IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

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

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION TO STRIKE VALUATION REPORT OF PLAZA EXTRA-WEST

INTRODUCTION

Plaintiff has moved to strike the expert report of the Defendants' business valuation expert, Integra Realty Resources (the "Integra Report"), pursuant to Federal Rules of Evidence 702, 401 and 401. Plaintiff's motion is ill-conceived as a threshold matter because it seeks to

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

upset the provisions of the Wind Up Plan adopted by this Court by having this Court to rule on issues that have been given to the Master to resolve in the first instance by report and recommendation. Assuming *arguendo* that this Court, rather than the Master, wishes to alter the Wind Up Plan and decide issues within the Master's province, the Motion should be denied. Hamed has offered no attack on the expert qualifications of Integra Realty Resources to render opinions on the value of businesses generally and the value of the Plaza Extra-West supermarket business. Instead, he takes issue with an assumption in the Report that, if the business had been sold by the partners in 2014, whoever purchased it would have had to pay a fair market rent to Plessen Enterprises, Inc., the owner of the property that the store occupies. His challenge to this reasonable assumption is illogical in the extreme. But in any event it is a challenge that goes to the weight to be given to the Report, not its admissibility.

ARGUMENT

A. Hamed's Request that the Court, Rather than the Master, Decide Whether it May be Considered Contravenes the Streamlined Procedures for Resolving Claims Established in the Wind Up Plan.

A fundamental flaw with Hamed's ill-conceived Motion to Strike is the fact that the Integra valuation report (the "Integra Report") it seeks to "strike" was never filed with the Court by Yusuf - nor was it supposed to be.[1] Rather, consistent with the Master's specific instructions and with the procedures established in the Wind Up Plan (the "Plan"), any reports offered in support of Yusuf's Claims would be presented to the Master and counsel only, so as to keep the

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[1] Moreover, as this Court noted in its recent opinion in *Schrader v. Juan F. Luis Hospital*, SX-12-CV-066, generally speaking, in deciding a *Daubert* motion in advance of trial, the admissibility of the expert's opinions contained in the report is considered, while the question of admissibility of the physical report at trial is deferred until trial. Hamed's motion to strike the Integra Report is, therefore, premature. Nonetheless, Yusuf responds to Hamed's motion as if it were seeking to exclude from evidence both the written Report and the opinions of James Andrews set forth in the Report.

financial and other proprietary information confidential. Since there was nothing in the record to strike, the motion is without merit for that threshold reason.[2]

Moreover, Hamed provides no authority whatsoever for his conclusion that this Court, rather than the Master, must address this Motion to Strike in the first instance. Since these exhibits were submitted in support of Fathi Yusuf's ("Yusuf") 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. Hamed seeks to overturn this clearly established procedure by asking the Court to tell the Master in advance which materials he may or may not rely on in determining whether a claim is valid. If the Court accepts this significant change to a process established many months ago, with significant input from the parties, this will only complicate and extend the task given to the Master to make a report and recommendation regarding claims. Moreover, until the Master's report and recommendation is issued, the Court and the parties will not know which claims the Master will recommend payment of, in full or in part, and which supporting material he may or may not rely on in making that recommendation.

B. Hamed's Criticism of the Integra Report Makes No Sense.

As this Court knows, the business of the Plaza Extra-West store was owned by a partnership in which Hamed and Yusuf each had a 50% interest, and the land on which the business operated was (and still is) owned by a corporation owned equally by members of the Hamed and Yusuf families. The Integra Report determines, by methods consistent with the

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[2] In light of the Master's directive, Hamed's Motion should have been filed under seal, because it quotes from and attaches the Integra valuation report, and discusses the dollar amount of the particular Yusuf claim supported by the report. Yusuf respectfully asks that the Court direct Hamed to withdraw his Motion to Strike and re-submit it under seal.

USPAP,[3] what the value of the Plaza Extra-West business was if it had been offered for sale. The Report used the income capitalization approach as one of the ways to determine value. Under that method, the annual earnings generated by the business are multiplied by a capitalization rate to determine value. To determine those earnings, Integra Realty Resources made the eminently reasonable assumption that whoever operated the store would have to pay rent to Plessen (i.e., they would not get to occupy the premises free of charge), thereby reducing the store's annual income. Integra's calculation of fair market rent is set forth in another report contemporaneously provided to the Master that Hamed is not challenging.

Plaintiff argues that by assuming a buyer of the Plaza Extra-West business would have to pay rent to occupy the premises, the Integra Report suffers from a "fatal flaw" necessitating its exclusion from evidence. This is so, according to Plaintiff's tortured argument, because "there never was a lease for the Plaza West store." (Plaintiff's Brief at 2). Since Hamed and Yusuf were in effect both lessor and operator of the business, they did not bother to cause the store they owned jointly as partners to pay rent to the landlord that they owned jointly in corporate form. But this fact hardly means that, if the partnership had sold Plaza Extra-West to a third party, Plessen would have given the new owner(s) of Plaza Extra-West free use of the real estate on which the store operated. Indeed, it would have been wholly irrational from an economic perspective if Hamed and Yusuf had elected not to collect rent.

Significantly, Plaintiff then makes the absurd claim that because Hamed and Yusuf did not bother to have the business pay rent to the corporation they owned, "the Plaza West store has no 'ongoing value' . . .." (Plaintiff's Brief at 3). What Plaintiff is saying, in other words, is that a supermarket business that generated millions annually had zero value. If this nonsensical

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

[3] Uniform Standards of Professional Appraisal Practice.

conclusion is what follows from Plaintiff's critique of the Integra Report, then that only proves beyond a shadow of a doubt that the critique merits no consideration by this Court.

C. Recasting Plaintiff's Nonsensical Critique as a *Daubert* Issue Does Not Make it any More Tenable.

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:

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

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.

Plaintiff does not and cannot attack the qualifications of Integra Realty Resources to arrive at a business valuation of Plaza Extra-West. Instead, he argues in conclusory fashion that the Integra Report is "unreliable" because it is not based on "sufficient facts or data." (Plaintiff's Brief at 3). 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)).

Plaintiff argues that the fact that rent was not collected by Plessen means that the store has to be valued on the assumption that whoever bought it would be able to occupy the premises free of charge, and that by making the opposite assumption the Integra Report has been rendered unreliable. Plaintiff is turning reliability upside down here. If the Integra Report had made the absurd assumption that a buyer of the business of Plaza Extra-West would obtain the premises rent-free, thereby increasing the store's income and the value of the business under an income capitalization approach, the Report would have exposed itself to justifiable criticism that it was inflating the value of Plaza Extra-West by means of a nonsensical assumption.

Plaintiff also argues that the Integra Report fails to meet the "fit" requirement because it does not adopt his strange and arbitrary assumption of rent-free use by any buyer of the business. Fitness, as Plaintiff notes, goes primarily to relevance. (Plaintiff's Brief at 3). But Plaintiff does

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

not argue that the dollar amount arrived at for the value of the Plaza Extra-West in the Integra Report is irrelevant to the claim of Yusuf for which it is offered in support. The conclusory claim that the Integra Report does not meet the fitness requirement thus merits no consideration by this Court.

Finally, Plaintiff makes the conclusory claim that admission of the Integra Report should be excluded under FRE 401 and 403. Once again, he invokes the strange notion that the business valuation must assume that Plessen would rationally permit any third party buyer of the Plaza Extra-West business to occupy its land rent-free. Even if Plaintiff's strange and wholly artificial critique of the Integra Report had any merit, and it does not, at most it would go to the weight to be assigned to the testimony, not its admissibility.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Plaintiff's Motion to Strike Valuation Report of Plaza Extra-West should be denied.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: October 21, 2016 By: 

Gregory H. Hodges (V.I. Bar No. 174)
Stefan B. Herpel (V.I. Bar No. 1019)
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-Mail: ghodges@dtflaw.com
E-Mail: sherpel@dtflaw.com

Attorneys for Fathi Yusuf
and United Corporation

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2016, I served the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO MOTION TO STRIKE VALUATION REPORT OF PLAZA EXTRA-WEST**, via e-mail addressed to:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

Mark W. Eckard, Esq.
Eckard, P.C.
P.O. Box 24849
Christiansted, VI 00824
Email: mark@markeckard.com

Jeffrey B.C. Moorhead, Esq.
C.R.T. Building
1132 King Street
Christiansted, VI 00820
Email: jeffreymlaw@yahoo.com

The Honorable Edgar D. Ross
Email: edgarrossjudge@hotmail.com

R:\DOCS\6254\1\PLDG\16W026402.DOCX

DUDLEY, TOPPER AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422