

**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 and Counterclaimants.

vs.

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

Counterclaim Defendants.

Case No.: SX-2012-cv-370

**ACTION FOR DAMAGES,
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF**

JURY TRIAL DEMANDED

MOHAMMAD HAMED,

vs.

Plaintiff,

FATHI YUSUF,

Defendant.

Case No.: SX-2014-CV-278

**ACTION FOR DEBT AND
CONVERSION**

JURY TRIAL DEMANDED

**HAMED'S RESPONSE TO YUSUF'S SUPPLEMENTAL FILING
RE THE DAUBERT MOTIONS**

On March 6th, this Court held a hearing on the motions to strike the BDO and Integra reports. The Court also gave Yusuf additional time to supplement that record, which he has now done. A response to these two motions by the Plaintiff is in order.

I. The Motion to Strike the BDO Report

On its face, the BDO report repeatedly admitted it was not based on reliable information, which was the initial basis for moving to strike. The March 6th hearing confirmed that this report, opining that Hamed owes Yusuf over \$9.6 million based on BDO's *analysis of partnership withdrawals*, is completely unreliable.

As the demonstrative exhibits prepared by Kim Japinga confirm (attached hereto as Group **Exhibit 1**) there are many glaring problems with this report. See, e.g., Hearing Exhibits 38,¹ 42,² 50³ and 51.⁴ Japinga carefully explained the missing records as well as the errors Hamed chose to put into evidence (see Hearing Tr. 330-360), which she put on a summary chart. Hearing Ex. 57 (also attached in Group **Exhibit 1**). Just the errors provided as examples on that chart negate the dollar amount of BDO's report.

Japinga's detailed testimony about these extensive errors, many involving millions of dollars, makes it clear these were egregious for an accountant to make, further proving that the BDO report is unreliable.⁵ As David Jackson testified, a report

¹ The chart shows the **years** of extensive partnership records *BDO admits were missing*.

² This chart shows the numerous Yusuf bank, brokerage and credit card accounts **exchanged with Yusuf in discovery** which were **not** provided to or reviewed by BDO.

³ This chart shows the vast difference in the number of Hamed accounts reviewed by BDO (2907 or **89.3%**) compared to the Yusuf accounts BDO reviewed (356 or **10.7%**).

⁴ This chart showed BDO's absurd, disparate '*allocation*' of attorney fees between the Hameds (**95%** or \$4,121,561) and the Yusufs (**5%** or \$237,691) for the 10 plus year defense of the criminal case. The fact that Yusuf even tries to articulate a justification for this allocation by BDO is an insult to this Court, particularly in light of the unrefuted declaration of Gordon Rhea (Hearing Ex. 44) explaining the lawyers worked equally on behalf of all of the Yusuf/Hamed criminal defendants. Indeed, Larry Schoenbach explained what a joint defense agreement is and why the lawyers who take part in such a joint defense divide the work up, rather than just work for their particular client. See Hearing Transcript 149-159. He then testified that based on his review of the criminal pleadings, Fathi Yusuf was at least an equally culpable defendant (Hearing Transcript at 158-160), again undermining the credibility of BDO's lopsided allocation of these fees.

⁵ For example, Japinga pointed out that multiple checks totaling \$1.5 million payable to Fathi Yusuf were not allocated to him solely because "**Yusuf said**" to BDO that they were to repay "a loan" -- **even though BDO had no evidence documenting such a loan**. See Hr. Transcript at 347-49. Yusuf attempts to justify this error on page 15 of his supplemental filing by saying he provided BDO with evidence of payments by him to Hamden Diamond (one of his companies), **which is untrue** (See **Exhibit 2**), **but those payments are not proof of any loan transaction**. Where is the loan documentation supporting BDO's decision to ignore these withdrawals of millions of dollars by Yusuf?

prepared by an accountant is unreliable if it has more than one or two errors. (Hearing Tr. 221). No one disputed this testimony. Jackson also testified at length why the BDO report is not even a proper "life style" analysis. See Hearing Tr. 210-221.

Larry Schoenbach, a lawyer who specializes in money-laundering cases, also testified, pointing out the glaring omission in the BDO report of any detailed analysis of or reference to the criminal case. He noted the significance of this fact since there was a very detailed FBI report (Hearing Exhibit 10) that showed numerous bank accounts and summaries documenting over \$65 million in unreported income, *none of which was even mentioned by BDO in doing its analysis*. See Hearing Tr. 163-171.

Aside from BDO's own admissions and the plethora of evidence introduced at the March 6th hearing, Yusuf's supplemental brief presents two significant new admissions that further support striking the BDO report. First, defense counsel concedes on page 3 of Yusuf's March 21st filing as follows:

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. (Emphasis Added).

If so, why was it filed as a final claim on September 30, 2016? ⁶ In any event, the repeated acknowledgement throughout Yusuf's brief that now, suddenly, more discovery is needed before *BDO's report can be **completed*** confirms it is not a "reliable" Rule 702 expert report at this juncture. ⁷

⁶ Clearly, the plan was to rush the BDO report through, hopefully persuading the Special Master to award this claim without the scrutiny of a Rule 702 *Daubert* hearing.

⁷ Moreover, the suggestion that the Plaintiff needs to supply BDO with *his counsel's analysis* before BDO can make the needed changes is laughable—BDO is a paid expert, not a neutral fact finder, as evidenced by its allocation of a \$75,000 withdrawal to Hamed for an unsigned and undated check (Hearing Ex. 15) or \$230,000 in checks that were never cashed (Hearing Ex. 31). This type of evidence would not even be accepted in the Small Claims Division of this Court as being reliable.

The second significant point made in Yusuf's brief involves Yusuf's new assertion on p. 17 that he gave the key FBI report (Hearing Ex. 10) to BDO, *but that he told BDO not to look at it because*, as Yusuf's counsel stated on page 17:

Foreign account information was not addressed by BDO as **Yusuf elected to address this category of claims separately.**" (Emphasis added).

This admission confirms that BDO did not even look at *all withdrawals available to it*, despite its statement on at p. 3 of its report that its engagement involved:

Identification of historical withdrawals both disclosed and undisclosed from the partnership during the period where no formal partnership accounting process was in place.

Of course, Yusuf's new "explanation" is also not mentioned by BDO, as obviously it is directly contrary to BDO's claim that it looked at all partner withdrawals. Thus, as Yusuf now admits **he told** BDO not to look at these critical and substantial withdrawals, his admission renders BDO's report, *based on the partnership withdrawals*, unreliable.⁸

In summary, this Court gave Yusuf additional time to supplement the record after the March 6th hearing. That filing, however, did not include a declaration from Yusuf or BDO explaining the numerous objections to it. Instead, it just contained the unverified argument of counsel, which is not sufficient to rebut the record made in this case that demonstrates that the BDO report is unreliable based on this record. As such, as there has been a hearing on the motion to exclude the BDO report, with a full opportunity to submit additional evidence, that report should be stricken **now** under Rule 702.⁹

⁸ In fact, the failure of BDO to take these withdrawals into account was one of Jackson's specific criticisms as to why it was not a proper life style analysis. See Hearing Tr. 220.

⁹ If Yusuf wishes to resubmit a revised report at some later date before the deadline for expert witness reports, that is fine, **but it certainly does not pass the Daubert threshold at this juncture.** Indeed, the evidence presented at the *Daubert* hearing was by no means all of the errors the Plaintiff found---to the contrary, these were just the ones selected for the *Daubert* hearing to make the point that the report is unreliable. By its own admissions at page 22, BDO cannot ever make its report reliable.

II. The Motion to Strike the Integra Report

Yusuf did not even make a supplemental argument about the Integra Report, which attempts to put a value on the partnership's "lost leasehold" at Plaza West, which amount is then listed as one of Yusuf's claims See Ex. 23. The reason why Yusuf did not add anything is obvious, as Integra states its valuation of the "lease" for Plaza West is contingent on a "pivotal assumption" (See **Exhibit 3** at page 2 of the cover letter):

3. . . . For the purposes of valuing the business entity separately from the value of the real estate (which was separately appraised), **we have assumed that the entity operating the business leases the property from a separate entity at market rent.**

However, as this Court will recall, Yusuf submitted a plan to this Court to have that store shut down, not sold, **as it had no lease**, stating (See **Exhibit 4**):

The Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for . . . Plaza Extra - West.

The fact that the partnership had no lease with the owner of the property where the Plaza West store was located has been before this Court in other pleadings as well and is not in dispute.

Thus, **since this "pivotal assumption" is false, as confirmed by Yusuf's admission filed in this Court**, the report has to be stricken under Rule 702 as well.

III. Conclusion

This Court held a hearing on the pending motions to strike the BDO and Integra reports. Based on the record, it is respectfully submitted that both the BDO report and the Integra report should be stricken at this time so that no further judicial resources are expended on either one, including discovery which is about to commence.

Dated: March 27, 2017



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2017, I served a copy of the foregoing by email, as agreed by the parties, on:

Hon. Edgar Ross
Special Master
% edgarrossjudge@hotmail.com

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EXHIBIT 1

Records BDO States (at p. 22) it Does and Does Not Have for the Plaza Extra Partnership

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Any Partnership Records	None	None	None	None	None	None	None	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some	All	All	All	All	All
Any Bank Records to Check	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	All	All	All	All	All
Plaza East Records	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	Some	Some	Some	All	All	All	All	All	All
Plaza West Records	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	Some	Some	Some	All	All	All	All	All	All
Plaza Tutu Records	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	None	Some	Some	Some	Some	Some	Some	All	All	All

BDO States it Had

- = No Reliable Information
- = Some Information, But not All
- = Reliable Information

4.5 Limitations (From BDO Report p. 22)

Our report and the findings included herein have been impacted by the limitation of the information available in the Case. Following is a summary of the limitations we encountered during the performance of the engagement.

- ☑ Accounting records of Plaza Extra-East were destroyed by fire in 1992 and the information was incomplete and/or insufficient to permit us to reconstruct a comprehensive accounting of the partnership accounts before 1993.
- ☑ Accounting records and/or documents (checks registers, bank reconciliations, deposits and disbursements of Supermarkets' accounts) provided in connection with Supermarkets were limited to covering the period from 2002 through 2004, East and West from 2006 through 2012, and Tutu Park from 2009 through 2012.
- ☑ Accounting records and/or documents provided to us for the periods prior to 2003 are incomplete and limited to bank statements, deposit slips, cancelled checks, check registers, investments and broker statements, cash withdrawal receipt listings. For example, the retention policy for statements, checks, deposits, credits in Banco Popular de Puerto Rico is seven years; therefore, there is no Bank information available prior to 2007 and electronic transactions do not generate any physical evidence as to regular deposits and/or debits.
- ☑ Information discovered about the case up to August 31, 2014. We only considered information up to December 31, 2012. Transactions after that date were adjusted in our report.



CHART 2 - THE YUSUF ACCOUNTS LEFT OUT OF BDO'S REPORT

Account Holder	Account Type	Name of Financial Institution & Account	BDO Report
Fathi Yusuf	Bank /Invest.	Banque Francaise Commerciale 0 40 60 63877 90	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 01 500 172349 00	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 01 532 172349 00	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 02 033 172349 00	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 02 503 172349 00	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 02 528 172349 00	NOT in BDO Report
Fathi Yusuf	Bank /Invest.	Cairo Amman Bank 02 533 172349 00	NOT in BDO Report
Fathi Yusuf	Credit Card	American Express-3713 -845112 -21003	NOT in BDO Report
Fathi Yusuf	Credit Card	Scotiabank Visa Gold 4563-4601- 5003-9052	NOT in BDO Report
Fathi Yusuf/ Hamdan Diamond Corp.	Bank /Invest.	Merrill Lynch 140-07884	NOT in BDO Report
Fathi Yusuf/ Hamdan Diamond Corp./Isam	Bank /Invest.	Banque Francaise Commerciale 0 40 60 63887 90	NOT in BDO Report
Fathieh Yousef	Bank /Invest.	Merrill Lynch 140-21722	NOT in BDO Report
Hamdan Diamond	Bank /Invest.	Merrill Lynch 140-07951	NOT in BDO Report
Mike Yusuf	Bank /Invest.	Scotiabank 60804314 (personal checking)	NOT in BDO Report
Mike Yusuf	Credit Card	Citi-Visa-4922 0020 0003 6759	NOT in BDO Report
Nejeh Yusuf	Bank /Invest.	BP 194-018332	NOT in BDO Report
Nejeh Yusuf	Bank /Invest.	First Bank 58-02114835	NOT in BDO Report
Nejeh Yusuf	Credit Card	Banco Popular-4549-0550-1358-6262	NOT in BDO Report
Nejeh Yusuf	Credit Card	Bank of America-5474-1500-0117-5222	NOT in BDO Report
Nejeh Yusuf	Credit Card	ML-4264-5200-2653-6235	NOT in BDO Report
United Corp.	Bank /Invest.	Prudential Securities 05Q-958838-55	NOT in BDO Report

CHART 4 - Hamed versus Yusuf Files in BDO Bank and CC Analysis

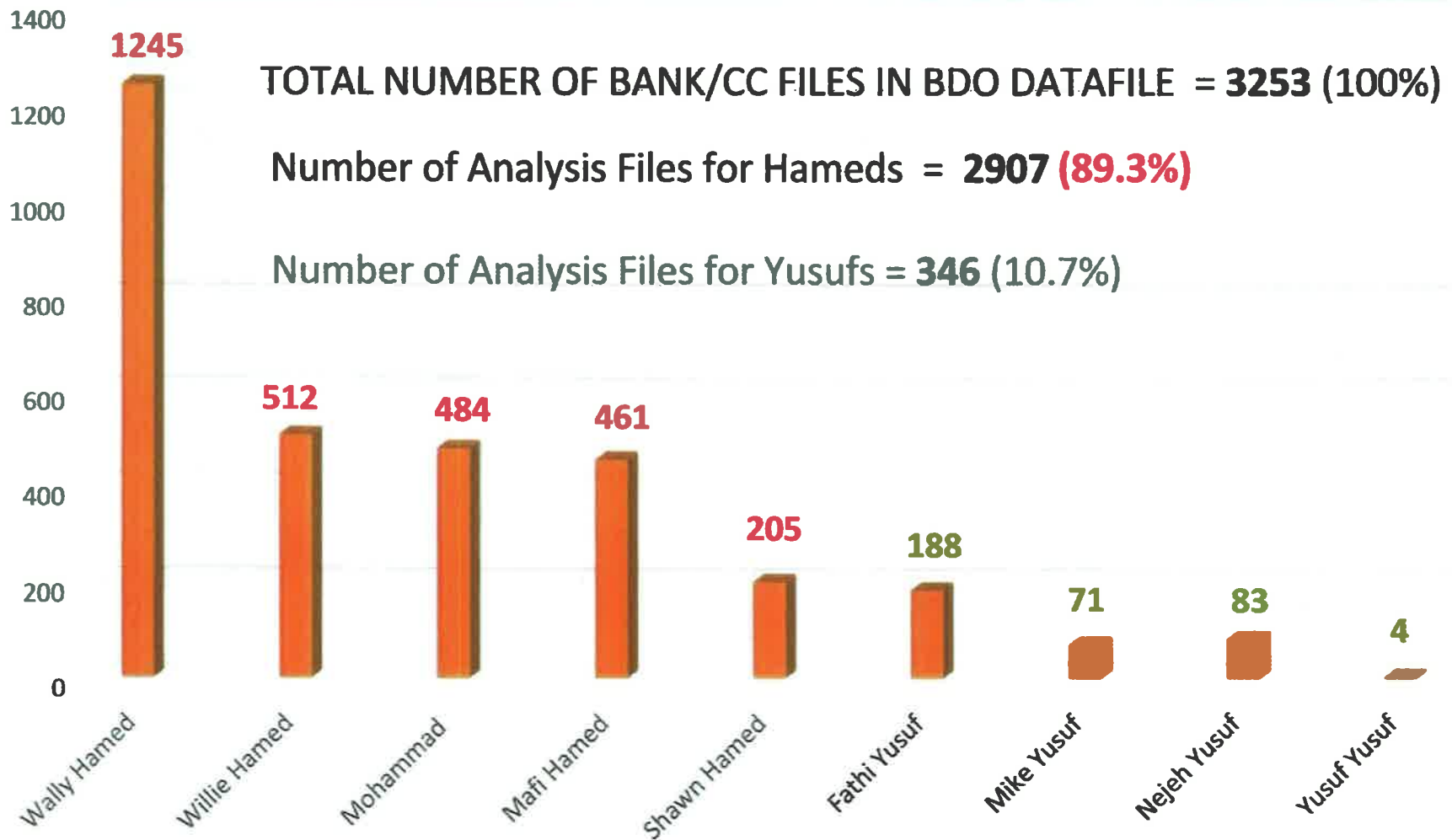
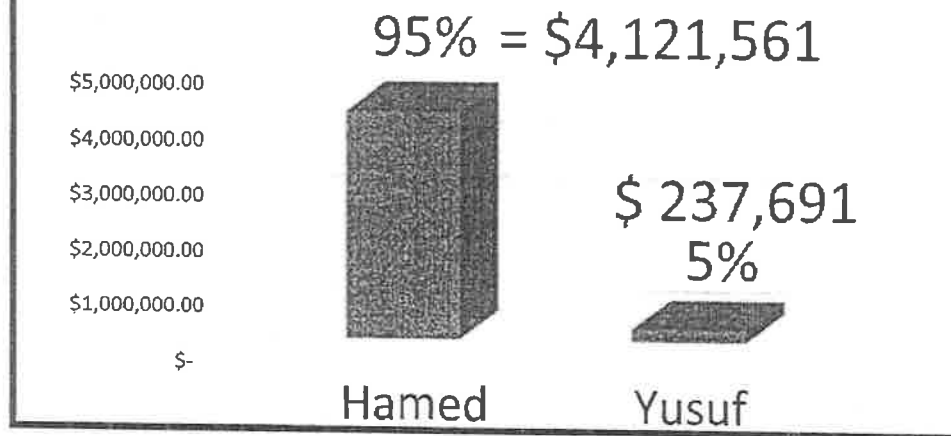


CHART 6 - Comparison of BDO's Calculation of Attorney Fees Between Hamed & Yusuf



Blumberg Ho 5206
EXHIBIT
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Sample BDO Errors and Omissions

- The \$1.5 million Hamden Diamond/Fathi checks
- The \$50,000 Willie check
- Shawn's \$2800 and \$2,900 checks (\$5700)
- Rebated checks
- Mafi chits (employee loan) (double charge)
- Mafi (9811-Carlton Account)
- Wally's Scotiabank account
- Wally unsigned chits (8-B)
- Wally unsigned chits (9-B)
- Receipts charged to Wally (Gas station refunds and Receipt of loan) (9-A)
- Shawn' \$250,000 charge
- Shawn's \$34,500 chit
- The BFC \$75,000 unsigned, undated check
- The \$286,000 "Jaber" checks
- United Pru-Bache/Wally 1993 Tax Return summary



EXHIBIT 2

DECLARATION OF WALLY HAMED

I, Wally Hamed, declare, pursuant to 28 U.S.C. Section 1746, as follows:

1. I am an adult resident of St. Croix and am personally familiar with the facts set forth herein.
2. I read the unverified claim by Fathi Yusuf's counsel that the partnership had a loan with Hamdan Diamond, explaining why the funds withdrawn from the partnership by him were done to repay a loan to Hamdan Diamond.
3. The partnership never had any such loan from Hamdan Diamond.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 27, 2017



Wally Hamed

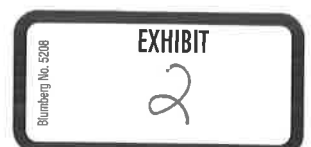


EXHIBIT 3

Integra Realty Resources
Caribbean

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September 26, 2016

Mr. Gregory Hodges, Esq.
Dudley Topper and Feuerzeig, LLP
Law House, 1000 Frederiksborg Gade
St. Thomas, VI 00802

SUBJECT: Conclusion of Value
Hamed/Yusuf Partnership d/b/a Plaza Extra West
Integra Caribbean File No. 172-2015-0081

Dear Mr. Hodges:

IRR – Caribbean is pleased to submit the accompanying valuation of the referenced business. The purpose of the valuation is to develop an opinion of the fair market value of a 100% interest in the subject company, *excluding the value of the real estate, under the going concern premise*, as of April 30, 2014. The client for the assignment is Dudley Topper and Feuerzeig, LLP, and the intended use is for litigation purposes.

The valuation (appraisal) is intended to conform with the Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers, the Business Valuation Standards of the American Society of Appraisers, the Professional Standards of the National Association of Certified Valuators and Analysts (NACVA), the Code of Professional Ethics and Standards of Professional Practice of the Appraisal Institute, the RICS Valuation Professional Standards, and the Uniform Standards of Professional Appraisal Practice. The type of valuation service provided is a Conclusion of Value and this report is considered a Summary Report as defined by USPAP.

The subject of the valuation is the grocery store business known as Plaza Extra West, operating in St. Croix, U.S. Virgin Islands. The grocery store business has been operating since 2000 as a part of a small independent chain of stores in the U.S.V.I. The valuation is of a whole ownership, 100%; marketable interest in the business, which is assumed to be a partnership entity having the right to operate the business using the Plaza Extra name.

Mr. Gregory Hodges, Esq.
Dudley Topper and Feuerzeig, LLP
September 26, 2016
Page 2

Based on the valuation analysis in the accompanying report, and subject to the definitions, assumptions, and limiting conditions expressed in the report, our opinion of value is as follows:

Final Value Conclusion

Standard of Value	Value Conclusion as of April 30, 2014
Fair Market Value - Equity	\$8,770,000
Going Concern Premise	<i>Eight Million Seven Hundred Seventy Thousand Dollars</i>

Note: Unless otherwise noted, all financial figures are expressed in United States Dollars

Note: Unless otherwise stated, all financial figures in this report are expressed in United States Dollars.

Extraordinary Assumptions and Hypothetical Conditions

The value conclusions are subject to the following extraordinary assumptions that may affect the assignment results. An extraordinary assumption is uncertain information accepted as fact. If the assumption is found to be false as of the valuation date, we reserve the right to modify our value conclusions.

} ←

1. In our valuation, we relied on the representations of company's accountant. The financial information provided to us was compiled by the company's accountant and has not been audited. To the extent that such information may, at a later date, be found to have been inaccurate or misrepresented, we accept no liability for the consequences such inaccuracy or misrepresentation may have on our value determination expressed in this report nor any responsibility to update the valuation conclusion to reflect the impact that more accurate and complete data may or may not have on the opinions expressed herein.
2. For the purposes of the valuation, it is assumed that the partnership owning the Plaza Extra West business is a separate legal entity; the ownership of which was divided evenly between the partners as of the date of valuation. We have valued the entity on a control basis rather than a specific fractional interest which would require adjustments for lack of control and/or marketability.
3. It is our understanding that the real estate was owned by a related entity as of the date of valuation. For the purposes of valuing the business entity separately from the value of the real estate (which was separately appraised), we have assumed that the entity operating the business leases the property from a separate entity at market rent. We have made adjustments accordingly in the process of normalizing the financial statements as described in this report.
4. The partnership holds marketable securities on its books, which have been removed (along with related income) from the financial statements in the process of making normalization adjustments as described in this report. These securities have not been added back to the value of the company as non-operating assets; rather, have been assumed to have been dealt with separately.

} ←

The value conclusions are based on the following hypothetical conditions that may affect the assignment results. A hypothetical condition is a condition contrary to known fact on the effective date of the appraisal but is supposed for the purpose of analysis.

1. None
-

Mr. Gregory Hodges, Esq.
Dudley Topper and Feuerzeig, LLP
September 26, 2016
Page 3

If you have any questions or comments, please contact the undersigned. Thank you for the opportunity to be of service.

Respectfully submitted,

Integra Realty Resources - Caribbean

A handwritten signature in black ink, appearing to read 'JVA', with a long horizontal flourish extending to the right.

James V. Andrews, MAI, CRE, ASA, CVA, FRICS
Telephone: 345-746-3110
Email: jandrews@lrr.com

EXHIBIT 4

**PLAZA EXTRA SUPERMARKETS
PLAN FOR
WINDING UP PARTNERSHIP**

This Plan provides for the winding up of the Partnership, as defined below. This is a liquidating plan and does not contemplate the continuation of the Partnership's business except as may be required for the orderly winding up of the Partnership.

Section 1. DEFINITIONS

1.1 "Act" means the Uniform Partnership Act, V. I. Code Ann. Tit. 26, §§ 1-274.

1.2 "Available Cash" means the aggregate amount of all unencumbered cash and securities held by the Partnership including cash realized from any Litigation Recovery or any Liquidation Proceeds.

1.3 "Case" means Civil No. SX-12-CV-370 pending in the Court.

1.4 "Claim" means

(a) any right to payment from the Partnership whether or not such right is reduced to judgment, liquidated, unliquidated, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(b) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment from the Partnership whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.5 "Claimant" means the holder of a Claim.

1.6 "Claims Reserve Account" means one or more interest-bearing bank account(s), money market or securities account(s) to be established and held in trust by the Master for the purpose of holding the Available Cash until distributed in accordance with the Plan and any interest, dividends or other income earned upon the investment of such Claims Reserve Account. The Claims Reserve Account will be further funded from time to time by the Liquidating Partner with:

- (i) any Liquidation Proceeds realized, plus
- (ii) any Litigation Recovery realized, minus
- (iii) any amounts necessary to pay Wind Up Expenses.

The Encumbered Cash shall be deposited into the Claims Reserve Account immediately after it is no longer encumbered by the restraining order entered in the Criminal Case and, thereafter, held for distribution in accordance with this Plan.

Section 8. PLAN OF LIQUIDATION AND WINDING UP

A. Sale of Plaza Extra Stores as Going Concern vs. Liquidation.

The Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for Plaza Extra - East and Plaza Extra - West and the existence of only a short term (less than 5 years) remaining on the lease between United and Tutu Park Mall, Ltd. for Plaza Extra - Tutu Park. Hence, liquidation of the Plaza Extra Stores is warranted.

B. Liquidation Process

The liquidation process will include the sale of all non-liquid Partnership Assets, payment of outstanding Debts, and deposit of all net Liquidation Proceeds into the Claims Reserve Account under the control of the Master.

1. Current Financial Profile of Partnership.

The Partnership Assets and Debts are reflected on the balance sheet for the Plaza Extra Stores attached as Exhibit B.

2. Estimated Time for Liquidation

The liquidation process is estimated to take six months to complete.

3. Steps to Be Taken for the Orderly Liquidation of the Partnership

STEP 1: Budget for Wind Up Efforts

The Liquidating Partner proposes the Wind Up Budget, attached as Exhibit A for the Wind Up Expenses. Such expenses include, but are not limited to, those incurred in the liquidation process, costs for continued operations of the Plaza Extra Stores during the wind up, costs for the professional services of the Master, costs relating to pending litigation in which United d/b/a Plaza Extra Store is named as a party, and the rent to be paid to the landlord of Plaza Extra - East and Plaza Extra - Tutu Park.

STEP 2: Setting Aside Reserves

The sum of Ten Million Five Hundred Thousand Dollars (\$10,500,000) - to cover the Wind Up Expenses as set out in the Wind Up Budget with a small surplus to cover any miscellaneous or extraordinary Wind Up Expenses that may occur at the conclusion of the liquidation process - shall be deposited in the Liquidating Expenses Account to be held in trust by the Liquidating Partner under the supervision of the Master. The Liquidating Partner shall