

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,  
MUFEEED HAMED, HISHAM HAMED,  
AND PLESSEN ENTERPRISES, INC.,**

COUNTERCLAIM DEFENDANTS.

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**WALEED HAMED, AS EXECUTOR OF THE  
ESTATE OF MOHAMMAD HAMED,**

PLAINTIFF,

v.

**UNITED CORPORATION,**

DEFENDANT.

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**MOHAMMAD HAMED,**

PLAINTIFF,

v.

**FATHI YUSUF,**

DEFENDANT.

Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE  
RELIEF, DECLARATORY  
JUDGMENT, PARTNERSHIP  
DISSOLUTION, WIND UP, and  
ACCOUNTING**

CONSOLIDATED WITH

Civil No. SX-14-CV-287

**ACTION FOR DAMAGES and  
DECLARATORY JUDGMENT**

CONSOLIDATED WITH

Civil No. SX-14-CV-278

**ACTION FOR DEBT and  
CONVERSION**

**ORDER**

**THIS MATTER** came before the Special Master (hereinafter “Master”) on Hamed’s motion to compel responses to discovery served in connection with Hamed Claim No. H-146: the credit card points earned by Fathi Yusuf (hereinafter “Fathi Yusuf” or “Fathi” or “Yusuf”) and Yusuf’s family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards in excess of the credit card points earned by Hamed and Hamed’s family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards, filed on July 28, 2021.<sup>1</sup> In response, Yusuf filed an opposition and Hamed filed a reply thereto.

### **BACKGROUND**

On February 16, 2016, Hamed directed a list of questions (hereinafter “Hamed’s February 16, 2016 Questions”) to the former Partnership accountant John Gaffney, which included a question regarding the credit card points earned by the Partners and the Partners’ family members on purchases made/expenses paid on behalf of the Partnership on their

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<sup>1</sup> As to Hamed Claim No. H-146, Hamed explained that: (i) the Partners and the Partners’ family members earned credit card points on their personal credit cards when they made purchases and paid expenses on behalf of the Partnership on their personal credit cards; (ii) the Partners and the Partners’ family members then submitted the relevant credit card statements to the Partnership for reimbursement; (iii) the Partnership subsequently reimbursed the Partners and the Partners’ family members for such purchases and expenses and therefore the credit card points belong to the Partnership and not the individual credit cardholders; and (iv) there was an imbalance of the credit card points earned between Hamed and Hamed’s family members and Yusuf and Yusuf’s family members based on the purchases made/expenses paid on behalf of the Partnership—to wit, Yusuf and Yusuf’s family members earned more credit card points than Hamed and Hamed’s family members. (Hamed’s Accounting Claims; Hamed’s Amended Accounting Claims; Motion; Reply.) Thus, Hamed claimed in Hamed Claim No. H-146 that the credit card points earned by Yusuf and Yusuf’s family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards in excess of the credit card points earned by Hamed and Hamed’s family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards belong to the Partnership.

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 Hamed’s motion to compel for Hamed Claim No. H-146 falls within the scope of the Master’s report and recommendation given that Hamed Claim No. H-146 involves an alleged debt Yusuf owes the Partnership.

personal credit cards.<sup>2</sup> On May 17, 2016, John Gaffney provided a response (hereinafter “Gaffney’s May 17, 2016 Response”) to Hamed’s February 16, 2016 Questions.<sup>3</sup>

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<sup>2</sup> The February 16, 2016 Questions provided in relevant part:

Description: There is an imbalance in credit card points between Yusuf Yusuf and Mafi Hamed, NejeH Yusuf and Willie Hamed and Mike Yusuf and Shawn Hamed.

General Ledger-Store, Date, Entry No. & Description [as an example] (if applicable): East, 4/30/13, 29900, V.I.B.I.R - GROSS RECEIPT 3/30/13 PAID W/YUSUF 6073/3791 MIKE C/C 3940 NEJEH C/C5222, \$158,381.20

Question/Request for Info: Are the credit card points reflected in the general ledger and if so, please provide that information. If the credit card points are not reflected on the general ledger, for the years 2012-2015, would you please account for the amounts paid to each of the following individual's credit cards - Fathi Yusuf, Yusuf Yusuf, Mike Yusuf, NejeH Yusuf, Wally Hamed, Willie Hamed, Mafi Hamed and Shawn Hamed. Please provide the canceled checks showing payment of Fathi Yusuf, Yusuf Yusuf, Mike Yusuf, NejeH Yusuf, Wally Hamed, Willie Hamed, Mafi Hamed and Shawn Hamed credit cards.

(Hamed’s Feb. 16, 2016 Questions.)

<sup>3</sup> Gaffney’s May 17, 2016 Response provided in relevant part:

Response:

See objection to Item No. 3002. Without waiving that objection, credit card points are not reflected in the general ledger. You already know that because you were provided complete backups of Plaza accounting systems for all years and you loaded them into Sage software on your computers. You were given all rights to run not only complete general ledgers, but you also have the ability to run vendor reports showing all payments with credit cards.

This request to identify credit card points creates significant new work such that is its completely impractical. Regarding cancelled checks, copies of all cancelled checks were already provided for all accounts for all years in conjunction with the provision of all bank statements to the extent the banks provided them. We had several discussions about what our banks provided versus what they didn't provide and what information was withheld by Willie Hamed after the St. Thomas store auction.

More importantly, it is also irrelevant to request cancelled checks since ALL checks are dual signed by one member of the Yusuf family and one member of the Hamed family. If you can produce an instance where this isn't so, your request for cancelled checks might be warranted. But another point bears repeating. You already know from previous conversations that we don't have many cancelled checks as the banks refused to provide them.

ScotiaBank never even provided monthly bank statements for the Plaza St. Thomas operating account ending in 2010. While they provided monthly bank statements for the payroll and telecheck accounts, repeated requests for monthly statements for the operating account fell on deaf ears. Margie Soeffing first informed me of this issue in November 2012. Disbelieving her, I made repeated phone calls and visits to their Red Hook branch in early 2013 and only succeeded in getting their agreement to provide daily statements on a "Hold for Pickup" basis. Making matters worse, I could never rely on whether all days during a month were provided. When I picked up daily statements, there were always days missing which always took several more weeks to obtain. The process was so tedious and worthless that in frustration, I resorted to using online screen prints of activity to reconcile cash just as Margie had done before me. You were told this several times.

Humphrey Caswell was hired in March 2013 to first perform payroll processing. After training another new hire to perform payroll duties, he was assigned to improve the accounting and controls over in-store charges (i.e. Accounts Receivable). Humphrey had an accounting degree and demonstrated significant accounting skills from the start. As a result, he was promoted to Assistant Controller. Disbelieving my failure to get monthly statements from Scotia, he too attempted to get them during the last six months of 2013 and finally resigned himself to using online screen prints in lieu of monthly or daily bank statements. Despite not having monthly statements, Humphrey maintained excellent records of daily and

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monthly work in St. Thomas. Following the store auction on April 30, 2015, I attempted to obtain his monthly files from January 2013 through April 2015 and Willie Hamed refused to allow me or even Humphrey to enter the store to obtain those records which included cash reconciliations and the screen prints used to reconcile cash monthly.

Banco Popular provided complete monthly bank statements with enclosures through July 2013. Then suddenly and without warning they stopped including copies of enclosures for the two operating accounts (Plaza East a/c ending in 8830 and Plaza Wes a/c ending in 6269). When we asked to restore the provision of cancelled checks, they pretended no knowledge and even challenged ever received cancelled checks. They remained very evasive and would never give a straight answer about why they stopped providing copies of cancelled checks.

Although neither ScotiaBank nor Banco Popular would ever clearly state why they wouldn't provide complete statements, it was clear neither wanted to be subjected to unnecessary liability. It was my belief that they felt the less we had the less they could be held responsible for. Of course, they were compelled to scrutinize so many checks to ensure two signatures (one from each family) that the service we received was severely lacking. There were instances when 50 checks were returned for no reason at all. These instances created tremendous accounting challenges and countless bank charges, too numerous to attempt recovery from due to lack of accounting resources.

Neither ScotiaBank nor Banco would open any new accounts for United Corporation. Furthermore, we suffered more than one instance where we were asked to close our accounts and take our business elsewhere. And indeed our accounts were involuntarily closed by ScotiaBank at the end of 2015. Fortunately, Banco Popular remains as trying as it was to open any new accounts.

Included herein are copies of vendor reports for credit cards used at Plaza East. These reports reflect all activity since January 1, 2013 (the accounting conversion date). Prior to 2013, it is impractical if not impossible to provide all credit card activity as vendor accounts for credit cards never reflected activity properly. Sample general ledgers for the months of December 2012 and January 2013 are provided to demonstrate the deficiencies prior to my employment. Note that in 2012 all freight activity was rolled into single journal entries for St. Croix and in one account for both stores. Note also that in St. Thomas most of the freight was paid using Banco Popular credit cards. However, these payments are not associated with a vendor account for the corresponding Banco Popular credit cards. Instead, the AP clerk would simply change the name on the true vendor's account (probably Tropical Freight) when he or she was making the payment. So while a vendor account might have first been created at Tropical Freight, there were countless payments to the various credit cards actually used to pay Tropical Freight. Add to this the confusion of constantly changing addresses so that a payment to Banco Popular didn't get mailed to Tropical Freight. This was complete circumvention of controls.

Note the difference beginning in 2013. There are no payments in Freight Expense with a description of "Banco Popular." In 2013 a true system of controls was implemented to show WHO the vender is. Furthermore, the control system was designed to ensure that any credit card payments appearing in the general ledger expense accounts were conspicuous. This assures system integrity and guards against the likelihood of payment of non- business items by anyone. Simple stated, if I see a Banco credit card voucher in the general ledger [sic] account for freight expense, I immediately know it's a posting error. And if the control account used to clear business expenses against payments with credit cards is anything other than zero, I am immediately alerted to a posting error.

I hope this lengthy dissertation establishes once and for all the limitations on providing cancelled checks as I thought that fact was established long ago.

List of documents provided:

2012 General Ledger detail of Freight Expense.

2013 General Ledger detail of Freight Expense to demonstrate controls in 2013 not in 2012.

37 Vendor Ledgers showing details of all purchase /payment activity from Jan 1, 2013 through various dates beyond the store split dates. These are all of the credit cards used one or more times at Plaza East and include cards owned by Yusuf family and Hamed family.

(Gaffney's May 17, 2016 Response.)

Subsequently, per the Master's order, the parties filed their respective accounting claims in 2016 and their respective amended accounting claims in 2017.<sup>4</sup> On October 17, 2016, Hamed filed his accounting claims and thereafter, on October 30, 2017, Hamed filed his amended accounting claims (hereinafter "Hamed's Amended Accounting Claims"), whereby both filings included Hamed's claim for the credit card points earned by Yusuf and Yusuf's family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards in excess of the credit card points earned by Hamed and Hamed's family members on purchases made/expenses paid on behalf of the Partnership on their personal credit cards.<sup>5</sup>

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<sup>4</sup> On July 25, 2017, the Court entered a memorandum opinion and order limiting accounting (hereinafter "Limitations Order"). In the Limitations Order, the Court "exercise[d] the significant discretion it possesses in fashioning equitable remedies to restrict the scope of the accounting in this matter and ordered, *inter alia*, that "the accounting in this matter, to which each partner is entitled under 26 V.I.C. §177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C. §71(a), based upon transactions that occurred on or after September 17, 2006." (Limitations Order, pp. 32, 34.) In light of the Limitations Order, the Master ordered the parties to file their amended accounting claims.

<sup>5</sup> Hamed's accounting claims filed on October 30, 2017 included the expert opinion of Jackson Vizcaino Zomerfield, LLP, dated September 28, 2016, which provided in relevant part:

Imbalance in credit card points

*Summary Description of Issue Identified:*

Credit card points earned on purchases/expenses paid on behalf of the Partnership using personal credit cards should be split evenly between the Hameds and Yusufs.

*Work performed:*

We interviewed John Gaffney and the Hameds regarding the use of personal credit cards to pay purchases/expenses of the Partnership and the credit card points earned. We also provided John Gaffney a query dated February 15, 2016 (see Attachment VII) requesting the detail of credit card payments for purchases/expenses from 2012-2015 and statements of credit card points earned on such purchases. In addition, we reviewed the general ledgers from 2012 to present provided by John Gaffney.

We were advised by Attorney Holt that further investigations through the legal process of discovery is need [sic] for the banks and credit card companies involved in this issue to provide documentations for transactions conducted with the Partnership from 2012-2015.

*Gaffney's response:*

John Gaffney's response dated May 17, 2016 (see Attachment IX) stated this request creates significant new work such that is [sic] its completely impractical. John Gaffney's response included detail of payments by vendor for the various credit cards used for Partnership transactions from the accounting records.

*Opinion as to the laws identified:*

We were advised that credit card points earned on purchases paid on behalf of the Partnership using personal credit cards belong to the Partnership and should be split evenly between the Hameds and

The parties then proceeded with discovery. On January 12, 2018, the parties filed a joint discovery and scheduling plan (hereinafter “JDSP”) whereby the parties agreed, inter alia, that for claims other than Hamed Claim Nos. H-41 through H-141, “no party shall propound more than 50 interrogatories, 50 requests for production of documents, and 50 request for admissions, including all discrete subparts thereof, unless otherwise stipulated by the parties or ordered by the Master.” (JDSP, p. 4.)

On July 28, 2021, Hamed filed this instant motion to compel responses to discovery served in connection with Hamed Claim No. H-146.

#### **STANDARD OF REVIEW**

Motions related to discovery pursuant to Rules 26 through 37 of the Virgin Islands Rules of Civil Procedure are governed by Rule 37 and Rule 37.1 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 37” and “Rule 37.1,” respectively). Rule 37 and Rule 37.1 mandates that the moving party submit a certification with its motion certifying that both parties engaged in substantive, good faith negotiations before filing a discovery motion. V.I. R. CIV. P. 37(a) and 37.1(a).<sup>6</sup> Under Rule 37, “[a] party seeking discovery may move for an

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Yusufs. We noted in the accounting records (general ledger) reimbursements to the Yusufs for purchases/expenses on behalf of the Partnership using personal credit cards. However, we found no evidence, nor were we provided any evidence upon request from John Gaffney, of credit card points earned being returned or used by the Partnership or divided between the Hameds and Yusufs. Additionally, there was no detail provided in the 2012 ledger. The total amount we identified as reimbursements to the Yusufs for purchases/expenses paid on behalf of the Partnership using personal credit cards based on information obtained from John Gaffney was \$32,085,919.10 from 2013 – 2015. The total amount we identified as reimbursements to the Hameds for purchases/expenses paid on behalf of the Partnership using personal credit cards based on information obtained from John Gaffney was \$15,236,534.50 from 2013 – 2015. We identified a difference of \$16,849,384.60, in the Yusufs favor. We presume a 2.5% earning on credit card purchases. Exhibit 3007-a contains a summary of the accounting (extracted from vendor detail provided by John Gaffney) of the payments posted as reimbursements for purchases/expenses on behalf of the Partnership using personal credit cards. The total amount of the claim is \$421,234.62, subject to further refinement after discovery is re-opened and completed.

(Hamed’s Accounting Claims, Exhibit B-2.)

<sup>6</sup> Rule 37 provides:

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General*. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in

order compelling an answer, designation, production, or inspection...if: ... (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.” V.I. R. CIV. P. 37(a)(3)(B)(iii)-(iv). “For purposes of this subpart (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” V.I. R. CIV. P. 37(a)(4). Rule 37 provides that “[a] failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).”<sup>7</sup> V.I. R. CIV. P. 37(d)(2).

## DISCUSSION

In his motion, Hamed moved the Master to compel Yusuf to provide responses to the interrogatory and the request for production of documents (hereinafter “RFPD”) served in connection with Hamed Claim No. H-146—to wit, Interrogatory 22 and RFPD 26. (Motion.)

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good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

V.I. R. CIV. P. 37(a).

Rule 37.1 provides:

(a) Good Faith Negotiation Requirement.

Prior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties and any self-represented parties shall confer in a good faith effort to eliminate the necessity for the motion -- or to eliminate as many of the disputes as possible.

V.I. R. CIV. P. 37.1(a).

<sup>7</sup> Rule 37(d)(1)(A) describes the following failures:

(d) Party’s Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In general

(A) *Motion; Grounds for Sanctions.* The court may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent -- or a person designated under Rule 30(b)(6) or 31(a)(4) -- fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

V.I. R. CIV. P. 37(d)(1)(A).

Hamed indicated that: (i) since he sent the July 7, 2021 letter to Yusuf requesting a Rule 37 conference for discovery served in connection with Hamed Claim No. H-146, “Hamed has not received a letter, email or phone call from Yusuf’s counsel responding to his request” and (ii) “[o]n November 12, 2018, the parties held a Rule 37 conference [whereby] Yusuf’s counsel indicated that no further information regarding RFPD 26 [] would be forthcoming.” (Id., at p. 6, Exhibit 7- Letter from Carl J. Hartmann III, Esq. to Charlotte Perrell, Esq., dated July 7, 2021, Exhibit 10-Letter from Carl J. Hartmann III, Esq. to Charlotte Perrell, Esq., dated November 28, 2018.)

As a preliminary matter, Master finds that Hamed has in good faith conferred or attempted to confer with Yusuf as required under Rule 37 and Rule 37.1. The Master will address Interrogatory 22 and RFPD 26 in turn.

#### **I. Rules Governing Interrogatories and RFPDs**

Rule 26 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 26”) provides that “[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Information within this scope of discovery need not be admissible in evidence to be discoverable.” V.I. R. CIV. P. 26(b)(1).

Rule 33 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 33”) provides that “[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts” and “[l]eave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).” V.I. R. CIV. P. 33(a)(1). Rule 33 further provides that “[a]n interrogatory may relate to any matter that may be inquired into under Rule 26(b)” and that “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the



application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” V.I. R. CIV. P. 33(a)(2). Rule 33 requires that “[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.” V.I. R. CIV. P. 33(b)(3). Rule 33 also requires that “[t]he grounds for objecting to an interrogatory must be stated with specificity” and “[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.” V.I. R. CIV. P. 33(b)(4). Rule 33 further requires that the interrogatory be answered “by the party to whom they are directed,” V.I. R. CIV. P. 33(b)(1)(A), and that “[t]he person who makes the answers must sign them, and the attorney or self-represented party who objects must sign any objections,” V.I. R. CIV. P. 33(b)(5).

Rule 34 of the Virgin Islands Rules of Civil Procedure (hereinafter “Rule 34”) permits a party to serve on any other party requests for production of documents or tangible things to inspect and requests for entry within the scope of Rule 26(b). V.I. R. CIV. P. 34(a). Rule 34 requires that “[t]he request: (A) must describe with reasonable particularity each item or category of items to be inspected; (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and (C) may specify the form or forms in which electronically stored information is to be produced.” V.I. R. CIV. P. 34(b)(1). Rule 34 also requires that “[f]or each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons” and “the responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection [with] [t]he production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.” V.I. R. CIV. P. 34(b)(2)(B). Untimely objections to requests for production are deemed waived. *See Klotzbach*

*v. V.I. Water & Power Auth.*, 74 V.I. 381, 390 (V.I. Super. Ct. June 14, 2021) (“The Court agrees if WAPA did not make a timely objection stating the requested customer information was ‘private or confidential,’ then WAPA waives that objection.”). Rule 34 further requires that “[a]n objection must state whether any responsive materials are being withheld on the basis of that objection with sufficient particularity to identify what has been withheld” and “[a]n objection to part of a request must specify the part and permit inspection of the rest.” V.I. R. CIV. P. 34(b)(2)(C).

#### **A. Interrogatory 22 and RFPD 26**

In his motion, Hamed argued that the Master should compel Yusuf to respond to Interrogatory 22 and RFPD 26. Hamed made the following assertions in support of his argument: (1) As to Interrogatory 22-(i) “Interrogatory 22 directly relates to information needed by Hamed to calculate his claim – the number of credit card points accrued by each Yusuf and Hamed family member for Partnership purchases made on their personal credit cards.” (Motion, p. 9); (ii) “[T]o understand Yusuf’s defense to the claim, Hamed would like to know how many credit card points Yusuf thinks each family member had, as well as how Yusuf would value these points.” (Id.); (iii) “Yusuf responded to Hamed’s Request to Admit 23 of 50 and denied that the Partnership management and accountant did not keep adequate records to calculate and state what credit card points were earned by each family.”<sup>8</sup> (Id.) and

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<sup>8</sup> Request to Admit Number 23 of 50:

Request to admit number 23 of 50 relates to Claim H-146 (old Claim No. 3007) as described in Hamed's November 16, 2017 Motion for a Hearing Before Special Master as "Imbalance in credit card points."

Admit or Deny that the Partnership's management and accountant did not keep adequate records to allow the Partnership to now calculate and state with specificity what credit card points were earned by paying for purchases/expenses incurred on behalf of the Partnership on the personal credit cards of the Hameds and Yusufs, and thus, whether these points were split evenly between Partners.

Yusuf’s Response: Denied.

(Motion, p. 9, Exhibit 11-Yusuf and United’s response to Hamed’s third request to admit, dated May 15, 2018.)

(2) As to RFPD 26-(i) “The balance here is greatly in Yusuf’s favor, so the best defense is to obscure and refuse this most basic information.” (Id.); (ii) “All that is involved are (1) credit card statements and (2) the list of payments for credit card reimbursements from the accounting.” (Id.); (iii) “They had notice of this back [sic] years, and if it is no longer being kept, it is because it was intentionally not kept [and] it can be requested from their financial institutions.” (Id., at p. 10) (emphasis omitted); (iv) “Hamed can use this information to determine the number of points each person received during the relevant time period and then calculate any differential in points between the Partners.” (Id.); and (v) “This is directly related to Hamed’s claim and therefore is discoverable.” (Id.) Hamed indicated that, “[f]or purposes of this Motion to Compel only, Hamed limits this request to the time period from January 1, 2012-March 9, 2015, the date of the split of the East and West stores.” (Id., at p. 3.)

In his opposition, Yusuf argued that the Master should deny Hamed’s motion. Yusuf made the following assertions in support of his argument for the Master to deny Hamed’s motion: (i) “Yusuf objected [to Interrogatory 22 and RFPD 26] on the grounds that the information cannot be easily obtained as the partners did not traditionally track the amount of credit card points that each family member employee used when making business purchases and never previously divided or reconciled those points.” (Opp., p. 2); (ii) “Various Hamed and Yusuf family members would purchase inventory and other business expenses on credit cards, and each would be reimbursed for those expenses [and] [a]s members of both families were engaged in this process, the credit card points that accumulated simply remained available to the family member to use.” (Id.); (iii) “There was no tracking of the points or reconciliation of the points accumulated in the history of the Partnership.” (Id.); (iv) “The accountant for the Partnership...indicate[d] that attempting to go back over years to determine the points attributable to the business-related purchases and then to value them, would be onerous and

was not something that the Partnership had ever done previously.”<sup>9</sup> (Id.); (v) “[T]o attempt to weed through all of the transactions comprising the \$45+ million for just two years, much less for an additional 5 years going back to 2008, is onerous.” (Id.); and (vi) “Since the partners never tracked those credit card points in the past, requiring such an undertaking now is improper and unduly burdensome.” (Id., at pp. 2-3.)

In his reply, Hamed made the following assertions in response to Yusuf’s opposition:

(1) As to Interrogatory 22-(i) Hamed had raised this issue regarding the credit card points as early as 2014. (Reply, p. 2); (ii) “[C]redit card points, miles and/or dollar points were tracked and reconciled.” (Id., at p. 3); (iii) “[E]xpenditures to individual family members credit cards were being tracked [and] [a]s credit points are derived from the amount of the expenditures, it would be simple for Yusuf to determine the number of points, as the critical piece of information needed to determine credit card points, the dollar amount charged, is tracked in the general ledger.” (Id.); (iv) “[R]eports can be generated out of the accounting system to show whose credit card was reimbursed for the Partnership expenditures, the date and the dollar amount paid [and] [a]s for those instances where the accountant failed to capture whose credit card was paid, he should be able to look at the physical back up detail underlying the credit card statement to determine the card owner.”<sup>10</sup> (Id.); (v) “Hamed’s accounting expert was able to discern from the general ledgers the dollar amount each Yusuf and Hamed family member charged to his credit card [and] [t]he dollar amount is the basis for determining the number of points.”<sup>11</sup> (Id., at p. 4); (vi) “Hamed has limited this inquiry to the years 2012 to 2015 [], not an unreasonable time period.” (Id.); (vii) Yusuf failed to answer the part of the interrogatory

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<sup>9</sup> Yusuf referenced: Hamed’s Motion’s Exhibit 4-Yusuf and United’s response to Hamed’s fourth interrogatories, dated May 15, 2018); Hamed’s Motion’s Exhibit 6-Gaffney’s May 17, 2016 Response.

<sup>10</sup> Hamed referenced: Exhibit 6- Gaffney’s May 17, 2016 Response.

<sup>11</sup> Hamed referenced: Exhibit 2-The expert opinion of Jackson Vizcaino Zomerfield, LLP, dated September 28, 2016.

asking “how Yusuf calculates the present value the credit card points...[and] to show all his calculations, sources of information and support for his approximation.” (Id.); and (2) As to RFPD 26-(i) “[T]here is no question that the Partnership’s business credit cards issued in a Yusuf family member’s name should be produced [because] these are not personal property of any Yusuf, they are records of the Partnership, not the individual” and “[a]ll such credit card records for the use of business credit cards by members of the Yusuf family should be produced.”<sup>12</sup> (Id., at p. 5); (ii) “[C]redit card statements where the Partnership paid or reimbursed the Yusuf personal credit cards for Partnership expenses also should be produced [since] [t]he Partnership received these records in order to know how much to pay or reimburse the Yusuf family members’ personal credit card[,] [t]hose records should have been retained by the Partnership and not destroyed.” (Id.); and (iii) “The information requested in RFPD 26 is directly related to Hamed’s claim and therefore, is discoverable.” (Id., at p. 6.) Hamed also argued that “[i]f Yusuf does not have the records, then Hamed should get the inference at hearing that the missing information was not favorable to Yusuf.”<sup>13</sup> (Id., at p. 6.)

### **1. Interrogatory 22**

Hamed’s Interrogatory 22 of 50: Interrogatory 22 of 50 relates to Claim No. H-146 (old Claim No. 3007): “Imbalance in credit card points,” as described in Hamed’s November 16, 2017 Motion for a Hearing Before Special Master, Exhibit 3 and the September 28, 2016 JVZ Engagement Report and Exhibits.

With respect to H-146, state the approximate value of these credit card points, by describing: the approximate number of points in each of the years 2008-the date of the splitting of the East and West stores; the present value of that many points if negotiated on the date of these answers at the point-to-dollar value now -- and show all of your calculations, sources of information and support for this approximation.

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<sup>12</sup> Hamed referenced: Exhibit 12-Bank of America statement for the period April 20, 2015 through May 19, 2015, for “Plaza Extra Supermarket” business card with the cardholder identified as NejeH Yusuf.

<sup>13</sup> Hamed referenced: *Powell v. People of the V.I.*, 70 V.I. 745, 778 (V.I. 2019); *Henry v. World Fresh Mkts., LLC*, 2018 V.I. LEXIS 82, \*10 (V.I. Super. Ct. Aug. 20, 2018).

Yusuf's Response:

Defendants object to this interrogatory as vague, ambiguous, and compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories under the JDSP and violates both the spirit and the terms of the JDSP limiting the number of interrogatory questions.

Defendants further object on the grounds that the responsive information cannot be readily obtained by making reasonable inquiries as these inquiries require the skilled and detailed attention and focus of John Gaffney, former Partnership accountant, to revisit his accounting and work papers. Yusuf is no longer being paid to function as the Liquidating Partner to answer questions on behalf of the Partnership and the accounting that took place during the liquidation process. Likewise, John Gaffney is no longer employed by the Partnership to function in the role as Partnership accountant. To respond to these questions, the expertise and knowledge of John Gaffney is necessary, which diverts him away from his employment with United. Rather, if Hamed seeks information from John Gaffney for questions as to the accounting efforts he undertook as the Partnership accountant, Hamed should be required to compensate John Gaffney for his time in researching and preparing those responses. Furthermore, many of these inquiries as to the Partnership accounting are duplicative of questions Gaffney has previously addressed at or near the time that the transactions took place. Reorienting now as to transactions from years ago constitutes an undue burden and causes unnecessary time and expense. If Hamed seeks to revisit these issues, Hamed should bear the cost.

Without waiving any objection, Defendants submit that information relating to this request was previously provided to Hamed by John Gaffney in his correspondence dated May 17, 2016 and Defendants incorporate that response as this response as if fully set forth herein verbatim.

First, Yusuf objected to this interrogatory as vague and ambiguous. However, Yusuf did not expressly identify the language in Interrogatory 22 that he finds vague or ambiguous. *See Innovative Communications Corp. v. Sheraw*, 2007 V.I. LEXIS 77, \*9 (V.I. Super. Ct. Feb. 5, 2007) (“The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity. Vagueness or ambiguity is when the definition of the terms or the wording of the request is unclear.”) (citations omitted). Here, Yusuf failed to demonstrate that Interrogatory 22 is vague or ambiguous. Second, Yusuf objected to this interrogatory as “compound such that the total number of interrogatories together with their sub parts and other discovery exceeds the maximum allowable number of interrogatories under the JDSP and

violates both the spirit and the terms of the JDSP limiting the number of interrogatory questions.” Here, the Master does not find Interrogatory 22 to be compounded questions—to wit, Interrogatory 22 sought information in connection with “the approximate value of these credit card points...[and] the present value...and show all of your calculations, sources of information and support for this approximation,” which involve the same line of inquiry and did not introduce any discrete separate subjects. *See e.g., Davis v. Hovenssa, L.L.C.*, 2011 V.I. LEXIS 91, \*7 (V.I. Super. Ct. Jan. 31, 2011) (“For Interrogatories No. 2, 3, 5, 8, 11, 13, 14, 15, 16 and 17, the Court finds that the subparts of each Interrogatory involve the same line of inquiry and did not introduce any discrete separate subjects. Accordingly, Interrogatories No. 2, 3, 5, 8, 11, 13, 14, 15, 16 and 17 will each be considered as a single interrogatory.”). Third, Yusuf objected to this interrogatory because “the responsive information cannot be readily obtained by making reasonable inquiries” and would cause “undue burden... [and] unnecessary time and expense.”<sup>14</sup> The Master disagrees. According to the accounting report of the Partnership prepared by Yusuf’s accounting expert BDO Puerto Rico, P.S.C., dated August 31, 2016 (hereinafter “BDO Report”), Yusuf’s accounting expert BDO Puerto Rico, P.S.C.’s (hereinafter “BDO”) “examination entailed reviewing and analyzing all known and available bank accounts, brokerage/investment accounts and credit card accounts of each of the Partners,

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<sup>14</sup> Interestingly, despite claiming “undue burden and unnecessary time and expense,” Yusuf never moved for a protective order as to Interrogatory 22. *See* V.I. R. CIV. P. 33(c) (“A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.”).

family members and their agents” and the BDO examined, inter alia, the following documents as part of its analysis: “[c]redit card statements of each Partner’s credit card accounts,” “[c]redit card statements of each Partners’ family members’ credit card accounts,” and “[c]redit card statements of each Partners’ agents’ credit card accounts.” (The BDO Report, Section 4.1.2 “Lifestyle Analysis to Identify Undisclosed Withdrawals from the Partnership” and Section 4.4 “Documents Examined.”) Furthermore, the BDO Report indicated that the BDO “divided into four periods the result of [its] work”: January 1994 thru September 2001, October 2001 thru December 2012, January 2013 thru January 30, 2015, and January 30, 2015 thru August 31, 2016, and that “[a]ll information, documents, evidence examined and used by BDO was provided by Dudley.” (*Id.*, at Section 4.3 “Periods for Analysis” and Section 4.4 “Documents Examined.”) This demonstrated that, unlike what Yusuf claimed in his opposition, the credit card statements at issue—to wit, credit card statements from January 1, 2012 thru March 9, 2015—could be readily obtained and were in fact obtained by Yusuf and/or Yusuf’s counsel Dudley Newman Feuerzeig, LLP and transferred to the BDO for examination. Thus, Yusuf and/or his agents—Dudley Newman Feuerzeig, LLP and the BDO—already have some or all of the responsive information in their possession, and therefore, it would not cause “undue burden... [and] unnecessary time and expense” for Yusuf to retrieve such information to respond to Interrogatory 22. Moreover, Yusuf, as the former managing partner of the Partnership and as the current liquidating partner under the Final Wind Up Plan, has knowledge and access to any responsive information in the Partnership’s possession. Here, Yusuf did not dispute Hamed’s assertion that the Partners and the Partners’ family members earned credit card points on purchases made/expenses paid on behalf of the Partnership on their personal credit cards, that the Partners and the Partners’ family members then submitted the relevant credit card statements to the Partnership for reimbursement, and that the Partnership



subsequently reimbursed the Partners and the Partners' family members for such purchases and expenses. Thus, the Partnership should have in its possession the credit card statements that the Partners and the Partners' family members submitted to the Partnership for reimbursement and information regarding the reimbursements that the Partnership made to the Partners and their family members for purchases made/expenses paid on behalf of the Partnership on their personal credit cards. As such, the Master finds that, unlike what Yusuf claimed, obtaining the responsive information to respond to Interrogatory 22 would not be unduly burdensome.<sup>15</sup> Fourth, Yusuf objected to this interrogatory because "these inquiries as to the Partnership accounting are duplicative of questions Gaffney has previously addressed at or near the time that the transactions took place." However, Interrogatory 22 was directed at Yusuf and not John Gaffney. Under Rule 33, "[t]he interrogatory must be answered: by the party to whom they are directed." V.I. R. Civ. P. 33(b)(1)(A). In his response to Interrogatory 22, Yusuf did not indicate that Interrogatory 22 was duplicative of questions Yusuf previously answered. As such, the Master does not find Interrogatory 22 duplicative. Fifth, Yusuf incorporated Gaffney's May 17, 2016 Response as if fully set forth in Yusuf's response to Interrogatory 22.<sup>16</sup> However, even with Gaffney's May 17, 2016 Response, the Master finds Yusuf's response to Interrogatory 22 insufficient—to wit, Yusuf did not respond fully as to the approximate value of the credit card points or the present value of the credit card points. *See* V.I. R. Civ. P. 33(b)(3). Under Rule 37, "an evasive or incomplete disclosure, answer, or

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<sup>15</sup> Nevertheless, in the event that Yusuf, in good faith, "cannot -- in the exercise of reasonable efforts -- prepare an answer from information in its possession or reasonably available to the party...and if the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information) -- and if the burden of deriving or ascertaining the answer will be substantially the same for either party --the responding party [Yusuf] may answer by: (1) specifying the records that must be reviewed, providing sufficient detail and explanation to enable the interrogating party to identify and understand the records as readily as the responding party could; and (2) producing copies of the records, compilations, abstracts, or summaries with the answer to the interrogatory, unless duplicating such materials would be unduly burdensome." V.I. R. Civ. P. 33(d).

<sup>16</sup> *See supra*, footnote 3.

response must be treated as a failure to disclose, answer, or respond,” V.I. R. CIV. P. 37(a)(4), and such failure “is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c),” V.I. R. CIV. P. 37(d)(2). There is no pending motion for a protective order as to Interrogatory 22.<sup>17</sup> As such, the Master finds that Yusuf’s failure to provide a complete response to Interrogatory 22 is not excused. Finally, in his opposition, Yusuf argued that “[s]ince the partners never tracked those credit card points in the past, requiring such an undertaking now is improper and unduly burdensome.”<sup>18</sup> (Opp., pp. 2-3.) However, the fact that the Partnership failed to track credit card points does not in and of itself mean that it was improper for Hamed to include Hamed Claim No. H-146 as one of his accounting claims for reconciliation in the accounting and distribution phase of the Final Wind Up Plan.<sup>19</sup> As noted above, Yusuf did not dispute Hamed’s assertion that the Partners and the Partners’ family members earned credit card points on purchases made/expenses paid on behalf of the Partnership on their personal credit cards, that the Partners and the Partners’ family members then submitted the relevant credit card statements to the Partnership for reimbursement, and that the Partnership subsequently reimbursed the Partners and the Partners’ family members for such purchases and expenses. As such, the Master does not find it improper for Hamed to include Hamed Claim No. H-146 as one of his accounting claims. Additionally, while the Partnership may not have

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<sup>17</sup> See *supra*, footnote 14.

<sup>18</sup> As to Yusuf’s argument that responding to Interrogatory 22 is “unduly burdensome,” the Master had already addressed it above.

<sup>19</sup> In the Limitations Order, the Court clarified that the term “claim” has taken on an entirely different and more specific meaning than “cause of action” in the context of this litigation—to wit: “Hamed and Yusuf have each, in their respective pleadings, presented only a single, tripartite cause of action, or claim, for an equitable partnership dissolution, wind up, and accounting under 26 V.I.C. § 75(b)(2)(iii)” and that the “the term ‘claims’ refers not to the parties’ respective causes of action for accounting, but rather to the numerous alleged individual debits and withdrawals from partnership funds made by the partners or their family members over the lifetime of the partnership that have been, and, following further discovery, will continue to be, presented to the Master for reconciliation in the accounting and distribution phase of the Final Wind Up Plain.” (Limitations Order, pp. 10-11.)

directly tracked the credit card points earned by the Partners and the Partners' family members, the Partnership should have in its possession the credit card statements that the Partners and the Partners' family members submitted to the Partnership for reimbursement and information regarding the reimbursements that the Partnership made to the Partners and their family members for purchases made/expenses paid on behalf of the Partnership on their personal credit cards, especially for a period as recent as January 1, 2012 through March 9, 2015.

Accordingly, based on the foregoing, the Master will rule on Hamed's motion to compel as to Interrogatory 22 as follows: (i) grant in the entirety and (ii) order Yusuf to respond to Interrogatory 22 "fully in writing under oath" as required under Rule 33. V.I. R. CIV. P. 33(b)(3). Interrogatory 22 will be revised as follows: "With respect to H-146, state the approximate value of these credit card points, by describing: the approximate number of points from January 1, 2012 through March 9, 2015; the present value of that many points if negotiated on the date of these answers at the point-to-dollar value now -- and show all of your calculations, sources of information and support for this approximation."

## **2. RFPD 26**

Request for the Production of Documents, 26 of 50, relates to Y-11, "Lifestyle Analysis." With respect to Y-11, please provide all bank account statements documenting deposits, all brokerage and retirement accounts documenting deposits and all credit card statements in the names of Fathi, Maher, Nejeh and Yusuf Yusuf (individually and any combination of joint accounts between them and all joint accounts with their spouses), from September 17, 2006 to September 30, 2016. Include but do not limit this to:

- All bank account statements documenting deposits or withdrawals
- All brokerage and retirement account statements documenting deposits or withdrawals
- All credit card statements

### Yusuf's Response:

Defendants object to this Request for Production because it seeks personal financial information concerning Yusuf's sons, who are not parties to this case.

Defendants further object to this Request because it seeks personal information when there has been no allegation that monies were removed from the partnership by any member of the Yusuf family which were not otherwise disclosed to the Hameds. Furthermore, unlike the Hameds, the Yusufs had sources of income other than the partnership which would account for income and assets in excess of the funds acknowledged to have been withdrawn from the partnership. Hence, the discovery is irrelevant because "the proposed discovery is not relevant to any party's claim or defense." V.I. R. Civ. P. 26(b)(2)(C)(iii).

To the extent documents already exist in the records, they may be found within the BDO Report which has been previously provided in the Tables to the BDO Reports and supporting documentation provided to Hamed on October 4, 2016.

On August 1, 2021, Hamed had previously filed a motion to compel responses to discovery served in connection with Yusuf Claim No. Y-11: reconciliation of past Partnership withdrawals and distributions based on the lifestyle analysis prepared by Yusuf's accounting expert Fernando Scherrer of BDO Puerto Rico, P.S.C. (hereinafter "Yusuf Claim No. Y-11"), which also included RFPD 26. In response, Yusuf filed an opposition and Hamed filed a reply thereto. On March 17, 2022, the Master entered an order whereby the Master made the following findings and rulings as to RFPD 26:

First, Yusuf objected to these requests for production of documents because they were directed at non-parties. Here, there is no indication that the non-parties were compelled by subpoena under Rule 45 to produce the documents requested in RFPD 26. *See* V.I. R. CIV. P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection."). As such, RFPD 26 will be limited to the parties in this lawsuit. Second, Yusuf objected to this interrogatory because the information sought therein is irrelevant. Meanwhile, Hamed argued in his motion and reply that the documents sought in RFPD 26 are directly relevant to his ability to defend Yusuf Claim No. Y-11. As noted above, according to the BDO Report and the BDO Summary of Withdrawals, the following items accounted for Yusuf Claim No. Y-11: (i) deposits to bank and brokerage accounts, (ii) payments to credit cards, and (iii) investments (cost) sold as per tax return." Yusuf noted in his response that "unlike the Hameds, the Yusufs had sources of income other than the partnership which would account for income and assets in excess of the funds acknowledged to have been withdrawn from the partnership." However, Yusuf never addressed why these documents would not be relevant to Hamed's defense against Yusuf Claim No. Y-11. Thus, the Master finds the documents sought in RFPD 26 regarding "all bank account statements documenting deposits, all brokerage and retirement accounts documenting deposits and all credit card statements" relevant to Hamed's defense against Yusuf Claim No. Y-11 since this information could help confirm or refute the information used in the calculation of Yusuf Claim No. Y-11.

Lastly, Yusuf noted in his response that “[t]o the extent documents already exist in the records, they may be found within the BDO Report” and Yusuf noted in his opposition that “information responsive to this Request...have been identified in the Tables and supporting documentation to the preliminary BDO Report as part of the original response and thus, there is no need to further compel any discovery as to this [Request].” The Master disagrees. Such reference to the BDO Report is not a proper response under Rule 34. *See* V.I. R. Civ. P. 34(b)(2)(B)-(C).

Accordingly, based on the foregoing, the Master will rule on Hamed’s motion to compel as to RFPD 26 in the context of Yusuf Claim No. Y-11 as follows: (i) deny as to the non-parties and (ii) grant as to documents requested from a party. RFPD 26 will be revised as follows: “With respect to Y-11, please provide all bank account statements documenting deposits, all brokerage and retirement accounts documenting deposits and all credit card statements in the names of Fathi... (individually and any combination of joint accounts...), from September 17, 2006 to September 30, 2016.”

...  
Although the Master denied Hamed’s motion to compel responses as to non-parties for the following discovery served in connection with Yusuf Claim No. Y-11: Interrogatory 33, RFPD 30, RFPD 31, Interrogatory 35, and RFPD 26, the Master must nevertheless point out that the BDO Report and the BDO Summary of Withdrawals included information from the non-parties in preparing the lifestyle analysis that formed the basis of Yusuf Claim No. Y-11. Thus, the Master finds that the non-parties’ information is relevant to Hamed’s defense against Yusuf Claim no. Y-11 since the non-parties’ information were used in the calculation of Yusuf Claim No. Y-11. Accordingly, the Master will order Fathi Yusuf and United to produce all documents either relating to the non-parties or containing the non-parties’ information that Fathi Yusuf and/or United provided to Yusuf’s accounting expert Fernando Scherrer of BDO Puerto Rico, P.S.C. in this matter.

... Accordingly, it is hereby:

...

**ORDERED** that Hamed’s motion to compel as to RFPD 26 in the context of Yusuf Claim No. Y-11 is **DENIED** as to the non-parties and **GRANTED** as to documents requested from a party. RFPD 26 shall be revised as follows:

“With respect to Y-11, please provide all bank account statements documenting deposits, all brokerage and retirement accounts documenting deposits and all credit card statements in the names of Fathi... (individually and any combination of joint accounts...), from September 17, 2006 to September 30, 2016.”

It is further:

**ORDERED** that, **within sixty (60) days from the date of entry of this Order**, Fathi Yusuf and/or United shall file supplemental responses to Interrogatory 33 (foreign assets), Interrogatory 33 (domestic assets), Interrogatory 35, Interrogatory 37, RFPD 26, RFPD 30, RFPD 31 (foreign assets), and RFPD 31 (domestic assets). It is further:

**ORDERED** that Fathi Yusuf and United **MUST ANSWER** the aforementioned interrogatories and RFPDs in compliance with the Virgin Islands Rules of Civil Procedure; Fathi Yusuf and United **CANNOT** answer by reference. More specifically, Fathi Yusuf and United **CANNOT USE** the BDO Report in lieu of his/its answers but can use the BDO Report to support his/its answers. **And** it is further:

**ORDERED** that **within sixty (60) days from the date of entry of this Order**, Fathi Yusuf and United shall **PRODUCE** all documents either relating to the non-parties or containing the non-parties' information that Fathi Yusuf and/or United provided to Yusuf's accounting expert Fernando Scherrer of BDO Puerto Rico, P.S.C. in this matter.

(March 17, 2022 Order, pp. 27-29, 32-33.)

The Master must clarify at the outset that the March 17, 2022 order addressed Hamed's August 1, 2021 motion to compel responses to discovery served in connection with Yusuf Claim No. Y-11: reconciliation of past Partnership withdrawals and distributions based on the lifestyle analysis prepared by Yusuf's accounting expert Fernando Scherrer of BDO Puerto Rico, P.S.C., which also included RFPD 26. There was no indication in Hamed's August 1, 2021 motion to compel that RFPD 26 was also served in connection with Hamed Claim No. H-146. Thus, the March 17, 2022 order only contemplated RFPD 26 in the context of Yusuf Claim No. Y-11 and did not contemplate RFPD 26 in the context of Hamed Claim No. H-146. Here, given the revelation that RFPD 26 pertains to both Yusuf Claim No. Y-11 and Hamed Claim No. H-146, and that the arguments raised by Hamed as to RFPD 26 in this instant motion to compel were not raised by Hamed as to RFPD 26 in Hamed's August 1, 2021 motion to compel and therefore, they were not previously considered, the Master will revisit RFPD 26 in the context of Hamed Claim No. Y-146.

Hamed Claim No. Y-146 is a very different claim from Yusuf Claim No. Y-11, and since the relevance of discovery varies depending on the claim involved, the ruling for this instant motion to compel as to RFPD 26 in the context of Hamed Claim No. H-146 may differ from the March 17, 2022 ruling of Hamed's motion to compel as to RFPD 26 in the context of

Yusuf Claim No. Y-11—to wit, the relevance of RFPD 26 in the context of Yusuf Claim No. Y-11 differs from the relevance of RFPD 26 in the context of Hamed Claim No. H-146.<sup>20</sup> Here, in the context of Hamed Claim No. H-146, the Master finds that Yusuf, as the former managing partner of the Partnership and as the current liquidating partner under the Final Wind Up Plan, is qualified to produce documents on behalf of the Partnership in response to RFPD 26—to wit, Yusuf has knowledge and access to Partnership documents that are responsive to RFPD 26. Accordingly, the Master will grant Hamed’s motion to compel as to RFPD 26 in the context of Hamed Claim No. H-146 as to the following documents: (i) for the period January 1, 2012 through March 9, 2015: all credit card statements of the Partnership’s business credit cards with the cardholders identified as Fathi Yusuf, Maher Yusuf, Nejeah Yusuf, and Yusuf Yusuf, and (ii) for the period January 1, 2012 through March 9, 2015: all credit card statements of Fathi Yusuf, Maher Yusuf, Nejeah Yusuf, and Yusuf Yusuf (individually and any combination of joint accounts between them and all joint accounts with their spouses) that included purchases made/expenses paid on behalf of the Partnership which were subsequently submitted to the Partnership and reimbursed by the Partnership.<sup>21</sup> This order is meant to complement and

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<sup>20</sup> Similarly, if it turns out that RFPD 26 was also served in connection with a third claim and a subsequent motion to compel is filed, then that may also result in a different ruling as to RFPD 26 in the context of that third claim. This is a problem that arises with piecemeal motion practice. Here, instead of filing one motion to compel for RFPD 26 in the context of all relevant claims and raising all relevant arguments thereto, Hamed filed two separate motions to compel for RFPD 26 and raised different arguments for each—to wit, one motion addressed RFPD 26 in the context of Yusuf Claim No. Y-11 and one motion addressed RFPD 26 in the context of Hamed Claim No. H-146. Likewise, instead of filing one motion to compel for Interrogatory 33, RFPD 30, and RFPD 31 in the context of all relevant claims and raising all relevant arguments thereto, Hamed filed two separate motions to compel for Interrogatory 33, RFPD 30, and RFPD 31 and raised different arguments for each—to wit, one motion addressed them in the context of Yusuf Claim No. Y-12 and one motion addressed them in the context of Yusuf Claim No. Y-11. As noted in the March 17, 2022 order, the Master is open to suggestions from the parties as to what is the best way to move to compel responses for an interrogatory or a RFPD served in connection with multiple claims.

<sup>21</sup> As noted above, Yusuf did not dispute Hamed’s assertion that the Partners and the Partners’ family members earned credit card points on purchases made/expenses paid on behalf of the Partnership on their personal credit cards, that the Partners and the Partners’ family members then submitted the relevant credit card statements to the Partnership for reimbursement, and that the Partnership subsequently reimbursed the Partners and the Partners’ family members for such purchases and expenses. Thus, the Partners and the Partners’ family members voluntarily submitted these credit card statements to the Partnership and in turn, these credit cards statements and information regarding the reimbursements that the Partnership made to the Partners and their family members for purchases

not limit the March 17, 2022 order; Fathi Yusuf and/or United should continue to comply with the March 17, 2022 order.

## **II. Spoliation Inference**

In his reply, Hamed raised for the first time that “Hamed should get the inference at hearing that the missing information was not variable to Yusuf.” (Reply, p. 6.) “It is improper for a party to raise an issue for the first time in a reply brief in Superior Court, because the opposing litigant is not, as a matter of course, given an opportunity to respond to that new argument ... under the rules governing standard motion practice in Virgin Islands trial courts.” *Brathwaite v. Xavier*, 71 V.I. 1089, 1100 (V.I. 2019); see *Perez v. Ritz-Carlton V.I., Inc.*, 59 V.I. 522, 528 n.4 (V.I. 2013) (“Like an issue raised for the first time in an appellate reply brief, an issue raised for the first time in a reply brief supporting summary judgment is deemed waived because the opposing party typically does not have the opportunity to respond.”). Yusuf should not be ambushed by Hamed’s argument for a spoliation inference without the opportunity to respond; permitting Hamed to belatedly argue for a spoliation inference he failed to argue in his motion would promote gamesmanship in motion practice where the moving party could simply wait for the reply brief to include new arguments. As such, the Master will deem the issue of spoliation inference waived at this juncture. See *Perez*, 59 V.I. at 528 n.4. However, even assuming, arguendo, that this issue is not waived, Hamed’s argument for a spoliation inference is completely without merit because Hamed did not provide any evidence that these responsive documents were destroyed and that such destruction was intentional and indicated fraud and a desire to suppress the truth. See *Samuel v. United Corp.*, 64 V.I. 512, 518 (V.I. 2016) (citing *Bright v. United Corp.*, 50 V.I. 215, 226 (V.I. 2008)

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made/expenses paid on behalf of the Partnership on their personal credit cards all became a part of the Partnership’s accounting records.



(“Before the spoliation inference can be applied it is essential that the evidence in question be within the spoliator's possession or control, and it must appear that there has been an actual suppression or withholding of evidence. Such a presumption or inference arises, however, only when the spoliation or destruction of evidence was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.”)). In fact, based on the BDO Report, these responsive documents exist, and they are in the possession of Yusuf and/or his agents—Dudley Newman Feuerzeig, LLP and the BDO. Nevertheless, Hamed may raise this issue later if necessary.

### **CONCLUSION**

Based on the foregoing, the Master will grant Hamed’s motion to compel responses to discovery served in connection with Hamed Claim No. H-146 as specified in this Order. Accordingly, it is hereby:

**ORDERED** that Hamed’s motion to compel as to Interrogatory 22 is **GRANTED**.

Interrogatory 22 shall be revised as follows:

“With respect to H-146, state the approximate value of these credit card points, by describing: the approximate number of points from January 1, 2012 through March 9, 2015; the present value of that many points if negotiated on the date of these answers at the point-to-dollar value now -- and show all of your calculations, sources of information and support for this approximation.”

It is further:


**ORDERED** that, **within thirty (30) days from the date of entry of this Order**, Fathi Yusuf shall file a supplemental response to Interrogatory 22 and respond to Interrogatory 22 “fully in writing under oath” as required under Rule 33. It is further:

**ORDERED** that Hamed’s motion to compel as to RFPD 26 is **GRANTED** in the context of Hamed Claim No. H-146 as specified in this Order. It is further:

**ORDERED** that, **within thirty (30) days from the date of entry of this Order**, Fathi Yusuf, as the former managing partner of the Partnership and as the current liquidating partner under the Final Wind Up Plan, shall **PRODUCE** the following documents on behalf of the Partnership in response to RFPD 26: (i) for the period January 1, 2012 through March 9, 2015: all credit card statements of the Partnership's business credit cards with the cardholders identified as Fathi Yusuf, Maher Yusuf, NejeH Yusuf, and Yusuf Yusuf, and (ii) for the period January 1, 2012 through March 9, 2015: all credit card statements of Fathi Yusuf, Maher Yusuf, NejeH Yusuf, and Yusuf Yusuf (individually and any combination of joint accounts between them and all joint accounts with their spouses) that included purchases made/expenses paid on behalf of the Partnership which were subsequently submitted to the Partnership and reimbursed by the Partnership. This order shall not limit the March 17, 2022 order in any way and Fathi Yusuf shall continue to comply with the March 17, 2022 order. **And** it is further:

**ORDERED** that Fathi Yusuf **MUST RESPOND** to Interrogatory 22 and RFPD 26 in compliance with the Virgin Islands Rules of Civil Procedure; Fathi Yusuf **CANNOT** answer by reference.

**DONE** and so **ORDERED** this 21<sup>st</sup> day of April, 2022.

  
EDGAR D. ROSS  
Special Master