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** **V17**
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 July 13, 2021 memorandum opinion and order and judgment as to the issue of damages for Yusuf Claim No. Y-8: water sales revenue collected by the Partnership from April 1, 2004 through February 28, 2015, filed on August 2, 2021.[1] In response, Hamed[2] filed an opposition and United filed a reply thereafter.

BACKGROUND

A more complete history of United's claim for the water sales revenue collected by the Partnership from April 1, 2004 through February 28, 2015 was recounted in the memorandum opinion entered on July 13, 2021. Nevertheless, a recap is appropriate here.

On November 9, 2020, the Master entered an order whereby the Master found that Yusuf Claim No. Y-8 is not barred by the six-year statute of limitations, vacated the portion of the September 4, 2020 order denying United's motion for partial summary judgment for Yusuf Claim No. Y-8 as to its conversion claim, granted United's motion for partial summary judgment for Yusuf Claim No. Y-8 as to the liability of its conversion claim, ordered that United is entitled to the money collected from the sale of the water collected in the cisterns located at the United Shopping Center (hereinafter "Water Proceeds") from April 1, 2004 through February 28, 2015,

[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 Yusuf Claim No. Y-8 falls within the scope of the Master's report and recommendation given that Yusuf Claim No. Y-8 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 whenever references are made to "Mohammad Hamed," the Master is referencing the individual—Mohammad Hamed.

and denied United's motion for partial summary judgment for Yusuf Claim No. Y-8 as to its restitution claim.[3]

On April 15, 2021, the parties appeared for a hearing on Yusuf Claim No. Y-8 to determine the issue of damages. United and Hamed each presented witness testimony and exhibits. More specifically, the Master heard oral testimony from Fathi Yusuf,[4] Maher Yusuf, and Waleed Hamed.[5] 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 July 13, 2021, the Master entered a memorandum opinion (hereinafter "July 13, 2021 Opinion") whereby the Master found that United is entitled to damages from the Partnership for Yusuf Claim No. Y-8 in the total amount of $205,043.62, and contemporaneously entered an order and judgment consistent with the July 13, 2021 opinion (hereinafter "July 13, 2021 Judgment," and together with July 13, 2021 Opinion, "July 13, 2021 Ruling"). In the July 13, 2021 Opinion, the Master invoked the doctrine of equitable estoppel and held that Hamed and the Partnership are estopped from raising any defenses based on the argument that United is not entitled to damages for Yusuf Claim No. Y-8 because the calculation of damages is speculative due to inadequate

[3] On September 4, 2020, the Master entered an order whereby the Master denied United's motion for partial summary judgment for Yusuf Claim No. Y-8 as to its conversion claim and its unjust enrichment claim, denied Hamed's cross-motion for summary judgment for Yusuf Claim No. Y-8 as to the issue of whether United asserted this claim prior to the cut-off date for filing claims, and ordered Parties to file: (i) their respective supplemental briefs as to the issue of United's restitution claim and (ii) their respective briefs as to the issue of whether Yusuf Claim No. Y-8 is barred by the statute of limitations. On September 16, 2020, Hamed filed his first supplemental brief regarding the statute of limitations, and on October 22, 2020, Hamed filed his second supplemental brief regarding the restitution elements and statute of limitations. On November 6, 2020, United filed its supplemental brief regarding the statute of limitations.

[4] Fathi Yusuf is also referred to as Yusuf in this memorandum opinion.

[5] Mohammad Hamed's sons and Fathi Yusuf's sons were delegated the authority to operate the Plaza Extra stores under the supervision, directions, and control of Fathi Yusuf.

accounting and deficient record keeping in connection with the water sale.[6] In the July 13, 2021 Opinion, the Master also explained how the damages was calculated:

> II. Calculation of Damages
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> After hearing the witnesses' testimony, and after due consideration of the evidence in the record, the Master will exercise the significant discretion he possesses in fashioning equitable remedies and establish the following figures to evaluate the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y-8:
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> > During the period of April 1, 2004 through February 28, 2015, the Partnership sold water to third parties at the rate of Fifteen Dollars ($15.00) per 1,000 gallons of water, the Partnership averaged one and one-half (1 ½) water trucks per day in water sale,[13] and the average capacity of the water trucks was 5,000 gallons.[14] In other words, $112.50 per day (1½ 5,000-gallon water truck per day at $15.00 per 1000 gallons of water) multiplied by 3,986 days (the number of days for the period of April 1, 2004 through February 28, 2015) = $448,425.00 in Water Proceeds.
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> However, the amount above—$448,425.00—must be reduced in half to $224,212.50 since United had previously conceded in its reply to Hamed's opposition to United's partial motion for summary judgment for Yusuf Claim No. Y-8, filed on July 7, 2020, that "the gross sales would have to cut in half to arrive at recoverable damages because United's principal, Fathi Yusuf, has already received one half of the net income from water sales." (July 7, 2020 Reply, p. 12.) Moreover, before the Master can arrive at the final amount, the Master must consider how much, if any, should be credited to the Partnership for Partnership money expended in connection with the sale of water to third parties during the period of April 1, 2004 through February 28, 2015.[15]
>
> A. Partnership Money Expended
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> 1. Incidental Expenses
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> Hamed pointed out that Partnership money was used to pay for all the incidental expenses associated with the sale of water to third parties during the period of April 1, 2004 through February 28, 2015, such as electricity, pump and cistern maintenance, and employee costs. Thus, Hamed argued the amount of Partnership money expended in the aforementioned incidental expenses should be taken into account when calculating the damages for Yusuf Claim No. Y-8. United opposed Hamed's argument and argued that

[6] In the July 13, 2021 Opinion, the Master explained:

> …Here, Yusuf's reasonable reliance on Mohammad Hamed's ongoing and repeated material misrepresentations resulted in Yusuf Claim No. Y-8 being disputed due to the unreliability and deficiency of the Partnership accounting and record keeping during the relevant period. Under these circumstances, the Master is inclined to invoke equitable estoppel to ensure fairness in the relationship between the parties for Yusuf Claim No. Y-8 and find that Hamed, and in turn the Partnership, are estopped from taking a position inconsistent with their prior conduct and language—to wit, the acceptance of the inadequacy of the Partnership accounting and record keeping. *See Browne*, 66 V.I. 328 at 334 ("because [equitable estoppel] promotes equity and justice by preventing one party from taking unfair advantage of another").
>
> (July 13, 2021 Opinion, p. 15.)

credit to the Partnership is not warranted for Partnership money expended on incidental expenses because Hamed failed to provide any information as to the value of the incidental expenses and that even if the value was calculated, it would be *de minimus*.[16]

Here, aside from conclusory statements that Partnership money was used to pay the incidental expenses, Hamed failed to provide any testimony or evidence whatsoever as to the amount of Partnership money that was used to pay the incidental expenses. As such, the Master finds that no credit is warranted to the Partnership in connection with the incidental expenses.[17]

2. Taxes

Hamed also pointed out that that Partnership money was used to pay the taxes associated with the sale of water to third parties during the period of April 1, 2004 through February 28, 2015, such as gross receipts taxes and income taxes. Thus, Hamed also argued the amount of Partnership money expended in the aforementioned taxes should be taken into account when calculating the damages for Yusuf Claim No. Y-8. United had previously conceded to this argument in its reply to Hamed's opposition to United's partial motion for summary judgment for Yusuf Claim No. Y-8, filed on July 7, 2020. (July 7, 2020 Reply, p. 12.)

However, again, aside from conclusory statements that Partnership money was used to pay the aforementioned taxes, Hamed failed to provide any testimony or evidence whatsoever as to the amount of Partnership money that was used to pay the aforementioned taxes. However, as United indicated in its reply to Hamed's opposition to United's partial motion for summary judgment for Yusuf Claim No. Y-8, filed on July 7, 2020, during the relevant period, the U.S. Virgin Islands imposed a tax of four percent (4%) to five percent (5%) on the gross receipts of U.S. Virgin Islands businesses.[18] (July 7, 2020 Reply, p. 12.) As such, the Master finds that no credit is warranted to the Partnership in connection with the income taxes, but that credit is warranted to the Partnership in connection with the gross receipts taxes in the amount of $19,168.88.[19]

B. Final Amount

Based on the figures above, the Master arrives at the final amount of $205,043.62.[20] In comparison to that number, the Master finds the amount of damages United claimed for Yusuf Claim No. Y-8—$693,207.46—unreasonable and unsupported. Accordingly, the Master will adjust the amount of damages claimed by United in Yusuf Claim No. Y-8 from $693,207.46 to $205,043.62.

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[13] At the April 15, 2021 hearing, Fathi Yusuf and Maher Yusuf testified that the average number of water trucks per day varied significantly day to day during the relevant period, and Waleed Hamed testified that his prior discovery responses to Fathi Yusuf's Interrogatory 30—that "[t]o get a sense of the scope, in the 2000s, the Partnership was sending out one or two trucks a day to deliver water, rather than the previous 10 or more trucks"—were correct. (April 15, 2021 Hr'g Tr. 8:1-25, 10:1-5, 37:23-25, 38:1-11, 49:8-12, 53:4-12.) Here, in the absence of any other supporting evidence that there were more water trucks per day in connection with the water sale than the numbers conceded to by Waleed Hamed, the Master will use the average of the numbers conceded to by Waleed

Hamed to calculate the Water Proceeds. In other words, for the purpose of evaluating the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y-8, the Master will use the following figure as the average number of water trucks per day in connection with the water sale during the relevant period: one and one-half (1½) water trucks per day.

[14] At the April 15, 2021 hearing, Fathi Yusuf and Maher Yusuf essentially both testified that the average capacity of the water trucks was 5,000 gallons during the relevant period, and Waleed Hamed testified that his prior discovery responses to Fathi Yusuf's Interrogatory 30—that "[a]t its peak, in the 1990s, 10 or more trucks a day, each with a capacity of 30,000 gallons, delivered water to St. Croix residents" and that "[t]o get a sense of the scope, in the 2000s, the Partnership was sending out one or two trucks a day to deliver water, rather than the previous 10 or more trucks"—were correct. (April 15, 2021 Hr'g Tr. 6:13-25, 7:1-11, 36:6-21, 41:1-14, 52: 7-17.) Here, in the absence of any other supporting evidence that the average capacity of the water trucks in connection with the water sale was 30,000 gallons during the relevant period, the Master will use the number Fathi Yusuf and Maher Yusuf testified to to calculate the Water Proceeds. In other words, for the purpose of evaluating the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y-8, the Master will use the following figure as the average capacity of the water trucks in connection with the water sale during the relevant period: 5,000-gallon water trucks.

There was no testimony or evidence that supports a finding that the Partnership sold water to third parties at a different rate for water sold at the United Shopping Center versus water sold via delivery. Thus, in determining the average capacity of the water trucks during the relevant period, the Master did not differentiate between water trucks that purchased water at the United Shopping Center and water trucks that delivered water for sale.

[15] While United and Hamed addressed the issue of Partnership money expended in connection with the sale of water to third parties during the relevant period in terms of a deduction from the damages to United and the Master addressed it in terms of a credit to the Partnership, the ultimate result is the same—namely, the amount of Partnership money expended will be taken into account when calculating the damages for Yusuf Claim No. Y-8.

[16] United had previously conceded in its reply to Hamed's opposition to United's partial motion for summary judgment for Yusuf Claim No. Y-8, filed on July 7, 2020, that "it would be appropriate to deduct the allocation of Mike Yusuf's salary, based on the time he spent on that installation [of the standpipe used to deliver water to the water trucks], to arrive at an appropriate measure of damages." (July 7, 2020 Reply, p. 12.) However, Hamed failed to provide any testimony or evidence whatsoever as to the amount of Mike Yusuf's salary for the installation of the standpipe. Thus, the Master finds that no credit is warranted to the Partnership in connection with Mike Yusuf's salary for the installation of the standpipe.

[17] In his proposed findings of facts and conclusions of law, Hamed made the following comments in passing in a footnote:

> If the September 4th and November 9th Orders rejected the "water" as being the chattel that was converted, holding that it was the water proceeds that were converted, then this alternate finding is misplaced. However, it is respectfully submitted that the partnership always owned the proceeds, the issue is what is the value of the water before adding any costs associated with selling it. See, e.g, Am.Jur., Sec. 231 of "Mines and Minerals," at page 445:
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> > In some cases, the plaintiff has been held entitled to the value of the coal or other mineral wrongfully mined, without allowing the defendant anything for the cost of digging or severing, for his equipment and facilities used in the trespass, or for breaking or other acts necessary to render the article marketable. A different rule of damages, and one more favorable to the defendant, has been followed by many courts. They deduct the cost of digging or severing the article in cases where the defendant is not chargeable with fraud, violence, or wilful negligence or wrong. (citations omitted).
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> Here, there certainly was no such fraud or wilful misconduct, as Yusuf not only knew all about the partnership selling the water, but was 'in charge of the office decisions' at that time. See, e.g., Tr. 11.
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> (Hamed's Proposed Findings of Facts and Conclusions of Law, p. 9, footnote 6.)

To the extent that Hamed is trying to re-litigate the issue of whether the Partnership or United owned the Water Proceeds, the Master has already made its ruling thereto and will not address it again here.

To the extent that Hamed is arguing that Partnership money expended should be taken into account when calculating the damages for Yusuf Claim No. Y-8 because no fraud and wilful misconduct exists, the Master finds Hamed's argument undeveloped and not properly supported—to wit, Hamed did not cite the proper binding legal authority, statute or rule, or develop its argument as to why Am.Jur., Sec. 231 of "Mines and Minerals" should apply in this instance. *See Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments … before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument."). "It is not the Court's job to research and construct legal arguments open to parties … In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate." *V.I. Taxi Association v. West Indian Company, Limited*, 2016 V.I. LEXIS 170, *4 (Super. Ct. Oct. 18, 2016) (citing *Charles v. CBI Acquisitions, LLC*, 2016 V.I. LEXIS 62, *27 n. 66). Thus, the Court will not address this argument.

[18] According to Title 33 V.I.C. § 43(a), "[e]very individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay a tax of four percent (4%) on the gross receipts of such business." Additionally, according to the Editor's Note thereto, "Act 7248, § 3, amended by Act 7342, § 7, and again amended by Act 7346, § 16, provides: 'Notwithstanding title 33 Virgin Islands Code, chapter 3, section 43(a), every individual and every firm, corporation, and other association

doing business in the Virgin Islands shall report their gross receipts and pay a tax of 5 percent on the gross receipts of such business from March 1, 2012, until such time as the corporate income taxes collected reaches the $185,000,000 level.'" Thus, a tax of four percent (4%) will be used to calculate the gross receipts taxes for the period of April 1, 2004 through February 29, 2012, and a tax of five percent (5%) will be used to calculate the gross receipts taxes for the period of March 1, 2012 through February 28, 2015.

[19] This amount is based on the following calculations using the figures the Master established above to evaluate the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y-8:

April 1, 2004 through February 29, 2012 (2,891 days):
$112.50 x 2,891 days = $325,237.50
0.04 x $325,237.50 = $13,009.50

March 1, 2012 through February 28, 2015 (1,095 days):
$112.50 x 1,095 days = $123,187.50
0.05 x $123,187.50 = $6,159.38

Total: $13,009.50 + $6,159.38 = $19,168.88

[21] This amount is based on the following calculation: $224,212.50 – $19,168.88 = $205,043.62.

(July 13, 2021 Opinion, pp. 16-20.)

On August 2, 2021, United filed this instant motion for reconsideration.

STANDARD OF REVIEW[7]

[7] In its motion for reconsideration, United did not indicate that it filed its motion pursuant to Rule 6-4 of the Virgin Islands Rules of Civil Procedure (hereinafter "Rule 6-4"), which governs motions for reconsideration. United requested "that the Master grant its Motion for Reconsideration and rule that the full amount of the net water revenues, or $410,087.24, be awarded to it." (Motion, p. 5.) The July 13, 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 No. Y-8 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

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).[8] 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

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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.").

[8] 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). Rule 50 of the Superior Court Rules provided: "For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications." Super. Ct. R. 50. 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.

have been raised in the first set of motions." *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008).[9] "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 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 the Master should grant its motion to reconsider the July 13, 2021 Ruling "and rule that the full amount of the net water revenues, or $410,087.24, be awarded to it." (Motion, p. 5.) United made the following assertions in support of its argument: (i) "[T]his reduction of the gross amount due United by 50% is inconsistent with how United's other claims have been handled by Judge Brady (in his April 2015 Order directing the payment of rent to United) and in the Master's Orders granting summary judgment and a money award to United on the Y-7/Y-9 claims and the Y-5 claim"—to wit, "[i]n all three of these awards to United, there was no discounting by 50% of the gross amounts recoverable." (Id., at pp. 2-3); (ii) "United's proposed findings of fact and conclusions of law submitted on May 19, 2021, after the evidentiary hearing on the water claim asserted a right to a 100% recovery of water sales revenues from the partnership"—to wit, United 's

[9] 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*.

"Proposed Finding no. 11 stated that 'the total value of Water Proceeds … is $597,687.50,'" "Proposed finding of fact number 15 asserted that "[t]he Court find that [the] amount due to United for the Water Proceeds…is $597,687.50," and "Conclusion of Law number 10 was to the same effect: 'United is entitled to a recovery in the amount of $597,687.50…'" (Id., at p. 3); (iii) "Hamed stated in his own May 19, 2010 proposed findings and conclusions, Yusuf testified: 'At the April 15th hearing, Yusuf testified that United is entitled to damages in the amount of $693,207.46.'" (Id.); (iv) "Hamed argued in its 2020 briefing a year ago that while there were no distributions of profits during the pendency of the criminal case in the period 2004 to 2012, after 2012 'millions of dollars in accrued profits' were distributed to Yusuf and Hamed on a 50-50 basis and that these distributions to each included the profits earned on the water sales after payment of taxes and expenses, to bolster his argument that the Partnership (as a tenant) was entitled to the water proceeds – a position that the Master has rejected finding that United (as the landlord) owns the water and the proceeds from its sale." (Id.); (v) "There has been no earmarking of the distributions that have been made by approval of the Master since 2012 such that it can be said that any part of them include profits on the water sales, much less that none are still sitting in the $9,000,000+ partnership fund that will be distributed to the partners once the claims resolution process had been concluded." (Id.); (vi) "Distributions to Hamed and Yusuf (even if they are of net profits from water sales collected for United) are not payments to United" because Yusuf and United are not the same" and "United is a creditor of the Partnership, if the Partnership has made earlier distributions to its partners, those distributions do not impact the funds now found to be due to its creditor – United." (Id., at pp. 3-4); (vii) "But even if any partnership monies distributed on an equal basis to Hamed and Yusuf after 2012 are deemed to have included all post-tax water sales revenues, United would not be made whole if it only collects only half of what it is owed" because "[t]hen Hamed would still owe United half of after-tax water sales ($205,043.62) that he received." (Id., at p. 4); (viii) "It would be inequitable for the amount awarded to United to be only 50% of what it is actually entitled

to." (Id.); (ix) "The statement [in United's July 7, 2020 reply] was mistakenly made in response to the arguments from Hamed that all the water proceeds were owned by the Partnership, as the tenant, as opposed to United, as the landlord – a position rejected by the Master." (Id., footnote 2); (x) "[A]ll of the prior submissions in Yusuf's Accounting Claims and Proposed Distribution Plan of September 30, 2016 ("Initial Distribution Plan"), Yusuf's Amended Accounting Claims of October 30, 2017 ("Amended Distribution Plan"), at the April 15, 2021 hearing and the Proposed Findings and Conclusions submitted by United almost a year later, on May 19, 2021 consistently took the position that 100% of United's water proceeds were recoverable, as noted above." (Id.); (xi) "This position is consistent with the formula in the Yusuf's Initial and Amended Distribution Plans to provide reserves, then pay debts of the partnership and then finally to reconcile the accounting claims between the partners." (Id.); (xii) "While statements in a denied motion for summary judgment or other brief may, in some circumstances, be introduced at trial as evidence, Hamed made no attempt to do that at the April 15, 2021 trial." (Id.); (xii) "Nor did he allude to that in his post-trial proposed findings and conclusions." (Id.); (xiii) "Had Hamed requested that statements from United's brief from a year before, be treated as evidence, contradicted by Yusuf's trial testimony and United's Proposed Findings and Conclusions of Law, be admitted into evidence, United would have objected and explained why the full 100% was sought."[10] (Id.); (xiii) "Hamed argued at trial and in his proposed findings and conclusions that United was entitled to no recovery at all because it had not proved its damages." (Id., at p. 3, footnote 2.)

In his opposition, Hamed argued that the Master should deny United's motion and should not amend the July 13, 2021 Ruling. (Opp., p. 4.) Hamed made the following assertions in support

[10] United referenced: *American Title Insurance Co. v. Lacelaw*, 861 F.2d. 224, 227 (9th Cir. 1988) (where party did not seek to introduce at trial a statement in a brief, court ruled correctly that the statement could not be treated as binding on the party).

of his argument: (i) The Master "found the amount of the total water sales to be $448,425.00, which was then reduced by half—to $224,212.50" and the "[r]eduction was based on United's express admission (quoted by the Special Master on p. 17 of the instant Order) that 'the gross sales would have to cut in half to arrive at recoverable damages because United's principal, Fathi Yusuf, has already received one half of the net income from water sales.'" (Id., at p. 2); (ii) "Yusuf's original statement and reasoning were absolutely correct"—to wit, "Fathi Yusuf already received one-half of any profits that the Partnership, not Hamed personally, kept." (Id.); (iii) "United failed to point to any provision of V.I.R. Civ. P. 6-4 setting forth the grounds upon which this reconsideration motion seeks relief, nor did this Court err in adopting United's express admission." (Id.) (footnote omitted); (iv) "[T]he other claims Yusuf identifies (Y-5, Y-7 and Y-9) were not instances where the Partnership kept profits that were then divided and paid out 50-50 to the partners, as they were *expenses* found to be due United." (Id.) (emphasis omitted); (v) "[T]he current ruling is not even slightly inconsistent with any past rulings." (Id.); (vi) "[T]he award on this Y-8 claim was based on the exercise of the Special Master's sound discretion" and "[t]hat award was largely based on a finding of equitable estoppel in favor of 'Yusuf' due to Hamed's conduct during the partnership." (Id., at p. 3); and (vii) "If anything, this Court should exercise its discretion and vacate the entire award, as 'Yusuf' is not the party here, so that United (a non-partner third party) should not be permitted to rely upon equitable estoppel between the partners." (Id.) (emphasis omitted); (viii) "While the partners failed to keep accurate records, leading to the equitable estoppel finding, United is a third party seeking amounts that it should have proven based on its own records, which it either did not have or failed to use for this claim" because "[t]here has never been a finding, nor should there have been, that United can benefit on the equitably questionable conduct between the partners–in this instance it is merely a third party claimant."

(Id.) (emphasis omitted.) Hamed also included the following example to further support his argument: "Assume the total gross sales were $100. Also assume there were no costs, so the $100 is also the net sales (i.e., profits). When the partners split the profits as received by the Partnership, Yusuf received $50 and Hamed received $50. As such, it would be a $50 windfall to Yusuf if his corporation, United, now was paid the entire $100 from the Partnership without an offset for the $50 he already received. This is exactly the reasoning put forward by Yusuf in his reply–as quoted above." (Id., at p. 3.)

In its reply, United pointed out that, in Hamed's opposition, "Hamed fail[ed] to respond to United's arguments that under *American Title Insurance Co. v. Lcaelaw*, 861 F.2d 224 (9th Cir. 1988), the statements in United's reply brief should not be deemed binding." (Reply, pp. 1-2.) United made the following assertions in support of its position that United should not be bound by the statements in its July 7, 2020 reply: (i) "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." (Id., at p. 2); (ii) "The [Ninth] Court cited a Second Circuit decision that "inadvertent statements of fact made by counsel in briefs should not be conclusively binding…'"[11] and also "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.'"[12] (Id.); (iii) "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

[11] United referenced: *American Title*, 861 F.2d at 226 (quoting from case).

[12] United referenced: *American Title*, 861 F.2d at 227.

court has discretion to rule the other way."[13] (Id.); (iv) The rule followed in *American Title* "is also the rule which is followed in the Virgin Islands."[14] (Id.); (v) While "[t]he 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[,]the *American Title* case suggests several factors that should inform the Court's exercise of discretion in this context." (Id.); (vi) "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." (Id., at p. 3); (vii) "It should be noted that the holding in *American Title* is consistent with V.I. 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'" and "[u]nder 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."[15] (Id., at p. 4); (viii) "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"[16]—to wit, United has acknowledged in its Motion for Reconsideration that the assertion in its reply brief was 'mistakenly made,'" "it is inconsistent with everything else that United has said about [Yusuf Claim No. Y-8]," and "[t]he sheer number of issues to cover and the felt need to be comprehensive in covering

[13] United referenced: *American Title*, 861 F.2d at 27 [sic] (emphasis in original).

[14] United referenced: *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…").

[15] United referenced: *Lavean v. Cowels*, 835 F.Supp. 375, 382 (W.D.Mich. 1993).

[16] United referenced: *American Title*, 861 F.2d at 227.

them can lead to honest mistakes in the drafting of briefs." (Id., at p. 5); (ix) "[T]he statement made in United's reply is objectively false." (Id.); an (x) Hamed also reiterated some of the assertions previously made in his motion.

The Master must note at the outset that United did not state the grounds on which its motion is based. While United stated in its reply that "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," 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 statement in its reply and the substance of United's motion, the Master will assess United's motion for reconsideration of the July 13, 2021 Ruling 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.").[17]

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 July 13, 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*,

[17] 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 forth in *Arvidson*, *Merchants*, *Smith*, and *Matthews*.

69 V.I. 394, 427 (Super. Ct., Oct. 17, 2018) (citing and quoting *Cabrita Point Dev., Inc. v. Evans*, 52 V.I. 968, 975 (D.V.I. 2009).[18] 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 Master should reconsider the July 13, 2021 Ruling because United should not be bound by the following statement in its July 7, 2020 reply: "the gross sales would have to cut in half to arrive at recoverable damages because United's principal, Fathi Yusuf, has already received one half of the net income from water sales." (July 7, 2020 Reply, p. 12.) The Master must point out that although United cited extensively to *American Title*, United failed to explain why *American Title*, a Ninth Circuit case, is binding authority on the Virgin Islands courts rather than *Walters v. Walters*, a Virgin Islands Supreme Court case that was cited in passing by United in its reply. The Master finds no reason to follow the guidelines set forth in *American Title* as United argued, and thus, the Master will follow the guidelines set forth in *Walters*.[19]

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[18] 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 9. Thus, the Master will follow the guidelines set forth in *Manbodh*.

[19] The parties are reminded of that the Virgin Islands attorneys have an obligation under the Virgin Islands Rules of Professional Conduct "to disclose the tribunal legal authority in the controlling jurisdiction." V.I. S. Ct. R. 211.3.3(a)(2). This is similarly mandated in the Virgin Islands Rules of Civil Procedure. *See* V.I. R. CIV. P. 6-1(a)(2) ("All motions must:…state with particularity the grounds for seeking the order, including a concise statement of reasons and citation of authorities,…"); V.I. R. CIV. P. 11(b)(5) ("By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:…the applicable Virgin Islands law has been cited, including authority for and against the positions being advocated by the party,…"). Attorneys may be subject to sanctions for failure to comply with these rules. *See Roy v. Poleon*, 2016 V.I. LEXIS 245, at *5 (V.I. Super. Ct. Dec. 12, 2016) (citing *Benjamin v. Coral World VI, Inc.*, 2014 V.I. LEXIS 35, *13, n.38 (V.I. Super. Ct. June 12, 2014) ("[T]he Court may strike motions lacking binding authority as fatally deficient."); *see also*, *Percival v. People of the Virgin Islands*, 62 V.I. 477, 491

In *Walters*, the Virgin Islands Supreme Court stated that "[a]lthough unsworn representations of an attorney are not evidence, an attorney's client may nevertheless be bound by such statements under the doctrines of judicial admissions and judicial estoppel." 60 V.I. at 775 n.7 (internal citation and quotations omitted). Here, United's statement in its July 7, 2020 reply was an unsworn representation of its attorney and thereby not evidence, but according to *Walters*, United may still be bound by such statement under the doctrines of judicial admissions and judicial estoppel.

A. The Doctrine of Judicial Estoppel

The Virgin Islands Supreme Court has recognized that "judicial estoppel is a common-law doctrine that prevents a party from adopting inconsistent positions when doing so would constitute a fraud on the court." *Sarauw v. Fawkes*, 66 V.I. 253, 260 (V.I. 2017); *see e.g., Walters*, 60 V.I. at 775 n.7; *Fontaine v. People*, 56 V.I. 571, 583 n.7 (V.I. 2012) (quoting *Boston v. Gov't of the V.I.*, 46 V.I. 520, 526 (D.V.I. App. Div. 2005)). In *Sarauw*, after conducting an in-depth *Banks* analysis,[20] the Virgin Islands Supreme Court concluded:

> …the judicial estoppel doctrine will preclude a party from asserting a position on a question of fact or a mixed question of law and fact that is inconsistent with a position taken by that party in a previous judicial proceeding if the totality of the circumstances compels such a result. In conducting this inquiry, a court must focus on the impact that allowing the inconsistent claims would have on the judicial process, which may include considering the extent of the inconsistency (including any reasonable explanations that would harmonize both positions), whether the party has received an unfair advantage or benefit from asserting the inconsistent claims, and whether another court has already relied on the claim made in the first proceeding. However, like the United States Supreme Court, we emphasize that these factors are neither exclusive nor exhaustive, and that a court may consider any relevant factor in light of the particular situation before it.

(V.I. 2015) (suggesting that an attorney failing to present controlling law in a brief is subject to sanctions as the Court deems appropriate).

[20] Under *Banks v. Int'l Rental & Leasing Co.*, 55 VI. 967 (V.I. 2011), the Virgin Islands courts are required to conduct a three-prong test to determine the applicable common law.

Sarauw v. Fawkes, 66 V.I. at 264-65 (footnotes omitted).[21]

The Virgin Islands Supreme Court emphasized that "[i]n reaching this decision, we are cognizant of our longstanding instruction 'that the preference is to decide cases on their merits' and 'that any doubts should be resolved in favor of this preference'" and that "[t]o that end, we emphasize that '[j]udicial estoppel is not a sword to be wield by adversaries,' and 'is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts.'" *Id.*, 66 V.I. at 265-66. "In other words, judicial estoppel is not a 'shortcut' to circumvent the ordinary fact-finding process" and instead, "'judicial estoppel is intended to protect the integrity of the fact-finding process by administrative agencies and courts." *Id.*, 66 V.I. at 266. Thus, the Virgin Islands Supreme Court cautioned that "'[b]ecause of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.'" *Id.*

[21] The *Sarauw* court discussed the doctrine of judicial estoppel in terms of inconsistent positions asserted by a party in two separate judicial proceedings and did not contemplate inconsistent positions asserted by a party in the same judicial proceedings. Nevertheless, the Master finds that it would be consistent with the *Sarauw* court's ruling to extend the doctrine of judicial estoppel to preclude a party from asserting a position that is inconsistent with a position previously taken by that party in the same judicial proceeding if the totality of the circumstances compels such a result. *See e.g.*, *Fontaine v. People of the V.I.*, 56 V.I. 571, 583 n.7 (V.I. 2012) (*citing Boston*, 46 V.I. 520, 526 (D.V.I. 2005) ("As the Appellate Division explained, Judicial estoppel is 'estoppel that prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.' Black's Law Dictionary 571 (7th ed. 1999). It has also been termed the 'doctrine of preclusion of inconsistent positions.' *Id*. The Third Circuit considers judicial estoppel to be 'an extraordinary-remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355, 365 (3d Cir. 1996) (quotation omitted)."). Because, ultimately, regardless of whether a party is asserting a position that is inconsistent with a position previously taken by that party in the same judicial proceeding or in a prior judicial proceeding, allowing the inconsistent claims could negatively impact the integrity of the judicial process and the doctrine of judicial estoppel is necessary to safeguard the interests of the judicial system. *See Sarauw*, 66 V.I. at 265, n.5 ("the doctrine of judicial estoppel is intended to safeguard the interests of the judicial system").

Applying these factors here, the Master will first consider if United presented inconsistent positions on a question of fact or a mixed question of law and fact. On one hand, United's position was that its recoverable damages as to Yusuf Claim No. Y-8 is all the Water Proceeds from April 1, 2004 through February 28, 2015—to wit, $693,207.46, based on United's calculation. (Yusuf's September 30, 2016 Accounting Claims, Yusuf's October 30, 2017 Amended Accounting Claims, United's April 17, 2020 Motion for Partial Summary Judgment for Yusuf Claim No. Y-8,[22] and United's May 19, 2021 Post-Hearing Brief for Yusuf Claim No. Y-8.) On the other hand, United's position was that its recoverable damages as to Yusuf Claim No. Y-8 is half of all the Water Proceeds from April 1, 2004 through February 28, 2015 "because United's principal, Fathi Yusuf, has already received one half of the net income from water sales." (United's July 7, 2020 Reply to Hamed's Opposition to United's Motion for Partial Summary Judgment for Yusuf Claim No. Y-8, p. 12.) Thus, the Master finds that United asserted inconsistent positions on a question of fact. This, however, does not automatically compel the Master to apply the doctrine of judicial estoppel to this case. To determine whether to invoke the doctrine of judicial estoppel, the Master still needs to consider the impact that permitting United's inconsistent claims would have on the judicial process.

In focusing on the impact that allowing the inconsistent claims would have on the judicial process, the Master considers the extent of the inconsistency, including any reasonable explanations that would harmonize both positions. Here, the Master finds the two positions asserted by United irreconcilably inconsistent. Next, the Master considers whether the party has received an unfair advantage or benefit from asserting the inconsistent positions. Here, the Master

[22] While United only sought summary judgment as to the issue of liability for Yusuf Claim No. Y-8 in its April 17, 2020 motion for partial summary judgment, United discussed the issue of damages in passing.

finds that United did not receive an unfair advantage or benefit from asserting the inconsistent positions. Next, the Master considers whether the Master has already relied on one of the inconsistent positions made in this proceeding. Here, the Master relied on United's position that its recoverable damages as to Yusuf Claim No. Y-8 is half of all the Water Proceeds from April 1, 2004 through February 28, 2015 to arrive at the amount of damages for Yusuf Claim No. Y-8. Next, the Master considers other factors relevant to this particular situation. *See Sarauw*, 66 V.I. at 265 ("However, like the United States Supreme Court, we emphasize that these factors are neither exclusive nor exhaustive, and that a court may consider any relevant factor in light of the particular situation before it.") Here, United explained that its statement in its July 7, 2020 reply—"the gross sales would have to cut in half to arrive at recoverable damages because United's principal, Fathi Yusuf, has already received one half of the net income from water sales"—was the result of inadvertence and mistake, and that it is "objectively false." While the Master certainly understands that inadvertence and mistake are inevitable, but the fact that United made an objectively false statement raises great concerns because this warrants an inference that United was willing to make any statements—even objectively false statements—to respond to Hamed's argument. In all cases, but especially in a case like this where a myriad of issues is raised and numerous briefs are filed, the Master relies on the parties to make truthful statements and to not mislead the Master. Nevertheless, the Master finds the alleged inconsistency insignificant at best because United subsequently argued at the April 15, 2021 hearing and in its post-hearing brief for Yusuf Claim No. Y-8 that its recoverable damages as to Yusuf Claim No. Y-8 is all the Water Proceeds from April 1, 2004 through February 28, 2015, which was consistent with its original position, and Hamed himself never acknowledged or relied on United's position that its recoverable damages as to Yusuf Claim No. Y-8 is half of all the Water Proceeds from April 1,

2004 through February 28, 2015 at the April 15, 2021 hearing or in his post-hearing brief for Yusuf Claim No. Y-8. Moreover, the Master finds no evidence of intent on United's part to manipulate or mislead the Master.[23] *See Id.*, 66 V.I. at 266 (noting that the doctrine of judicial estoppel "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts"). Based on the foregoing, the Master finds that the totality of the circumstances does not compel the Master to apply the doctrine of judicial estoppel in this instance. *See Sarauw*, 66 V.I. at 265 (noting that "[i]n reaching this decision, we are cognizant of our longstanding instruction 'that the preference is to decide cases on their merits' and 'that any doubts should be resolved in favor of this preference'"). As such, the Master concludes that United is not bound by its statement in its July 7, 2020 reply under the doctrine of judicial estoppel. *See Id.*, 66 V.I. at 266 ("'Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.'").

B. The Doctrine of Judicial Admissions

In *Arlington Funding Services, Inc. v. Geigel*, the Virgin Islands Supreme Court recognized the doctrine of judicial admissions in the Virgin Islands and held that "facts asserted in pleadings may be regarded as 'judicial admissions' which are binding on the party asserting them for the purpose of that case and any later appeal and which do not have to be later proven." 51 V.I. 118, 133 (V.I. 2009), *overruled in part on other grounds by Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564 (V.I. 2012), (citing *Sobratti v. Tropical Shipping & Constr. Co.*, 267 F. Supp. 2d 455,

[23] The parties are reminded to be more diligent with the accuracy of their representations to the Master.

463 (D.V.I. 2003) ("Hence, a party is precluded from retreating from a factual claim, which he affirmatively asserted in support of his cause of action, simply to avoid summary judgment") (collecting cases)). Here, the statement at issue was not asserted in pleadings, and thus, the statement will not be regarded as judicial admissions. As such, the Master concludes that United is not bound by its statement in its July 7, 2020 reply under the doctrine of judicial admissions.

C. Clear Injustice

Based on the foregoing, the Master finds that there is a clear injustice in having United bound by the statement in its July 7, 2020 reply. After considering the overall record, the Master finds that the reduction of the figure the Master established to evaluate the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y- 8 by half was not warranted because United is entitled to recover from the Partnership all the Water Proceeds from April 1, 2004 through February 28, 2015 (minus the gross receipt taxes in the amount of $19,168.88), regardless of whether the Partnership distributed the Water Proceeds to its partners, Mohammad Hamed and Fathi Yusuf. The Master will illustrate this using the example given by Hamed in his opposition. In his example, Hamed stated:

> …Assume the total gross sales were $100. Also assume there were no costs, so the $100 is also the net sales (i.e., profits). When the partners split the profits as received by the Partnership, Yusuf received $50 and Hamed received $50.
>
> (Opp., p. 3.)

As Hamed pointed out, when the Partnership split $100.00 equally between the partners, Mohammad Hamed and Fathi Yusuf, each partner gets $50.00. This is precisely why that even if the Partnership distributed the Water Proceeds to its partners, United is entitled to recover from the Partnership the sum of $100.00 because Fathi Yusuf received the $50.00 as a partner of the Partnership and not as the president of United. While it is true that Yusuf simultaneously acted as

the managing partner of the Partnership and as the president of United, Yusuf and United are not the same entity and it is illogical to consider any distributions Fathi Yusuf received as a partner from the Partnership to be automatically treated as distributions to United.[24] After all, the Court

[24] Interestingly, while Hamed argued in his opposition that Fathi Yusuf and United should be treated the same for the purpose of receiving distributions from the Partnership, Hamed also argued that Fathi Yusuf and United should not be treated the same for the purpose of invoking the doctrine of equitable estoppel. In fact, Hamed argued that "this Court should exercise its discretion and vacate the entire award, as 'Yusuf' is not the party here, so that United (a non-partner third party) should not be permitted to rely upon equitable estoppel between the partners." (Opp., p. 3.) The Master must note that Hamed's opposition to United's motion for reconsideration was not the proper place for Hamed to move the Master to reconsider the July 13, 2021 Ruling and vacate the entire award; Hamed should have filed its own motion for reconsideration. Although the Master does not need to address Hamed's argument here since it was not properly raised, the Master will nevertheless address it in the interest of judicial efficiency and economy.

Here, though not stated directly, Hamed essentially argued that the Master should reconsider the July 13, 2021 Ruling based on the need to correct clear error of law—to wit, the Master committed clear error when he invoked the doctrine equitable estoppel based on the partners' conduct and found that Hamed was estopped from raising any defenses based on the argument that United is not entitled to damages for Yusuf Claim No. Y-8 because the calculation of damages is speculative due to inadequate accounting and deficient record keeping in connection with the water sale. Upon review, the Master agrees. As such, the Master will reconsider the July 13, 2021 Ruling and conduct proper analysis for the doctrine of equitable estoppel based on the conduct of the Partnership and United.

In *Browne v. Stanley*, the Virgin Islands Supreme Court established that "[i]n the Virgin Islands, equitable estoppel requires an asserting party to demonstrate that (1) the party to be estopped made a material misrepresentation (2) that induced reasonable reliance by the asserting party and (3) resulted in the asserting party's detriment" and explained that this is the soundest rule "because it promotes equity and justice by preventing one party from taking unfair advantage of another." 66 V.I. 328 at 334 (V.I. 2017). As noted in the July 13, 2021 Opinion, the Master finds the *Wilkinson* court's definition of misrepresentation and material misrepresentation applicable in this instance. A misrepresentation is "an assertion that is not in accordance with the facts" and a misrepresentation is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *Wilkinson v. Wilkinson*, 70 V.I. 901, 914 (V.I. 2019). Furthermore, in certain circumstances, misrepresentations may also include concealment or even nondisclosure. *See Id.*, 70 V.I. at 914, n.7 ("Actionable misrepresentations may also include, in certain circumstances, concealment or even non-disclosure."). With the elements of equitable estoppel in mind, the Master will begin his evaluation. *See Browne*, 66 V.I. at 336 ("The existence of reasonable reliance and detriment 'depends upon the facts of each particular case.'").

The first element of equitable estoppel concerns the conduct or language amounting to a material misrepresentation. Here, both partners and their respective sons, and thereby the Partnership, had at all times, either actual or constructive knowledge, of United's informal and unreliable accounting and record keeping of the transactions and the arrangements between the Partnership and United. To list a few examples, both partners and their respective sons, and thereby the Partnership, were aware that (i) in the early phases of the Partnership, United and the Partnership filed taxes as one unit and there were no written documentations as to the arrangement between the Partnership and United regarding the which entity—the Partnership or United—was responsible for the payment of taxes, such as the gross receipt taxes relating to United Shopping Center, (ii) in the early phases of the Partnership, United maintained the bank accounts for both the Partnership and United's own separate bank accounts, there were no written documentations as to the arrangement between the Partnership and United regarding the bank accounts, (iii) there were no written leases or documentations as to the arrangement between the Partnership and United regarding the Partnership's use of Bay 1, Bay 5, and Bay 8 of the United Shopping Center, (iv) there were no written documentations as to the arrangement between the Partnership and United regarding the Water Proceeds sent to the partners' respective relatives in the Middle East, and (v) there were no written documentations as to the arrangement between the Partnership and United regarding the ownership of Parcel No. 2-4 Rem Estate Charlotte Amalie, No. 3 New Quarter, St. Thomas, U.S. Virgin Islands. In all the aforementioned examples, the transactions and arrangements continued for

found that Mohammad Hamed and Fathi Yusuf, and not Mohammad Hamed and United, were partners in the Partnership. *See* Nov. 7, 2014 Order ("the Court finds and declares that a partnership was formed in 1986 by the oral agreement between [Mohammad Hamed] and [Fathi] Yusuf…"). Here, there are no evidence that any distributions Fathi Yusuf received from the Partnership for the Water Proceeds were to be treated as distributions to United. As such, unlike what Hamed claimed, it would not be a windfall for United to get all the Water Proceeds from April 1, 2004 through February 28, 2015 from the Partnership without an offset of the money distributed to Fathi Yusuf because, even if the Partnership made distributions to the partners, United did not receive any money from the Partnership.

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years with both partners and their respective sons' full knowledge and agreement, and thereby the Partnership's full knowledge and agreement, and no one ever objected or took any actions to rectify the situation. Thus, the Master finds the Partnership and the partners' conduct of ongoing and repeated silence and acceptance of the inadequacy of United's accounting over the years and the lack of record keeping through failure to document went beyond a miscommunication or single act and amounted to an ongoing and repeated material misrepresentation of the fact that the Partnership and the partners agreed and consented to such inadequacy and deficiency.

The second element, reasonable reliance. The facts are clear that United reasonably relied on the Partnership and the partners' ongoing and repeated misrepresentation. As noted above, the inadequacy of the Partnership accounting and the lack of record keeping of the transactions and the arrangements between the Partnership and United continued for years without any objections from the Partnership, the partners, or their respective sons, and without any actions taken by them to rectify the situation.

The final element, detriment. Here, United's reasonable reliance on the Partnership and the partners' ongoing and repeated material misrepresentations resulted in Yusuf Claim No. Y-8 being disputed due to the inadequacy and deficiency of United's accounting and record keeping of the transactions and the arrangements between the Partnership and United during the relevant period. Under these circumstances, the Master will invoke the doctrine of equitable estoppel to ensure fairness in the relationship between United and the Partnership as to Yusuf Claim No. Y-8 and find that the Partnership and the partners are estopped from taking a position inconsistent with their prior conduct and language—to wit, the acceptance of the inadequacy and deficiency of United's accounting and record keeping of the transactions and the arrangements between the Partnership and United. *See Browne*, 66 V.I. 328 at 334 ("because [equitable estoppel] promotes equity and justice by preventing one party from taking unfair advantage of another"). More specifically, the Partnership and the partners are estopped from raising any defenses based on the argument that United is not entitled to damages for Yusuf Claim No. Y-8 because the calculation of damages is speculative due to inadequate accounting and deficient record keeping in connection with the water sale.

Based on the foregoing, the Master finds that Hamed is still estopped from raising any defenses based on the argument that United is not entitled to damages for Yusuf Claim No. Y-8 because the calculation of damages is speculative due to inadequate accounting and deficient record keeping in connection with the water sale. As such, there is no need to vacate the July 13, 2021 Judgment.

Thus, based on the Master's findings herein and the figures provided in the July 13, 2021 Opinion, the Master arrives at the following figure to evaluate the reasonableness of the amount of damages claimed by United for Yusuf Claim No. Y-8: $429,256.12.[25] In comparison to that number, the Master finds the amount of damages United claimed for Yusuf Claim No. Y-8—$693,207.46—unreasonable and unsupported. Accordingly, the Master will adjust the amount of damages claimed by United for Yusuf Claim No. Y-8 from $693,207.46 to $429,256.12.

CONCLUSION

For the reasons stated above, the Master will grant United's motion for reconsideration, reconsider the July 13, 2021 Ruling, and amend the July 13, 2021 Opinion in accordance with this Order. An amended judgment amending the July 13, 2021 Judgment in accordance with this Order will be entered contemporaneously herewith. Accordingly, it is hereby:

ORDERED that United's motion for reconsideration of the Master's July 13, 2021 Ruling, filed on August 2, 2021, which the Master construed as a motion to amend a judgment pursuant to Rule 59(e), is **GRANTED**. It is further:

ORDERED that the portions of the July 13, 2021 Opinion that are inconsistent with this Order shall be and are hereby **VACATED**.

DONE and so ORDERED this 24th day of September, 2021.

EDGAR D. ROSS
Special Master

[25] This amount is based on the following calculation: $448,425.00 (Water Proceeds from April 1, 2004 through February 28, 2015) – $19,168.88 (credit for gross receipt taxes) = $429,256.12.

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**

AMENDED JUDGMENT

In accordance with the Order entered contemporaneously herewith, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the portions of the order and judgment as to Yusuf Claim No. Y-8, entered on July 13, 2021, that are inconsistent with the Order entered contemporaneously herewith shall be and are hereby **VACATED**. It is further:

ORDERED, ADJUDGED, AND DECREED that Yusuf Claim No. Y-8 filed on behalf of United against the Partnership for water sales revenue collected by the Partnership from April 1, 2004 through February 28, 2015 in the amount of $429,256.12 is **GRANTED**. **And** it is further:

ORDERED, ADJUDGED, AND DECREED that United shall recover from the Partnership the sum of $429,256.12 for Yusuf Claim No. Y-8.

DONE and so ORDERED this 24th day of September, 2021.

EDGAR D. ROSS
Special Master