

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

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

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and **UNITED CORPORATION**

Defendants/Counterclaimants.

vs.

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

Counterclaim Defendants,

Case No.: SX-2012-CV-370

**ACTION FOR DAMAGES,
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF**

JURY TRIAL DEMANDED

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

vs.

UNITED CORPORATION, *Defendant.*

Consolidated with

Case No.: SX-2014-CV-287

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

vs.

FATHI YUSUF, *Defendant.*

Consolidated with

Case No.: SX-2014-CV-278

KAC357 Inc., *Plaintiff,*

vs.

HAMED/YUSUF PARTNERSHIP,

Defendant.

Consolidated with

Case No.: ST-18-CV-219

FATHI YUSUF, *Plaintiff,*

vs.

ESTATE OF MOHAMMAD A. HAMED,

Defendant.

Consolidated with

Case No.: ST-17-CV-384

**HAMED'S REPLY
RE YUSUF CLAIM Y-11
(LIFESTYLE ANALYSIS)**

I. Yusuf's "Opposition" Concedes the Brady Holding but Seeks Reconsideration

At page 8 of Yusuf's Opposition, he admits that Judge Brady has already found that the assumption necessary for this claim simply cannot be supported in this case. Yusuf concedes:

Judge Brady did allude that BDO, had in his view made as assumption which could not be supported – namely, that if their analysis showed that one or more of the Hameds had received money in excess of documented withdrawals or distributions from the Plaza Extras safes or bank accounts, that excess came from partnership monies. See Judge Brady's July 21, 2012 [*sic*] Limitations Order, p. 24. (Emphasis added.)

Instead of changing the claim or disputing that Judge Brady did express this "view," Yusuf seeks to continue on the same track by asking the Master to engage in a second motion for reconsideration—because Yusuf feels Judge Brady "did not appear to acknowledge" one statement out of the voluminous evidence and testimony--

such statement *did not appear to acknowledge* Mr. Mohammad Hamed's testimony, as referenced in the preliminary BDO report, that the Hamed family's sole source of income was the partnership.

Id. However, after a long, detailed evidentiary hearing, Judge Brady based his holding—what Yusuf variously calls "his view" or "dicta"—on (1) huge swaths of necessary accounting and other financial records being permanently missing, and (2) this being a criminal enterprise whose purpose was to falsify and otherwise obscure such information. In other words, Judge Brady held that it would be impossible to support this claim under the facts of this case,

that one or more of the Hameds had received money in excess of documented withdrawals or distributions from the Plaza Extras safes or bank accounts, that excess came from partnership monies.

Id.

This excerpt from the Opposition also admits that Judge Brady DID have the identical Hamed statement Yusuf seeks to rely on here before him when he made that earlier determination. Despite this, and the fact that other Hameds testified as to other sources of

income,¹ Yusuf asks the Master to same this claim in the only way remaining to him—to overturn Judge Brady’s determination because Yusuf feels that Judge Brady “did not appear to acknowledge” that statement. The motion to reconsider should be denied and thus the motion for summary judgment should be granted.

A. Facts as to This Yusuf (Second) Motion for Reconsideration

On August 11, 2017, Yusuf filed a first motion to reconsider Judge Brady’s opinion, making the identical arguments he raises here. On November 15, 2017, Judge Brady denied reconsideration at some length.

In that first motion (and reply) to Judge Brady, Yusuf did not supply cases, secondary authority or any responses to the actual legal arguments,² but rather relied on a lengthy declaration from Mr. Fernando Scherrer, a BDO accountant from Puerto Rico, stating, in effect, that Judge Brady’s opinion was just plain wrong. Mr. Scherrer opined that Judge Brady “misrepresented” the pivotal facts and was “incorrect” about his conclusions.³ After reading Mr.

¹ See, e.g., March 6, 2017 Hearing Transcript at 304-305 as to outside income for Hamed family members.

² Similarly, in the instant opposition Yusuf does not quote to any contrary cases or accounting experts; or even begin address Hamed’s case analysis and the applicable precedent about the extreme limitations of lifestyle analysis. Instead, Yusuf repeatedly quotes BDO’s views and thoughts as though they are authority for a second reconsideration when they were refused in the first motion. And he again tries to argue, as he did to Judge Brady (in the first motion for reconsideration) that Judge Brady’s observations about the records regarding this form of analysis were dicta, but that BDO’s opinions were authoritative

³ At ¶6, Mr. Scherrer opined that Judge Brady was not only wrong about the effect of unavailable financial records, but that the Court’s “characterization” went beyond a mere error, and were “misleading.”

6. The Court's characterization of the financial records available to assess the historical withdrawals between the Partners as "scant" or "patchwork" is misleading.

Scherrer's odd, unusually aggressive and hostile 'views'⁴—including the identical arguments Yusuf re-hashes here, Judge Brady responded in some detail. In denying that motion, Judge Brady made the following observation as to why the assumption that underlies a lifestyle analysis could not be supported in this case⁵—which was NOT DICTA at all—but rather lies

Similarly, at ¶10, he states that both the Court and the contrary expert is incorrect in suggesting that intentional destruction of documents “renders an accurate accounting impossible. . . .”

10. Mr. Shoenbach's Opinion Letter and the Court's Opinion place great significance on the destruction of safe receipts after the 2001 partial reconciliation by both parties, and both conclude that this one instance of destruction **renders an accurate accounting impossible**. See Court's Opinion at pp. 26-27, 29; Schoenbach Opinion Letter at p. 6. This conclusion is incorrect. . . .

⁴ In an odd way, Judge Brady's “views” rejecting Mr. Scherrer's cavalier critique of a court's decision and the apparent motives of the deciding judge anticipated the 2019 actions of the Justice Department and BDO in viewing Mr. Scherrer. See, e.g., October 21, 2021 article downloaded from: <https://www.elnuevodia.com/english/news/story /the-federal-government-has-several-ongoing-investigations-related-to-fema-reconstruction-funds/>.”

Earlier this month, former Education Secretary Julia Keleher pleaded guilty to two counts of conspiracy to commit fraud. . . .Former PRHI administrator Ángela Avila, meanwhile, faces charges of wire fraud and conspiracy, as does **former** BDO manager Fernando Scherrer. (Emphasis added.)

⁵ See, *Order Denying Motions for Reconsideration and to Certify Questions for Immediate Appeal*, November 15, 2017. More particularly, see Yusuf's August 11, 2017 *Motion for Reconsideration of Ruling Limiting Period of Accounting Claims*--which was denied by Judge Brady. There Yusuf makes the identical argument as here; one Judge Brady refused to accept. Yusuf contended:

The Court's opinion also includes a great deal of discussion of the state of the accounting records that has nothing to do with a laches analysis, and which in any event **is unsupported by the evidence and contradicted by the declaration of BDO's Mr. Scherrer**. The Court states that any reconciliation would be created "out of whole cloth," because there is "scant documentary evidence" to support the tabulation of withdrawals by each partner. Court's Opinion at p. 15. **In fact, there are many thousands of documents evidencing withdrawals by one or the other partner**. See Exhibit 3, Sherrer Declaration, 5(a) and 6. The Court also states that the BDO report includes a statement describing "substantial 'limitations'" resulting from the absence or inadequacy of records," and that this statement thereby "acknowledges the insurmountable difficulties" of preparing a partnership reconciliation. Opinion at 23-24. In fact,

the very heart of the entire case, this claim, and why claim Y-11 simply cannot be pursued in such a factual setting of missing or falsified documents (at 5-6):

where, as here, business partners have schemed to deliberately omit large sums of money from their accounting, have intentionally destroyed existing records of cash withdrawals, and have, even at their best, engaged only in loose, informal accounting practices, any attempt to accurately reconstruct Partnership records will necessarily involve some element of unreliability, as that is the very point of such a scheme.

Judge Brady issued his decision on a full factual record after more than eight hours of an intense evidentiary hearing that extended well past dinner time,⁶ and on extensive pre- and post-hearing briefs. At the time of Judge Brady's description of lifestyle analysis and the effect of the gaps in documents, there was a great deal of evidence before him, both from the Hamed sons and from other witnesses (CPA Jackson and Attorney Schoenbach) about the inapplicability of lifestyle analysis to a partnership claim, other sources of Hamed income, and the massive gaps in the financial records.⁷ All of these legal points and evidence were in before the Court and fully contested in detail by the parties.

statements of limitation are routine in accounting analyses, and BDO's professional opinion is that there are sufficient records to perform a reliable partnership accounting. See Exhibit 2, Sherrer Declaration, at ¶ 9. (Emphasis added.)

⁶ The transcript of the March 6, 2017 hearing shows that the proceedings began at 10:00 a.m., broke for one hour for lunch and did not end until 7:30 p.m. *Id.*, at 6, 116 and 382-383:

(The following proceedings commenced at 10:00 a.m.)

* * * *

THE COURT:Thank you all. (The proceedings concluded at 7:45 p.m.)

⁷ As just one example, Judge Brady had the live testimony of David Jackson, CPA, in the March 6, 2017 hearing.

The lifestyle analysis, or expense method is another method that they use, is typically used by -- I've seen it used by the Internal Revenue Service to prove up income that is not verified. I've seen it used by some divorce attorneys in

Yusuf tries to cure all these defects, the gaps in the record, and Judge Brady's holding by implying that BDO substantively revised its opinion in light of Judge Brady's decision.

Based upon the information available and following Judge Brady's limitation Order, BDO removed potential undisclosed income deposits prior to September 17, 2006

Opposition at 6. But BDO did NOT revise its opinion and the underlying statements about absence and unreliability of the critical financial documents relied on by Judge Brady. It did not revise its "opinion" at all. All BDO did was submit a spreadsheet update which removed pre-cutoff amounts. **See Exhibit 1**. BDO did not retract or even slightly alter its admissions as to the complete absence and unreliability of data and records which were the bases of Judge Brady's decision—including major chunks of financials for the period *after 2006*. As just one example, BDO stated in the original (and did not change in the revised report) the admission:

Accounting records and/or documents (checks registers, bank reconciliations, deposits and disbursements of Supermarkets' accounts) provided in connection with Supermarkets were **limited to covering the period from 2002 through 2004, East and West from 2006 through 2012, and Tutu Park from 2009 through 2012**. (Emphasis added).

Thus, Yusuf 's opposition agrees there are "gaps"—the underlying report admits that two years of post-2006 data from the Tutu Park operations are just plain missing.

After the full factual hearing, Judge Brady relied on the many admissions about the complete absence of records, such as page 16 of the report where it is admitted that "*books and records are incomplete, inadequate, or not available. . . .*" What Judge Brady held was

determining if one of the spouses is trying to hide money or hide income. **But I've never seen it used in a partnership reconciliation**. (Emphasis added.)

Transcript at 205, lines 13-20.

that the Court cannot compute what Hamed and his whole family received and spent—or compare it to what Yusuf and his whole family received and spent—if Yusuf’s own experts admit that there is no way to get any financial data for entire years of operations.

B. Yusuf Does Not Meet the Requirements Regarding a *Second* Reconsideration

Since this is really a second motion for reconsideration it must be evaluated under the correct rule. In the Superior Court of the Virgin Islands such motions are governed by the Virgin Islands Rule of Civil Procedure 6-4 (hereinafter “Rule 6-4”). A motion for reconsideration “*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.*” *Worldwide Flight Services v. Govt of the V.I.*, 51 V.I. 105, 110 (V.I. 2009) (internal citation omitted); *see also, In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008) (“A motion for reconsideration is not a second bite of the apple.... [Instead, it serves] to focus the parties on the original pleadings as the ‘main event’ and to prevent parties from filing a second motion with the hindsight of the court’s analysis covering issues that should have been raised in the first set of motions.”). As such, “when determining whether to grant or deny 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.”” *Smith v. Law Offices of Karin A. Bentz, P.C.*, 2018 V.I. LEXIS 13, 14-15 (V.I.Super. Ct. Jan. 29, 2018) (quoting *In re Infant Sherman*, 49 V.I. at 458). Thus, to successfully move for reconsideration under Rule 6-4, a party must meet both the procedural requirements as set forth in Rule 6-4(a) and the substantive requirement as set forth in Rule 6-4(b).

i. The Procedural Requirement

Rule 6-4(a) provides that “[e]xcept 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” and that “[e]xtensions will only be granted for good cause shown.” V.I. R. CIV. P. 6-4(a).

Thus, this motion is made out of time. The opposition must accept the earlier ruling on a full evidentiary record as law of the case and cannot reargue those matters here.

ii. The Substantive Requirement

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

Yusuf does not and cannot meet the substantive requirements for requesting a motion to reconsider: 1) changes in controlling law, 2) new evidence, 3) correct clear error of law or 4) failure of the court to address an issue specifically raised.

II. Yusuf’s argument that there are a “lot of documents” that might have some relevant data is directly contrary to what both Judge Brady and BDO stated—that the records are too incomplete to do such an analysis under any standard.

Judge Brady’s findings were based on BDO/Yusuf admissions which are unchanged in the minimally “revised” version of the report. He stated that many of the documents that would be necessary to such an analysis are missing, will never be obtainable, or were the objects of purposeful falsification. In this instant opposition Yusuf does not disagree with Judge Brady’s assessment that many of the documents are missing or were falsified—that there are what Yusuf admits are large “gaps” in the necessary financials. Rather, Yusuf states that despite these admitted gaps, there are still lots of other types of documents. In his opposition (at page 6) Yusuf admits “there were gaps in the records.”

Further, although **there were gaps in the records**, there was not a dearth of information. To the contrary, the information was voluminous – years of records for numerous family members. Various procedures were established to ensure that a deposit was not double counted or reflected a known distribution. Based upon the information available and following Judge Brady’s limitation Order, BDO removed potential undisclosed income deposits prior to September 17, 2006. (Emphasis added.)

How can a lot of other documents replace the fact that *Yusuf’s own experts state*⁸ that these accounts simply cannot be reconstructed for entire years of operations because financials critical to any comparison don’t even exist—and if they do, they were intentionally falsified at the time?

III. Conclusion⁹

Judge Brady did more than simply mention this issue in passing—as dicta on a scant, preliminary record, as Yusuf tries to imply. To the contrary, he took extensive evidence, testimony and briefs and then issued a detailed opinion. He stated at some length why it would be impossible to ever collect or trust financials necessary to litigate a lifestyle analysis. However, it is a dead claim not only because Judge Brady held that this is so, but also because of his detailed explanation of WHY pursuit of this claim would require exploration of an assumption that could not be supported.

⁸ At page 12, not altered in the revised submission: “As forensic accountants, we use financial information to reconstruct past events. It should be noted that the findings and the report are impacted by the quality of the information provided and/or by the **lack or limitation of the information provided for analysis**.” (Emphasis added). At page 22, not altered in the revised submission: “Our report and the findings included herein have been impacted by the **limitation of the information available** in the Case.

⁹ Hamed would have liked to include references to Yusuf’s opposition to his (second) motion to compel as to this claim. However, after agreeing to multiple extensions of the time for Yusuf to file, including two recent “hard dates,” that opposition (and two others) remain un-filed. It is anticipated that Yusuf will once again, while refusing to accept Judge Brady’s holding, continue to refuse virtually any of the discovery responses and documents requested. As time forces this filing without that opposition, Hamed may well ask the Master for a brief supplemental filing to place Yusuf’s refusal in the context of this reply.

Dated: November 20, 2021

/s/ Joel H. Holt

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2021, I served a copy of the foregoing by email, as agreed by the parties, on:

Hon. Edgar Ross (*w/ 2 paper copies to his Clerk*)
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/s/ Joel H. Holt

CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)

This document complies with the page or word limitation set forth in Rule 6-1(e).



EXHIBIT J-2



Dudley, Topper and Feuerzeig, LLP
 United Corporation
 Civil No. SX-12-CV-99

Summary calculation of Additional Income as a result of withdrawals from Supermarkets' accounts (or partnership's accounts) - January 1994 to August 2014. (Including adjustments for withdrawals before 9/17/2006 as instructed by the Court)

Summary of Withdrawals

Description	Hamed					Total
	Mohammad	Waleed	Waheed	Mufeed	Hisham	
Funds received from partnership through checks	\$ 1,500,000.00	\$ -	\$ -	\$ -	\$ -	\$ 1,500,000.00
Withdrawals from the partnership with a signed ticket/receipt	-	237,352.75	-	-	-	237,352.75
Amount owed by Hamed family to Yusuf as per agreement before raid Sept 2001. As per Mike's testimony these tickets were burned. (Refer to Letter dated August 15, 2012)	-	1,778,103.00	-	-	-	1,778,103.00
Payments to third parties on behalf of Hamed/Yusuf with partnership funds either with tickets or checks	-	20,311.00	-	-	-	20,311.00
Payments to Attorneys with partnership's funds	-	3,749,495.48	372,155.95	-	-	4,121,651.43
Funds received by cashier's checks	-	-	-	-	-	-
Total Partnership	1,500,000.00	5,785,262.23	372,155.95	-	-	7,657,418.18
Deposits to bank and brokerage accounts	16,505.80	430,439.13	100,000.00	306,999.56	510,061.57	1,364,006.06
Payments to credit cards	-	422,824.70	-	179,786.80	-	602,611.50
Investments (cost) sold as per tax returns	-	-	-	-	-	-
Subtotal Lifestyle analysis	16,505.80	853,263.83	100,000.00	486,786.36	510,061.57	1,966,617.56
Net Withdrawals	\$ 1,516,505.80	\$ 6,638,526.06	\$ 472,155.95	\$ 486,786.36	\$ 510,061.57	\$ 9,624,035.74

Description	Yusuf										Total	Difference
	Fathi	Nejeh	Maher	Yusuf	Najat	Zayed	Syaid	Amal	Hoda	Yacer		
	\$ 4,284,706.25	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,284,706.25	\$ (2,784,706.25)
	-	-	2,000.00	-	-	-	-	-	-	-	2,000.00	235,352.75
	-	-	-	-	-	-	-	-	-	-	-	1,778,103.00
	-	-	-	-	-	-	-	-	-	-	-	20,311.00
	183,607.05	20,370.00	33,714.00	-	-	-	-	-	-	-	237,691.05	3,883,960.38
	-	-	-	-	-	-	-	-	-	-	-	-
	4,468,313.30	20,370.00	35,714.00	-	-	-	-	-	-	-	4,524,397.30	3,133,020.88
Deposits to bank and brokerage accounts	-	-	-	-	-	-	-	-	-	-	-	1,364,006.06
Payments to credit cards	-	-	-	-	-	-	-	-	-	-	-	602,611.50
Investments (cost) sold as per tax returns	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal Lifestyle analysis	-	-	-	-	-	-	-	-	-	-	-	1,966,617.56
Net Withdrawals	\$ 4,468,313.30	\$ 20,370.00	\$ 35,714.00	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,524,397.30	\$ 5,099,638.44

Note:

1 Total amounts include adjustments made for withdrawals in 2016.

HAMD652413