

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,

Plaintiff,

vs.

FATHI YUSUF,

Defendant.

Case No.: **SX-2014-CV-278**

**ACTION FOR DEBT AND
CONVERSION**

JURY TRIAL DEMANDED

MOHAMMAD HAMED,

Plaintiff,

vs.

UNITED CORPORATION,

Defendant.

Case No.: **SX-2014-CV-287**

**ACTION FOR DEBT AND
CONVERSION**

JURY TRIAL DEMANDED

MOTION TO STRIKE YUSUF'S "REVISED BDO REPORT" CLAIM

In 2016, Yusuf produced an expert report from BDO Puerto Rico, PSC ("BDO") that was the subject of an evidentiary hearing before Judge Brady on March 6, 2017. After the hearing, Judge Brady entered multiple orders on July 21, including one directing the Special Master to resolve all remaining claims. Judge Brady severely criticized the BDO report as well, but Yusuf is still seeking damages based on a "revised" version of it.

Thus, Hamed moves to strike the "revised" BDO report as (1) it is still based on the same unreliable records and faulty "lifestyle" analysis that Judge Brady rejected, and (2) it attempts to invade the decision-making process now assigned to the Special Master.

I. This Court has already discredited the BDO report.

BDO issued a report that supposedly "analyzed" the withdrawals from the Mohammad Hamed/Fathi Yusuf partnership since 1994. See **Exhibit 1**.¹ It consisted of cherry-picked information supplied *solely* by Yusuf and his lawyers to BDO. BDO admitted in the report that it did not conduct any independent investigation. The analysis was based on what Judge Brady later determined was a completely false premise---that *any* funds traced *to any Hamed* "must have" been removed from the partnership, while only **certain funds** traced *to any Yusuf* were similarly taken from the partnership.² Based on this skewered approach, BDO concluded that Hamed owed Yusuf \$9.6 million.

¹ All referenced exhibits are voluminous and are attached in a separate booklet being filed with this motion. Based on the fact that Judge Brady essentially rejected the initial BDO report, as discussed herein, it need not be reviewed in any detail (or maybe not at all) in order to address this motion.

² For example, Yusuf told BDO that Wally Hamed used partnership funds to build a home in the 1995-1996 time period, which BDO then allocated as a withdrawal to Mohammad Hamed, but Yusuf did not tell BDO about the two palatial homes he and his son Mike Yusuf built between 2004 and 2008.

In reaching its conclusion, however, **BDO admitted that many partnership records were missing, with no accurate accounting records available until 2012** when John Gaffney began overseeing the partnership accounting. See **Exhibit 1** at p. 3-4, 22 (“Limitations” and “Assumptions”). Hamed filed a *Daubert* motion to strike this report.

In his first of two opinions criticizing this report, Judge Brady completely discounted the BDO "analysis" and "data" submitted by Yusuf, stating (see **Exhibit 2** at pp. 23-24):

[t]he BDO report, by its own terms, appears to be anything but comprehensive. Most tellingly, the body of the BDO Report itself contains a section detailing its own substantial "limitations," resulting from the absence or inadequacy of records for each of the grocery stores covering various periods during the life of the partnership. **Additionally, the analysis presented in the report rests on the unsupported assumption that any monies identified in excess of "known sources of income" constitute distributions from partnership funds to the partners' §71(a) accounts.** (Emphasis added.) (Footnote 25 detailing these missing records omitted)(References to Plaintiff's motion omitted.)

Judge Brady then discussed the well-documented criminal facets of the partnership accounting that made BDO's analysis *totally unreliable*, before limiting the wind-up partnership accounting to claims arising after September 17, 2006. See **Exhibit 2** at pp. 24-31, 34.

In response, Yusuf moved for reconsideration, attaching a "saving" declaration from BDO's lead accountant, basically saying Judge Brady was wrong. **See Exhibit 3.**

Judge Brady denied this motion, *expanding his criticism of the BDO report* in light of the unreliable accounting practices of the partnership, stating (**Exhibit 4** at 5-6):

[t]hat where, as here, business partners have schemed to deliberately omit large sums of money from their accounting, have intentionally destroyed existing records of cash withdrawals, and have, even at their best, engaged only in loose, informal accounting practices, **any attempt to accurately reconstruct partnership records will necessarily involve some element of unreliability, as that is the very point of such a scheme.** (Emphasis added).

Judge Brady, however, stopped short of striking the BDO report, stating that such a determination was for the Special Master to address. See **Exhibit 5**.³

II. The “revised” BDO report violates the orders of this Court.

Undaunted by Judge Brady’s scathing criticism of the report, Yusuf submitted a “revised” BDO report for the Special Master to address, still seeking \$4.5 million from Hamed. See **Exhibit 6**. A review of this “new” spreadsheet reveals it still should be stricken or ignored, as it still violates the orders entered by Judge Brady and further attempts to invade the decision-making process assigned to the Special Master. Several glaring examples make this point:⁴

1. Marked as “Item #1” is an entry charged to Waleed (Wally) Hamed for \$1,778,103 for “Amount owed by Hamed family to Yusuf **as per agreement before raid Sept 2001.**” (Emphasis added). However, in his July 24th order, Judge Brady made it clear this claim was barred, stating that all claims that predated September 17, 2006, were now barred, even if the amount was supposedly undisputed. See **Exhibit 2** at p. 34 n.35. Thus, the inclusion of this claim in the “revised” BDO report is in direct violation of this Court’s order.
2. Marked as “Item #2” is a line allocating \$4.1 million in attorney’s fees to Hamed and \$237,691 to Yusuf for the defense of the criminal case. **That accounting entry consists of a “finding” that this allocation is appropriate, which is a finding reserved for the Special Master, not BDO.** Indeed, the lawyer who headed up the legal team for the criminal case, Gordon Rhea, submitted a declaration at the March 6th hearing that all legal work was done jointly on behalf of all of the Yusuf/Hamed defendants, so that no such allocation was proper (See **Exhibit 7**), which no one contradicted. Indeed, it is unknown why BDO (who did not attend the hearing) was not shown the hearing exhibit so it could correct this error.
3. Marked as “Item 3” is an entry for Mufeed (Mafi) Hamed in excess of \$300,000 for deposits to a bank account. However, at the March 6th hearing, it was established that this was Account No. 9811 at Scotiabank, which is an account *for a rental apartment complex Mafi and Wally Hamed own that is not related to any partnership activity.* See **Exhibit 8**. Thus, this incorrect

³ As noted in that opinion, this finding was based in large part on the fact that Judge Brady also struck the jury demand, as a Court need not act as a “gatekeeper” for itself, rendering any *Daubert* issues moot.

⁴ To assist in analyzing these points, an extra copy of this “revised” BDO report (Exhibit 6) is also attached at the end of this motion.

allocation by BDO also **consists of a “finding” that this account contains partnership withdrawals, which is a finding reserved for the Special Master, not BDO.** Indeed, it is unknown why BDO was not shown the hearing transcript so it could also correct this error.

4. Marked as “Item #4” is an entry for Mohammad Hamed for allegedly withdrawing \$1.5 million. This entry is based on an assumption that **\$3 million in gifts given by Fathi Yusuf and his wife, Fawzia Yusuf,** to two of their Hamed son-in-laws married to two of their daughters should now be allocated 50/50 between them. See **Exhibit 9.** Again, this accounting entry **consists of a “finding” that this allocation is correct, which is a finding reserved for the Special Master, not BDO.** Indeed, Hamed has a claim allocating this entire withdrawal to Yusuf, which the Special Master, not BDO, needs to resolve.

These few examples make it clear that Yusuf is trying to use this “revised” BDO report to (1) make allocations stricken by the Court and (2) make “findings” that have been entrusted to the Special Master, not BDO. Indeed, Yusuf’s counsel made this admission at the December 14th hearing when Hamed’s claim for Yusuf’s \$2.7 million withdrawal in August of 2012 was discussed, stating (see **Exhibit 10** on page 15):

I think he's suggesting that there's no further – nothing further needs to be done on the 2.7 million that he refers to, which is, you know -- respectfully, Your Honor, **it's already on Mr. Yusuf's side of the ledger, so to speak, in the BDO report.** We acknowledged he withdrew those funds. That's not in dispute. The accounting effect of that is what is in dispute (Emphasis added).

However, it is the Special Master, not BDO, who is in charge of deciding all remaining accounting claims. In short, while Yusuf is free to raise any claims that Hamed withdrew funds to which he is entitled to an off-set, **he must present evidence proving each such specific claim to the Special Master,** not just say "allow it because BDO says so."

Thus, the revised BDO report that “packages” multiple “findings” into an alleged debt of \$4.5 million supposedly “owed” by Hamed to Yusuf should be stricken as invading the province of the Special Master, who has been entrusted with making such findings.

III. The “revised” BDO report is based on incomplete and unreliable records.

As noted by Judge Brady, the BDO report was based (1) on **“unsupported assumptions that any monies identified in excess of “known sources of income” constitute distributions from partnership funds”** and (2) incomplete partnership records. Both criticisms remain equally valid as to the “revised” BDO report.

As for the first point, a quick look at the revised BDO report shows 11 accounts in the name of the Hamed sons and three in the name of the Yusuf sons that are supposedly “partnership” withdrawals. Such an assumption is not only unsupported by any evidence that the funds in question were taken from a partnership account, but **extensive evidence at the March 6th hearing confirmed this assumption is not correct**, such as the allocation of a bank account to Mufeed (Mafi) Hamed discussed above. In short, this assumption is not valid, rendering the “revised” report unreliable as well.

As for the second point, while the partnership records from 2007 to 2012 were not as sparse as those before 2007, BDO still admitted that the partnership accounting records were not complete until after 2012, when Gaffney was hired and instituted formal accounting procedures. See **Exhibit 1** at p. 3. As Gaffney stated under oath, before he was retained in 2012, the accounting records of the partnership were a **complete, useless mess**. See **Exhibit 11**. In short, the “revised” BDO report is still based in incomplete and unreliable records, as confirmed by John Gaffney’s sworn testimony.

Thus, the “revised” BDO report can also be summarily rejected, as it still suffers from the same two deficiencies noted by Judge Brady, with no effort to try to correct them despite Judge Brady’s succinct and harsh “criticisms.”

IV. Conclusion

For the reasons set forth herein, it is respectfully submitted that the hopelessly flawed "revised" BDO report should be stricken.

Dated: December 27, 2017



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2017 , I served a copy of the foregoing by email (via Case Anywhere ECF), as agreed by the parties, on:

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Dudley, Topper and Feuerzeig, LLP
 United Corporation
 Civil No. SX-12-CV-99

ITEM #4

ITEM #1

ITEM #2

Summary calculation of Additional Income as a result of withdrawals from Supermarkets' accounts (or partnership's accounts) - January 1994 to August 2014. (Including adjustments

Summary of Withdrawals

| Description | Hamed | | | | | Total |
|---|------------------------|------------------------|----------------------|----------------------|----------------------|------------------------|
| | Mohammad | Waleed | Waheed | Mufeed | Hisham | |
| Funds received from partnership through checks | \$ 1,500,000.00 | \$ - | \$ - | \$ - | \$ - | \$ 1,500,000.00 |
| Withdrawals from the partnership with a signed ticket/receipt | - | 237,352.75 | - | - | - | 237,352.75 |
| Amount owed by Hamed family to Yusuf as per agreement before raid Sept 2001. As per Mike's testimony these tickets were burned. (Refer to Letter dated August 15, 2012) | - | 1,778,103.00 | - | - | - | 1,778,103.00 |
| Payments to third parties on behalf of Hamed/Yusuf with partnership funds either with tickets or checks | - | 20,311.00 | - | - | - | 20,311.00 |
| Payments to Attorneys with partnership's funds | - | 3,749,495.48 | 372,155.95 | - | - | 4,121,651.43 |
| Funds received by cashier's checks | - | - | - | - | - | - |
| Total Partnership | 1,500,000.00 | 5,785,262.23 | 372,155.95 | - | - | 7,657,418.18 |
| Deposits to bank and brokerage accounts | 16,505.80 | 430,439.13 | 100,000.00 | 306,999.56 | 510,061.57 | 1,364,006.06 |
| Payments to credit cards | - | 422,824.70 | - | 179,786.80 | - | 602,611.50 |
| Investments (cost) sold as per tax returns | - | - | - | - | - | - |
| Subtotal Lifestyle analysis | 16,505.80 | 853,263.83 | 100,000.00 | 486,786.36 | 510,061.57 | 1,966,617.56 |
| Net Withdrawals | \$ 1,516,505.80 | \$ 6,638,526.06 | \$ 472,155.95 | \$ 486,786.36 | \$ 510,061.57 | \$ 9,624,035.74 |

Note:

1 Total amounts include adjustments made for withdrawals in 2016.

ITEM #3

