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 WAHEED HAMED'S REPLY WITH REGARD TO HIS MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff brought suit based two sets of alleged acts -- the first occurred in 1992 and the second in 1995. This Court previously dismissed the 1995 acts based on the obvious statute of limitations defense. At the time of that dismissal, the Court declined to similarly dismiss as to the 1992 claim; but only because plaintiff alleged that it did not have access to documents in the U.S. Government's control, holding:

> Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which *Plaintiff [contends it] previously did not have access*. (Emphasis added.)

Summary judgment is, therefore, sought regarding the 1992 claim. Two contemporaneous FBI affidavits have been submitted stating that plenary access was fully available to Plaintiff's counsel. Plaintiff responds with a Fathi Yusuf affidavit (Opposition

Exhibit A) stating that ***he*** did not ***see*** the document. He avers no actual personal knowledge as to what documents his attorney did or did not see or have access to.

But mainly, to try to avoid summary judgment, Plaintiff asks that discovery be re-opened pursuant to Rule 56(d) for three (incorrect) reasons:

> 1) "a genuine issue of material fact exists as to whether Plaintiff had possession, access, or even reason to know of Defendant Hamed's tax returns."

because

> 2) "Plaintiff has received absolutely no responsive discovery to Plaintiffs Interrogatories, Request for Production of Documents, and Request for Admissions. (Emphasis added.)

and

> Plaintiff is awaiting the release of substantial document [sic.] from the United States Attorney's Office in the case of *United States* v. *United Corporation).* See *Affidavit of Fathi Yusuf,*

I. Facts

The parties submitted a joint proposed Scheduling Order *with dates and times altered to accommodate plaintiff.* There Court thereafter entered the stipulated Scheduling Order which provided:

> FACTUAL DISCOVERY. All factual discovery, including written discovery and fact witness depositions, shall be completed by April 1, 2014.

Both parties promulgated a full spread of discovery -- interrogatories, requests for documents and requests for admissions. Both parties then answered the full spread of

discovery.[1] (MANY of the discovery questions promulgated by Plaintiff dealt with questions about, or requests for documents in or about 1992. Thus, many of the responses were "I did not keep records from 22 years ago" or "I cannot recall.") Thereafter, both parties requested Rule 37 conferences. Rule 37 conferences were held separately on both parties' sets of Rule 37 notifications.[2]

Moreover, *the instant motion was filed in January of this year*. Instead of replying within the time allowed, Plaintiff asked for and received extensions during which it could have filed any discovery, taken additional depositions[3] or filed discovery motions. The stated purpose for the needing more than **two months** to reply was to allow plaintiff to complete whatever it felt necessary to fully reply.

The final such extension was to April 7, 2014 -- at which time the reply was filed, essentially asking for more extensions. No motions to enlarge discovery were requested as plaintiff already had the extra time allotted under its other time requests.

Only after the time allowed for discovery lapsed, did plaintiff file its reply.

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[1] Plaintiff had defendant's responses for more than a month before the Opposition was filed.

[2] The parties discussed and agreed to have the issues set forth in a letter that plaintiff was to write prior to the end of the discovery date (as had been done with regard to the other Rule 37 conference) -- but did not do so.

[3] Plaintiff cleverly words its reply, but tacitly admits that it did not seek discovery, serve subpoenae or otherwise attempt in any manner to take depositions of the FBI agents whose contemporaneous sworn affidavits in another proceeding are before the Court. Having the burden with regard to the non-access/statute of limitations it is Plaintiff's burden to prove *reasonable* lack of access, not Defendants to prove the contrary.

III. Argument

This Court has stated the applicable law -- which is patently clear:

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][4] (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.[215][] However, similarly to the discovery rule, **f**or a Plaintiff to invoke equitable tolling, **the <u>Plaintiff must demonstrate</u> "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim**."[22][6] (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][(Emphasis added.)

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[4] 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).

[5] 21 [*Footnote in original*] *Id.* at *6.

[6] 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)).

The Court's footnote 23 makes this even clearer:

> 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). (Emphasis added.)

Thus it is plaintiff's burden to "demonstrate" some factual basis for believing that "[it] could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."

This is a **1992** event, it is based on 22 year-old memories and plaintiff is seeking to try to prove its case solely by fishing for plaintiff's own 22 year old, non-existent documents. These are documents that nobody would keep -- documents from before Marilyn, Georges, Lenny and Omar. There simply are no more responsive documents.

Moreover it is uncontested that the sole Plaza Extra Store (East) burned down on in January, 1992, and did not even re-open until more than a year later. This means that not only all applicable business records burned, but that *Plaza Extra was not even open during 1992 or most of 1993 when this was supposed to have happened.* No more discovery is warranted because there is not even the faintest indication that defendant has any such documents -- he does not.

Finally, in the face of two sworn FBI affidavits which state that plaintiff and their counsel **absolutely and positively had access to ALL of the documents in the government's possession**, and the admission that plaintiff got the 1992 tax returns from the government -- more discovery should be allowed because . . . . because why? Having

the burden, plaintiff should have done some fact discovery or Rule 45 depositions. Plaintiff states:

> ***Defendant*** *fails to cite any proof* of how, when, and where the Plaintiff, through its counsel, had access specifically to Waheed Hamed's 1992 tax returns. Defendant attaches the Declaration of FBI Agents Thomas L. Petri and Christine Zieba. These Declarations make general claims of access to evidence or documents by defense attorneys. (Emphasis added.)

Defendant fails? Leaving aside the fact that this is plaintiff's burden and that plaintiff has supplied no affidavits of anyone with personal knowledge supporting such a lack of ACCESS, the Yusuf affidavit contests actual possession of the specific document rather than access, and is just legally irrelevant. The document was clearly in the government's collection -- *plaintiff admits that is where it came from*. And two FBI agents recite not only the fact that ALL collected documents were made available -- but that Plaintiff's counsel went through, copied and scanned *many times*. Did he see this exact document? Again, not the question.

a. Plaintiff's statements in Reply are completely unsupported of record.

Below are Plaintiff's verbatim statements (italicized text) made in opposition -- with Defendant's reply to each:

> *On November 15th, 2013, Plaintiff served upon Defendant Waheed Hamed its interrogatories, request for production of documents, and request of admissions. On February 12th, 2014, Defendant Waheed Hamed responded to Plaintiffs discovery requests. Unfortunately, no responsive discovery was received.*

Defendant's Response: (1) Responsive discovery was most certainly received, and (2) no motion for enlargement of time for discovery was filed on a timely basis.

> *Additionally, during the course of this matter, Plaintiff has been awaiting the release of tens of thousands of financial documents seized by the U.S. Government in the case of United States v. United Corporation (05-cr-l 5). Waheed Hamed who is a co-indictee is fully aware of the existence, location, and custody of these documents. (Emphasis added.)*

Defendant's Response: (1) Plaintiff's lawyers have had access to these documents and the opportunity to review them for more than a decade -- something plaintiff does not dispute by any method or submission of record, (2) there is no showing what the relevance is here and (3) plaintiff has not sought to depose the FBI agents or dispute the access by its attorneys.

> *however, in a race against time, Defendant Hamed seeks to dismiss this matter on statute of limitations grounds*

Defendant's Response: What race against time ? Plaintiff stipulated to a scheduling order, (2) Plaintiff has been given all extensions requested, (3) plaintiff has had over two months since this motion was filed but sought neither Rule 45 inquiry nor an extension of discovery.

> *Defendant's assertions are sadly misleading and based on speculation.*

Defendant's Response: The FBI affidavits are neither misleading nor speculative. And it is plaintiff's burden here that is important -- so defendant's assertions are not the issue.

> *In response to a motion for summary judgment, the nonmoving party can file a Rule 56(d) declaration. Fed. R. Civ. P. 56(d) provides: If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to*
> *justify its opposition, the court may:*
> *(1) defer considering the motion or deny it;*
> *(2) allow time to obtain affidavits or declarations or to take discovery; or*
> *(3) issue any other appropriate order.*
> *In the declaration, a party must specify: (1) what particular information is*

> *sought; (2) how, if uncovered, it would preclude summary judgment; and (3) why it has not previously been obtained. Pa., Dept. of Pub. Welfare v. Sebelius, 674 F.3d 139, 157 (3d Cir.2012)(citing Dowling v. City of Phi/a., 855 F.2d 136, 139--40 (3d Cir.1988)). If a party opposing summary judgment files an affidavit that specifically addresses these requirements, the Third Circuit has held that "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course," especially when particular information is in the sole possession of the moving party. Malouf v. Turner, 814 F.Supp.2d 454, 459--60 (D.N.J.2011) (quoting Sames v. Gable, 732 F.2d 49, 51 (3d Cir.1984)).*

Defendant's Response: This is a patently absurd argument. ***All*** of the cases cited and the applicable rule involve the right to Rule 56(d) discovery *BEFORE* discovery as ordered by the court and stipulated to by the parties has been completed. Even the most cursory reading of *Sebelius* and *Same*s reveals that additional discovery may be necessary when an opportunity for adequate discovery has not yet already been given. The cases cited *directly* contradict plaintiff's argument. The whole reason that defendant gave plaintiff many extra weeks to reply was to allow any such discovery or make an appropriate motion.

> *Moreover, both Declarations refer to attorney Randall Andreozzi's request to review documents, and his failure to "pursue the matter." In his arguments, Defendant conveniently omits ~11, which states the following:*
>
> *"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." See Declaration of FBI Agent Thomas L Petri, ~11, Exhibit D (relevant portion highlighted) See Declaration of FBI Agent Christine Zieba, ~11, Exhibit E (relevant portion highlighted).*
>
> ***The Declarations show that Attorney Andreozzi needed a "subpoena" in 2009 to request documents. This begs the question of why would Andreozzi need a subpoena if as Defendant contends the documents were always***

> ***available to Plaintiff through its attorneys. Clearly, these documents were not available for inspection without a subpoena****. Defendant's cherry picking and selective presentation of evidence is calculated to present a misleading view of the real facts.*

Here, plaintiff simply misreads the document. Attorney Andriozzi was not exercising a subpoena to <u>see</u> the documents -- he was requesting all documents the government had obtained *by subpoena*. And the Government was not able to supply them all *in toto* at that moment -- but the affidavits reflect that *all* of those documents were reviewed many times. And aside from that -- who is testifying to what went on there? It is plaintiff's counsel in his argument -- with no deposition or affidavit. Again, nothing of record. Counsel argues:

> *Declarations demonstrate that in fact no review and/or identification of documents was done by Attorney Andriozzi. If anything both of these Declarations clearly state that Attorney Andriozzi did not "pursue the matter" i.e., the documents that he was seeking.*

No affidavit or deposition of Attorney Andriozzi is presented. There is no basis for this.

> *No one even knows which attorneys were present at the evidence review meetings with the FBI, and what documents in fact were available for inspection.*

This is not plaintiff's burden. The documents were available. United clearly could have accessed them. Defendant needs not prove that United took the opportunity or ever saw the specific document.

Conclusion

Plaintiff has failed to shoulder its burden by placing any facts before the Court that give rise to any issue as to its defense to its "lack of access" defense to the statute of limitations.

Dated: April 16, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2014, I served a copy of the foregoing document by email, as per the agreement of the parties, on:

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