to perform the same analyses as Plaintiff's experts, so long as he is qualified to perform the damages analysis that he in fact undertakes.

Zandman is similarly qualified to testify to his criticisms of Plaintiff's experts. Zandman's testimony draws on his expertise in litigation damages to criticize the method by which Plaintiff's experts estimate damages. Zandman specifically notes that Plaintiff's experts used pro forma, or theoretical, data, rather than actual data when actual data was available. Zandman's proffered testimony in

this area essentially regards proper methodology for a damages calculation, and Zandman's general experience as a lost profits expert and as a forensic accountant qualifies him to offer it.

Zandman is also qualified to testify regarding whether Plaintiff had enough money to fund the deals into which it entered. Capitalization issues are within the core knowledge of a certified public accountant.

2. *Are Millkey and Zandman's Testimony Reliable under Daubert?*

Assuming Millkey and Zandman are qualified to testify competently regarding these subjects, Defendants also must demonstrate that the methodology by which they reach their conclusions is sufficiently reliable under Rule 702.

Rule 702 provides that expert witness testimony is reliable if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. The Supreme Court in Daubert set out a non-exclusive checklist for use in evaluating the reliability of expert testimony. These factors include:

1. Whether the expert's technique or theory can be or has been tested -- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
2. Whether the technique or theory has been subject to peer review and publication;
3. The known or potential rate of error of the technique or theory when applied;
4. The existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.

509 U.S. at 593-94. This same analysis applies where, as here, the witness's field of expertise is an experience-based field rather than one of the more traditional "hard sciences." See United States v. Frazier, 387 F.3d 1244, 1262 (11th Cir. 2004) ("The same criteria that are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony.") (citing Kumho Tire, 526 U.S. at 152).

In applying the Daubert criteria and others that may be relevant, the Court must determine if the expert unjustifiably extrapolated from an accepted premise to an unfounded opinion. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). That

is, there must not be too “great an analytical gap between the data and the opinion proffered.” Id. Where an expert witness relies solely or primarily on his experience in rendering an opinion, “the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Frazier, 387 F.3d at 1261. In short, the Court must be assured the expert is using the “same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire, 526 U.S. at 152.

The testimony of both Millkey and Zandman fail, at least in part, the test for reliability under Daubert. Millkey’s testimony consists of purely subjective conclusions that, in his opinion, the operating agreement standing alone would not have put him on notice that the relationship between Biondo and Plaintiff was exclusive and, in his opinion, it is not unusual for members of LLCs to engage in freelance competing business opportunities. Millkey’s expert “opinion” is based on his experience rather than on scientific principle. The record before the Court fails to demonstrate how Millkey’s experience leads to the conclusions he reached, why his experience is a sufficient basis for his opinions, and how his experience is reliably applied to the facts. Millkey’s two-page report is a series of conclusions

that lack the foundational and explanatory elements demanded by Frazier.

Zandman's testimony also fails, in part, to meet the Daubert standard. Zandman's report concludes that Plaintiff's damages range from \$23,333 to \$90,000, and explains that this figure was derived by adding certain amounts paid to Biondo in transactions where Plaintiff was likely to be involved. (Zandman Report at 15-16.) Defendants admit that Zandman derives these figures by "analyzing the documentation and deposition testimony of . . . [Biondo]." (Def. Resp. to Pl. Renewed Mot. to Exclude at 3.) Zandman discounts entirely one of the transactions at issue (the "Liberty deal") because "it does not appear likely that [Plaintiff] would have been involved . . . in the deal." (Id. at 16.) Zandman offers no basis in his report or deposition for Plaintiff or the Court to assess why he excluded the Liberty deal. See Frazier, 387 F.3d at 1261 ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'") (quoting Fed. R. Evid. 702 Advisory Committee's Note on 2000 Amends.); Joiner, 522 U.S. at 146 (stating that "court[s] may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). The Court does not find Zandman's methodology for determining damages in the deals he includes inadequate; the Court takes issue with the lack of foundation in his selection of


which deals to include. Zandman may therefore testify as to his estimation of damages provided that he completes an estimation of damages that includes damages for the Liberty deal that he discounted summarily in his report. If Zandman fails to include damages for the Liberty deal, he may not offer the damages testimony contemplated.

Zandman's opinions regarding Plaintiff's ability to fund its own deals and regarding Biondo's responsibilities under the Operating Agreement are unfounded and impermissible. Zandman merely restates Biondo's deposition testimony, and does not offer any properly applied scientific principle or experiential expertise.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Renewed Motion to Exclude [64] is **GRANTED IN PART** and **DENIED IN PART**. The Motion is **GRANTED** with respect to Defendants' expert Millkey. The Motion is **GRANTED IN PART** with respect to Defendants' expert Zandman. Zandman may testify only as to (i) his criticism of the methodology of Plaintiff's damages experts; and (ii) his estimation of damages, provided that he completes an estimation that includes damages for the Liberty deal.

SO ORDERED, this 21st day of November, 2006



WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE