

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS/ST. JOHN

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**DEFENDANT HAMED'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, Waheed Hamed, and moves this Court for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015, for the reasons set forth in the accompanying Memorandum of Law, to wit:

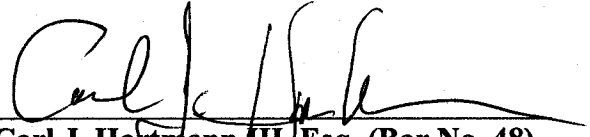
1. the time period for the bringing of an action based on an act in 1992 has long passed, and
2. there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this Court, it had full and complete access to all of the documents in possession of the U.S. Government for *many* years prior to the physical return of the documents in 2011.

A Proposed Order is attached.

Motion
Page 2

RESPECTFULLY SUBMITTED,

Dated: January 31, 2014

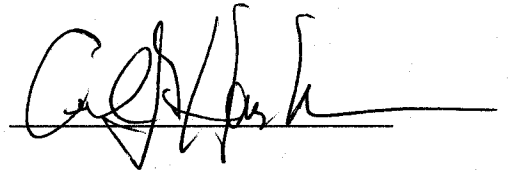


Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January April, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on :

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



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**DEFENDANT HAMED'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT AS TO THE SOLE REMAINING CLAIM**

I. Introduction

Defendant, Waheed Hamed, hereby moves for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015.

II. Procedural Posture

The original *Complaint* (filed March 5, 2013) alleged claims arising out of two acts:

- (1) Defendant's issuance of a \$70,000 payment (dismissed), and
- (2) that Defendant covertly participated in a competing grocery store in 1992.

On June 24, 2013, the Court dismissed the first claim and ordered the *First Amended Complaint* to be filed, limited to the remaining wrongful act -- Defendant's alleged 1992 involvement in the 5-Corners Mini-Mart.

With regard to this remaining factual allegation, in its June 24, 2013 *Memorandum Order*, at 9-10, the Court found Defendant's motion to be "premature" and provisionally allowed this remaining claim as follows:

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory ... belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."³³ **Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in U.S. v. United Corporation, et al., were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.**³⁴

* * * *

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determined as a matter of law and is rather a question of material fact.³⁵ Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in U.S. v. United, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, **here, Plaintiff contends** their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, **a document to which Plaintiff previously did not have access.** As such, ***Defendant's motion is premature*** with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011. **While there are many defenses to plaintiff's complaint, the most obvious one is statute of limitations**, which is properly raised by a Rule 12(c) motion. *See, 5C Wright and Miller, Federal Practice and Procedure (2004), §1367 at p. 211 (with cases cited in n.9).* (Emphasis added, text of footnotes omitted)

III. Facts Relevant to this Motion

As discussed below, the time period for the bringing of an action based on an act in 1992 has long passed. Summary judgment based on the statute of limitations is appropriate here because there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this Court, it had full and complete access to all of the documents in possession of the U.S. Government for many years prior to the physical return of the documents in 2011. Moreover, there is no question that the document at issue (Defendant's 1992 tax return) was in that collection or that plaintiff took advantage of this access in that it repeatedly viewed the documents without restriction -- and repeatedly scanned and copied any documents it wished.

Defendant's tax document at issue here was seized by the FBI in its 2001-2003 collection of documents in the criminal case. (Plaintiff's tax returns, like all of the rest of the documents returned in 2011, bears the *sequential* Bates numbers of those collected documents. Because of this, there is no dispute that they were all in that collection in the government's possession.) United Corporation had full, unfettered access to all of these documents beginning in 2003, as detailed in the *Declaration* (dated July 8, 2009) of FBI Special Agent Thomas L. Petri, in *U.S.A. v. Fathi Yusuf Mohammed Yusuf et. al.*, Crim. No. 2005-015 (DE 1148-1):

7. In **2003**, subsequent to the return of the indictment, counsel for defendants was afforded **complete access** to seized evidence. Attorney Robert King, the attorney then representing defendants, reviewed the discovery at the FBI office on St. Thomas. **He and a team of approximately four or five individuals reviewed evidence for several weeks. They brought with them a copier and made many copies of documents.**

and

8. In **2004**, a different set of attorneys presently representing the defendants reviewed the evidence seized in the course of the execution of the search

warrants. By my estimation, document review team included up to ten people at any one time. The defense team spent several weeks reviewing the evidence. They had with them at least one copier and one scanner with which they made numerous copies and images of the evidence.

9. During the 2004 review, the defense team was afforded unfettered access to discovery. They were permitted to review *any* box of documents at *any* time, including evidence seized during the searches, foreign bank records, documents obtained either consensually or by grand jury subpoena, and FBI Forms 302. The defense team pulled numerous boxes at one time with many different people reviewing different documents from different boxes.

See **Exhibit 1** (Emphasis added.) This unfettered access for United continued over many years, as noted by FBI Special Agent Christine Zieba. She personally watched Plaintiff's counsel access and review these documents over many weeks on subsequent occasions, as set forth in her *Declaration* in the same case. See **Exhibit 2**.

3. I have been present at the review of documents conducted by counsel for defendants in the Yusuf matter.

4. The FBI office is comprised of two buildings, an upper building and a lower building. The two buildings are secured facilities. As part of their duties, the agents and support staff housed in the lower building possess classified and secret national security information.

5. The evidence obtained in the course of the investigation and prosecution of the defendants is stored in the lower building. The evidence is secured either in a locked storage room or in locked file cabinets in the secured work space.

6. By necessity, the defendants' document review has taken place at a long conference table in middle of the central work space. The desks of one agent and analyst are freely accessible from that central work space. The special agent and the analyst possess and utilize classified, secret, and grand jury information in their work spaces.

7. Given that FBI special agents and employees maintain classified, secret, and grand jury information in the lower building, it is not feasible to provide the defendants unfettered access to that space.

8. I memorialized my conversations with defense counsel as well as the events

8. I memorialized my conversations with defense counsel as well as the events that transpired during the document review from November 8, 2008 through January 29, 2009. Those memoranda are attached to this declaration and incorporated as if fully set forth herein.

9. A process was put in place in order to ensure that evidence was not lost, misplaced or destroyed during the review process by defense counsel. Defense counsel were allowed to review one box at a time, and were allowed to handle the documents.

Thus, it is undisputed that Plaintiff had full, unfettered access to the information it now claims gives rise to this cause of action *in 2003* and thereafter. There is no requirement that Defendant somehow prove Plaintiff looked at all of the documents to which it has such access. To the contrary, as discussed below, any exception is Plaintiff's burden.

IV. Law

a. Summary Judgment

As this Court is well-versed in the standard for summary judgment, defendant will not belabor the point. *See e.g. Machado v. Yacht Haven USVI, LLC*, 2012 WL 5894805, *1 (V.I.Super. 2102) ("Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Rule 7 of the Rules of the Superior Court, provides that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, a court must "draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party." An issue is

"genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue.")

b. Statutes of Limitations

Plaintiff seeks relief for breach of fiduciary duty, constructive trust/recoupment, conversion, breach of contract, conversion and accounting. The statute of limitations has expired on all five of these counts. Chapter 3 of Title 5 of the Virgin Islands Code provides the statutes of limitations for all of these causes of action expire after 6 years or less pursuant to 5 V.I.C. §31 (e.g., 6 years for contract, 2 years for conversion, etc.) Clearly more than 6 years have passed since the dates of both the alleged wrongdoings in 1992 and the beginning of unfettered access to all relevant documents in 2003. The date of physical return in 2011 is irrelevant.

Likewise, regarding the equitable claims such as constructive trust/recoupment and accounting, 5 V.I.C. § 32(a) provides:

- (a) An action of an equitable nature shall only be commenced within the time limited to commence an action as provided in this chapter.

Thus, since none of the counts involve claims related to real property, the equitable claims are also time barred since they are over 6 years old without the need to decide whether a more specific statute of limitations applies.

c. Exceptions to Statutes of Limitations

The applicable law has been clearly set forth by this Court. At 5-6 of this Court's *Memorandum Opinion*, it observed the following regarding Plaintiff's burden here::

Ordinarily, "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.¹⁹ While Plaintiff's reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant

argues that Plaintiffs argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.^{20[1]} (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.^{21[2]} However, similarly to the discovery rule, **for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."**^{22[3]} (emphasis added). To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."^{23[4]} (Emphasis added.)

¹ 20 [Footnote in original] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I 2002)) (internal citations and quotations omitted).

² 21 [Footnote in original] *Id.* at *6.

³ 22 [Footnote in original] *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

⁴ 23 [Footnote in original] *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ("[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.")(internal citations and quotations omitted).

V. Argument

There is no dispute that the factual basis for the five counts alleged in the *Amended Complaint* all occurred in 1992. Thus, they fall within and are time-barred by the applicable statutes of limitations. Plaintiff has the burden to show an exception to the statutes of limitations. To do so, United raised the lack of access to the documents. The Court allowed this sole factual issue to remain pending an examination of that access.

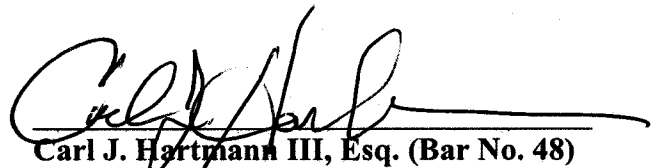
No material fact exists as to whether plaintiff either had "unfettered access" to the documents in 2003, or that such access has been thoroughly exercised since 2003. Thus, there is no set of facts under which Plaintiff can carry the burden of showing that lacked such access -- that it "could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." All Plaintiff or its counsel had to do was copy and/or read the documents. The fact that they were located outside of Plaintiff's physical premises or that Plaintiff (or its counsel) did not focus on the issues here at that time is irrelevant.

VI. Conclusion

As such, summary judgment should be granted.

RESPECTFULLY SUBMITTED,

Dated: January 31, 2014



Carl J. Hartmann III, Esq. (Bar No. 48)

Counsel for the Defendant

5000 Estate Coakley Bay, L-6

Christiansted, VI 00820

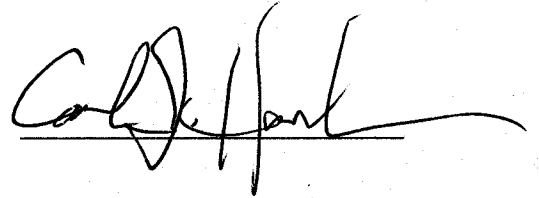
(340) 719-8941

carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

A handwritten signature in black ink, appearing to read "Nizar A. DeWood", is written over a horizontal line. The signature is stylized and cursive.

DECLARATION OF SPECIAL AGENT THOMAS L. PETRI



I, Thomas L. Petri, make this declaration in support of the Government's Response to Defendants' Reply Memorandum in Support of the Motion for Specific Relief.

- 1 I am employed as a Special Agent of the Federal Bureau of Investigation. I have served in that capacity for 20 years. I am assigned to the Miami Field Office.
- 2 I was assigned to the St. Thomas office of the Federal Bureau of Investigation from 2000 through 2006. While stationed on St. Thomas, I was the lead case agent of the investigation of United Corporation, Fathi Yusuf, Maher Yusuf, Negeh Yusuf, Waleed Hamed, Waheed Hamed, and Isam Yousuf.
- 3 In the course of that investigation, the government obtained and executed search warrants. Those searches were conducted at numerous locations throughout the islands, including the Plaza Extra stores and the homes of the defendants.
- 4 Evidence seized during the course of those searches was placed in boxes. Numbers were placed on the boxes to maintain an order.
- 5 The seized evidence, as well as evidence obtained either consensually or through grand jury subpoenas, was stored at the upper building of the FBI office in St. Thomas.
- 6 During the course of the investigation, FBI agents maintained control over the evidence. It was stored in a conference room in the office. No other materials but the documents pertinent to the investigation were stored in that room.
- 7 In 2003, subsequent to the return of the indictment, counsel for defendants was afforded complete access to seized evidence. Attorney Robert King, the attorney then representing defendants, reviewed the discovery at the FBI office on St. Thomas. He and a team of approximately four or five individuals reviewed evidence for several weeks. They brought with them a copier and made many copies of documents.
- 8 In 2004, a different set of attorneys presently representing the defendants reviewed the evidence seized in the course of the execution of the search warrants. By my estimation, document review team included up to ten people at any one time. The defense team spent several weeks reviewing the evidence. They had with them at least one copier and one scanner with which they made numerous copies and images of the evidence.
- 9 During the 2004 review, the defense team was afforded unfettered access to discovery. They were permitted to review any box of documents at any time, including evidence seized during the searches, foreign bank records, documents obtained either consensually or by grand jury subpoena, and FBI Forms 302. The defense team pulled numerous boxes at one time with many different people reviewing different documents from different

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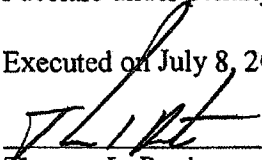
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boxes.

- 10 Immediately following the defense team's departure from the FBI premises, I had occasion to obtain documents from boxes that had been reviewed by the defense team. I discovered that documents that originally had been placed in one box had been placed in a different box. I returned the documents to their original boxes. I cannot be certain that I was able to identify each instance where documents had been misfiled by the defense team.
- 11 During the document review in January 2009, Randall Andreozzi requested to review all documents obtained via subpoena. I explained to him that I could not produce all evidence at once. That evidence comprises approximately 40 boxes. I asked him for a specific list of documents, or category of documents that he wished to review. He declined to identify the records that he wished to review and did not pursue the matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 8, 2009.


Thomas L. Petri

Declaration of Special Agent Christine Zieba



I, Christine Zieba, make this Declaration in support of the Government's Response to Defendants' Reply Memorandum in Support of the Motion for Specific Relief.

- 1 I am employed as a Special Agent of the Federal Bureau of Investigation. I have served in that capacity for approximately 5 years.
- 2 I am a case agent who is assigned to the St. Thomas office of the FBI. I have been assigned to assist the prosecution in United States v. Yusuf, 05-15 (D.V.I.).
- 3 I have been present at the review of documents conducted by counsel for defendants in the Yusuf matter.
- 4 The FBI office is comprised of two buildings, an upper building and a lower building. The two building are secured facilities. As part of their duties, the agents and support staff housed in the lower building possess classified and secret national security information.
- 5 The evidence obtained in the course of the investigation and prosecution of the defendants is stored in the lower building. The evidence is secured either in a locked storage room or in locked file cabinets in the secured work space.
- 6 By necessity, the defendants' document review has taken place at a long conference table in middle of the central work space. The desks of one agent and analyst are freely accessible from that central work space . The special agent and the analyst possess and utilize classified, secret, and grand jury information in their work spaces.
- 7 Given that FBI special agents and employees maintain classified, secret, and grand jury information in the lower building, it is not feasible to provide the defendants unfettered access to that space.
- 8 I memorialized my conversations with defense counsel as well as the events that transpired during the document review from November 8, 2008 through January 29, 2009. Those memoranda are attached to this declaration and incorporated as if fully set forth herein.
- 9 A process was put in place in order to ensure that evidence was not lost, misplaced or destroyed during the review process by defense counsel. Defense counsel were allowed to review one box at a time, and were allowed to handle the documents.
- 10 Despite this procedure, the defense team misplaced evidence. For example, the defense team reviewed a box of evidence and scanned documents contained within it. They then replaced the documents in the box and asked to review a different box of evidence.

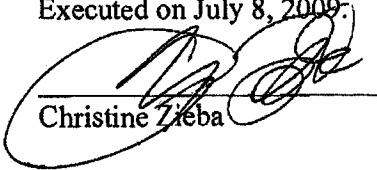
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Subsequent to the shelving of the original of the first box, it was discovered that the defense team had left a document on the scanner and had not returned it to the original box. The document was taken from one of the defense team and returned to the box from which it had been taken.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 8, 2009.


Christine Zieba

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Defendant.

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JURY TRIAL DEMANDED

JUDGMENT

THIS MATTER having come on before the Court on the motion for summary judgment of Defendant, Waheed Hamed, and the Court being fully apprised of the premises, it is hereby:

ORDERED and ADJUDGED:

1. The Counts applicable to the sole remaining factual averment with regard to the 5-Corners Mini-Mart are dismissed with prejudice.

Dated:

HON. MICHAEL C. DUNSTON
Judge of the Superior Court
of the U.S. Virgin Islands

ATTEST:
Clerk of Court
Deputy Clerk

By: _____
Deputy Clerk