

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
PLESEN 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 MOTION TO STRIKE DEFENDANTS' BUSINESS VALUATION EXPERT-
INTEGRA REALTY RESOURCES CARIBBEAN**

Yusuf has opposed the Plaintiff's *Daubert* motion to strike the expert opinion of the Defendants' business evaluation expert, Integra Realty Resources Caribbean ("Integra"). For the reasons set forth herein, it is respectfully submitted that Integra's report should be stricken.

Two preliminary comments are in order, as were also noted in the reply to the motion to strike Integra's opinion. 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 Integra 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

I. Yusuf's Opposition Re The Integra Motion

In his opposition, Yusuf tries to confuse the point that was made—that the partnership did not have a lease for the Plaza West location to give a new business, so its business could not be sold as a going concern. However, Yusuf is forgetting that he

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 Integra's report as well.

submitted a plan to this Court to have the store shut down, not sold, as it had no lease, where he stated to this Court that the West store could not be sold as a going concern (See Exhibit A):

The Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for Plaza Extra - East and Plaza Extra - West and the existence of only a short term less than 5 years) remaining on the lease between United and Tutu Park Mall, Ltd. for Plaza Extra - Tutu Park. Hence, liquidation of the Plaza Extra Stores is warranted. (Emphasis added).

Thus, the report submitted by Integra, attached as **Exhibit 1** to the Plaintiff's initial motion, totally ignores the most important fact – that the Plaza West store had no lease--rendering Integra's opinion both unreliable and irrelevant, requiring it to be stricken. In short, the Integra valuation is contingent on one pivotal assumption that is false (See **Exhibit 1** at page 2 of the cover letter):

Extraordinary Assumptions and Hypothetical Conditions

The value conclusions are subject to the following extraordinary assumptions that may affect the assignment results. **An extraordinary assumption is uncertain information accepted as fact. . . .**

3. It is our understanding that the real estate was owned by a related entity as of the date of valuation. For the purposes of valuing the business entity separately from the value of the real estate (which was separately appraised), **we have assumed that the entity operating the business leases the property from a separate entity at market rent.**

Thus, once this "assumption" is removed, the Plaza West store has no "ongoing value" under this valuation based on this assumption.³ Indeed, Yusuf admitted this fact when he filed his proposed plan, acknowledging that the Plaza West store could not be sold

³ Indeed, if the partners could create leases where none exist, Hamed would have the EXACT same claim on the Plaza East store. Yusuf acknowledged the lack of any such lease when he presented his plan that proposed to simply close this store.

as a going concern. How can he now call an expert to opine otherwise?

Moreover, in response to Yusuf's proposed plan, the Plessen directors held a meeting and entered into a long term lease with KAC 357, Inc., so that the store could remain open without the employees losing their jobs. The KAC lease has now been found to be valid, twice by this Court and once by Judge Willocks in another lawsuit filed against Plessen.⁴ Thereafter, the Plaza West store was liquidated and KAC took possession of the store. Thus, the Integra report is also unreliable since the Plaza West store has been closed since March of 2015, with a new tenant in that location.

II. THE RULE 702 "RELIABILITY" PRONG

As noted, Rule 702 provides in part as follows regarding expert testimony:

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:
... (Emphasis Added)

While Yusuf argues generalities like "the *Daubert* standard is liberal, the standard for admissibility is lower than the standard for correctness, etc.," none of those arguments can save every proffered expert opinion. Here, based on Integra's admissions that its opinion is contingent on the assumption that there is a lease on the Plaza West store, when there is no possibility of such a lease under the law of the case, the Integra expert opinion should not be admitted because it is simply not based on "reliable" data

⁴ These opinions, which can be submitted again if requested by the Court, are now the law of the case.

III. THE RULE 702 "FIT" PRONG

Regarding "fit," the Virgin Islands Supreme Court addressed this prong in *Virgin Islands v. Todmann*, 53 V.I. 431 (V.I. 2010), finding it is equivalent to a requirement of "relevance," citing *Daubert*. *Id.* at 439. Rule 702(d) incorporates this "fit prong":

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:

• • •

- (d) the expert has reliably applied the principles and methods to the facts of the case.

As Integra's report is based on a false premise, it does not "fit" the facts of this case, requiring it to also be stricken under the "fit" prong of Daubert as well.

IV. 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. Yusuf responded to this argument in a one paragraph summary manner, again misstating the basic point-- that the partnership did not have a lease for the Plaza West location so its business could not be sold--so no further argument is needed here.

In short, as Integra's opinion is based on a premise that is false, the report should be stricken under Rules 401 and 403 as well.

V. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Integra'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:

Hon. Edgar Ross
Special Master
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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,)	CIVIL NO. SX-12-CV-370
Plaintiff/Counterclaim Defendant,)	ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF
vs.)	JURY TRIAL DEMANDED
FATHI YUSUF and UNITED CORPORATION,)	
Defendants/Counterclaimants,)	
vs.)	
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESEN ENTERPRISES, INC.,)	
Additional Counterclaim Defendants)	
)	

MEMORANDUM IN SUPPORT OF
MOTION TO APPOINT MASTER FOR JUDICIAL SUPERVISION
OF PARTNERSHIP WINDING UP OR,
IN THE ALTERNATIVE, TO APPOINT RECEIVER TO WIND UP PARTNERSHIP

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), respectfully submit this Memorandum in Support of their Motion To Appoint Master For Judicial Supervision Of Partnership Winding Up Or, In the Alternative, To Appoint Receiver To Wind Up Partnership (the "Motion").

FACTUAL AND PROCEDURAL BACKGROUND

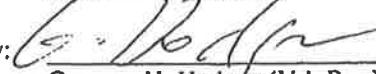
1. On September 17, 2012, plaintiff/counterclaim defendant Mohammed Hamed ("Hamed" or "Plaintiff") filed his complaint in this matter. Hamed filed his first amended complaint ("FAC") on October 19, 2012. The FAC alleges, among other things, that Hamed and Yusuf formed a partnership to own and operate a supermarket business comprised of three supermarket stores located in Sion Farm, St. Croix, Estate Plessen, St. Croix, and Tutu Park, St.



the partnership pursuant to the Plan or appointing a Receiver to effect the wind up and requiring the parties to promptly submit proposed Receiver candidates for the Court to consider along with a brief addressing the Receiver's proposed powers and compensation, and providing such further relief as is just and proper under the circumstances.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: April 7, 2014

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**PLAZA EXTRA SUPERMARKETS
PLAN FOR
WINDING UP PARTNERSHIP**

This Plan provides for the winding up of the Partnership, as defined below. This is a liquidating plan and does not contemplate the continuation of the Partnership's business except as may be required for the orderly winding up of the Partnership.

Section 1. DEFINITIONS

1.1 "Act" means the Uniform Partnership Act, V. I. Code Ann. Tit. 26, §§ 1-274.

1.2 "Available Cash" means the aggregate amount of all unencumbered cash and securities held by the Partnership including cash realized from any Litigation Recovery or any Liquidation Proceeds.

1.3 "Case" means Civil No. SX-12-CV-370 pending in the Court.

1.4 "Claim" means

(a) any right to payment from the Partnership whether or not such right is reduced to judgment, liquidated, unliquidated, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(b) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment from the Partnership whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.5 "Claimant" means the holder of a Claim.

1.6 "Claims Reserve Account" means one or more interest-bearing bank account(s), money market or securities account(s) to be established and held in trust by the Master for the purpose of holding the Available Cash until distributed in accordance with the Plan and any interest, dividends or other income earned upon the investment of such Claims Reserve Account. The Claims Reserve Account will be further funded from time to time by the Liquidating Partner with:

- (i) any Liquidation Proceeds realized, plus
- (ii) any Litigation Recovery realized, minus
- (iii) any amounts necessary to pay Wind Up Expenses.

The Encumbered Cash shall be deposited into the Claims Reserve Account immediately after it is no longer encumbered by the restraining order entered in the Criminal Case and, thereafter, held for distribution in accordance with this Plan.

Section 8. PLAN OF LIQUIDATION AND WINDING UP

A. Sale of Plaza Extra Stores as Going Concern vs. Liquidation.

The Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for Plaza Extra – East and Plaza Extra – West and the existence of only a short term (less than 5 years) remaining on the lease between United and Tutu Park Mall, Ltd. for Plaza Extra – Tutu Park. Hence, liquidation of the Plaza Extra Stores is warranted.

B. Liquidation Process

The liquidation process will include the sale of all non-liquid Partnership Assets, payment of outstanding Debts, and deposit of all net Liquidation Proceeds into the Claims Reserve Account under the control of the Master.

1. Current Financial Profile of Partnership.

The Partnership Assets and Debts are reflected on the balance sheet for the Plaza Extra Stores attached as Exhibit B.

2. Estimated Time for Liquidation

The liquidation process is estimated to take six months to complete.

3. Steps to Be Taken for the Orderly Liquidation of the Partnership

STEP 1: Budget for Wind Up Efforts

The Liquidating Partner proposes the Wind Up Budget, attached as Exhibit A for the Wind Up Expenses. Such expenses include, but are not limited to, those incurred in the liquidation process, costs for continued operations of the Plaza Extra Stores during the wind up, costs for the professional services of the Master, costs relating to pending litigation in which United d/b/a Plaza Extra Store is named as a party, and the rent to be paid to the landlord of Plaza Extra – East and Plaza Extra – Tutu Park.

STEP 2: Setting Aside Reserves

The sum of Ten Million Five Hundred Thousand Dollars (\$10,500,000) - to cover the Wind Up Expenses as set out in the Wind Up Budget with a small surplus to cover any miscellaneous or extraordinary Wind Up Expenses that may occur at the conclusion of the liquidation process - shall be deposited in the Liquidating Expenses Account to be held in trust by the Liquidating Partner under the supervision of the Master. The Liquidating Partner shall