

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

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)
)
Plaintiff/Counterclaim Defendant,)
)
vs.)
)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

FATHI YUSUF and UNITED CORPORATION,)
)
Defendants/Counterclaimants,)
)
vs.)
)

WALEED HAMED, WAHEED HAMED,)
MUFEED HAMED, HISHAM HAMED, and)
PLESSEN ENTERPRISES, INC.,)
)
Additional Counterclaim Defendants.)

Consolidated With

WALEED HAMED, as Executor of the)
Estate of MOHAMMAD HAMED,)
)
Plaintiff,)
v.)

CIVIL NO. SX-14-CV-287

ACTION FOR DAMAGES
AND DECLARATORY RELIEF

UNITED CORPORATION,)
)
Defendant.)

WALEED HAMED, as Executor of the)
Estate of MOHAMMED HAMED,)
)
Plaintiff,)
v.)

CIVIL NO. SX-14-CV-278

ACTION FOR DEBT
AND CONVERSION

FATHI YUSUF,)
)
Defendant.)

JURY TRIAL DEMANDED

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

Pursuant to the Court's direction at the conclusion of the hearings on March 6-7, 2017 (the "Hearings"), defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United")(collectively, the "Defendants") submit this Supplemental Brief in Opposition to Plaintiff's Motion to Strike the Report of Defendants' Accounting Expert, Fernando Scherrer of BDO, Puerto Rico, P.S.C. (the "BDO Report").

I. It is Premature to Strike the BDO Report at this Stage of the Proceedings.

At the Hearings, Plaintiff argued that his Motion to Strike was an *in limine* motion¹ seeking to prohibit BDO's testimony and the introduction of BDO's conclusions at trial. First, as set forth in Yusuf's original opposition brief and during the Hearings, Plaintiff's Motion is improper as this matter is not to be resolved through a jury trial but rather is to be submitted to the Master for his report and recommendation to this Court for final determination. As this Court is well aware, the BDO Report was never filed by Defendants with this Court. Rather, in accordance with the Master's directives, it was submitted only to the Master and counsel for Plaintiff on September 30, 2016 as part of Yusuf's Accounting Claims and Proposed Distribution Plan ("Yusuf's Claims"). The BDO Report is not proper part of the record and cannot be stricken. Moreover, the BDO Report is a compilation of historical withdrawals between the Partners (an accounting) based upon the information available at the time it was prepared.

¹ Motions *in limine* are usually filed shortly before a jury trial, after discovery has been completed and the case is ready for trial. See LRCi. 7.2 ("All motions in *limine* shall be filed no later than twenty-one (21) days before the day scheduled for jury selection...").

Discovery has been stayed since October of 2014, such that the information available was limited to document production and interrogatory responses. The deposition of Plaintiff had not even been taken.² Yet, BDO acknowledged that if further information became available, it would be evaluated and their Report would be amended, if necessary. Nonetheless, Hamed challenged the BDO Report based upon new information in the form of testimony from the Hameds and others, challenging certain allocations that were unknown to BDO and not evident from the face of the documentation. Hence, the BDO Report, while comprehensive as to the information upon which it is based, is not final and will be amended, as needed, upon receipt and evaluation of new information, once discovery is complete. It is simply premature, prior to the completion of discovery, to strike the BDO Report in its current form.

A. The BDO Report was not filed with the Court, is not a proper part of the record, and cannot be stricken.

As argued in Yusuf's original opposition brief and again during the Hearings, pursuant to the "Final Wind Up Plan Of The Plaza Extra Partnership," entered on January 9, 2015 (the "Plan"),³ §9, Steps 4 and 6, and the August 31, 2016 and September 22, 2016 directives of the Master, the Parties were required to submit their accounting claims and proposed distribution plans by September 30, 2016 directly to each other and the Master. Yusuf complied by submitting Yusuf's Claims with exhibits directly to the Master and counsel for Plaintiff. He only filed a Notice of Service with this Court. The BDO Report was one exhibit to Yusuf's Claims and related to historical withdrawals between the Partners from 1994 to 2012.⁴ The BDO Report

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² Although Mohammed Hamed's deposition had been taken before he died, it was not complete. None of the other Hamed family members' depositions have been taken.

³ Unless otherwise defined, capitalized terms shall have the same meaning provided for in the Plan.

⁴ Plaintiff did not undertake to set forth an accounting of the historical withdrawals as between the Partners for purposes of a true up or equalization for a final distribution of the remaining

was not filed with the Court because it was required to be submitted to the Master. Pursuant to §9, Step 6 of the Plan, following the submissions of their proposed accounting and distribution plans to the Master, “[t]hereafter, the Master shall make a report and recommendation of distribution to the Court for its final determination.” Hence, from a procedural standpoint, the BDO Report is not a proper part of the record and cannot be stricken or prohibited from introduction at a jury trial, as the matter is to be addressed first by the Master and then ultimately by the Court.

B. The BDO Report was prepared based upon information available while discovery was stayed.

The BDO Report was prepared with the information available to BDO while a discovery stay was in place. This Court stayed all discovery at the hearing held on October 7, 2014 and directed the parties to focus their efforts on the liquidation of the Partnership Assets and development of a plan for the wind up of the Partnership. At the time of the stay, the deposition of Mohammad Hamed had not been completed and none of his four sons, Waleed Hamed, Waheed Hamed, Hisham Hamed or Mufeed Hamed, who all testified at the Hearings, had been deposed. Although extensive records were available for review, there had not been an opportunity to depose the Hameds as to particular transactions, general procedures for the removal of funds from the Partnership, their contentions as to withdrawals, their tax returns or any other relevant allocation issues or financial transactions.

BDO was engaged to prepare a comprehensive accounting or reconciliation of the historical Partner withdrawals 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

Partnership Assets. Furthermore, Plaintiff filed his claims with the Court, rather than the Master in violation of the requirements of the Plan and the Master’s directives.

for those years, from all of the information then available to them (i.e. documentary evidence including records secured by the FBI during the criminal investigation, documents produced between the parties before the stay and subpoenaed bank information received prior to the imposition of the stay). Specifically, the BDO Report explains:

The engagement was divided into two (2) areas:

1. Identification of historical withdrawals both disclosed and undisclosed from the partnership during the period where no formal partnership accounting process was in place.
2. Review the accounting of the Claims Reserve Account and the Liquidating Expenses Account, as those terms are defined in the “Final Wind Up Plan of the Plaza Extra Partnership (the “Plan”) approved by an order entered in the Case on January 9, 2015 (the “Wind Up Order”).

See BDO Report, p. 3. Further describing the scope of their undertaking, BDO explained that because Partnership withdrawals prior to January 2013 were not part of John Gaffney’s⁵ accounting:

Therefore, our work was aimed towards **identifying withdrawals** which could be considered to be Partnership distributions and to incorporate them into Gaffney’s accounting in order to provide an **Adjusted Partnership Accounting**.

This report only includes our conclusions relating to the withdrawals/distributions from the Partnership and the available amount to be allocated per Partner to equalize the historical distributions.

See BDO Report, p. 3 (emphasis added). Further, “[t]he analysis and conclusions included in this report are **based on the information made available to use as of the date of this report.**”

See BDO Report, p. 3 (emphasis added). As the identification of historical withdrawals was based upon the documentary information available prior to the imposition of the discovery stay,

⁵As the Court is aware, John Gaffney has been engaged as the accountant for the Partnership.

it is not a final report. Plaintiff's witnesses at the Hearings acknowledged that they have "done no discovery as to the BDO report at all." See Hearings Transcript; 373; 12-13, relevant pages from the March 6, 2017 testimony is attached hereto as **Exhibit A**.

C. If new information is discovered, BDO will evaluate it and amend the Report, if necessary.

BDO also explains that "[I]n the event that **any other relevant information** is provided, **we shall evaluate it and amend our report, if necessary.**" See BDO Report, p. 3 (emphasis added). As discovery continues to be stayed, there still has not been an opportunity, since the BDO Report was compiled, to discover the relevant information Plaintiff may have to the allocations, nor review any documentation or procure testimony contesting the allocations. At the Hearings, Plaintiff's witnesses raised objections, *for the first time*, to specific allocations by presenting testimony and information based upon new information to which BDO was not otherwise privy. Hence, the BDO Report is not final. BDO "shall evaluate" the new information raised by the Hameds for the first time at the Hearings, along with any additional information garnered through the discovery process and "amend our report, if necessary."

However, the fact that Plaintiff questions specific transactions and objects to the allocations on the basis of new information, does not undermine the process utilized by BDO to identify a particular transaction or its initial allocation based solely upon the documentary evidence available to them at the time of their review. The reliability requirement for an expert report 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 v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997), as amended (Dec. 12, 1997)). "The evidentiary requirement of reliability is lower than the merits standard of correctness." *Pineda*, 520 F.3d at 247 (quoting *In*

re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994) A 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). The process utilized by BDO to identify and quantify historical withdrawals based upon the documentary evidence available to them was a reliable process for collecting and analyzing such information. Consequently, the testimony set forth at the Hearings contesting various allocations and conclusions based upon new evidence does not render the BDO Report unreliable.

The authority cited by Plaintiff in his Motion to Strike actually supports the position Yusuf has taken that amendment to the BDO Report can be had so as to accommodate new information. Plaintiff originally cited 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). In the *Atlantic Rim* case, however, the CPA expert, Howard Zandman, was allowed to testify and, in fact, was allowed to supplement his report.⁶ 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.” Hence, the expert was provided an opportunity to supplement his report to include information previously disregarded. Zandman did, in fact,

⁶ 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.

testify at trial as an expert witness. *Atlantic Rim* provides no support for Plaintiff's Motion to Strike and, if anything, undercuts it, as the *Atlantic Rim* Court exercised its discretion and liberally applied the *Daubert* factors to allow the expert not only the opportunity to testify but also to revise his report to consider a matter previously disregarded.

Here, the objections and any evidence in support of those objections, which may be relevant, will be evaluated and the BDO Report will be amended, as necessary. Even after amendment, objections may still remain. If so, those objections along with any supporting evidence would need to be presented to the Master for preliminary resolution and then ultimately to the Court for final resolution. Objections alone are not a sufficient basis upon which to exclude the conclusions of BDO, rather they are fodder for cross examination if not otherwise addressed by an amended report.

II. Plaintiff's Specific Objections to Allocations in BDO Report

Without belaboring each objection, Yusuf addresses the objections in three groups: 1) objections based upon new information, not available or known to BDO at the time of the Report; 2) objections contending that documentation is insufficient to determine allocations as between the Partners; and, 3) objections contending that information available was not considered.

A. Objections Based upon New Information, Not Available or Known to BDO

Plaintiff objects to various allocations set forth in the BDO Report offering new testimony as to specific transactions. A large number of the objections were to specific transactions that reflect payments to a particular member of the Hamed family but which Plaintiff contends were part of a money laundering operation such that the funds were not made available for their personal use and, therefore, should not be allocated to the family member as a

withdrawal. Waleed Hamed offers a new explanation as to his 1993 tax return that contradicts positions he previously had taken which was not otherwise known to BDO. Finally, Plaintiff also objects to specific transactions for a variety of other reasons, offering explanations unknown to BDO at the time of the Report.

1. Monies Returned to the Partnership through the Money Laundering Operation

Plaintiff contends that Exhibits 3, 4, 5, 6, 7, 8, 9, 13, 14⁷ represent funds that were part of a money laundering operation and that the individual Hameds receiving these funds from the Plaza Extra accounts, ultimately did not receive a personal benefit from these funds, as they were either sent to foreign accounts or otherwise returned to the Partnership once laundered. Plaintiff argues that they should not be allocated as a personal withdrawal as they were recollected by the Partnership. However, as to Exhibit 14, the Draft Summary Sheets (upon which Plaintiff relies so heavily), show this check for \$95,000.00 was deposited into an account for Waleed Hamed at the Cairo Amman Bank. *See* Hearings Exhibit 10, Tab Q, p. 21. Hence, it is unclear whether these funds were, in fact, returned to the Partnership as Plaintiff now contends or simply deposited for Waleed Hamed's own use. While the fact that money laundering took place is not new information, the hearing testimony that particular transactions were part of these efforts as opposed to reflecting personal withdrawals from the Partnership is new evidence as to the ultimate distribution of these funds. From the face of the checks, the funds appear to be paid directly from Plaza Extra to the various members of the Hamed family. Hence, they were properly identified as withdrawals from Plaza Extra and allocated to the particular Hamed family member by BDO. To the extent that Plaintiff can show that, following their initial withdrawal,

⁷ Many of these exhibits were introduced for the proposition that the checks at issue should have been known to Yusuf and, therefore, are time barred. Defendant's supplemental brief regarding the statute of limitations will be filed separately.

the funds were not retained for the Hameds' personal uses and otherwise were returned to the Partnership, this information, along with additional discovery will be submitted to BDO for its evaluation and amendment of the BDO Report, if necessary.

It should be noted that Plaintiff attempts to conflate two issues: 1) the money laundering operations to evade taxes and, 2) the withdrawals as between the Partners and their families. While the purpose of a money laundering scheme is to obfuscate the movement of money as to outside authorities, as between the Partners, they have each testified that their withdrawals were to be fully transparent and evidenced in writing. Written receipts and ledgers for the removal of cash from the safes created written records from which the Partners would conduct periodic and partial reconciliations. Hamed even alleged that:

Hamed and Yusuf have also scrupulously maintained records of withdrawals from the United-held "supermarket" Partnership profit account to each of them (and their respective family members), to make certain there would always be an equal (50/50) amount of these withdrawals for each partner directly or to designated family members.

See First Amended Complaint, ¶21. Therefore, while it may be difficult to trace all of the laundered money that was hidden from the authorities to evade taxes, such an undertaking is *not* necessary for determining the Partners' historical withdrawals of funds taken directly from the Partnership.⁸ As between the Partners, Plaintiff has already acknowledged that the Partners "scrupulously maintained records of withdrawals" so as "to make certain there would always be

⁸ The laundered money was predominately used to purchase jointly held assets in Jordan and otherwise was divided equally. To the extent that there are disputes as to these foreign accounts and assets, such claims are addressed separately in Section VI of Yusuf's Claims. Hence, Schoenbach's testimony relating to difficulties with ascertaining the "amount of cash taken in" by a business engaged in money laundering misses the crucial point—recreating the total income of the Plaza Extra Stores is not required to compile a Partnership accounting as to the historical withdrawals between the Partners. Such a quantification is possible from the "scrupulously" kept records between the Partners.

an equal (50/50) amount of these withdrawals for each partner.” *See* First Amended Complaint, ¶21. BDO identified and quantified those historical withdrawals from the “scrupulously maintained records of withdrawals,” cross checked with all bank accounts, investment accounts and credit card accounts available and then reviewed the financial records to discover any previously undisclosed withdrawals as between the Partners. To the extent that certain funds were not to be counted as part of the withdrawals between the Partners because they were ultimately returned to the Partnership as part of the money laundering operations, then the Plaintiff can provide evidence to that effect, which will be considered by BDO and addressed in an amended report, if necessary.

2. Waleed Hamed’s New Contention that the 1993 Tax Returns Reflect Trades from United.

At the Hearings, Waleed Hamed and other witnesses offered testimony that the stock trades reflected in Waleed Hamed’s 1993 tax return were actually trades from one of United’s Prudential Securities accounts. This explanation is new. In fact, it contradicts Waleed Hamed’s prior sworn discovery responses as to the nature of these trades. In September of 2014, shortly before discovery was stayed, Waleed Hamed provided different information as to these trades. In response to interrogatories, Waleed Hamed stated that the trades on his returns were something that Yusuf had traded “as he was using another name, Mohammad Hamdan, to trade stocks to avoid paying taxes on the trades.” *See* Interrogatory Response 5, dated September 26, 2014, attached hereto as **Exhibit B**. Waleed Hamed provided no supporting documentation for this contention and discovery then was stayed. Nothing in this original response would have led to the specific United Prudential Securities account as a possible source of the trades identified on Waleed Hamed’s 1993 tax return. Until the testimony at the Hearings, Waleed Hamed had never contended that these trades were from United. Initial review of the information provided

reveals that the trades listed on Waleed Hamed's 1993 tax return are not an exact match with the Prudential Securities account. As to certain trades, the number of shares do not match⁹ as to as to others, the sale prices do not match and certain trades do not have matching sale dates. Further discovery will be needed to determine if, in fact, the trades set forth in the Prudential Securities account for United were improperly included in Waleed Hamed's tax returns. If so, the BDO Report would need to be amended to address new evidence. At this stage of the proceedings and with the information available to BDO including Waleed Hamed's prior discovery responses as to the nature of these trades, BDO's allocation to Waleed Hamed for trades listed on his tax returns was not improper and is not a basis upon which to strike the BDO Report.

3. Other Objections Based Upon New Information Not Available to BDO

Plaintiff made a number of objections as to specific allocations offering testimony as to particular circumstances surrounding the transaction. As to Exhibit 15, Waleed Hamed offered new testimony contesting the allocation of \$75,000 on the basis that the check does not appear to have been deposited. The BDO Report noted at Schedule 12A, p. 38, n.1 that the check did not have the date it was issued and deposited. Hence, BDO noted the possibility that the check had not been deposited and the fact that they could not tell from the information available to them. Waleed Hamed will need to show that a deposit or cashing did not occur. Hence, additional information will need to be further developed through discovery. Such information will be reviewed and evaluated and BDO will amend its report, if necessary.

⁹ By way of example, Waleed Hamed's 1993 tax returns reveals a sale of Advance Logic stock (ALLR) of 20,000 shares on October 18, 1993. The Prudential Securities statement reveals sales of 40,000 in ALLR stock on two different dates October 25 and 26, 1993. If the United trades are on Waleed Hamed's tax returns, the full sale of 40,000 trades should have been included and the dates should match. They do not.

As to Exhibits 16, 17, 18, Plaintiff offered new testimony as to the alleged procedures for reflecting when a receipt/chit constitutes a withdrawal as opposed to simply a receipt for acceptance of a payment. This information is further information on the receipt/chit process previously unavailable to BDO. Such information needs to be further developed through discovery and addressed in an amended report, if necessary.

As to Exhibit 19, Plaintiff offered new testimony that many of these deposits relating to gas station operations and were not received for the Hameds' personal use. No further documentation has been offered to show that the funds were deposited to an account other than their personal account or otherwise received by the Hameds for their personal use. Nonetheless, such information will need to be further developed through discovery. The information will be evaluated and adjustments made, if necessary.

As to Exhibit 20, Plaintiff offered new testimony that this receipt was not for the Hameds' personal use, but rather for an ex-son-in-law. No further documentation has been offered to show the purpose and use of the funds. Nonetheless, such information will need to be further developed through discovery.

As to Exhibits 30 and 31, relating to checks made payable to Waleed Hamed from Yusef Jaber, Plaintiff contends that these checks were never cashed such that he did not receive these funds and, therefore, they should not be allocated as a withdrawal to Waleed Hamed. Further discovery will be necessary to confirm whether the checks were, in fact, cashed, and, if not, if replacement funds were received. From the face of the document, it appears that these checks were made payable to Waleed Hamed in the amounts noted. BDO does indicate at Exhibit 30 (Table 11A), that they were not able to trace these checks to any bank account deposit

information. Again, should further information reflect that these sums were not received by Waleed Hamed, BDO will evaluate such information and amend its report, if necessary.

As to Exhibit 32, Waheed Hamed testified that he used the monies from this check for \$50,000.00 for the benefit of Yusuf relating to an immigration matter. This testimony provides new information, not previously known to BDO. To the extent that additional discovery reveals that these funds were used for the benefit of Yusuf and not for the personal benefit of Waheed Hamed, then BDO will consider such evidence and amend its report as to this transaction, if necessary.

As to Exhibit 33, Waheed Hamed testified that \$250,000.00 allocated to Hisham Hamed was used to purchase property jointly held by Waheed Hamed and Yusuf. While the documentation alone does not reveal this without the new testimony from Waheed Hamed, to the extent that that additional discovery reveals that these funds were used for the benefit of Yusuf and Waheed Hamed and not for the personal benefit of Hisham Hamed, then BDO will consider such evidence and amend its report as to this transaction, if necessary.

As with all of these objections, they are based upon new information not evident from the documentary evidence alone. Hence, none of these objections can serve as a basis upon which to strike the BDO Report which relied upon the documentary evidence available at the time the BDO Report was made.

B. Documentation Insufficient to Quantify Partnership Withdrawals

Throughout the Hearings and in the Motion to Strike, Plaintiff contends that the records of the Partnership are insufficient to quantify Partnership withdrawals. However, Hamed has not always maintained this position. To the contrary, in his First Amended Complaint, Hamed alleged that the Partners “scrupulously maintained records of their withdrawals” so as “to make

certain there would always be an equal (50/50) amount of these withdrawals for each partner.” See First Amended Complaint, ¶21. Testimony from Kim Japinga, who has maintained the documents for Plaintiff admitted the documents were “voluminous” and estimated that there were at least 50,000 documents in the case. See Exhibit A - Hearings Transcript; 375:6-20. Plaintiff cannot, on the one hand, contend that the Partnership records were “scrupulously” kept but, at the same time, argue that the record keeping was such that it would be impossible to recreate the historical withdrawals between the Partners. Ultimately, David Jackson conceded that if he had been asked to do a “true up” or an accounting between the Partners that he would have attempted to do one. See Exhibit A - Hearings Transcript; 261:6-13. He did not claim that it was impossible or could not be done.¹⁰

In addition to Plaintiff’s general objections as to insufficient documentary support, he also contends the documentary evidence concerning certain transaction is missing or cannot support an adjustment that was made in favor of Yusuf. Specifically, certain checks in Exhibit 54 made payable to Yusuf were adjusted on the basis that the amounts were used to pay Partnership debts to Hamdan Diamond. Plaintiff contends that BDO failed to provide any documentary support for this debt and resulting adjustment. This is incorrect. In the supporting documentation provided with the checks at issue, there are checks made payable to Hamdan Diamond in the same amounts which are support for the adjustments.¹¹ Hence, the contention that these transactions or the adjustments thereto lacked evidentiary support is without merit and cannot be a basis for striking the BDO Report.

¹⁰ Unlike Yusuf, Plaintiff did not submit a proposed accounting and did not request David Jackson to prepare one.

¹¹ The checks to Hamdan Diamond are included in the supporting documentation and are located in same folder as the checks made to Yusuf for Account 044-55312010 and are part of Exhibit 54.

C. Objections Contending that Information Available Was Not Considered

After contending that the information was insufficient to quantify historical withdrawals, Plaintiff also objected to the BDO Report on the basis that information that *was* available to BDO was not reviewed or considered. Plaintiff contends that failure to consider such information demonstrates that only select or limited information was provided to BDO and that its conclusions are unreliable. These contentions are incorrect.

1. Draft Summary Sheets

Plaintiff contends, without any basis, that the Draft Summary Sheets were not reviewed by BDO. This is false. The Draft Summary Sheets were provided to BDO two separate ways on September 24, 2014: 1) through an upload to BDO by a paralegal with Dudley, Topper and Feuerzeig, LLP and, 2) via email from Attorney Perrell to BDO. The Draft Summary Sheets contain no supporting or back up documentation. They are preliminary schedules which appear to have been prepared by the Department of Justice, however, the author is unknown. While the Draft Summary Sheets were considered by BDO to provide a cross-check or preliminary base line, BDO did not consider them to be a Partnership accounting but rather simply someone's worksheets. Further, the allocations in the Draft Summary Sheets do not even address one of the Partners, Mohammad Hamed. Therefore, they could never be a comprehensive reflection of Partnership withdrawals as they do not include one of the Partners. 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. The gross income of the grocery store business is not a reflection of Yusuf's Partnership withdrawals. Simply because the BDO Report did not adopt the preliminary calculations in the Draft Summary Sheets 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. Although, the Draft Summary Sheets were provided to BDO and considered they were not used as primary evidence of Partnership withdrawals. Hamed's contention that this information was not provided to or considered by BDO is incorrect.

2. Foreign Accounts not addressed in BDO Report

At various points throughout the Hearings, Plaintiff attempted to challenge the BDO Report on the basis that it failed to account for funds in foreign bank accounts for which certain bank statements were available.¹² Foreign account information was not addressed by BDO as Yusuf elected to address this category of claims separately. As set forth above, the bulk of the laundered money ultimately was used to purchase jointly held assets in Jordan or assets otherwise divided equally. To the extent that there are disputes as to these accounts and assets, these claims are addressed separately in Section VI of Yusuf's Claims. Hence, it is not a failing on the part of BDO and does not demonstrate that the BDO Report is somehow unreliable or deficient.

3. Plea Agreement is one of the Exhibits to the BDO Report

At the Hearings, various witnesses criticized the BDO Report on the basis that it failed to mention or address the fact that the parties had been engaged in a money laundering operation and that this was essential to the credibility of the BDO Report. Mr. Schoenbach described this as a "hole" in BDO's analysis. First, the Plea Agreement is actually an exhibit to the BDO Report – it is Exhibit 2 to the BDO Report. These exhibits were provided to Plaintiff along with

¹² Plaintiff introduced various exhibits relating to this contention, including Exhibits 4,5,6.

all of the supporting documentation and schedules.¹³ Hence, BDO was certainly aware of the money laundering operation and also aware of the ultimate outcome of the criminal prosecution. While a money laundering operation may make it difficult to identify all of the gross income from an operation for tax purposes, as between the Partners, who “scrupulously” maintained records to document their withdrawals, there are sufficient records to quantify these historical withdrawals. Accordingly, this objection does not impact the reliability of the BDO Report and the process employed to identify and quantify the historical Partnership withdrawals.

4. Ledger Information as to Construction of Hamed Home

As to Exhibit 21, Plaintiff contends that this ledger information reflects monies paid for the construction of one of the Hamed homes and there was a double counting as the funds used to pay construction expenses directly were counted and then counted again as a receipt. This is incorrect. At Table 9A of the BDO Report, both receipts and the ledger, which is Exhibit 21, are chronicled. A series of notations, 1-26 at pages 33-35, provide explanation for various adjustments that were made by BDO to avoid double counting. Specifically, the notations indicate, for example “Ticket #473 dated 9/14/9 concurs with this transaction, amount was adjusted to avoid double counting.” *See* BDO Table 9A, p. 33-34, n. 26. The adjustments by BDO subtract the values so that a particular transaction is only accounted for one time, even if the transaction is reflected in multiple sources, i.e. a receipt/chit as well as a ledger. Hence, there is nothing from this objection which supports Plaintiff’s position that the allocations were improper or that the BDO Report is unreliable.

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¹³ In addition to the Schedules and supporting documentation, the BDO Report contained twenty-one (21) Exhibits as well as the transcript of the January 25, 2013 hearing before this Court, the Memorandum in Support of Motion for a Temporary Restraining Order and/or a Preliminary Injunction and deposition testimony of Mohammed Hamed.

5. Information as to the Construction of Yusuf Home in St. Thomas

As to Exhibit 22, Plaintiff offers this exhibit to show that BDO did not account for funds Yusuf withdrew from the Partnership for the construction of his home, but did count monies the Hameds withdrew for their home. This is incorrect. The Yusuf home on St. Thomas was constructed following the FBI raid and during the period when a Federal Monitor was in place. The funds used to build the Yusuf home had to be requested directly from the Monitor and approved by the Monitor. At this point in time, the receipt/chit process had ended and all funds received came in the form of checks. In the BDO Report at Table 43A, various checks for the construction of the Yusuf house are captured and attributed to Nejah Yusuf. BDO also notes that the amounts “concur with the FBI log ‘Yusuf House.’” *See* Table 43A, p. 2, n. 2 and Table 43B, p.1, n. 1. This further provides evidence that BDO did review the FBI materials in detail and utilized same as a cross check as to various allocations.

6. Attorney’s Fees Allocation

Plaintiff objects to the allocation of the attorneys’ fees based upon the invoices submitted by the attorneys to their clients for their representation. While Hamed attempts to argue that all of the parties were to equally share in the fees such that the allocation should not be made according to the face of the invoices, nothing in the documentary evidence requires this approach. To the contrary, the billing records reflect bills for each attorney and their particular client. To the extent that the parties may have attempted to pool their efforts and insure a coordinated defense, does not automatically equate to an equal distribution of expense. To engage in an allocation which differs from the written billing records, would be open to differing interpretations outside the documentary evidence. However, allocating fees according to the documentary evidence is a consistent and unbiased approach. To the extent that Plaintiff seeks

to challenge such an allocation, he can raise it with the Master, who can listen to the parties' arguments and then make a report and recommendation to the Court for its ultimate determination.

7. Additional Objections Not Otherwise Fully Addressed

To the extent that additional objections were raised by Hamed but are not otherwise addressed in this Supplemental Brief, Yusuf submits that further discovery is necessary to eliminate and clarify the allocations which may reveal that amendments to the BDO Report should be made. Yusuf reserves the right to defend or otherwise respond to such objections if not fully addressed herein.

III. Conclusion.

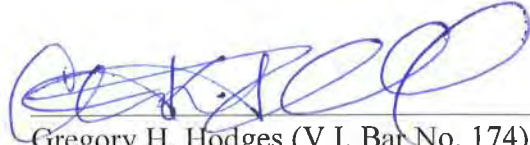
To create some perspective as to the limited extent of the challenges to the BDO Report, in its current form, consider the total number of transactions reviewed and quantified by BDO over an eighteen (18) year period. The total number of transactions identified and quantified by the BDO Report is approximately 20,000. The total number of transactions challenged by Plaintiff is approximately less than 100. Hence, the challenges represent only 0.5% of the total transactions quantified. The total value of all of the transactions quantified equals \$37,641,979.96. Additional discovery will likely provide further information as to certain transactions and allocations, which may serve as a basis to adjust the BDO Report by a relatively low percentage as compared to the overall value of the transactions quantified. A large portion of the quantification and allocation process has been completed, however, new information revealed by continued discovery may alter a limited number of the allocations. These limited challenges, at this stage of the case, cannot serve as a basis to strike the BDO Report. Hence, for all of the foregoing reasons, Plaintiff's motion is premature and should be denied.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: March 21, 2017

By:



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2017, I served the foregoing **SUPPLEMENTAL BRIEF IN 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 A

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

3 MOHAMMAD HAMED, by his) SX-12-CV-370
4 authorized agent WALHEED)
5 HAMED,)
6 Plaintiff/Counterclaim Defendant,)
7 v.)
8 FATHI YUSUF and UNITED)
9 CORPORATION,)
10 Defendants/Counterclaimants,)
11 v.)
12 WALEED HAMED, WAHEED HAMED,)
13 MUFEEED HAMED, HISHAM HAMED, and)
14 PLESSEN ENTERPRISES, INC.,)
15 Additional Counterclaim Defendants.)
16 _____)

14 **March 6, 2017**
15 Kingshill, St. Croix

16 The above-entitled action came on for MOTIONS HEARING
17 before the Honorable Douglas A. Brady, in Courtroom
18 Number 211.

19 THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN
20 OFFICIAL COURT REPORTER, ENGAGED BY THE COURT,
21 WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS
22 HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND
23 PROCEEDINGS OF THE CASE AS RECORDED.

24 TRACY BINDER, RPR
25 Official Court Reporter
(340) 778-9750 Ext. 7151

1 should they be faulted for not including an analysis of
2 something they weren't asked to do?

3 A No, I -- it's an agreed-upon procedure, as I
4 said before. You know, they're just doing what they
5 agreed to do.

6 Q Okay. All right. And you weren't asked to do
7 a true-up or an accounting for the period from 2001 to
8 date, were you, by Mr. Holt or Mr. Hamed?

9 A No, I was not.

10 Q Okay. If they had asked you to do that
11 true-up, you would have at least attempted to do it,
12 wouldn't you?

13 A Yes.

14 Q Exhibit 30 and 31.

15 A (Perusing documents.)

16 Q I believe you testified -- correct me if I'm
17 wrong, Mr. Jackson -- that the \$160,000 check was never
18 cashed; is that right?

19 A That's correct.

20 Q Have you examined bank statements for the Bank
21 of Nova Scotia account that's referenced here?

22 A 2000? I have not, no.

23 Q So you don't know from personal knowledge
24 whether this check has been cashed or not, do you?

25 A I do not. My understanding is they were in a

1 Q All right. So after September 16, 2000 --
2 excuse me, September 30, 2016, no further discovery, no
3 investigation, no questions have been propounded by any
4 party with respect to the accounting that was prepared
5 by our side or the objections that were prepared by
6 Hamed; is that fair to say?

7 A That's correct, yes.

8 Q Okay. And would you say that that applies to
9 all of your criticisms of the BDO report and all the
10 other criticisms that you've heard today, BDO has never
11 had an opportunity to respond to them?

12 A We've done no discovery on the BDO report at
13 all.

14 Q Okay. The allocation of fees by BDO has been
15 criticized by the Hameds and, I understand, from you as
16 well. When, other than today when we received a
17 declaration from Mr. Gordon Rhea, has anything been said
18 that suggests that that is improper?

19 A That the allocation is improper?

20 Q Yes.

21 A This is the first time we've heard of that
22 allocation, so I can't imagine there would have been any
23 time prior to this that there would have been a
24 discussion.

25 Q All right. But you had the allocation on

1 Q Okay. So all you can say is the BDO report,
2 in your opinion, did not refer to the draft report. You
3 cannot say that it didn't consider that draft report; is
4 that fair to say?

5 A Yeah, that's fair to say.

6 Q All right. Would you agree with me that the
7 volume of documents that were produced by the parties in
8 this case, produced by the FBI, are voluminous?

9 A I would agree with that, definitely.

10 Q Would you agree that it's actually a huge
11 volume of documents?

12 A Define "huge".

13 Q Well, what would you call huge? I mean, is it
14 more than 160 bankers boxes of FBI documents?

15 A Well, it would have to be, because the 160
16 boxes of -- bankers boxes of documents were just the
17 documents that were sent over from Puerto Rico. That
18 didn't include the documents that were scooped up as a
19 part of the raid. I think for the part of the raid,
20 that that was around 50,000 documents, maybe.

21 Q 50,000 just from the raid itself?

22 A Yes. But in a big document case, that's not a
23 huge number. I've worked on other cases with Attorney
24 Holt where we've had a lot more than that.

25 Q Okay. But you would refer to this as a big

EXHIBIT B

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

MOHAMMAD HAMED, by his)
authorized agent WALEED HAMED,)

Plaintiff/Counterclaim Defendant,)

vs.)

CIVIL NO. SX-12-CV-370

FATHI YUSUF and)
UNITED CORPORATION,)

Defendants/Counterclaimants,)

vs.)

ACTION FOR DAMAGES
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF

WALEED HAMED, WAHEED)
HAMED, MUFEED HAMED,)
HISHAM HAMED,)
and PLESSEN ENTERPRISES, INC.,)

Counterclaim Defendants.)

JURY TRIAL DEMANDED

**COUNTERCLAIM DEFENDANT WALEED HAMED'S
RESPONSES TO DEFENDANTS'
8/27/14 INTERROGATORIES**

Counterclaim defendant Waleed Hamed responds to the interrogatories served on him on August 27, 2014.

PRELIMINARY STATEMENT

These answers and objections are made solely for the purpose of this action. Each answer is subject to any and all objections as to competence, relevance, materiality, propriety, and admissibility; and any and all objections and grounds that would require the exclusion of any statement contained in any response, if

In addition to the "General Objections" raised above, which are incorporated herein by reference, this request is also objected to as unduly burdensome, unduly harassing and overly broad. Subject to those objections, to the extent this information exists, it was supplied in response to the request for documents.

5. What is your explanation for the amounts listed as investment losses on Bates No. UC00203-4 of your 1993 Income Tax return, including how, when and from what source you received the funds for such investments, what brokerage account(s) were used for these investments, or, if you contend that the 1993, 1994 and 1995 Income Tax returns were in error, explain when you discovered the error and what you did, if anything, to correct the error identifying any documentation reflecting this error and your corrective actions.

In addition to the "General Objections" raised above, which are incorporated herein by reference, this request is also objected to as unduly burdensome, unduly harassing and overly broad. Subject to those objections, it was an error by the accountant. I did not focus on it until it was raised in these proceedings, but Fathi Yusuf knows the accounts in question were his, as he was using another name, Mohammad Hamden, to trade stocks to avoid paying taxes on the trades.

6. Describe all of the means and method by which the Yusuf and Hamed family would withdraw funds from the Plaza Extra Stores for their personal benefits.

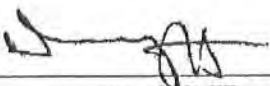
In addition to the "General Objections" raised above, which are incorporated herein by reference, this request is also objected to as unduly burdensome, unduly harassing and overly broad. Subject to those objections, the response is the same answer as given by Yusuf in response to this identical question in response to Willie Hamed's interrogatories, which is incorporated herein by reference, as he was the one who set everything up.

7. Describe all the means and method by which the Yusuf and Hamed families would account, note or keep track of withdrawals either from the safes or the Plaza Extra Stores' accounts, including any ledgers, books, sign-off sheets, receipts, loans, checks or any other means, including who specifically had access to the funds, whether the removal methods changed over time (i.e. before and after the FBI raid and the Criminal Case).

Object as to irrelevant and not likely to lead to discoverable information. Subject to this objection, the Yusufs had stolen \$2.7 million from a joint account. The money was removed to protect it from looting by them again. One-half was deposited to the Court accounts representing the Yusuf's 50% interest in these funds and the Yusufs have been given a stipulation to withdraw their share.

I, Waleed Hamed, declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the foregoing interrogatory responses are true and correct.

Dated: September 26, 2014

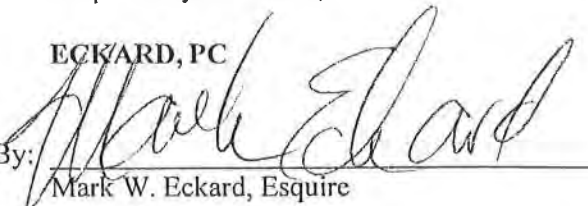


Waleed "Wally" Hamed

Respectfully submitted,

ECKARD, PC

Dated: September 26, 2014

By: 

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Counsel to Waleed, Mufeed and Hisham Hamed

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2014, I served a copy of the foregoing in compliance with the parties consent, pursuant to Fed. R. Civ. P. 5(b)(2)(E), to electronic service of all documents in this action on: Nizar A. DeWood, Esquire (dewoodlaw@gmail.com); Gregory H. Hodges, Esquire (ghodges@dtflaw.com); Joel H. Holt, Esquire (holtvi@aol.com); and Jeffrey B.C. Moorhead, Esquire (jeffreymlaw@yahoo.com).

