

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

**MOHAMMAD HAMED, BY HIS
AUTHORIZED AGENT WALEED HAMED,**

PLAINTIFF/COUNTERCLAIM DEFENDANT,

v.

**FATHI YUSUF AND UNITED
CORPORATION,**

DEFENDANTS/COUNTERCLAIMANTS,

v.

**WALEED HAMED, WAHEED HAMED,
MUFEEED HAMED, HISHAM HAMED,
AND PLESSEN ENTERPRISES, INC.,**

COUNTERCLAIM DEFENDANTS.

**WALEED HAMED, AS EXECUTOR OF THE
ESTATE OF MOHAMMAD HAMED,**

PLAINTIFF,

v.

UNITED CORPORATION,

DEFENDANT.

MOHAMMAD HAMED,

PLAINTIFF,

v.

FATHI YUSUF,

DEFENDANT.

Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE
RELIEF, DECLARATORY
JUDGMENT, PARTNERSHIP
DISSOLUTION, WIND UP, and
ACCOUNTING**

CONSOLIDATED WITH

Civil No. SX-14-CV-287

**ACTION FOR DAMAGES and
DECLARATORY JUDGMENT**

CONSOLIDATED WITH

Civil No. SX-14-CV-378

**ACTION FOR DEBT and
CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter “Master”) on Hamed’s motion to strike Yusuf’s “revised BDO report” claim.¹ Yusuf filed an opposition and Hamed filed a reply thereafter.

BACKGROUND

In 2016, Yusuf submitted a report prepared by his accounting expert, Fernando Scherrer of BDO Puerto Rico, P.S.C. (hereinafter “BDO”), titled “Report of Historical Withdrawals and Distributions of the Partners and Proposed Allocation to Equalize Partnership Distributions,” dated August 31, 2016 (hereinafter “BDO Report”). Subsequently, Hamed filed, *inter alia*, a motion to strike the Yusuf’s accounting expert. In an order dated July 21, 2017 (hereinafter “July 21, 2017 Order”), the Court entered an order whereby the Court, *inter alia*, denied without prejudice Hamed’s motion to strike Yusuf’s accounting expert. In its July 21, 2017 Order, the Court stated:

At the hearing, Hamed presented extensive testimony from several witnesses to the effect that the BDO report, supported by the report’s own disclaimers, is unreliable as an expert accounting report and fails the test for admissibility under Virgin Islands Rule of Evidence 702 as defined in *Antilles School, Inc. v. Lembach*, 64 V.I. 400 (V.I. 2016) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.D. 579 (1993). As such, Plaintiff [Hamed] asserts that the report must be stricken.² Defendants [Yusuf and United] responded that the Motions are premature in that the reports were submitted to the Master only as part of Defendants’ proposed accounting and distribution plan, and are not a part of the record. Further, Defendants state that the BDO report represents only a preliminary accounting based on information available at the time, and will be supplemented upon completion of additional discovery. Both parties agree that more discovery is required to adequately present their respective claims.

While Plaintiff took the opportunity at the recent hearing to present evidence in the nature of a pretrial motion in limine, a determination of trial admissibility of the testimony of the author(s) of the reports in issue, and of the reports themselves, is premature. The primary purpose of conducting a *Daubert* hearing pursuant to V .I. R. Evid. 104 is to permit the trial court to act as gatekeeper to prevent a jury from hearing

¹ The Master was appointed by the Court to “direct and oversee the winding up of the Hamed-Yusuf Partnership” (Sept. 18, 2015 order: Order Appointing Master) and “make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination.” (Jan. 7, 2015 order: Final Wind Up Plan) The Master finds that that Hamed’s instant motion to strike Yusuf’s “revised BDO report” claims falls within the scope of the Master’s report and recommendation given that these claims are alleged debt owed by Yusuf and Hamed to the Partnership (or in other words, potential Partnership Assets).

inadmissible testimony. Because the Court, by Memorandum Opinion and Order entered contemporaneously herewith, strikes both Plaintiffs and Defendants' demands for trial by jury, that concern is not present. Further, the ability of the Master and the Court to evaluate the reports and ascribe to them only such weight as they deserve, militates against striking the reports at this stage of the litigation.³

² No evidence was presented at the bearing regarding the Integra report, which Plaintiff challenges as failing the last two of the three-prong test for admissibility: qualifications, reliability and fit. Because the same issues are involved, both Motions are treated together for purposes of this Order.

³ See, e.g., "The Court also deferred ruling on some of the motions involving expert testimony, as the judge need not serve as gatekeeper for himself." *Eames v. Bedor*, 2012 N.H. Super. LEXIS 15, *7 (N.H. Super. Ct. 2012) (citing *Traxys N. Am., LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011)).

On October 30, 2017, Yusuf filed his amended accounting claims limited to transactions occurring on or after September 17, 2006 (hereinafter "Amended Accounting Claims"), and included, *inter alia*, Exhibit J-2: Revised schedules for BDO Report based on limitations of accounting order² (hereinafter "Exhibit J-2"). Exhibit J-2³ is a one-page document that purportedly shows, *inter alia*, the total net withdrawals in the total amount of \$9,624,035.74 by the Hameds, and in the total amount of \$4,524,397.30 by the Yusufs. Thereafter, Hamed filed this instant motion to strike.

DISCUSSION

In his motion, Hamed pointed out that, Yusuf "[u]ndaunted 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."⁴ (Motion, p. 4). As such, Hamed moved to strike the "revised BDO Report" because "(1) it is still based on the same unreliable records

² In a memorandum opinion and order dated July 21, 2017, the Court ordered, *inter alia*, that "the accounting in this matter, to which each partner is entitled under 26 V.I.C. § 177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C. § 71(a), based upon transactions that occurred on or after September 17, 2006. *Hamed v. Yusuf*, 2017 V.I. LEXIS 114, *44-45 (V.I. Super. Ct., July 21, 2017) (hereinafter, "Limitation Order").

³ Exhibit J-2 is titled "Summary calculation of Additional Income as a result of withdrawals from Supermarkets' accounts (or partnership's accounts) - January 1994 to August 2014 (Including adjustments for withdrawals before 9/17/2006 as instructed by the Court)." (Motion, Exhibit 6; Opp, Exhibit J-2)

⁴ Hamed attached a copy of the revised BDO Report he referenced as Exhibit 6 to his motion, which is identical to Exhibit J-2.

and faulty ‘lifestyle’ analysis that Judge Brady rejected, and (2) it attempts to invade the decision-making process now assigned to the Special Master.” (Id, at p. 2) In his opposition, Yusuf pointed out that “Hamed mischaracterize[d] Exhibit J-2 as a ‘revised BDO Report’ because Exhibit J-2 “is not a ‘Report’ revised or otherwise.”⁵ (Opp., p. 2) Instead, Yusuf addressed Exhibit J-2 as “Revised BDO Calculations.”⁶ Yusuf argued that “[t]here is no need for the Master to strike the Revised BDO Calculations at this stage of the proceedings as it relates to the historical withdrawals between the Partners for which additional discovery is needed and although revised to reflect the limitation imposed by the Court as to transactions occurring on or after September 17, 2006, it remains preliminary based upon the information currently available.” (Id., at pp. 2-3) Yusuf noted that the “Revised BDO Calculations were prepared without the benefit of deposition testimony and additional written discovery following the discovery stay” and that “[i]t is anticipated that additional discovery will yield information necessitating further revisions to these calculations.” (Id., at p. 16) Thus, Yusuf concluded that “challenges to the Revised BDO Calculations are premature just as Judge Brady found Hamed’s challenges to the Original BDO Report premature” and that “efforts to strike the Revised BDO Calculations are unnecessary as the Master may ascribe the weight and value he sees fit to any particular allocations and thus, it does not invade the province of the Master.”

⁵ Yusuf explained that:

...It is merely a compilation exhibit which adjusts the initial preliminary allocations to include only those allocations which occurred on or after September 17, 2006 as required by the Court following its July 21, 2017 Order limiting the accounting claims (“Limitation Order”). Yusuf anticipates filing a Revised BDO Report pursuant to the provisions of the Joint Stipulated Discovery Plan following discovery. Hence, to clarify the nomenclature:

- a) the BDO Report attached as Exhibit J along with its supporting Tables and documentation to Yusuf’s Accounting Claims and Proposed Distribution Plan submitted on September 22, 2016 (and later supplemented on December 7 and 12, 2016) (“Yusuf’s Original Claims”) is referred to as the “Original BDO Report”; and,
- b) Exhibit J-2 to Yusuf’s Amend Claims which Hamed seeks to strike is referred to hereafter [sic] as “Revised BDO Calculations.” An additional copy is attached for the Master’s convenience. (Opp., p. 2)

⁶ *See, Id.*

(Id.) In his reply, Hamed argued that “Yusuf now submits a [revised BDO Report], reduced from 62 pages to a 1 page accounting spreadsheet” but the “revised spreadsheet is still defective, as it is nothing more than a simple invasion into the tasks assigned to the Special Master” and that “additional ‘discovery’ will not correct this obvious flaw.” (Reply, p. 2) As such, Hamed argued that Exhibit J-2 “should be stricken now, allowing the Master to make all decisions on each individual claim, rather than allowing BDO to try grouping such findings it made into a single claim.” (Id., at p. 4)

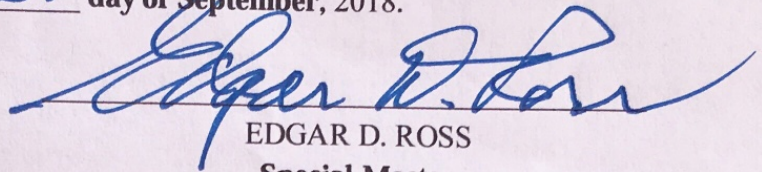
The Master must note at the outset that while Hamed’s motion is titled “motion to strike Yusuf’s ‘revised BDO Report’ claim,” it appears that Hamed is actually seeking to strike Exhibit J-2, which he called the “revised BDO Report” while Yusuf called it the “revised BDO Calculations.” Since Yusuf has yet to submit a motion for a claim based on Exhibit J-2, the Master will treat Hamed’s motion as a motion to strike Exhibit J-2. Here, Yusuf admitted that the Revised BDO Calculations are not final but preliminary calculations, and that further discovery is necessary. As such, the Master finds it premature to strike it at this juncture. Furthermore, as the Court pointed out in its July 21, 2017 Order, “the ability of the Master and the Court to evaluate the reports and ascribe to them only such weight as they deserve, militates against striking the reports at this stage of the litigation.” (July 21, 2017 Order, p. 2) Thus, the Master will deny Hamed’s motion to strike without prejudice.

CONCLUSION

Based on the foregoing, the Master will deny Hamed’s motion to strike without prejudice. Accordingly, it is hereby:

ORDERED that Hamed’s motion to strike Exhibit J-2 is **DENIED WITHOUT PREJUDICE**.

DONE and so ORDERED this 30th day of September, 2018.

A handwritten signature in blue ink, appearing to read "Edgar D. Ross", written over a horizontal line.

EDGAR D. ROSS
Special Master