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

WALEED HAMED, as the Executor of the Estate of MOHAMMAD 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

WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,*

vs.

UNITED CORPORATION, *Defendant.*

Consolidated with

Case No.: SX-2014-CV-287

WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff*

vs.

FATHI YUSUF, *Defendant.*

Consolidated with

Case No.: SX-2014-CV-278

FATHI YUSUF, *Plaintiff*,

vs.

MOHAMMAD A. HAMED TRUST, *et al*,

Defendants.

Consolidated with

Case No.: ST-17-CV-384

KAC357 Inc., *Plaintiff*,

vs.

HAMED/YUSUF PARTNERSHIP,

Defendant.

Consolidated with

Case No.: ST-18-CV-219

HAMED'S OPPOSTION TO YUSUF'S MOTION TO RECONSIDER THE ORDER STRIKING HIS Y-13 "PLAZA WEST GOING CONCERN" CLAIM

Hamed moved to strike Yusuf's Y-13 claim regarding Yusuf's alleged damages based upon the loss of the "going concern" value of Plaza Extra-West (as calculated by the Integra Report) for two reasons. The motion was based in part on the fact that the Partnership had no Plaza Extra-West *lease and hence the store could not have any value as going concern.*

The motion to strike was granted on November 14, 2018, based on the fact that there was no lease for Plaza Extra-West. On December 6, 2018, Yusuf moved to reconsider this Order, arguing (1) that it failed to consider arguments previously raised by Yusuf and (2) that its conclusion was based on a clear error of law.

For the reasons set forth herein, it is respectfully submitted that Yusuf's motion for reconsideration should be denied, as (1) it fails to raise any issue not previously addressed by the Court (despite asserting otherwise in its motion for reconsideration) and (2) there was no clear error of law in the Order striking this claim.

I. The Rule 6-4 Standard for Motion for Reconsideration

The applicable "reconsideration" process was discussed in a prior Order issued by the Special Master on September 24, 2018.[1] In that Order, it was first noted on page 7:

> Rule 6-4(b) provides that "[a] motion to reconsider must be based on: (1) intervening change in controlling law; (2) availability of new evidence; (3) the need to correct clear error of law; or (4) failure of the court to address an issue specifically raised prior to the court's ruling." V.I. R. CIV. P. 6-4(b)(1)-(4). Additionally, "[w]here ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court." Id.

At page 10, that Order then clarifies what constitutes a "clear error of law":

> When assessing a motion for reconsideration on the ground based on 'the need to correct clear error of law,' the court may grant such a motion when the prior decision involved the incorrect application of law or incorrect analysis to a proper application of law." Daybreak, Inc. v. Freidberg, 2018 V.I. LEXIS 84, *5 (V.I. Super.

[1] Attached are copies of the pertinent pages from that Order. See **Exhibit 1**.

> Ct. Aug. 21, 2018); see also, Smith, 2018 V.I. LEXIS at *15. Additionally, when assessing these types of motions for reconsideration, courts have "required the moving party to provide 'the specific legal authority it claims the [c]ourt either failed to apply correctly or failed to apply in totum in its original decision." Daybreak, 2018 V.I. LEXIS 84 at *5 (quoting Smith, 2018 V.I. LEXIS at *15-16).

As Judge Brady held last month in *Velasquez v. United Corp.*, No. SX-16-CV-043, 2018 WL 6177294 (V.I. Super. Nov. 16, 2018):

> "Generally, '[a] motion for reconsideration is not a second bite of the apple... [Instead, it serves] to focus the parties on the original pleadings as the "main event" and to prevent parties from filing a second motion with the hindsight of the [C]ourt's analysis covering issues that should have been raised in the first set of motions.'". Relief through such a motion is "an extraordinary remedy" that should be used sparingly. A party moving for reconsideration has a "heavy burden to establish an error sufficiently serious to merit amendment."

Id., at *1 (Citations omitted). Judge Brady then went on to state as to the "clear error" prong of Rule 6-4:

> Manifest injustice must amount to more than "mere disagreement with the Court's interpretation" of the law. In the context of a motion to reconsider, manifest injustice generally means that "the Court overlooked some dispositive factual or legal matter that was presented to it."

Id., at *3 (Citations omitted).

With this standard in mind, it is appropriate to address Yusuf's motion for reconsideration.

II. Yusuf's arguments fail to meet the required Rule 6-4 standard

In the November 14th Order rejecting Yusuf's Y-13 claim, the Special Master first set forth in detail Yusuf's arguments regarding the Plaza Extra-West store -- on page 6-7 of the Order. In particular, the Order noted the following "Yusuf" argument on page 7:

> Lastly, Yusuf noted in a footnote that "[w]hile Yusuf did take that position [that Plaza Extra-West could not be sold as a going concern because of the absence of a commercial lease], he later recognized that his position was incorrect, and instead argued that both stores should be sold in a closed bid between Hamed and Yusuf." (Id.) As such, Yusuf requested the Master to deny Hamed's motion to strike Yusuf Claim No. Y-13. (Footnote omitted).

In addressing this argument, the Special Master's November 14th Order took express note of Yusuf's prior admission that the Plaza West store had no lease so it could not be sold as a going concern.[2] The Order then proceeded to address Yusuf's argument about his alleged "change in position," holding on page 10:

> Yusuf claimed in his opposition that "he later recognized that this position was incorrect, and instead argued [in his response to Hamed's comments concerning the Court's proposed wind-up plan, dated October 28, 2014] that both stores should be sold in a closed bid between Hamed and Yusuf." (Opp., p. 6) However, Yusuf never stated that he "recognized that this position was incorrect" in the October 28, 2014 document; **instead, the October 28, 2014 document shows that Yusuf suggested a closed bid sale for Plaza Extra-West without any discussion of his alleged change of position with regards to the "going concern" value of Plaza Extra-West.** As such, the Master finds that Yusuf has already conceded that Plaza Extra-West cannot be sold as a going concern. (Emphasis added).

In short, the Special Master found that while Yusuf changed his mind about how he wanted the Court to transfer the Plaza Extra-West store, he did not "change his mind" about the fact that the West store could not be sold as a "going concern" since it did not have a lease. Of course, he could not change his mind about an undisputed fact, as that store location had no lease.

Despite the clear language of the Court's Order, Yusuf still insists this Court did not properly address his arguments for two separate reasons. Hamed will address both of these arguments.

A. Yusuf's Rule 6-4(3) "Clear Error" Argument

Yusuf first resorts to arguing that this Court's finding that Yusuf was bound by his prior factual admission is based on an improper application of the doctrine of judicial

[2] *This fact remains undisputed* and is the crux of Hamed's motion to strike this claim. Even the Integra Report conceded this point, noting its valuation was contingent on the business having a lease that does not in fact exist.

estoppel, which he asserts constitutes "clear error." **However, the November 14th Order did not rely upon the doctrine of judicial estoppel in reaching its holding.** To the contrary, **the Order explicitly relied upon Yusuf's admission – in this case and on this exact issue -- that the store could not be sold as a going concern because it had no lease.**

Thus, the entire "judicial estoppel" argument is *completely irrelevant*, as the legal standard regarding *judicial admissions* is not based on any such estoppel concept. Indeed, as Judge Brady previously held in this case in *Hamed v Yusuf,* 58 V.I. 117, 130, 2013 WL 1846506, at *7 (V.I. Super. Apr. 25, 2013), *aff'd in part, vacated in part,* 59 V.I. 841, 2013 WL 5429498 (V.I. Sept. 30, 2013):

> The evidentiary record before the Court includes the testimony of witnesses and documentary exhibits. Those exhibits include **prior filings of the parties in this case by which the parties are bound by virtue of the doctrine of judicial admissions.** *Berckley Inv. Group, Ltd. V. Colkitt,* 455 F.3d 195, 211 n. 20 (3d Cir.2006); *Partita v. IAP Worldwide Serv., VI, Inc.,* 368 F.3d 269, 275 (3d Cir. 2004). (Emphasis added.)

See also, Arlington Funding Services, Inc. v. Geigel, 51 V.I. 118, 133 (V.I. 2009) (recognizing that parties "are bound by the admissions in their pleadings"). Thus, there was no "clear error" as suggested by Yusuf.

B. Yusuf's Rule 6-4(4) claim that the Special Master failed to consider his arguments

Yusuf then attempts to throw more mud in the water by arguing that the Special Master 'misunderstood' his argument about Yusuf "changing his mind" about his prior admission, which constitutes his assertion that the Special Master failed to address this argument, warranting Rule 6-4(4) relief. In this regard, Yusuf argues at length on pages 6-7 of his motion for reconsideration that his "going concern" loss includes setting aside the KAC357 lease now in place on the former Plaza Extra-West store, and then imposing

a new lease on the land owner (who is not a party to these proceedings). This argument fails for two reasons.

First, Subsection (4) of Rule 6-4 allows a party to seek reconsideration of an issue it raised but which was not addressed by the Court. However, that rule requires specificity in pointing out the "overlooked" argument, stating as follows:

> Where ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court.

However, Yusuf failed to point out any such "specific" overlooked language in his motion. The reason why is simple--a review of Yusuf's initial opposition memorandum on Claim Y-13 reveals that this argument regarding the "improper KAC lease" was never even mentioned in that memorandum.[3] See **Exhibit 2**. Hence, as this argument was not previously raised, as required by Rule 6-4(4), there was nothing for this Court to overlook.

Second, the November 14th Order *did* fully address the claim Yusuf raised, as it recognized that Yusuf **was trying to argue** that he "changed his mind" in a pleading dated October 12, 2014, allegedly claiming his prior position "was incorrect." After recognizing this argument, the November 14th Order then rejected it by expressly pointing out:

> . . . the October 28, 2014 document shows that Yusuf suggested a closed bid sale for Plaza Extra-West **without any discussion of his alleged change of position with regards to the "going concern" value of Plaza Extra-West.** (Emphasis added).

---

[3] Yusuf's 'new' argument here is really just another attack on the validity of the KAC357 lease for this store. However, this lease has been *repeatedly* found to be valid by both Judge Brady and Judge Willocks, despite Yusuf's frantic efforts to the contrary. *Hamed v. Yusuf*, 62 V.I. 38, 48, 2014 WL 3697817, at *6 (V.I. Super. July 22, 2014) (Brady, J.) *reconsideration denied* Dec. 5, 2014; *Yusuf on behalf of Plessen Enterprises, Inc. v. Hamed*, No. SX-13-CV-120, 2016 WL 9454299, at *7 (V.I. Super. Apr. 19, 2016) (Willocks, J.). Thus, it is unknown why Yusuf would expect the Special Master to ignore the lease as affirmed in these multiple decisions even if Yusuf had previously raised this issue in the instant motion.

Thus, the Order did acknowledge Yusuf's argument, before disposing of it *in full*.

Indeed, while Yusuf might have wanted to change his mind about how the wind-up should have proceeded, he cannot "change his mind" about an undisputed fact—that he admitted to—in order to try to create a lease where none existed. Similarly, he cannot value a business as a "going concern" unless it has a lease (or deed) giving it the right to possess the property for a predetermined period of time upon which the valuation is based. Thus, the undisputed fact that Plaza Extra-West had no such lease bars Yusuf's Y-13 claim.

C. Summary

In short, despite Yusuf's repetitive arguments in his motion for reconsideration, Yusuf failed to show "clear error" or identify an argument it raised that the Special Master did not address. To the contrary, Yusuf's arguments regarding the inability to value the Plaza Extra-West store as "going concern without a lease were fully considered and properly rejected in the November 14th Order.

III. Conclusion

For the reasons set forth herein, it is respectfully submitted that this Court should deny Yusuf's motion for reconsideration of its November 14, 2018, Order that rejected Yusuf's Y-13 claim.

Dated: December 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2018, I served a copy of the foregoing by email, as agreed by the parties, on:

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Special Master
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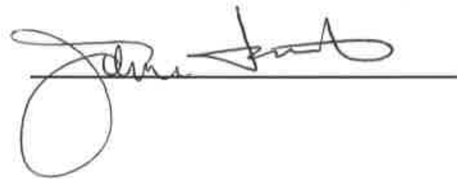

EXHIBIT 1

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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, MUFEED HAMED, HISHAM HAMED, AND PLESSEN ENTERPRISES, INC.,** COUNTERCLAIM DEFENDANTS.	**Civil No. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, PARTNERSHIP DISSOLUTION, WIND UP, and ACCOUNTING**
WALEED HAMED, AS EXECUTOR OF THE ESTATE OF MOHAMMAD HAMED, PLAINTIFF, v. **UNITED CORPORATION,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-287** **ACTION FOR DAMAGES and DECLARATORY JUDGMENT**
MOHAMMAD HAMED, PLAINTIFF, v. **FATHI YUSUF,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-378** **ACTION FOR DEBT and CONVERSION**

ORDER

decision within 14 days after the entry of the ruling, unless the time is extended by the court" and that "[e]xtensions will only be granted for good cause shown." V.I. R. CIV. P. 6-4(a). Here, Yusuf filed this instant motion on October 15, 2018—more than 14 days after the entry of the September 24, 2018 Order, and has not shown good cause for an extension. Thus, Yusuf's motion was untimely and did not meet the procedural requirement of Rule 6-4.[7] Assuming, *arguendo*, that Yusuf's motion was timely filed, the Master will address whether Yusuf's motion met the substantive requirement.

2. The Substantive Requirement

Rule 6-4(b) provides that "[a] motion to reconsider must be based on: (1) intervening change in controlling law; (2) availability of new evidence; (3) the need to correct clear error of law; or (4) failure of the court to address an issue specifically raised prior to the court's ruling." V.I. R. CIV. P. 6-4(b)(1)-(4). Additionally, "[w]here ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court." Id. Here, as a preliminary matter, Yusuf did not explicitly ground his motion for reconsideration on any of the bases enumerated in Rule 6-4(b). He did, however, contend that: (A) "the Master overlooked Walleed [sic] Hamed's sworn interrogatory answers [dated May 15, 2018] that are tantamount to an admission by Waleed Hamed that the $1.6 million dollar [sic] debt to Mr. Yusuf was a real one (albeit one that Hamed contends is unenforceable)" and; (B) that the September 24, 2018 Order failed to recognize "that it is only '[i]n very rare cases' that 'the doctrine of laches may be applied when the statute of limitations has not run'" and that "regardless of whether a court decides a statute of limitations defense or a laches defense, it

[7] Rule 6-4 applies in this instance instead of Virgin Islands Rules of Civil Procedure 59 and 60 because the September 24, 2018 Order was not a final judgment or order. As noted above, the Master was appointed to "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)

necessarily must determine when the claim in question accrued." (Motion, pp. 2-3) In doing so, Yusuf indicated an intent to ground his motion for reconsideration in Rule 6-4(b)'s second and third bases, respectively, and the Master will address Yusuf's motion accordingly. V.I. R. CIV. P. 6-4(b)(2)-(3).

A. Waleed Hamed's May 15, 2018 Interrogatory Response

In his motion, Yusuf claimed that Waleed Hamed's May 15, 2018 interrogatory response[8] (hereinafter "Waleed Hamed's May 15, 2018 Interrogatory Response") is "tantamount to an admission by Waleed Hamed that the $1.6 million dollar [sic] debt to Mr. Yusuf was a real one." (Motion, p. 2) Hamed filed his motion to preclude Yusuf's for $1,600,000.00 of the $1,778,103.00 on December 27, 2017, Yusuf filed his opposition January 19, 2018, and Hamed filed his reply on January 22, 2018. Although Waleed Hamed's May 15, 2018 Interrogatory Response was submitted after parties already filed their respective briefs, as of the date Waleed Hamed submitted his May 15, 2018 interrogatory response, the Master had yet to rule on Hamed's motion. Thus, while Waleed Hamed's May 15, 2018 Interrogatory Response was "new evidence" after Yusuf filed his opposition, it is not "new evidence" at the time the Master ruled on Hamed's motion in September 2018; Yusuf had ample opportunity to supplement his opposition with Waleed Hamed's May 15, 2018 Interrogatory Response prior to the Master's ruling. Nevertheless, at this time, the Master will treat Yusuf's motion for reconsideration based on new evidence—Waleed Hamed's May 15, 2018 Interrogatory Response.

Upon review of Waleed Hamed's May 15, 2018 Interrogatory Response, the Master finds Yusuf's argument unpersuasive. First, in Waleed Hamed's May 15, 2018 Interrogatory

[8] Exhibit A of Yusuf's motion; Exhibit A of Hamed's opposition.

$1,600,000.00 debt; instead, Waleed Hamed admitted that $1,600,000.00 was part of the calculation but not the final calculation of all the "true ups." Thus, the Master cannot conclude that Waleed Hamed admitted to the $1,600,000.00 debt in his May 15, 2018 Interrogatory Response and therefore, the Master will deny Yusuf's motion for reconsideration based on new evidence.

B. The Doctrine of Laches

In his motion, Yusuf claimed that the September 24, 2018 Order failed to recognize "that it is only '[i]n very rare cases' that 'the doctrine of laches may be applied when the statute of limitations has not run'" and that "regardless of whether a court decides a statute of limitations defense or a laches defense, it necessarily must determine when the claim in question accrued." (Motion, pp. 2-3) Thus, the Master will treat Yusuf's motion for reconsideration based on the need to correct clear error of law.

When assessing a motion for reconsideration on the ground based on 'the need to correct clear error of law,' the court may grant such a motion when the prior decision involved the incorrect application of law or incorrect analysis to a proper application of law." *Daybreak, Inc. v. Freidberg*, 2018 V.I. LEXIS 84, *5 (V.I. Super. Ct. Aug. 21, 2018); *see also, Smith,* 2018 V.I. LEXIS at *15. Additionally, when assessing these types of motions for reconsideration, courts have "required the moving party to provide 'the specific legal authority it claims the [c]ourt either failed to apply correctly or failed to apply in totum in its original decision." *Daybreak*, 2018 V.I. LEXIS 84 at *5 (quoting *Smith,* 2018 V.I. LEXIS at *15-16). Here, Yusuf essentially argued that the Master's application and analysis as to the legal principle of laches were both incorrect—to wit, (1) that laches should not have applied when the statute of limitations has not run; (2) that the Master should have determined the accrual date of the $1,600,000.00 debt before determining whether laches applied; and (3) that the

15, 2018 Interrogatory Responses; and (2) as the Master found in his September 24, 2018 Order, Bakir Hussein's Affidavit, dated August 10, 2014, did not provide evidence that Waleed Hamed personally admitted to the $1,600,000.00 debt. As such, there is no new accrual date based on the acknowledgment of the $1,600,000.00 debt, and Yusuf's claim for $1,600,000.00 remains barred by the Court's Limitation Order. Finally, the Master has already addressed in his September 24, 2018 Order the applicability of the Court's Limitation Order to bar Yusuf's claim for $1,600,000.00. A motion for reconsideration "is not a vehicle for registering disagreement with the [Master's] initial decision,[or] for rearguing matters already addressed by the court." *Worldwide Flight Services*, 51 V.I. at 110 (internal citation omitted); *see also, In re Infant Sherman*, 49 V.I. at 457. Based on the foregoing, the Master will deny Yusuf's motion for reconsideration based on the need to correct clear error of law.

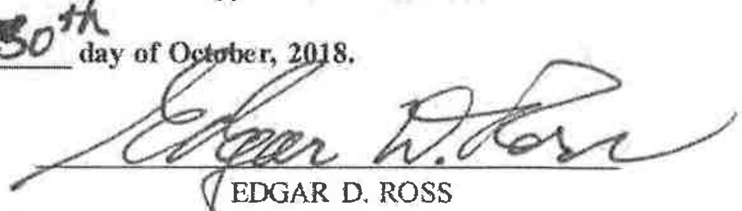
CONCLUSION

For the reasons stated above, the Master will deny Yusuf's motion for reconsideration of the Master's September 24, 2018 Order granting and striking Hamed's motion to preclude Yusuf's claim for $1,600,000.00 of the $1,778,103.00. Accordingly, it is hereby:

ORDERED that Yusuf's motion for reconsideration of the Master's September 24, 2018 Order granting and striking Hamed's motion to preclude Yusuf's claim for $1,600,000.00 of the $1,778,103.00 is **DENIED**. **And** it is further:

ORDERED that Hamed's request for costs for his opposition is **DENIED**.

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



EDGAR D. ROSS
Special Master

EXHIBIT 2

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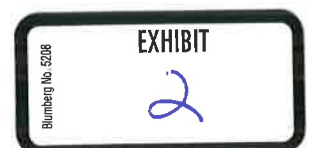
IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATION, Defendants/Counterclaimants, v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC., Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING Consolidated With
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY JUDGMENT
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	CIVIL NO. SX-14-CV-278 ACTION FOR DEBT AND CONVERSION

YUSUF'S BRIEF IN OPPOSITION TO MOTION TO
STRIKE YUSUF'S PLAZA WEST/INTEGRA CLAIM



INTRODUCTION

Fathi Yusuf ("Yusuf") has submitted a claim for one half of the going concern value of Plaza Extra-West, as determined by the Integra Realty Resources Report (the "Integra Report") – i.e. one half of $8,770,000, or $4,385,000. *See* § VII of Yusuf's Amended Accounting Claims Limited to Transaction Occurring on or after September 17, 2006, submitted on October 30, 2017 ("Yusuf's Amended Claims"). As the Master knows, the business of the Plaza Extra-West store was owned by a partnership in which Hamed and Yusuf each had a 50% interest, and the land on which the business operated was (and still is) owned by a corporation, Plessen Enterprises, Inc. ("Plessen"), whose shares are owned equally by members of the Hamed and Yusuf families.

Hamed seeks to strike Yusuf's claim for one half of the going concern value of the Plaza Extra-West business on two grounds. First, he argues that the claim is barred by certain language in the Court's Wind Up Order. Second, he argues that the Integra Report used to support the claim is fatally defective because it assumes that there was a lease between Plessen and the partnership in making the determination of the going concern value of the West store, when there was no such lease. Both arguments are without merit, and the second has already been rejected by the Honorable Douglas A. Brady in this case.

ARGUMENT

I. The Wind Up Order Does Not Bar this Claim.

Hamed first argues, in a conclusory way, that language in Judge Brady's January 7, 2015 Order Adopting Final Wind Up Plan (the "Wind Up Order"), which provides that the West store would be transferred "free and clear of any claims of Yusuf or United," bars this claim of Yusuf.

Hamed reads this provision as preventing Yusuf from asserting his claim as partner for one half of the going concern value of the West store. That argument can readily be exposed as meritless. What this provision means is that Yusuf could not assert a claim on store assets, including store personalty and realty. That is to say, he could not create a cloud on title to assets or inventory of the Plaza Extra-West store. It says nothing about partnership claims by Yusuf against Hamed for his taking of the West business without payment of any consideration for his half of the business.

The Wind Up Order and the Final Wind Up Plan it approved (the "Plan") also had similar language that Plaza Extra-East would be transferred "free and clear of any claims or interest of Hamed." *See* Wind Up Order at p. 3 and Plan at p.6. Yet Hamed is still asserting claims against Yusuf with respect to that store. *See, e.g.*, Hamed's Amended Claim Nos. 11 ("100 shopping carts purchased for Plaza Extra-East"), 12 ("Replacement of four condensers, plus associated costs for shipping, delivery and installation"), 23 ("2015 Workers' Compensation payment for Plaza East"), 24 ("2015 Health permit payments for Plaza East"), and 25 ("2015 Business License payment for Plaza East").

Clearly, the Wind Up Order and Plan contemplated that these stores would be transferred "free and clear" of any competing claim of ownership but without prejudice to the accounting claims that the Court expressly contemplated would be filed in the future. *See* Plan at § 9, Step 6 ("Within forty-five (45) days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan…").

II. Hamed's Attack on the Integra Report is Without Merit.

Hamed's second argument, which attacks the validity of the Integra Report, is also devoid of merit. As equal Partners, both Hamed and Yusuf had ownership interests in the "going

concern" value of Plaza Extra-West. A "going concern" value recognizes the many advantages that an established business has over a new business, such as avoidance of start-up costs and improved operating efficiency. In this sense, the "going concern" value of a business represents the difference between the value of an established business and the value of a start-up one. "Going concern" value also indicates the value of a business as an operating, active whole, rather than merely as distinct items of property.[1]

The Integra Report determines, by methods consistent with common appraisal practice, that the market value of the Plaza Extra-West supermarket business was $8,770,000 as of April 30, 2014. *See* **Exhibit A**, Declaration of James Andrews, ¶ 4; Integra Report, p. 55, attached to Declaration. The Integra Report used the income capitalization approach as one of the methods to determine value. *See id.* at ¶ 7. Under that method, the annual earnings generated by the business are multiplied by a capitalization rate to determine value. To determine those earnings, Integra made the eminently reasonable and necessary assumption that whoever operated the store would have to pay rent to Plessen (i.e., they would not get to occupy the premises free of charge), thereby reducing the store's annual income. Integra's calculation of fair market rent is set forth in another report contemporaneously provided to the Master that Hamed is not challenging.

Hamed argues that by assuming a buyer of the Plaza Extra-West business would have to pay rent to occupy the premises, the Integra Report is fatally flawed. This is so, according to Hamed's tortured argument, because "there never was a lease for the Plaza West store."

[1] Preservation of the going concern value is recognized in many contexts including bankruptcy proceedings, which seek to preserve such value when reorganizing businesses in order to maximize recoveries for creditors and shareholders (11 U.S.C. § 1101 et seq.).

(Hamed's Motion at 2). Since Hamed and Yusuf were in effect both lessor and operator of the business, they did not bother to cause the store they owned jointly as partners to pay rent to the landlord that they owned jointly in corporate form. But as the attached declaration of the Integra expert makes clear, despite the absence of a lease, "[C]ommon appraisal practice required [Integra] to determine a fair market rental value for the property occupied by Plaza Extra-West and to reflect that as an expense under the income approach that was utilized (along with the asset value approach) to determine the value of the business." *See* **Exhibit A,** Declaration of James Andrews, ¶ 7. Had it not made this assumption, Integra's "valuation of the Plaza Extra-West business would have been inflated . . .." *See id.* at ¶ 7.[2]

Significantly, Hamed then makes the implausible and completely unsupported assertion that because Hamed and Yusuf did not bother to have the business pay rent to the corporation they owned, "the Plaza West store has no 'ongoing value' . . .." Motion at 3. What Plaintiff is saying, in other words, is that a supermarket business that generated millions annually had zero value. As the Andrews Declaration states, that contention is "untenable." *See* Exhibit A, ¶ 8.

In any event, Hamed made precisely the same attack on the Integra Report in an October 3, 2016 Motion to Strike Business Valuation Report (Integra) that was denied by Judge Brady, without prejudice, in an Order dated July 21, 2017. *See* **Exhibit B,** Hamed's Motion to Strike Business Valuation Report (Integra) and **Exhibit C.**, Order Denying

[2] As the Andrews Declaration further points out, the definition of Fair Market Value in the Integra Report "assumes a hypothetical sale [of the business] between a willing seller and willing buyer." Exhibit A, ¶ 7. The assumption that the hypothetical buyer of the business would have an obligation to pay rent at market levels in order to operate the business in that location "is logical and consistent with appraisal practice," because a reasonably prudent owner of land which was occupied by the business would "require[] the payment of market rent," and in turn "the amount of rent to be paid by a reasonably prudent prospective buyer of the business would affect the amount it was willing to pay for the business." *Id.* at ¶ 7.

Without Prejudice Plaintiff's Motion to Strike Business Valuation Expert (Integra) and Accounting Expert (BDO). The Court noted that since the Master and the Court would be triers of fact, and in light of their ability to "evaluate the reports and ascribe to them only such weight as they deserve," the motion to strike the Integra Report should be denied.[3] *See* Exhibit C, p. 2.

For all the foregoing reasons, the Motion should be denied.

Respectfully submitted,

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DATED: January 11, 2018 By:

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[3] Hamed also argues that in his initial proposed dissolution plan, Yusuf argued that the Plaza Extra-West store could not be sold as a going concern because of the absence of a commercial lease, and that the Plaza Extra-Tutu Park store likewise could not be sold as a going concern because less than 5 years remained on the lease with the landlord, Tutu Park, Ltd. *See* Motion at p. 4. While Yusuf did take that position in his initial Proposed Plan For Winding Up The Partnership attached as Exhibit A to his April 7, 2014 Memorandum in Support of Motion to Appoint Master For Judicial Supervision of Partnership Winding Up, he later recognized that this position was incorrect, and instead argued that both stores should be sold in a closed bid between Hamed and Yusuf. *See* **Exhibit D**, Yusuf's Response to Hamed's Comments Concerning the Court's Proposed Wind-up Plan (p.1-7) and the Proposed Plan attached thereto as Exhibit 3 (p.6-7). The Court adopted that approach as to Plaza Extra-Tutu Park, but declined to order a closed bid as to the Plaza Extra-West store.

CERTIFICATE OF SERVICE

It is hereby certified that on this 11th day of January, 2018, I served a true and correct copy of the foregoing **YUSUF'S BRIEF IN OPPOSITION TO MOTION TO STRIKE YUSUF'S PLAZA WEST/INTEGRA CLAIM,** which complies with the page and word limitations set forth in Rule 6-1(e), via the Case Anywhere docketing system:

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