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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

THIS MATTER came before the Special Master (hereinafter "Master") on United's motion for reconsideration of the Master's May 5, 2021 memorandum opinion and order and judgment as to the past due rent the Partnership owes United for the use of Bay 5 of the United Shopping Plaza, filed on May 25, 2021.[1] In response, Hamed[2] filed an opposition. As of the date of this order, United has not filed a reply.

BACKGROUND

A more complete history of United's claim for the past due rent the Partnership owes United for the use of Bay 5 of the United Shopping Plaza is recounted in the memorandum opinion entered on May 5, 2021. Nevertheless, a recap is appropriate here.

The past due rent the Partnership owes United for Bay 5 was part of Yusuf Claim No. Y-2: past due rent to United for Bay 5 and Bay 8 of the United Shopping Plaza (hereinafter "Bay 5" and "Bay 8" respectively). Regarding Yusuf Claim No. Y-2, United claimed that it is entitled to recover past due rent from the Partnership for the use of Bay 5 and Bay 8 in the total amount of $793,984.38. According to Yusuf's amended accounting claims,[3] Yusuf and United's August 12, 2014 motion for partial summary judgment, and United's June 22, 2019 revised motion for summary judgment, the breakdown of the past due rent for Bay 5 and Bay 8 was as follows: $271,875.00, the total amount of past due rent for Bay 5 from May 1, 1994 through July 31, 2001,

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[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 United's claim for the past due rent the Partnership owes United for the use of Bay 5 of the United Shopping Plaza falls within the scope of the Master's report and recommendation given that said past due rent is an alleged debt owed by the Partnership to United.

[2] To clarify, in this memorandum opinion, whenever references are made to "Hamed," the Master is referencing the plaintiff/counterclaim defendant party, and not the individual Mohammad Hamed.

[3] In Yusuf's amended accounting claims, Yusuf referenced Yusuf Declaration, dated August 12, 2014, at ¶¶ 21-25.

plus $323,515.63, the total amount of past due rent for Bay 8 from May 1, 1994 through September 30, 2002, and plus $198,593.75, the total amount of past due rent for Bay 8 from April 1, 2008 through May 30, 2013. More specifically, "[t]he Bay 5 Rent is calculated by multiplying the square feet occupied (3,125) by $12.00 for 7.25 years." (June 22, 2019 Revised MSJ, p. 6; SOF ¶29.)

On February 4, 2021, the parties appeared before the Master for a hearing on Yusuf Claim No. Y-2 and Yusuf Claim No. Y-4: prejudgment interest on the past due rent to United for Bay 5 and Bay 8. United and Hamed each presented witness testimony and exhibits. More specifically, the Master heard oral testimony from Fathi Yusuf, Maher Yusuf, and Waleed Hamed. At the conclusion of the hearing, the Master took the matter under advisement and ordered United and Hamed to file their respective proposed findings of facts and conclusions of law. Thereafter, the parties timely filed their post-hearing filings.

On May 5, 2021, the Master entered a memorandum opinion (hereinafter "May 5, 2021 Opinion") whereby the Master found that United is entitled to rent from the Partnership for the use of Bay 5 and Bay 8 in the total amount $647,851.57 and that United is not entitled to prejudgment interest for past due rent for Bay 5 and Bay 8, and contemporaneously entered an order and judgment consistent with the May 5, 2021 opinion (hereinafter "May 5, 2021 Judgment," and together with May 5, 2021 Opinion, "May 5, 2021 Ruling"). In the May 5, 2021 Opinion, the Master explained how he calculated the past due rent for Bay 5 and Bay 8:

> B. Rent Calculation
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> In the Rent Order,[4] the Court, based on Yusuf's September 9, 2013 affidavit (¶¶ 4-6) and Yusuf's April 2, 2014 deposition (86:8-12), concluded that the rent for Bay 1 was calculated at the rate of $5.55 per square foot for the period January 1, 1994 to May 4,

[4] In the May 5, 2021 Opinion, the "Rent Order" was defined as the memorandum opinion and order the Court entered on April 27, 2015 as to United's September 9, 2013 motion to withdraw rent and Hamed's May 13, 2014 motion for partial summary judgment.

2004. (Rent Order, p. 9.) The Court did not differentiate between the retail use versus the warehouse use of Bay 1 yet the testimony indicates that Bay 1 was utilized for both purposes. In the absence of any credible evidence to establish a reasonable and fair rental rate for the Partnership's use of Bay 5 and Bay 8, the Master will exercise the significant discretion he possesses in fashioning equitable remedies as the need arises and use this rate for the evaluation of the rent claimed by United for Bay 5 and Bay 8.

It is undisputed that the square footage of Bay 5 is 3,125 square feet and the square footage of Bay 8 is 6,250 square feet. As noted above, credible evidence indicates that the Partnership exercised dominion and control over Bay 5 and Bay 8 for the following periods: Bay 5-May 1, 1994 through July 31, 2001, which totals 7 years and 3 months, and Bay 8-May 1, 1994 through September 30, 2002 and April 1, 2008 to May 30, 2013, which totals 13 years and 7 months. Thus, applying $5.55 as the appropriate rate, the total rent due for Bay 5 would be $125,742.19 for the rental period May 1, 1994 through July 31, 2001 and the total rent due for Bay 8 would be $713,984.36 for the rental periods May 1, 1994 through September 30, 2002 and April 1, 2008 through May 30, 2013. In comparison to those numbers, the Master finds: (i) United's claim for past due rent for Bay 5 for the aforementioned rental period in the total amount of $271,875.00 unreasonable and not supported by evidence and (ii) United's claim for past due rent for Bay 8 for the aforementioned rental periods in the total amount of $522,109.38 reasonable and supported by evidence. Accordingly, the Master will adjust United's claim for the total past due rent for Bay 5 for the aforementioned period from $271,875.00 to $125,742.19, an amount that is reasonable and supported by evidence, and keep United's claim for the total past due rent for Bay 8 for the aforementioned rental periods at $522,109.38, for a total of $647,851.57.

(May 5, 2021 Opinion, pp. 41-44) (footnotes omitted.)[5]

On May 25, 2021, United filed this instant motion for reconsideration.

On June 8, 2021, the Master entered a memorandum opinion (hereinafter "June 8, 2021 Opinion") whereby the Master noted that "it has come to the Master's attention that there was a mistake arising from oversight—to wit, the Master's determination of the reasonableness of the

[5] In the May 5, 2021 Opinion, the Master noted that: (i) although "[t]he month of May 2013 was a day short of the full month since it ended on May 30, 2013 instead of May 31, 2013… for the purpose of the calculation of rent for Bay 8, the Master will treat May 1, 2013 through May 30, 2013 as a full month to keep the numbers simple"; and (ii) the rent calculation for Bay 8 is as follows:

$5.55 x 6,250 sq. ft. = $34,687.50 per year
$34,687.50 x 13 years = $450,937.50
($450,937.50/12 months) x 7 months = $263,046.88
$450,937.50 + $263,046.88 = $713,984.38.

(May 5, 2021 Opinion, p. 43, n.36-37.)

total past due rent for Bay 8 was based on the incorrect rent calculation for Bay 8," that "[i]n light of the correction, the Master will give United the opportunity to supplement its motion for reconsideration in the event that United wishes to extend his motion for reconsideration to the Master's determination of a reasonable rent for Bay 8," and that "[a]t this juncture, the Master will reserve ruling on United's motion for reconsideration.[6] On the same date, the Master

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[6] In the June 8, 2021 Opinion, the Master explained:

> …As noted above, in the May 5, 2021 Opinion, the Master found that "applying $5.55 as the appropriate rate, the total rent due for Bay 5 would be $125,742.19 for the rental period May 1, 1994 through July 31, 2001 and the total rent due for Bay 8 would be $713,984.36 for the rental periods May 1, 1994 through September 30, 2002 and April 1, 2008 through May 30, 2013." (May 5, 2021 Opinion, p. 43.) The Master noted that, as to Bay 8, "[t]he month of May 2013 was a day short of the full month since it ended on May 30, 2013 instead of May 31, 2013" but "[n]evertheless, for the purpose of the calculation of rent for Bay 8, the Master will treat May 1, 2013 through May 30, 2013 as a full month to keep the numbers simple." (Id.) The May 5, 2021 Opinion provided the rent calculation for Bay 8 as follows:[2]
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> > $5.55 x 6,250 sq. ft. = $34,687.50 per year
> > $34,687.50 x 13 years = $450,937.50
> > ($450,937.50/12 months) x 7 months = $263,046.88
> > $450,937.50 + $263,046.88 = $713,984.38
> >
> > (Id., at p. 43 n. 37.)
>
> The mistake was that, instead of using the annual rent amount ($34,687.50) and dividing it by 12 months to get the monthly rent amount, the total rent amount for 13 years ($450,937.50) was used, and resulted in an incorrect monthly rent amount for 7 months ($260,046.88), which ultimately resulted in the Master erroneously concluding that the "total rent due for Bay 8 would be $713,984.36" for the aforementioned rental periods, and thereby erroneously finding that "United's claim for past due rent for Bay 8 for the aforementioned rental periods in the total amount of $522,109.38 reasonable and supported by evidence," and thus keeping "United's claim for the total past due rent for Bay 8 for the aforementioned rental periods at $522,109.38." (Id, at pp. 43-44) (footnote omitted).
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> However, the Master now acknowledges that the correct rent calculation for Bay 8 should be as follows:
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> > $5.55 x 6,250 sq. ft. = $34,687.50 per year
> > $34,687.50 x 13 years = $450,937.50
> > (**$34,687.50**/12 months) x 7 months = **$20,234.38**
> > $450,937.50 + $20,234.38 = $471,171.88
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> Under the correct calculation—again, applying $5.55 as the appropriate rate, and using the annual rent amount ($34,687.50) and dividing it by 12 months to get the correct monthly rent amount—the total rent due for Bay 8 for the aforementioned rental periods would be $471,171.88. In comparison to this number, the Master finds that United's claim for past due rent for Bay 8 for the aforementioned rental periods in the total amount of $522,109.38 ($323,515.63 for the rental period May 1, 1994 through September 30, 2002, plus $198,593.75 for the rental period April 1, 2008 through May 30, 2013) unreasonable and not supported by evidence. Accordingly, the Master will adjust United's claim for the total past due rent for Bay 8 for the aforementioned rental periods from $522,109.38 to $471,171.88, an amount that is reasonable and supported by evidence.

contemporaneously entered an order and judgment consistent with the memorandum opinion (hereinafter "June 8, 2021 Judgment")—to wit, the Master ordered that: (i) the May 5, 2021 Opinion is vacated in part to the extent inconsistent with the June 8, 2021 Opinion, (ii) the May 5, 2021 Judgment is vacated in part,[7] (iii) Yusuf Claim No. Y-2 against the Partnership for past rent due to United for Bay 5 and Bay 8 of the United Shopping Plaza in the amount of $496,914.07 is granted, (iv) United shall recover from the Partnership the sum of $496,914.07 on Yusuf Claim No. Y-2, and (v) "**within fourteen (14) days from the date of entry of this Order**, United **MAY** supplement its motion for reconsideration, filed on May 25, 2021, in the event that United wishes to extend his motion for reconsideration to the Master's determination of a reasonable rent for Bay

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Based on the foregoing, the Master finds that United is entitled to past due rent from the Partnership for the use of Bay 5 and Bay 8 in the total amount of $496,914.07 (125,742.19, the adjusted total past due rent for Bay 5, plus $471,171.88, the adjusted total past due rent for Bay 8),[3] and not in the total amount of $647,851.57, which was based on the incorrect rent calculation for Bay 8. Accordingly, consistent with this Memorandum Opinion, the Master will make the necessary corrections to the May 5, 2021 Order and May 5, 2021 Judgment pursuant to Rule 60 of the Virgin Islands Rules of Civil Procedure. V.I. R. CIV. P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.").

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[2] The May 5, 2021 Opinion inadvertently left out the rent calculation for Bay 5, but it was based on the following:

$5.55 x 3,125 sq. ft. = $17,343.75 per year
$17,343.75 x 7 years = $121,406.25
($17,343.75/12 months) x 3 months = $4,335.94
$121,406.25 + $4,335.94 = $125,742.19

[3] In the May 5, 2021 Opinion, the Master noted that he "will adjust United's claim for the total past due rent for Bay 5 for the aforementioned period from $271,875.00 to $125,742.19, an amount that is reasonable and supported by evidence." (May 5, 2021 Opinion, p. 44.) Thus, $125,742.19 plus $471,171.88 equals $496,914.07.

(June 8, 2021 Opinion, pp. 6-8.)

[7] In the June 8, 2021 Judgment, the Master vacated the following paragraphs of the May 5, 2021 Judgment:

ORDERED, ADJUDGED, AND DECREED Yusuf Claim No. Y-2 against the Partnership for past rent due to United for Bay 5 and Bay 8 of the United Shopping Plaza in the amount of $647,851.57 is **GRANTED**. It is further:

ORDERED, ADJUDGED, AND DECREED that United shall recover from the Partnership the sum of $647,851.57 on Yusuf Claim No. Y-2.

8. If United chooses to file a supplemental brief, United shall only include supplementation necessitated by the Master's [June 8, 2021] Judgment and [June 8, 2021] Opinion." (June 8, 2021 Order and Judgment, pp. 2-3) (emphasis in original.)

As of the date of this order, United has not supplemented its May 25, 2021 motion for reconsideration.

STANDARD OF REVIEW[8]

[8] In its motion for reconsideration, United indicated that it filed its motion pursuant to Rule 6-4 of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 6-4") and requested "that the Master grant his Motion for Reconsideration and amend his May 5 Order by ruling that United is entitled to a reasonable rent of $10 per square foot per year for Bay 5, which translates into a total rent award for Bay 5 of $226,562.50." (Motion, p. 5.) The May 5, 2021 Judgment, though titled as "Order and Judgment" and referred to as an order by United, is ultimately a judgment given that it is the written final determination of Yusuf Claim Nos. Y-2 and Y-4 and should be treated as a judgment. Thus, either Rule 59(e) of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 59(e)"), which governs motions to alter or amend a judgment, or Rule 60(b) of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 60(b)"), which governs motions for relief from a final judgment or order, applies here, and Rule 6-4 does not apply. V.I. R. CIV. P. 6-4 ("Except as provided in **Rules 59 and 60 relating to final orders or judgments**, a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless the time is extended by the court.") (emphasis added).

Prior to the promulgation of the Virgin Islands Rules of Civil Procedure, Rule 59 and Rule 60 of the Federal Rules of Civil Procedure (hereinafter "Federal Rule 59" and "Federal Rule 60," respectively) applied in the Virgin Islands Superior Courts via Superior Court Rule 50, and whether Federal Rule 59 or Federal Rule 60 applied was based on when the motion for reconsideration was filed after the entry of the judgment—to wit, if it was filed within the ten-day deadline then imposed in Federal Rule 59(e), then Federal Rule 59(e) governed and if it was filed after the ten-day deadline but within the deadline imposed under Rule 60(b), then Federal Rule 60(b) governed. *See e.g., Chavayez v. Buhler*, 2009 V.I. Supreme LEXIS 26, *29 (V.I. 2009) ("Whether a motion for reconsideration is governed by Rule 59(e) or Rule 60(b) will depend on the date it is filed. If it is filed within the ten day period set for Rule 59(e) motions, reconsideration will be addressed under Rule 59(e)."); *Ruiz v. Jung*, 2009 V.I. Supreme LEXIS 43, *9 (V.I. 2009) ("If a motion for reconsideration is brought within ten days of the order to be reconsidered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the motion is brought after ten days, however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b).") (unpublished); *Reliance Lovenlund Assocs. 2, LLLP*, 73 V.I. 129, 132 n.2 (Super. Ct. 2015) ("The Virgin Islands Supreme Court has established that if 'a motion for reconsideration is brought within ten days of the order to be considered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the motion is brought after ten days, however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b).') (quoting *Ruiz*, 2009 V.I. Supreme LEXIS 43, at *9).

The Master finds no reason to depart from this practice. Given that United filed its motion for reconsideration within the 28-day deadline imposed by Rule 59(e), Rule 59(e) will govern in this instance. As such, the Master will construe United's motion as a motion to amend a judgment pursuant to Rule 59(e). *See Rodriguez v. Bureau of Corr.*, 70 V.I. 924, 928 n.1 (V.I. 2019) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 648 n.2 (V.I. 2011) ("[T]he substance of a motion, and not its caption, shall determine under which rule the motion is construed.").

Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." V.I. R. CIV. P. 59(e). The Virgin Islands Supreme Court has held that "[a] proper Rule 59(e) motion … must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 715 (V.I. 2010); *see also Martin v. Martin*, 58 V.I. 620, 629 (V.I. 2013) (citing *Beachside*, 53 V.I. at 715).[9] Furthermore, "new evidence is not grounds for reconsideration under Rule 59(e) if the evidence was previously available, i.e. not newly discovered." *Beachside*, 53 V.I. at 715.

Generally, "[a] motion for reconsideration is not a second bite of the apple… [Instead, it] is intended 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 court's analysis covering issues that should have been raised in the first set of motions." *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008).[10] "It is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Id.*, 49 V.I. at 457-58. In determining whether to grant such a motion, the court

[9] The *Beachside* court discussed the motion for reconsideration therein in terms of Rule 50 of the Superior Court Rules, Federal Rule 59(e), and Federal Rule 60(b). Since *Beachside*, the Virgin Islands Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which went into effect on March 31, 2017. Subsequently, Superior Court Rule 50 was repealed on April 7, 2017 by Supreme Court Promulgation Order No. 2017-0006. While Superior Court Rule 50 has been repealed and the Federal Rules of Civil Procedure do not apply in this matter, the Master nevertheless finds the discussion in *Beachside* helpful here since Rule 59(e) is identical to its federal counterpart and Rule 60(b) closely mirrors its federal counterpart. Thus, the Master will use the standard set forth in *Beachside* to assess United's motion.

[10] The *Sherman* court discussed the motion for reconsideration therein in terms of Rule 7.4, now Rule 7.3, of the Local Rules of Civil Procedure (hereinafter "Local Rule 7.3") promulgated by the District Court of the Virgin Islands. Although the Local Rules of Civil Procedure do not apply in this matter, the Master nevertheless finds the discussion in *Sherman* helpful here since the grounds for reconsideration as set forth in *Beachside* closely mirrors the grounds for reconsideration as set forth in Local Rule 7.3. *See* D.V.I. Local R. CIV. P. 7.3(a) ("A party may file a motion asking the Court to reconsider its order or decision" and it "shall be based on: (1) an intervening change in controlling law; (2) the availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice."). Thus, the Master will follow the guidelines set forth in *Sherman*.

operates with "the common understanding that reconsideration is an 'extraordinary' remedy not to be sought reflexively or used as a substitute for appeal." *Id.*, 49 V.I. at 458. As such, motions for reconsideration pursuant to Rule 59(e) must be based on one of the grounds delineated in *Beachside*.

DISCUSSION

In its motion, United argued that "the evidence at the February 4 hearing showed that an equitable rate for the Bay 5 space is at least $10 per square feet per year" and that it was "clear error" for the Master to have found "that there was an 'absence of any credible evidence to establish a reasonable and fair rental rate' for Bay 5" because "United did introduce evidence of what a tenant actually paid for Bay 5" and it was also "erroneous" that the Master used "the $5.55 rental rate for Bay 1 as a proxy for a reasonable rent for Bay 5" since "[t]he unrebutted evidence shows that the $5.55 rate for Bay 1 was far below market rent from 1994 forward – i.e., for the entire period in which the Partnership used Bay 1" and "Fathi Yusuf testified that after the Plaza Extra store burned down in 1992 and before it reopened in 1994, he agreed with Mohammad Hamed to keep the rent for Bay 1 at the 'much lower than market rate of $5.55 per square foot for a ten-year period.'" (Motion, pp. 2-4.) In support of its argument, United made the following assertions: (i) "As the Master found, the lease between Diamond Girl and United that was introduced at the February 4, hearing indicated that Diamond Girl began occupying Bay 5 on September 1, 2001 and was paying $2,604 per month, which is $31,250 per year or $10.00 per square foot per year for the 3,125 square foot space" and therefore, "at a minimum, the Master should have used the $10 rental rate as the reasonable rent for Bay 5, which would have yielded an aggregate rent for the space for the 7 year, 3-month period of use of $226,562.50." (Id., at p. 3); (ii) "The Master awarded approximately $100,000 less in Bay 5 rent—$125,742.19—without

explaining why he regarded the Diamond Girl lease rate for that very bay as not credible evidence of a reasonable rent, and United is aware of no reason why it is not credible." (Id.); (iii) "Hamed argued only that the Diamond Girl lease was not strong evidence because Diamond Girl was a 'retail tenant' with a 'written lease,' as opposed to an at-will wholesale tenant, but these contentions do not withstand analysis" given that "[Fathi] Yusuf made clear in his trial testimony, the United Shopping Center was designed and built to be a retail shopping center, not a warehouse facility" and that "[i]n fact, having warehouse space at a shopping center is not advantageous to the landlord and the tenant as it leads to reduced customer traffic." (Id., at pp. 3-4); (iv) "What is reasonable rent should therefore be determined by reference to the market rental rates for what actually existed at the United property – namely, space at a retail shopping center, not space at a warehouse facility." (Id., at p. 4); (v) "As for Hamed's contention that a month-to-month lease commands a lower market rate than a longer term lease, the Court can take judicial notice that precisely the opposite is the case"—to wit, "[t]he market rate for month-to-month leases is nearly always higher than the rate for a lease of a term of 6 months, 1 year, or several years." (Id.); (vi) "Use of the $5.55 rate that is far below market for a retail space that is more than 20 times larger than Bay 5 to determine the reasonable rent for Bay 5 is not tenable." (Id.); (vii) "It is also significant that after that ten-year period expired, the rent for Plaza Extra East (Bay 1) was increased according to a rent formula that calculated rent paid at Plaza Extra Tutu Park as a percentage of sales at that store, and then applied that percentage to Plaza East sales to determine rent." (Id., at p. 5); (viii) "As Judge Brady found in his rent order, the average monthly rent under that formula came to $58,791.38 per month" and "[m]ultiplying that monthly average by 12 months to get an annual average rent amount, and then dividing that sum by the 69,680 square feet that make up Bay 1, yields a price per square foot of $10.13." (Id.); (x) "In other words, the

effective square foot rate for Bay 1 under the rent formula in effect from 2004 forward was $10.13." (Id.); and (ix) "The market retail rental rate for a 69,680 square foot space occupied by an anchor tenant is normally going to be less than the rate for a far smaller retail space like the 3,125 square foot Bay 1" and "[t]his is further evidence that a reasonable rent for Bay 5 is $10 at the very least and that the Master erred by using the below market $5.55 rate for Bay 1 that was in effect from 1994 to 2004." (Id.) Based on the foregoing, United requested the Master to grant his motion and amend the May 5, 2021 Judgment "by ruling that United is entitled to a reasonable rent of $10 per square foot per year for Bay 5, which translates into a total rent award for Bay 5 of $226,562.50."[11] (Motion, pp. 2, 5.)

In his opposition, Hamed argued that the Master should deny United's motion. Hamed made the following assertions in support of his argument: (i) "ln its motion for reconsideration, United does not cite the legal standard for granting such relief, which is set forth in V.I. R. Civ. P. 6-4(b)." (Opp., at p. 2); (ii) "A review of United's May 25th motion for reconsideration confirms that none of these factors would apply, as United's motion did not raise (1) any alleged change in any controlling law, (2) any alleged new evidence, (3) any 'clear error' in the Master's significantly 'discretionary' ruling or (4) any alleged issue the Special Master failed to address in his 45 page opinion." (Id.); and (iii) "[T]he Master addressed all of the evidence that United rehashes in its motion for reconsideration, but found that none of the matters raised created any credible basis for calculating rent for a vacant space that no third party wanted to rent." (Id).

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[11] In its motion, United noted that "United sought in its proposed findings and conclusions to adjust the $10 rate up modestly to $12 because of certain charges assumed by Diamond Girl in its lease" but "United is no longer seking that $2 upward adjustment in this [motion]." (Motion, p. 3.)

The Master will note at the outset that since United has not supplemented its May 25, 2021 motion for reconsideration, United's motion is "confined to the Master's determination of a reasonable rent for Bay 5." (Motion, p. 1 n.3.) The Master will further note that, while United argued in its motion that the Master should reconsider its May 5, 2021 Ruling based on the need to correct clear error, the need to correct clear error as stated is not one of the grounds set forth in *Beachside* for reconsideration. The three grounds set forth in *Beachside* are: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Beachside*, 53 V.I. at 715. Nevertheless, based on United's argument for clear error and the substance of United's motion, the Master will assess United's motion for reconsideration based on the need to correct clear error of law and to prevent manifest injustice.

1. The Need to Correct Clear Error of Law

"When assessing a motion for reconsideration based on 'the need to correct clear error of law,' the court may grant the motion when its prior decision applied an incorrect legal precept or failed to conduct proper legal analysis using the correct legal precept." *Arvidson v. Buchar*, 72 V.I. 50, ¶ 4 (Super. Ct. 2019); *see Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 706, 713-715, 716-718 (V.I. 2010) (affirming, in part, and vacating and remanding, in part, a trial court's denial of a motion for reconsideration because, in denying the motion, the trial court (1) correctly applied the law when finding no good cause existed for extending the time for service of process but (2) incorrectly applied the law after finding no good cause existed and then failing to complete the second step required by the rule, which prescribed the court to assess whether any additional factors warranted granting a permissive extension of time to effectuate service of process). Furthermore, "the Court looks for the moving party to offer the specific legal authority it claims

the Court either failed to apply correctly or failed to apply *in toto* in its decision." *Arvidson*, 72 V.I. 50, ¶ 4 (emphasis in original); *see also*, *Merchants Commercial Bank*, 2019 V.I. LEXIS 145, *6 (Super. Ct., Nov. 22, 2019) (quoting *Smith v. Law Offices of Karin A. Bentz, P.C.,* 2018 V.I. LEXIS 13, *16 (Super. Ct. Jan. 29, 2018) (When analyzing a motion for reconsideration based on the need to correct clear error of law, the Court has required the moving party to provide "the specific legal authority … the [c]ourt either failed to apply correctly or failed to apply in totum in its original decision."); *Matthews v. R&M Gen. Contractors, Inc.*, 72 V.I. 583, ¶ 39 (Super. Ct. 2020) ("Finally, in requesting reconsideration, the Plaintiff offered no legal authority that he claims the Court failed to apply or apply correctly. Thus, the Court's ruling did not involve a clear error of law and the Court will not reconsider its ruling.").[12]

Here, United offered no legal authority that it claimed the Master previously failed to apply or apply correctly. Thus, the Master finds that United failed to demonstrate that there was a clear error of law requiring reconsideration of the May 5, 2021 Ruling.

2. The Need to Prevent Manifest Injustice

When analyzing a motion for reconsideration based on the need to prevent manifest injustice, the term manifest injustice has been described as "the result of a plain error" or "an error in the trial court that is direct, obvious, and observable." *In re Manbodh Asbestos Litigation Series*, 69 V.I. 394, 427 (Super. Ct., Oct. 17, 2018) (citing and quoting *Cabrita Point Dev., Inc. v. Evans*,

[12] Although the *Arvidson* court, the *Merchants* court, the *Smith* court, and the *Matthews* court discussed the need to correct clear error of law in terms of Rule 6-4, the Master nevertheless finds the discussion therein helpful here since it is identical to one of the grounds set forth in *Beachside* for reconsideration. *See* V.I. R. CIV. P. 6-4 ("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.").Thus, the Master will follow the guidelines set for in *Arvidson*, *Merchants*, *Smith*, and *Matthews*.

52 V.I. 968, 975 (D.V.I. 2009).[13] But there is no manifest injustice "when a litigant merely disagrees with the court." *In re Manbodh*, 69 V.I. at 427-428 (citing and quoting *Bostic v. AT&T of the V.I.*, 312 F. Supp. 2d 731, 45 V.I. 553, 559 (D.V.I. 2004)); *accord In re Infant Sherman*, 49 V.I. at 457 ("A motion for reconsideration is not a second bite of the apple.").

Here, United essentially argued that the May 5, 2021 Judgment was the result of two plain errors: (i) the Master errored when he used the $5.55 per square foot rental rate, the rental rate the Court used in the Rent Order (as defined in the May 5, 2021 Opinion) to calculate the rent for Bay 1 for the period January 1, 1994 to May 4, 2004, to establish the reasonable rent for Bay 5 for the rental period May 1, 1994 through July 31, 2001, and (ii) the Master errored when he found that there was an absence of any credible evidence to establish a reasonable and fair rental rate for Bay 5 for the relevant rental period because there was credible evidence to establish a reasonable and fair rental rate for Bay 5—to wit, United introduced evidence of what Diamond Girl, a tenant, paid for Bay 5 for a period of ten calendar years commencing on September 1, 2001.

A. The $5.55 Per Square Foot Rental Rate

In its motion, United argued that the rental rate of Bay 5 should be $10.00 per square foot because in the Rent Order (as defined in the May 5, 2021 Opinion), the Court concluded that the rent for Bay 1 for the period January 1, 1994 to May 4, 2004 was to be calculated at the rate of $58,791.38 per month based on the sales of Plaza Extra-Tutu Park in St. Thomas, and "[m]ultiplying that monthly average by 12 months to get an annual average rent amount, and then dividing that sum by the 69,680 square feet that make up Bay 1, yields a price per square foot of

[13] Although the *Manbodh* court discussed the need to prevent manifest injustice in terms of Local Rule 7.3, the Master nevertheless finds the discussion therein helpful here since it is identical to one of the grounds set forth in *Beachside* for reconsideration. *See supra*, footnote 10. Thus, the Master will follow the guidelines set forth in *Manbodh*.

$10.13." (Motion, p. 5.) However, this argument could have and should have been raised previously. Although not raised by United, the Master noted in the May 5, 2021 Opinion that, "for the purpose of evaluating the rent claimed by United for Bay 5 and Bay 8, the Master finds this monthly rate inapplicable and will not use it in his evaluation."[14] (May 5, 2021 Opinion, p. 41 n.34.) Thus, it appears that United is using the motion for reconsideration as a vehicle for raising arguments that could have been raised before but were not, with the hindsight of the court's analysis, which is not permitted. *See In re Infant Sherman*, 49 V.I. at 457 ("A motion for reconsideration is not a second bite of the apple… [Instead, it] is intended 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 court's analysis covering issues that should have been raised in the first set of motions… It is not a vehicle for… raising arguments that could have been raised before but were not.").

In its motion, United also argued that the rental rate of Bay 5 should be $10.00 per square foot because Diamond Girl paid $2,604.00 per month when it rented Bay 5, "which is $31,250 per year or $10.00 per square foot per year for the 3,125 square foot space." (Motion, p. 3.) While this argument was raised previously,[15] the Master did not find the rental rate proposed by United to be

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[14] Although the Master need not address this argument since it was not raised previously, the Master will nevertheless point out that the $58,791.38 per month rental rate for Bay 1 was based on the sales of Plaza Extra-Tutu Park in St. Thomas and thus, inapplicable and inappropriate when evaluating and calculating the reasonable rent for Bay 5 based on square footage, and United never explained in its motion why it would be applicable or appropriate.

[15] In its February 23, 2021 post-hearing filing, United stated:

> 32. Plaza Extra used Bay 5 for warehousing merchandise until it entered a 10-year lease with David Zahriyeh (doing business as Diamond Girl) for those premises. Trial Exhibit 11, Trial Exhibit E, p. 4. Diamond Girl renewed that lease in 2011. The rental rate in the lease was $31,250 per year, which works out to $10/square foot per year for the 3,125 square foot Bay 5. Trial Exhibit 11, p. 6, ¶ 10.
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> 33. The rate of $12/square foot for Bay 5 for the 7 year, 2 month period in which Plaza Extra used that space which United is seeking is a reasonable rent. This works out to $271,875 for Bay 5. Tr. 46, lines 6-25; 47, lines 1-25; and 48, lines 1-11. See also Trial Exhibit E, Supplemental Responses to Interrogatories, p. 4; Trial

credible evidence of the reasonable and fair rental rate for Bay 5, and instead, the Master exercised the significant discretion he possesses in fashioning equitable remedies as the need arises and used the $5.55 per square foot rental rate for the evaluation of the rent claimed by United for Bay 5, and ultimately used the $5.55 per square foot rental rate to calculate the reasonable rent for Bay 5. Thus, it appears that United is using the motion for reconsideration as a vehicle for registering disagreement with the court's initial decision and for rearguing matters already addressed by the court with the hindsight of the court's analysis, which is also not permitted. *See In re Infant Sherman*, 49 V.I. at 457 ("A motion for reconsideration is not a second bite of the apple… [Instead, it] is intended 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 court's analysis covering issues that should have been raised in the first set of motions… It is not a vehicle for registering disagreement with the court's initial decision, [or] for rearguing matters already addressed by the court…"); *see also In re Manbodh*, 69 V.I. at 427-428 (there is no manifest injustice "when a litigant merely disagrees with the court").

B. The Absence of Any Credible Evidence to Establish a Reasonable and Fair Rental Rate for Bay 5

In its motion, United argued that the rental rate paid by Diamond Girl for Bay 5 was credible evidence of the reasonable and fair rental rate for Bay 5 for the relevant rental period. The Master disagrees. First, both Fathi Yusuf and Waleed Hamed testified that the understanding and

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Exhibit 2, p. 9, ¶ 22 (showing Bay 5 rent calculation); Chronology of Rents, appended to Trial Exhibit 2 as Exhibit G.

(United's Feb. 23, 2021 Post-Hearing Filing, ¶ 32-33.)

United also stated that "[s]ince Diamond Girl was also responsible for paying WAPA and other utility bills see Trial Exhibit 11, p. 9, ¶ 16, it is appropriate to adjust Diamond Girl's $10/square foot per year rate upward modestly to arrive at a reasonable rent." (Id., at p. 14, n.6.)

expectation of both United and the Partnership were that if United was able to rent Bay 5 to other tenants, then United could evict the Partnership from Bay 5 and the Partnership would be required to vacate Bay 5—i.e., stop warehousing activities and remove all inventory. This indicated that United did not expect nor have the same type of rental relationship with the Partnership as United expected and had with an ordinary retail tenant like Diamond Girl. Second, if the agreement was that United would charge, and the Partnership would pay, the same rental rate United would have charged for Bay 5 for another retail tenant like Diamond Girl, then why would United evict the Partnership to get a tenant that was paying the same amount in rent? Third, Fathi Yusuf, as a partner, owes the Partnership the fiduciary duties of loyalty and care. *See* Title 26 V.I.C. § 74(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section."); *see also, Woodson v. Akal*, 2017 V.I. LEXIS 130, at *8 n.4 (Super. Ct. Aug. 17, 2017) (noting that Title 26 V.I.C. § 74 specifies "the fiduciary duties of loyalty and due care owed in a partnership"). Furthermore, "[a] partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." Title 26 V.I.C. § 74(d). In this instance, Fathi Yusuf, as the president of United, acted on behalf of United and charged the Partnership rent for the use of Bay 5. The mere fact that Fathi Yusuf's conduct furthered his own interest does not in and of itself violate his duty and obligation as a partner of the Partnership. *See* Title 26 V.I.C. § 74(e) ("A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."). However, Fathi Yusuf's conduct went beyond furthering his own interest when Fathi Yusuf decided, during the winding up of the

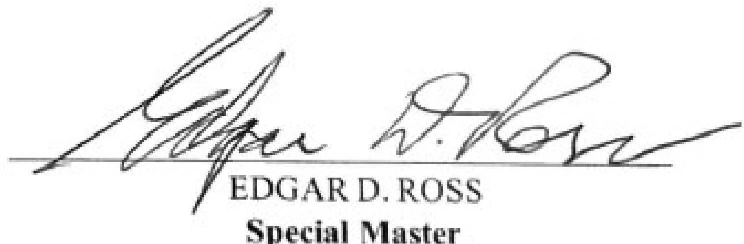
Partnership, to charge the Partnership a high rental rate for Bay 5 for the relevant rental period,[16] and is therefore not consistent with his obligation of good faith and fair dealing as a partner of the Partnership. Based on the foregoing, the Master confirms his prior finding that the rental rate paid by Diamond Girl for Bay 5 was not credible evidence of the reasonable and fair rental rate for Bay 5 for the relevant rental period. Thus, after considering United's argument, as well as the overall record, the Master does not find any clear or obvious injustice that would result from the Master not reconsidering the May 5, 2021 Ruling.

CONCLUSION

Based on the foregoing, the Master finds that United failed to demonstrate that there was a need to correct clear error of law or manifest injustice in the May 5, 2021 Ruling. As such, the Master will deny United's motion, not reconsider the May 5, 2021 Ruling, and not amend the May 5, 2021 Judgment. Accordingly, it is hereby:

ORDERED that United's motion for reconsideration of the Master's May 5, 2021 Ruling as to the past due rent the Partnership owes United for the use of Bay 5, filed on May 25, 2021, which the Master construed as a motion to amend a judgment pursuant to Rule 59(e), is **DENIED**.

DONE and so ORDERED this 31st **day of July, 2021.**



EDGAR D. ROSS
Special Master

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[16] United originally argued that the Partnership's past due rent for Bay 5 should be calculated based on the rental rate of $12.00 per square foot, which is higher than the rental rate United charged Diamond Girl, and United now indicated in its motion that the Partnership's past due rent for Bay 5 should be calculated based on the rental rate of $10.00 per square foot, the same rental rate United charged Diamond Girl. However, these rental rates—whether $12.00 per square foot and $10.00 per square foot—both exceeded the rental rate of $5.55 per square foot the Court used in the Rent Order to calculate the Partnership's past due rent for Bay 1 for the period January 1, 1994 to May 4, 2004.