

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

MOHAMMAD HAMED, by his
authorized agent **WALEED HAMED**,

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and **UNITED CORPORATION**,

Defendants and Counterclaimants.

vs.

WALEED HAMED, **WAHEED HAMED**,
MUFEED 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

MOHAMMAD HAMED,

Plaintiff,

vs.

FATHI YUSUF,

Defendant.

Case No.: SX-2014-CV-278

**ACTION FOR DEBT AND
CONVERSION**
JURY TRIAL DEMANDED

**PLAINTIFF'S REPLY TO YUSUF'S OPPOSITION TO *DAUBERT* MOTION
TO STRIKE DEFENDANTS' ACCOUNTING EXPERT, BDO**

Yusuf has opposed the Plaintiff's *Daubert* motion to strike the expert opinion of the Defendants' accounting expert, BDO Puerto Rico, PSC ("BDO"). For the reasons set forth herein, it is respectfully submitted that the opposition fails to address the substance of the motion. In evading the problems raised, Yusuf therefore fails to

explain, much less establish by a preponderance of the evidence, that BDO's report is "reliable." To the contrary, the opposition confirms that the opinions of BDO are facially unreliable by BDO's own admissions. As such, the report must be stricken pursuant to FRED 702 as well as FRED 401 and 403.

Two preliminary comments are in order. First, counsel will not respond to the *ad hominem* attacks on him, which are irrelevant to deciding the merits of this motion. Counsel is confident that he has neither violated an order of the Special Master nor engaged in any **improper** ex parte communications with him. The Special Master can respond if he feels otherwise, but defense counsel is simply out of place in making these accusations of wrongdoing, particularly when It has no relevance to the merits of this motion.¹

Second, regarding the argument that the BDO report is not before this Court because it was not filed with this Court is meritless. No expert opinion (as expressed in a report) is ever filed with this Court in any pretrial disclosure unless challenged in a Rule 702 *Daubert* motion, at which time the report is attached to the motion, as was done here. Likewise, the rules of evidence still apply in this case, as there is no authority for allowing expert reports to be considered if they do not meet the required Rule 702 "*Daubert*" standards.²

¹ The Special Master's task by its very nature requires such ex parte conversations, as he could not perform his assignment if he could not speak with the Liquidating Partner or the other partner without all counsel present. Indeed, it is well known that the Special Master has **acted properly** in talking to all parties and all counsel on an ex parte basis.

² Indeed, for Yusuf to suggest otherwise confirms that he has his own doubts about the reliability of BDO's report, as admitted in his opposition, which will be discussed further in this reply.

I. Yusuf's Opposition

At no point does Yusuf disagree with the fact that BDO fully disclaimed the reliability of its report, stating at the outset of its report that it **could not provide "an opinion or provide any other form of assurance on the completeness or accuracy of the information"** in its report. See Exhibit 1 to Plaintiff's initial motion at p. 3):

Despite this admission, Yusuf argues that the report is still reliable because it complies with an accounting standard it identifies on page 12 of its opposition:

In this case, the work required to review the financial information and prepare the BDO Report is considered to be a litigation support engagement. As such, it is within the definition of a "consulting engagement" and, therefore, is subject to the standards set forth in the Statement of Standards for Consulting Services promulgated by the American Institute of Certified Public Accountants ("AICPA").

Yusuf then attaches this 'standard' as Exhibit C to his opposition. A review of that standard confirms that reports prepared under this standard ***explicitly*** do not claim to be "reliable" like other accounting engagements, stating in part in section .02 on page 1 of that Standard:

Consulting services differ fundamentally from the CPA's function of attesting to the assertions of other parties. In an attest service, the practitioner **expresses a conclusion about the reliability** of a written assertion that is the responsibility of another party, the asserter. (Emphasis added).

That section then continues, noting that reports issued under this "Consulting" standard are for the use of the client, but ***not*** for use by others, such as a court or jury, stating:

In a consulting service, the practitioner develops the findings, conclusions, and recommendations presented. The nature and scope of work is determined solely by the agreement between the practitioner and the client. Generally, the work is performed **only for the use and benefit of the client**. (Emphasis added).

In short, this standard confirms the BDO report issued under this standard does not make any representation about the reliability of its contents, *as expressly stated at the*

outset of BDO's report, as noted.

Thus, the BDO report, and the so-called 'standard' under which it was issued, expressly disclaims any reliability of its data or use of the report by third parties. Indeed, on page 15 of its opposition memorandum, Yusuf himself noted the lack of reliability of BDO's report, stating that even he disagrees with an allocation of a distribution to him regarding a trip to Turkey and then stating:

If further information comes to light to demonstrate that the expenses were for a business purpose, then an adjustment could later be made.

Yusuf then makes the exact "reliability" argument being asserted in the Plaintiff, stating further on p. 15:

The import of this is to demonstrate the integrity of the process and to demonstrate that the positions in the report are consistent with the parameters established and demonstrated by the documentary evidence, **even though Yusuf make take the position that further evidence as to a particular transaction will demonstrate that it should not be categorized as a distribution.** (Emphasis added).

That is exactly the Plaintiff's position—the BDO report is not based on accounting records that can be deemed to be "reliable," as the records reviewed, even if voluminous, were *hopelessly incomplete*.³ Indeed, this fact was openly admitted in

³ Indeed, does the Court really want to get bogged down in this line-by-line analysis? For example, Yusuf tries to explain away the FBI's extensive analysis and 1996-2002 accounting by arguing that BDO did not allocate the diversion of millions of dollars to the Hamden Diamond Account in 1996 to Fathi Yusuf (see Exhibit A to the opposition memorandum). However, the evidence will show that the FBI determined that this Hamden account was just one of the many accounts Fathi Yusuf used for his money-laundering scheme they were investigating.

The same is true of the allocation of fees in the criminal case—the defense lawyers will all testify that there was a joint defense agreement, so fees were never intended to be allocated to any one defendant.

BDO's report, which expressly stated (See **Exhibit 1 at p. 22**):

Our report and the findings included herein *have been impacted by the limitation of the information available in the Case*. Following is a summary of the limitations we encountered during the performance of the engagement.

- Accounting records of Plaza Extra-East were destroyed by fire in 1992 and the *information was incomplete and/or insufficient to permit us to reconstruct a comprehensive accounting of the partnership accounts before 1993*. (Emphasis added).
- 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).
- *Accounting records and/or documents provided to us for the periods prior to 2003 are incomplete* and limited to bank statements, deposit slips, cancelled checks, check registers, investments and broker statements, cash withdrawal tickets/receipts and cash withdrawal receipt listings. For example, the retention policy for statements, checks, deposits, credits in Banco Popular de Puerto Rico is seven years; *therefore, there is no Bank information available prior to 2007 and electronic transactions do not generate any physical evidence as to regular deposits and/or debits.*" (Emphasis Added").

The report then repeatedly included this admonition throughout the report, as previously noted on page 4 of the Plaintiff's initial motion, but which Yusuf's opposition failed to address or explain, *some* of which are worth highlighting again to make this point clear:

- At page 13: "In order to identify all monies withdrawn from the Partnership through checks we identified *available checks* Our examination included

By way of another example, the BDO report attempts to allocate the payment of \$1,500,000 to Yusuf's daughter as a partnership distribution (See **Exhibit 1** to the initial motion at page 23), but she filed a pleading in this case claiming that payment was a gift from her father, Fathi Yusuf, based on the documents he provided her. See **Exhibit A** attached. In short, the BDO report is based on information provided by Fathi Yusuf through this "consulting engagement" review, which if found to be admissible would plunge this Court (or the Special Master) into a time consuming investigation of what everyone has to say, without having any conclusive, verifiable information.

available Partnership bank accounts . . .”

- At page 14: “Our examination included **reviewing any available supporting documentation** of such disbursements in order to determine whether such withdrawals/disbursements constituted partnership distributions.”
- At page 16: “. . .**when books and records are incomplete, inadequate, or not available, such as in this case.**”
- At page 23: “In order to identify all monies withdrawn from the Partnership through checks, we identified **available checks** made to the order of Mohammad Hamed.”
- At page 33: “In order to identify all monies withdrawn from the Partnership through cash withdrawals we reviewed and analyzed **available cash tickets/receipts** and tickets/receipts ledgers provided from the Partnership.”

These acknowledged deficiencies, which Yusuf ignored in his opposition, simply negate Yusuf's attempts to make BDO's report reliable.

II. THE RULE 702 “RELIABILITY” STANDARD

Rule 702 provides in relevant part regarding the “reliability” standard for expert testimony as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

• • • • •
(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods;

As the V.I. Supreme Court held in *Suarez v. Government*, 56 V.I. 754 (VI 2012):

The purpose of that determination is to ensure that when experts “testify in court they adhere to the **same standards of intellectual rigor that are demanded in their professional work.**” *Id.* at 761. (Emphasis added) (Citation omitted).

In its report, BDO admits it did not perform **any** of the standard **verification** procedures, utilized in the accounting field to verify the data it was given, such an audit or

compilation. Indeed, Yusuf admits BDO followed an informal "Consulting" procedure, where it relied solely on Yusuf to supply data to it.

As a result, BDO performed no independent review of either completeness or veracity, openly admitting that the data was incomplete and unreliable. Thus, BDO's "report" is simply the selective feeding of information to it, causing it to expressly **disclaim** the validity of any of the data it was given. Indeed, what can be more compelling than BDO's own statement that "we do not express an opinion or provide any other form of assurance **on the completeness or accuracy of the information,**" further conceding that **its findings "are impacted"** by the **quality** of the information provided and the **lack of information** that was provided. See **Exhibit 1** to Plaintiff's initial motion at pp. 3, 12 and 22.

As such, it is respectfully submitted that BDO's report cannot pass the *Daubert* requirements of Rule 702 regarding reliability and must be stricken.

III. RULES 401 and 403

As the Plaintiff noted in the initial motion, even if an expert's opinion is admissible under FRED 702, it is still subject to exclusion under FRED 401 and 403, but Yusuf failed to even reply to this argument. Thus, the Plaintiff will just rely on the prior argument submitted, although the report should be stricken under Rules 401 and 403 as well.

IV. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that BDO's expert opinion fails to meet the requirements of FRED 702, so that this motion to exclude this report should be granted. Alternatively, it should be excluded under FRED 401 and 403.

Dated: October 26, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2016, I served a copy of the foregoing by email, as agreed by the parties, on:

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED, by his authorized
agent WALEED HAMED,

Plaintiff,

v.

FATHI YUSUF and UNITED
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Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
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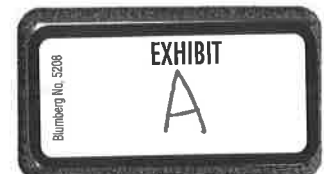
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HODA FATHI YUSUF HAMED'S MOTION FOR LEAVE TO INTERVENE

COMES NOW Proposed Intervenor Hoda Fathi Yusuf Hamed (hereinafter "Hoda Hamed" or "Mrs. Hamed"), by and through her undersigned counsel, and hereby files this Motion to Intervene for the *limited* purpose of objecting to the posting of Plot 100 Eliza's Retreat to secure the bond requirement issued against the Plaintiff in the above-captioned action. See, *Mountain Top Condominium Assoc. v. Dave Stabber Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995)(stating "[p]roposed intervenors need not have an interest in every aspect of the litigation. They are entitled to intervene as to specific issues so long as their interest in those issues is significantly protectable."). Mrs. Hamed contends that she has an interest in Plot 100 as it is marital property subject to distribution by the divorce court and that Plot 100 was posted as a bond in this matter without her knowledge or consent. As such, Mrs. Hamed submits that, as a matter of law, her interest in Plot 100 is sufficient to support intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), which is applicable to this Court



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100 in his name at the sale price of \$995,000.00 and \$100,000.00 and to use title to both plots to secure the mortgage. *Id.*

Approximately a year later, on or about July 1, 2011, the parents of Hoda Hamed, Fahti and Fawzia Yusuf, gifted Hisham and Hamed \$1.5 million. The gift was made as a result of Hisham Hamed's marriage to Hoda Hamed and the proceeds of the gift were used to pay off the mortgage, which encumbered the marital property and to make renovations to the marital home. The mortgage was paid in full in 2011 and the release of the mortgage was recorded on September 21, 2011. Exhibit "8", Release of mortgage dated September 21, 2011. Although the mortgage, power of attorney, and release were all recorded with the Recorder of Deeds at or near the time they were executed, none of these documents appear in the title report attached to Plaintiff's Notice of Posting Additional Bond nor did Plaintiff or Hisham Hamed disclose the existence of these documents to the Court.

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Hisham Hamed moved out of the marital home he shared with his wife and four children in or about November, 2012. Exhibit "3", Affidavit of Hoda Hamed dated September 30, 2013, at ¶ 4. After much back and forth and Mrs. Hamed's repeated attempts to save the couple's marriage, she filed for divorce on March 21, 2013. See, Complaint in *Hamed v. Hamed*, SX-13-DI-42. Mrs. Hamed advised her attorney at the time that the marital home was located on Plot 65, but neglected to inform her counsel that Plot 100 was also part of the marital estate as Hisham Hamed possessed all of the family business records and was charged with executing the purchase of both Plots 65 and 100. Exhibit "9", Affidavit of Hoda Hamed dated February 27, 2014, at ¶ 5. In the

the property posted to secure the preliminary injunction is unencumbered and otherwise sufficient to compensate the Defendants for any damages incurred as a result of being wrongfully enjoined.

WHEREFORE, and for the foregoing reasons, Proposed Intervenor, Hoda Fathi Yusuf Hamed, respectfully requests that her Motion for Leave to Intervene be **GRANTED**.

Respectfully Submitted,

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