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

UNITED'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF MASTER'S JULY 13, 2021 ORDER RE: CLAIM Y-8

In his Opposition to United's Motion for Reconsideration regarding the Master's July 13, 2021 Order regarding the Y-8 claim for water revenues owed to United, Hamed fails to respond to United's arguments that under *American Title Insurance Co. v. Lacelaw*, 861 F.2d 224 (9th Cir.

1988), the statements in United's reply brief should not be deemed binding. In *American Title*, the Ninth Circuit noted that while admissions in a "complaint, answer or "pretrial order" -- or in an affidavit are readily considered binding judicial admissions, courts have been hesitant to categorically treat statements in a brief or legal memorandum as binding judicial admissions. The Court cited a Second Circuit decision that "inadvertent statements of fact made by counsel in briefs should not be conclusively binding…" See id. at 226 (quoting from case). And it quoted a Tenth Circuit case holding that "statement of facts contained in a brief may be considered admissions of the party in the discretion of the district court." *Id*. at 277. The Ninth Circuit agreed that statements in a brief "*may* be considered admissions of the party in the discretion of the [trial court]," which of course also means that the court has discretion to rule the other way. *Id*. at 27 (emphasis in original). This is also the rule which is followed in the Virgin Islands. *See Walters v. Walters*, 60 V.I. 768, 775 n.7 (2014) ("Although unsworn representations of an attorney are not evidence…, an attorney's client may nevertheless be bound by such statements under the doctrine of judicial admissions…") .

The factors that should guide a court's discretion in determining whether or not to treat a lawyer's statement in a brief as an admission have not been articulated by the Virgin Islands Supreme Court. But the *American Title* case suggests several factors that should inform the Court's exercise of discretion in this context. The first is whether the party who would benefit from treating the statement as an admission "introduce[d] the statement into evidence or object[ed] to the introduction of contradictory testimony." Here Hamed did not seek to introduce the statement from United's reply brief into evidence. As Hamed acknowledged in his proposed findings and conclusions filed after trial, "Yusuf testified that United is entitled to damages in the amount of $693,207.46." *See* United's Motion for Reconsideration at p. 2 (quoting from p. 3, ¶15

of Hamed's Proposed Findings and Conclusions). Hamed did not object to that testimony at trial. Nor did Hamed attempt to counter United's Proposed Findings and Conclusions seeking recovery in that amount by asserting that United's reply brief statement is an admission that they are entitled to, at most, only half of the amount claimed. *See* Motion for Reconsideration at p. 2, and p. 3, note 2. Under the holding in *American Title*, because Hamed failed to do any of these things, the Master should have exercised its discretion not to treat United's statement in its reply as a binding judicial admission that justified cutting its water revenue recovery in half. United submits that the Master's sua sponte exercise of discretion to bind United to its reply statement and to reduce by 50% the award to United was clear error under Rule 6-4.

Hamed offers no explanation at all why it did not object to Mr. Yusuf's testimony, or seek to introduce United's reply brief into evidence at the April 15, 2021 trial. *See* Opposition to Motion for Reconsideration at p. 4, n.2. As for his failure to address it in his post-trial filing, Hamed says the reason "why [he] did not address this issue" then is that he believed United was "correct" in having "conceded" in its reply "that the award must be cut in half…" *See id*. at pp. 3-4. This makes no sense. If Hamed truly believed that United had said something in a 2020 reply brief which limited its recovery to half of what it was seeking at trial a year later, then that would have been reason to highlight it at trial and in his post-judgment filings, not a reason to say nothing about it. Nor does Hamed offer any reason why the decision in *American Title* should not be followed by the Master – in other words, why his failure to object to Yusuf's trial testimony or to introduce the reply brief into evidence does not warrant a grant of United's motion for reconsideration.[1]

[1]In many cases, the issue of whether the attorney's statement in a brief should be admitted arises when the party seeks to introduce the brief into evidence at trial. *See*, *e.g.*, *Heil Co v. Snyder Industries*, 763 F. Supp. 422, 427 (D. Neb. 1991) (admitting excerpts from trial brief into evidence

It should be noted that the holding in *American Title* is consistent with VI Rule of Civil Procedure 15(b))(2), drawn verbatim from Fed.R.Civ.P. 15(b)(2), which relates to issues "tried by the parties' express or implied consent." Under Fed.R.Civ.P. 15(b)(2), even where a factual issue is conceded in a pleading, such as an answer, the opposing party must object at trial to the introduction of evidence that is at variance with the admission, or the contrary admission will be "amended out" of the pleading:

> If plaintiff desired to take the position that defendant's admissions in his answer were a concession concerning the date of delivery of the Lila/Paul deed, it was incumbent upon plaintiff "to oppose the introduction of evidence directly at variance" with the claimed admission…Where, as here, a party fails to object but instead allows full development of evidence directly at odds with a claimed admission, the contrary admission is "amended out" of the pleading, pursuant to the operation of Rule 15(b)…A*ccord, White v. Arco/Polymers, Inc.,* 720 F.2d 1391, 1395 (5th Cir.1983) (by failing to contend that the opponent's pleadings barred subsequent assertion of a contrary position, a litigant effectively waives the argument that the issue is settled by the pleading).

Lavean v. Cowels, 835 F.Supp. 375, 382 (W.D.Mich.,1993). In addition, a formal motion to amend a statement in a pleading or brief to conform to the proofs at trial is not required. *See id*. at 382. Rule 15(b) specifically provides that the absence of a formal amendment or request for leave to amend "does not affect the result of the trial of those issues actually litigated." *See id*. at 382. *See also Karlen v. Ray E. Friedman & Co. Commodities,* 688 F.2d 1193, 1197 n. 3 (8th Cir.1982); 6A Wright & Miller, Federal Practice & Procedure: Civil 2d § 1493 at 16 (1990). All that is required is that the issue be tried by consent, and consent is generally inferred from a failure to object. *Id.* at 24. Even in the case of formal admissions in pleadings or pretrial orders, courts recognize that if

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as an admission of a party under FRE 801, but ruling that "these statements are not conclusive, and may be contradicted by other evidence" at trial) (citation and internal marks omitted); *TAS Distributing Company, Inc. v. Cummins, Inc*., 2013 WL 122411232, * 1 (C.D. Ill. 2013) (granting pre-trial motion in limine and ruling that Defendant lawyer's testimony is an admission that is admissible under Rule 801, but ruling that it should be excluded under FRE 403 because the Court would in fairness have to give Defendant an "opportunity to explain or contravene the statements," and that would only confuse the jury and delay the trial).

properly amended, they will not be regarded as judicial admissions. *See White v. Arco/Polymers, Inc*. 720 F.2d 1391, 1396 (5th Cir. 1983) (holding that if they are amended, admissions in pleadings and pretrial orders will not be considered judicial admissions). Rule 15(b) is one means of effecting such an amendment.

Another factor militating in favor of the Master granting reconsideration and exercising his discretion not to treat United's reply brief statements as a binding admission is that they were inadvertent. *See American Title, supra* at 226. United has acknowledged in its Motion for Reconsideration that the assertion in its reply brief was "mistakenly made." Motion for Reconsideration, p. 4, n.2. It is inconsistent with everything else that United has said about the Y-8 claim -- at the April 15 trial, and in pre-trial filings and discovery response and in its post-trial proposed Findings and Conclusions. *See id.* at p. 4, n.2. The Master knows from the history of this case that any one claim can raise a myriad of factual and legal issues, some of them difficult ones. The sheer number of issues to cover and the felt need to be comprehensive in covering them can lead to honest mistakes in the drafting of briefs.

In addition, the statement made in United's reply is objectively false, and that is an additional reason why, on reconsideration, the Master should exercise his discretion not to rely on the statement in United's reply brief and should award United the full $410,087.24. United's statement in the reply was prompted by Hamed's contention that Yusuf, in receiving prior distributions made since 2012[2] (which would include one or more distributions approved by the

[2]Hamed asserted in his Counter-Statement of Undisputed Facts, in proposed finding no. 24, that "between 2004 and 2012 no profits were distributed due to the FBI raid." *See* Hamed's May 1, 2020 Opposition to Partial Summary Judgment Motion and Cross-Motion for Summary Judgment, p. 10. So he is necessarily referring to distributions to the partners made from the period just before the lawsuit was brought through the present.

Master), has already been paid half of whatever amount United would be found to have earned from water sales. But both Hamed's contention and Yusuf's acceptance of it in that one reply brief are incorrect factually and legally.

Hamed claims that as to the distributions from the partnership account to Hamed and Yusuf that have been since 2012, if one treats Yusuf as a proxy for United, and if one assumes that the amounts distributed included all of United's $410,087.24 in water revenues, United/Yusuf has already been paid one half of the water revenues, and United/Yusuf therefore is only owed the half he has not been paid. But treating Mr. Yusuf as the equivalent of United for these purposes is not valid legally. Yusuf and the corporation in which he and other family member are shareholders have always been treated as distinct entities in this proceeding. United is a third party creditor of the partnership in these wind-up proceedings. In addition, the amount that United owed for water revenues had not been determined as of the time of any of those distributions. There is no legal justification for treating monies that belonged to United and were being held by the partnership for United as having been distributed to the partners when distributions of partnership funds were made. Why should Hamed (or Yusuf for that matter) be treated as having been given distributions of water revenues that belonged to neither of them?

What was distributed to the partners in the previous distributions were plainly revenues belonging to the partnership from its sale of groceries, not United's revenues from water sales. And because the partner distributions cannot be deemed to have included any part of, let alone all of, the $410,087.24 in water revenues that the Master found belonged to and were earned by United, it would be erroneous to conclude that any portion of that sum was paid to Mr. Yusuf or Mr. Hamed in prior distributions of partnership funds. It wasn't the partnership's money to release to Hamed and Yusuf, and could not have been lawfully transferred to anybody except United. The

entire $410,087.24 is still sitting in the partnership account that is under the supervision of the Court and that will be used in the final settlement of claims, including this one. Thus, the Master should not have reduced by half the $410,087.24 in rendering an award to United on the Y-8 claim.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, as well as those set forth in United's Motion for Reconsideration, United respectfully requests that the Master grant its Motion for Reconsideration, by amending its July 13, 2021 award to United to increase it to $410,087.24.

Respectfully submitted,

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By: s/Charlotte K. Perrell

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2021, I caused the foregoing **UNITED'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF MASTER'S JULY 13, 2021 ORDER RE: CLAIM Y-8,** which complies with the page and word limitations of Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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