

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

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

**FATHI YUSUF’S OBJECTIONS AND RESPONSES TO  
COUNTERCLAIM DEFENDANT WAHEED HAMED’S  
INTERROGATORIES**

Defendant Fathi Yusuf (“Yusuf”), through his undersigned counsel, subject to the objections set forth below, respectfully answers as follows to Counterclaim Defendant Waheed Hamed’s Interrogatories (“Interrogatories”).

**PRELIMINARY STATEMENT**

These answers and objections are made solely for the purpose of this action. Each answer is subject to all objections as to competence, relevance, materiality, propriety, and admissibility; and all objections and grounds that would require the exclusion of any statement contained in any response, if such request were asked of, or any statement contained therein were made by, a witness present and testifying in court, all of which objections and grounds are hereby reserved and may be interposed at the time of trial.

The following answers are based upon information presently available to Yusuf and, except for explicit facts provided herein, no incidental or implied admissions are intended hereby. The fact that Yusuf has answered or objected to any Interrogatory should not be taken as an admission that he accepts or admits the existence of any facts set forth or assumed by such Interrogatory, or that such answer constitutes admissible evidence. The fact that Yusuf has answered part or all of any such Interrogatory is not intended and shall not be construed to be a waiver by him of all or any part of any objection to such Interrogatory.

### **GENERAL OBJECTIONS**

Yusuf makes the following general objections to the Interrogatories. Although these general objections apply to all of the Interrogatories, for convenience, they are set forth herein and are not necessarily repeated after each objectionable Interrogatory. The assertion of the same, similar, or additional objections in the individual objections to these Interrogatories, or the failure to assert any additional objections to a request does not waive any of Yusuf's objections as set forth below:

1. Yusuf objects to each Interrogatory that seeks information that is not relevant to the claims or defenses in this matter.
2. Yusuf objects to each Interrogatory to the extent it seeks the disclosure or production of documents or information protected by the attorney-client, work product or other privileges.
3. Yusuf objects to each Interrogatory that seeks information that is irrelevant, immaterial, and not reasonably calculated to lead to the discovery of admissible evidence.

4. The information sought by the Interrogatories may be as much as twenty-seven (27) years old. Documents that may have contained information relevant to the Interrogatories may no longer be in existence. Thus any information provided herein may not be, and should not be considered complete, and may be subject to supplementation if additional information becomes available.

5. Yusuf objects to defined terms and instruction to the extent that they vary from applicable law and/or impose different obligations than those set forth in the Federal Rules of Civil Procedure.

**SPECIFIC RESPONSES**

1. Describe in detail all conversation between Gregory Hodges and Carl Hartmann prior to the taking of any depositions on March 31, 2014, including but not limited to what was said and by whom and any stipulations or agreements entered into.

**RESPONSE:**

Yusuf objects to Interrogatory No. 1 on the grounds that the information sought is not relevant to any defenses or claims of Waheed Hamed (“Waheed”) (as he has made no claims) and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further responding, Yusuf states that he is without information to confirm or deny discussions that may or may not have taken place by counsel. Further, since Yusuf was not a party to any such discussion, the only way he could have learned about it would be through his counsel and such information is protected by the attorney-client privilege.

2. Describe in detail all contact, including phone conversation and emails between any member of the DTF firm and any judge or clerk of the Superior Court regarding this action where neither Joel Holt or Carl Hartmann was a part of the conversation or copied on the email.

**RESPONSE:**

Yusuf objects to Interrogatory No. 2 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Yusuf is without information to confirm or deny discussions or any other communication that may or may not have taken place by counsel. Further, since Yusuf was not a party to any such discussion or communication, the only way he could have learned about it would be through his counsel and such information is protected by the attorney-client privilege.

3. With regard to the email below, state with specificity why no copy of the email to Judges Brady or Dunston were copied to opposing counsel.

**From:** Henry L. Feuerzeig [<mailto:hfeuerzeig@dtflaw.com>]

**Sent:** Tuesday, April 01, 2014 9:48 AM

**To:** Douglas A. Brady; Michael C. Dunston

**Subject:** Emergency Motion; MOHAMMAD HAMED, by his authorized agent WALEED HAMED v. FATHI YUSUF and UNITED CORPORATION, Civil No. SX-12-CV-370

Good Morning,

Pursuant to my conversation this morning with Presiding Judge Dunston's office, attached is a Motion to Continue or extend the Durational Limit of the Deposition of Mohammad Hamed in the above captioned St. Croix case. It is being filed now in the Superior Court on St. Thomas due to the closure of the court on St. Croix. Judge Dunston's office advised me to file the attached motion and email it to Judge Brady as well as to Judge Dunston. The motion involves depositions occurring on St. Croix, which began yesterday and are continuing today.

I also am attaching an EMERGENCY MOTION FOR PROTECTIVE ORDER CONCELLING DEPOSITIONS, which was filed on Friday, March 28, 2014, with Clerk's Office on St. Thomas, again, because the Court on St. Croix was closed on Friday.

Hank

Henry L. Feuerzeig, Esq.  
Dudley, Topper and Feuerzeig, LLP  
Law House, 1000 Federiksberg Gade  
St. Thomas, US Virgin Islands 00802-6736  
Mailing: PO Box 756  
St. Thomas, US Virgin Islands 00804-0756 Direct Dial:340.715.4443  
Facsimile: 340.715.4400  
Web: [www.DTFLaw.com](http://www.DTFLaw.com)

**RESPONSE:**

Yusuf objects to Interrogatory No. 3 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not

reasonably calculated to lead to the discovery of admissible evidence. Yusuf is without information to confirm or deny discussions or any other communication that may or may not have taken place by counsel. Further, since Yusuf was not a party to any such discussion or communication, the only way he could have learned about it would be through his counsel and such information is protected by the attorney-client privilege.

4. Describe in detail all occasions on which counsel for Fathi Yusuf (either individually or as one of a group of criminal defendants):
  - A. Reviewed seized criminal documents in the possession of the United States Government (including but not limited to the FBI, the U.S. Department of Justice or any other investigative or prosecutorial agency.)
  - B. With regard to reviews of documents set forth in response to A above, state the dates and all materials provided for review, as well as any restriction on documents provided for review.

**RESPONSE:**

Yusuf incorporates by reference filings made in USA v. Fathi Yusuf et al., CR-2005-015, District Court, Div. St. Croix (the “Criminal Case”), which reflect the limited access his counsel had during the course of the case and the Court’s findings as to same as his response to Interrogatory No. 4 as if fully set forth herein verbatim. Relevant filings from the Criminal Case are attached hereto as **Exhibits A, B and C**.



5. Describe generally how, from 1986 to 2002, cash was removed from Plaza Extra Supermarket sales reporting by the Hameds and Yusufs. For each method or technique used, provide specificity about: A. Methods used to remove (“skim”) the cash; B. Where cash first went after being skimmed; C. Which individuals Hameds or Yusufs were involved; D. What intermediate accounts or transfer instruments and methods were used (i.e. that the cash was used to purchase or create); E. What final destinations the cash (or instruments into which the cash had been converted) were placed, deposited or otherwise used to purchase assets; F. What funds existed in foreign bank accounts now, obtained with such funds; G. What property or assets exist in the U.S. Virgin Islands now, obtained with such funds; and, H. What property or assets exist in foreign countries now, obtained with such funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 5 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further responding, Yusuf states that Waheed has acted in a managerial role as to the Plaza Extra supermarkets and is fully aware of how cash was handled in the Plaza Extra supermarkets.

6. Describe why cash was removed or “skimmed” from the sales of Plaza Extra Supermarkets. Give Yusuf’s understanding of the purpose and goals of those acts and what results were achieved or sought to be achieved, and state:
  - A. Whose idea was the skimming
  - B. Who was “in charge” of the skimming
  - C. Who kept the records of the skimming and what records were kept.

**RESPONSE:**

Yusuf objects to Interrogatory No. 6 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

7. For each of the years from 1986 to 2001, state the approximate amount Fathi believes was skimmed from the sales of Plaza Extra supermarkets.

**RESPONSE:**

Yusuf objects to Interrogatory No. 7 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further responding, to the extent that this Interrogatory requests information as to Waheed's defalcations, Fathi incorporates by reference as if fully set forth herein verbatim Bates No. UC001673-UC002614 as his response to Interrogatory No. 7.

8. Describe in detail whether the amount reflected in the plea agreement in the criminal case (where tax evasion by underreporting of sales in 2002 was part of the allocation) for the actual and reported sales is correct, and for the amount that was not reported, state what Fathi understands was done with those funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 8 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

9. Describe all bank accounts and property which Fathi directly or indirectly owns presently as a result of the transactions set forth in #5 above.

**RESPONSE:**

Yusuf objects to Interrogatory No. 9 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

10. Describe all bank accounts and property known to Fathi which Waleed Hamed directly or indirectly owns presently as a result of the transaction set forth in #5 above.

**RESPONSE:**

Yusuf objects to Interrogatory No. 10 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

11. Describe all funds obtained as set forth in #5 above which Fathi Yusuf used for gambling – and provide the amount gambled, won and lost by year for the years 1990-2008.

**RESPONSE:**

Yusuf objects to Interrogatory No. 11 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

12. Describe in detail the net worth, assets and liabilities of Mr. & Mrs. Fathi Yusuf, United Corporation and Mattress Pal as of the date of your responses hereto.

**RESPONSE:**

Yusuf objects to Interrogatory No. 12 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.



13. Describe all funds obtained as set forth in #5 above, which Fathi Yusuf used for investing in stock options – and provide the amount invested, gains and losses by year for the years 1990-2008.

**RESPONSE:**

Yusuf objects to Interrogatory No. 13 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

14. State how monies skimmed by the Hameds and Yusufs as set forth in response to Interrogatory #5 were divided among family members; and state what amount Waleed Yusuf should correctly have received of these funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 14 on the grounds that the information sought is not relevant to claims or any defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

15. With regard to your response to Interrogatory #14, state how monies skimmed by the Hameds and Yusufs as set forth in response to Interrogatory #5 beyond amounts that Waleed Hamed should have properly received were taken by Waleed Hamed, and state what amount (and calculation) Waleed Yusuf obtained beyond what he should correctly have received of these funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 15 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

16. State how monies skimmed by the Hameds and Yusufs set forth in response to Interrogatory #5 were divided among Yusuf family members; and state what amount Fathi and Mike Yusuf should have correctly received of these funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 16 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

17. With regard to your response to Interrogatory #14, state how monies skimmed by the Hameds and Yusufs as set forth in response to Interrogatory #5 beyond amounts that Fathi and Mike Hamed should have properly received were taken by them, and state what amount (and calculations) they obtained beyond what should correctly have received of these funds.

**RESPONSE:**

Yusuf objects to Interrogatory No. 17 on the grounds that it is vague and ambiguous and the information sought is not relevant to any claims or defenses or claims of Waheed (as he has made no claims) and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

18. Describe any and all accounting or recordkeeping for the years 1986 to 2002 which reflect on or were used in calculating responses to 14-17 above.

**RESPONSE:**

Yusuf objects to Interrogatory No. 18 on the grounds that the information sought is not relevant to any claims or defenses between these parties and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further responding, Yusuf states that Waheed has acted in a managerial role as to the Plaza Extra supermarkets and is fully aware of how cash was handled in the Plaza Extra supermarkets and has had equal access to all accounting records.

19. Describe when and how the Associated Grocers (AG) membership and stock were obtained, what funds were used to obtain them and who Fathi Yusuf presently believes is the rightful owner of them.

**RESPONSE:**

Yusuf objects to Interrogatory No. 19 on the grounds that the information sought is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

20. Describe in detail the relationship between Seaside Market and AG, and whether the AG membership or stock are involved and how.

**RESPONSE:**

Yusuf objects to Interrogatory No. 20 on the grounds that the information is not relevant to any claims or defenses in this matter and, therefore, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.



Respectfully submitted,

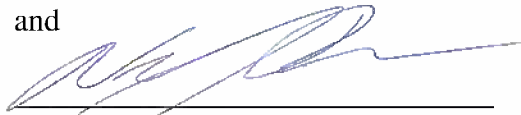
**DUDLEY, TOPPER AND FEUERZEIG, LLP**

Dated: September 24, 2014

By:

Charlotte K. Perrell (V.I. Bar No. 1281)  
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and



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Attorneys for Fathi Fathi and United Corporation

**CERTIFICATE OF SERVICE**

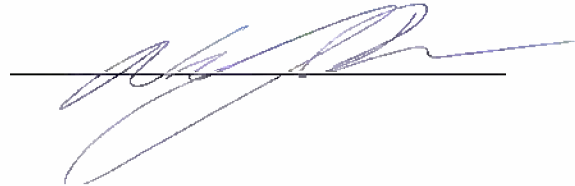
I hereby certify that on this 22<sup>nd</sup> day of September, 2014, I caused the foregoing **Fathi's Objections and Responses to Counterclaim Defendant Waheed Hamed's Interrogatories** to be served upon the following via e-mail:

Joel H. Holt, Esq.  
**LAW OFFICES OF JOEL H. HOLT**  
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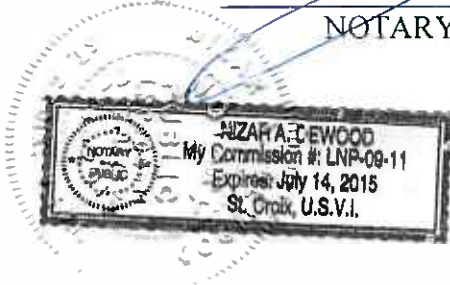
VERIFICATION OF RESPONSES

DATED: 9-24-2014

  
FATHI YUSUF

SWORN TO AND SUBSCRIBED  
BEFORE ME THIS 24<sup>th</sup> DAY  
OF SEPTEMBER, 2014

  
NOTARY PUBLIC



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

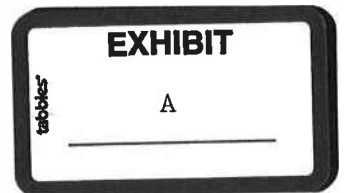
UNITED STATES OF AMERICA and	)	
GOVERNMENT OF THE VIRGIN	)	
ISLANDS,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
FATHI YUSUF MOHAMMED YUSUF,	)	CRIM NO. 2005-0015
WALEED MOHAMMED HAMED,	)	
WAHEED MOHAMMED HAMED,	)	
MAHER FATHI YUSUF, ISAM	)	
MOHAMAD YOUSUF, and UNITED	)	
CORPORATION, dba Plaza Extra	)	
Supermarkets,	)	
	)	
Defendants.	)	
_____	)	

**ORDER**

THIS MATTER comes before the Court on Defendants' Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence. A hearing was held on such motion on July 9, 2009.

In raids on the six Defendants' various businesses and homes in October of 2001, the Government seized Defendants' business, financial and personal records. Since that date, the Government has retained hundreds of boxes of such records for its use in this case. The Government also obtained additional documents from third-party sources.

The Government organized the voluminous documents and recorded their various sources by boxes numbered and bar coded to correspond with the various locations from which the Government had removed the documents. Rather than identify or log each specific document seized, the Government prepared an index with a general description of the documents contained



in each box.

Since 2001, the Government has returned some of the boxes of seized document. The remaining documents have been retained in the FBI offices in St. Thomas, Virgin Islands.

The Government used a bates numbering system for certain documents within certain boxes. The bates numbering contained prefixes that were indexed to the numbers and bar codes on the boxes. Many of Defendants' documents were not given bates number. However, all of the documents the Government intends to use at trial do have bates numbers.

The Government never provided the Defendants with a detailed inventory of the specific documents seized. The Government has only permitted the Defendants limited review of the evidence under supervision which often involves oversight by Government agents involved in investigating this case.

Several years ago the defense team prepared a general inventory of the groupings of documents and scanned pertinent documents. During their November 2008 document review, the defense team realized that the documents were not in the same order that they had been initially. The Government had reorganized and rearranged the Defendants' documents by removing some documents from the initial original boxes and placing them in different boxes to suit the Government's needs.

The new system of organization is not apparent to the Defendants. The Government has not provided Defendants with any means of tracing the unnumbered documents to the locations from which they were seized within their businesses and homes.

Without a complete set of documents for their unlimited review, the defense team cannot determine the extent of harm, if any, that the Government's rearrangement of the documents has

caused. Accordingly, it is hereby

**ORDERED** that the Government serve upon the defense team one duplicate set of documents seized from the Defendants, as well as all discoverable documents seized from third parties; that the duplicate set correspond to the present document arrangement; and that Defendants have 60 days from the receipt of such documents to supplement their Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence.

ENTER:

DATE: July 16, 2009

\_\_\_\_\_/s/\_\_\_\_\_  
RAYMOND L. FINCH  
SENIOR DISTRICT JUDGE

IN THE DISTRICT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA, and  
GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiffs,

vs.

CRIMINAL NO. 2005-15E/B

FATHI YUSUF MOHAMAD YUSUF,  
aka Fathi Yusuf

WALEED MOHAMMAD HAMED,  
aka Wally Hamed

WAHEED MOHOMMAD HAMED,  
aka Willie Hamed

MAHER FATHI YUSUF,  
aka Mike Yusuf

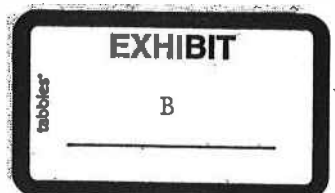
NEJEH FATHI YUSUF and

UNITED CORPORATION,  
dba Plaza Extra

Defendants.

**DEFENDANTS' MOTION FOR SPECIFIC RELIEF DUE TO THE GOVERNMENT'S  
DESTRUCTION OF THE INTEGRITY, ORGANIZATION AND SOURCING OF  
MATERIAL EVIDENCE**

THE DEFENDANTS, by and through their respective counsel, respectfully request that the Court enter an Order granting relief to the Defendants for harm caused by the government's willful and knowing destruction and alteration of the integrity, organization and sourcing of selected impeachment and exculpatory evidence. As a direct consequence of the Government's actions, the organization and control of certain material documents has been severely



compromised such that (1) Defendants can no longer establish the source and authenticity of the documents; (2) Defendants can no longer determine whether and to what extent any exculpatory or impeaching documents have been removed or destroyed; and (3) Defendants cannot trace or identify individuals who created such documents, had access to the documents, used the documents, or relied or should have relied on such documents. In short, the Government, through its knowing and deliberate actions of its Agents, has created a cloud of credibility on certain documents in this case, while those same Agents took deliberate actions to preserve and maintain the highest level of integrity and organization for documents it intended to use at trial.

THE DEFENDANTS request that the Court, in its discretion, (1) dismiss the Third Superseding Indictment in its entirety; (2) suppress all evidence seized and currently retained by the Government; (3) adopt appropriate evidentiary rulings as to the authenticity, sources, and weight of the subject documents; (4) adopt appropriate jury instructions explaining the Government's actions and detailing the appropriate factual and evidentiary inferences the jurors should make as a result of the government's actions; (5) order that the Government compensate the Defendants for all attorneys' and expert fees incurred as a result of the Government's actions; (6) order the Government to return the Defendants' documents and/or (7) grant any additional or alternative relief that the Court, in its discretion, deems appropriate.

IN SUPPORT THEREOF, the Defendants show unto the Court as follows:

*I. Case Background and Chronology of the Government's Seizure and Retention of the Defendants' Property.*

1. This matter is before the Court on a 78-count Third Superseding Indictment under which the Government charges Defendants with various tax-related offenses. Many of those offenses involve allegations of conspiracy and money laundering which require the Government to proffer evidence in the negative (for example, the Government seeks to



establish that the Defendants concealed information from other individuals and entities).

The initial Indictment in this matter was handed down in September of 2003.

2. In coordinated raids on the six Defendants' various businesses and homes in October of 2001, the Government seized substantially all of the Defendants' business, financial and personal records. Since that date, the Government has retained hundreds of boxes of Defendants' property for use in this case.
3. In the course of its subsequent investigation and case development, the Government solicited and procured Defendants' documents from a variety of other third-party sources. Among the third parties from whom the Government solicited Defendants' documents are the Defendants' financial institutions, outside accounting firms, family members, and various foreign governments. All told, the Government procured more than five hundred banker boxes of the Defendants' documents from these and other sources. Many of the documents procured by the Government are originals.
4. The Government organized the voluminous documents and recorded their various sources by boxes numbered and bar coded to correspond with the various locations from which the Agents removed the documents. The specificity of the source description would vary, as the Government would describe sources as specific rooms or offices, file cabinets or desk drawers. The corresponding box numbers and bar codes were accompanied by a very general description of the documents contained therein. *The Government did not identify or log each specific documents seized.*
5. Since the raids of October 2001, the Government has returned some of the boxes of seized property to the Defendants, but the remaining *relevant* documents have been retained in the FBI offices in St. Thomas, USVI.

6. Upon information and belief, the Government began the process of bates numbering only certain documents within the boxes — documents it intended to use in its case in chief at trial. The bates numbering contained prefixes that were indexed to the numbers and bar codes on the boxes. However, the Government continued this project sporadically and eventually abandoned the effort due to lack of funding. Consequently, some of the Defendants' documents held by the Government are bates numbered, but a significant number are not.
7. To summarize, *all* of the documents the government intends to use at trial are bates numbered using the bar coded system and the vast number of remaining documents, likely having significant relevance to the defense, are not bates numbered.
8. The Government never provided the Defendants with a detailed inventory of the specific documents seized. Upon information and belief, such inventory does not exist. Consequently, given the large volume of records the Defendants maintained, the Defendants cannot identify the specific documents the Government seized in October of 2001.
9. The Government continues to hold Defendants' documentary evidence at the FBI offices on St. Thomas, permitting the Defendants only limited supervised review of the evidence.
10. During their initial review of the documents at the FBI offices in St. Thomas, the defense team prepared a general inventory of the groupings of documents held in the boxes, and scanned as many of the pertinent documents as possible.
11. In the seven years since the October 2001 raids, the Government has periodically returned boxes of documents to their owners that it deemed not pertinent to the subject

case. The Government identified and logged the boxes returned, and required the owners to sign a document acknowledging receipt of the documents.

12. This protocol implies that the Government deemed the documents it chose to retain to be pertinent to the issues in the case. It also illustrates that the Government continually preserved and identified the documents by reference to the box numbers. It is in the context of such awareness that the Government Agents rearranged the documents among the boxes.

13. The defense team's last permitted visit to the FBI offices was in 2006. From that time until November of 2008, the Government denied the Defendants access to their documents despite numerous requests. In November of 2008, Government counsel agreed to allow the defense team to view the documents. The document review was scheduled for November 10, 12, 13 and 14, 2008.

#### *II. Defense Team's Discovery of Spoliation*

14. On the defense team's November 10, 2008 discovery visit to the St. Thomas FBI offices, FBI Special Agent Christine Zieba initially denied the team access to the records. According to Ms. Zieba, the defense must now submit a detailed list of specific documents they wished to view, and she would produce the specific documents for review. As the defense team would soon learn, case FBI Agent Thomas Petri and testifying IRS Agent Javier Bell traveled to the Virgin Islands from their United States Places of Duty to monitor the documents requested and observe the defense team's review of the documents.

15. Defense counsel Randall Andreozzi asked Ms. Zieba to explain why the defense team was suddenly being denied the access and ability to review and examine the Defendants' own documents in a manner that was inconsistent with the prior discovery visits.

16. Without explanation, Ms. Zieba advised that prior protocol would no longer be possible. She directed the defense team to leave and return on Wednesday, November 12, 2008, to discuss the matter with Department of Justice attorney Lori Hendrickson.

17. On November 12, 2008, the defense team returned to the FBI offices and was greeted by several Government representatives, including FBI case Agent Thomas Petri, IRS case Agent Javier Bell, and newly-assigned case Agent Christine Zieba. Department of Justice Counsel Lori Hendrickson was also in attendance. As the Court is aware, Agents Bell and Petri were involved in this case at the search warrant stage. They advised that they will also be working on the trial of the case.

18. Ms. Hendrickson explained that Agents Petri and Bell were detailed from their United States Places of Duty so that they could monitor the defense team's document review. She outlined new procedures that she would enforce for the Defendants' review of their own documents. As part of that procedure, the defense team would only be permitted to review one box at a time; only one person would be allowed to touch the documents; and the Government agents -- not defense counsel -- would decide which boxes the team would be permitted to review.

19. When the defense team demanded an explanation, Ms. Hendrickson stated that she implemented these new procedures to ensure the integrity of the documents as the Government maintained them.

20. With little alternative, the defense team agreed to proceed under this protocol so long as it proved feasible to an effective and efficient review of the documents. Defense counsel Randall Andreozzi stated, however, that the defense could not agree to allow Agents Petri and Bell, and Attorney Hendrickson, to monitor the team's review of the defendants' documents. As a compromise, the team agreed to limit the number of individuals who would review the documents at any one time. Ms. Hendrickson agreed to this stipulation.

21. The first box the Government provided for the defense team's review was FBI box number 131. Upon review of the contents of Box 131, the defense team immediately recognized that the current contents of the box did not match the general summary inventory the defense had prepared during its previous document reviews. Box 131 now contained groups of documents that were not identified in the defense's inventory of Box 131, including, *inter alia*, documents with the bates prefix 295. By reference to its summary index, the defense team confirmed that these documents were originally stored in Box 295.

22. Defense counsel Andreozzi asked Ms. Zieba why documents with bates prefixes 295 were contained in box 131.

23. It was then that Ms. Zieba informed the defense team that she had reorganized and rearranged the Defendants' documents by removing some documents from their original boxes and placing them in different boxes because the revised organization better suited her needs. She refused to explain the revised organizational method.

24. Mr. Andreozzi explained to Ms. Zieba that the FBI represented to the defense team during the initial document review sessions that the box numbers corresponded to the various sources from which the documents were seized or otherwise procured. Because

the FBI chose to bates number only some of the documents, the only way for the defense team to track the sources of the non-bates stamped documents even generally was by box number.

25. Mr. Andreozzi asked, "So if we were to look through Box 200, for example, and refer to our index, the contents of the box would not match?" Ms. Zieba confirmed that this was correct -- the documents would no longer match either the Defendants' index or the Government's original index. She explained, "I had no idea the defense relied on the order of these documents to particular boxes. I rearranged them how I was doing them and what made sense to me."

26. Mr. Andreozzi asked Ms. Zieba if, in light of this development, it would be possible to determine: (1) whether and to what extent documents were removed from the boxes; (2) whether and to what extent documents have been rearranged among the boxes; or (3) what sources the specific documents were procured from

27. Ms. Zieba refused to answer the questions. She repeated that she had no idea the defense or the FBI relied on the box numbers as the identifying factor in indexing and arranging the documents, or as a reference as to the sources of the documents. She stated that any other questions should be addressed to Attorney Hendrickson.

28. Attorney Hendrickson returned to the office with Agent Petri. Both were apprised of the issue.

29. Agent Petri at first responded by accusing the defense team of misplacing the documents in Box 131. He asserted that, during the defense team's initial review of the boxes, he and his colleagues would review the boxes after each examination to make sure that the defense team did not disturb the integrity of the FBI's organization of the documents.

Agent Petri claimed that on some occasions he found documents misplaced and had to replace them in correct order in the boxes. He stated, "This is why we have to have an agent watch you."

30. Mr. Andreozzi then posed the question: "If there was integrity to the order of the documents in their respective boxes, and Agent Zieba just informed us that she rearranged the documents and boxes, why will the FBI not provide us with the methodology for her reorganization?" Mr. Petri then turned and confronted Ms. Zieba: "You reorganized the boxes?!" At that point, Mr. Petri stated that he would not discuss the issue any further.

31. Mr. Andreozzi advised Attorney Hendrickson that, in order to evaluate the extent of the harm caused, the defense team would need to select and review specific boxes of documents, and could no longer rely on the Government's discretion in selecting the boxes for review. Attorney Hendrickson tentatively agreed to this, but asked that the group adjourn for lunch and return in the afternoon to continue its review.

32. On the afternoon of November 12, 2008, the defense team returned to the FBI offices to continue its review of boxes. The team noted the presence of Agents Bell and Petri. Ms. Zieba stated that the Agents would not observe the team's document review but would remain in the storage room where the boxes were maintained.

33. The team provided Ms. Zieba with a list of six numbered boxes to review. Ms. Zieba produced one box and two redwell folders. One redwell was labeled "161 formerly" and contained only approximately ten documents. The other was labeled "428" and contained only a few manila folders of documents. Mr. Andreozzi advised Ms. Zieba that the numbers 161 and 428 had been associated with actual boxes. He asked why she

now produced redwell folders and why one was labeled "161 formerly". Ms. Zieba would only repeat that the documents are no longer in their original order.

34. Ms. Zieba refused to produce three of the boxes requested. She stated that, pursuant to Attorney Hendrickson's instructions, "For today I will just keep pulling boxes randomly because I don't have them organized the way you have them organized."

35. The team requested access to the storage room to view the current manner in which the boxes were being maintained. Ms. Zieba refused access and directed all questions to Ms. Hendrickson.

36. Upon Ms. Hendrickson's return to the office, Mr. Andreozzi explained the afternoon's events and the defense team's concerns regarding the integrity of the documents. Ms. Hendrickson responded by stating, "What's done is done."

37. Mr. Andreozzi insisted that, in light of the circumstances, the team be allowed to review all of the boxes in numerical order to determine the extent of the harm. Ms. Hendrickson agreed, but asked that the defense team leave for the day to allow her to "prepare" the boxes for viewing. She stated that, if the team allowed the prosecution team to start working now, they could have the first fifty or so boxes "ready" for review by the next morning.

38. Mr. Andreozzi again expressed concern, and asked what Ms. Hendrickson meant by "prepare" the documents for review. Ms. Hendrickson refused to answer the question and asked again that the team leave for the day.

39. The next morning, November 13, 2008, Ms. Hendrickson advised Mr. Andreozzi that she had occasion to work with and review the documents until 8 p.m. the prior evening. She confirmed that the FBI Agents did in fact reorganize and remove documents from the



boxes since the defense team's last review of the documents. Ms. Hendrickson explained that, as best she can determine, the following occurred:

- a. The Special Agents removed the documents *they intended to use at trial* and placed them in trial binders. They used the originals, and no copies were replaced in the original boxes.
- b. The Special Agents returned some documents to the Defendants at various points in time. Ms. Hendrickson claims that some items and documents returned were pulled from boxes and returned to the defendants (rather than entire boxes being returned intact), but she cannot identify the specific items or documents returned.
- c. As for the boxes of documents that the FBI retained and did not place into exhibit folders for trial, the Agents removed and reorganized the documents contained in those boxes in various ways, *without employing any method to track the original source of the documents*. For example, the Agents may have grouped all bank statements together so that they no longer maintained the statements in the original boxes based on their sources. As a result, neither the source nor the authenticity of the various documents can be determined. Nor can one determine whether or to what extent documents may have been removed from the boxes.

40. Ms. Hendrickson explained this was the best she could do under the circumstances, and repeated that, "What's done is done."

41. Thus, the Government knowingly and willfully reorganized the documents, but did so only after it meticulously identified and preserved the integrity and chain of custody of the specific documents they intend to rely on at trial.

42. The defense team continued to review the boxes in numerical order during the time remaining on November 13, and 14, 2008, to determine the extent of the damage caused by the Government's actions. Of the boxes the team was able to review during that time, the team continued to discover misplaced and missing documents.

43. The defense team returned to the FBI offices on January 26, 2009 and continued its document review through January 29, 2009. Agents Petri and Bell returned to St. Thomas from their United States Places of Duty to monitor the review with Agent Zieba.

44. Attorney Hendrickson was not present. In a telephone conversation with Randall Andreozzi, Mr. Andreozzi advised Ms. Hendrickson that the defense planned to continue to review the boxes in numerical order from where it left off in November. He asked Ms. Hendrickson whether the Government Agents had reorganized the documents since the defense team's last review. Ms. Hendrickson informed Mr. Andreozzi that the Government had not reorganized the documents since the defense team last reviewed them in November 2008. She refused to comment on whether the Agents did anything to affect the integrity of the boxes of documents the defense team had yet to review.

45. At various points during the course of the document review, Mr. Petri informed the defense team that they were misinformed if they believed the documents seized and maintained by the government belonged to the defendants. Mr. Petri stated that the documents belonged to the Government, and that he would do with them as he pleased. He informed the team that he and other Agents rearranged and removed documents from the boxes and that the Agents were within their rights to do so.

46. Mr. Petri also stated that he selected certain documents in the various boxes to be bates stamped based on whether the Government intended to use them at trial. This is how he determined which documents got bates stamped and which did not.

47. Mr. Andreozzi asked Mr. Petri whether he would return the documents that the Government did not intend to use at trial. Mr. Petri refused, stating that the remaining documents were nonetheless relevant to the case.

48. The team concluded its review of the integrity of the boxes on January 29, 2009, and continued to find that some boxes were entirely missing, some boxes were re-numbered, and numerous documents (most non-bates stamped) identified in the defense team's initial inventory were now missing from the boxes. The team also observed that several boxes now bore numbers that the Government previously identified as having been returned to the Defendants in 2006.

### *III. Consequences of the Government's Actions*

49. The Government seized and then held the Defendants' documents for seven years. Before shuffling and rearranging the documents it held, the Government prepared its case for trial. The FBI Agents bates stamped the documents the Government intended to use to support its case. They carefully and meticulously removed each and every document the prosecutors identified for use at trial, encased each document in a plastic binding, organized it in an evidentiary file, and identified its source by inserting FBI evidence return documents as placeholders for the original documents in the source Exhibit boxes. Through this process, the Government endeavored to ensure the integrity, sourcing and authenticity of the documents, thereby protecting its ability to establish the admissibility and probative value of each document it intends to use at trial to support its case.

50. With respect to the remaining documents, instead of returning them to the Defendants, the Government kept them and willfully proceeded to reorganize and shuffle them. Because most of these documents are not bates stamped, they cannot be returned to their original boxes.

51. The Government could have returned these documents to the Defendants. In fact, the Government has returned some boxes of documents to the Defendants, presumably on the presumption that such documents were not pertinent to the case. Yet, the Government has affirmatively elected to retain the remaining documents and then to shuffle and reorganize them.

52. The Defendants and the Court may never know all of the documents that may have been lost or destroyed by the Government's conduct. However, some aspects of the harm caused can be articulated and evaluated with some specificity:

- a. The defense can no longer establish or contest the authenticity of the non-bates stamped documents.
- b. The defense can no longer establish or contest the source of the non-bates stamped documents.
- c. The Defendants have been completely deprived of their ability to cross-examine the government's witnesses at trial with respect to any of the non-bates stamped documents, thus seriously impairing their Sixth Amendment rights.
- d. Defendants can no longer establish or contest whether any particular individual had access to a particular non-bates stamped document, challenge a witnesses' knowledge of the contents of or existence of a particular document, or question their reliance on a particular documents. The resulting harm is infinite.

e. The Defendants can no longer establish or contest whether all documents pertinent to this case are accounted for. Therefore, admission of any single item of evidence may violate the rule of completeness.

f. Defendants can no longer determine whether certain documents may have been procured by the Government solely through improper means (see, for example, Defendants' motion regarding foreign bank records) or whether such documents may have been procured from other proper sources or means. Further, now that the source of the documents is undeterminable, the Defendants may lose the ability to invoke the protection of the attorney-client privilege with respect to privileged communications seized from their offices.

53. These issues represent only some of the potential harm caused by the Government's actions.

#### *IV. Argument and Grounds for Relief*

54. The events recited above illustrate that the Government intentionally seized possession of the Defendants' property and painstakingly preserved the integrity of select portions of that property that it intended to use at trial to support its case. Instead of returning the rest of the Defendants' property to them, it kept it, and then knowingly and willfully manipulated the organization of those documents. In this manner, the Government irreparably compromised the integrity of documents it knew to be relevant to the case but not favorable to its case in chief. Since most of these documents are not bates stamped, the damage caused by the Government cannot be remedied by any reasonably available means.

55. These actions are simply a continuation of the consistent and methodical bad faith exhibited by the Government throughout this case as illustrated to the Court in the various pending and resolved motions, all of which the Defendants incorporate herein by reference.

56. Government counsel and Agents acknowledge what has occurred, and respond only with the statement, "What's done is done."

57. As enumerated herein, the Government's actions severely impair the Defendants' ability to defend against the indictment, thereby depriving the Defendants of their Constitutional right to due process of law.

58. In *United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257 (1997), the Court of Claims stressed the importance of preserving the integrity of documentary evidence:

Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings -- erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures -- and our civil justice system suffers.... To guard against this, each party in litigation is solemnly bound to preserve potentially relevant evidence.

59. In criminal matters, the Government has a duty under the Due Process clause to preserve exculpatory evidence the admissibility and probative value of which cannot be replicated by other reasonably available means. *California v. Trombetta*, 467 U.S. 479 (1984). If the Government, in bad faith, fails in this regard, it has violated the Defendant's constitutional due process rights. *Arizona v. Youngblood*, 488 U.S. 51 (1988). See also

*Griffin v. Spratt*, 969 F.2d 16 (3d Cir. 1992); accord *Brady v. Maryland*, 373 U.S. 83 (1963).

60. In civil cases, an independent duty to preserve evidence arises when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded. See *Joe Hand Promotions v. Sports Page Café*, 940 F. Supp. 102, 104 n13 (D.N.J. 1996); see also *Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D.Pa. 1994). It is well recognized that tax evasion cases are inherently civil in nature. The prosecution must prove willful violation of the civil statute before a defendant can be held criminally liable for tax evasion. See *Sansone v. United States* 380 U.S. 343 (1965). Consequently, the Government in such a case has the duty to follow both the civil and criminal standards of evidence preservation.

61. Federal courts have recognized that a constitutional mandate against suppression of evidence imposes a duty upon prosecutors to instruct agencies to preserve evidence. See, e.g., *United States v. Henriquez*, 731 F.2d 131, 137-38 (2d Cir. 1984):

The government has long been on notice of its duty to preserve discoverable evidence and has been repeatedly warned of the jeopardy in which it places its prosecutions when it disregards this obligation.... Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the Government "can bear the heavy burden of demonstrating that no prejudice resulted to the defendant."

(citing and quoting, *inter alia*, *United States v. Grammatikos*, 633 F.2d 1013, 1019 (2d Cir. 1980)

62. In *United States v. Yevakpor*, 419 F. Supp. 2d 242 (N.D.N.Y. 2006), the District Court for the Northern District of New York held the Government's destruction of evidence must

be remedied by the exclusion of the evidence, and subsequently dismissed the case. The Court admonished the prosecutor for failing to meet its affirmative duty to preserve evidence.

63. The Government's duty "covers not only exculpatory material, but also information that could be used to impeach a key government witness." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (citing *Giglio v. United States*, 405 U.S. 150, 154, (1972)).

64. In the instant case, the Government seized the exculpatory evidence from the Defendants' possession. In doing so, the Government took on a duty to preserve the evidence in its custody. The question of whether shuffling and removing documents from the boxes would prejudice the Defendants was not within the Government's authority to evaluate. The seizure warrants merely gave the Government authority to retain temporary possession of the evidence. It surely did not shift title and did not authorize the destruction of the organization, integrity and sourcing of the evidence.

65. At a minimum the Government has a duty to follow its own procedures for preserving evidence. *Cf. California v. Trombetta*, 467 U.S. 479 (1984) (holding no bad faith where the Government's actions were in accord with its normal practice and procedures). Such is not the case here.

66. The Internal Revenue Service's Criminal Investigation Manual sets forth the following procedure to employ in implementing search warrants:

**I.R.M. 9.4.9.3.6 Post Operation Search Warrant Procedures**

1. Following the execution of the search warrant, the special agent pursuant to Fed. R. Crim. P. R 41, will return the search warrant, with an inventory of the items seized, to the issuing magistrate. This return must be done within 10 days of executing the search warrant.
2. The special agent (team leader) will also prepare the Post Enforcement Operation Summary Form, (Exhibit 9.4.9.3), for each search warrant.



site, as soon as possible. This form is mandatory for all CI search warrants, not just tax, or tax-related search warrants.

3. Criminal Tax Counsel will be provided with a copy of the inventory to conduct a post search warrant inventory review for all search warrants obtained in Title 26 and tax-related Title 18 investigations. Criminal Tax Counsel will not conduct an inventory review for search warrants obtained in pure money laundering investigations.
4. A copy of the inventory will be given to the local AFC to ensure that required items are identified and properly inventoried on the Asset Forfeiture Tracking and Retrieval System (AFTRAK).

#### I.R.M. 9.4.9.3-6:1 Preserving the Chain of Custody

1. In order to preserve, in its original condition, all evidentiary material that may be offered into evidence, seized material such as records, recordings, videotapes, document, and other physical objects should be tracked so the custody and control of the evidence can be documented at all times....

67. The referenced Manual provisions admonish Special Agents to maintain the chain of custody and integrity of documents procured via search warrants. Agency policy mandates that Agents return seized items *as quickly as possible* and secure receipts for all returned items.

68. In the context of explaining the protocol for the defense team's review of the documents, the FBI Agents and prosecutor Hendrickson expressed their understanding of the importance of maintaining the organizational integrity of the documents seized.

69. The Agents never compiled an inventory of the specific items and documents seized in the October 2001 raid. Instead, they merely summarized documents they arranged in the various numbered boxes. They then destroyed the integrity of even this system by shuffling and rearranging documents.

70. Rather than promptly copying and returning the documents to the rightful owners, the Government deliberately held the property *for more than seven years*. It should have

returned the documents to the rightful owners as mandated by its internal protocol, but chose not to. It elected to retain the documents, and then proceeded to shuffle and rearrange them so as to destroy their integrity, organization and sourcing.

71. The Government Agents and Counsel selectively followed this protocol when it suited their purpose, and ignored it when it did not. This demonstrates the government knowingly and deliberately violated its duty to preserve the subject evidence

72. *During the November document review, the Government presented the boxes of documents to the defense team without revealing that the FBI Agents rearranged them. The FBI Agent did not reveal that she rearranged the documents until the team recognized the fact and confronted her with regard to the issue. Thus, had the defense team not discovered the problem, the Government would have led the defense to believe that the documents were never rearranged among the boxes. Since the box numbers tie to the source of the documents, the government would have misled the Defendants and the Court as to the sources of the rearranged documents. This is crucial since many of the government's allegations in this case involve concealment of information on the part of the Defendants.*

73. Specifically, the Government charges Defendants with conspiracy, money laundering, and mail fraud based on allegations that they deliberately concealed alleged financial activity and transactions from others. Notwithstanding any other harms, the Government's conduct now prevents the Defendants from effectively establishing the source of documents, the individuals who may have had access to them, and whether any such "concealment" ever occurred.

74. FBI Agents Zieba and Petri concede that they deliberately destroyed the organization of the seized documents because they were not ordered in a way that suited *their* needs. Regardless of the Agents' purported motivation, sanctions are appropriate since the actions prejudiced the Defendants.

75. The source and authenticity of the particular documents are critical to defense of the case. Consequently, the Defendants are prejudiced by the Agents' deliberate actions. Accordingly, sanctions are warranted. *Accord Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favorite maxim of the law, *omina presumuntur contra spoliatores*.'").

76. The appropriateness and extent of sanctions depends upon a case-by-case assessment of (1) the Government's culpability for the loss, (2) a realistic appraisal of its significance when viewed in light of its nature, (3) its bearing upon critical issues in the case, and (4) the strength of the Government's untainted proof. *United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980). The Second Circuit is not alone in applying a balancing test to determine appropriate sanctions. *See United States v. Doty*, 714 F.2d 761, 764 (8<sup>th</sup> Cir. 1983); *United States v. Baca*, 687 F.2d 1356, 1359 (10<sup>th</sup> Cir. 1982); *United States v. Traylor*, 656 F.2d 1326, 1334 (9<sup>th</sup> Cir. 1981); *United States v. Picariello*, 568 F.2d 222, 227 (1<sup>st</sup> Cir. 1978); *Lovern v. United States*, 689 F. Supp. 569, 585 (E.D.Va. 1988); *United States v. Beall*, 581 F.Supp. 1457, 1467 (D.Md. 1984).

77. Sanctions can range from exclusion or suppression of the subject matter, granting a new trial, or dismissal of the indictment or the direction of a judgment or acquittal. *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975). In *California v. Trombetta*,

467 U.S. 479, 487 (1984), the Court wrote, "But when evidence has been destroyed in violation of the Constitution, the Court must choose between barring further prosecution or suppress[ion]."

78. In *United States v. Heath*, 147 F.Supp. 877 (D. Haw. 1957), the defendant was indicted on charges of tax evasion. Defendant filed two motions requesting that he be allowed to inspect documentary evidence he had turned over to the Internal Revenue Service. While in the hands of the Internal Revenue Service, the documentary evidence had been lost or destroyed. In light of the fact that the documents were necessary to defend the case, the court granted defendant's motion to dismiss the indictment on due process grounds.

79. Considering the nature of the instant case and the vast number of documents at issue, the materiality of those documents is obvious. The Government infringes upon Defendants' due process rights through its willful failure to preserve or return those documents. Accordingly, severe sanctions are warranted.

WHEREFORE, Defendants respectfully request that the Court in its discretion:

- (1) Dismiss the Third Superseding Indictment in its entirety;
- (2) Suppress all evidence seized and currently retained by the Government;
- (3) Adopt appropriate evidentiary rulings as to the authenticity, sources, and weight of the subject documents;
- (4) Adopt appropriate curative jury instructions explaining the government's actions and detailing the appropriate factual and evidentiary inferences the jurors should make as a result of the government's actions;

- (5) Order that the Government compensate the Defendants for all attorneys' and expert fees incurred as a result of the Government's actions;
- (6) Order the government to return the Defendants' documents and/or
- (7) Grant any additional or alternative relief that the Court, in its discretion, deems appropriate.

DATED: February 5, 2009

Respectfully submitted,

/s/Randall P. Andreozzi

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

**UNITED STATES OF AMERICA, and  
GOVERNMENT OF THE VIRGIN ISLANDS**

**Plaintiffs,**

**v.**

**Criminal No. 2005-015F/B**

**FATHI YUSUF MOHAMAD YUSUF  
aka Fathi Yusuf,**

**WALEED MOHAMMAD HAMED,  
aka Wally Hamed,**

**MAHER FATHI YUSUF,  
aka Mike Yusuf,**

**SAM MOHAMAD YOUSEF,  
aka Sam Yousuf,**

**NEJIB FATHI YUSUF, and**

**UNITED CORPORATION  
d/b/a Plaza Extra**

**Defendants.**

**DEFENDANTS' REPLY TO THE GOVERNMENT'S RESPONSE TO  
DEFENDANTS' MOTION FOR SPECIFIC RELIEF**

**COME NOW, Defendants, by and through their respective counsel, in reply to the  
Government's Response to Defendants' Motion for Specific Relief as follows:**

**Introduction and Procedural History**

**On February 5, 2009, Defendants filed their Motion for Specific Relief Due to the  
Government's Destruction of the Integrity, Organization and Sourcing of Material**

**EXHIBIT**

**C**

tabbles

Evidence (Dkt. No. 1038). The Government responded to Defendants' Motion on February 24, 2009 (Dkt. No. 1067).

The Government's 4-page Response fails to admit or deny the detailed numbered factual allegations set forth in Defendant's Motion. Instead, it offers a vague statement that "numerous" allegations are "spurious" and "false". Because the allegations describe actions and statements made by two Government case agents (FBI Agents Thomas Petri and Christine Zieba) and one Government attorney of record (Department of Justice Attorney Lori Hendrickson) in this matter, the Government possesses direct knowledge sufficient to admit or deny each allegation in the motion. It chose not to. The clear inference is that the government does not dispute the factual allegations, and the only issue in controversy is whether the requested relief is warranted.

On the issue of relief, the Government argues in its 4-page response that (1) the Defendant failed to identify harm caused by the Government's actions, and (2) that the Defendant failed to attach an affidavit or other evidence to substantiate the harm. Defendants address each of these arguments in turn.

#### I. The Government's Actions Harmed the Defendants.

The Government opens its argument on the harm caused with what appears to be a categorical denial of *all* of the Defendants' allegations. It then immediately rephrases the denial to imply that only the Defendants' claim of *harm* is false. The response is vague, and the Government avoids the specific facts relevant to whether its Agents in fact shuffled, reorganized, and destroyed the sourcing of the Defendants' documents. Instead of proffering facts to either refute or affirm the specific allegations set forth in the Defendants' Motion, the Government trivializes the allegations. In this manner, the



Government avoids the pertinent issues and fails to address the precise harms identified in the Defendants' Motion. As a consequence, the Government's Response leaves undisputed the fact that the FBI Agents knowingly and willfully rearranged and shuffled the Defendants' documents in their custody so as to severely compromise the Defendants' ability either to utilize or rely on those documents in their defense.

The Government asserts at page 2 of its Response that the Defendants cannot identify all specific documents that may have been destroyed or compromised. From this, the Government draws the inference that the Defendants' claim for relief is without merit. The assertion is correct; the inference is false.

The fallacy of the Government's inference is best understood through the Government's own actions: When the Government seized the original documents from the Defendants' homes and businesses, it chose to Bates stamp only *some* of the seized documents and not others. The Government then returned some of the non-Bates stamped documents to the Defendants that it deemed to be inconsequential to the case, but retained thousands of other non-Bates stamped documents at its FBI Office. Defendants requested the return of the remaining documents held by the FBI, but the Government refused. The seized documents, therefore, fall into three categories: (1) Bates stamped documents retained by the Government; (2) Non-Bates stamped documents retained by the Government; and (3) Documents returned to the Defendants.

Government Agents and Government Counsel then organized each Bates stamped document they intend to use at trial in plastic binders. Each document is cross referenced to its Bates inventory number and bar-coded search warrant evidence boxes so as to preserve the source and authenticity of each and every document. *The Government did*

*not employ these controls with the non-Bates numbered documents it returned to the Defendants or with the non-Bates numbered documents it retains at the FBI Office.*

Now, in the epitome of self-serving statements, and as if to somehow *reassure* the Defendants and this Court, the Government states: "As is customary, the government will provide the seized location and inventory number *for any evidence the government seeks to use at trial.*" (Dkt. No. 1067, at 2 n1). The Government's statement unequivocally proves that the Government understands its obligation to preserve the integrity of evidence and that it understands the protocol that must be followed to ensure that the integrity of evidence is preserved. The Government's "assurance" also demonstrates that the Government followed its protocol with respect to the evidence it intends to use at trial to prove its case, but that it *violated* the protocol with respect to the rest of the documentary evidence, including the non-Bates stamped documents held at the FBI Office.

It is these documents that the FBI Agents shuffled and reorganized, destroying any chance of establishing the "customary" inventory numbering preserved by the Government *with its evidence.* The statement thus confirms that the Government understands the need to follow established protocol to ensure the integrity of seized property. The Government's selective application of such protocol and its willful reorganization and shuffling of the documents is direct evidence of its bad faith and willful disregard of the defendants' due process rights.

The Government's next argument on the issue of harm is deeply troubling as it confirms one of the grave consequences expressed in Defendants' Motion. The Government states: "The [Defendants'] claim is inherently unreliable because it presumes

that the defendant's index was true and accurate at the time it was made." (Dkt. 1067 at 2-3). The Government, without ever having seen Defendants' index, dismisses it as "inherently unreliable" for purposes of this Motion and would no doubt do the same at trial. *Thus, it is undisputed that the government shuffled and reorganized the defendants' documents knowing that there is no "reliable" indexing in place that would provide the "customary" assurance of the organizational integrity required by the Court for evidence proffered by a party for admission at trial.*

In view of this, the Defendants cannot identify and quantify each and every harm caused, nor can the Defendants identify every specific document that may have been, or even in fact has been destroyed or misplaced by the Government.<sup>1</sup> Had the Government followed its internal protocol, and properly Bates stamped, inventoried and organized every document it seized, the defense may have been able to accomplish such identification. To the Defendants' direct and irreversible detriment, the Government made the deliberate choice not to do so. This very inability to identify the specific resulting harm illustrates the gravity of the prejudice caused by the Government's actions.

To demonstrate the Government criticizes the Defendants' inability to "provide a description of any records" that are missing, and touts "repeated" offers to locate "any document" that the defense cannot find (Dkt. No. 1067 at 2 n1). The fallacy underlying such bogus "offers" is that: (1) the Government maintained no index of the specific non-bate stamped documents, and (2) it challenges any index created by the defense team as

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<sup>1</sup> This inability to identify the true extent of the harm was among the issues raised by the Defendants in their motion.

"inherently unreliable." Obviously, without a detailed inventory of Bates stamped documents, the Defendants cannot identify specific documents that may be missing.

The Government continues its sleight of hand in its footnote 2. In an apparent effort to explain away the Agents' concession that they rearranged the Defendants' documents, the government concocts a scenario under which it suggests that that the Agents actually rearranged the numbered and bar-coded boxes purportedly to facilitate the defense team's review. "In an attempt to facilitate the defendants' review of evidence, the agents reorganized boxes to place them in numerical order." (Dkt. No. 1067 at 3.n2). This is not the "reorganization" at issue in the Motion.

The defense team demanded numerical review of the boxes *after* it discovered that Agent Zieba had shuffled and rearranged documents among the boxes. When confronted by the defense team, Agent Zieba confessed that she reorganized and shuffled the documents. It was after Agent Zieba's admission that the Government agreed to the defense's numerical review of the boxes. Attorney Hendrickson required, as a condition to such numerical review, that the Government review each box before the defense team was granted access. Let it be clear: Agent Zieba rearranged *documents*, not *boxes*. She did so *not* to assist the defense in its review. Rather, she did so for her own reasons—reasons Government counsel has refused to allow the Agent to reveal to the Defense. The Government's assertion at footnote 2 is false, and the defense calls upon the Government to correct the statement or be prepared to address it at a hearing through the appropriate government witnesses.

As its final argument on harm, the Government—in the face of its earlier assertion that any document index prepared by the defense is "inherently unreliable"—complains

that it cannot determine the extent of the harm its actions caused the defense *without having access to the defense's document index*. The Government has the burden of maintaining the integrity of all evidence. It is the Government that should have Bates-stamped *all* the documents and recorded its own *complete* inventory of *all* the documents. The Government has no basis to now request or require a Defendant's general inventory to determine the organizational integrity of the documents it holds. The Government failed to properly catalogue and maintain the documentary evidence of this case, and the Government is now faced with the fact that it cannot ensure the integrity of the documents in its custody. In the words of Attorney Hendrickson, "What's done is done."

In any event, the Government's agents and attorneys have full knowledge of what was done with the documents. Thus, while they cannot reconstruct the organization of thousands of un-Bates stamped documents, they can respond to Defendants' allegations by explaining to this Court precisely what they did with the documents. They choose not to. Instead (as might any wrongdoer) the Government seeks to ascertain the extent of the harm their victim figured out before admitting what its agents and attorneys have done. The result is a blanket denial that the government agents must now defend at an evidentiary hearing.

In view of the above, the Government's arguments on the issue of harm actually reinforce the Defendants' position that the Government's shuffling and rearrangement of the Defendants' property unfairly and unconstitutionally prejudices Defendants' ability to, *inter alia*, (1) establish or contest the authenticity of documents; (2) establish or contest the source of documents; (3) cross-examine the Government's witnesses with respect to documents; (4) establish or contest whether a particular individual had access

to or knowledge of documents; (5) establish whether all of the seized documents are properly accounted for; and (6) contest whether particular documents were obtained by improper means and/or whether materials are privileged. These and other issues were expressly identified and addressed in Defendants' Motion, yet the Government ignores them in its response. The Defendants can only assume that the Government understood the end result of its willful malfeasance, and fully intends to reap the benefits at trial.

## II. Defendants Bring this Motion in Good Faith.

Instead of addressing the specific detailed allegations set forth in the Defendant's Motion, the Government merely ignores them and argues that reciting facts in the motion rather than through an affidavit shows bad faith in bringing the Motion. The Government fails to cite any case law or other authority to support this argument. The Government could have raised this argument and addressed the specific allegations. It chose not to. Defendants respectfully submit that it is the Government's actions that illustrate bad faith.

The Government can verify the truth of the Defendant's allegations through its own agents and attorneys in this case, for it is they who actively participated in or were privy to the subject acts and communications. The absurdity of the Government's position is illustrated in its argument that a significant number of allegations pertain to actions taken by law enforcement, and that it is difficult to respond to the Defendants' Motion "given the unsourced allegations." Given the Government's refusal to confirm the allegations through the individuals charged with the statements or acts (namely case Agents Zieba and Petri, and case Attorney Hendrickson), and its refusal to provide statements from any of those individuals, the Defendants attach hereto as Exhibits A-F

statements of contact from members of the defense team supporting the allegations set forth in the Defendants' Motion.

Thus, the Government's claim that it is unable to respond to Defendants' Motion with particularity is without merit. It is telling, moreover, that the Government has not submitted its own affidavits from Assistant Attorney General Hendrickson or Agents Zeiba, Petri, and Petri—or for that matter averred any facts whatsoever—disputing the allegations made in Defendants' Motion.

### **III. The Defendants Have Been Denied Access to View and Inspect Their Documents from November 2004 Until November 2008.**

The Government denies that it has forbidden the Defendants access to FBI Offices to inspect their documents from November 2004 through November 2008. It attacks this single allegation, raised at paragraph 13 of Defendants' 79-paragraph Motion, as if it were the only allegation upon which the claim for relief is based. Presumably, the Government asserts this singular denial on a presumption by the Government that there is no documentary evidence memorializing the Government's refusal to allow Defendants access during this period. Defendants challenge the Government's denial as false. During this time period, defense counsel requested—both telephonically and in writing—access to the FBI Office to inspect the Defendants' documents. Following each request, Government counsel denied the requested access and instead imposed a rule that if defense counsel wished to review a particular document, they should identify the document to Government Counsel and he or she would determine whether to provide that document to the defense for review.<sup>2</sup> Government Counsel must concede these acts:

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<sup>2</sup> The absurdity of this "rule," is transparent. First, the Government's "rule" would require the Defendants to know and be able to identify every document in the Government's possession. Second, the rule would

Defense counsel stands ready to offer proof of such actions at an evidentiary hearing on this matter. (See Dkt. No. 1067 at 4).

Conclusion

WHEREFORE, in light of the foregoing, Defendants respectfully request that this Court

- (1) Grant Defendants' Motion for Specific Relief Due to The Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence;
- (2) Dismiss the case in its entirety, with prejudice, and
- (3) Grant such other relief as requested in the Motion or as the Court in its discretion deems appropriate.

DATED: March 17, 2009.

Respectfully submitted,

/s/ Gordon C. Rhea, Esq.  
Gordon C. Rhea, Esq.  
RICHARDSON, PATRICK WESTBROOK &  
BRICKMAN, LLC  
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(843) 727-6656  
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require the Defendants to identify each document that the defense deems pertinent to this case before gaining access to it. Thus, the "rule" is not only impossible but violates the Defendants due process rights.



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/s/  
Thomas Alkon, Esq.  
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/s/  
Randall P. Andreozzi, Esq.  
9145 Main St.  
Clarence, NY 14031

/s/  
Derek M. Hodge, Esq.  
P.O. Box 303678  
St. Thomas, USVI 00804

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send a notice of electronic filing (NEF) to all counsel of record.

/s/  
Gordon C. Rhea, Esq.

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MEMORANDUM  
UNITED STATES V. YUSUF, ET AL.

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TO: ALL DEFENSE COUNSEL

FROM: RANDALL ANDREOZZI, RONALD WISE, JOSÉ MARRERO, HOWARD EPSSTEIN, THERESA MAINS, TRACY MARIEN

SUBJECT: NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON MONDAY, NOVEMBER 10, 2008

DATE: NOVEMBER 10, 2008

CC:

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The following persons travelled to the FBI Offices in St. Thomas to review client documents: Randall Andreozzi, Ronald Wise, José Marrero, Howard Epstein, Theresa Mains, and Tracy Marien.

When the group arrived at the FBI offices, we were greeted by a staff person who told us Special Agent Christine Zeiba was waiting for us at the lower office. Randy Andreozzi asked the woman if the documents were moved down to that office. The woman assured us that Special Agent Zeiba had everything we needed. We walked to the office and were greeted there by Special Agent Zeiba. She asked to speak with Mr. Andreozzi privately.

In a private conversation, Special Agent Zeiba advised Mr. Andreozzi that she was under the impression that a group of only two or three people would be at the office, and that the group would identify specific documents they wished to see and that she would bring the documents to them. She advised that she was by herself and could not accommodate such a large group. Special Agent Zeiba stated that she was informed by FBI Agent Petri that the defense had been provided with copies of all documents in the case, and that this visit was to view only specific documents. She asked why we had not given her a list of the documents we wanted to see so that she could pull them for us ahead of time. Mr. Andreozzi informed her that this was not the understanding, and that the defense had not in fact been provided with copies of all documents. Mr. Andreozzi reminded her that, in their discussions on the previous Saturday, he advised her of the size of the group attending and had forwarded his email correspondence with Mr. Daly confirming their review for the week. Special Agent Zeiba expressed concern that she had not been properly informed of the scope of the week's document review. After conferring with co-counsel Gordon Rhea, Mr. Andreozzi advised that the group would return on Wednesday, after Agent Zeiba had the opportunity to confer with DOJ Counsel on the matter. [Mr. Andreozzi attests to this paragraph].

Upon their return to the group, Special Agent Zeiba told Randy Andreozzi that DOJ attorney Hendrickson and Special Agent Petri would be present when we returned to review documents on Wednesday. Whereupon the defense team departed from the FBI offices.

I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.

  
Randall P. Andreozzi

\_\_\_\_\_  
Jose Marrero

  
\_\_\_\_\_  
Ronald Wise

\_\_\_\_\_  
Theresa Mains

\_\_\_\_\_  
Howard Epstein

  
\_\_\_\_\_  
Tracy Marien



I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.

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Randall P. Andreozzi



Jose Marrero

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Ronald Wise



Theresa Mains

---

Howard Epstein

---

Tracy Marlen

MEMORANDUM

UNITED STATES V. YUSUF, ET AL.

TO: ALL DEFENSE COUNSEL

FROM: RANDALL ANDREOZZI, RONALD WISE, JOSÉ MARRERO, HOWARD EPSTEIN, THERESA MAINS, TRACY MARIEN, EUGENE BENTON

SUBJECT: NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON WEDNESDAY, NOVEMBER 12, 2008

DATE: NOVEMBER 12, 2008

CC:

The following persons travelled to the FBI Offices in St. Thomas to review client documents: Randall Andreozzi, Ronald Wise, José Marrero, Howard Epstein, Eugene Benton, Theresa Mains, and Tracy Marien.

Present for the Government: Lori Hendrickson (DOJ); Thomas Petri (FBI), Javier Bell (IRS), Christine Zeiba (FBI), and various FBI staff.

Upon the team's arrival at FBI offices, we encountered current case agent Christine Zeiba, DOJ counsel Laurie Hendrickson, FBI Special Agent Thomas Petri, and IRS Special Agent Javier Bell. Ms. Hendrickson advised that these agents would be present to monitor our document review. She explained that we would be allowed to view one box at a time; that only one person would be allowed to touch the documents at a time; and that the government agents—not the defense team—would select and produce each box that we would be allowed to review. Randy Andreozzi stated that this protocol was entirely inconsistent with the protocol of the defense's earlier review sessions. He requested that Ms. Hendrickson explain why this protocol was in place. Ms. Hendrickson explained that such protocol was necessary to ensure that the documents were not rearranged in the boxes and to maintain the integrity of the chain of custody of the documents.

IRS Agent Javier Bell was not introduced to the group upon our arrival. Mr. Marrero recognized Mr. Bell and greeted him. Upon inquiry, we learned that Mr. Bell was relocated by the IRS to Denver, Colorado.

Ms. Hendrickson advised that our review would be monitored by herself, Messrs. Petri and Bell, and Ms. Zeiba. Mr. Andreozzi asked why a Denver-based IRS Agent and a Florida-based FBI Agent were required to monitor document review at a St. Thomas FBI Office. Ms. Hendrickson advised that we were not entitled to know the reasons for their presence at the St. Thomas FBI offices. Mr. Andreozzi advised Ms. Hendrickson that such protocol was not acceptable to the defense team.

After negotiations between Ms. Hendrickson and Mr. Andreozzi, it was agreed that the defense would limit the number of people in the review at given times, and that Ms. Hendrickson and Messrs. Petri and Bell would not be allowed to observe or otherwise monitor the review. Ms. Zeiba would monitor the review, along with other members of her office as needed. Ms. Zeiba would bring out boxes in groups of five, and the team would review one box at a time.

Upon review of the first box produced (Box 131), the team found that it contained documents that had not been in Box 131 at the time of the defense team's earlier document review. (The defense team had prepared a general summary index of documents contained in each box on their prior visits to the FBI offices in 2004, and brought the Index with them to this visit.) The defense team was able to discern the discrepancy by (1) referencing its document index created during the previous visit, and (2) noting that the bates stamp on these documents began with 295 rather than 131 (the government's organization of the documents uses a prefix of the bates number that matches the box number in which it stored each document). The prefixes of the bates stamped documents no longer matched the box number. We then verified that the subject documents matched the bates numbers of the defense's index of some of the documents in Box 295, thus confirming that the subject documents were in fact originally catalogued from a different box.

Randy Andreozzi asked Christine Zeiba why this document was located in box 131.

It was then that Christine Zeiba informed us that she reorganized the documents and boxes. Randy Andreozzi explained to Special Agent Zeiba that the defense's indexing of the documents was based on the boxes in which they were originally maintained by the FBI. Mr. Andreozzi further explained that the FBI represented to the defense team during the initial document reviews that the box numbers corresponded with the various locations and rooms within each location from which the documents were seized. Because the FBI elected to bates number only some of the documents seized, the only way for the defense to track the documents was by box number. Randy Andreozzi asked why she rearranged the documents and whether she employed a certain methodology in rearranging the documents. Special Agent Zeiba stated she could not discuss her method of organization with us. Special Agent Zeiba stated she just changed the boxes and rearranged the documents to fit with her organizational method.

Randy Andreozzi repeated the question: "So if we were to look through, say, Box 200, and refer to our index, the contents of the box would not match?" Christine Zeiba confirmed that this was correct; the documents would no longer match to the defense's index. She explained, "I had no idea the defense relied on the order of these documents to particular boxes. I rearranged them how I was doing them and what made sense to me. I was thinking you would give me a list of the documents you were missing or wanted to look at and I could pull them because I know where they are. I did not know you would be looking through all the boxes."

Randy Andreozzi stated that this development puts the defense at square one. The integrity, organization, and custody chain of the boxes, the bates stamped documents, and the non-bates stamped documents have all been compromised. He asked Ms. Zeiba how, in light of this, could the defense (1) determine what documents were removed from the various files; (2) determine what documents the defense does not have; (3) determine what documents have been removed or are missing from the boxes; (4) determine what documents have been rearranged among the boxes; and (5) determine what rooms, stores, homes, or individuals specific documents were seized from. Ms. Zeiba did not answer the question. Special Agent Zeiba repeated she had no idea the defense or the FBI relied on the box numbers as the identifying factor in indexing and arranging the documents, or as a reference as to the locations from which the FBI procured the documents. Special Agent Zeiba repeated she truly thought that we were to provide her with a list of documents to pull. Ms. Zeiba then stated she needed to speak with attorney Hendrickson and Special Agent Petri. At this point, Hendrickson, Petri and Bell returned to the FBI office. When attorney Hendrickson and Petri entered, Randy Andreozzi informed them of the issue.



Special Agent Petri claimed that after the defense team looked through documents from the boxes during its initial document review, the FBI Agents found many misplaced documents and had to replace them in their correct boxes. Thus, claimed Petri, it was probably the defense team that misplaced the document in Box 131. Randy Andreozzi challenged this assertion by asking how the FBI Agents would know whether the documents were misplaced if they were not relying on a specific organizational method based on box numbers in the first place. Petri repeated his allegation and then said, "This is why we have to have an agent watch you to insure the integrity of the order of the documents."

Randy Andreozzi then repeated his question: If there is integrity to the order of the documents in their respective boxes, and Christine Zeiba just informed us that she rearranged the documents and boxes, why will the FBI not provide us with the methodology (if any) for her reorganization? Petri then confronted Special Agent Zeiba, "You reorganized the boxes?" Ms. Zeiba now claimed she just rearranged the boxes. Mr. Petri replied he did not want to discuss the issue anymore.

After Hendrickson, Petri and Bell left the office, Special Agent Zeiba advised the defense team that she did not realize the documents were organized by box number. Special Agent Zeiba stated that she did not understand the issue when we first explained it to her but now she understands. Special Agent Zeiba stated that this explains why Randy Andreozzi told her that the defense could go through all of the boxes relatively expeditiously, and with respect to some of the boxes, we would need only glance through them. Ms. Zeiba stated that she reorganized the documents among the boxes because she did not like how they were originally organized. Ms. Zeiba continued to make comments regarding the boxes and what she had initially perceived would be the order of events when the defense team arrived for the document review. Ms. Zeiba repeatedly attempted to persuade Randy Andreozzi to adopt a procedure by which the defense would tell her what documents we needed and she could retrieve the specific documents. Randy Andreozzi stated it was not that "we need specific documents," but that we needed to review all of the documents as they are maintained in the boxes and under the FBI's document controls. Mr. Andreozzi explained again that when the defense conducted its initial document review, it attempted to create in the time allowed a detailed general inventory summarizing documents or groups of documents that were in each box based on box number as possible. Some documents were bates numbered, but most were not. Mr. Andreozzi pointed out that even the documents that were bates stamped were identified based on the box number. Tracy Marien observed further that the FBI placed bar codes on the specific boxes that matched the box numbers and bates prefixes.

At this point Ms. Zeiba asked the team to break for lunch.

After the lunch break, Special Agent Zeiba had the defense team wait in the waiting room. When the team entered the FBI office, Agents Bell and Petri came into the office. Randy Andreozzi asked Special Agent Zeiba why Bell and Petri were present. Randy Andreozzi reiterated his agreement with attorney Hendrickson that they would not be present during our review. However, Agents Bell and Petri were now in the storage room where the United documents were stored. Special Agent Zeiba told us that she had asked Bell and Petri re-shelve the boxes we were finished reviewing and bring our new boxes. Randy Andreozzi asked Ms. Zeiba whether Petri and Bell were reviewing or further rearranging or removing documents. Ms. Zeiba stated they were not. Special Agent Petri then emerged from the storage room carrying documents and asked Special Agent Zeiba to instruct him as to the boxes she wanted him to the documents in. Zeiba got up from the table and went into the storage room with Petri and Bell. Zeiba stated to them, "I just finished telling them you were not looking at documents." It was clear to the team that Petri and Bell were taking further unknown actions with respect to the clients' documents.

Upon review of the contents of box 468, José Marrero noted that the documents were not bates stamped. Consequently, we would not know what to look for or ask for with respect to any documents that might be moved or missing. Randy Andreozzi explained again that the defense's general indexing summarizes the documents in each box, assuming that the defense team would be able to come back and go back to each box as needed, with the understanding that the integrity of each bar coded box would be maintained. Many documents were not bates stamped so the identifying location and integrity of the evidence was assumed to be with the box numbers the FBI utilized. Christine Zeiba responded, "I don't have them organized the way you have them organized."

Randy Andreozzi then asked, "When you did your new system, did you bates stamp the documents?"

Christine Zeiba responded, "I am not sure what you mean. If you feel you are missing something and cannot articulate the document, we would have to recopy everything." Christine Zeiba repeatedly stated she assumed the defense was given copies of 100% of the documents and she did not understand why the FBI had not given us all of the documents.

Randy Andreozzi gave Ms. Zeiba a list of six boxes we wanted to review. Special Agent Zeiba retrieved three of the requested items. One was a banker's box and two were redwells. One redwell was labeled "161-formerly" and contained only about 8-10 documents. The other redwell was labeled "428" and contained a few manilla folders of documents. Randy Andreozzi informed Ms. Zeiba that 161 and 428, based on our index, used to be full boxes of documents. He asked why the redwell was labeled "161-formerly." Ms. Zeiba would only restate that the documents are no longer in their original order.

Randy Andreozzi asked for the other 3 boxes he requested. Ms. Zeiba stated that she was not going to provide them to us today. Special Agent Zeiba stated, "For today I will just keep pulling boxes randomly because I don't have them organized the way you have them organized." Randy Andreozzi expressed his concern that it appears that Special Agents Zeiba, Bell and Petri were preparing boxes of documents and providing them to the team at their discretion. Mr. Andreozzi explained that such actions are entirely unacceptable. Mr. Andreozzi asked why Special Agent Zeiba could not retrieve specific numbered boxes when requested or why the Special Agent Zeiba could not produce the boxes in numerical order, as they were arranged at the FBI office during the defense's earlier visits. Ms. Zeiba simply stated that she could not do this, and then told Mr. Andreozzi that Ms. Hendrickson specifically instructed her to just pull random boxes for the defense. Mr. Andreozzi asked Ms. Zeiba for permission to view the boxes to determine how they were arranged in the storage room. Ms. Zeiba refused. Special Agent Zeiba then stated that at this time she wanted to defer any further questions or discussions to Laurie Hendrickson and Thomas Petri. Ms. Zeiba called for Ms. Hendrickson and met with her in the waiting room for an extended discussion.

Laurie Hendrickson then arrived and asked Randy Andreozzi to meet with her in the waiting area. The two went outside to discuss the matter privately.

Randy Andreozzi explained the situation and his concerns to Ms. Hendrickson. Ms. Hendrickson acknowledged what occurred but could say only, "What's done is done." Mr. Andreozzi stated that he would discuss the matter with his co-counsel so that they may evaluate the gravity and effect of the events and any possible remedies. He stated that it was now more important than ever for the team to review *all* boxes of client documents held at the FBI office in numerical order so that the team could properly evaluate the extent of the harm. Ms. Hendrickson agreed to this procedure. She stated that she would work that evening toward that end, and hoped that she would have at least the

first fifty boxes ready for review the following morning. Mr. Andreozzi again expressed concern, and asked why they needed the evening to "prepare" the boxes. He stated that, based on his familiarity with the boxes, if it was a matter of organizing the boxes in numerical order, he could assist the team, and they could have the boxes organized in less than an hour. Ms. Hendrickson would not answer the question. She asked that we leave for now and return in the morning. [Randy Andreozzi attests to this paragraph]

Randy Andreozzi returned to the conference room and the team departed from the FBI office for the rest of the day.

I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



Randall P. Andreozzi

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Jose Marrero



Ronald Wise

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Theresa Mains

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Howard Epstein



Tracy Marien



Eugene Benton

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Randall P. Andreozzi



Jose Marrero

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Ronald Wise



Theresa Mains

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Howard Epstein

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Tracy Marlen

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Eugene Benton

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MEMORANDUM  
UNITED STATES V. YUSUF, ET AL.

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TO: AEL DEFENSE COUNSEL

FROM: RANDALL ANDREOZZI, RONALD WISE, JOSÉ MARRERO, HOWARD EPHSTEIN, THERESA MAINS, TRACY MARIEN<sup>1</sup>

SUBJECT: NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON THURSDAY, NOVEMBER 13, 2008

DATE: NOVEMBER 13, 2008

CC:

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FBI OFFICES DOCUMENT REVIEW NOVEMBER 13, 2008

The following persons travelled to the FBI Offices in St. Thomas to review client documents: Randall Andreozzi, José Marrero, Howard Epstein, and Theresa Mains. Ron Wise joined the group during the afternoon session.

Present for the Government: Lori Hendrickson (DOJ); Thomas Petri (FBI), Javier Bell (IRS), Christine Zeiba (FBI).

MORNING

Upon the group's arrival, Lori Hendrickson asked to speak privately with Randy Andreozzi.

In a private discussion, Ms. Hendrickson advised Mr. Andreozzi that she reviewed the documents until 8 p.m. the previous night. Ms. Hendrickson's explanation is that the FBI Special Agents did in fact reorganize and remove documents since the defense team's last visit. Ms. Hendrickson explained that, as best she can determine, the following occurred:

1. The Special Agents removed some documents and put them in trial folders. They used the originals, and no copies were replaced in the original boxes.
2. The Special Agents returned some documents to the defendants at various points in time. Ms. Hendrickson claims that some items and documents returned were pulled from boxes and returned to the defendants (rather than entire boxes being returned intact), but she cannot identify the specific items or documents returned. Mr. Andreozzi advised that he recalls a document return in 2006 that was box by box, and not a return of specifically identified documents or items.
3. As for the boxes that the FBI has retained, the Special Agents reorganized the documents contained in those boxes in various ways. For example, the Special Agents may have grouped all bank statements together so that they no longer maintained the statements in the original boxes based on their source. Defense counsel is now unable to determine where the various documents were procured or who may have had access to them.

Ms. Hendrickson stated that this was the best she could do on the matter, and repeated that, "What's done is done." Ms. Hendrickson further asserted that she failed to understand why there was an issue since we had access to the documents earlier. Mr. Andreozzi explained that, for the same reasons the government was compelled to maintain the integrity of the system while we reviewed the documents today, the defense needs to verify whether that same integrity has been maintained during

the years in which the evidence was in the government's hands. Mr. Andreozzi asked whether Ms. Hendrickson could now ever make any representations as to the integrity of the chain of custody of the documents based on what has occurred. Ms. Hendrickson refused to answer the question. (Randy Andreozzi testifies to this private discussion).

The defense team identified a number of documents that they wanted to scan. Ms. Zeiba noted that we should tag all documents for scanning and after lunch she would provide them to us. The team tagged 3 documents that were in a binder that was in one of the boxes.

At this point Ms. Zeiba requested that the defense team leave the offices for the lunch break.

### AFTERNOON

Ron Wise joined the group for this portion of the review. After returning from lunch, Ms. Zeiba produced for the defense team the contents of the aforementioned binder (previously box 35). Two tagged documents (including a cover sheet of "Search Warrant Return" which reflected location and description of seized items) were now missing from the binder. When asked where the documents to be scanned were, Special Agent Zeiba stated that those documents were the property of the FBI and we could not scan those documents. We again noted the box contained Gross Receipts tax returns. However, the box no longer contained Scotia Bank information, although we did find checks written on the Scotia Bank account.

As the review of documents proceeded, the defense team noted numerous instances in which documents that were originally noted (per their index) as being in certain boxes were no longer contained in the boxes. Additionally, as the boxes were now being brought out in numerical order, there were a number of boxes missing that were identified in the earlier index, as available before.

At one point, Ronald Wise handed a document to Theresa Mains and asked her to scan it for our files. An unidentified FBI Special Agent who had been monitoring our activities from one end of the table immediately stood, feigned as if stretching, and casually walked to the side of the table where Ms. Mains was working. There he stopped, leaned casually against a file cabinet, and began to observe the computer screen that would reflect the document Ms. Mains was attempting to scan. Mr. Wise immediately advised this agent to move back to his original position at the end of the table. This FBI Special Agent did not move, and asked why he should have to move. Mr. Wise explained that it was unacceptable for him to observe Ms. Mains' computer screen which would enable him to determine documents deemed pertinent by the defense team. After a brief pause, this FBI Special Agent returned to the end of the table, shaking his head to demonstrate he did not understand or disagreed with Mr. Wise's request.

I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



Randall P. Andreozzi

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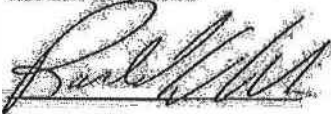
Jose Marrero

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Theresa Mains



Howard Epstein



Ronald Wise



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I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.

\_\_\_\_\_  
Randall P. Andreozzi

  
Jose Marrero

  
Theresa Mains

\_\_\_\_\_  
Howard Epstein

\_\_\_\_\_  
Ronald Wise

**MEMORANDUM OF ACTIVITIES**

**Date:** January 26, 2009  
**Time:** 9:00 AM to 5:00 PM (Approximately)  
**Location:** FBI Offices, St. Thomas USVI  
**Present:** Randall Andreozzi, Attorney  
José I. Marrero, Consultant  
Ronald E. Wise, Consultant  
Howard Epstein, CPA  
Thomas Petri, Special Agent, FBI  
Christine Zeiba, Special Agent, FBI  
Javier Bell, Special Agent, IRS

**SUBJECT:** NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON MONDAY,  
JANUARY 26, 2009

**FBI OFFICES DOCUMENT REVIEW JANUARY 26, 2009**

On this date, Randall Andreozzi, José Marrero, Howard Epstein, and Ronald Wise arrived at the FBI Offices in St. Thomas to continue the review of client documents that began in November, 2008.

Present for the Government were Special Agent Thomas Petri (FBI), Special Agent Javier Bell (IRS), and Special Agent Christine Zeiba (FBI).

The session began at approximately 9:15 a.m. with the defense team continuing its review of the boxes of client documents to determine the extent of the harm caused by the Agents' reorganization of documents. Specifically, the team began its review with Box 255 and continued in numerical progression.

To facilitate the team's evaluation of the harm, Randy Andreozzi requested that the FBI provide the search warrant returns identifying the specific documents seized and their respective sources. Special Agent Petri stated he would not provide the defense team with copies of the search warrant returns and inventory, as he claimed this information had already been provided. The search warrant returns in the possession of the defense contain only general and often vague references to the documents seized. In many instances, the description of the documents seized is listed as "Documents" or "Boxes of Documents." Consequently, a significant number of the search warrant returns produced by the FBI — particularly those relating to un-bates-stamped documents — are of no use in identifying the specific documents seized.

Agent Petri further attested that all of the documents obtained by the U. S. Government during the raid and subsequent investigation were "his" and not the defendants'. According to Agent Petri, he could and did organize them as he deemed appropriate. In response to questions from Randy Andreozzi, SA Petri stated he had in fact already reviewed the contents contained in the boxes of seized evidence and moved documents to different boxes as appropriate.

The team continued its review of the documents and terminated its review at approximately 5:00 p.m.

I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



Randall Andreozzi, Attorney



José I. Marrero, Consultant



Ronald E. Wise, Consultant



Howard Epstein, CPA

**MEMORANDUM OF ACTIVITIES**

**Date:** January 27, 2009  
**Time:** 9:00 AM to 5:10 PM (Approximately)  
**Location:** FBI Offices, St. Thomas USVI  
**Present:** Randall Andreozzi, Attorney  
José I. Marrero, Consultant  
Ronald E. Wise, Consultant  
Howard Epstein, CPA  
Thomas Petri, Special Agent, FBI  
Christine Zeiba, Special Agent, FBI  
Javier Bell, Special Agent, IRS

**SUBJECT:** NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON TUESDAY,  
JANUARY 27, 2009

**FBI OFFICES DOCUMENT REVIEW JANUARY 27, 2009**

On this date, Randall Andreozzi, José Marrero, Howard Epstein, and Ronald Wise arrived at the FBI Offices in St. Thomas to review client documents maintained by the Government:

Present for the Government were Special Agent Thomas Petri (FBI), Special Agent Javier Bell (IRS), and Special Agent Christine Zeiba (FBI).

The session began at approximately 9:15 a.m. with the defense team picking up where it left off on January 26, 2009 in its review of the boxes of client documents to determine the extent of the harm caused by the Agents' reorganization of documents. During the initial portion of the session, SA Javier Bell was not present. During the morning meetings, SA Petri spoke with Randy Andreozzi, stating that "discovery" was OK, but he would not allow the defense team to review evidence for the purpose of developing another motion. He added that Mr. Andreozzi should simply take the case to trial. Mr. Andreozzi stated the purpose of the defense team's presence was to both review documents and to assess any potential harm resulting from the rearrangement of documents by the Government. SA Petri responded that if that was true, Ms. Hendrickson had lied to him (Petri), apparently suggesting that he was under a mistaken impression as to the purpose of the defense team's visit. SA Petri then asked us to leave the area while he attempted to telephone DOJ Attorney Laurie Hendrickson.

A few minutes later, SA Petri allowed us to return to the area, saying "Come in and I will explain what is left of your charade." He suggested Mr. Andreozzi should bring a photocopier to the premises to copy

documents, as the defense team may not be allowed to return again. Mr. Andreozzi repeated that the purpose of the defense team's presence was to both review documents and to assess any potential harm resulting from the rearrangement of documents by the Government. SA Petri said that the only movement of documents was the movement of the boxes from one location to another, and the chain of custody had been preserved. He then added, "I probably have taken documents from one box, and at my discretion moved them to another box." Shortly thereafter, he denied having said that he had moved documents from one box to another, explaining that he had previously said, "If I had moved documents...." He then added, "Even if I said there was stuff that was moved from one box to another, I don't care. If I move evidence from one box to another, it does not matter as long as you have seen all the evidence. I do not have to tell you how I catalogue my evidence."

Mr. Andreozzi asked that Agent Petri also produce any documents the Government procured in the matter through subpoenas. Special Agent Petri explained that the only subpoenaed documents he would allow the defense to review would be those that we specifically request. He advised Mr. Andreozzi to request specific documents as opposed to all subpoenaed records, and that he would determine which documents were relevant. Mr. Andreozzi explained to the Agent that this protocol was not logically feasible. SA Petri disagreed, and the defense team continued review of the seized documents.

The defense team left the premises around 11:45 AM and returned around 1:15 PM to continue its review. During the afternoon session, SA Petri and Mr. Andreozzi continued to discuss documents needed for review by the defense team. Mr. Andreozzi explained to SA Petri that the FBI's identification of specific documents and the organization of the documents based on the source from which they were procured during the search is an important issue. SA Petri stated, "It doesn't matter how we store our evidence." He added, "A document is a document, is a document." Mr. Andreozzi continued to inquire as to whether the FBI employed a certain methodology in rearranging the seized documents within the storage boxes. SA Petri declined to provide answers to his questions, stating he considered those questions only for their "pure entertainment value."

Near the end of the afternoon session, Agent Petri stated that he would require a list of additional items the defense would like to review the next day. The defense team left the premises at approximately 5:00 PM to prepare a list for Agent Petri. Mr. Andreozzi and Mr. Marrero returned to the FBI facility at approximately 5:05 PM to provide the list and confer with SA Petri regarding documents to be reviewed on the following day. The list included foreign bank account information, seized computer analyses, tax return preparer files (already being supplied), and all documents procured by the Agents from third parties through the current date, either through subpoenas or otherwise. SA Petri reviewed the list, stated, "I know where you are going with this," and demanded that Messrs. Andreozzi and Marrero leave the office. [This paragraph is attested to by Mr. Andreozzi and Mr. Marrero, only.]


I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



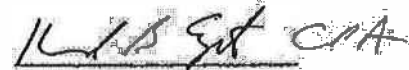
Randall Andreozzi, Attorney



Ronald E. Wise, Consultant



José I. Marrero, Consultant



Howard Epstein, CPA

**MEMORANDUM OF ACTIVITIES**

**Date:** January 28, 2009  
**Time:** 9:00 AM to 5:00 PM (Approximately)  
**Location:** FBI Offices, St. Thomas, USVI.  
**Present:** Randall Andreozzi, Attorney  
José I. Marrero, Consultant  
Ronald E. Wise, Consultant  
Howard Epstein, CPA  
Thomas Petri, Special Agent, FBI  
Christine Zeiba, Special Agent, FBI  
Javier Bell, Special Agent, IRS  
**SUBJECT:** NARRATIVE OF EVENTS AT ST. THOMAS FBI OFFICES ON WEDNESDAY,  
JANUARY 28, 2009

**FBI OFFICES DOCUMENT REVIEW JANUARY 28, 2009**

On this date, Randall Andreozzi, José Marrero, Howard Epstein, and Ronald Wise arrived at the FBI Offices in St. Thomas to continue their document review.

Present for the Government were Special Agent Javier Bell (IRS) and Special Agent Christine Zeiba (FBI). Agent Petri was not present.

The defense team continued to review documents in the possession of the Government during the morning session before breaking for lunch around noon.

During the afternoon of January 28, 2009, the defense team concluded its review of the seized documents (with the exception of boxes 134 through 254). Special Agent Javier Bell then began production of certain items identified by the defense team the previous day. He produced a box containing expandable folders bearing notations "CAB-#1," "CAB-#2," etc. These folders contained various documents, some identified with document numbers, and others unmarked. One of the folders contained documents identified by numbers beginning with the prefix "S4." Although the majority of these documents were in French, most of them appeared to consist of or relate to bank records from St. Martin. One un-numbered document consisting of multiple pages appeared to set forth banking regulations.

Special Agent Zeiba then produced from her office an expandable file folder containing what appeared to be requests for bank records by the U. S. Government and various responding documents from the French.



government. References were made throughout these documents to "Afghanistan," "Taliban," and "Terrorist." Mr. Andreozzi noted that the defense team had not previously been provided these documents and asked Special Agent Bell to provide copies. At approximately 4:30 PM, Special Agent Bell conferred with Christine Zeiba regarding the request. Agent Zeiba refused to provide the requested copies. Mr. Andreozzi advised that he required copies of these documents before the team departed for the evening and suggested that the Agents contact Attorney Hendrickson immediately. She returned a few minutes later and stated Ms. Hendrickson advised her we had had ample time to copy documents and that the Government would not copy any documents for the defense team today. She stated that the defense team should obtain a photocopier and return to make copies for ourselves. Upon further questioning, Special Agent Zeiba said that even though she had said the government would not provide copies of the requested documents "today," she did not believe the government would provide copies at a later date, either. She said Ms. Henderson told her these documents were the subject of an ongoing motion, and therefore would not be provided to the defense team.

The defense team reminded Special Agent Zeiba that the Government did not produce copies of Suspicious Activity Reports (SAR's) and Currency Transaction Reports (CTR's). She advised that the defense team would not be provided with any of these documents. No explanation was given. Special Agent Bell was also reminded that we had requested a copy of the "Reports of Analysis of Seized Computers" that had been allegedly prepared by Special Agent Mike Anderson of the IRS as noted on the return of inventory/chain of custody FBI form FD-192. Special Agent Bell stated the government was in the process of gathering the information.

Based on the defense team's review of the seized property, the defense has determined the following:

1. Numerous exhibit boxes or redwells are missing and cannot be accounted for as returned to the defendants. The boxes contained both date-stamped and non-date-stamped documents.
2. Some boxes or redwells appear to have been consolidated into other boxes, but the consolidations can only be confirmed with respect to the date stamped documents.
3. Numerous boxes are now missing documents that were in the boxes during the defense team's earlier visits in 2004.
4. Many boxes now contain more documents than were accounted for during the defense team's earlier visits in 2004.
5. There were a number of instances in which old boxes were missing and appeared to have been put in renumbered boxes.
6. Numerous boxes (both numbered and unnumbered) were provided to the defense team that were not produced for inspection during the earlier visits in 2004. Many of these documents were stored in the Special Agents' offices.

This memorandum was prepared on January 29, 2009 from notes made during the meeting with SA Zeiba and other members of the prosecution team.

I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



Randall Andreozzi, Attorney



José L. Marrero, Consultant



Ronald E. Wise, Consultant



Howard Epstein, CPA